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Civil Law—Municipal Liability—Distinguishing Between Causation and Facilitation—Immunity—Political Subdivision Tort Claims Act ("Tort Claims Act")—Real Property Exception—Recreational Use of Land and Water Act ("RULWA")

1. For a municipal entity to be liable for damages, it must be shown that (1) the damages are otherwise recoverable under common law or statute; (2) the injury was caused by the negligent act of the local agency or an employee acting within the scope of his official duties; and (3) the negligent act of the local agency falls within one of eight enumerated exceptions to immunity.

2. The acts of a municipality or its employees which subject a local government agency to liability must be a cause, and not merely a facilitator, of injury.

3. Section 8541 of the Tort Claims Act precludes a finding of liability against a municipality premised upon the acts of third parties, simply because of its status or relationship with such third parties.

4. A municipality is immune from liability for harm caused solely by third parties, even if such harm is foreseeable or avoidable by the municipality or its employees. A fundamental principle governing the exceptions to municipal immunity is the elimination of the imputation of negligence back through a non-governmental actor to the governmental unit. Consequently, a municipality is not subject to vicarious or secondary (**i.e.,** relational) liability based on the conduct of third parties.

5. While a municipal entity cannot be held liable for its conduct or that of its employees which allows or facilitates injury caused by third parties, where the conduct of the municipality, or its employees, is in fact a cause of injury, it need not be the sole or exclusive cause for liability to attach. The Tort Claims Act does not abolish joint tort-feasor liability against a governmental agency in those circumstances where the negligence of the local agency joins with that of other parties in causing injury to another. In other words, a municipality can be held jointly liable with other third parties if both are negligent and such negligence is a cause of injury.

6. In this case, the Plaintiff's six-year-old son was injured when he fell from a merry-go-round located in a borough park. At the time, the merry-go-round was being pushed by a third party, allegedly at an excessive speed. Plaintiff claims the Borough was negligent in its installation, inspection and maintenance of the merry-go-round such that the merry-go-round rotated faster than was safe. These acts of negligence by the Borough, if proven, in fact made the merry-go-round unsafe for its intended use; they did not merely facilitate injury by the individual pushing the merry-go-round, a co-defendant.

7. The real property exception to governmental immunity under the Tort Claims Act provides that a local agency may be liable for its employees' or its own negligence related to the care, custody or control of real property in its possession. This exception to immunity does not apply where a person is injured by the negligent maintenance of personalty.

8. Whether the real property exception to governmental immunity permits municipal liability to attach requires a finding that injury was caused either by a defect, or a condition of, real property in the municipality's possession, or by its care, custody or control of such real property.

9. In determining whether an item of personal property which is attached to real estate and is removable without destroying or materially injuring the item, or the real property to which it is attached, is part of the realty or remains personalty, depends on the intention of parties at the time of the annexation. If the attachment is intended to be permanent, it has become part of the realty.

10. In this case, whether the merry-go-round became realty or retained its status as personalty, requires on the resolution of disputed facts concerning whether it was attached to the land year around or removed by the Borough and placed in storage during the winter months, as well as the intent of the Borough at the time of attachment.

11. The RULWA eliminates the common-law duties of a landowner to keep land safe and to warn of dangerous conditions with respect to outdoor recreational activities conducted on largely unimproved land made available for public use without charge, unless injury is caused by the wilful or malicious failure to guard or warn against a dangerous condition. This immunity from liability is an incentive to landowners in exchange for allowing public access to their lands for recreational pursuits.

12. The RULWA does not apply to improved land nor does it apply to those areas of largely unimproved land which have been improved and which require continued maintenance to be used and safely enjoyed. When a recreational facility has been designed with improvements that require regular maintenance and monitoring to be safely used and enjoyed, the owner of the facility has a duty to maintain the improvements.

13. In this case, because the park where the merry-go-round was located was cleared and improved with a playground, paved pathways and an indoor recreational facility, and because the merry-go-round was an improvement which was maintained and annually inspected by the Borough, the RULWA did not relieve the Borough of its duty of care.

No. 08-3372

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MEMORANDUM OPINION

NANOVIC, P.J.—May 31, 2012

That government cannot be held responsible for the acts of third parties is a relatively simple statement which appears, on its face, to be easy to understand and to apply. However, in the context of governmental immunity under the Political Subdivision Tort Claims Act ("Tort Claims Act"), 42 Pa. C.S.A. §§8541-8564, this simplicity vanishes when the existence of third-party conduct is examined in relation to that of government and the determination of liability for injuries sustained by others.

When so examined, our Supreme Court has made a distinction between government conduct which merely facilitates an injury caused by the acts of others and government conduct which joins with that of third parties in causing injury.[1] Although this distinction may, at times, be difficult to make, where the government's conduct combines with that of others in causing injury, the government is subject to liability, provided such conduct falls within one of the eight enumerated exceptions to immunity found in Section 8542(b) of the Tort Claims Act.

This case concerns such a dispute, one where the parties disagree whether the Defendant Borough of Lehighton's ("Borough") conduct caused or, at most, facilitated injuries to the Plaintiff Robert William Green. The Borough further contends it is relieved of liability under the Recreational Use of Land and Water Act ("RULWA"), 68 Pa. C.S.A. §§477-1 through 477-8.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff Robert William Green, a minor, was injured on March 31, 2006, when he fell from a playground merry-go-round being manually pushed by Defendant Stephen Christman ("Christman"). The merry-go-round was designed, manufactured and distributed by Defendant Game Time, Inc. ("Game Time") with certain safety equipment, including a governor to limit or restrict its rotational speed.

[1] As we believe the following discussion will show, use of the word "facilitate," as distinct from "cause," can be confusing when the conduct of third parties is involved. In those cases where government conduct was found to facilitate, rather than cause, injury, and for which damages might otherwise have been recoverable under the common law or statute were it not that the defendant was a governmental agency, the claimed basis of liability of the governmental agency appears to be its status as a person potentially vicariously or secondarily liable for the acts of others. **See Crowell v. City of Philadelphia,** 531 Pa. 400, 412, 613 A.2d 1178, 1184 (1992); **see also, Builders Supply v. McCabe,** 366 Pa. 322, 326, 77 A.2d 368, 370-71 (1951) (discussing the meaning of indemnification and secondary liability) together with **infra** note 8 and accompanying text.

In the complaint which commenced this action, Plaintiff named Game Time and Christman as Defendants. Plaintiff's claim against Game Time was premised on a defective product (that the merry-go-round as designed, manufactured and distributed was unsafe; that it did not properly restrict the speed at which the merry-go-round could be safely operated) and against Christman for negligence (that Christman pushed the merry-go-round at an excessive speed so as to cause Plaintiff to lose his grip and be thrown off).

The merry-go-round was purchased by the Borough from Game Time. In Christman's joinder complaint against the Borough, Christman alleges the Borough was negligent in its installation, inspection and maintenance of the merry-go-round.[2] Additionally, the complaint alleges that the merry-go-round had been in the Borough's custody since 1997, that the Borough's employees conducted the initial field assembly and installation of the merry-go-round, and that annually thereafter, around Labor Day, the Borough would disassemble the merry-go-round, service and store it for the winter months, and then reinstall the merry-go-round in the spring.[3] The merry-go-round was installed in Grove Park, a public park, which contains paved pathways, other commonly found outdoor playground equipment (**e.g.,** sliding board, swings, springy animals) in the same area as the merry-go-round, and an indoor recreational facility.

On the day of the incident, Christman was present in the park with his two-and-a-half-year-old son. Christman's son had been riding the merry-go-round, when Plaintiff, then six years old, asked

[2] Specifically, paragraph 14 of the joinder complaint alleges:

> The negligence, carelessness, and recklessness of the additional defendant, Borough of Lehighton, consists of the following:
>
> a. failing to install the product properly;
>
> b. failing to inspect and properly maintain the product;
>
> c. failing to service and maintain the braking system on the product;
>
> d. removing the braking system on the product;
>
> e. re-installing the product in an unsafe manner; and
>
> f. allowing the product to spin at a dangerous rate of speed.

(Joinder Complaint, paragraph 14.)

[3] In response to this averment, the Borough responded that once installed in 1997, the merry-go-round was never removed or reinstalled before the Green accident. (Answer to Joinder Complaint, paragraph 10.)

if he could also get on. To permit this, the merry-go-round was stopped, Plaintiff got on, and Christman again began spinning the merry-go-round.

At some point, Christman stopped the merry-go-round for his son to get off. Before leaving with his son, Plaintiff asked if Christman could spin the merry-go-round one more time. Christman agreed. Christman pushed the merry-go-round for three to four revolutions with Plaintiff on board. As he did so, Christman held on to the merry-go-round, running beside it. Christman then gave the merry-go-round one last fling before he left to follow his son. It was at this point that Plaintiff lost his grip and was thrown off. When Plaintiff hit the ground he allegedly sustained serious head and spinal injuries.

Before us is the Borough's Motion for Summary Judgment to Christman's joinder complaint. In this Motion, the Borough asserts it is immune from liability under both the Tort Claims Act and the RULWA.

DISCUSSION

Political Subdivision Tort Claims Act

With certain limited exceptions, local government agencies are generally immune from tort liability under the Tort Claims Act.[4] **Mascaro v. Youth Study Center,** 514 Pa. 351, 355, 523 A.2d 1118, 1120 (1987). However,

> an injured party may recover in tort from a local governmental agency if:
>
> (1) damages would be otherwise recoverable under common law or statute; (2) the injury was caused by the negligent act of the local agency or an employee acting within the scope of his official duties; and (3) the negligent act of the local agency falls within one of eight enumerated categories.

LoFurno v. Garnet Valley School District, 904 A.2d 980, 983 (Pa. Commw. 2006) (**quoting Wells v. Harrisburg School Dis-**

[4] Section 8541 of the Tort Claims Act provides:

> § 8541. Governmental immunity generally
>
> Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or **any other person.**

42 Pa. C.S.A. §8541 (emphasis added).

trict, 884 A.2d 946, 948 (Pa. Commw. 2005)). Here, Christman relies upon the real property exception to governmental immunity.[5] This exception "provides that a local agency may be liable for its employees' or its own negligence related to the 'care, custody or control of real property' in its possession." **Grieff v. Reisinger,** 548 Pa. 13, 15, 693 A.2d 195, 197 (1997) (plurality decision) (**quoting** 42 Pa. C.S.A. §§8542(a)(2), (b)(3)).[6]

a) **Joint Tort-Feasor Liability**

The Borough's argument, as we understand it, is that the direct and immediate cause of Plaintiff's fall from the merry-go-round was the high rate of speed at which Christman was spinning the merry-go-round, rather than any defect or malfunction in the merry-go-round itself. From this, the Borough argues that even if its installation, maintenance and repair of the merry-go-round

[5] There is no dispute that the Borough is a "local agency" and subject to the protections of the Tort Claims Act. **Sider v. Borough of Waynesboro,** 933 A.2d 681 (Pa. Commw. 2007) (finding that a borough was a "local agency" entitled to immunity under the Tort Claims Act), **appeal denied,** 596 Pa. 712, 940 A.2d 367 (2007).

[6] Section 8542 of the Tort Claims Act provides in relevant part:

> § 8542. Exceptions to governmental immunity
>
> (a) Liability imposed.—A local agency shall be liable for damages on account of an injury to a person or property within the limits set forth in this subchapter if both of the following conditions are satisfied and the injury occurs as a result of one of the acts set forth in subsection (b):
>
> (1) The damages would be recoverable under common law or a statute creating a cause of action if the injury were caused by a person not having available a defense under section 8541 (relating to governmental immunity generally) or section 8546 (relating to defense of official immunity); and
>
> (2) The injury was caused by the negligent acts of the local agency or an employee thereof acting within the scope of his office or duties with respect to one of the categories listed in subsection (b). As used in this paragraph, 'negligent acts' shall not include acts or conduct which constitutes a crime, actual fraud, actual malice or willful misconduct.
>
> (b) Acts which may impose liability.—The following acts by a local agency or any of its employees may result in the imposition of liability on a local agency:
>
> ...
>
> (3) **Real property.**—The care, custody or control of real property in the possession of the local agency, except that the local agency shall not be liable for damages on account of any injury sustained by a person intentionally trespassing on real property in the possession of the local agency.

42 Pa. C.S.A. §§8542(a), (b)(3).

may have been deficient and allowed the merry-go-round to spin at a speed faster than it was designed for, this conduct at most facilitated Plaintiff's injuries, but cannot be considered a cause of those injuries. On this, we disagree.

According to Game Time, the merry-go-round has a top speed of 8.9 miles per hour and will come to a stop within three revolutions of being last pushed. Although disputed, Game Time denies that any defect existed in the design or manufacture of the merry-go-round. In joining the Borough in this suit, Christman, in effect, contends that if the manufacturer's assertions are correct, then, to the extent the merry-go-round was unsafe, the fault lies with the Borough's installation, inspection and maintenance. In effect, two general theories of liability are being pursued: a defect or malfunction in the braking system for which either Game Time, as the designer and manufacturer, or the Borough, as the installer and maintainer, or both, are responsible; and negligence in the operation of the merry-go-round by Christman.

At this stage of the proceedings, the Borough is potentially solely liable, not liable, or jointly liable with either Christman, Game Time, or both. As to liability, the Borough's attempt to characterize an alleged defect in the operation of the braking system attributable to its installation and maintenance of the merry-go-round as simply a facilitator, rather than a cause, of the merry-go-round spinning too fast, is confusing and meaningless under the facts before us.

Contrary to the ultimate conclusion reached by the Borough, the Tort Claims Act did not abolish joint tort-feasor liability against a governmental entity in those circumstances where the conduct of the governmental agency joins with that of other parties in causing injury to another. This is to be contrasted with a claimant's reliance on vicarious and secondary liability to establish a claim against a local agency, which, when based on the acts of third parties, is barred under Section 8541 of the Tort Claims Act. **Mascaro, supra** at 363, 523 A.2d at 1124. ("[T]he Legislature has clearly precluded the imposition of liability on itself or its local agencies for acts of third parties by its language of §8541, **supra,** and that it has not seen fit to waive immunity for these actors or their acts in any of the eight exceptions."). It is in this sense that the conduct of a local agency or its employees has been held to "facilitate," but not to "cause,"

a consequent injury for which recovery against the local agency is prohibited. **Id.** at 1124 (holding, where a detainee of a detention center for juvenile criminal offenders was able to escape, allegedly because of negligently maintained real estate, and thereafter broke into and seriously injured the inhabitants of a home, that "the real estate exception can be applied only to those cases where it is alleged that the artificial condition or defect of the land **itself** causes the injury, not merely when it facilitates the injury by the acts of others, whose acts are outside the statute's scope of liability").[7]

"[A] fundamental principle governing the immunity exceptions [is] the elimination of the imputation of negligence back through a non-governmental actor to the governmental unit." **Crowell v. City of Philadelphia,** 531 Pa. 400, 411 n.9, 613 A.2d 1178, 1183 n.9 (1992). In other words, a direct causal connection must exist between the injury and, for our purposes, the government's care, custody or control of real estate within its possession.

> Consequently, as applied to cases where a plaintiff is injured and brings an action against a governmental unit, the governmental unit can be subjected to liability despite the presence of an additional tortfeasor [sic] if the governmental unit's actions would be sufficient to preclude it from obtaining indemnity from another for injuries rendered to a third person. ... This assumes, of course, that the specific facts fall squarely within one of the exceptions. Alternatively, if the claim against the governmental unit is dependent merely upon the unit's status, as opposed to the action fitting within one of the statutory exceptions, then the language of § 8541 would preclude the imposition of liability.

Id. at 412-13, 613 A.2d at 1184 (citation omitted).[8]

Here, Christman claims the merry-go-round's braking system failed to work either because of improper assembly or maintenance

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[7] On this issue, the court in **Mascaro** further stated:

> We agree that the real estate exception to governmental immunity is a narrow exception and, by its own terms, refers only to injuries arising out of the care, custody or control of the real property in the possession of the political subdivision or its employees. Acts of the local agency or its employees which make the property unsafe for the activities for which it is regularly used, for which it is intended to be used, or for which it may reasonably be foreseen to be used, are acts which make the local agency amenable to suit. Acts of **others,** however, are specifically excluded in the general immunity section (42 Pa.C.S. § 8541), and are nowhere discussed in the eight exceptions. On this basis alone, we must conclude that any harm that others cause may not be imputed to the local agency or its employees. This, of course, is a difference from the duties and liabilities of a private landowner who can be held accountable for the forseeable criminal conduct of others under **Ford v. Jeffries,** [474 Pa. 588, 379 A.2d 111 (1977)].

Mascaro v. Youth Study Center, 514 Pa. 351, 362, 523 A.2d 1118, 1123-24 (1987); **see also, Jones v. Chieffo,** 549 Pa. 46, 50, 700 A.2d 417, 419 (1997) ("[A] municipality cannot be vicariously liable for a third party's harmful acts under section 8541 of the Act. ... However, a municipality can be liable despite the presence of a third party if it is jointly negligent.").

[8] In **Builders Supply Co. v. McCabe,** cited for the same proposition in **Crowell,** the Pennsylvania Supreme Court explained further the difference between indemnity and joint liability:

> The right of **indemnity** rests upon a difference between the primary and the secondary liability of two persons each of whom is made responsible by the law to an injured party. It is a right which ensures to a person who, without active fault on his own part, has been compelled, by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable. The difference between primary and secondary liability is not based on a difference in **degrees** of negligence or on any doctrine of **comparative** negligence, ... It depends on a difference in the **character** or **kind** of the wrongs which cause the injury and in the nature of the legal obligation owed by each of the wrongdoers to the injured person.
>
> ...
>
> [I]t is clear that the right of a person vicariously or secondarily liable for a tort to recover from one primarily liable has been universally recognized. But the important point to be noted in all the cases is that secondary as distinguished from primary liability rests upon a fault that is imputed or constructive only, being based on some legal relation between the parties, or arising from some positive rule of common or statutory law or because of a failure to discover or correct a defect or remedy a dangerous condition caused by the act of the one primarily responsible. In the case of **concurrent** or **joint** tortfeasors [sic], having no legal relation to one another, each of them owing the same duty to the injured party, and involved in an accident in which the injury occurs, there is complete unanimity among the authorities everywhere that no right of indemnity exists on behalf of either against the other; in such a case, there is only a common liability and not a primary and secondary one, even though one may have been very much more negligent than the other. The universal rule is that when two or more contribute by their wrongdoing to the injury of another, the injured party may recover from all of them in a joint action or he may pursue any one of them and recover from him, in which case the latter is not entitled to indemnity from those who with him caused the injury.

366 Pa. 322, 325-28, 77 A.2d 368, 370-71 (1951).

by the Borough and that, in consequence, the merry-go-round was unsafe for its intended use. For purposes of its Motion, the Borough does not deny the defect but claims that the real estate exception does not apply because the merry-go-round did not act on its own to harm Plaintiff, but that its condition at most facilitated Plaintiff's injuries because of the speed at which Christman, a third party, spun Plaintiff.

This argument, we believe, is fundamentally flawed. This is not a case where Christman is claiming that the Borough failed to protect users of the merry-go-round from the manner in which it was used or against conduct of third parties beyond its control. **See Mascaro, supra** at 362, 523 A.2d at 1124 (noting the consistent refusal of Pennsylvania Courts to allow a cause of action under the real estate exception against "those whose claim of negligence consists of a failure to supervise the conduct of students or persons adequately"). This is a case where Christman is claiming a defect existed for which the Borough was directly responsible, a defect which did not facilitate injury by a third party, but one which was a separate and independent cause of that injury. **Cf. Crowell, supra** (finding the action of a city employee in erecting a directional arrow pointing in the wrong direction was an actual cause and not merely a facilitator of a motor vehicle accident involving a drunk driver, who was also determined to be a cause of the accident and who, while following the arrow, crossed into the lane of oncoming traffic striking a car in which a three-year-old boy was killed).

According to Christman, the Borough negligently installed and maintained real estate under its care, custody and control, namely the merry-go-round, which conduct was a substantial contributing cause of Plaintiff's injuries, thus fitting squarely within the Supreme Court's decision in **Grieff v. Reisinger** (holding that a firechief's negligent use of paint thinner in removing paint from the floor of a fire station subjected the chief and the fire association to liability under the Tort Claims Act within the real property exception for negligence in the care of real property—the fire station floor—when the paint thinner ignited and caused severe injuries to plaintiff); **see also, City of Philadelphia v. Duda,** 141 Pa. Commw. 88, 595 A.2d 206 (1991) (holding that the city's negligent conduct in covering or painting over depth markings and racing stripes on a

city pool made the property unsafe for its intended use and did not merely facilitate injury by the acts of others).[9] Under these circumstances, Section 8541 does not insulate the Borough from liability.[10]

b) **Real Estate Exception**

Beyond this requirement of direct liability, before a governmental unit may be held liable for its own negligence, or that of its employees acting within the scope of their authority, such conduct must specifically implicate one of the eight statutory exceptions to governmental immunity. Here, Christman claims exception three—that pertaining to real property—applies. Whether Christman is correct in this belief raises another question of fact which the parties appear not to have addressed: whether the merry-go-round is real estate. The real property exception to immunity does not apply where a person is injured by the negligent maintenance of personalty.

In **Repko v. Chichester School District,** the Commonwealth Court noted that determining whether certain property is personalty or real estate may, at times, be difficult and involves two separate approaches to making this determination. Specifically, the court stated:

> At the outset, we recognize that there are two approaches that can be used to determine whether to apply the real estate exception to immunity under the Tort Claims Act, and that, at times, deciding which approach to apply under a given set of

[9] In **Grieff v. Reisinger,** 548 Pa. 13, 693 A.2d 195 (1997), unlike cases concerned with the real estate exception to sovereign immunity, it is not necessary that the cause of Plaintiff's injuries result from a defect in, or a condition of, the real estate itself. **See also, Hanna v. West Shore School District,** 717 A.2d 626, 629 (Pa. Commw. 1998) (holding that plaintiff's fall allegedly caused by a wet floor in a school hallway caused by damp mopping was not barred by immunity). For liability to attach, it must only be shown that the harm was caused by municipal negligence in the care, custody or control of real property in the Borough's possession. **Grieff, supra** at 17 n.3, 693 A.2d at 197 n.3.

[10] The Supreme Court's conclusion precluding governmental liability for harm caused by third parties is rooted in its construction of the phrase "or any other person" in Section 8541, as opposed to common-law principles of superseding cause. **Crowell, supra** at 410 n.7, 613 A.2d at 1183 n.7. Because Christman's conduct does not rise to the level of a superseding cause—since such conduct was clearly foreseeable—it does not form a basis to relieve the Borough of liability. **Id.** at 413 n.12, 613 A.2d at 1185 n.12 (**citing Vattimo v. Lower Bucks Hospital,** 502 Pa. 241, 253 n.4, 465 A.2d 1231, 1237 n.4 (1983)).

> facts is challenging. Under the **Blocker** approach, the determinative inquiry is whether the injury is caused by personalty, which is not attached to the real estate, or by a fixture, which is attached. Under the **Grieff** approach, the determinative inquiry is whether the injury is caused by the care, custody or control of the real property itself. Both approaches have been applied by the courts.

904 A.2d 1036, 1040 (Pa. Commw. 2006).[11]

In **Repko,** the property involved was a folding table which fell on the plaintiff when she went to retrieve a basketball during gym class. The table was not affixed to the real estate, and the Commonwealth Court had little difficulty in determining that the table retained its status as personalty, reversing the decision of the trial court which had applied the analysis in **Grieff** believing that the question was whether the school had negligently cared for the gymnasium area by failing to remove a dangerous condition on the property, **i.e.,** the table. Here, however, while the merry-go-round was attached to real estate at the time of Plaintiff's injury, a question remains whether it was attached year round or was annually

[11] In **Blocker v. City of Philadelphia,** 563 Pa. 559, 763 A.2d 373 (2000), the Pennsylvania Supreme Court applied the traditional test set forth in **Clayton v. Lienhard** for determining whether a chattel used in connection with real estate is personalty or realty. This test provides:

> Chattels used in connection with real estate are of three classes: First, those which are manifestly furniture, as distinguished from improvements, and not peculiarly fitted to the property with which they are used; these always remain personalty. ... Second, those which are **so annexed to the property,** that they cannot be removed without material injury to the real estate or to themselves; these are realty. ... Third, those which, although **physically connected with the real estate, are so affixed** as to be removable without destroying or materially injuring the chattels themselves, or the property to which they are annexed; these become part of the realty or remain personalty, **depending on the intention of the parties at the time of annexation** ... .

312 Pa. 433, 436-38, 167 A. 321, 322 (1933) (emphasis added). The court in **Repko** further noted that "consideration of the intention of an owner regarding whether a chattel has been **permanently** placed on real property is only relevant where the chattel has, in fact, been affixed to the realty." **Repko, supra** at 1039 (emphasis added); **see also, Rieger v. Altoona Area School District,** 768 A.2d 912 (Pa. Commw. 2001) (holding that even if the school's failure to cover a gymnasium floor with mats during a gymnastic stunt was negligent, because the mats were not affixed to the real property, and as such, were personalty, the assumed negligent act would not fall within the real estate exception).

removed by the Borough during the winter months and placed in storage. Under these facts, the intention of the Borough is neither clear nor ripe for decision. **See LoFurno, supra** at 984 n.4 (noting that neither **Clayton** nor subsequent cases indicate what it is about the intention of the owner at the time of annexation which the court is supposed to ascertain and suggesting that to conclude that the chattel has been made part of the real estate, one should have to find an intent that the property would remain connected to the building (or land) even if the owner relocated).[12]

Recreational Use of Land and Water Act

Separate and apart from the Tort Claims Act, the Borough contends Christman has failed to set forth a **prima facie** cause of action for negligence in that the Recreational Use of Land and Water Act ("RULWA") eliminates the common-law duties of a landowner to keep the land safe or to warn of dangerous conditions. The purpose of the RULWA is "to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes." 68 P.S. §477-1. To accomplish this purpose, the RULWA grants immunity to owners who make their land available for use by the public for recreational purposes free of charge, unless injury is caused by the "wilful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity." 68 P.S. §§477-4, 477-6. "The need to limit owner liability derives from the impracticability of keeping large tracts of largely undeveloped land safe for public use." **Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc.,** 510 Pa. 1, n.17, 507 A.2d 1, 8 n.17 (1986).

On this issue, the following are not disputed: that the Borough was the owner of Grove Park and the land upon which the merry-go-round was located; that this property was under the Borough's care, custody and control; that it was open to the public and used for recreational purposes; that the use being made of the merry-go-round at the time of Plaintiff's fall was recreational; and that the

[12] In his brief opposing the Borough's Motion for Summary Judgment, Christman also claims that the Borough was negligent in failing to provide or maintain proper and adequate fall protection material on the ground surrounding the merry-go-round onto which children could safely fall. Because we do not believe a fair and reasonable reading of paragraph 14 of the joinder complaint supports such a theory of liability, we do not address it here.

Green family, including Plaintiff, used the park free of charge. The difficulty with the Borough's argument is that the RULWA does not apply to improved land. **Stone v. York Haven Power Company,** 561 Pa. 189, 195, 749 A.2d 452, 455 (2000) ("where land devoted to recreational purposes has been improved in such a manner as to require regular maintenance in order for it to be used and enjoyed safely, the owner has a duty to maintain the improvements").

Grove Park is clearly no longer in the natural, untouched, forested state which once existed before human intervention. However, in light of the case law which has developed on this subject, whether the improvements made to the park exempt this property from the protections of the RULWA is not as simple a question as might at first appear.

Our Supreme Court has held that the RULWA must be interpreted with its overall underlying objective in mind—"to provide immunity to landowners as an incentive to them in exchange for their tolerance of public access to their lands for recreational pursuits," **Mills v. Commonwealth of Pennsylvania,** 534 Pa. 519, 526, 633 A.2d 1115, 1119 (1993)—and not simply by reference to the isolated meaning of certain language in the statute when read standing alone. **Rivera, supra** at 14-15, 507 A.2d at 8; **Walsh v. City of Philadelphia,** 526 Pa. 227, 235, 585 A.2d 445, 449 (1991). In this respect, the court found that "[t]he intention of the Legislature to limit the applicability of the [RULWA] to outdoor recreation on largely unimproved land is evident not only from the Act's stated purpose but also from the nature of the activities it listed as recreational purposes within the meaning of the statute." **Rivera, supra** at 16, 507 A.2d at 8. In the same vein, notwithstanding the statute's definition of the term "land," which includes "buildings, structures and machinery or equipment when attached to realty," the court concluded that the Legislature intended "land" to encompass only "'ancillary structures attached to open space lands made available for recreation and not to [encompass] enclosed recreational facilities in urban regions' which presumably can be monitored and maintained unlike large expansive unimproved lands." **Bashioum v. County of Westmoreland,** 747 A.2d 441, 444 (Pa. Commw. 2000) (**quoting Rivera, supra** at 15, 507 A.2d at 8, which found that the statute's protection did not apply to a seminary's indoor swimming pool).

"[O]ur courts have held that RULWA immunity applies to open land that remains in a mostly natural state, whether the property is located in rural, suburban or urban areas." **Murtha v. Joyce,** 875 A.2d 1154, 1158 (Pa. Super. 2005). They have also held that "an improvement" on certain parts of property does not necessarily remove the entire property from the protection of the RULWA, **see e.g., Lory v. City of Philadelphia,** 544 Pa. 38, 674 A.2d 673 (1996) (holding RULWA immunity applied to natural pond located in a remote and undeveloped portion of a city park), and that if a specific improvement on otherwise unimproved, undeveloped property is the cause of injury, "RULWA protection should not extend beyond its legislative intent and thus 'thwart basic principles of tort liability.'" **Murtha, supra** (**quoting Mills, supra** at 523, 633 A.2d at 1117); **see also, Bashioum** (holding injury at manmade slide within approximately four hundred acres of largely unimproved land was outside the protection of the RULWA).

"[T]he intended beneficiaries of the [RULWA], in addition to the general public, are landowners of large unimproved tracts of land which, without alteration, is amenable to the enumerated recreational purposes within the act." **Stone, supra** at 195, 749 A.2d at 456. In particular, if the improvement is one requiring regular maintenance and monitoring for its safe use and enjoyment, the reasonable expectations of its users is a factor to be considered, as is the effect on landowners of imposing liability and whether the purpose of the RULWA (**i.e.,** relieving landowners of large tracts of unimproved land from the duty to make those tracts safe for public use) will thus be thwarted. **See Ithier v. City of Philadelphia,** 137 Pa. Commw. 103, 110, 585 A.2d 564, 567 (1991) (holding that an outdoor swimming pool, "filled and emptied as the City desires, and which can be monitored and supervised with relative ease," does not fall within the protections of RULWA). These two interests are, in fact, compatible and explain, in part, why "the proper focus should be on the specific area where the injury occurred or the specific area which caused the injury." **Bashioum, supra** at 446. "Moreover, the focus of [the court's] analysis should not be on whether the land was maintained, but on whether there were **improvements** that **require** maintenance." **Davis v. City of Philadelphia,** 987 A.2d 1274, 1278 (Pa. Commw. 2010). "Where there are improvements on those lands that require regular maintenance to be safe, as is

the case here, the purpose of RULWA is not served by granting immunity for such improvements." **Bashioum, supra** at 447 n.5.

In **Walsh v. City of Philadelphia,** the Pennsylvania Supreme Court stated:

> When a recreational facility has been designed with improvements that require regular maintenance to be safely used and enjoyed, the owner of the facility has a duty to maintain the improvements. When such an improved facility is allowed to deteriorate and that deterioration causes a foreseeable injury to persons for whose use the facility was designed, the owner of the facility is subject to liability. We do not believe that the RUA [**i.e.,** RULWA] was intended by the Legislature to circumvent this basic principle of tort law.

Supra at 238, 585 A.2d at 450-51. "Thus, it appears that pursuant to **Walsh,** the rationale in **Rivera** of wishing to relieve landowners of the burden of monitoring large tracts of undeveloped land to encourage them to open the land to the public is rendered inapplicable in the context of those areas of land where there are improvements which require regular maintenance and inspection." **Bashioum, supra** at 444.[13]

[13] Both the Commonwealth and Superior Courts have set forth a multi-factored test to determine the applicability of the RULWA. In **Pagnotti v. Lancaster Township,** the Commonwealth Court stated:

> [F]rom a review of the cases dealing with the [RULWA], we identify the following factors that the courts have considered in determining whether the [RULWA] was intended to apply to insulate a particular landowner from tort liability: (1) the nature of the area in question, that is, whether it is urban or rural, indoor or outdoor, large or small; (2) the type of recreation offered in the area, that is, whether persons enter to participate in one of the recreational purposes listed in section 2(3) of the [RULWA]; (3) the extent of the area's development, that is, whether the site is completely developed and/or significantly altered from its natural state; and (4) the character of the area's development, that is, whether the area has been adapted for a new recreational purpose or, instead, would be amenable to the enumerated recreational purposes of the [RULWA] even without alteration. We also deem it appropriate to consider any unique facts as additional factors where doing so would advance the purpose of the [RULWA].

751 A.2d 1226, 1233-34 (Pa. Commw. 2000) (holding low head dam in creek flowing through 7.7-acre community park which consisted primarily of grass and trees did not remove property from RULWA's protection). In **Yanno v. Consolidated Rail Corporation,** the Superior Court stated:

> [I]t is proper for a trial court to consider the following factors when deciding whether a landowner receives immunity under the RULWA: (1) use; (2) size; (3) location; (4) openness; and (5) extent of improvement. First, where the owner of the property has opened the property exclusively for recreational use, the property is more likely to receive protection under the RULWA than if the owner continues to use the property for business purposes. Second, the larger the property, the less likely that it allows for reasonable maintenance by the owner and the more likely that the property receives protection under the RULWA. Third, the more remote and rural the property, the more likely that it will receive protection under the RULWA because the property is more difficult and expensive for the owner to monitor and maintain and because it is less likely for a recreational user to reasonably expect the property to be monitored and maintained. Fourth, property that is open is more likely to receive protection than property that is enclosed. Finally, the more highly-developed the property, the less likely it is to receive protection because a user may more reasonably expect that the landowner of a developed property monitors and maintains it.

744 A.2d 279, 282-83 (Pa. Super. 1999) (holding railroad trestle located inside 9.6-mile swath of unimproved land did not remove property from RULWA's protection), **appeal granted,** 564 Pa. 714, 764 A.2d 1071 (2000).

In **Yanno** the court further stated:

> Whether the application of these factors involves the entire piece of property owned by the defendant landowner or only the section of the property upon which the plaintiff sustained the alleged injury, cannot be fixed indelibly for every case. To date, our courts have made this determination on a case by case basis. For example, in one instance this Court afforded protection to a landowner under the RULWA based on the fact that the injury occurred on 'a part of ... [the] land which remained unimproved.' **Redinger,** 615 A.2d at 750. However, in another instance, the Pennsylvania Supreme Court denied protection under the RULWA for injuries that occurred on the grassy area of a property that was otherwise highly developed. **See Mills.** Thus, where the parties can make reasonable arguments for viewing the factors either in terms of the entire property or in terms of only the section where the injury occurred, a court should look to the intended purpose of the RULWA to guide its determination of the matter on a case by case basis. **See id.** at 526, 633 A.2d at 1119.

Supra at 283.

Grove Park is located at Seventh and Iron Streets within the Borough of Lehighton where it is surrounded by residential homes along its perimeter. It is evident from the photographs of record that Grove Park is cleared and improved land. **See e.g.,** photographs contained in the following: Christman's Response to the Borough's Motion for Summary Judgment (Exhibits A and B); Hudson Expert Report (Photo 1); Clauser Expert Report (Figure 1).

The park is a publicly accessible recreational facility having playground equipment outside for children, including the subject merry-go-round, paved pathways, and an indoor recreational facil-

ity with courts for basketball and volleyball, as well as pool tables. Further, the Borough maintained the park and did maintenance and repairs to the equipment. This included, at a minimum, annual inspections of the playground equipment with the Borough testing, maintaining, and repairing, as required, hoses, oil levels, bearings, bolts, and hydraulic fluid on the merry-go-round. These facts preclude application of the RULWA to this case.[14]

CONCLUSION

In denying the Borough's Motion, we make no determination whether the Borough was in any manner negligent, whether such alleged negligence was a substantial cause of injury to Plaintiff, or whether the merry-go-round is real estate. These ultimately are factual questions for the jury.

We do conclude, however, that given the intended purpose of the RULWA, the improvements to Grove Park, including the merry-go-round, and the condition of the merry-go-round itself being claimed as a cause of Plaintiff's injuries, that the immunity afforded by the RULWA does not apply. To extend the provisions of the RULWA to the merry-go-round and surrounding area under the facts of this case would be to ignore the purpose of the RULWA and to disregard the reasonable expectations of the users of the merry-go-round.

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[14] The Borough also claims in its Motion for Summary Judgment that Christman should be sanctioned by dismissal of the joinder complaint because the verification to that complaint was not taken by Christman, but by his counsel; because Christman did not authorize or consent to his counsel filing the joinder complaint; and because Christman had no personal knowledge of the material facts alleged therein as establishing liability on the Borough. We have denied this request because the Borough, if it had so chosen, could have filed preliminary objections to the verification (having failed to do so, the issue is waived); the issue of what was authorized and consented to between Christman and his counsel, is a matter between them; and a party need not have personal knowledge of all material facts alleged in a pleading provided there is a good faith basis to believe that the facts therein exist or are likely to have evidentiary support upon further investigation. **See** Pa. R.C.P. 1023.1(c)(3) and Explanatory Comment. In this case, evidence exists, if believed, that no defect existed in either the design or manufacture of the merry-go-round at the time it was purchased by the Borough and further, at the time of Plaintiff's accident, nearly nine years after the purchase, the braking system no longer functioned properly to limit spinning of the merry-go-round to a safe speed. Moreover, the relief sought ignores the direct claims created by the joinder in Plaintiff pursuant to Pa. R.C.P. 2255(d) and the consequences of dismissal on such claims.

COMMONWEALTH OF PENNSYLVANIA vs. FRANK DUANE SWARTZ, Defendant

Criminal Law—Arson—Propriety of Reading Defendant's Confession to Jury, in Open Court, in Response to Jury Request During Deliberations—Mistrial (Prejudicial Effect of Responses Made During Voir Dire*; Prejudicial Effect of Reference to Defendant's Past Criminal Conduct and to Defendant Being Held in Custody; Length of Jury Deliberations)—Chain of Custody—Sufficiency of Evidence—Timely Prosecution—Propriety of Sentence*

1. Pa. R.Crim.P. 646(C), which prohibits the jury from receiving a copy of a written confession made by the defendant during deliberations, does not prohibit reading to the jury in open court a statement given by defendant to the police, which was previously read to the jury in the course of testimony, in response to a jury request to do so.

2. Before a mistrial may be declared, the court must determine that the unavoidable effect of the event complained of is to deprive the defendant of a fair and impartial trial. In exercising its discretion, the court must consider less drastic alternatives before granting a mistrial. A mistrial is not necessary where cautionary instructions are adequate to overcome any possible prejudice.

3. The mere expression by a prospective juror of his personal opinion made during **voir dire** in response to a question is not by itself so prejudicial as to require the granting of a new trial.

4. As a general rule, the Commonwealth may not present evidence of prior criminal acts against a defendant that have no relation to his present charge. The operative question is whether the jury could reasonably infer from the facts presented that the accused had engaged in prior criminal activity.

5. Testimony by a Pennsylvania state police investigator that latent fingerprints found at a crime scene were submitted to a criminal database for comparison, without disclosing the results of that analysis, or that defendant's identity was thereby determined, does not imply past criminal conduct of the defendant or warrant a new trial.

6. The mere reference to a defendant's prior criminal activity does not warrant a new trial unless the record shows that prejudice resulted from the testimony. An unintentional passing reference by a witness, or by the prosecution when questioning a witness, to the defendant at one point being in jail does not mandate a mistrial provided the prejudicial effect, if any, can be cured by a cautionary instruction, here that evidence of the defendant having been in jail is irrelevant to the determination of guilt or innocence and should be disregarded by the jury in rendering its verdict.

7. The duration of jury deliberations is a matter within the sound discretion of the trial court, whose decision will not be disturbed absent a showing that the court abused its discretion or that the jury's verdict was the product of coercion or fatigue. In exercising its discretion, the court should consider the complexity of the issues, the seriousness of the charges, the amount of testimony, length of trial, the solemnity of the proceedings, and indications from the jury on the possibility of reaching a verdict.

8. The Court did not err in denying Defendant's request for a mistrial after five hours of deliberation following five and one-half days of deliberations with sixty-six charges to be decided, instead, permitting the jury to recess for the day and return the following day to resume deliberations which resulted in a verdict after roughly three more hours of deliberations.

9. Proof of the chain of custody for physical evidence does not require the Commonwealth to establish the sanctity of its exhibits beyond a moral certainty. It is sufficient that the evidence, direct or circumstantial, establishes a reasonable inference that the identity and condition of the exhibits has not been compromised between the time of their recovery and their introduction in evidence.

10. In determining whether evidence is sufficient to sustain a verdict, the court must determine whether when viewed in the light most favorable to the verdict winner, the evidence is sufficient to enable the fact-finder to find every element of the crimes charged beyond a reasonable doubt. The test is not whether the court itself believes that the evidence at trial established guilt beyond a reasonable doubt.

11. In deciding a timely trial claim under Pa. R.Crim.P. 600, the court must determine whether any excludable time and/or excusable delay exists. While excludable time is expressly defined by Rule 600(C), excusable delay is not. Excusable delay consists of delays which occur as a result of circumstances beyond the Commonwealth's control and despite its due diligence. Further, a defendant's consent, without objection, to the Commonwealth's continuance requests constitutes a waiver of his Rule 600 rights.

12. To successfully challenge a discretionary aspect of sentencing, a substantial question as to the appropriateness of the sentence must be presented. A substantial question is one which advances a colorable argument that the sentencing judge's actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms underlying the sentencing process.

13. Defendant's challenge to his sentence on the basis that his rehabilitative needs were not considered, did not raise a substantial question where the sentence was supported by a presentence investigation report, was accompanied by reasons stated on the record, was not manifestly excessive, was within the statutory limits, and was within the standard range of the sentencing guidelines.

NO. 104 CR 2009

JAMES LAVELLE, Esquire—Counsel for the Commonwealth.

MICHAEL P. GOUGH, Esquire—Counsel for the Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—June 6, 2012

On December 13, 2011, Defendant, Frank Duane Swartz, was found guilty, after a jury trial, of fourteen counts of arson endangering persons,[1] one count of arson endangering property,[2] fifteen

[1] 18 Pa. C.S.A. §3301(a)(1)(i).

[2] 18 Pa. C.S.A. §3301(c)(2).

counts of possession of incendiary materials or devices,[3] fifteen counts of risking a catastrophe,[4] and fifteen counts of maliciously setting or causing a fire.[5] These charges relate to a series of sixteen separate brush fires set in Carbon County during a one-month period in 2008, all in the same general vicinity, with Defendant being charged with four different counts for each fire and, with respect to two of the fires, an additional charge of arson endangering property.

Defendant was subsequently sentenced on January 30, 2012, to an aggregate sentence of not less than two hundred sixteen months nor more than four hundred thirty-two months of incarceration in a state correctional facility. In his post-sentence motion, now before us, Defendant seeks a new trial, a judgment of acquittal, an arrest of judgment and/or a modification of sentence. Following a review of the record, we deny all of Defendant's requests.

FACTUAL AND PROCEDURAL BACKGROUND

The evidence introduced at trial established the following. From March 17, 2008 until April 18, 2008, sixteen separate brush fires were intentionally set in three adjoining municipalities in Carbon County: Lower Towamensing Township, Franklin Township and the Borough of Parryville. Approximately thirty-one incendiary devices—consisting of a lit cigarette inserted in a matchbook, held together with a rubber band—were recovered at these sites. Forensic testing of three of the devices revealed a DNA profile recovered from the cigarette filter matching that of Defendant's, and on one of these devices, a latent fingerprint recovered from the matchbook matched Defendant's right index finger.

Using this information, Trooper David Klitsch, a fire investigator with the Pennsylvania State Police, obtained a search warrant for Defendant's residence in Summit Hill, his vehicle and to obtain a DNA sample. Trooper Klitsch and other officers executed the warrant on November 24, 2008, in the presence of Defendant's fiancée, Carol Nickerson. At the time of the search, Defendant was hunting with his fiancée's two sons, Donnie Christman and Harold Nickerson, Jr. As a result of the search, police seized two clear plastic bags of colored rubber bands and two white in color

[3] 18 Pa. C.S.A. §3301(f).

[4] 18 Pa. C.S.A. §3302(b).

[5] 32 Pa. C.S.A. §344(b).

matchbooks matching those used on the incendiary devices. Upon completion of their search, the police waited outside of Defendant's residence for Defendant to return home.

Defendant returned shortly after 5:00 P.M. At that time, Trooper Klitsch informed Defendant that the police had executed a search warrant of his residence, that they needed him to provide a DNA sample, and that they wished to speak with him regarding a series of brush fires. Defendant denied any knowledge of the fires, however, he agreed to meet the trooper at the Summit Hill Police Station. While at the station, and after being given his **Miranda** warnings, Defendant confessed, both through oral and written statements, to being involved in sixteen of the nineteen fires for which he was questioned.[6] As a result, a criminal complaint was filed against Defendant on December 29, 2008. That same day, he was arrested.

On January 8, 2010, Defendant entered a plea of guilty. However, on February 25, 2010, he filed a **pro se** motion to withdraw his guilty plea. Following a hearing on the matter, we granted Defendant's motion and allowed him to proceed to trial.

A jury trial began on December 5, 2011, and ended on December 13, 2011, when the jury returned a verdict of guilty on sixty of the sixty-six counts charged. On January 30, 2012, following a presentence investigation report, Defendant was sentenced as previously stated. On February 6, 2012, Defendant filed the instant post-sentence motion. We discuss each of the items raised in this motion in the order advanced by Defendant, as phrased by him.

DISCUSSION

1. **The Defendant Was Denied a Fair Trial As Both the Oral and Written Incriminating Statements Attributable to the Defendant on November 24, 2008 Were the Product or Result of Improper and Unconstitutional Agreements on the Part of a Law Enforcement Officer Designed To Induce the Defendant To Waive** Miranda, **As Well As Impermissible Assistance Rendered by That Same Officer, and Therefore Should Have Been Suppressed.**

[6] The three fires for which Defendant did not admit responsibility were located in another area of the county. The fires admitted to were all along or close to the route Defendant would travel between his home in Summit Hill and his father's home in Lower Towamensing Township.

This court has previously ruled on this matter by Order and Opinion filed on June 21, 2011. Consequently, we do not address Defendant's contention further. Rather, we affirm our previous findings in holding that we did not err in permitting the introduction of Defendant's oral and written statements at the time of trial.

2. **A Violation of Pennsylvania Rule of Criminal Procedure Number 646 and the Right to a Fair Trial Occurred When, Following the Commencement of Deliberations, This Court Ultimately Determined To Read Aloud to the Jury on More Than One Occasion the Entire Content of the November 24, 2008 Written Statement Allegedly Attributable to the Defendant.**

Rule 646(C) provides that upon deliberation, the jury is not to be given a copy of the transcript, a written confession, or any of the other items specifically prohibited by the Rule. Pa. R.Crim.P. 646(C). Since the jury was never given a physical copy of the written statement during deliberations, we find the Rule inapplicable in this case. **See e.g., Commonwealth v. Gladden,** 445 Pa. Super. 434, 442-43, 665 A.2d 1201, 1205-1206 (1995) (the rule, prohibiting the jury from having a copy of a written confession made by defendant with them during deliberation, does not apply to a reading by the court reporter of defendant's confession after the jury had been sent to deliberate), **appeal denied,** 544 Pa. 624, 675 A.2d 1243 (1996).

Rather, when the jury asks for testimony to be read to refresh its recollection, it is within the court's discretion to grant or deny the request. **Commonwealth v. Manley,** 985 A.2d 256, 273 (Pa. Super. 2009), **appeal denied,** 606 Pa. 671, 996 A.2d 491 (2010). In granting the request, we must be careful so as not to place undue emphasis on the testimony being read. **Commonwealth v. Toledo,** 365 Pa. Super. 224, 232, 529 A.2d 480, 484 (1987), **appeal denied,** 517 Pa. 622, 538 A.2d 876 (1988).

In this case, we properly exercised our discretion in granting the jury's requests. On both occasions, the jury expressly asked that the Court read Defendant's entire written statement—a

three-page document consisting of several "yes" or "no" questions and a narrative detailing Defendant's involvement in the sixteen fires. (N.T. 12/12/11, pp. 356, 361); **see Commonwealth v. Bell,** 328 Pa. Super. 35, 54, 476 A.2d 439, 449 (1984) ("The parameters concerning the extent that testimony should be read to the jury are set by the juror's request."). In so doing, we took every precaution necessary to ensure that the statement was accurately read: the reading was done in open court, it was made a part of the record, and the statement was read in its entirety—all three pages verbatim. (N.T. 12/12/11, pp. 354-66); **see Commonwealth v. Johnson,** 576 Pa. 23, 48, 838 A.2d 663, 678 (2003) (no error where court allowed testimony of witness to "be read in its entirety, including direct and cross-examinations, so that neither portion received greater emphasis"). Furthermore, we repeatedly instructed the jury not only what must be found by them before they could consider the statement but also that they "should consider the facts and circumstances surrounding the making of the statement, along with all other evidence in the case in judging its truthfulness and deciding how much weight the Defendant's statement deserves on the question of whether the Defendant has been proven guilty." (N.T. 12/12/11, pp. 292, 339.)

3. **This Court Should Have Declared a Mistrial, Either Upon Defense Request or** Sua Sponte, **Based on Prejudicial Remarks Elicited During** Voir Dire, **Testimony Forthcoming From a Commonwealth Witness, a Remark by the Prosecutor During Cross-Examination of the Defendant, and the Representation by the Jury that It Was Unable To Reach a Unanimous Decision.**

We begin with our standard. Pennsylvania Rule of Criminal Procedure 605(B) provides:

> When an event prejudicial to the defendant occurs during trial only the defendant may move for a mistrial; the motion shall be made when the event is disclosed. Otherwise, the trial judge may declare a mistrial only for reasons of manifest necessity.

Pa. R.Crim.P. 605(B). It is within the trial court's discretion to **sua sponte** declare a mistrial upon a showing of manifest necessity. **Commonwealth v. Hoovler,** 880 A.2d 1258, 1260 (Pa. Super. 2005), **appeal denied,** 586 Pa. 723, 890 A.2d 1057 (2005). "Where there exists manifest necessity for a trial judge to declare a mistrial **sua sponte,** neither the Fifth Amendment to the United States Constitution, nor Article I, § 10 of the Pennsylvania Constitution will bar retrial." **Id.**

> The determination by a trial court to declare a mistrial after jeopardy has attached is not one to be lightly undertaken, since the defendant has a substantial interest in having his fate determined by the jury first impaneled. ... Additionally, failure to consider if there are less drastic alternatives to a mistrial creates doubt about the propriety of the exercise of the trial judge's discretion and is grounds for barring retrial because it indicates that the court failed to properly consider the defendant's significant interest in whether or not to take the case from the jury.

Commonwealth v. Kelly, 797 A.2d 925, 936 (Pa. Super. 2002) (citations and quotation marks omitted). Moreover, "[w]e are mindful that doubts concerning the necessity of a mistrial must be resolved in favor of the defendant." **Commonwealth v. Gains,** 383 Pa. Super. 208, 219, 556 A.2d 870, 876 (1989).

With respect to a mistrial requested by the Defendant,

> A trial court may grant a mistrial only where the incident upon which the motion is based is of such a nature that its unavoidable effect is to deprive the defendant of a fair trial by preventing the jury from weighing and rendering a true verdict. Likewise, a mistrial is not necessary where cautionary instructions are adequate to overcome any possible prejudice.

Commonwealth v. Fletcher, 41 A.3d 892, 894-95 (Pa. Super. 2012) (citation and quotation marks omitted).

A. Voir Dire

Defendant contends that we erred in failing to grant defense counsel's request for a mistrial during **voir dire** as the prejudicial remarks made by two potential jurors tainted the entire jury pool and prevented them from being fair and impartial.

The first remark was volunteered as part of a potential juror's response to the Commonwealth's question of whether anyone knew Defendant personally. The juror indicated that he had known Defendant and his family for thirty years, and that his "mind was

made up when I heard who he was." (N.T. 12/05/11, p. 24.) Following this statement, defense counsel objected to the remark and moved for a mistrial. We denied the request and gave a cautionary instruction asking the jurors to disregard this remark.[7]

Shortly thereafter, the second remark was produced by another potential juror. In response to the Commonwealth's questions of whether the juror could set aside his knowledge of Defendant's family in judging Defendant's credibility, the juror replied that he was not sure because "I know some other stuff, so ..." (N.T. 12/05/11, p. 30.) Again, defense counsel objected. We denied this request and instructed the remaining jurors to disregard the remark.[8]

"The mere expression of a prospective juror's personal opinion [is] not itself so prejudicial as to require the granting of a mistrial." **Commonwealth. v. Frazier,** 269 Pa. Super. 527, 536, 410 A.2d 826, 831 (1979) (no mistrial where potential juror indicated that her

[7] The instruction was as follows:

> Before we continue **voir dire,** I do want to caution the jurors, prospective jurors, that this is only **voir dire** where questions are asked of potential jurors. The responses of the potential juror are only being used for counsel to see and determine whether or not a prospective juror can be fair and impartial. The responses are not evidence in the case. The responses should not be considered by any of you in any way if you are selected to hear this case as to how you should decide the case.
>
> I know that a response was just given that some of you reacted to. Again, that should not be considered or given any weight by you if you are selected in this case. Please keep that in mind. This is not evidence. This is to see who can be fair and impartial. Responses go a long way to counsel determining whether or not that individual who has answered the question can be fair and impartial. The responses are only for that purpose. It's not to make any determination or any reason to judge this person substantively as to whether or not he is guilty or not guilty of the charges made.

(N.T. 12/05/11, pp. 26-27.)

[8] The cautionary instruction charged the jury as follows:

> I know I already made this comment to the prospective jurors. Please keep in mind that the questions that are being asked of prospective jurors are only for purposes of determining who should be selected in this case. They are not to be used for any other purpose. They are being used only for that purpose by Counsel. So, again, I know we just had a response that could be interpreted in more than one way. It's important that however it is interpreted, that none of the prospective jurors and no one who is selected to hear this case interpret that adversely to the defendant or adversely to the Commonwealth.

(N.T. 12/05/11, p. 32.)

mind was made up after the first trial). In order for a mistrial to be declared, "[t]he comment must be of such a nature or made in such a manner as to deprive the defendant of a fair and impartial trial." **Id.** at 537, 410 A.2d at 831. In this case, both jurors were rendering their opinion and in both instances it is unclear as to whether their opinion was of a negative or positive nature. Nevertheless, we immediately gave cautionary instructions to prevent any potential prejudice. Furthermore, prior to being selected, all jurors indicated that they were able to be fair and impartial.

Since the record does not indicate that the remarks deprived Defendant of a fair and impartial trial, we find no error occurred.

B. **Trooper John Corrigan's Testimony**

Next, Defendant asserts that we erred in failing to declare a mistrial **sua sponte** in response to allegedly prejudicial testimony given by Trooper John Corrigan of the Pennsylvania State Police.

As part of the investigation, Trooper Corrigan processed several pieces of evidence for latent fingerprints. As a result, eight latent prints were developed, one of which was of AFIS quality. When questioned by the Commonwealth on what the trooper meant by an AFIS quality print, he responded:

> Mr. Corrigan: By AFIS quality, I am referring to the Automated Fingerprint Identification System. That's at the PSP Wyoming Crime Lab, where the terminal we use is located. Fingerprints that have enough quality and quantity of detail are submitted there. The operator at that terminal will process it through the AFIS terminal. Basically, it does a search of tens and tens of millions of criminal record fingerprints.
>
> Assistant District Attorney: Any other people besides criminals in that database?
>
> Mr. Corrigan: I believe AFIS it's actually just a criminal record database.

(N.T. 12/08/11, p. 68.)

Defendant now asserts that this testimony gave rise to manifest necessity such that this Court was required, at that time, to declare a mistrial **sua sponte** notwithstanding the fact that no objection was raised. **Cf. Commonwealth v. Montalvo,** 434 Pa. Super. 14,

31, 641 A.2d 1176, 1184 (1994) ("In order to preserve an issue for review, a party must make a timely and specific objection at trial.").[9]

As a general rule, the Commonwealth may not present evidence of prior criminal acts against a defendant that have no relation to his present charge. Not all improper references to past criminal activities, however, warrant a new trial. In determining whether to declare a mistrial, "the operative question is whether the jury could **reasonably** infer from the facts presented that the accused had engaged in prior criminal activity." **Commonwealth v. West,** 440 Pa. Super. 575, 579, 656 A.2d 519, 521 (1995) (citation and quotation marks omitted), **appeal denied,** 542 Pa. 668, 668 A.2d 1131 (1995). Furthermore, the mere reference of a defendant's prior criminal activity does not warrant a new trial unless the record shows that prejudice resulted from the testimony. **Commonwealth v. Valerio,** 712 A.2d 301, 303 (Pa. Super. 1998), **appeal denied,** 557 Pa. 639, 732 A.2d 1210 (1998).

Applying these criteria to the testimony, we conclude the record does not support Defendant's position that the testimony gave rise to a reasonable inference that Defendant had committed a prior criminal act. Essentially, what Trooper Corrigan testified to was that AFIS is a criminal database. He further testified that he submitted the AFIS quality print to AFIS on April 18, 2008. At no point during his testimony, or the testimony of any other witness, was it ever indicated that the AFIS search yielded a match to Defendant's fingerprints. (N.T. 12/09/11, pp. 9, 71-72); **see Commonwealth v. Claffey,** 264 Pa. Super. 453, 455-56, 400 A.2d 173, 174 (1979) (testimony by detective that he submitted fingerprints lifted from the scene of the burglary to the Federal Bureau of Investigation for comparison did not provide a reasonable inference implying that defendant had engaged in prior criminal acts).

Moreover, later testimony indicated that on or about November 21, 2008, Trooper Klitsch was informed that a DNA profile recovered from a cigarette filter retrieved from one of the fires matched that of Defendant's. With this information, Trooper Klitsch contacted Trooper David Andreuzzi, a fingerprint comparison and identification expert with the Pennsylvania State Police, and asked

[9] At trial, defense counsel concurred with the Court's decision not to interject at the time this testimony occurred in order not to highlight an issue that was only briefly and rapidly touched upon by the witness. (N.T. 12/09/11, p. 9.)

that he run a comparison between the AFIS quality print and the known fingerprints of Defendant. Once finished with the comparison, Trooper Andreuzzi was able to identify the latent print as that of Defendant's right index finger, thus offering an explanation to the jury as to how Defendant's fingerprint was matched with the AFIS quality print. Trooper Andreuzzi never identified the database or source he accessed to compare with the latent print. **Cf. Commonwealth v. Hall,** 264 Pa. Super. 261, 399 A.2d 767 (1979) (court properly denied counsel's motion for a mistrial after officer testified to comparing defendant's fingerprint found at the scene with his BCI Rap Sheet, where later testimony indicated that defendant's fingerprints, used for comparison, were those obtained on the day of his arrest for the crimes charged, and not from the BCI Rap Sheet).

In short, the record does not indicate that any prejudice resulted from Trooper Corrigan's testimony. Indeed, had defense counsel raised an objection, the issue could have been cured by a cautionary instruction requesting the jury to disregard the remark. **Cf. Hall, supra** at 265, 399 A.2d at 769 (court cautioned the jury not to attach any significance to comments made in regard to BCI Rap Sheet); **see also, Commonwealth v. Bibbs,** 970 A.2d 440, 454 (Pa. Super. 2009) (court cautioned as to source of photographs used to identify defendant), **appeal denied,** 603 Pa. 683, 982 A.2d 1227 (2009).

C. **References to Defendant's Imprisonment**

Defendant further asserts that we erred in failing to declare a mistrial **sua sponte** because of prejudicial remarks made by the Commonwealth, as well as reference in a defense witness' testimony read to the jury, indicating that Defendant had been incarcerated.

Due to his poor health, Timothy Swartz, Defendant's father, was unavailable to testify at trial. Consequently, Timothy Swartz' deposition, taken on December 22, 2010, was read to the jury. During the Commonwealth's cross-examination, defense counsel requested two sidebars—both times asking that the witness refrain from reading any reference to Defendant's imprisonment. Notwithstanding this fact, in response to the question, "You did not regard it as a threat to your property?" (N.T. 12/09/11, pp. 280-81), the witness read from the deposition: "No. As a matter of fact, I do want to tell you this. Since Frank is in jail ... ." (N.T. 12/09/11,

p. 281.) At that point, we instructed the jury to disregard the last answer given by the witness.[10]

The second reference to Defendant's imprisonment was made by the Assistant District Attorney. When questioning Defendant on whether any promises were made in exchange for his confession, Attorney Lavelle stated: "Okay. Because by New Years, you were in jail or—well, by New Years, you had to turn yourself in." (N.T. 12/12/11, p. 168.) Defense counsel objected, and after a sidebar we gave the jury another cautionary instruction.[11]

[10] The exact instruction, which defense counsel also concurred in, was as follows: "What I am going to ask, first of all, is that the last answer that was given by Mr. Devlin, that answer be disregarded by the jury." (N.T. 12/09/11, p. 283.)

[11] The instruction given was as follows:

> Members of the jury, individuals who are facing criminal charges may or may not be placed in custody for various reasons. Whether they have been has absolutely nothing to do with guilt or innocence. It may be a diversion from that issue before you. Therefore, to the extent there may have been references in this proceeding to whether or not Mr. Swartz may have been in jail or may not have been put in jail, that has absolutely no bearing on what you have to decide. It is totally irrelevant to his guilt or innocence in this case.
>
> So, I am giving you a cautionary instruction that to the extent a question may have implied that he was in jail, to the extent you may have heard testimony during the course of this proceeding that he may have been in jail, to the extent that there may have been something that you believe would indicate he was in jail, completely disregard that.
>
> Because in all truthfulness and fairness to Mr. Swartz, it has absolutely nothing to do with what you have to decide. So I just want to caution you on that.

(N.T. 12/12/11, pp. 170-71.) We further instructed the jury, in our closing instructions, as follows:

> The defendant, Frank Duane Swartz, comes before you presumed to be innocent, and these are not just empty words. It's a fundamental principal of our system of criminal law that the defendant is presumed to be innocent. The mere fact that he was arrested and a criminal complaint was filed against him accusing him of a crime, or even the fact that he may have been held in custody, is not any evidence against him. Sometimes a person is held in custody for reasons which have nothing to do with guilt or innocence. You cannot in any way consider that as evidence one way or the other.

(N.T. 12/12/11, p. 270.) **See Commonwealth v. Carson,** 559 Pa. 460, 489, 741 A.2d 686, 702 (1999) (approving substance of similar charge conveying to the jury that whether the defendant is in the custody of law enforcement officials is irrelevant to the determination of guilt or innocence; court concluded that possibility that some of jurors may have seen defendant in handcuffs while being escorted into courtroom is not so inherently prejudicial as to deprive defendant of the presumption of innocence), **abrogated on other grounds by Commonwealth v. Freeman,** 573 Pa. 532, 827 A.2d 385 (2003); **Commonwealth v. Evans,** 465 Pa. 12, 14-15, 348 A.2d 92, 93-94 (1975) (same).

As previously stated, not all references which indicate prior criminal activity require a mistrial. "Mere passing references to criminal activity will not require reversal unless the record indicates that prejudice resulted from the reference." **Commonwealth v. Guilford,** 861 A.2d 365, 370 (Pa. Super. 2004); **see also, Commonwealth v. Miller,** 333 Pa. Super. 58, 61, 481 A.2d 1221, 1222 (1984) (passing reference to defendant having been in jail, where offer to give a cautionary instruction was refused, was insufficient to justify a mistrial). "[T]he nature of the reference and whether the remark was intentionally elicited by the Commonwealth are considerations relevant to the determination of whether a mistrial is required." **Commonwealth v. Kerrigan,** 920 A.2d 190, 199 (Pa. Super. 2007), **appeal denied,** 594 Pa. 676, 932 A.2d 1286 (2007).

In neither instance were the statements intentionally elicited by the Commonwealth. In fact, as to the first remark, counsel had previously agreed at sidebar to have the witness skip over any remarks made referencing Defendant's imprisonment. In addition, the testimony was unsolicited and unresponsive to the question asked, as the Commonwealth was inquiring on whether the witness felt that his home was threatened by the fires. As to the second remark, the Commonwealth quickly rectified its mistake by changing the question prior to receiving Defendant's response. Moreover, at no time did the Commonwealth try to take advantage of the reference made. **See Commonwealth v. Zook,** 532 Pa. 79, 96-97, 615 A.2d 1, 10 (1992).

While it's unfortunate that these references were made, any prejudice created by these statements was cured by the cautionary instructions given. **Id.** at 96, 615 A.2d at 10 ("An immediate curative instruction to the jury may alleviate any harm to the defendant that results from reference to prior criminal conduct."). Unless shown to the contrary, it is presumed that the jury follows the court's instructions. **Commonwealth v. Laird,** 605 Pa. 137, 157, 988 A.2d 618, 629 (2010).

D. **Jury Deliberation**

Lastly on this topic, Defendant contends we erred in failing to grant defense counsel's request for a mistrial because of the prolonged duration of jury deliberations.

After five and a half days of trial, the jury began deliberations on December 12, 2011, at approximately 6:03 P.M. A few hours later, they returned the following question to the Court: "If we can't come to a unanimous decision, what should we do?" (N.T. 12/12/11, p. 340.)

While in chambers, defense counsel requested a mistrial based upon the fact that the jury had been deliberating for five hours and had yet to reach a verdict. We denied this request. Instead, we brought the jury into open court and informed them that they could exercise one of three options: recess for the night and return to continue deliberations in the morning; render a verdict as to charges they agreed upon; or be given a hung jury instruction and attempt to further deliberate that evening. Upon further discussion, the jury informed the Court that they would like to recess for the night.

The jury was dismissed at 11:30 P.M. and asked to return to recommence deliberations at 10:00 A.M. the next day. At approximately 1:04 P.M., on December 13, 2011, defense again requested that we declare a mistrial based upon the duration of the deliberations, and again we denied the request. The verdict was eventually rendered at 2:33 P.M.

"The duration of jury deliberations is a matter within the sound discretion of the trial court, whose decision will not be disturbed unless there is a showing that the court abused its discretion or that the jury's verdict was the product of coercion or fatigue." **Commonwealth v. Moore,** 594 Pa. 619, 645, 937 A.2d 1062, 1077 (2007). Only "[w]here the jury, after full consideration of the case, fails to agree and there is no reasonable basis for believing that they will be able to agree after further deliberation, [does] a manifest necessity exist for their discharge." **Commonwealth v. Verdekal,** 351 Pa. Super. 412, 417, 506 A.2d 415, 417 (1986), **appeal denied,** (Pa. 1986). Moreover, the factors taken into consideration in deciding whether to grant a mistrial include the complexity of the issues, the seriousness of the charges, the amount of testimony, length of trial, the solemnity of the proceedings, and indications from the jury on the possibility of reaching a verdict. **Commonwealth v. Marion,** 981 A.2d 230, 235 (Pa. Super. 2009), **appeal denied,** 605 Pa. 697, 990 A.2d 729 (2010).

Here, the trial lasted five and one-half days. At the conclusion of closing arguments, the jury was given instructions relating to four separate charges which Defendant faced with respect to each of the sixteen fires set, together with two additional charges. In total, the jury was asked to make a determination of Defendant's guilt on sixty-six counts.

After deliberating for five hours, the jury indicated that it had a question regarding what would happen if they could not reach a verdict. Once apprised of their options, they indicated their willingness to return the following day to continue their deliberations. After roughly three more hours of deliberations, the jury rendered its verdict.

Where the issues are complex, it is not uncommon for the court to instruct the jury to continue deliberations when only a brief period has passed. **See e.g., Commonwealth v. Bridges,** 563 Pa. 1, 757 A.2d 859 (2000) (trial court did not abuse its discretion in instructing the jury to continue deliberations after a six-day trial, and four hours of deliberations had elapsed), **abrogated on other grounds by Commonwealth v. Freeman,** 573 Pa. 532, 827 A.2d 385 (2003); **Commonwealth v. Zook, supra** (trial court did not abuse its discretion in instructing the jury to continue deliberations after a five-day trial, and four and a half hours of deliberations had elapsed). Moreover, at no point in time during these two days did the jury indicate that it was at a standstill. **See Commonwealth v. Johnson,** 542 Pa. 384, 408, 668 A.2d 97, 109 (1995) (trial court did not abuse its discretion in instructing jury to continue deliberations where it did not indicate that it was hopelessly deadlocked). Consequently, no error occurred.

4. **The Verdict Returned by the Jury Was Against the Weight of the Evidence As There Was a Break in the Chain of Custody of the Physical Evidence Submitted for Fingerprint and DNA Analysis Which Calls Into Question the Results of the Analysis and Which Thereby Eliminates All Physical Evidence Linking the Defendant to Any of the Sixteen Subject Fires.**

A motion for a new trial on the grounds that the verdict is contrary to the weight of the evidence concedes that there is sufficient evidence to sustain the verdict, but contends that it is against the

weight of the evidence. **Commonwealth v. Bennett,** 827 A.2d 469, 481 (Pa. Super. 2003), **appeal denied,** 577 Pa. 707, 847 A.2d 1277 (2004). "For a new trial to lie on a challenge that the verdict is against the weight of the evidence, the evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court." **Commonwealth v. Shaffer,** 722 A.2d 195, 200 (Pa. Super. 1998), **appeal denied,** 559 Pa. 665, 739 A.2d 165 (1999). Defendant challenges the weight of the evidence on the grounds that there is a break in the chain of custody of the DNA and fingerprint evidence linking Defendant to the fires.

Our review of the record indicates that Wesley Keller of the Pennsylvania Bureau of Forestry testified that thirty-one incendiary devices were recovered and placed with him for processing. As the devices were collected, he would seal each individual device in a separate container, document it, and place the container in his evidence locker. He would then personally transport the evidence to the Wyoming Regional Laboratory of the Pennsylvania State Police for DNA and fingerprint testing. (N.T. 12/06/11, pp. 180-81.)

The record further indicates that Trooper Corrigan of the State Police Forensic Services Unit in Hazleton recalled receiving thirty matchbook devices, most of which were hand delivered by Mr. Keller, to be processed for latent fingerprints. Upon receipt of this evidence, Trooper Corrigan testified he removed the intact devices from their containers, photographed them, removed the cigarette butts—consisting of the filter portion and any unsmoked or unburnt portion remaining on the cigarette—placed these inside of a separate white envelope for possible future DNA testing, and processed the matchbooks for latent fingerprints. (N.T. 12/08/11, p. 66.) Once finished processing this evidence, Trooper Corrigan repackaged and resealed these items. (N.T. 12/08/11, p. 76.)

Particularly relevant to Defendant's present contention are seven incendiary devices Trooper Corrigan received from Wes Keller on March 28, 2008. It was from one of these match packs that he developed the AFIS quality print previously referred to. From that same device, as well as a second device, the cigarette butts were removed from the matchbooks and placed in a separate white envelope. These devices, each in a separate container, were taken by Wes Keller to the Wyoming Crime Lab for further analysis. (N.T. 12/08/11, pp. 72-75; Commonwealth Exhibit 16 (Keller Request for Forensic Analysis).)

Brunee Coolbaugh, a serologist with the Pennsylvania State Police Crime Laboratory in Wyoming, Pennsylvania, became involved with the investigation on April 23, 2008, when she was provided three incendiary devices for DNA analysis. These devices, each in separate containers, had previously been hand delivered to the Wyoming Laboratory by Mr. Keller on March 31, 2008. (N.T. 12/08/11, p. 127.) Item number one contained a cigarette inside a matchbook held together by a rubber band. Items number two and three contained a matchbook, a rubber band and a white envelope with a cigarette butt inside. As to all three items, Ms. Coolbaugh removed the cigarette butts and packaged them for DNA analysis. (N.T. 12/08/11, pp. 109-14.) She then sent the items, via UPS, to the Bethlehem DNA laboratory for DNA testing on April 24, 2008. (N.T. 12/08/11, p. 121; Commonwealth Exhibit 20.)

Geena Musante, a forensic scientist at the Bethlehem State Police Crime Laboratory, received these items on April 25, 2008. DNA profiles were developed for each item and found to match with one another, implying each might come from the same source. Additionally, by reference to CODIS (Combined DNA Indexing System), it was determined that the likely source of the DNA found on the cigarette butts was Defendant's. A subsequent comparison of DNA obtained from the buccal swab taken from Defendant on November 24, 2008, confirmed Defendant as the source.

The standard for establishing the chain of custody for admission of physical evidence was set forth by the Pennsylvania Supreme Court in **Commonwealth v. Hudson,** 489 Pa. 620, 414 A.2d 1381 (1980):

> The admission of demonstrative evidence is a matter committed to the discretion of the trial court. ... Furthermore, there is no requirement that the Commonwealth establish the sanctity of its exhibits beyond a moral certainty. ... Every hypothetical possibility of tampering need not be eliminated; it is sufficient that the evidence, direct or circumstantial, establishes a reasonable inference that the identity and condition of the exhibit remained unimpaired until it was surrendered

to the trial court. ... Finally, physical evidence may be properly admitted despite gaps in testimony regarding its custody.

Id. at 631-32, 414 A.2d at 1387 (citations omitted).

Instantly, Defendant argues that because Trooper Corrigan testified that in processing the incendiary devices he received from Wes Keller he separated the matchbooks from the cigarette butts and because Ms. Coolbaugh testified that of the three devices she received, two had the cigarette butt separated from the matchbooks but the other did not, the integrity of the DNA and fingerprint testing was somehow compromised. This conclusion sought by Defendant is neither legally nor logically sustainable.

A number of reasons can explain this apparent discrepancy seized upon by Defendant. For instance, Trooper Corrigan may have been mistaken in his belief that he separated each incendiary device he processed when the cigarette was intertwined with the matches; Ms. Coolbaugh may have been mistaken that the one device she processed was still intact; or, since Mr. Keller testified that thirty-one incendiary devices were recovered and Trooper Corrigan testified that he received thirty matchbooks from Mr. Keller, the difference may be that the extra matchbook which was not processed by Trooper Corrigan was the one Ms. Coolbaugh found intact.[12] The reconciliation of the alleged discrepancy argued by Defendant among the possibilities mentioned, together with others which may exist, are questions of credibility, not admissibility, and are thus questions for the jury to decide.

More importantly, there is nothing in the record to suggest that the cigarettes which Ms. Coolbaugh prepared for DNA analysis and forwarded to the Bethlehem DNA laboratory had been tampered with. At most, even if the one device was untouched and intact, there is no reason to believe that this would affect either the fingerprint obtained by Trooper Corrigan from the matchbook or the DNA subsequently recovered from the cigarette butts. Nor is there any testimony that there was a mix-up in the evidence such that

[12] It is important to understand that at no time was Trooper Corrigan specifically asked if he separated the cigarette butt from each incendiary device he processed. (N.T. 12/08/11, p. 66.) Further, Ms. Coolbaugh did acknowledge a descriptive error in her laboratory report. (Commonwealth Exhibit 20) (N.T. 12/08/11, p. 120.)

what was recovered and sent for testing was not actually evidence obtained at the scene of the subject fires.

Trooper Corrigan expressly testified that the AFIS quality fingerprint he had lifted from one matchbook was personally transported by him to the Wyoming Crime Lab. (N.T. 12/08/11, p. 104.) Further, the DNA profile developed from all three cigarette butts processed by Ms. Coolbaugh for DNA analysis all matched with Defendant's DNA. Under these circumstances, absent evidence indicating that either the matchbook from which the AFIS quality print was lifted or that the three cigarette butts submitted for DNA analysis were altered, a reasonable inference exists that the identity and physical condition of these items remained unimpaired from the time they were recovered by the police until the time they were presented in court at trial. **See id.** at 632-33, 414 A.2d at 1387-88 (discussing discrepancies in the condition of black electrical tape used in the commission of a crime between the time of its recovery by police and the time of its presentation in court as insufficient to negate the chain of custody; **cf. Commonwealth v. Hess,** 446 Pa. Super. 222, 666 A.2d 705 (1995) (finding chain of custody not met where two vials of blood were drawn from defendant for blood analysis and placed in evidence locker, but three vials were removed from locker and tested by forensic scientist), **appeal denied,** 544 Pa. 603, 674 A.2d 1067 (1996).

5. **The Defendant Is Entitled to a Judgment of Acquittal/ Arrest of Judgment As the Commonwealth Failed To Produce at Trial Legally Sufficient Evidence That It Was the Defendant Who Was Responsible for Any of the Sixteen Fires in Question.**[13]

In reviewing a challenge to the sufficiency of the evidence, we must determine "whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is

[13] Both a motion for judgment of acquittal and a motion for an arrest of judgment challenge the sufficiency of the evidence. **Compare Commonwealth v. Hutchinson,** 947 A.2d 800, 805 (Pa. Super. 2008) (stating that the standard of review for a motion for judgment of acquittal is sufficiency of the evidence), **appeal denied,** 602 Pa. 663, 980 A.2d 606 (2009); **Commonwealth v. Marquez,** 980 A.2d 145, 147 (Pa. Super. 2009) (stating that the standard of review for a motion for arrest of judgment is sufficiency of the evidence), **appeal denied,** 604 Pa. 704, 987 A.2d 160 (2009). Since these claims are interrelated, we address them together.

sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt." **Commonwealth v. Hutchinson,** 947 A.2d 800, 805 (Pa. Super 2008), **appeal denied,** 602 Pa. 663, 980 A.2d 606 (2009). In so doing, "we may not weigh the evidence and substitute our judgment for the fact-finder." **Id.** Additionally, the Commonwealth may sustain its burden of proving each element of the crime beyond a reasonable doubt through the use of circumstantial evidence. **Id.** at 806. "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be ... to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to 'ask itself whether **it** believes that the evidence at trial established guilt beyond a reasonable doubt.'" **Jackson v. Virginia,** 443 U.S. 307, 318-19 (1979), **quoted in Hutchinson, supra.**

Under this test, the evidence introduced at trial established that over a period of one month sixteen separate brush fires were set in three adjoining municipalities in Carbon County. Robert McJilton, a fire investigator for the Bureau of Forestry, offered his opinion that the fires were intentional in nature, as all accidental causes were ruled out and several incendiary devices were found at many of the sites. Firefighters as well as private citizens assisted in suppressing the fires. In one instance, a personal care home was threatened and forced to be evacuated due to the fire's proximity.

Forensic testing of three of the devices found provided a DNA profile and a latent fingerprint matching Defendant's. A search of Defendant's residence revealed two clear plastic bags of colored rubber bands and two white in color matchbooks similar to those used on the incendiary devices. When questioned by police, Defendant confessed to being responsible for causing all sixteen fires.

Here, the evidence supports the jury's conclusion that Defendant not only possessed the incendiary devices, but also was the person responsible for setting the fires: Defendant's fingerprint and DNA were found on three devices; the supplies needed to make the devices—the rubber band and matchbook—were found at Defendant's residence; Defendant admitted to being a smoker and to being familiar with this type of incendiary device and how to assemble it; and Defendant confessed to police to being the

person responsible for causing the fires. That in so doing he risked a catastrophe and endangered others, as well as property, is also clear: all sixteen fire sites were located on woodlands; firefighters and private citizens responded to suppress the fires; and residents of a personal care home were evacuated.

Thus, when the evidence is viewed in the light most favorable to the Commonwealth and allowing all reasonable inferences therefrom, the evidence is sufficient to support Defendant's convictions of arson endangering persons, arson endangering property, possession of incendiary materials or devices, risking a catastrophe and maliciously setting or causing a fire.

6. **The Commonwealth Failed To Timely Bring the Within Matter to Trial.**

We have previously addressed most of Defendant's contentions raised on this issue by Order dated December 9, 2010. Thus, we address here only the period of time from June 21, 2010, through June 22, 2011, consisting of 366 days and representing the time that elapsed from Defendant's filing of his motion to suppress and the order dismissing that motion.

In assessing a prompt trial claim, a court must determine whether any excludable time and/or excusable delay exists. While excludable time is expressly defined by Rule 600(C), excusable delay is not. **See Commonwealth v. Hunt,** 858 A.2d 1234, 1241 (Pa. Super. 2004), ("'Excusable delay' is not expressly defined in Rule 600, but the legal construct takes into account delays which occur as a result of circumstances beyond the Commonwealth's control and despite its due diligence."), **appeal denied,** 583 Pa. 659, 875 A.2d 1073 (2005).

The days that elapsed between the filing of the motion on June 21, 2010, and the hearing on November 12, 2010, constitute excludable time, as Defendant was unavailable. **See e.g., Commonwealth v. Hill,** 558 Pa. 238, 254, 736 A.2d 578, 587 (1999) ("[T]he mere filing of a pretrial motion by a defendant does not automatically render him unavailable. Rather, a defendant is only unavailable for trial if a delay in the commencement of trial is caused by the filing of a pretrial motion."). On the other hand, the days that elapsed following the hearing and concluding with the order on June 22, 2011, constitute excusable delay, as this was a circumstance outside of the Commonwealth's control.

As to the period of exclusion, Rule 600 "requires a showing of due diligence in order for the Commonwealth to avail itself of an exclusion." **Id.** at 253, 736 A.2d at 586 (quotation marks and citation omitted). Arguably, the Commonwealth failed to act with due diligence in two instances. The first was on August 13, 2010, when the Commonwealth requested a continuance of the hearing on the Motion to Suppress, resulting in a delay of 28 days. The second was on October 18, 2010, when the Commonwealth once again requested a continuance of the hearing on this matter, resulting in a delay of 25 days. However, both requests were agreed to by Defendant.

By consenting to both continuances, Defendant essentially waived his Rule 600 rights with respect to these 53 days. **See Hunt, supra** at 1243 (finding defendant's consent, without objection, to the Commonwealth's continuance requests constituted a waiver of his Rule 600 rights). Accordingly, this entire time period is either excluded or excused for purposes of Rule 600.

7. **The Sentence As Meted Out by This Court on February 3, 2012 Should Be Modified To Reflect Concurrency in Sentencing As to Certain of the First Degree Felony Charges As No Express or Implied Consideration Was Given to the Rehabilitative Needs of the Defendant.**

A challenge to the discretionary aspects of sentencing is not absolute. Rather, a precondition to review of the merits of such a challenge is the articulation of a substantial question as to the appropriateness of the sentence. 42 Pa. C.S. §9781(b); **Commonwealth v. Paul,** 925 A.2d 825, 828 (Pa. Super. 2007) ("The determination of whether a particular issue constitutes a substantial question as to the appropriateness of sentence must be evaluated on a case-by-case basis."). In order to raise a substantial question, Defendant must advance "a colorable argument that the sentencing judge's actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process." **Commonwealth v. Phillips,** 946 A.2d 103, 112 (Pa. Super. 2008) (citation omitted), **appeal denied,** 600 Pa. 745, 964 A.2d 895 (2009).

The sentence imposed was supported by a presentence investigation report, was not manifestly excessive, was accompanied by reasons stated on the record, and was within the standard range

of the sentencing guidelines. Defendant has not identified any specific provision of the Sentencing Code that has been violated or any violation of the fundamental norms underlying the sentencing process. The sole issue raised by Defendant, that the Court failed to consider his rehabilitative needs, does not raise a substantial question that the sentence imposed was, in fact, inappropriate. **See Commonwealth v. Mobley,** 399 Pa. Super. 108, 115-16, 581 A.2d 949, 952 (1990) (claim that sentence imposed for narcotics offense failed to take into consideration defendant's rehabilitative needs and was manifestly excessive did not raise a substantial question where sentence was within the statutory limits and within sentencing guidelines).

As such, Defendant has failed to present a substantial question as to the appropriateness of his sentence.

CONCLUSION

In accordance with the forgoing, we believe Defendant's contentions to be wholly without merit and deny Defendant's request for post-sentence relief.

PANTHER VALLEY SCHOOL DISTRICT, Appellant/Respondent vs. PANTHER VALLEY EDUCATION ASSOCIATION and ROBERT J. THOMAS, Appellees/Petitioners

Civil Law—Public School Code—Furloughed Professional School Employee—Failure To Recall and Reinstate—Damages—Salary Step Determination—Computation of Back Pay (Adjustment for Mitigation)—Interest—Employment Status (Entitlement to Tenure)—Fringe Benefits (Reimbursement of Medical and Educational Expenses)—Contempt

1. A furloughed professional school employee subject to recall, who would have been recalled and reinstated had his name been placed on a school district's recall list, is entitled to back pay and all other financial emoluments for the period for which he should have been recalled, less monies and other work-related benefits received by him during such period.

2. For purposes of placement on a school district's salary scale, a furloughed professional employee who has not been recalled and reinstated in accordance with the parties' collective bargaining agreement is entitled to recovery of his lost salary, inclusive of any increments in such salary attributable to annual salary step increases which he would have received had he been properly recalled and reinstated.

3. An employee who suffers a loss due to breach of an employment contract has a duty to make reasonable efforts to mitigate that loss. The applicable

measure of damages is the wages which were to be paid less any amount actually earned or which might have been earned through the exercise of reasonable diligence and seeking other similar employment. The burden of showing that losses could have been avoided is upon the breaching party.

4. Pursuant to Section 1155 of the Public School Code, an employee of a school district who has not been paid his salary when due is entitled to interest at the rate of six percentum per annum from the due date.

5. The measure of damages for medical expenses incurred by a furloughed school employee who has not been timely reinstated in accordance with the parties' collective bargaining agreement is his actual losses for the period he was improperly denied reinstatement, **i.e.,** his out-of-pocket expenses for insurance premiums or those medical expenses which would have been covered by the District's insurance program.

6. Tuition reimbursement to a furloughed professional school employee entitled to reinstatement who has paid for college credits necessary to retain his professional certification while on furlough are to be determined in accordance with the parties' collective bargaining agreement.

7. A temporary professional employee who works for a school district for three years without receiving an unsatisfactory rating shall thereafter be a professional employee with tenure rights associated with such status. This period of probation applies whether the employee was actually working for the school district, or was entitled to work, but was prevented from doing so by being improperly denied timely reinstatement. Consequently, a temporary professional employee who has been improperly furloughed and is entitled to reinstatement, and who has completed a three-year probationary period for which he has not received an unsatisfactory rating during the final four months—including in this computation the period of any improper furlough—is entitled upon reinstatement to be granted tenure status.

8. To be held in contempt of a court order, the complaining party must prove by a preponderance of the evidence: (1) that the contemnor had notice of the specific order or decree which he is alleged to have disobeyed; (2) that the act constituting the contemnor's violation was volitional; and (3) that the contemnor acted with wrongful intent. Contempt will not be found where legitimate disputes exist regarding tenure and the amount of back pay to which a claimant is entitled when adjusted for mitigation.

NO. 09-0206

ROBERT T. YURCHAK, Esquire—Counsel for Respondent.

A. MARTIN HERRING, Esquire—Counsel for Petitioners.

MEMORANDUM OPINION

NANOVIC, P.J.—June 18, 2012

On December 22, 2008, Robert J. Thomas ("Thomas") was the beneficiary of an arbitration award directing the Panther Valley School District ("District") to place his name on the District's recall list, to reinstate him to a position he was qualified to teach in the District, and to make Thomas whole for all wages, seniority and benefits he was denied between August 11, 2006 and the date of his

reinstatement. This award, modified to make clear that the District was entitled to credit for any substitute wages and benefits received by Thomas during the period of his furlough, was upheld by us in our decision of December 11, 2009, which was later affirmed by the Pennsylvania Commonwealth Court on November 24, 2010.

On January 3, 2011, the District reinstated Thomas to a teaching position. Unfortunately, the parties have been unable to agree on what Thomas is entitled to receive to be made whole. This is the basic issue before us, including within it questions of back pay, mitigation of damages, seniority, employment status and accrued fringe benefits.

FACTUAL AND PROCEDURAL BACKGROUND

On August 10, 2006, the District elected not to renew Thomas' employment contract as a temporary professional employee in the District's alternative education program due to a change in status of that program. Thomas' employment with the District under this contract began on November 12, 2004. Between November 12, 2004 and August 10, 2006, Thomas received four performance evaluation reviews: three satisfactory and the last, dated August 1, 2006, unsatisfactory.

As a temporary professional employee, Thomas did not have tenure at the time his contract ended. However, prior to his employment in the District's alternative education program, Thomas had worked for the District as a substitute teacher with certification as a health and physical education teacher.

In his position as a temporary professional employee, Thomas was subject to the provisions and protections of the collective bargaining agreement existing between the Panther Valley Education Association ("Association"), the collective bargaining agent for the District's professional employees, and the District.[1] Under this agreement, teachers with professional certifications who had been laid off and furloughed—Thomas' official status as determined in prior proceedings in this case—were to be placed on the District's

[1] On August 10, 2006, the collective bargaining agreement in effect between the District and the Association was that dated May 25, 2006, for the period from August 2005 until August 2008. (Thomas Exhibit P-3.) This contract was later succeeded by that dated November 6, 2008, for the three-year period between August 2008 and August 2011. (Thomas Exhibit P-2.) As there is no need to distinguish between these contracts for purposes of this opinion, both are referred to collectively as the collective bargaining agreement.

recall list and given preferential consideration in filling any future vacancies in their areas of certification. (Collective Bargaining Agreement, Article X (Lay Off and Recall), Section 2.) When Thomas was neither recalled nor reinstated by the District to fill a vacancy which had opened within his field of certification, the Association, on September 13, 2006, filed a grievance on Thomas' behalf. That grievance, as previously stated, was sustained by the arbitrator on December 22, 2008.

During the District's appeal of the arbitrator's decision to this court and the appellate litigation which followed, Thomas received unemployment compensation benefits and miscellaneous income, incurred medical expenses which otherwise would have been covered had he remained an employee of the District, and also expended money for continuing education to maintain his professional certification.

After the Commonwealth Court affirmed our December 11, 2009 decision, the District reinstated Thomas as a high school physical education teacher on January 3, 2011. Specifically, the District hired Thomas as a temporary professional employee, subject to tenure status after the receipt of six consecutive satisfactory ratings over the next three years. Moreover, he was placed on Step 3 of the salary scale as provided by the collective bargaining agreement. Thomas contends that he should have been reinstated with tenure, as he did not receive any unsatisfactory ratings between August 2006 and January 2011, and that at the time of reinstatement he was entitled to be placed on Step 7 of the salary scale, where he would have been had his employment with the District continued during his period of furlough.

When the parties were unable to resolve their differences, the Association and Thomas filed a joint Petition for Contempt on March 17, 2011, seeking to have the issues between them decided by this court and further requesting payment of their attorney fees as relief for the District's alleged willful violation of our December 11, 2009 order upholding the arbitrator's award.[2] A hearing was held on August 16, 2011. At that time, Thomas also requested interest on any award rendered.

[2] The interests and contentions advocated by both the Association and Thomas are identical. For this reason, unless otherwise indicated, both are encompassed within our singular reference to Thomas hereafter.

DISCUSSION

As delineated by the Petition for Contempt, the arguments made by the parties, and the hearing held on August 16, 2011, the following six issues are to be decided:

1. The proper salary step at which Thomas was to be reinstated;

2. The amount of back pay, with appropriate adjustments for mitigation, which Thomas is entitled to receive;

3. Thomas' claim to interest on any back pay awarded;

4. Thomas' request for reimbursement of medical and educational expenses incurred by him while on furlough;

5. Whether Thomas is entitled to be reinstated with tenure; and

6. Thomas' request that the District be held in contempt and ordered to pay his attorney fees.

(N.T. 08/16/2011, pp. 3-6.) Each will be addressed in the order presented.[3]

1. **Salary Step Determination**

A furloughed professional school employee subject to recall, who would have been recalled and reinstated had his name been placed on a school district's recall list, is entitled to back pay and all other financial emoluments for the period for which he should have been recalled, less monies and other work-related benefits received by him during such period. **Colonial Education As-**

[3] Prior to filing the instant Petition for Contempt, the Association filed another grievance on Thomas' behalf alleging that "upon return to employment by direction of an arbitrator, Robert Thomas was improperly denied tenure and placed on the incorrect salary step." Following our review of this Petition, we ordered the parties to provide us with legal authority as to "whether the court has jurisdiction at this time to entertain the issues raised in the Petition for Contempt, or whether this matter needs to be remanded back to the original arbitrator (John J. Dunn, Esquire) or to be resolved by a grievance procedure under the Collective Bargaining Agreement." (Order, 05/2/2011.) Subsequently, the parties agreed to our jurisdiction and asked that we resolve the issues presented. (N.T. 08/16/2011, p. 3.)

In addition to the issues listed, prior to the August 16, 2011 hearing, the parties disagreed on whether Thomas was entitled upon reinstatement to seventy sick days and twelve personal days, which were claimed to have accrued prior to August 11, 2006 and during Thomas' period of unemployment with the District. At the time of hearing, the parties agreed that this matter was no longer in dispute and that Thomas would be credited with seventy sick days and twelve personal days. (N.T. 08/16/2011, p. 4.)

sociation v. Colonial School District, 165 Pa. Commw. 1, 3-4, 644 A.2d 211, 212 (1994), **appeal denied,** 539 Pa. 670, 652 A.2d 840 (1994). In order to determine the amount of back pay Thomas would have earned with the District had he not been furloughed, we must first determine whether Thomas was entitled to annual step increases on the District's salary scale, each step corresponding to an additional year of service with the District, for each year of his furlough.

The parties agree that had Thomas' employment with the District continued for the 2006-2007 school year, Thomas would have been placed on Step 3 of the salary scale. The District contends that the salary step to which an employee is entitled to be placed depends upon his actual years of service with the District. Accordingly, since Thomas had only been employed in the District's alternative education program for two school years prior to the non-renewal of his employment contract, the District argues that it correctly placed him at Step 3 upon his reinstatement on January 3, 2011.

In this regard, the District relies upon Section 11-1142(a) of the Public School Code of 1949 ("Code"), 24 P.S. §§1-101—27-2702, which provides:

> (a) Except as hereinafter otherwise provided, all school districts and vocational school districts shall pay all regular and temporary teachers, supervisors, directors and coordinators of vocational education, psychologists, teachers of classes for exceptional children, supervising principals, vocational teachers, and principals in the public schools of the district the minimum salaries and increments for the school year 1968-1969 and each school year thereafter, as provided in the following tabulation in accordance with the column in which the professional employe is grouped and the step which the professional employe has attained by years of experience within the school district each step after step 1 constituting one year of service. When a school district, by agreement, places a professional employe on a step in the salary scale, each step thereafter shall constitute one year of service. When a district adopts a salary scale in excess of the mandated scale, it shall not be deemed to have altered or increased the step which the employe has gained through years of service.

24 P.S. §11-1142(a). While this provision has been interpreted to require that a teacher's past years of service in the same district be credited upon rehire, following a voluntary break in service, for purposes of placement on the salary scale following a forced furlough and failure to reinstate, it does not address the issue before us. **Mifflinburg Area Education Association v. Mifflinburg Area School District,** 555 Pa. 326, 332, 724 A.2d 339, 343 (1999).

Thomas argues that to be made whole the back pay to which he is entitled includes any increase in the salary step he would have received had he been permitted to continue his employment with the District. In other words, the risk of improperly furloughing Thomas must be borne by the District and not Thomas. This accords with principles of fundamental fairness and is consistent with the case law. **See Mullen v. Board of School Directors of the DuBois Area School District,** 436 Pa. 211, 217-18, 259 A.2d 877, 881 (1969) (finding improperly discharged teacher, a temporary professional employee, was entitled to "restoration to his position, damages for lost salary **together with any increments to his salary to which he would have been entitled had he continued in his position,** and a certification which would result in his becoming a 'permanent professional employee' ") (emphasis added). Thus Thomas was entitled to a four-step advance within the salary scale while on furlough—from Step 3 for the 2006-2007 school year, to Step 4 for the 2007-2008 school year, to Step 5 for the 2008-2009 school year, to Step 6 for the 2009-2010 school year, and finally, to Step 7 for the 2010-2011 school year.

2. **Computation of Back Pay Award**

> When an employee is furloughed or discharged, he or she is entitled to all compensation lost if the employer's action is later determined to be illegal or improper. In **Shearer v. Commonwealth, Secretary of Education,** 57 Pa.Commonwealth Ct. 266, 269, 424 A.2d 633, 634 (1981), we held that:
>
> [A] professional employee is entitled to back pay for any period of involuntary separation form [sic] his employment which is subsequently resolved in his favor. **See Theros v. Warwick Board of School Directors,** 42 Pa.Commonwealth Ct. 296,

> 401 A.2d 575 (1979), where we held that a wrongfully suspended professional employee be paid 'an amount of money equal to the compensation he would have been paid during the period of his suspension.' **Id.** at 301, 401 A.2d at 577.

Arcurio v. Greater Johnstown School District, 157 Pa. Commw. 525, 529, 630 A.2d 529, 531 (1993) (Pellegrini, J. dissenting). Further,

> [i]t is a well-established rule of law that one who suffers a loss due to breach of a contract has a duty to make reasonable efforts to mitigate that loss. **State Public School Building Auth. v. W.M. Anderson Co.,** 49 Pa.Commonwealth Ct. 420, 410 A.2d 1329 (1980). In a breach of contract of employment case, the measure of damages is the wages which were to be paid less any amount actually earned or which might have been earned through the exercise of reasonable diligence in seeking other similar employment. **Coble v. Metal Township School Dist.,** 178 Pa.Superior Ct. 301, 116 A.2d 113 (1955). Further, it is the breaching party who has the burden of showing that the losses could have been avoided. **Savitz v. Gallaccio,** 179 Pa.Superior Ct. 589, 118 A.2d 282 (1955).

Appeal of Edge, 147 Pa. Commw. 27, 33-34, 606 A.2d 1243, 1246 (1992).

For the relevant time period, the parties' collective bargaining agreement contained the following salary schedule for professional employees of the District with respect to the step levels for which Thomas was entitled to be compensated:

School Year	Salary Step	Wages
2006-2007	Step 3	$33,157.00
2007-2008	Step 4	$33,595.00
2008-2009	Step 5	$34,470.00
2009-2010	Step 6	$36,315.00
2010-2011	Step 7	$19,142.50[4]

(Thomas Exhibits P-2, P-3.) In accordance with this schedule, between August 11, 2006, the date of Thomas' furlough, and January 3, 2011, the date of his reinstatement, Thomas' wages would have totaled $156,679.50.

[4] This figure for that portion of the 2010-2011 school year which preceded Thomas' reinstatement on January 3, 2011, represents one-half of the total salary provided in the District's salary schedule, $38,285.00, for the 2010-2011 school year for a teacher at Step 7 holding a bachelor's degree.

During this same period, Thomas received unemployment benefits and earned income as follows:

Calendar Year	Source	Amount
2006	Unemployment Compensation	$5,775.00
2007	Unemployment Compensation	$4,325.00
	Access Services (part-time therapeutic support staff)	$7,933.72[5]
	Vanak Detective Agency (part-time security guard)	$3,298.00[6]
2008	Vanak Detective Agency (part-time security guard)	$8,406.25

Thomas received no outside compensation for the years 2009 and 2010 as he elected to stay home and care for his mother.

In determining the amount of back pay Thomas is entitled to receive, "the measure of damages is the wages which were to be paid, less any sum actually earned, or which might have been earned, by [the employee] by the exercise of reasonable diligence in seeking other similar employment." **Coble v. Metal Township School District,** 178 Pa. Super. 301, 307, 116 A.2d 113, 116 (1955). Under this standard, the District is entitled to credit for the amount of wages Thomas actually earned while he was on furlough, as well as the amount of unemployment compensation benefits he received. **Shearer v. Commonwealth of Pennsylvania, Secretary of Education,** 57 Pa. Commw. 266, 270, 424 A.2d 633, 635 (1981) (noting the procedure for adjusting back pay awards for unemployment compensation benefits is set forth in Sections 704 and 705 of the Unemployment Compensation Law, 43 P.S. §§864, 865).[7]

[5] **See** School District Exhibit 3.

[6] **See** School District Exhibit 2.

[7] These sections provide as follows:

§ 864. Deductions from back wage awards

> Any employer who makes a deduction from a back wage award to a claimant because of the claimant's receipt of unemployment compensation benefits, for which he has become ineligible by reason of such award, shall

Additionally, Thomas voluntarily left his employment with Access Services as a TSS worker in October 2007, choosing instead to care for his mother. While certainly laudatory, the income foregone by this decision should not be underwritten by the District. Under the circumstances, we believe it appropriate to attribute $15,867.00 to Thomas' earnings for each of the following years preceding Thomas' reinstatement.[8] **Cf. Pletz v. Department of Environmental Resources,** 664 A.2d 1071, 1073 (Pa. Commw. 1995) (finding employee who voluntarily chose to take sick leave without pay made herself unavailable for work thereby abrogating her right to back pay). The District has not otherwise met its burden of establishing a failure to mitigate.[9] **Edge, supra** at 34, 606 A.2d at 1247 (noting that to meet its burden, the employer must demonstrate that substantially comparable work was available and that the employee failed to exercise reasonable due diligence in seeking alternative employment).

After adjustment for amounts actually received, or which might have been earned through the exercise of reasonable diligence, Thomas is entitled to $61,183.03 in back pay computed as follows:

Calendar Year	School Salary[10]	Mitigation Damages	Amount of Back Pay Due
2006	$16,578.50	$ 5,775.00	$10,803.50
2007	$33,376.00	$15,556.72	$17,819.28
2008	$34,032.50	$24,273.25	$ 9,759.25
2009	$35,392.50	$15,867.00	$19,525.50
2010	$19,142.50	$15,867.00	$ 3,275.50

be liable to pay into the Unemployment Compensation Fund an amount equal to the amount of such deduction. When the employer has made such payment into the Unemployment Compensation Fund, his reserve account shall be appropriately credited.

§ 865. Recoupment and/or setoff of unemployment compensation benefits Currentness

Recoupment and/or setoff of benefits paid to a discharged employe, if any, shall be determined from employe's gross, not net, back wages if employe is reinstated by arbitrator with back pay during period back pay is awarded.

[8] In 2007, Thomas was employed at Access Services from April 2, 2007 until October 3, 2007, during which period he earned $7,933.72. (School District Exhibit 3.) This equates to $1,322.28 monthly or $15,867.00 on a yearly basis.

[9] Thomas was last employed by Vanak Detective Agency as a security guard in 2008. This employment ended through no fault of Thomas' when the detective agency lost its contract for security at St. Luke's Hospital in Coaldale, whereupon Thomas was laid off from this position.

[10] We have adjusted the school salary for each year to a calendar year basis by taking the salary for the second half of each school year and adding it to the salary for the first half of the following year.

3. **Interest**

Pursuant to Section 1155 of the School Code, Thomas is entitled to interest on his back pay award at the rate of six percent per annum. This Section provides in relevant part:

> In the event the payment of salaries of employes of any school district is not made when due, the school district shall be liable for the payment of same, together with interest at six percentum (6%) per annum from the due date. ...

24 P.S. §11-1155. Under this Section, Thomas is entitled to the payment of interest on the amount of salary withheld, the cause for which the salary was withheld being irrelevant. **Shearer, supra; see also, Pennsylvania State Education Association v. Appalachia Intermediate Unit 08,** 505 Pa. 1, 7, 476 A.2d 360, 363 (1984) (holding that absent an explicit statutory or contractual provision, interest is to be awarded at a simple, not compound, rate). This provision is self-executing and not, as the District argues, waived because it was not requested in the Petition for Contempt.

The total amount of interest due to Thomas is $13,649.40 computed as follows:

Year	Back Pay Amount By Calendar Year	Interest Due[11]
2006	$10,803.50	$3,565.15
2007	$17,819.28	$4,811.20
2008	$ 9,759.25	$2,049.44
2009	$19,525.50	$2,928.82
2010	$ 3,275.50	$ 294.79

4. **Tuition Reimbursement and Medical Expenses**

While on furlough, Thomas attended, completed and paid for twelve college credits necessary to retain his professional certifica-

[11] Cumulative interest for each calendar year has been computed at the rate of six percent simple interest from December 31 of each calendar year until June 30, 2012.

tion. The cost for these credits was $2,601.00, which Thomas seeks to have reimbursed by the District.[12] On this issue, the collective bargaining agreement provides:

> The Panther Valley School District will provide tuition reimbursement for nine of the twenty-four (24) credits earned for certification. The reimbursement shall be limited to twelve (12) credits in any one calendar year and shall be at the actual cost of the Kutztown University fee for undergraduate and graduate credits.

(Collective Bargaining Agreement, Article VI (Professional Employee Benefits), Section 7.) While ambiguous on its face, the District's Superintendent, Rosemary Porembo, testified without contradiction that under this contract a teacher who has a level one certification is entitled to be reimbursed for nine credits. Once the teacher achieves level two status—this is done by completing an induction program, receiving six satisfactory ratings, and taking twenty-four credits from an accredited Pennsylvania graduate or undergraduate school—the teacher is then entitled to receive twelve credits of reimbursement per calendar year. (N.T. 08/16/2011, pp. 72-74.)

Ms. Porembo further explained that, at the time of the hearing, Thomas currently had a level one certification. Moreover, he had previously been reimbursed for six credits taken prior to August of 2006. Consequently, as of 2009, when Thomas enrolled in the twelve credits, he was only entitled to reimbursement for three additional credits. (N.T. 08/16/2011, p. 72.) Accordingly, Thomas is entitled to be paid the cost of three of the twelve credits taken in 2009 to be calculated at the rate of the Kutztown University fee for the spring semester.

As to Thomas' claim for medical expenses incurred during the period of his furlough, "the proper measure of damages is limited to [Thomas'] actual losses, **i.e.,** his out-of-pocket expenses for insurance premiums **or** those medical expenses which would have been covered by the District's insurance program." **Arcurio, supra** at

[12] Prior to the hearing, the parties stipulated that Thomas did in fact take and pay for the twelve credits. (N.T. 08/16/2011, pp. 9-10.)

528, 630 A.2d at 531. In this case, these expenses total $608.27. (N.T. 08/16/2011, pp. 24-25.)[13]

5. **Tenure**

Under the School Code, "teachers are professional employees with tenure rights unless newly hired, in which case they are temporary professional employees." **Pookman v. School District of the Township of Upper St. Clair,** 506 Pa. 74, 80, 483 A.2d 1371, 1375 (1984) (**citing** 24 P.S. §11-1101) (Zappala, J., dissenting). Pursuant to Section 1108(d) of the Code, 24 P.S. §11-1108, temporary professional employees shall for all purposes, except tenure status, be viewed as full-time employees and shall enjoy all the rights and privileges of regular full-time employees. **Id.,** at 78 n.3, 483 A.2d at 1374 n.3. ("[T]he only thing distinguishing temporary professional employees from professional employees is tenure.") "Temporary professional employees have no right of retention on the basis of seniority or ratings against professional employees or among themselves." **Id.** at 82, 483 A.2d at1376.

Under Section 1108 of the Code:

> the non-tenured teacher or 'temporary professional employe' is employed for what is, in essence, a probationary period of [three] years. At least twice yearly the county or district superintendent is required to rate such a teacher's performance according to the procedure set forth in § 1123. ... After [three] consecutive years of satisfactory performance and upon a satisfactory rating during the last four months of the probationary period, the non-tenured teacher gains the status of a 'professional employe', **i. e.,** he acquires tenure and is entitled to a professional employe's contract.

Board of Education of the School District of Philadelphia v. Philadelphia Federation of Teachers Local No. 3, 464 Pa.

[13] In computing this amount, we have credited Thomas for all medical expenses claimed except those billed by Vermillion Dental Office. As to the latter, the District's business manager, Kenneth Marx, Jr., testified that Vermillion Dental is not part of the approved network of providers for the District. (N.T. 08/16/2011, p. 89.) Mr. Marx further testified that because of this fact, the reimbursement rate to Thomas will be significantly less than that for a covered provider, however, that rate was not available to him at the time of hearing. Additionally, Thomas acknowledged that part of the charges on the Vermillion billing were taken care of prior to his separation from the District. (N.T. 08/16/2011, pp. 57-59.)

92, 112 n.7, 346 A.2d 35, 46 n.7 (1975) (Pomeroy, J. dissenting) (citations omitted).[14]

In **Commonwealth, Department of Education v. Jersey Shore Area School District,** 481 Pa. 356, 392 A.2d 1331 (1978), the Pennsylvania Supreme Court held that "a temporary professional employee who works for two years without receiving an unsatisfactory rating thereupon becomes a professional employee with the tenure rights associated with such status." **Pookman, supra.** An affirmative satisfactory rating is not required. **Elias v. Board of School Directors of Windber Area,** 421 Pa. 260, 218 A.2d 738 (1966). On this basis, we conclude, as did our Supreme Court in **Mullen, supra,** under similar circumstances, that Thomas

[14] Section 11-1108 of the School Code provides:

§ 11-1108. Temporary professional employes

(a) It shall be the duty of the district superintendent to notify each temporary professional employe, at least twice each year during the period of his or her employment, of the professional quality, professional progress, and rating of his or her services. No temporary professional employe shall be dismissed unless rated unsatisfactory, ...

(b)(1) ...

(2) A temporary professional employe initially employed by a school district, on or after June 30, 1996, whose work has been certified by the district superintendent to the secretary of the school district, during the last four (4) months of the third year of such service, as being satisfactory shall thereafter be a 'professional employe' within the meaning of this article.

(3) The attainment of the status under paragraph (1) or (2) shall be recorded in the records of the board and written notification thereof shall be sent also to the employe. The employe shall then be tendered forthwith a regular contract of employment as provided for professional employes. No professional employe who has attained tenure status in any school district of this Commonwealth shall thereafter be required to serve as a temporary professional employe before being tendered such a contract when employed by any other part of the public school system of the Commonwealth.

(c)(1) ...

(2) Any temporary professional employe employed by a school district after June 30, 1996, who is not tendered a regular contract of employment at the end of three years of service, rendered as herein provided, shall be given a written statement signed by the president and secretary of the board of school directors and setting forth explicitly the reason for such refusal.

(d) Temporary professional employes shall for all purposes, except tenure status, be viewed in law as full-time employes, and shall enjoy all the rights and privileges of regular full-time employes.

24 P.S. §11-1108.

is entitled to be reinstated as a permanent professional employee, that is one with tenure.

6. **Contempt**

Lastly, Thomas argues that the Board is in contempt of our December 11, 2009 order. For contempt, the complaining party has the burden of proving, by a preponderance of the evidence: "(1) that the contemnor had notice of the specific order or decree which he is alleged to have disobeyed; (2) that the act constituting the contemnor's violation was volitional; and (3) that the contemnor acted with wrongful intent." **Lachat v. Hinchliffe,** 769 A.2d 481, 489 (Pa. Super. 2001).

In this case, while the first element has been met, neither the second nor third elements have been proven. As is evident from the foregoing discussion, legitimate factual disputes exist—some of which arose after entry of the December 11, 2009 order—which have prevented a clear determination of what was required for Thomas to be made whole under the December 11, 2009 order. On this basis, Thomas' request that the Board be held in contempt will be denied.

CONCLUSION

In accordance with the foregoing, we find Thomas should be accorded tenured status in his employment with the District and is due the following additional compensation attributable to the period prior to his reinstatement:

Back Pay	$61,183.03
Accrued Interest (through June 30, 2012)	$13,649.40
Medical Expenses	$ 608.27
Total	$75,440.70

In addition, Thomas is entitled to additional compensation since the date of his reinstatement on January 3, 2011 through the completion of the 2011-2012 school year measured by the difference in pay he actually received versus that amount he was entitled to receive had he been placed on Step 7 of the salary scale upon reinstatement. For the second half of the 2010-2011 school year,

this difference is $1,422.50 ($1,507.85 with interest).[15] Because the record does not include a copy of the collective bargaining agreement setting the salary scales for the 2011-2012 school year, we are unable to compute this difference.

Finally, Thomas is entitled to receive compensation for three additional college credits for courses taken by him in 2009. The amount of this compensation as provided for in the collective bargaining agreement is to be at the actual cost of the Kutztown University fee for undergraduate and graduate credits. Thomas is also entitled to partial reimbursement for $1,496.00 in medical expenses he incurred with the Vermillion Dental Office at the rate provided by the District for out-of-network dental providers.[16]

[15] This amount represents one-half of the difference between the salary as provided by the collective bargaining agreement for the 2010-2011 school year at Step 7 (**i.e.,** $38,285.00) and the salary for the same year at Step 3 (**i.e.,** $35,440.00).

[16] This amount represents the total billings Thomas submitted from the Vermillion Dental Office, less $249.00 which Thomas testified was no longer in issue having been incurred and accounted for prior to his furlough.

COMMONWEALTH OF PENNSYLVANIA vs.
KERMIT R. SPONHEIMER, Defendant

Criminal Law—Sentencing—Discretionary Aspects of Sentencing—Effect of Plea Agreement—Imposing a Consecutive Sentence

1. A challenge to the trial court's imposition of consecutive sentences is a challenge to the discretionary aspects of the sentence.

2. Where a plea agreement exists which is silent as to a discretionary aspect of sentencing, a challenge to the court's exercise of discretion on such matters is not governed by the plea agreement.

3. Before the merits of a challenge to a discretionary sentencing issue will be addressed on appeal, the appellate court conducts a four-part analysis to determine: (1) whether the defendant filed a timely notice of appeal; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence; (3) whether the defendant's brief has a fatal defect; and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code.

4. When a sentence is challenged as being excessive, a **prima facie** showing of a substantial question requires the defendant to sufficiently articulate the manner in which the sentence violates either a specific provision of the sentencing scheme set forth in the Sentencing Code or a particular norm underlying the sentencing process.

5. Where sentences are imposed consecutive to one another, whether a substantial question has been raised depends on whether the decision to sentence consecutively raises the aggregate sentence to, what appears upon its face to be, an excessive level in light of the criminal conduct at issue in the case.

6. In determining whether a sentence is manifestly excessive, the appellate court must give great weight to the sentencing court's discretion, as he or she is in the best position to measure factors such as the nature of the crime, the defendant's character, and the defendant's display of remorse, defiance, or indifference.

7. A sentence will not be disturbed on appeal absent an abuse of discretion. Ordinarily, an abuse of discretion requires a showing by the defendant that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision. In addition, sentences within the standard range must be evaluated under the "clearly unreasonable" standard set out in 42 Pa. C.S.A. §9781(c)(2), as opposed to the standard of reasonableness applicable to sentences which lie outside of the sentencing guidelines.

8. Where a presentence investigation report exists, it is presumed that the sentencing judge was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors.

9. A sentence within the guideline range imposed consecutive to a previous sentence, the net effect of which is to add four months to a defendant's overall sentence, as compared to if the sentence were to run concurrent to the previous sentence, and which is neither grossly disparate to the defendant's conduct nor patently unreasonable, is a valid exercise of the court's discretion.

NO. 361 CR 2011

JEAN A. ENGLER, ESQUIRE, Assistant District Attorney—Counsel for the Commonwealth.

KENT D. WATKINS, Esquire—Counsel for the Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—July 24, 2012

The Defendant, Kermit R. Sponheimer, has appealed from the judgment of sentence imposed on May 14, 2012, raising one issue: whether the sentence is excessive and unduly harsh because it runs consecutively to a sentence previously imposed on an unrelated case. This opinion is filed in accordance with Pa. R.A.P. 1925(a).

PROCEDURAL AND FACTUAL BACKGROUND

On March 5, 2012, Defendant pled guilty to criminal attempt to commit the crime of contraband, a felony of the second degree. 18 Pa. C.S.A. §§901(a), 5123(a.2). The offense involved Defendant's attempt to have his son supply Defendant with Suboxone, a Schedule III narcotic, while Defendant was an inmate in the Carbon County Correctional Facility. The plea agreement

recommended a sentence of two to five years with the remaining charges to be dismissed. The agreement was silent on whether the sentence would be concurrent or consecutive to any existing sentence Defendant was serving.

Plaintiff's plea was taken on the first day Defendant's case was scheduled for jury trial. Upon receipt of Defendant's plea, a presentence investigation was ordered. Sentencing was scheduled for May 14, 2012. At the time of sentencing, the presentence investigation report previously ordered was made part of the record. The report recommended a sentence of not less than twenty-four months nor more than sixty months in a state correctional facility. The recommendation further indicated that Defendant was entitled to no credit.

At the time of the offense, Defendant was fifty-eight years old. He was sixty at the time of sentencing. Defendant had a significant criminal history spanning twenty-seven years, between 1983 and 2010, with fourteen recorded offenses. Defendant's prior record score was five. The standard guideline range was twenty-four to thirty months.

Defendant's prior criminal history was significant for drug use and for crimes to support his habit. Defendant admitted he preyed on the love and vulnerability of his son to entice him, as well as Defendant's wife, to arrange to smuggle Suboxone into the prison for Defendant's use.

The sentence imposed ran consecutive to a sentence Defendant was then serving in the county prison for retail theft, a felony of the third degree, with the max date being September 30, 2012. (Pre-Sentence Investigation Report, p. 5.)

As stated at sentencing, the reasons for the sentence included Defendant's serious addiction problem which he had failed to address; the nature and circumstances of Defendant's conduct which showed a disregard for the community; the perceived risk that Defendant would commit further criminal acts based upon his previous history; and consistency of the sentence with the plea agreement. The court further noted Defendant's long and extensive criminal history and condemned Defendant for preying on his son and involving his son in his criminal activities.

On May 24, 2012, Defendant filed a post-sentence motion seeking to have his sentence modified to run concurrent to the sentence Defendant was serving for retail theft. This motion was denied by order dated May 31, 2012.

Defendant's notice of appeal was filed on June 4, 2012. Subsequently, on June 27, 2012, Defendant filed a timely concise statement in response to our Pa. R.A.P. 1925 order of June 5, 2012.

DISCUSSION

The issue Defendant raises is a challenge to the discretionary aspects of his sentence. **Commonwealth v. Marts,** 889 A.2d 608 (Pa. Super. 2005) (holding that a challenge to the trial court's imposition of consecutive sentences is a challenge to the discretionary aspects of the sentence); **see also, Commonwealth v. Dalberto,** 436 Pa. Super. 391, 400, 648 A.2d 16, 21 (1994) (explaining that where a plea agreement exists which is silent as to a discretionary aspect of sentencing, an appeal which addresses the court's exercise of discretion on such matters is not barred by the plea agreement), **appeal denied,** 540 Pa. 594, 655 A.2d 983 (1995). Such challenges, as a condition to appellate review, require a defendant to set forth pursuant to Pa. R.A.P. 2119(f)[1] a substantial question that

[1] Pa. R.A.P. 2119(f) provides:

> **Discretionary aspects of sentence.** An appellant who challenges the discretionary aspects of a sentence in a criminal matter shall set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence. The statement shall immediately precede the argument on the merits with respect to the discretionary aspects of sentence.

Before reaching the merits of a discretionary sentencing issue on appeal, the appellate court conducts a four-part analysis to determine:

> (1) whether appellant filed a timely notice of appeal, Pa.R.A.P. 902, 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, Pa.R.Crim.P. 720; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code[.]

Commonwealth v. Mastromarino, 2 A.3d 581, 585 (Pa. Super. 2010), **appeal denied,** 609 Pa. 685, 14 A.3d 825 (2011). The statement of the reasons relied upon for allowance of the appeal under Rule 2119(f) "focus[es] on the **reasons** for which the appeal is sought, in contrast to the **facts** underlying the appeal, which are necessary only to decide the appeal on the merits." **Commonwealth v. Reynolds,** 835 A.2d 720, 733 (Pa. Super. 2003) (**quoting Commonwealth v. Goggins,** 748 A.2d 721, 727 (Pa. Super. 2000)).

the sentence imposed was not appropriate under the Sentencing Code. **Marts, supra** at 612. When the claim involves excessiveness of the sentence, a **prima facie** showing of a substantial question requires the defendant to "sufficiently articulate[] the manner in which the sentence violates either a specific provision of the sentencing scheme set forth in the Sentencing Code or a particular norm underlying the sentencing process." **Commonwealth v. Mouzon,** 571 Pa. 419, 435, 812 A.2d 617, 627 (2002) (plurality).

Specifically, when the claim challenges the length of imprisonment predicated on the imposition of consecutive sentences, the Superior Court noted:

> Recently, this Court examined whether a claim that an appellant's sentence was manifestly excessive based on the imposition of consecutive sentences presents a substantial question. Specifically, in **Gonzalez–Dejusus,** this Court held the following:
>
> Generally speaking, the court's exercise of discretion in imposing consecutive as opposed to concurrent sentences is not viewed as raising a substantial question that would allow the granting of allowance of appeal. **Commonwealth v. Marts,** 889 A.2d 608 (Pa.Super.2005). However, the case of **Commonwealth v. Dodge ('Dodge I'),** 859 A.2d 771 (Pa.Super.2004) [(Stevens, J., dissent)], **vacated and remanded on other grounds,** 594 Pa. 345, 935 A.2d 1290 (2007), finds an aggregate sentence manifestly excessive and that a substantial question was presented where there were numerous standard range sentences ordered to be served consecutively. **Dodge I** offered this holding despite the existence of prior cases finding that an assertion of error grounded upon the imposition of consecutive versus concurrent sentences did not raise a substantial question. Discussing the matter, **Marts** indicates:
>
> To the extent that he complains that his sentence on two of the four robberies were imposed consecutively rather than concurrently, [the appellant] fails to raise a substantial question. Long standing [sic] precedent of this Court recognizes that 42 Pa.C.S.A. section 9721 affords the sentencing court discretion to impose its sentence concurrently or consecutively to other sentences being imposed at the same time or to sentences already imposed. **Commonwealth v. Graham,** 541 Pa. 173, 184, 661 A.2d 1367, 1373 (1995). ... Any challenge to the exercise of this discretion ordinarily does not raise a substantial question. **Commonwealth v. Johnson,** 873 A.2d 704, 709 n. 2 (Pa.Super.2005); **see also, Commonwealth v. Hoag,** 445 Pa.Super. 455, 665 A.2d 1212, 1214 (Pa.Super.1995) (explaining that a defendant is not entitled to a 'volume discount' for his or her crimes).

The recent decisions of a panel of this Court in **Commonwealth v. Dodge,** 859 A.2d 771 (Pa.Super.2004), does not alter our conclusion. In fact, the panel in **Dodge** noted the limitations of its holding. **See id.** at 782 n. 13 (explaining that its decision 'is not to be read a [**sic**] rule that a challenge to the consecutive nature of a standard range sentence always raises a substantial question or constitutes an abuse of discretion. We all are cognizant that sentencing can encompass a wide variation of factual scenarios. Thus, we make clear again that these issues must be examined and determined on a case-by-case basis.'). In **Dodge,** the court imposed consecutive, standard range sentences on all thirty-seven counts of theft-related offenses for an aggregate sentence of 58 1/2 to 124 years of imprisonment. **Marts, 889 A.2d at 612-613. Thus, in our view, the key to resolving the preliminary substantial question inquiry is whether the decision to sentence consecutively raises the aggregate sentence to, what appears upon its face to be, an excessive level in light of the criminal conduct at issue in the case.**[5]

FN5. ... We note that **Dodge I** was decided prior to the supreme court's decision in **Commonwealth v. Walls,** 592 Pa. 557, 926 A.2d 957 (2007). Of course, in **Walls,** our supreme court reiterated that the ability of this Court to vacate a sentence is predicated upon a sentence being outside of the guidelines. Given **Walls,** it would appear reasonable to consider whether the **Dodge** approach to reviewing and vacating aggregate sentences that may have been viewed as manifestly excessive, although comprised of standard range sentences, had continuing viability. However, **Dodge** was remanded back to this Court for reconsideration in light of **Walls.** Upon reconsideration, the original panel still found the sentence

> unreasonable and vacated the sentence previously imposed. **Commonwealth v. Dodge ('Dodge II'),** 957 A.2d 1198 (Pa. Super.2008). Thus, as of this date, we view the 'excessive aggregate sentence' argument as cognizable upon appellate review.

Commonwealth v. Mastromarino, 2 A.3d 581, 586-87 (Pa. Super. 2010) (emphasis added) (footnote in original), **appeal denied,** 609 Pa. 685, 14 A.3d 825 (2011).

As to the merits of Defendant's appeal:

> Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. To constitute an abuse of discretion, the sentence imposed must either exceed the statutory limits or be manifestly excessive. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

Commonwealth v. Perry, 883 A.2d 599, 602 (Pa. Super. 2005) (**quoting Commonwealth v. Mouzon,** 828 A.2d 1126, 1128 (Pa. Super. 2003)).

> In determining whether a sentence is manifestly excessive, the appellate court must give great weight to the sentencing court's discretion, as he or she is in the best position to measure factors such as the nature of the crime, the defendant's character, and the defendant's display of remorse, defiance, or indifference.

Id. Moreover,

> [w]here pre-sentence [sic] reports exist, we shall continue to presume that the sentencing judge was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors. A pre-sentence [sic] report constitutes the record and speaks for itself. ... Having been fully informed by the pre-sentence [sic] report, the sentencing court's discretion should not be disturbed.

Commonwealth v. Devers, 519 Pa. 88, 101-102, 546 A.2d 12, 18 (1988).

The sentence imposed here is clearly not illegal; for a felony of the second degree a defendant may be imprisoned for a period not to exceed ten years. 18 Pa. C.S.A. §1103(2). Further, the sentence was at the low end of the standard sentencing guideline range of twenty-four to thirty months and consistent with the plea agreement, which recommended a period of imprisonment on the offense pled of two to five years.

At the time of sentencing, the court was clear that the sentence was to run consecutive to any other sentence Defendant was then serving. (N.T. 5/14/12, pp. 4, 6-7.) The consequence of this sentence was understood and clearly intended by the court. **Id.** The court further clearly stated on the record the reasons for the sentence, including Defendant's implicating his son in committing this crime. (N.T. 5/14/12, pp. 4-6.)

The sentence imposed was within the guideline range, notwithstanding being consecutive to Defendant's previous sentence for retail theft, the effect being to further circumscribe appellate review: sentences within the standard range must be evaluated under the "clearly unreasonable" standard set out in 42 Pa. C.S.A. §9781(c)(2), as opposed to the standard of reasonableness applicable to sentences which lie outside of the sentencing guidelines. **Commonwealth v. Coulverson,** 34 A.3d 135, 146 (Pa. Super. 2011). Yet, Defendant has presented no arguments that the sentence imposed violated any specific provisions of the Sentencing Code; nor has Defendant specified any particular deviation from the fundamental norms underlying the sentencing process. **See Commonwealth v. Pass,** 914 A.2d 442, 446-47 (Pa. Super. 2006) ("42 Pa. C.S.A. section 9721 affords the sentencing court discretion to impose its sentence concurrently or consecutively ... . Any challenge to the exercise of this discretion ordinarily does not raise a substantial question."); **see also, Commonwealth v. Bromley,** 862 A.2d 598 (Pa. Super. 2004) (defendant did not raise substantial question by merely asserting sentence was excessive when he failed to reference any section of Sentencing Code potentially violated by sentence).

Because Defendant had already served twenty months of the six to twenty-four month sentence he was then serving for retail theft at the time of the sentence imposed in this case, the difference between running the sentences concurrent to one another,

as requested by Defendant, or consecutive, as was done, is four months on Defendant's overall sentence. This additional four months is neither grossly disparate to Defendant's conduct nor patently unreasonable. Consequently, we conclude that both under the law and the facts, Defendant has not demonstrated that the sentence imposed was unreasonable or manifestly excessive.

CONCLUSION

Defendant has not raised, much less proven, a substantial question that the aggregate sentence imposed violates either a specific provision of the sentencing scheme set forth in the Sentencing Code or was inappropriate or contrary to a fundamental norm underlying the sentencing process. In addition, the sentence imposed was appropriately commensurate with the criminal conduct at issue in this case. Accordingly, we respectfully request the Court affirm our decision and deny Defendant's appeal.

COMMONWEALTH OF PENNSYLVANIA vs. MERRICK STEVEN KIRK DOUGLAS, Defendant

Criminal Law—PCRA—Ineffective Assistance of Counsel—Direct Appeal Rights—Failure to Request Supreme Court Review

1. To establish a claim for ineffective assistance of counsel, a defendant must demonstrate: (1) the underlying legal claim has arguable merit; (2) counsel's action or omission lacked any reasonable basis designed to serve his client's interest; and (3) there is a reasonable probability that the outcome of the proceedings would have been different had counsel not been ineffective in the relevant regard—**i.e.,** that the petitioner was prejudiced by counsel's act or omission.

2. An unjustified failure to file a requested petition for allowance of appeal is ineffectiveness of counsel **per se.**

3. Independent of counsel's failure to file an appeal requested by a defendant, counsel has a duty to consult with his client about the client's appellate rights. Counsel may be found ineffective for a failure to consult, and prejudice will be presumed, where there were issues of merit to raise on direct appeal or the defendant, in some manner, displayed signs of desiring an appeal.

NO. 289-CR-2008

JEAN ENGLER, Esquire, Assistant District Attorney—Counsel for Commonwealth.

MICHAEL P. GOUGH, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—August 17, 2012

In this collateral proceeding under the Post-Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. §§9541-9546, the Defendant, Merrick Douglas, claims, **inter alia,** that he has been deprived of the effective assistance of counsel by counsel's failure to file a petition for allowance of appeal from the Pennsylvania Superior Court's decision affirming, on direct appeal, this court's judgment of sentence. Because we find merit in this claim, Defendant's other claims will not be addressed.

PROCEDURAL AND FACTUAL BACKGROUND

On December 9, 2009, at the conclusion of a jury trial, the jury found Defendant guilty of criminal attempt to commit the crimes of rape by forcible compulsion, aggravated indecent assault by forcible compulsion, aggravated indecent assault without consent, and sexual assault.[1] Defendant was also convicted of indecent assault by forcible compulsion,[2] indecent exposure,[3] and unlawful contact with a minor.[4] Defendant was acquitted of the crime of rape by forcible compulsion.[5]

Following his convictions and prior to sentencing, Defendant's parents employed new counsel to represent Defendant at sentencing and for the purpose of taking a direct appeal. Although Defendant was not involved in the selection or employment of new counsel, who Defendant first met on the date of sentencing, this change of counsel was done with Defendant's knowledge and consent. Moreover, it was agreed and understood that communication between Defendant and his counsel would be through Defendant's parents. (N.T. 11/18/11, pp. 13, 31, 73.)

Defendant was sentenced on March 26, 2010, to an aggregate term of imprisonment in a state correctional facility of not less than six nor more than twelve years. A direct appeal to the Pennsylvania Superior Court was filed on April 9, 2010. Six issues were presented to the Superior Court on appeal: (1) whether the Commonwealth failed to provide the defense with requested and

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[1] 18 Pa. C.S.A. §901(a).

[2] 18 Pa. C.S.A. §3126(a)(2).

[3] 18 Pa. C.S.A. §3127(a).

[4] 18 Pa. C.S.A. §6318(a)(1).

[5] 18 Pa. C.S.A. §3121(a)(1).

mandatory discovery; (2) whether the trial court erred in allowing the Commonwealth to ask the victim leading questions on direct examination; (3) whether the trial court erred in denying Defendant's request for a mistrial after the investigating trooper testified that Defendant had volunteered to take a polygraph test; (4) whether the evidence was insufficient to sustain Defendant's convictions; (5) whether the verdict was against the weight of the evidence; and (6) whether trial counsel was ineffective both before and during trial.

The Superior Court held that the error claimed with respect to discovery and leading questions had been waived because it was not included in Defendant's court-ordered Pa. R.A.P. 1925(b) statement of matters complained of on appeal; that the weight of the evidence claim had not been properly preserved by oral motion prior to sentencing or in a post-sentence motion, and was waived; and that the insufficiency of the evidence claim had not been properly briefed and was also waived. The court further held that the claim for ineffectiveness of counsel was premature under **Commonwealth v. Grant,** 572 Pa. 48, 813 A.2d 726 (2002), and that the claim for a mistrial was without merit.

The Superior Court's Memorandum Opinion affirming the judgment of sentence is dated May 3, 2011. By letter dated May 5, 2011, appellate counsel forwarded a copy of the Superior Court's Memorandum Opinion to Defendant's father; advised that the Defendant had ten days from May 3, 2011 to file a request for reconsideration with the Superior Court and thirty days from that date to file a petition for allowance of appeal to the Pennsylvania Supreme Court; and recommended that the petition for allowance of appeal be filed. Defendant's father immediately contacted appellate counsel's office by telephone and e-mail to discuss what issues would be raised on appeal and what the cost would be. (N.T. 11/18/11, pp. 69, 71-72, 75-76.) No response was received by Defendant's father from either contact.

Defendant first learned of the Superior Court's decision over the Memorial Day weekend in late May 2011 when he was visited by his parents in prison. Because Defendant's parents were not permitted to bring documents into the prison, a copy of the Superior Court's Memorandum Opinion was not given to Defendant at

that time. However, immediately following this meeting, a copy of the opinion was mailed to the Defendant by his parents. Defendant received this copy after the thirty-day period within which to request an allowance of appeal had expired. (N.T. 11/18/11, p. 17.)

On August 2, 2011, Defendant filed a **pro se** petition for post-conviction relief. Present counsel was appointed, and an amended PCRA Petition was filed on September 27, 2011. Therein, Defendant claims former counsel was ineffective on three primary bases: (1) that trial counsel failed to raise and preserve an alibi defense; (2) that appellate counsel failed to file a legally adequate statement of matters complained of on appeal; and (3) that appellate counsel failed to petition for allowance of appeal with the Pennsylvania Supreme Court following the Superior Court's affirmance of Defendant's judgment of sentence, and further failed to advise and consult with Defendant as to the advantages and disadvantages of seeking this review by the Supreme Court. Because we find Defendant is entitled to reinstatement of his right to petition the Pennsylvania Supreme Court for direct review of the Superior Court's decision of May 3, 2011, it would be premature and inappropriate for us to address Defendant's remaining PCRA claims.

DISCUSSION

In order to establish a claim for ineffective assistance of counsel, a defendant must demonstrate that: "(1) the underlying legal claim—**i.e.,** that which the petitioner charges was not pursued, or was pursued improperly—has 'arguable merit;' (2) counsel's action or omission lacked any reasonable basis designed to serve his client's interests; and (3) there is a reasonable probability that the outcome of the proceedings would have been different had counsel not been ineffective in the relevant regard—**i.e.,** that the petitioner was prejudiced by counsel's act or omission." **Commonwealth v. Dennis,** 597 Pa. 159, 174-75, 950 A.2d 945, 954 (2008).

In **Commonwealth v. Liebel,** 573 Pa. 375, 381-85, 825 A.2d 630, 634-36 (2003), our Supreme Court held that the unjustified failure to file a requested petition for allowance of appeal is ineffectiveness of counsel **per se.** When a defendant on direct appeal timely requests the taking of a discretionary appeal to the Supreme Court and counsel fails to do so, no further proof of prejudice is required; the defendant need not show that the petition would have

been granted, only that the appeal was requested and counsel failed to act. **Id.; see also, Commonwealth v. Markowitz,** 32 A.3d 706, 714 (Pa. Super. 2011) ("[W]hen a lawyer fails to file a direct appeal requested by the defendant, the defendant is automatically entitled to reinstatement of his direct appeal rights."), **appeal denied,** 40 A.3d 1235 (Pa. 2012).

Independent of counsel's obligation to file an appeal requested by a defendant, is counsel's obligation to consult with the defendant about the propriety of an appeal.

> Where a defendant does not ask his attorney to file a direct appeal, counsel still may be held ineffective if he does not consult with his client about the client's appellate rights. **Roe v. Flores-Ortega,** 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); [**Commonwealth v.**] **Carter,** [21 A.3d 680 (Pa.Super. 2011)]. Such ineffectiveness, however, will only be found where a duty to consult arises either because there were issues of merit to raise on direct appeal or the defendant, in some manner, displayed signs of desiring an appeal. **Roe v. Flores-Ortega, supra.**

Markowitz, supra at 714; **see also, Commonwealth v. Gadsden,** 832 A.2d 1082, 1088 (Pa. Super. 2003) (recognizing as a cognizable PCRA issue, a claim of ineffective assistance of counsel for failure to provide adequate consultation to a client with respect to the filing of a petition for **allocatur** with the Pennsylvania Supreme Court), **appeal denied,** 578 Pa. 162, 850 A.2d 611 (2004); **Liebel, supra** at 384, 825 A.2d at 635 ("provided that appellate counsel believes that the claims that a petitioner would raise in a [petition for allowance of appeal to the Supreme Court] would not be completely frivolous, a petitioner certainly has a right to file such a petition [under Pa.R.A.P. 1112]").

For such ineffectiveness to justify the granting of relief, the breach of counsel's duty to consult must be shown to have prejudiced Defendant's appellate rights; prejudice **per se** does not exist in this context. **Roe v. Flores-Ortega,** 528 U.S. 470, 484 (2000). "[T]o show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." **Id.** "[W]hen counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." **Id.**[6]

Factually, the evidence before us does not support a finding that Defendant asked counsel to file a petition for allowance of appeal. (N.T. 11/18/11, p. 36.) Defendant's father, though wanting to discuss this issue with appellate counsel, was unsuccessful in contacting counsel. Defendant himself was unaware of the Superior Court's decision until late May 2011 and did not receive a copy of the decision until after the time for filing a petition for allowance of appeal had expired. Nevertheless, we find that counsel acted timely and reasonably in communicating directly with Defendant's parents, through whom counsel was authorized and directed by Defendant to communicate, about the Superior Court's decision[7] and that Defendant did, in fact, learn of this decision before the time to appeal had expired.

The question here, however, is closer to that posited in **Roe:** "Is counsel deficient for not filing a notice of appeal when the defendant has not clearly conveyed his wishes one way or the other?" **Id.** at 477. To answer this question, which ultimately involves judging the reasonableness of counsel's challenged conduct under the totality of the circumstances, we must determine whether counsel had a duty to consult with Defendant. **Commonwealth v. Bath,** 907 A.2d 619, 623-24 (Pa. Super. 2006) (**citing Roe v. Flores-Ortega,** 528 U.S. 470 (2000)), **appeal denied,** 591 Pa. 695, 918

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[6] In **Commonwealth v. Liebel,** the Pennsylvania Supreme Court noted that while a defendant has no federal constitutional right to counsel on a petition for discretionary review, such a right did exist under former Pennsylvania Rule of Criminal Procedure 122(C)(3), now Rule 122(B)(2), which provided that "[w]here counsel has been assigned, such assignment shall be effective until final judgment, including **any proceedings** on direct appeal." 573 Pa. 375, 380, 825 A.2d 630, 633 (2003) (emphasis in original). This right encompasses the concomitant right to effective assistance of counsel.

[7] Counsel's letter to Defendant's parents advising of the Superior Court's decision is dated May 5, 2011, two days after the date of the Court's decision. As to the delay in Defendant's parents advising Defendant of the decision, this was caused by Defendant's parents' determination to first meet with their son and notify him in person of the decision, rather than mailing a copy to him beforehand. (N.T. 11/18/11, pp. 70-71.) Accordingly, this delay is not fairly attributable to counsel.

A.2d 741 (2007); **Commonwealth v. Touw,** 781 A.2d 1250 (Pa. Super. 2001). On this issue, the Superior Court has summarized the pertinent law arising from the **Roe** and **Touw** decisions as follows:

> The **Roe** Court begins its analysis by noting: 'We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable.' **Id.** at 477 [120 S. Ct. 1029.] In **Commonwealth v. Touw,** 781 A.2d 1250 (Pa.Super.2001), this Court concisely summarized the remainder of the **Roe** decision as follows:
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> The [United States Supreme] Court began its analysis by addressing a separate, but antecedent, question: 'whether counsel in fact consulted with the defendant about an appeal.' The Court defined 'consult' as 'advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes.' The Court continued[:]
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> If counsel has not consulted with the defendant, the court must in turn ask a second, and subsidiary, question: whether counsel's failure to consult with the defendant itself constitutes deficient performance. That question lies at the heart of this case: Under what circumstances does counsel have an obligation to consult with the defendant about an appeal?
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> [**Roe,** at 478, 120 S.Ct. 1029]. The Court answered the question by holding:
>
> [C]ounsel has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination, courts must take into account all the information counsel knew or should have known.
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> [**Id.** at 480, 120 S.Ct. 1029]. A deficient failure on the part of counsel to consult with the defendant does not automatically entitle the defendant to reinstatement of his or her appellate rights; the defendant must show prejudice. The [**Roe**] Court held that 'to show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed.' [**Id.**]

Commonwealth v. Carter, 21 A.3d 680, 683 (Pa. Super. 2011) (**quoting Commonwealth v. Gadsden,** 832 A.2d 1082, 1086-87 (Pa. Super. 2003).

That appellate counsel did not consult with Defendant after receipt of the Superior Court's May 3, 2011 decision is clear. Counsel's letter of May 5, 2011, while advising Defendant of the decision, did not examine the merits or disadvantages of taking an appeal. More importantly, though recommending that an appeal be taken, counsel never sought to discover Defendant's wishes in this regard. **See also, Touw, supra** at 1254 (finding that counsel's discussion with appellant's parents after sentencing, as well as a letter sent to appellant's stepfather, did not satisfy the consultation requirements of **Flores-Ortega,** which requires that the consultation be made with defendant).

Having found that consultation within the meaning of **Roe** did not occur, we next turn to the second and subsidiary question posed in **Roe:** Was there a duty to consult. To establish a duty to consult, a defendant must "put[] forward or describe[] an issue raised upon direct appeal that would rise above mere frivolity upon further review," **Bath, supra** at 623, or prove that the circumstances "reasonably demonstrated to counsel that he was interested in appealing." **Carter, supra** at 683 (citation omitted).

In the instant case, Defendant has made no attempt to show that any issue which was raised with the Superior Court or which he intends to present to the Supreme Court rises above frivolity. Of the six issues Defendant presented to the Superior Court, four were deemed waived, one was found to be premature, and the sixth was determined to have no merit. It was incumbent upon Defendant to demonstrate to this court why Defendant's request to appeal such issues further would not be manifestly frivolous. **See Bath, supra** at 624 (contrasting the frivolity of further review of issues already determined to be meritless on direct appeal, with issues that had yet to receive appellate review). This Defendant has failed to do.

However, the second basis to sustain such a request, that this particular Defendant reasonably demonstrated to counsel that he

was interested in appealing appears to have substance. On this issue, appellate counsel's May 5, 2011 letter to Defendant's father expressly stated that counsel was "shocked that the Superior Court did not grant your son a new trial in this matter" and advised that "it is our professional opinion that you should file a petition for allowance of appeal to the Pennsylvania Supreme Court." Immediately upon receipt of this letter, Defendant's father sought to contact counsel regarding this recommendation and left messages for counsel to return, but counsel failed to respond.

Moreover, Defendant himself testified with respect to appellate counsel that "he was my lawyer to help me get home" and that "they were going to fight for me. They were my lawyers. You know, that they were going to—from the sentencing through the whole process, that they will be my lawyers to file whatever needed to be filed," and that he wanted appellate counsel to take the appeal but was time barred from doing so by the time he received a copy of the Superior Court's decision. (N.T. 11/18/11, pp. 12, 36-39.) Defendant's desire to have the appeal filed is further demonstrated by the legal research he undertook on his own to pursue this appeal after receipt of the Superior Court's decision and the **pro se** filing he made on August 2, 2011. (N.T. 11/18/11, pp. 16-17, 29.)

These circumstances—counsel's recommendation to take the appeal, Defendant's father's efforts to contact counsel which were ignored, and Defendant's expectations as expressed by Defendant and his parents to counsel that counsel would be aggressive in pursuing his appeal—all should have placed counsel on notice that Defendant was interested in appealing. Knowing this, counsel had an obligation to consult with Defendant, to discuss the advantages and disadvantages of filing an appeal, and to ascertain Defendant's desire to appeal. This, unfortunately, was never done, the result being an abdication by counsel of the duty to consult with Defendant, whose selfsame evidence supports the prejudicial effects of this breach by demonstrating that, but for counsel's breach of this duty to consult, there is a reasonable likelihood that Defendant would have timely appealed. **Roe, supra** at 486 (noting that the prejudice inquiry is not wholly dissimilar from the inquiry used to determine whether counsel performed deficiently in the first place).

CONCLUSION

Based on the record before us, we have concluded that Defendant should be permitted to exhaust his rights on direct appeal by reinstatement of his right to file a petition for allowance of appeal with the Pennsylvania Supreme Court **nunc pro tunc.** Given this outcome, Defendant's remaining claims will be dismissed without prejudice to his ability to raise them in a subsequent PCRA petition, such claims being premature while Defendant's right to continue his direct appeal remains pending. **Commonwealth v. Seay,** 814 A.2d 1240, 1241 (Pa. Super. 2003) (holding that a PCRA petition is premature and should be quashed where defendant's direct appeal is pending and has not yet been adjudicated) and **Commonwealth v. Kubis,** 808 A.2d 196, 198 n.4 (Pa. Super. 2002) (holding that the PCRA has no applicability until the judgment of sentence becomes final), **appeal denied,** 572 Pa. 700, 813 A.2d 839 (2002).

COMMONWEALTH OF PENNSYLVANIA vs.
ERNEST T. FREEBY, Defendant

*Criminal Law—Murder—Post-Sentence Motion—Sufficiency of the Evidence—Weight of the Evidence—*Brady *Violation—Materiality—Admissibility of Evidence—Presumptive Blood Tests—*Frye *Challenge—Expert Opinion Testimony—Relevance/Prejudice of Inculpatory Statement of Intent To Harm Victim—Mistrial—Attorney/Client Privilege—Waiver—After-Discovered Evidence*

1. Evidence is sufficient to sustain a conviction of murder in the first degree when the Commonwealth establishes that a human being was unlawfully killed, the defendant committed the killing, the defendant acted with a specific intent to kill, and the killing was done in a willful, deliberate and premeditated manner. The **corpus delicti** may be established through the use of wholly circumstantial evidence.

2. In considering a challenge to the sufficiency of evidence, all of the evidence admitted at trial, viewed in the light most favorable to the verdict winner, must be examined to determine whether the evidence is sufficient to enable the fact-finder to find every element of the crime charged beyond a reasonable doubt. In making this analysis, the credibility of witnesses and the weight of the evidence is determined by the trier of fact, not the reviewing court. Further, all doubts regarding the defendant's guilt are for the fact-finder to resolve, unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances.

3. In a homicide case, it is not necessary that the Commonwealth produce the body of the victim to establish death. An abrupt termination by a healthy, young female of a consistent pattern of living without any prior preparation or discussion with relatives or friends, its unexplained character, and the

length of the victim's absence is sufficient to support an inference that the victim is dead.

4. Proof that the victim—Defendant's wife, from whom he was estranged, and who previously had maintained close ties with her family—was last seen alive by the Defendant in his home, together with the unexplained presence of large quantities of the victim's blood in Defendant's home under circumstances indicative of a significant injury sustained from trauma or violence, an earlier statement by Defendant expressing the possibility of killing the victim in order to marry his girlfriend with whom he had three children, Defendant's possession and use of the victim's car and credit cards immediately after her disappearance, his attempts to destroy or dispose of evidence, and his inconsistent and deceptive statements to police concerning the victim's disappearance, was sufficient to convict the Defendant of first-degree murder.

5. A challenge to the weight of the evidence concedes the sufficiency of the evidence but questions the strength of the evidence in support of the verdict when weighed against all the evidence presented. For a challenge to the weight of the evidence to succeed, the evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court.

6. A **Brady** violation consists of three elements: (1) suppression by the prosecution (2) of evidence, whether exculpatory or impeaching, favorable to the defendant, (3) to the prejudice of the defendant. Moreover, a **Brady** violation only exists when the evidence is material to guilt or punishment, **i.e.,** when there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

7. Defendant failed to prove that the Commonwealth's purported failure to provide the defense with e-mail names and IP addresses of various witnesses, who were not eyewitnesses, violated the standards of **Brady** or was material to guilt or punishment. The mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial does not establish materiality in the constitutional sense.

8. A presumptive blood test is a field test designed to determine whether an unknown substance or stain contains blood. Presumptive blood tests do not distinguish between animal and human blood, and may give false positives.

9. Evidence need not be conclusive to be admissible. The results of presumptive blood tests are admissible provided the qualifications and limitations of a presumptive blood test are fully explained to the jury.

10. A challenge to scientific evidence on the basis of **Frye** is a challenge to the novelty of scientific principles or the methodology employed in reaching scientific conclusions. **Frye** requires that, before novel scientific evidence is admissible in criminal trials, the theories and methods of that evidence must have gained general acceptance in the relevant scientific community.

11. Defendant's challenge to the reliability or certainty of the results of presumptive blood testing went to the weight of the evidence and did not challenge the scientific principles or methodology upon which presumptive blood tests are conducted.

12. A witness who has a reasonable pretension to specialized knowledge on a subject matter under investigation may express an opinion on such subject matter if to do so would assist the jury in grasping complex issues not within the knowledge, intelligence and experience of an ordinary lay person. Under this standard, it is not error to allow an expert in blood spatter analysis to testify to the type and extent of the bleeding evidenced by pools of blood found in a defendant's coal bin.

13. Defendant's statement made to his girlfriend approximately one year prior to his wife's disappearance that he might have to kill his wife in order for them to marry was relevant both to Defendant's intent and motive, and was properly admitted in evidence. The circumstances under which and the seriousness with which the statement was made went to the weight of the statement, and not its admissibility.

14. In order for a mistrial to be declared because of a witness' remark, the remark must be of such a nature or substance or delivered in such a manner that it may reasonably be said to have deprived the defendant of a fair and impartial trial.

15. The testimony of the Commonwealth's forensic pathologist that the scene in defendant's basement was consistent with or indicative of either significant bodily injury or homicide, the latter being properly objected to, did not under the circumstances—including the overwhelming evidence that the victim was dead—warrant the **sua sponte** declaration of a mistrial by the court where the defendant failed to request a mistrial and the court struck the witness' answer from the record, and later instructed the jury that evidence which had been stricken should be totally disregarded, treated as though it had never been heard, and none of their findings should be based upon it.

16. The attorney/client privilege renders an attorney incompetent from testifying about confidential communications made to him by his client unless the client waives the privilege.

17. Once the attorney/client privilege is properly invoked, the burden is upon the proponent of the evidence to show that disclosure would not violate the attorney/client privilege, **e.g.,** because the privilege had been waived or because some exception applied.

18. Although all communications made in the course of an attorney's joint representation of two or more clients are discoverable when the clients, who were represented in a matter of common interest, sue one another, this exception to the attorney/client privilege does not apply in a criminal prosecution to communications made by the purported victim of a crime to counsel who represented both the victim and the person charged. In a criminal proceeding, the victim and defendant are not adverse parties. Instead, the charging party in a criminal prosecution is the Commonwealth.

19. After-discovered evidence is the basis for a new trial when it: (1) has been discovered after the trial and could not have been obtained at or prior to the conclusion of trial by the exercise of reasonable diligence; (2) is not merely cooperative or cumulative; (3) will not be used solely for impeaching the credibility of a witness; and (4) is of such nature and character that a new verdict would likely result if a new trial is granted. Further, the proposed new evidence must be produced and admissible.

GARY F. DOBIAS, Esquire, District Attorney—Counsel for Commonwealth.

PAUL J. LEVY, Esquire, Assistant Public Defender and GEORGE T. DYDYNSKY, Esquire, Assistant Public Defender—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—November 20, 2012

On January 30, 2012, the Defendant, Ernest T. Freeby, was convicted of murder in the first degree[1] and tampering with physical evidence.[2] As required by statute,[3] on the charge of murder Defendant was sentenced to life imprisonment without the possibility of parole.[4] In Defendant's post-sentence motion now before us, Defendant requests an arrest of judgment and judgment of acquittal or, in the alternative, a new trial. Following a thorough review of the record, we deny Defendant's requests.

FACTUAL AND PROCEDURAL BACKGROUND

Ernest Troy Freeby ("Defendant") and Edwina Onyango ("Edwina") married on March 20, 2001. Theirs was a marriage of convenience: Defendant wanted a wife to increase his chances of gaining custody of his two children from a previous relationship; Edwina, a native of Kenya whose legal status in this country was in question, hoped to obtain United States citizenship.[5] Marriage to a United States citizen would enhance her prospects of reaching this goal.

Following their marriage, the couple lived together in Allentown until 2003, when Defendant moved to Carbon County. Edwina remained in the Lehigh Valley where she eventually obtained employment as a personal caretaker for an elderly couple,

[1] 18 Pa. C.S.A. §2501(a).

[2] 18 Pa. C.S.A. §4910(1).

[3] 18 Pa. C.S.A. §1102(a)(1).

[4] In regards to his conviction for tampering with physical evidence, Defendant was sentenced to a consecutive term of probation for a period of two years.

[5] Edwina emigrated from Kenya to this country in 1998. Although it appears she first entered this country on a temporary visa and no longer was in possession of a valid unexpired immigrant visa, the record is not totally clear on this point. Formal deportation, also known as removal, proceedings were begun against her on February 6, 2006.

Richard and Edith Schoch (the "Schochs").[6] Shortly thereafter, she began living with the Schochs in a second floor bedroom of their Bethlehem home.[7]

In the meantime, Defendant was living with Julianne Sneary ("Sneary") with whom he had begun a romantic relationship even before his separation from Edwina. From that relationship, three children were born, the oldest on June 11, 2003, and the youngest on January 9, 2008. Not until sometime in 2007 did Edwina learn that Defendant was the father of Sneary's children.[8]

One evening in the winter of late 2006 or early 2007, while driving home together, Defendant and Sneary spoke, as they often had, about getting married. When the conversation turned to making wedding plans, Sneary commented that no plans could be made so long as Defendant was married. In response, Defendant said that he could not divorce Edwina until she obtained her citizenship. Then, according to Sneary, Defendant said that the only way he could get rid of Edwina would be by killing her. Roughly a year later, Edwina went missing.

The events surrounding Edwina's disappearance are as follows. On December 8, 2007, Edwina told her sister, Phoebe Onyango ("Phoebe"), that she was going to Defendant's home in Lansford the next day to pick up some bills she was responsible for paying and to deliver a check for an insurance bill. The following morning Edwina left her Bethlehem residence at approximately 11:00 A.M.[9] A short time later, Edwina called Ester Ouma, a friend, telling her, among other things, that she was on her way to Defendant's home. Edwina arrived at Defendant's home at approximately noon. She again called Phoebe, this time leaving a voicemail stating that she

[6] Edwina did not have a valid social security number and, because of her immigration status, was not legally authorized to work. (N.T. 01/26/12, p. 204.) To obtain employment, she assumed the name and social security number of a friend, Veronica Gaya, who claims to have been unaware of this subterfuge. The Schochs, who were unaware of this deception, erroneously believed Edwina was Veronica Gaya.

[7] Edwina also maintained a second residence, an apartment she shared with a roommate in Allentown.

[8] Up until that time, Defendant had told Edwina that the children were his sister's. (N.T. 01/18/12, pp. 161-62, 174.)

[9] Edwina was seen by the Schochs leaving that morning and indicated her intentions of returning that evening.

would be returning home that same day. That was the last time Edwina was heard from or seen by her family or friends.

On December 17, 2007, Edwina's family reported her missing to the Borough of Lansford Police Department. The following day, at approximately 11:30 in the evening, Officer Joshua Tom of the Lansford Police Department met briefly with Defendant at his home, inquired whether Defendant knew of Edwina's whereabouts, and conducted a quick walk-through of the home. Lansford Police Chief John Turcmanovich, accompanied by Edwina's brother, Lamech Onyango, inquired further on December 21, 2007. Although acknowledging that Edwina had been at his home on December 9, 2007, Defendant stated he had not seen her since and did not know where she was. A few weeks later, the Schochs also reported Edwina missing to the Bethlehem Police Department, the Allentown Police Department and the Pennsylvania State Police (the "State Police").

On December 26, 2007, the State Police took over as the primary investigating agency. The following day, Defendant was questioned about the last time he had seen or heard from Edwina. Defendant advised the State Police he last saw Edwina on either December 9, or December 16, 2007, when she had come to his home with a black female friend to pick up a cell phone bill and left her 2000 Dodge Neon with him to keep. According to Defendant, Edwina stayed for approximately two to two and a half hours and then left in her friend's vehicle. When the State Police noticed the cell phone bill Defendant referred to was still present in his home, Defendant was unable to account for this. When questioned about Edwina's finances, Defendant informed the State Police that Edwina had a Capital One credit card in her name, which he denied possessing or using.

Several days later, on December 31, 2007, the State Police obtained information from the Capital One credit card fraud investigation unit that Edwina's card had been utilized eight times after December 9, 2007, each time by Defendant.[10] In addition, a video obtained from Home Depot showed Defendant attempting to utilize the card. Because of this, Defendant was questioned further by the State Police on January 14, 2008. This time, Defendant admitted to lying about his possession and use of Edwina's Capital

[10] The charges occurred between December 11 and December 19, 2007.

One card. According to Defendant, Edwina gave him the card the last time he saw her.

The State Police next obtained a search warrant for Defendant's home, which was executed on January 17, 2008. Upon searching the premises, they found that the steps leading from the first floor to the basement, as well as the door which opened from the basement into a coal bin at the front of the home, had been recently painted. They also observed multiple bloodstains on the concrete floor of the basement between the stairs and the coal bin door. Once inside the coal bin, they discovered two pools of blood on the dirt floor, bloodstains on a wooden two-by-four and bloodstains on the concrete wall.

The basement steps and coal bin door were removed for further analysis. Upon stripping the paint, the State Police found additional bloodstains. Forensic testing of three samples taken from the blood in Defendant's basement were determined to be a match for Edwina's DNA profile.[11]

On August 21, 2008, the State Police conducted a second search of Defendant's residence. By that time, Defendant had removed the top eight to ten inches of soil from the floor of the coal bin and the wooden two-by-four. The bloodstains previously observed on the concrete wall were now faint. However, this time the State Police noticed hair embedded within these stains. An analysis of the mitochondria DNA from this hair was found to be a match to Edwina's maternal bloodline.[12]

On August 3, 2009, a criminal complaint was filed against Defendant charging him with one count of criminal homicide and

[11] The three items tested were a bloodstain found on the concrete floor near the entrance to the coal bin, a soil sample collected from one of the blood pools found inside the coal bin and a bloodstain found on a portion of the fourth step. (N.T. 01/19/12, pp. 19-21; Commonwealth Exhibit Nos. 52, 53 and 54.)

[12] Mitochondria, organelles in the cytoplasm of cells, are maternally inherited. (N.T. 01/20/12, pp. 102-103.) Consequently, unlike nuclear DNA which is specific to an individual, mitochondria DNA is specific to a maternal bloodline.

Edwina's full brothers—Reuben Onyango, Lamech Onyango and James Onyango—provided DNA samples, via buccal swabs. Using this information, Dr. John Planz, associate director of the University of North Texas Center for Human Identification, determined that the DNA profile obtained from the hair inside the coal bin was a sibling match. Specifically, a comparison between the DNA taken from Reuben Onyango and that present in the hair revealed that Reuben and the person to whom the hair belonged had the same maternal relative. (N.T. 01/23/12, pp.25-29, 35-36.)

one count of tampering with physical evidence. Trial before a jury began on January 9, 2012. Since Edwina's body was never found, the Commonwealth relied heavily on circumstantial evidence to prove its case. The jury returned a verdict on January 30, 2012, finding Defendant guilty of both counts.

On May 14, 2012, following the preparation of a presentence investigation report, Defendant was sentenced to life imprisonment without the possibility of parole to be served in a state correctional facility. On May 24, 2012, Defendant filed the instant post-sentence motion which is the subject of this opinion.

DISCUSSION

I. **Sufficiency of the Evidence**

Defendant first argues that he is entitled to an arrest of judgment or judgment of acquittal for insufficiency of the evidence to support his convictions.

> When considering a challenge to the sufficiency of the evidence [t]he standard we apply ... is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying [the above] test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. ... The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all the evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. DiStefano, 782 A.2d 574, 582 (Pa. Super. 2001), **appeal denied,** 569 Pa. 716, 806 A.2d 858 (2002) (citations and quotation marks omitted).

A. **First-Degree Murder**

Since the Commonwealth was unable to produce a body, a weapon, or exact measurements of the volume and age of the blood found in Defendant's residence, Defendant argues the Commonwealth has failed to introduce evidence sufficient to support his conviction of murder in the first degree. We disagree.

Evidence is sufficient to sustain a conviction of murder in the first degree when the Commonwealth establishes that a human being was unlawfully killed, the defendant committed the killing, the defendant acted with a specific intent to kill, and the killing was done in a willful, deliberate and premeditated manner. **Commonwealth v. Williams,** 586 Pa. 553, 573, 896 A.2d 523, 535 (2006), **cert. denied,** 127 U.S. 1253 (2007). In a homicide case, the Commonwealth is not required to produce the body of the victim. **Commonwealth v. Rivera,** 828 A.2d 1094, 1104 (Pa. Super. 2003), **appeal denied,** 577 Pa. 672, 842 A.2d 406 (2004). Moreover, the absence of a weapon, blood or DNA is not fatal to the Commonwealth's case; the **corpus delicti** may be established through the use of wholly circumstantial evidence. **Id.**

To establish Edwina's death, the Commonwealth showed that a seemingly healthy, thirty-four year old woman, who regularly kept in contact with her family and friends, and barely missed a day of work, suddenly disappeared following a visit to Defendant's home on December 9, 2007. (N.T. 01/10/12, pp. 53, 133, 148, 159, 174, 188, 195); **see Commonwealth v. Burns,** 409 Pa. 619, 187 A.2d 552 (1963) (an abrupt termination in a consistent pattern of living without any prior preparation or discussion with relatives or friends is relevant to establishing that death of the victim occurred); **Commonwealth v. Smith,** 523 Pa. 577, 568 A.2d 600 (1989) (the length of the victim's absence, its unexplained character, and the failure of the victim to communicate with all known relatives and associates can lead to the inevitable conclusion that the individual is dead).

In addition, an extensive search was undertaken—locally, nationwide and worldwide—to determine Edwina's whereabouts, to no avail. (N.T. 01/11/12, pp. 133-39.) A search of her mailbox in Whitehall on January 7, 2008, revealed that no mail had been collected after December 7, 2007. (N.T. 01/11/12, pp. 121-23, 140-41.) An examination into her financial records showed that after December of

2007 there was no activity by her on her JCPenney, Victoria's Secret or Capital One credit card accounts, notwithstanding a prior history of regular use and prompt payment. (N.T. 01/11/12, pp. 139-40; N.T. 01/12/12, pp. 127-28; N.T. 01/19/12, p. 119; N.T. 01/20/12, p. 7.) Further, no deposits were made into her Merchants Bank account, which she previously made on a regular basis, and the account had a balance of over one thousand dollars. (N.T. 01/11/12, pp. 142-43.)[13]

Edith Schoch testified that all of Edwina's personal belongings—her clothes, jewelry and money—were still intact in her second floor bedroom. (N.T. 01/10/12, p. 148.) And Jolene Kibler, the mother of the two children Defendant fathered prior to marrying Edwina and to whom Defendant had previously agreed to sell Edwina's car, testified that Edwina's mail, personal property and papers were still in the car on December 10, 2007, when she came to pick it up, notwithstanding Defendant's statement to the police that Edwina had removed her property before leaving the car with him. (N.T. 01/17/12, pp. 176-78; N.T. 01/20/12, p. 137.)[14]

That the death resulted from criminal activity was amply supported by the testimony of the police and the Commonwealth's experts. According to the police, a search of Defendant's home on January 17, 2008, revealed a number of bloodstains throughout the basement, three of which were a match to Edwina's DNA profile. (N.T. 01/13/11, pp. 49, 54, 56-57, 60-62, 110-19, 127-29; N.T. 01/19/12, pp. 21-32.) The blood on the floor of the coal bin had pooled and was coagulated, indicating not only a large amount of blood, but also fresh bleeding. (N.T. 01/23/12, p. 131.) During a second search of Defendant's home on August 21, 2008, the police recovered hair, from what was believed to be the head of the victim and which matched Edwina's maternal bloodline, embedded in dried blood found on the wall of the coal bin, inches above the

[13] During closing argument, the Commonwealth noted that if Edwina were alive and in hiding, as the defense suggested, it made no sense for her to walk away from this money.

[14] When Kibler brought this to Defendant's attention, Defendant insisted on cleaning out the car himself. (N.T. 01/17/12, p. 178.) When questioned by the police on January 17, 2008, Defendant further admitted that among the items he had removed from the car and thrown out were a garage opener and phone charger. (N.T. 01/20/12, pp. 139-40.) Again, the Commonwealth questioned in closing argument why Defendant would discard such items if he expected to see Edwina again.

pools of blood. (N.T. 01/13/12, pp. 142-43; N.T. 01/23/12, pp. 30-42.) All of this suggested Edwina's body had been lying in the coal bin, resting against the wall.

The Commonwealth's experts opined that the nature, location, and extent of the blood found in Defendant's basement was consistent with an individual suffering from a significant injury resulting from trauma or violence, rather than accidental means. (N.T. 01/23/12, pp. 148-50; N.T. 01/24/12, pp. 140-43.) It was the experts' further opinion that the individual who suffered this injury would have required medical attention and treatment due to the large amount of blood lost, particularly when examining the two blood pools in the coal bin. (N.T. 01/13/12, pp. 75-77; N.T. 01/23/12, pp. 148-52; N.T. 01/24/12, pp. 42-43.)

Defendant's involvement in Edwina's death was evidenced in part by the fact that Edwina was last seen alive by Defendant in his home and that, following her disappearance, her blood was inexplicably found throughout his basement. (N.T. 01/20/12, p. 150.) As part of its case, the Commonwealth presented evidence to establish that approximately one year prior to her disappearance, Defendant contemplated the possibility of killing Edwina in order to marry Sneary.[15] (N.T. 01/19/12, pp. 201-202); **see Commonwealth v. Zimmerman,** 351 Pa. Super. 5, 17 n.4, 504 A.2d 1329, 1335 n.4 (1986) (noting that although proof of motive is not required for a conviction of first-degree murder, it may be probative of the killer's intent or plan). In addition, the Commonwealth produced evidence to support a finding that Defendant was planning Edwina's murder a month prior to her disappearance, when the day after Thanksgiving he agreed to sell Edwina's car to Jolene Kibler for a thousand dollars. (N.T. 01/17/12, pp. 169-71.)

Perhaps the most incriminating evidence linking Defendant to Edwina's death were his actions as well as his statements to the police. In regards to his conduct, Defendant never reported her missing, or expressed concerns for her safety. (N.T. 01/10/12, pp. 54-55.) After Defendant was questioned by Officer Tom and Chief Turcmanovich on December 18 and December 21, 2007 respectively, and later

[15] In this same context, it is also not insignificant that Defendant's youngest child with Sneary was born on January 9, 2008, one month after Edwina disappeared.

by the State Police on December 27, 2007, about his knowledge of Edwina's whereabouts, Defendant attempted initially to paint over and later to dispose of the blood evidence in his home. (N.T. 01/11/12, pp. 55-56; N.T. 01/13/12, pp. 45-47, 135-41; N.T. 01/20/12, p. 177); **see Commonwealth v. Dollman,** 518 Pa. 86, 91, 541 A.2d 319, 322 (1988) (actions subsequent to a killing in attempting to destroy or dispose of evidence are relevant to prove the accused's intent or state of mind).

Moreover, Defendant repeatedly made inconsistent statements to the police. Among these statements were his accounts of how long Edwina remained at his house when she visited on December 9, 2007;[16] stating that the reason for Edwina's visit was to pick up a cell phone bill, yet having no explanation why this bill was still in his home (N.T. 01/11/12, pp. 144-45); giving contradictory statements regarding his use and possession of Edwina's Capital One credit card (N.T. 01/11/12, p. 146; N.T. 01/19/12, pp. 76, 80-81); and providing vague and misleading statements about greeting cards and envelopes which he claimed to have received from Edwina after her disappearance, which, he said, contained a return address, and which he promised to provide to the police, but never did.[17] (N.T. 01/19/12, pp. 84-89.)

Viewing the evidence and all reasonable inferences in the light most favorable to the Commonwealth, we find that the testimony and circumstantial evidence presented was sufficient to convict Defendant of murder in the first degree.

[16] At first, he told the police that she had only stayed for ten minutes. (N.T. 01/11/12, p. 9.) Later, he stated she stayed for two to two and a half hours. (N.T. 01/11/12, pp. 143-46.)

[17] Such envelopes, if they existed, would have been important not only in locating Edwina, but also in determining whether she was alive. In particular, the police wanted to examine the envelopes for postmarks, the possibility of a return address, and the chance of obtaining DNA evidence. (N.T. 01/19/12, pp. 85-89.) Even though the importance of the police examining the envelopes was repeatedly explained to Defendant, he used their represented existence as a bargaining tool in his discussions with the police, proclaiming their existence, yet demanding one concession after another before he would produce them (**e.g.,** to have a computer tower returned and later requesting that his .22 rifle, a phone charger and the basement steps be returned). (N.T. 01/19/12, pp. 83-89, 133-36; N.T. 01/20/12, pp. 9-11, 120-22, 140-49.) After six months of requesting the envelopes from Defendant, the police gave up in these efforts. (N.T. 01/20/12, pp. 8-10, 207-208.)

B. **Tampering With the Evidence**

Defendant also contends the Commonwealth's evidence was insufficient to sustain his conviction of tampering with physical evidence because it failed to show that Defendant acted with the necessary intent to hinder the police investigation. On this charge the Commonwealth's evidence is sufficient if it establishes that: "(1) the defendant knew that an official proceeding or investigation was pending; (2) the defendant altered, destroyed, concealed, or removed an item; and (3) the defendant did so with the intent to impair the verity or availability of the item to the proceeding or investigation." **Commonwealth v. Jones,** 904 A.2d 24, 26 (Pa. Super. 2006), **appeal denied,** 591 Pa. 690, 917 A.2d 845 (2006).

When viewed in the light most favorable to the Commonwealth, we conclude the jury could reasonably find that all three elements were proven beyond a reasonable doubt. As already indicated, the police testimony clearly established that Defendant knew an official investigation into Edwina's whereabouts was in progress.[18]

The evidence further established that it was after Defendant was made aware of the investigation but before the police searched his home on January 17, 2008,[19] that he painted both the steps leading to the basement and the coal bin door. (N.T. 01/12/12, pp. 48-49; N.T. 01/19/12, p. 195.) Underneath the recently painted areas, the police discovered bloodstains. During the January 17, 2008 search, the police also discovered two pools of blood on the dirt floor of the coal bin and bloodstains on a two-by-four inside the coal bin. Between this first search and that on August 21, 2008, the Defendant removed and disposed of between eight and ten inches of soil, as well as the two-by-four.

[18] Defendant was questioned about Edwina's disappearance on the following days by the following officers: December 18, 2007 by Officer Tom of the Borough of Lansford Police Department; December 21, 2007 by Chief Turcmanovich of the Borough of Lansford Police Department; December 27, 2007 by Corporal Thomas McAndrew of the Pennsylvania State Police; and January 14, 2008, again by Corporal McAndrew. (N.T. 01/11/12, pp. 9-10, 45-46, 143-46; N.T. 01/19/12, pp. 80-81.) Defendant was questioned a total of four times prior to the January 17, 2008 execution of the first search warrant on his home.

[19] It was during this same time period that Defendant's earlier statement denying possession or use of Edwina's Capital One credit card was disproved and Defendant admitted he had lied. (N.T. 01/19/12, pp. 80-81.)

This evidence, together with that previously discussed, was more than sufficient to establish that Defendant engaged in these acts with the intent of hindering the police investigation. **See e.g., Commonwealth v. Yasipour,** 957 A.2d 734, 746 (Pa. Super. 2008) (evidence was sufficient to support a conviction of tampering with physical evidence where the police found defendant attempted to clean up the crime scene), **appeal denied,** 602 Pa. 658, 980 A.2d 111 (2009). Accordingly, Defendant's Motion on this basis is without merit.

II. **Weight of the Evidence**

In a related matter, Defendant contends he is entitled to a new trial on the grounds that the verdict was against the weight of the evidence.

> A motion for new trial on the grounds that the verdict is contrary to the weight of the evidence, concedes that there is sufficient evidence to sustain the verdict. Thus, the trial court is under no obligation to view the evidence in the light most favorable to the verdict winner. ... [A] new trial should be awarded when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail. ... Stated another way, ... the evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court.

Commonwealth v. Sullivan, 820 A.2d 795, 806 (Pa. Super. 2003) (citations, quotation marks and emphasis omitted), **appeal denied,** 574 Pa. 773, 833 A.2d 143 (2003).

A. **First-Degree Murder**

Defendant challenges the weight of the evidence on the grounds that the expert testimony falls short of establishing whether Edwina is dead and whether Defendant caused her death.

Lisa Shutkufski, a forensic scientist with the State Police, testified that the three blood samples collected from Defendant's basement and tested for DNA were a match to Edwina's DNA profile. She further testified that the probability of randomly selecting an unrelated individual with this combination of DNA type was one in four hundred and thirty quintillion from the African American population. (N.T. 01/19/12, pp. 31-32.) Dr. John Planz, an associate director of the University of North Texas Center for Human Identification, testified that the mitochondrial DNA obtained from the hair sample collected from Defendant's residence belonged to the same maternal bloodline as Edwina's brothers. According to Dr. Planz, the probability of someone outside this bloodline having mitochondrial DNA matching that found in the hair was one in 1.8 trillion; thus, denoting that the source of the hair was a sibling of Edwina's brothers. (N.T. 01/23/12, pp. 28-29, 36.)

The Commonwealth also placed in evidence the opinion testimony of Trooper Phillip Barletto, an expert in crime scene processing and blood splatter analysis, that the blood evidence was indicative of an individual who had suffered a significant injury and that the pooling in the coal bin indicated such individual was in a stationary position for a prolonged period of time; the opinion testimony of Dr. Isidore Mihalakis, a forensic pathologist, that the evidence was consistent with someone suffering a significant injury caused by trauma or violence, and that the amount of blood loss suggested the person was in need of medical attention; and the opinion testimony of Paul Kish, a forensic consultant, that the injury was a serious one caused by criminal activity. (N.T. 01/13/12, pp.75-77; N.T. 01/23/12, pp. 148-50.) From this evidence, together with that set forth earlier when discussing Defendant's claim as to the sufficiency of the evidence, and the fact that Edwina was not seen by her family or friends since December of 2007, the jury determined that Edwina was dead.

In arguing that this conclusion is unsustainable, Defendant argues not only that the Commonwealth's evidence was untrustworthy and unreliable, but that the jury arbitrarily ignored and capriciously disregarded his evidence to the contrary, particularly that of two eyewitnesses, Pat Gordon and Doris Meitzler, who claimed to have seen Edwina after December 9, 2007. As to both, the jury had reason to doubt their testimony.

Pat Gordon is Defendant's mother. She testified that on three separate occasions after December 9, 2007, she saw Edwina. (N.T. 01/18/12, pp. 194-95.) On one of these occasions, she stated Edwina was a front seat passenger in a vehicle driven by one of Edwina's brothers which quickly passed where she was standing outside a McDonald's in Easton waiting for her daughter. (N.T. 01/18/12,

pp. 199-204, 206-207.) No further details were provided as to the dates, times, or circumstances of the other two incidents. (N.T. 01/18/12, pp. 195-96.)

On each occasion when these observations were made, Ms. Gordon was by herself, with no one else present to confirm what she claimed to have observed. Ms. Gordon was unable to give any specific dates or times when these sightings occurred, other than to state that they occurred after Edwina disappeared. In fact, Ms. Gordon testified that she had suffered a stroke, had difficulty with her memory, and could not recall dates and times. (N.T. 01/18/12, pp. 176-77, 188-89, 206.) In addition to having an obvious interest in helping her son, Ms. Gordon's testimony was in complete contradiction to that of Edwina's brothers, each of whom denied having had any contact with Edwina since December 9, 2007.

The other eyewitness Defendant presented, Doris Meitzler ("Meitzler"), worked for Express Cash, a check cashing business in the Lehigh Valley. Meitzler testified she was familiar with Defendant, who cashed his payroll checks at Express Cash every two weeks, and Edwina, who frequently accompanied him. (N.T. 01/26/12, pp. 31-33.) She also testified that after learning through media reports that Edwina was missing and that Defendant was charged with her killing, she saw Edwina once or twice outside her office with another woman. (N.T. 01/26/12, pp. 35-37.) According to Meitzler, she intended to report what she had witnessed to the police but failed to do so because it slipped her mind. (N.T. 01/26/12, p. 39.)

On December 18, 2011, Meitzler gave a statement about observing Edwina to Defendant's private investigator. (Defense Exhibit No. 37.) This statement was handwritten by the investigator and signed by Meitzler. However, in early January 2012, Meitzler signed a typewritten letter which was sent to defense counsel and Trooper William Maynard of the State Police Criminal Investigation Unit in which she repudiated her earlier statement and stated she could recall nothing about the case other than what she had seen in the news media. (Commonwealth Exhibit No. 60.) This letter further stated that Defendant's private investigator had "put words in [her] mouth in order to obtain false and misleading statements." At trial, Meitzler claimed that she had never read the typewritten

letter, that it was prepared for her by her manager, and that it was wrong. (N.T. 01/26/12, pp. 63, 66-69.)

During her testimony, Meitzler wasn't certain about when she had seen Edwina last or how many times, claiming at one point that she had seen Edwina in 2010 and at another point that it was sometime between 2007 and 2009. (N.T. 01/26/12, pp. 54-56.) She also testified that it had to be between these two years because she first learned of Edwina's reported death from news media accounts in December 2007 which reported that Defendant was suspected in the disappearance and death of Edwina, and that 2009 was when Defendant was arrested. (N.T. 01/26/12, pp. 56, 61.) When told that the police only began their investigation of Edwina as a missing person in December 2007 and that Defendant was not arrested and charged until 2009, Meitzler backed off of her previous testimony and stated she did not know when she had last seen Edwina. (N.T. 01/26/12, pp. 76-77.) Meitzler further vacillated as to the number of times—between one and two—she saw Edwina after December 9, 2007. (N.T. 01/26/12, pp. 38, 54.)

Meitzler was interviewed by Trooper Maynard on December 28, 2011, about the handwritten statement she first gave. On cross-examination, Meitzler agreed she told Maynard she had not read the statement the private investigator prepared before signing it and she did not know what was in it; that she did not know the last date she had seen Edwina; that she had not given any specific date to the private investigator after which she saw Edwina; and that, at some point, Edwina suddenly stopped coming to Meitzler's place of employment. (N.T. 01/26/12, pp. 73, 75-76.) This interview with Trooper Maynard occurred ten days after the statement given to the private investigator and within a week or two prior to the typewritten letter.

Defendant also presented evidence that once before, in 2003, Edwina disappeared without notice for several weeks or months and went to Canada. (N.T. 01/11/12, p. 33; N.T. 01/19/12, pp. 150-51, 153, 204-205; N.T. 01/27/12, pp. 53-55.) That time, however, when Edwina left, she took all of her belongings with her. (N.T. 01/27/12, p. 75.) This was in obvious contrast to her present disappearance which, as of trial, was in excess of four years and after an intense search had been undertaken, to no avail, to locate her. Also, unlike

Edwina's previous disappearance, this time there was substantial reason to believe that Edwina was the victim of a crime and that Defendant was the perpetrator.

The Commonwealth's evidence that Defendant was the last person to see Edwina alive, that the circumstances of her disappearance and the results of its investigation to find her suggest death, that Defendant had a motive and expressed a reason for killing Edwina, and that, subsequent to her disappearance, Edwina's blood was found in sufficient quantity throughout Defendant's basement to indicate a serious bodily injury, all support the conclusion that Edwina is dead and that Defendant is responsible. This evidence, which was not limited to expert testimony alone, also established that Edwina's death resulted from criminal agency.

Given the evidence, the verdict does not shock our conscience, nor will Defendant's conviction for murder in the first degree be set aside on this basis.

B. **Tampering With the Evidence**

Defendant further challenges the weight of the evidence to show Defendant acted with the requisite intent of concealing or removing physical evidence when he painted the basement steps and coal bin door, and later removed the dirt and two-by-four from the coal bin.

At trial, the Commonwealth proved that Defendant painted over blood on the basement steps and coal bin door, after knowing that Edwina was missing and that an investigation to find her—which was focusing on him—was underway, and before the police conducted a full search of his home.[20] Furthermore, the Commonwealth established that Defendant removed dirt from the coal bin floor, as well as the two-by-four, after the initial search revealed evidence of Edwina's blood on these items.

Defendant's explanation of the foregoing, that he painted the steps to cover splinters (N.T. 01/18/12, p. 193), the coal bin door to prevent a draft (N.T. 01/20/12, p. 149), and removed between eight and ten inches of soil from the coal bin floor to make repairs and improvements (N.T. 01/18/12, pp. 181-82, 190-92; N.T. 01/19/12,

[20] Officer Tom's walk-through of Defendant's home on December 18, 2007 was just that, a brief view looking for a missing person and not a search looking for any signs or evidence of a crime. (N.T. 01/11/12, pp. 46-48, 82-84.)

p. 197; N.T. 01/20/12, p. 150) was not so convincing or overwhelming as to require its acceptance by the jury. This is especially true given that the painting occurred within days after Defendant was questioned by the police about Edwina's whereabouts and he had been caught in a lie about her Capital One account. Further, the removal of the dirt from the coal bin occurred soon after Defendant was told that the blood in the basement was Edwina's.

From all of the evidence, the jury could fairly determine that Defendant committed these acts with the intent to hinder the police investigation. "[I]t is absurd to suggest that [Defendant] attempted to destroy the evidence for any reason **other** than to keep it out of the hands of police. ... Certainly, by destroying evidence to avoid arrest, [Defendant] necessarily demonstrated his intent to impair a police investigation." **Commonwealth v. Govens,** 429 Pa. Super. 464, 490, 632 A.2d 1316, 1329 (1993) (emphasis in original), **appeal denied,** 539 Pa. 675, 652 A.2d 1321 (1994). Accordingly, Defendant's conviction of tampering with the evidence was not so contrary to the evidence as to shock one's sense of justice.

III. **Discovery and Trial Issues**

Defendant raises one issue which occurred during discovery and five which occurred during trial which he contends entitle him to a new trial. We address each in the order presented.

A. **Discovery—**Brady **Violation**

In answer to Defendant's pretrial discovery requests, the Commonwealth produced in excess of 1,000 pages of documents with certain information blacked out. Defendant moved for the Commonwealth to produce clean and unredacted copies of these documents. The Commonwealth responded that the information redacted "concerns primarily the addresses and phone numbers of witnesses, but may also include social security numbers, dates of birth and drivers' license numbers." (**See** Order of Court dated November 12, 2010 ruling on Defendant's motion.) This was never disputed by Defendant. In its response, the Commonwealth further noted that none of the witnesses involved were eyewitnesses and that by redacting personal information of the type indicated, it sought, in part, to protect these individuals from certain persons who had been harassing potential witnesses and misrepresenting themselves as being from the District Attorney's office.

To Be Continued

By order dated November 12, 2010, we denied Defendant's motion reasoning that none of the individuals whose personal information had been deleted were known to be eyewitnesses, that in denying Defendant's request the information which Defendant sought to have disclosed was not the subject of mandatory disclosure under Pa. R.Crim.P. 573(B)(1), and that Defendant had not shown that any of the information requested was material to the preparation of the defense, keeping in mind that the names of the witnesses and their statements had been disclosed. Defendant argues we erred in denying his motion.

Specifically, Defendant claims that some of the information redacted included e-mail names and internet protocol ("IP") addresses that may have been helpful to impeach Phoebe's trial testimony. This was never disclosed to us prior to trial nor do we know whether such information was in fact redacted by the Commonwealth. At the time we ruled on Defendant's pretrial motion, no specific mention was made of e-mail names or IP addresses. Nor did Defendant advise the court that e-mail names or IP addresses were of any significance to his questioning of Phoebe.

We see no error in our November 12, 2010 order given the information which was then made available to us and the arguments made by counsel. **See Commonwealth v. Colson,** 507 Pa. 440, 462-63, 490 A.2d 811, 822-23 (1985) (holding that the Commonwealth is not required to disclose names and addresses of all witnesses, only those of eyewitnesses and only on a discretionary basis), **abrogated on other grounds by Commonwealth v. Burke,** 566 Pa. 402, 781 A.2d 1136 (2001); **see also,** Pa. R.Crim.P. 573(B)(2).[21]

[21] Pa. R.Crim.P. 573(B)(2), which allows for the discovery of non-mandatory matters in the discretion of the court, provides, in relevant part, as follows:

> (a) In all court cases, except as otherwise provided in Rule 230 (Disclosure of Testimony Before Investigating Grand Jury), if the defendant files a motion for pretrial discovery, the court may order the Commonwealth to allow the defendant's attorney to inspect and copy or photograph any of the following requested items, **upon a showing that they are material to the preparation of the defense,** and that the request is reasonable:
>
> (i) **the names and addresses of eyewitnesses;**
>
> (ii) all written or recorded statements, and substantially verbatim oral statements, of eyewitnesses the Commonwealth intends to call at trial;
>
> (iii) all written and recorded statements, and substantially verbatim oral statements, made by co-defendants, and by co-conspirators or accomplices, whether such individuals have been charged or not; and

With respect to Defendant's reliance on the seminal case of **Brady v. Maryland,** 373 U.S. 83 (1963):

> A **Brady** violation consists of three elements: (1) suppression by the prosecution (2) of evidence, whether exculpatory or impeaching, favorable to the defendant, (3) to the prejudice of the defendant. No violation occurs if the evidence at issue is available to the defense from non-governmental sources. More importantly, a **Brady** violation only exists when the evidence is material to guilt or punishment, **i.e.,** when there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

Commonwealth v. Burkett, 5 A.3d 1260, 1267 (Pa. Super. 2010) (citation and quotation marks omitted).

Defendant's claim of **Brady** error is misplaced for at least four reasons. First, Defendant has failed to demonstrate that the Commonwealth in fact withheld e-mail names and IP addresses relevant to the impeachment of Phoebe. **Id.** at 1268 ("The burden of proof is on the defendant to establish that the Commonwealth withheld evidence."). Second, the type of information Defendant claims was withheld—e-mail names and IP addresses—is not in itself exculpatory or impeaching and it is not known whether access to this information would have led to information favorable to Defendant. Third, Defendant has not shown that the information sought was not available to him from non-governmental sources. At trial, it was evident that the e-mails with which he sought to impeach Phoebe and the e-mail addresses from which they were sent were already in Defendant's possession.[22] Fourth, and most importantly, there is no basis to conclude that even if Defendant had

> (iv) any other evidence specifically identified by the defendant, provided the defendant can additionally establish that its disclosure would be in the interests of justice.

(Emphasis added.)

[22] When Phoebe was questioned at trial about several e-mails which Defendant believed had been sent by her, she denied having sent them. (N.T. 01/10/12, pp. 63-64, 103-105.) When Defendant then sought to track down the IP addresses for the computer from which the messages were sent in hope of impeaching Phoebe, we did not prevent Defendant from inquiring further on this subject, from subpoenaing records to obtain such information, or from employing an IP expert, if deemed necessary. (N.T. 01/10/12, pp. 79-80, 89, 105, 128-29.)

been provided the information he claims to have been deprived of and that with this information he would have been able to prove, as Defendant intimated at trial, that Phoebe was plotting with Edwina to fabricate a resume for Edwina to seek political asylum in this country as a refugee from torture, that the result of the trial would have been different. **Id.** ("[T]he mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial does not establish materiality in the constitutional sense.").

B. **Admissibility of Presumptive Blood Test Results**

Defendant's first claim of trial error is that we erred in allowing in evidence the results of presumptive blood tests to establish that blood was found in Defendant's home.

On January 6, 2012, Defendant filed a motion **in limine** seeking to preclude, among other things, the introduction of presumptive tests to establish the presence of blood in Defendant's home, arguing such tests are unreliable because they are not definitive. (Motion **in Limine** Pertaining to Testimony of John V. Planz, Ph.D., Trooper Phillip Barletto and Paul Erwin Kish, Paragraph 18.) By order dated January 10, 2012, we denied Defendant's motion.[23] At trial, Defendant renewed his objection to the Commonwealth's introduction of presumptive test results arguing primarily, and more specifically, that these tests are inherently unreliable given their inability to distinguish between human or animal blood, and their susceptibility to false positives, not that presumptive tests are not generally accepted in the scientific community or that they are based on unreliable scientific methods. (N.T. 01/12/12, pp.177-78.)

To better understand this issue, it is important to explain briefly the various tests administered in this case to detect and identify blood in suspected bloodstains and smears found in Defendant's basement. First are presumptive tests, field tests designed to react with hemoglobin to indicate that blood may be present. (N.T. 01/13/12, p. 51.) Three types of presumptive testing were utilized

[23] Within this order, we explained that with respect to "the evidence regarding the testing of blood and hair fibers found in Defendant's home, as well as genetic testing, the arguments made in Defendant's Motion go to the weight, not the admissibility, of the evidence." (Order of Court dated January 10, 2012.)

by the police: phenolphthalein testing,[24] luminol testing[25] and testing with leuco crystal violet.[26] Also utilized was a confirmation test, known as the Takayama test, used to determine with certainty whether blood is present in the sample.[27] While the three presumptive tests may react with other substances to give a false positive, a reaction similar to that which occurs when blood is present, a positive confirmation test is definitive for blood.[28] (N.T. 01/18/12, pp. 70, 101.) All four tests, however, do not distinguish between human and animal blood. (N.T. 01/18/12, p. 70.)

The third level of testing is the ring precipitant test. This test, by testing for human or higher primate proteins, is species specific: it is used to distinguish whether the substance being tested is from an animal, or from a human or higher primate.[29] (N.T. 01/18/12, p. 66.) It does not, however, determine whether the substance is blood. (N.T. 01/18/12, pp. 119, 145-46.) Finally, there is DNA testing, which while specific to an individual, also does not identify the tissue or fluid (**e.g.,** bone, blood, saliva) from which the sample is taken. (N.T. 01/19/12, pp. 16-17, 42.)

At trial, Trooper Barletto testified that several samples of suspected blood found in Defendant's basement gave a positive presumptive test. On cross-examination, Trooper Barletto ac-

[24] For this test, if blood is present, the phenolphthalein reacts with blood in the sample being tested to produce a hot pink color. (N.T. 01/13/12, p. 51.)

[25] For this test, luminol is sprayed on the unknown sample. When the room is darkened, a glowing effect indicates the presence of blood. (N.T. 01/13/12, p. 51.)

[26] For this test, leuco crystal violet is sprayed on an unknown sample, and then removed with either water or a methanol rinse. The sample will produce a purple color to indicate the presence of blood. (N.T. 01/13/12, pp. 207-208.)

[27] For this test, the unknown sample is mixed with a chemical (paradione) and heated. Red crystals form if there is a positive reaction to blood. (N.T. 01/18/12, pp. 70, 100.)

[28] As further confirmation of the presence of blood, in several instances more than one presumptive test was performed on the same stain. (**See e.g.,** N.T. 01/13/12, pp. 132-33.)

[29] For this test, the unknown stain or sample is mixed with water and placed on top of a solution containing antibodies. If human or higher primate proteins are present in the sample being tested, the antibodies react with these proteins to form a white band precipitate at the interface between the two solutions. (N.T. 01/18/12, pp. 64-65.) Higher primates refers to any type of greater ape: gorillas, orangutans and chimps. (N.T. 01/18/12, p. 101.) It does not include all monkeys. **Id.**

knowledged that presumptive testing by itself does not distinguish between human and animal blood.[30]

Trooper Barletto was followed by Gordon Calvert, a forensic scientist with the State Police, who conducted presumptive (here, phenolphthalein), confirmatory, and ring precipitant testing on several of the samples collected. Mr. Calvert testified that although the presumptive test is subject to false positives,[31] this rarely happens. (N.T. 01/18/12, p. 68.)

In two instances where the presumptive test results conducted by Mr. Calvert differed from the confirmatory test results, the presumptive test being positive and the confirmatory test negative, one explanation given by Mr. Calvert for this difference was that the sample tested contained an insufficient quantity of blood to be detected by the confirmatory test, which is less sensitive to blood than the presumptive test.[32] Two additional reasons given for the negative confirmatory test were that the substance tested was not blood or there was an interference from a second substance in the sample. (N.T. 01/18/12, pp. 82-83, 148.)

In three instances, the ring precipitant test performed by Mr. Calvert was negative when the presumptive test was positive. (N.T. 01/18/12, pp. 84-90.) Given the extra sensitivity of the presumptive test to small quantities of blood, Mr. Calvert explained that this could occur if the sample tested was too small, if there were no human or higher primate proteins present, or if there was an interference. (N.T. 01/18/12, p. 85.)

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[30] This was particularly important in this case since Defendant was an active trapper, and skinned and dressed what he caught in the basement. (N.T. 01/19/12, pp. 139, 220, 229.)

[31] According to Mr. Calvert's testimony, "other peroxidases ... like horseradish and I think potatoes, they have been known to give positive reactions to this test, however, this usually only happens after an extended period of time ... ." (N.T. 01/18/12, p. 68.) In addition to horseradish and potatoes, Trooper Barletto also identified citrus juice and rust as substances that can give a false positive. (N.T. 01/16/12, pp. 38-39.) Trooper Barletto further testified that luminol can give a false positive for copper, fecal matter and for some bleaches. (N.T. 01/16/12, pp. 94-95.)

[32] In both instances, the ring precipitant test, which is more sensitive to blood than the confirmatory test but less sensitive than presumptive testing, was also positive. (N.T. 01/18/12, pp. 84, 90-91, 119.) Further, in one of these samples, that taken from the fourth step in Defendant's basement, DNA testing was found to be a DNA match for Edwina. (N.T. 01/18/12, p. 91; N.T. 01/19/12, pp. 19-21.)

In addition, the Commonwealth presented the testimony of Ms. Shutkufski, who testified to conducting DNA testing on three of the samples by Mr. Calvert. In each, Ms. Shutkufski determined Edwina's DNA profile was consistent with that found in the sample. One of these was one of the two samples which Mr. Calvert had tested and found a positive presumptive test but a negative confirmatory test.[33]

Evidence need not be conclusive to be admissible. **Commonwealth v. Crews,** 536 Pa. 508, 523, 640 A.2d 395, 402 (1994). In **Commonwealth v. Romano,** 392 Pa. 632, 638-39, 141 A.2d 597, 600-601 (1958), the Pennsylvania Supreme Court upheld the admissibility of chemical testing to prove that certain stains found on clothing and money were blood, even though the expert was unable to distinguish whether the blood was human or animal blood, or whether it was from the decedent or of the defendant, because of the small quantity available for testing. Specifically, the court held that evidence of blood was a circumstance to be considered by the jury and, even further, that expert testimony is not required to identify a substance as being blood. **Id.** (citing **Gains v. Commonwealth,** 50 Pa. 319 (1865)). Additionally, in **Commonwealth v. Hetzel,** 822 A.2d 747, 762 (Pa. Super. 2003), **appeal denied,** 576 Pa. 711, 839 A.2d 351 (2003), the Pennsylvania Superior Court held that as long as the qualifications and limitations of presumptive testing are fully described to the jury, it is not error to admit the results of presumptive tests. Under such circumstances, the inability of the test to distinguish between human and animal blood, and the possibility that some substance other than blood may trigger a positive test, goes to the weight, not the admissibility of the evidence. **Id.** at 762.

The bloodstains were one piece of evidence linking Defendant to Edwina's death. In evaluating whether the stains found in Defendant's basement were blood, and if so, were human blood,

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[33] **See supra,** note 32. These findings are consistent with the presumptive test correctly signaling blood, an insufficient sample amount to yield a positive confirmatory test, and a DNA profile confirming the substance is human. It is also possible in this scenario that the presumptive test could be giving a false positive, and that the substance being tested is a human specimen other than blood, such as saliva or urine, which would also give a DNA match for a human. (N.T. 01/13/12, p. 193.)

and if so, were Edwina's blood, the jury was permitted to consider not only the results of the presumptive tests, but also the results of the multiple other tests performed. This is allowed under the case law provided the qualifications and limitations of the tests are fully explained to the jury, including that presumptive tests are not conclusive for blood. Since this was done, we find no error was committed.

Before leaving this issue, we also note that at trial, almost as an afterthought, Defendant for the first time nominally raised a **Frye** challenge to the use of presumptive blood tests on the apparent basis that these tests are subject to false positives. (N.T. 01/12/12, p. 224.) As was explained to counsel "[a] **Frye** challenge is where the defense is challenging the novelty of scientific principles or the methodology by which scientific conclusions are made." (N.T. 01/12/12, p. 178); **see also, Commonwealth v. Hall,** 867 A.2d 619, 633 (Pa. Super. 2005) ("**Frye** requires that, before novel scientific evidence is admissible in criminal trials, the theories and methods of that evidence 'must have gained general acceptance in the relevant scientific community.'").

As is evident from the reasons set forth by Defendant for this challenge, Defendant's challenge is based upon the certainty of the test results, not upon any novel or untested scientific principle or methodology. Moreover, Defendant presented no expert evidence questioning the validity of the scientific principles or methodology underlying the test results.[34] For these reasons, we believe it unnecessary to address this claim further and find it to be without merit. **Cf. Hetzel, supra** at 761 (finding that since a **Frye** challenge to the validity and admissibility of presumptive blood testing had not been made, no further discussion was necessary on this point).

[34] In discussing the **Frye** test, the Pennsylvania Superior Court recently stated:

> The **Frye** test is a two-step process. ... First, the party opposing the evidence must show that the scientific evidence is novel by demonstrating that there is a legitimate dispute regarding the reliability of the expert's conclusions. ... If the moving party has identified novel scientific evidence, then the proponent of the scientific evidence must show that the expert's methodology has general acceptance in the relevant scientific community despite the legitimate dispute.

Commonwealth v. Foley, 38 A.3d 882, 888 (Pa. Super. 2012) (citations and quotation marks omitted).

C. **Testimony of Trooper Phillip Barletto**

Defendant argues that we erred in permitting Trooper Barletto to testify to the type and extent of the bleeding evidenced by the pools of blood found in Defendant's coal bin because he was an expert in blood spatter analysis, and not a medical expert.

The purpose of expert testimony is to assist the jury in grasping complex issues not within the knowledge, intelligence and experience of the ordinary layperson. Pa. R.E. 702. Where a witness has a reasonable pretension to specialized knowledge on a subject matter under investigation, the witness may testify as an expert and the weight to be given such testimony is for the jury to decide. **Commonwealth v. Gonzalez,** 519 Pa. 116, 128, 546 A.2d 26, 31 (1988). "It is also well established that an expert may render an opinion based on training and experience; formal education on the subject matter is not necessarily required." **Commonwealth v. Copenhefer,** 553 Pa. 285, 310, 719 A.2d 242, 254-55 (1998).

In his brief, Defendant fails to establish how Trooper Barletto's testimony, which was essentially cumulative to that of Dr. Mihalakis' and Mr. Kish's, prejudiced him. Notwithstanding this fact, a review of Trooper Barletto's training and experience clearly establishes that he was qualified to render opinions about the blood found in the coal bin. Trooper Barletto stated during **voir dire** that he has been a member of the forensic services unit with the State Police for the past fourteen years, that he has processed over 1,820 crime scenes, and that he has participated in 310 death investigations. (N.T. 01/13/12, pp. 18-19.) He further testified that his training in blood splatter analysis began in February of 1998. (N.T. 01/13/12, pp. 20-22.) Since then, the trooper testified to receiving advanced training in blood spatter analysis as well as training in forensic photography, fingerprint analysis, evidence collection and crime scene analysis. (N.T. 01/13/12, p. 20.) In addition, he testified to attending a weeklong class conducted by Paul Kish, a recognized expert on blood spatter analysis. (N.T. 01/13/12, p. 21.)

Instantly, Defendant challenges Trooper Barletto's opinion that the pooling in the coal bin came from an individual who had lost a "significant" amount of blood, sustained a "significant wound" and was in a stationary position "for a prolonged period of time." (N.T.

01/13/12, pp. 75-77.) Given Trooper Barletto's practical experience and training, we found that these opinions were within Trooper Barletto's expertise and would assist the jury in understanding the evidence. Essentially, Trooper Barletto's opinion amounted to an interpretation of the physical evidence based upon the shape, location, amount, and distribution of blood found in Defendant's coal bin and basement. We find no error in having admitted this testimony.

Next, Defendant asserts that we erred in allowing the trooper to give his opinion that the painting of various areas in the basement, the removal of soil and the removing of the two-by-four were indicative of a "cover-up."[35] It is "well-settled that a defendant's failure to object to allegedly improper testimony at the appropriate stage in the questioning of the witness constitutes a waiver." **Commonwealth v. Molina,** 33 A.3d 51, 55 (Pa. Super. 2011) (citation omitted). Since Defendant failed to object to this testimony at the time of trial, we deem this claim waived.

D. **Julianne Sneary's Testimony**

The third trial issue Defendant raises is Sneary's testimony about a statement Defendant made that for them to marry he might have to kill Edwina. This statement occurred within a year of Edwina's disappearance during a conversation in which Sneary and Defendant were discussing their marriage plans, something

[35] The trooper's testimony was as follows:

> Mr. Dobias: Trooper Barletto, maybe I'm not doing a good job in asking the question, but looking at the blood stains and the blood transfers in the basement as well as the painting of the various areas, the removing of the soil and the removing of that piece of wood that's in the coal bin door, what does that tell you?
>
> Trooper Barletto: That, in fact, the scene had been tampered with, that evidence had been removed or, therefore, covered up. The painting of the steps, the painting of the coal bin door, taking the entirety of the residence, looking at the coal bin door, looking at the steps, to have them recently painted like that and then to find blood where the steps weren't painted indicates a cover-up to me. The mere fact that the two by four [sic] which had originally been at the residence had been removed, it had blood on it, the soil had been taken out of the basement, out of the coal bin, that and the totality of all those circumstances would indicate to me that the scene had been tampered with and a crime had been covered up.

(N.T. 01/13/12, pp. 152-53.)

they had been discussing for several years, in part because Sneary's parents, especially her mother, were upset with her for having a relationship with a married man and fathering children with him. Defendant's statement was made in response to Sneary's comment that it made no sense to make wedding plans as long as he was married.

On January 9, 2012, Defendant filed a motion **in limine** seeking, among other things, to preclude Sneary from testifying about this conversation. By order dated January 10, 2012, we directed "counsel to provide the court with legal authority in support of their respective positions on the admission of this statement ... ." (Order of Court dated January 10, 2012.)

Before Sneary testified, counsel was given an opportunity to argue their positions further. Moreover, we first heard Sneary's testimony **in camera.** (N.T. 01/19/12, p. 172.) When asked about their conversation, Sneary indicated Defendant told her in "a frustrated quipper remark ... that the only way he'd be able to get rid of [Edwina] is to kill her." (N.T. 01/19/12, p. 176.) She further defined a quip as "a remark made not necessarily to be funny, but at the moment it did not appear to be a remark to be taken seriously." (N.T. 01/19/12, p. 178.)

In ruling Sneary's testimony admissible, we relied upon the decision of the Superior Court in **Commonwealth v. Showers,** 452 Pa. Super. 135, 681 A.2d 746 (1996), **appeal denied,** 546 Pa. 665, 685 A.2d 544 (1996), which held that

> evidence concerning the nature of the marital relationship [between a defendant and a homicide victim] is admissible for the purpose of proving ill will, motive or malice. This includes, in particular, evidence that the accused physically abused his or her spouse. ... [I]t is generally true that remoteness of the prior instances of hostility and strained relations affects the weight of that evidence and not its admissibility. ... [N]o rigid rule can be formulated for determining when such evidence is no longer relevant.

Id. at 151, 681 A.2d at 754 (**quoting Commonwealth v. Ulatoski,** 472 Pa. 53, 60-61, 371 A.2d 186, 190-91 (1977)). We also found Sneary's characterization of the statement as a quip went

to its weight, and not its admissibility. Accordingly, the jury heard Sneary's account of what Defendant said.[36] (N.T. 01/19/12, p. 202.)

The challenged testimony consists of evidence probative of Defendant's state of mind and reveals a clear motive why he would kill Edwina.[37] Defendant's statement was clearly relevant to at least two main issues in the case: whether Defendant killed his wife and whether he intended to do so. **See Commonwealth v. Bederka,** 459 Pa. 653, 659, 331 A.2d 181, 184 (1975) (testimony by daughter-in-law that appellant had stated he was going to kill his wife and then himself was admissible to show appellant's "state of mind toward certain persons with respect to a particular subject"). Whether this statement was said in jest or in a moment of candor goes to its weight, not its admissibility. As such, the statement was properly admitted.

As part of this issue, it appears that Defendant is now claiming that we also erred in allowing the introduction of this statement prior to the Commonwealth's proof of the **corpus delicti.** Beyond the failure of Defendant to object on this basis, "[t]he order of proof is a matter within the realm of (the trial court's) judicial dis-

[36] The testimony heard by the jury included the following exchange:

Mr. Dobias: And when you say—I think you said the status of things between Troy and Edwina, what do you mean by that?

Ms. Sneary: When a divorce would be forthcoming and that.

Mr. Dobias: And can you tell the jury what did the Defendant say at that time?

Ms. Sneary: He said that, um, that it wouldn't be possible until she got her citizenship.

Mr. Dobias: What else did he say?

Ms. Sneary: He—he had mentioned that the only way he could get rid of her would be to kill her.

(N.T. 01/19/12, p. 202.) During cross-examination, defense counsel asked Sneary to characterize the statement, to which she replied that it was a quip—"a remark made out of frustration, not a joke but not necessarily intended to be taken seriously." (N.T. 01/19/12, p. 226.) Sneary also testified the statement was one she never forgot. (N.T. 01/19/12, pp. 202-203.)

[37] When interviewed by the police on January 14, 2008, Defendant denied that he had planned to marry Sneary and, inferentially, that he had a motive to kill Edwina. (N.T. 01/19/12, p. 151.) This was the same date that Defendant admitted lying to the police about his possession and use of Edwina's Capital One credit card (N.T. 01/19/12, pp. 80-81), and also the same or one day previous to when he painted the basement steps. (N.T. 01/19/12, pp. 195, 217-18.)

cretion." **Commonwealth v. Burns,** 409 Pa. 619, 637, 187 A.2d 552, 562 (1963). The law does not require that the **corpus delicti** be established prior to the admission of the inculpatory statement as it can be established following its admission. **See e.g., Commonwealth v. Smallwood,** 497 Pa. 476, 484, 442 A.2d 222, 225 (1982) (in a prosecution for murder and arson, the court did not err in admitting testimony concerning defendant's statement, which was proffered before the **corpus delicti** of arson was established, where Commonwealth subsequently did establish the **corpus delicti** and could have obtained the admission of the testimony thereafter). Nevertheless, we find the **corpus delicti** was, in fact, established prior to the introduction of the statement. Therefore, no violation of the principle of **corpus delicti** has been made out.

E. **Testimony of Dr. Isidore Mihalakis**

Next, Defendant contends we erred in failing to declare a mistrial **sua sponte** in response to an allegedly prejudicial remark made by Dr. Isidore Mihalakis, an expert in the field of forensic pathology.

The decision of whether to declare a mistrial **sua sponte** upon a showing of manifest necessity rests within the discretion of the trial court. **Commonwealth v. Hoovler,** 880 A.2d 1258 (Pa. Super. 2005), **appeal denied,** 586 Pa. 723, 890 A.2d 1057 (2005).

> The determination by a trial court to declare a mistrial after jeopardy has attached is not one to be lightly undertaken, since the defendant has a substantial interest in having his fate determined by the jury first impaneled. ... Additionally, failure to consider if there are less drastic alternatives to a mistrial creates doubt about the propriety of the exercise of the trial judge's discretion and is grounds for barring retrial because it indicates that the court failed to properly consider the defendant's significant interest in whether or not to take the case from the jury.

Commonwealth v. Kelly, 797 A.2d 925, 936 (Pa. Super. 2002) (citations omitted).

At trial, the Commonwealth asked Dr. Mihalakis if he had formed an opinion as to whether the scene in Defendant's basement was "consistent with or indicative of serious bodily injury or even

homicide." (N.T. 01/23/12, p. 150.) Defense counsel objected, and we sustained the objection.[38] (N.T. 01/23/12, pp. 151-52.) The Commonwealth was allowed to rephrase the question, this time simply asking the doctor if the scene was indicative of serious bodily injury to which he replied: "Yes, I believe it is indicative of significant bodily injury or homicide." (N.T. 01/23/12, pp. 152-53.) Defense counsel again objected and we sustained, directing that the remark be stricken.[39] Later, during closing instructions, we reminded the jury to disregard any testimony that had been previously stricken and "not [to] base any of [their] findings upon it."[40] (N.T. 01/30/12, p. 163.) A similar preliminary instruction was given prior to any testimony being taken. (N.T. 01/09/12, p. 6.)

[38] In his report of February 18, 2008, Dr. Mihalakis expressed the opinion that the amount and location of blood found in Defendant's basement was indicative of an individual who had suffered trauma. Furthermore, he opined, relying on what he called "interpersonal factors," that it was apparent this individual is now dead. Because the "interpersonal factors" to which Dr. Mihalakis referred in opining Edwina was dead—factors such as her unexplained disappearance, failure to contact friends and family, and failure to return to work—were all factors which the jury could interpret on its own, without the need for expert testimony, we declined to allow Dr. Mihalakis to make this conclusion for the jury. Moreover, Dr. Mihalakis did not opine in his report that the nature of the wounds sustained were indicative of a homicide. Hence, if allowed to testify to the question posed, Dr. Mihalakis would have been giving an opinion that went beyond the scope of his report.

[39] The exact words exchanged were as follows:

> Mr. Dobias: Doctor, let me go back. Do you have an opinion as to whether or not the scene in Mr. Freeby's basement, again, the totality of the situation, is consistent with or indicative of serious bodily injury?
>
> Mr. Dydynsky: Objection as to what does he mean by totality of the situation.
>
> Court: I'm going to overrule that objection.
>
> Dr. Mihalakis: Yes, I believe it is indicative of significant bodily injury or homicide.
>
> Mr. Dydynsky: Objection.
>
> Court: I'm going to sustain that objection. That answer will be stricken.

(N.T. 01/23/12, pp. 152-53.)

[40] The actual instruction was the following:

> If there was any testimony which was stricken from the record, and I know that happened on a number of occasions, then you are to disregard that testimony and treat it as though you had never heard it and not base any of your findings upon it.

(N.T. 01/30/12, p. 163.)

Though Defendant failed to request a mistrial,[41] he now asserts that Dr. Mihalakis' remark was so prejudicial as to give rise to manifest necessity such that this Court was required, as a matter of law, to declare a mistrial **sua sponte.** Not every unwise or irrelevant remark made in the course of a trial by a witness, however, compels the granting of a new trial. In order for a mistrial to be declared, the remark must be of such "a nature or substance or delivered in such a manner that it may reasonably be said to have deprived the defendant of a fair and impartial trial." **Commonwealth v. Sullivan,** 820 A.2d 795, 800 (Pa. Super. 2003), **appeal denied,** 574 Pa. 773, 833 A.2d 143 (2003).

Dr. Mihalakis' remark does not rise to this level. This is especially so given the Court's immediate instruction that the testimony be stricken together with our opening and closing instructions that the jury not base its finding upon stricken testimony. **See Commonwealth v. Lee,** 541 Pa. 260, 275, 662 A.2d 645, 653 (1995) (no mistrial warranted where court sustained the objection, cautioned the jury that the testimony should be disregarded, and later instructed the jury not to consider in its deliberations any evidence that the court had previously told it to disregard); **Commonwealth v. Brown,** 567 Pa. 272, 289, 786 A.2d 961, 971 (2001) (the law presumes that the jury will follow the instructions of the court). We believe these instructions to have been enough to cure whatever prejudice, if any, resulted from the remark.

Moreover, the record demonstrates overwhelming evidence of a homicide, even without Dr. Mihalakis' comment. In such circumstances, it cannot reasonably be said that Dr. Mihalakis' remark deprived Defendant of a fair and impartial trial. Thus, we find that Defendant is not entitled to a new trial on this issue.

F. **Attorney-Client Privilege**

As his final trial issue, Defendant argues it was error to permit Attorney Dennis Mulligan to assert attorney-client privilege on behalf of his client, Edwina.

[41] **See Commonwealth v. Ables,** 404 Pa. Super. 169, 181-82, 590 A.2d 334, 340 (1991) (holding that a request for mistrial must be made at time of prejudicial event in order to preserve perceived trial error), **appeal denied,** 528 Pa. 620, 597 A.2d 1150 (1991).

Attorney Mulligan was called by the defense to identify several documents, as well as to testify about his representation of Defendant and Edwina with respect to proceedings pending against her for deportation.[42] Prior to Attorney Mulligan's trial testimony, on September 27, 2011, Defendant filed a Petition/Motion for Waiver of Attorney/Client Privilege and for the Production of Documents and Testimony of Dennis Mulligan, Esquire. A hearing was held on October 25, 2011. At that time Attorney Mulligan asserted attorney-client privilege on behalf of Edwina with respect to three areas of inquiry: how Edwina entered this country; whether Edwina claimed to be a victim of torture; and what Edwina told him regarding her sisters. (N.T. 11/25/11, pp. 36-39, 72, 76-77.)

At the conclusion of this hearing, we granted defense counsel ten days to provide us with legal authority in the event that counsel sought to challenge the exercise of the privilege. (N.T. 11/25/11, p. 80.) After no legal memorandum was submitted, we issued an order dated January 9, 2012, denying and dismissing Defendant's request.[43] Notwithstanding this procedural history, at trial defense counsel again asked Attorney Mulligan whether he knew "how [Edwina] was admitted to the United States in terms of actual admission as to what she told you." (N.T. 01/26/12, pp. 195-96.) To this question Attorney Mulligan invoked the attorney-client privilege. (N.T. 01/26/12, p. 196.)

The attorney-client privilege, as it pertains to criminal matters in Pennsylvania, is set forth as follows:

> In a criminal proceeding counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.

42 Pa. C.S. §5916;[44] **see also, Gillard v. AIG Insurance Company,** 609 Pa. 65, 15 A.3d 44 (2011) (holding the attorney-client privilege is a two-way street, applying to both client communications and attorney advice, so long as the purpose of the communication is to secure or provide professional legal services).

It is undisputed that Attorney Mulligan was representing Edwina in her efforts to avoid deportation. It is also clear that information regarding how she entered this country was a communication relating to those proceedings and was at issue.[45] Consequently, there is no question that the attorney-client privilege was properly invoked. **Carbis Walker, LLP v. Hill, Barth & King, LLC,** 930 A.2d 573, 579 (Pa. Super. 2007) (listing the four elements necessary to secure successful enforcement of the privilege). Therefore, the burden was upon Defendant to show that "disclosure [would] not violate the attorney-client privilege, **e.g.,** because the privilege [had] been waived or because some exception [applied]." **Id.** at 581 (citation and quotation marks omitted).

Defendant argues that since Attorney Mulligan was representing both himself and Edwina in her efforts to obtain permanent residence status, and thus to avoid deportation, the privilege does not prevent disclosure to him. Essentially, Defendant claims that

[42] To explain Edwina's sudden disappearance, part of Defendant's defense was that Edwina had gone into hiding to avoid deportation. In line with this argument, Defendant hoped to show through Attorney Mulligan that Edwina was running out of time in the deportation proceedings and that if it were determined she had entered this country illegally, her chances of establishing permanent residency status were virtually nonexistent.

[43] In this order we also noted our belief that Defendant had abandoned his earlier reservation of perhaps seeking to set aside the privilege as claimed by Attorney Mulligan, defense counsel having advised the Court at the conclusion of the hearing that he was unsure whether he would be pursuing the issue further and would be filing the requested legal authority if he intended to do so.

[44] 42 Pa. C.S. §5928 contains the same language with respect to civil matters.

[45] Attorney Mulligan explained that Edwina was involved in two separate and independent proceedings: a deportation or removal proceeding pending before the immigration court and a request for permanent resident status filed with the United States Department of Justice, Office of Immigration and Naturalization Service. The latter consists of a two-step process: a relative petition by a United States citizen, followed by an application for adjustment of status to that of a lawful permanent resident. The relative petition was filed in August 2006 by Defendant and approved in May 2007. Edwina's application for adjustment of status was filed in June 2007 but, due to various clerical errors, not acted upon prior to her disappearance in December 2007. For the application for adjustment of status to be approved, it is necessary that the applicant have entered this country legally and been inspected. (N.T. 01/26/12, pp. 194-95.) Whether this had occurred, was one of the issues Attorney Mulligan was reviewing with Edwina at the time of her disappearance. (N.T. 01/26/12, p. 195.) It was his belief that if Edwina had been successful in obtaining legal status in this country through the process of applying for permanent resident status based upon her marriage to a United States citizen, she would have been able to avoid deportation.

because of this dual representation, a communication between Edwina and Attorney Mulligan should be viewed the same as a communication by him to Attorney Mulligan.[46] Defendant cites no authority to support this position and, at least in the context of this case, we believe the law to be to the contrary.

The holder of the attorney-client privilege is the client and the attorney, without the consent of the client, cannot be compelled to reveal or disclose the communication. **Commonwealth v. Maguigan,** 511 Pa. 112, 124-25, 511 A.2d 1327, 1333-34 (1986). While it is true that when former co-clients of the same counsel representing them in a matter of common interest sue one another, all communications made in the course of the joint representation are discoverable, **Loutzenhiser v. Doddo,** 436 Pa. 512, 518-19, 260 A.2d 745, 748 (1970), such is not the case here. As is apparent from the nature of these proceedings, Defendant and Edwina are not adverse parties. Instead, Defendant is a defendant in a criminal proceeding charged with killing his wife. **See also, In re Teleglobe Communications, Corp.,** 493 F.3d 345, 363 (3rd Cir. 2007) (recognizing a joint client may unilaterally waive privilege concerning his own communications with attorney, but may not waive privilege as to communications by any other joint client). Thus, Attorney Mulligan was entitled to assert the privilege on behalf of Edwina.

IV. **After-Discovered Evidence**

As his final claim, Defendant argues he is entitled to relief on the basis of after-discovered evidence.

> After-discovered evidence is the basis for a new trial when it: 1) has been discovered after the trial and could not have been obtained at or prior to the conclusion of trial by the exercise of reasonable diligence; 2) is not merely corroborative or cumulative; 3) will not be used solely for impeaching the credibility of a witness; and 4) is of such nature and character that a new verdict will likely result if a new trial is granted. ... Further, the proposed new evidence must be 'producible and admissible.'

Commonwealth v. Chamberlain, 612 Pa. 107, 163-64, 30 A.3d 381, 414 (2011) (citations omitted). Additionally, "[i]n order for after-discovered evidence to be exculpatory, it must be material to a determination of guilt or innocence." **Id.** at 166, 30 A.3d at 416. A new trial is warranted only where the defendant has demonstrated each factor by a preponderance of the evidence. **Commonwealth v. Padillas,** 997 A.2d 356, 363 (Pa. Super. 2010), **appeal denied,** 609 Pa. 687, 14 A.3d 826 (2010).

[46] In this regard, there is no evidence that Defendant was actually present and able to hear whatever Edwina may have told Attorney Mulligan regarding the circumstances of her admission to this country.

A. **Evidence of Real Estate Holdings**

In his brief in support of his post-sentence motion, Defendant contends that during trial and for more than a year preceding trial, the defense hired a private investigator to determine, among other things, whether Edwina had financial holdings or interests in Kenya. Prior to the conclusion of trial, Defendant admits to receiving verbal information from the investigator, which defense used when cross-examining Edwina's family members. According to Defendant, a final written report detailing the extent of Edwina's holdings was not received, however, until after the conclusion of trial. This report, titled "Report of Investigations," forms the basis of this claim of after-discovered evidence.[47]

Presently, Defendant has failed to explain why he could not have produced the evidence at or before trial by the exercise of due diligence. The Report of Investigations shows that the letter from the investigator containing his findings is dated January 19, 2012. Therefore, the evidence which forms the basis for this claim was, in fact, discovered prior to the conclusion of trial, which ended on January 30, 2012. (Report of Investigations, 01/19/12, p. 1); **see Commonwealth v. Chambers,** 528 Pa. 558, 580-81, 599 A.2d 630, 641 (1991) (a defendant who fails to question or investigate an obvious, available source of information, cannot later claim evidence from that source constitutes newly discovered evidence).

Further, Defendant has failed to demonstrate that the sole purpose of the evidence was not for impeachment purposes or merely to corroborate Defendant's belief that Edwina was in hiding. In his brief, Defendant states that he intends on using the evidence to "impeach the untruthfulness of the Onyango witnesses" and "to

[47] We note that Defendant did not file a copy of this report until September 20, 2012, one month after the filing of his brief in support of his post-sentence motion. Though untimely, we have reviewed the report.

show a determined pattern of deception and determination by the Onyangos to establish control over [Ediwna's (sic)] real estate in Kenya." (Defendant's Brief in Support of His Post-Trial Motion, p. 21.) Lastly, a reading of the report indicates that the nature and character of the evidence is not such as would likely result in a different verdict because it is at best tangential to the core evidence linking Defendant to Edwina's disappearance and death.

As such, the evidence upon which Defendant bases this claim is insufficient to entitle him to a new trial.

B. **Evidence From An Internet Protocol (IP) Expert**

In his last issue, Defendant asserts he is entitled to a new trial based upon the possibility that after-discovered expert evidence could establish that Phoebe authored the e-mails the defense attempted to introduce when cross-examining her at trial. This issue overlaps and is a variation of that previously discussed with respect to discovery, but now recast as after-discovered evidence.

Defendant acknowledges that he was given multiple e-mails from the Commonwealth during discovery, which he assumed were authored by Phoebe. However, when questioned at trial, Phoebe denied writing several of these e-mails. Defendant contends he was unable to refute her testimony because he had not employed an IP computer expert. Defendant now asks this Court to grant him the remedy of a new trial in order to present testimony from an expert who could testify that the e-mails were sent from Phoebe's computer IP address.

Accepting for the moment that such evidence even exists, Defendant has failed to meet the standards required to support this claim of after-discovered evidence by a preponderance of the evidence. First, such evidence could have been obtained at or prior to the conclusion of trial by the exercise of reasonable diligence. Second, it seems that Defendant's only use for the evidence would be to impeach the credibility of Phoebe as Defendant states in his brief that he would use the evidence to show that "Phoebe Onyango was a liar, and is covering up the disappearance of her sister" and to "expose the interest of the Onyango family in having the Defendant found guilty of murder because in this way they would be the heirs to the holdings of Onyango." (Defendant's Brief in Support of His Post-Trial Motion, p. 22.) Finally, critically absent

from Defendant's claim is proof that such evidence even exists. Without Defendant producing the proposed new evidence, the claim is wholly speculative and unsubstantiated. **See Commonwealth v. Dickerson,** 900 A.2d 407 (Pa. Super. 2006) (holding that the appellant's mere assertions were insufficient to support after-discovered evidence exception), **appeal denied,** 590 Pa. 656, 911 A.2d 933 (2006). Accordingly, we deny Defendant's request for a new trial on this issue.[48]

CONCLUSION

In accordance with the foregoing, we conclude Defendant's contentions are without merit. We, therefore, find that Defendant is not entitled to any of the remedies he seeks.

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[48] We also note, in accordance with defense counsel's representations to the Court at the time of trial, that an IP address can only show from which computer an e-mail was sent, not who sent it. (N.T. 01/10/12, p. 80.) Consequently, even if Defendant were to establish that the e-mails in question were sent from Phoebe's computer, their authenticity and that they were sent by Phoebe would still be an issue. **See Commonwealth v. Koch,** 39 A.3d 996 (Pa. Super. 2011) (noting that the mere fact that an e-mail bears a particular e-mail address or comes from a particular computer is inadequate to authenticate the identity of the author; courts oftentimes demand that the messages themselves contain factual information or references unique to the parties involved), **appeal granted,** 44 A.3d 1147 (Pa. 2012).

COMMONWEALTH OF PENNSYLVANIA vs.
JAMES J. JAEGER, Defendant

Criminal Law—DUI—Drug and Alcohol Intoxication—Sufficiency of the Evidence—Weight of the Evidence—Restitution—Merger

1. When a defendant is convicted of violating two subsections of the same statute designed to proscribe one harm—here driving under the influence, Sections 3802(a)(1) (alcohol intoxication) and 3802(d)(3) (drug and alcohol intoxication)—while engaged in a single act, the sentences merge. Otherwise the sentences would constitute more than one punishment for the same crime and be impermissible under principles of double jeopardy.

2. A defendant convicted of driving under the influence whose insurance company has compensated the victim for damages sustained in a motor vehicle accident caused by the defendant is required by statute to make restitution to his own insurance company.

3. Evidence is deemed sufficient to support a verdict if, when viewed in the light most favorable to the Commonwealth, it establishes each element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt.

4. A defendant's conviction of driving under the influence of alcohol to a degree which rendered him incapable of safe driving is amply supported by the evidence where, following a motor vehicle accident in which the defendant drove his vehicle in the wrong lane of traffic for a distance of approximately three hundred and fifty feet, slurred speech, glassy eyes, imbalance, an odor of alcohol, difficulty producing identification, and failing several field sobriety tests were all observed by the arresting officer. In addition, the Defendant admitted consuming two alcoholic beverages and refused a requested blood alcohol test.

5. Expert testimony is not required to convict a defendant of driving under the combined influence of alcohol and a drug or a combination of drugs to a degree which impaired his ability to safely drive. The offense, as defined, requires only that the driver's ability to safely drive be impaired because of the combined influence of alcohol and one or more drugs; it does not require that either alcohol or drugs be chemically detectible in the defendant's body, that blood tests be performed, or that a certain concentration of drugs be found. Section 3802(d)(3) neither specifies nor limits the type of evidence that the Commonwealth may proffer to prove its case.

6. The discovery of hypodermic needles and white pills in Defendant's vehicle, pills in his pant pockets, and his acknowledgement that he was unable to perform field tests because of prescriptive medication he had taken earlier that day, together with the previously mentioned indicia of alcohol intoxication, are sufficient to support a finding that Defendant's ability to safely drive was impaired because of the influence of a combination of alcohol and one or more drugs.

7. A new trial based on the weight of the evidence is only warranted where the fact-finder's verdict is so contrary to the evidence that it shocks one's sense of justice.

8. Notwithstanding Defendant's assertions that he did not consume any alcoholic beverages and that the observations the arresting officer made were attributable to injuries he sustained in the accident, including a claimed concussion, Defendant's evidence did not overwhelm or undermine that presented by the Commonwealth so as to make Defendant's conviction untenable or shock one's sense of justice.

NO. 222 CR 2011

MICHAEL S. GREEK, Esquire, District Attorney—Counsel for Commonwealth.

MICHAEL P. GOUGH, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—November 30, 2012

Following a bench trial on July 20, 2012, James J. Jaeger ("Defendant") was found guilty of two counts of driving under the influence ("DUI") in violation of 75 Pa. C.S.A. §§3802(a)(1) and (d)(3), and one count of driving on right side of roadway in violation of 75 Pa. C.S.A. §3301(a). Following his sentencing on August 13, 2012,[1] Defendant filed a Post-Sentence Motion whereby he sought a judgment of acquittal on the basis that the evidence was insufficient to support his convictions for DUI. Defendant further sought an arrest of judgment or, in the alternative, a new trial on the basis that the verdict of guilty, as to the DUI convictions, was against the weight of the evidence. By order dated August 27, 2012, we denied Defendant's challenge to the verdict.[2]

Defendant filed his Notice of Appeal to the Superior Court on September 25, 2012. At the time, we were not provided a copy. However, upon learning of the appeal, we immediately issued a Rule 1925(b) order on October 9, 2012, granting Defendant twenty-one days within which to file a Concise Statement of Matters Complained of on Appeal. After this time had passed, Defendant requested additional time to file his concise statement. This request was granted, and on November 5, 2012, Defendant's statement was filed. In this statement, Defendant identifies the same issues previously raised in his Post-Sentence Motion. For the reasons that follow, we believe the appeal is without merit.

[1] Pursuant to 75 Pa. C.S.A. §3804(c)(1), as a first time offender, Defendant was sentenced to a term of imprisonment of not less than seventy-two hours nor more than six months, loss of his driving privileges for a period of one year and a fine of two thousand five hundred dollars for violating Section 3802(d). Additionally, Defendant was ordered to make restitution to the victims of the motor vehicle accident resulting from this violation in the amount of one thousand two hundred five dollars and eighty-seven cents ($1,205.87), and to their insurance company in the amount of eleven thousand two hundred fifty-eight dollars and thirty-five cents ($11,258.35). By order dated September 20, 2012, this sentence was modified, upon stipulation of the parties, to delete the latter amount, the court being advised that Defendant's insurance company had reimbursed this amount to the victim's insurance company. **But see, Commonwealth v. Stradley,** 50 A.3d 769, 773 (Pa. Super. 2012) (requiring the sentencing court to direct defendant to pay restitution to his own insurance company when it is determined that the victim has been fully compensated by defendant's insurance carrier).

No further sentence was imposed for Defendant's Section 3802(a) violation, this conviction having merged with that under Section 3802(d). **See Commonwealth v. McCoy,** 895 A.2d 18, 26-27 (Pa. Super. 2006) (requiring merger where violations of subsections of the same statute are designed to proscribe a single harm and the defendant in violating them committed one act). A fine of twenty-five dollars was imposed on the summary offense.

[2] In his Post-Sentence Motion, Defendant also petitioned this court to continue his release on bail pending appeal, as well as requested the appointment of new counsel. We granted Defendant's request to remain on bail, conditioned upon his perfecting and pursuing an appeal. Additionally, new counsel has since entered his appearance for Defendant.

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of December 4, 2010, Valerie Stankavage ("Wife"), Joseph Stankavage ("Husband"), and their eight-month-old son were traveling eastbound on State Route 443, in Mahoning Township, Carbon County, on their way home from a family gathering they had attended earlier that day. In this area, Route 443 is a two-lane highway, running generally in an east/west direction. As Wife was operating the vehicle, a Nissan Altima, Husband sat behind her next to their son, who was seated in a car seat. Unexpectedly, two headlights appeared from a vehicle moving westbound, heading directly for the Stankavage vehicle. The headlights belonged to Defendant's vehicle, a Nissan Xterra. Defendant, who was by himself, continued driving in the wrong lane for a distance of approximately three hundred and fifty feet. (N.T. 7/20/12, pp. 96-97, 103.) Just before impact, Defendant swerved to his right crashing his vehicle into the front driver side of the Stankavages' sedan.[3]

The accident occurred at approximately 6:27 P.M. Both Officer Richton Penn of the Mahoning Township Police Department and Sergeant Joseph Lawrence of the Lehighton Borough Police Department were dispatched to the scene. Officer Penn arrived first, at approximately 6:31 P.M. Upon his arrival, he observed Defendant sitting in the driver's seat of the Xterra.[4]

At first, Officer Penn thought Defendant was unconscious, as he was slumped over the driver's seat. With the intent of gaining Defendant's attention, Officer Penn knocked on driver's side window of Defendant's vehicle. Defendant responded by rolling the window down. The officer asked Defendant if he was hurt, to which Defendant replied no. (N.T. 7/20/12, p. 28.)

[3] Wife was unable to move her car to the westbound lane as there were other vehicles traveling in that direction. A steep rise adjacent to the eastbound lane prevented her from pulling off the road on her side of the highway. Wife slowed her vehicle down and moved as close as possible to the eastbound shoulder. (N.T. 7/20/12, pp. 104-105.) Unfortunately, she was unable to avoid the collision.

[4] When he arrived, Officer Penn observed the Xterra partially in the westbound lane and partially on the shoulder. The Altima was observed to be partially in the eastbound lane and partially on the shoulder.

Next, Officer Penn directed Defendant to remain in his vehicle until emergency medical services ("EMS") arrived. As they waited, Officer Penn requested that Defendant produce identification. After searching through his wallet and the center console of his vehicle for close to four minutes, in the process passing over his driver's license multiple times while looking through his wallet, Defendant eventually located his license. During this initial exchange, Officer Penn noticed that Defendant's speech was slurred and that his eyes had a glassy-like appearance.

EMS arrived a short time later. After being escorted to the EMS vehicle, Defendant refused treatment. Officer Penn attempted to speak with Defendant regarding this decision. During this second exchange, the officer noticed that Defendant's breath smelled of alcohol and that Defendant had difficulty standing on his own, needing to lean against the EMS vehicle in order to maintain his balance. Suspecting that Defendant was under the influence of alcohol, the officer asked Defendant whether he had been drinking. Though originally denying he had any alcoholic beverages that day, Defendant later admitted to having a few drinks. (N.T. 7/20/12, p. 29.)

At the officer's request, Defendant performed two field sobriety tests and failed both.[5] Defendant explained to Officer Penn that he was unable to perform the tests because of prescription medication he had taken that day.[6] (N.T. 7/20/12, p. 31.) Defendant was unable to recall how long prior to operating the vehicle he had taken this medication.

It was at this point in time that Sergeant Lawrence arrived at the scene. Sergeant Lawrence observed Defendant being given the horizontal gaze nystagmus (HGN) test. Sergeant Lawrence noticed as well that Defendant's speech was slurred and that Defendant was off balance and swayed. Later, while performing an

[5] The two tests administered were the heel to toe, and one leg stand. Officer Penn also administered the horizontal gaze nystagmus test.

[6] Defendant suffers from lupus and other medical conditions. As of December 4, 2010, Defendant was prescribed at least eleven prescription medications. (N.T. 7/20/12, pp. 136, 177-78.) These included Cabergoline, methotrexate, Naprosyn, Lyrica, Flexeril, Oxycontin, Pristique, prednisone, folic acid, Actonel and Mobic. (Defendant's Exhibit No. 3.) At the time of the accident, Defendant was being weaned from prednisone.

inventory search of Defendant's vehicle prior to its removal from the accident scene, Sergeant Lawrence found a plastic bag with several white pills inside. (Defendant's Exhibit No. 2; N.T. 7/20/12, p. 201.) No prescription containers or prescription information was found. (Defendant's Exhibit No. 1.) Defendant claimed these were samples his doctor had given him.

Based upon his observations at the scene, Officer Penn initially concluded that Defendant was under the influence of alcohol to a degree which rendered him incapable of safe driving. (N.T. 7/20/12, pp. 32-33.) As such, Defendant was taken into custody and a search incident to arrest was performed. From Defendant's pant pockets, Officer Penn recovered three pills wrapped in a plastic baggie and a small white plastic bottle without markings also containing several pills inside.[7] (N.T. 7/20/12, pp. 33-34, 62, 201.) The officer transported Defendant to the Gnaden Huetten Memorial Hospital in Lehighton where he refused to submit to a blood test.[8] Defendant did not complain of nor was he treated for any injuries at the hospital. (N.T. 7/20/12, p. 35.)

A criminal complaint was filed against Defendant on January 12, 2011. On July 20, 2012, Defendant appeared before this court for a bench trial, where he was found guilty of two counts of DUI and one count of driving in the opposite lane of traffic, a summary offense. Defendant has since been sentenced and his Post-Sentence Motion denied. On September 25, 2012, Defendant filed a timely

[7] Officer Penn was unable, at the time of the search, to identify the pills. He did, though, submit the evidence to the Pennsylvania State Police Crime Lab. No further information regarding the identification of the pills was introduced at trial.

[8] When they arrived at the hospital, Officer Penn read Defendant the PennDOT DL-26 Form and advised him of his rights. Defendant requested to speak with an attorney, which Officer Penn explained he was not entitled to at this stage of the proceedings. Defendant then asked to speak with his wife, and again the officer explained that he did not have the right to speak with anyone regarding his decision. Defendant responded by screaming that he was not refusing to take the test, but rather that he was simply not consenting to it. He did so multiple times. The officer explained to Defendant that failure to consent to the test would be considered a refusal. Sergeant Lawrence witnessed this exchange, which lasted approximately twenty minutes. At the conclusion, Defendant's refusal to submit to the blood alcohol test was documented by Officer Penn. (Commonwealth Exhibit No. 1.) Linda Hopis, a registered nurse, was a witness to Defendant's refusal. According to her stipulated testimony, she would not have signed as a witness to Defendant's refusal had she not heard the **O'Connell** warnings read.

appeal with the Pennsylvania Superior Court challenging both the sufficiency and weight of the evidence to sustain the DUI convictions. We discuss both issues below.

DISCUSSION

I. **Sufficiency of the Evidence**

Defendant contends that the evidence was insufficient to support his convictions for DUI under 75 Pa. C.S.A. §§3802(a)(1) and (d)(3).

> When reviewing a sufficiency of the evidence claim, the ... court must review all of the evidence and all reasonable inferences drawn therefrom in the light most favorable to the Commonwealth, as the verdict winner. Evidence will be deemed to support the verdict when it establishes each element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. The Commonwealth need not preclude every possibility of innocence or establish the defendant's guilt to a mathematical certainty. Finally, the trier of fact while passing upon the credibility of the witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Smith, 904 A.2d 30, 37-38 (Pa. Super. 2006) (citations omitted).

A. **DUI—Section 3802(a)(1)**

In regards to Section 3802(a)(1), Defendant claims that the Commonwealth failed to establish that he had consumed a sufficient amount of alcohol to render him incapable of safe driving. We disagree.

To sustain a defendant's guilt under Section 3802(a)(1), the Commonwealth must establish beyond a reasonable doubt that the defendant was operating a motor vehicle while under the influence of alcohol to a degree which rendered him incapable of safe driving. 75 Pa. C.S.A. §3802(a)(1). Here, the evidence, when viewed in the light most favorable to the Commonwealth, was clearly sufficient to sustain a finding that Defendant did just that.

The arresting officer testified that Defendant exhibited several signs of intoxication—slurred speech, glassy eyes, inability

to stand on his own, an odor of alcohol, difficulty producing his identification, and failure to pass several field sobriety tests. Based upon these observations and being of the opinion that Defendant was under the influence of alcohol to a degree which rendered him incapable of safe driving, Officer Penn took Defendant into custody and requested a blood alcohol test. Defendant refused. In addition, Defendant drove in the face of oncoming traffic and was responsible for causing a motor vehicle accident. When questioned by Officer Penn, he denied that he was injured and he refused medical treatment.

These facts, combined with Defendant's admission to having consumed two alcoholic beverages, amply support Defendant's conviction of this offense.[9] **See Commonwealth v. Palmer,** 751 A.2d 223, 228 (Pa. Super. 2000) ("Evidence that the driver was not in control of himself, such as failing to pass a field sobriety test, may establish that the driver was under the influence of alcohol to a degree which rendered him incapable of safe driving ... ."); **Commonwealth v. Feathers,** 442 Pa. Super. 490, 502, 660 A.2d 90, 96 (1995) (evidence that driver had glossy eyes, slurred speech, strong odor of alcohol, imbalance, difficulty in producing license, and failure of field sobriety tests was sufficient to establish that she was under the influence of alcohol to a degree which rendered her incapable of safe driving); **see also,** 75 Pa. C.S.A. §1547(e) (refusal is a factor properly considered in determining whether a driver is under the influence of alcohol).

B. **DUI—Section 3802(d)(3)**

We likewise find that the evidence was sufficient to support Defendant's conviction of DUI pursuant to Section 3802(d)(3). In this regard, Defendant challenges the sufficiency of the evidence on the basis that the Commonwealth failed to produce a qualified witness who could attest to the quantity of drugs, if any, present in his body and the effect that these drugs had on his ability to drive or operate a motor vehicle.

[9] Although Sergeant Lawrence did not detect an odor of alcohol, Sergeant Lawrence did opine that Defendant was clearly under the influence of alcohol or a controlled substance, and unable to drive safely. (N.T. 7/20/12, pp. 72-73.) We found the testimony of both officers to be credible.

Section 3802(d) of the Vehicle Code provides:

> (d) Controlled substances.—An individual may not drive, operate or be in actual physical control of the movement of a vehicle under any of the following circumstances:
>
> (1) There is in the individual's blood any amount of a:
>
> (i) Schedule I controlled substance, as defined in ... The Controlled Substance, Drug, Device and Cosmetic Act;
>
> (ii) Schedule II or Schedule III controlled substance, as defined in The Controlled Substance, Drug, Device and Cosmetic Act, which has not been medically prescribed for the individual; or
>
> (iii) metabolite of a substance under subparagraph (i) or (ii).
>
> (2) The individual is under the influence of a drug or combination of drugs to a degree which impairs the individual's ability to safely drive, operate or be in actual physical control of the movement of the vehicle.
>
> (3) **The individual is under the combined influence of alcohol and a drug or combination of drugs to a degree which impairs the individual's ability to safely drive, operate or be in actual physical control of the movement of the vehicle.**

75 Pa. C.S. §3802(d)(1)-(3) (emphasis added to subsection at issue here).

To sustain Defendant's conviction under Section 3802(d)(3), the Commonwealth must prove beyond a reasonable doubt that as the driver of a motor vehicle, Defendant was under the combined influence of alcohol and a drug or a combination of drugs to a degree which impaired his ability to safely drive. 75 Pa. C.S.A. §3802(d)(3). Pursuant to the plain language of the statute, it is not necessary to prove that any specific quantity of alcohol or of a drug was present in his system. **Cf. Commonwealth v. Williamson,** 962 A.2d 1200, 1204 (Pa. Super. 2008) (interpreting Section 3802(d)(2) as addressing the effect, rather than the quantity, of a drug in a defendant's blood or urine), **appeal denied,** 602 Pa. 666, 980 A.2d 608 (2009).

In **Commonwealth v. Griffith,** 613 Pa. 171, 180, 32 A.3d 1231, 1237 (2011), our Supreme Court noted that:

> while subsection 3802(d)(1) prohibits driving when there is **any** quantity of illegal drug in one's blood, subsections 3802(d)(2) and (d)(3) do not require that a drug be chemically detectible

> in the defendant's body or that blood tests be performed. ... Rather, the text of subsections 3801(d)(2) [sic] and (d)(3) requires only that one's ability to safely drive be impaired because of the influence of a drug.

Id. (citations omitted and emphasis in the original).

At issue in **Griffith** was whether expert testimony was required "to convict a defendant of driving under the influence of a drug or combination of drugs, 75 Pa. C.S. §3802(d)(2), when the drugs in question are prescription medications." **Id.** at 174, 32 A.3d at 1233. As a matter of law, the court declined to "read into subsection 3802(d)(2) a mandatory requirement for expert testimony to establish that the defendant's inability to drive safely was caused by ingestion of a drug, even if it is a prescription drug, or drug combination." **Id.** at 181, 32 A.3d at 1238. Similarly, we conclude here that for the Commonwealth to prove its case under Section 3802(d)(3), it is not necessary to produce expert testimony to establish that Defendant's ability to drive safely was impaired by the combined influence of alcohol and a drug or combination of drugs. This section "neither specifies nor limits the type of evidence that the Commonwealth may proffer to prove its case." **Id.** at 182, 32 A.3d at 1238. Rather, as with Section 3802(a)(1), the Commonwealth is allowed to establish this element of the offense by wholly circumstantial evidence. **Id.** at 182-83, 32 A.3d at 1238-39.

On the day of the accident, several white pills were discovered in a plastic bag in Defendant's motor vehicle, he had drugs in his pant pockets, and he acknowledged that he was unable to perform the field tests because of the prescriptive medication he had taken earlier that day. Hypodermic needles were also found in his vehicle. (Defendant's Exhibit No. 2; N.T. 7/20/12, p. 205.) This evidence, taken together with that discussed to sustain Defendant's Section 3802(a)(1) conviction, is more than sufficient to support a finding that Defendant's ability to safely drive was impaired because of the influence of a combination of alcohol and one or more drugs.

Moreover, the evidence showed that Defendant, a former bartender, had been warned against consuming alcohol while taking his prescription medications. Unfortunately, on the day of the accident, Defendant ignored these warnings. The effect, as is evident, was tragically clear.

II. **Weight of the Evidence**

Defendant also contends that he is entitled to have judgment arrested or, in the alternative, be awarded a new trial on the grounds the verdict of guilty as to the DUI charges was against the weight of the evidence.

> It is well settled that the [fact-finder] is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses, and a new trial based on a weight of the evidence claim is only warranted where the [factfinder's] [sic] verdict is so contrary to the evidence that it shocks one's sense of justice.

Commonwealth v. Karns, 50 A.3d 158, 166 (Pa. Super. 2012) (citation omitted).

A. **DUI—Section 3802(a)(1)**

With respect to Section 3802(a)(1), Defendant contends the verdict was against the weight of the evidence because the Commonwealth did not introduce evidence of Defendant's BAC level and because the totality of the evidence indicates that the accident occurred as a result of a preexisting medical condition, not alcohol.

We first note that Section 3802 (a)(1) does not require "a blood or breath test to determine alcohol level ... ; rather, a different standard is used, to wit, imbibing a sufficient amount of alcohol such that [one] is rendered incapable of safely driving." **Griffith, supra** at 182, 32 A.3d at 1238 (citation and quotation marks omitted). Hence, the fact that the Commonwealth did not introduce evidence of Defendant's BAC level is immaterial to Defendant's claim.

In order to establish that Defendant had consumed a sufficient amount of alcohol such that he was impaired and incapable of safe driving, the Commonwealth introduced the testimony of Wife that Defendant was driving in the wrong lane, towards her, for almost three hundred and fifty feet. The Commonwealth further presented the testimony of the arresting officer that Defendant's behavior was indicative of someone who was under the influence of alcohol, and that Defendant had admitted to consuming two alcoholic beverages that day. In addition, two officers with experience in prosecuting DUI cases both opined that Defendant was under the influence and incapable of safe driving. **See Commonwealth v. DiPanfilo,**

993 A.2d 1262, 1267 (Pa. Super. 2010) (under Section 3802(a)(1) "the Commonwealth may present any form of proof, including defendant's behavior, the nature of the accident itself, and any other relevant evidence (which may or may not include blood alcohol tests)"), **appeal denied,** 40 A.3d 120 (Pa. 2012).

To refute this evidence, Defendant presented the testimony of various family members and a friend. The first to testify was Defendant's wife, Heather Jaeger. According to Mrs. Jaeger, Defendant was with her at her parents' house in Jim Thorpe hanging Christmas decorations from 9:30 A.M. until approximately 11:00 A.M. (N.T. 7/20/12, pp. 111-12.) Mrs. Jaeger further testified that she did not observe her husband consuming any alcoholic beverages during this period of time. To the contrary, Mrs. Jaeger testified that since Defendant had been prescribed his medications, he no longer consumed any alcoholic beverages because he knew the side effects of doing so. (N.T. 7/20/12, pp. 133-35, 216.)

Next to testify was Defendant's mother, Susan Jaeger. Defendant's mother testified she was with Defendant at her daughter's apartment in Lehighton from approximately 11:30 A.M. until 5:00 P.M.[10] She also testified that she did not observe Defendant consuming any alcoholic beverages during this period. However, it is important to note that Defendant's mother was not physically in her son's presence during this entire five-and-a-half hour period, as she remained outside, in her vehicle, while Defendant was inside the apartment with his sister.[11] Finally, Defendant's mother testified that Defendant left her daughter's apartment at around 5:00 P.M. to get her coffee. When he did not return by 5:30-6:00 P.M., she thought he had forgotten about the coffee. (N.T. 7/20/12, pp. 149.)

Defendant then called his friend Jim Kemmerer, who lives in Lehighton. Mr. Kemmerer testified Defendant arrived at his home close to 5:00 P.M. Mr. Kemmerer also stated that Defendant was

[10] While at his wife's parents' house, Defendant received a phone call from his sister between the hours of 10:00 A.M. and 11:00 A.M. indicating that her vehicle had been stolen. In response, Defendant went to his sister's apartment, arriving there sometime between 11:00 A.M. and 11:30 A.M.

[11] While Defendant was inside his sister's apartment, Defendant's mother waited outside to see if the individual responsible for taking her daughter's vehicle would return. As such, she saw Defendant only a couple of times that day, when he came to bring her water. Defendant's sister did not testify.

worked up about his sister's car being taken and that he tried to calm him down. Mr. Kemmerer denied that Defendant consumed any alcohol while he was with him. Finally, because as Defendant left, he told Mr. Kemmerer he was going back to his sister's apartment, Mr. Kemmerer did not understand why the accident happened where and when it did. (N.T. 7/20/12, pp. 157-58.) Defendant's father, Richard Jaeger, who next testified, stated that Defendant was supposed to pick up his sister's daughter, Jaden, in Palmerton sometime between 5:15 P.M. and 5:30 P.M., but that Defendant failed to show. (N.T. 7/20/12, pp. 146-47, 150, 169-70.)

Defendant was the last person to testify on his behalf. Defendant testified that he left his sister's apartment sometime between 4:15 P.M. and 4:30 P.M. to get something to eat and to pick up coffee for his mother. (N.T. 7/20/12, p. 180.) He admitted first going to Mr. Kemmerer's home where he remained for thirty to forty minutes, leaving at approximately 5:00 P.M.

To account for the hour-and-a-half gap between when he left Mr. Kemmerer's home and the time of the accident, Defendant testified that on his way to McDonald's (located on Route 443) to get something to eat, he stopped at the Lehighton Rite Aid for approximately an hour to fill a prescription. He then decided to go to Walmart, where he was headed at the time of the accident. He never credibly explained why he was running more than an hour late to pick up his niece; why no recently filled prescription was found in his vehicle when searched by Sergeant Lawrence; or why, after more than two hours had passed since he left his sister's apartment, he had yet to eat or get coffee for his mother. Defendant maintained, nevertheless, that he did not drink any alcoholic beverage during this period.

Defendant's account of how the accident occurred was as follows: he was traveling westbound on Route 443 on his way to Walmart. There was a vehicle directly in front of him "brake checking him"; however, he could not slow his vehicle down, as there was another vehicle directly behind him. Suddenly, as he was in his lane of traffic, he was struck on the side by the Stankavages' vehicle.

To explain his erratic behavior after the accident, Defendant claimed he sustained a concussion in the accident. To support that claim, Defendant testified that for two days after the accident

he was not himself—that among other things, he was confused, dizzy, off balance, nauseous and experiencing headaches. As a consequence, he went to St. Luke's Miners Memorial Hospital in Coaldale on December 6, 2010, where he reported his symptoms, had some imaging studies taken which were normal, and received the clinical impression that he had sustained a concussion. This impression was based solely on Defendant's self reporting, two days after the accident, and after Defendant had been arrested for DUI, refused a blood alcohol test, and told Officer Penn he was not injured. Further, Defendant's claim of sustaining a concussion in the accident does not explain his conduct before the accident and which was the cause of the accident: why he drove in the opposing lane of traffic and failed to safely return to his lane of traffic.

It is clear that each of the witnesses who testified in Defendant's behalf had an interest in helping him. It is also clear that in order to accept their testimony we would have to disregard the testimony of the arresting officer concerning the indicia of intoxication he observed, including the odor of alcohol on Defendant's breath and the statement given by Defendant that he had been drinking that day. Defendant further asks us to disbelieve the testimony of Wife about Defendant driving in her lane of traffic against oncoming traffic for a distance of almost three hundred and fifty feet. We did not do so, accepting instead the evidence presented by the Commonwealth.

After considering the totality of the evidence, we found that Defendant was under the influence to a degree which rendered him incapable of safe driving. Given the evidence, the verdict is not so contrary to the evidence as to shock one's sense of justice. Accordingly, Defendant's conviction for DUI in violation of 3802(a)(1) should stand.

B. **DUI—Section 3802(d)(3)**

Lastly, Defendant claims that his conviction for violating Section 3802(d)(3) was against the weight of the evidence because the Commonwealth did not present a drug recognition expert, or introduce evidence of Defendant's BAC level or the concentration of drugs in his system. As previously stated, the Commonwealth is not required to present a drug recognition expert in proving its case pursuant to Section 3802(d)(3). Further, Section 3802(d)(3),

by its plain language, does not require that the Commonwealth establish Defendant's BAC level or quantify, to any extent, the amount of drugs in his system.

The Commonwealth offered circumstantial evidence to establish that Defendant had been operating the motor vehicle while under the influence of a combination of alcohol and drugs. This evidence showed that Defendant was driving on the wrong side of the road prior to colliding with the Stankavages' vehicle; that Defendant exhibited signs of intoxication; that Defendant had consumed at least two alcoholic beverages at some point before the accident; that Defendant admitted he was unable to perform the field sobriety test because of the medication he had taken; and that Defendant, at the time of the accident, was not only heavily medicated, but had also consumed alcohol notwithstanding medical advice not to mix the two. Defendant failed to produce any credible testimony to refute the Commonwealth's evidence. As such, his conviction for DUI in violation of Section 3802(d)(3) was appropriate.

CONCLUSION

In accordance with the foregoing, we conclude Defendant's contentions are without merit. We, therefore, find that Defendant is not entitled to any of the remedies he seeks.

AMERICAN EXPRESS CENTURION BANK, Plaintiff
vs. ALFONSO SEBIA, Defendant

Civil Law—Credit Card Collection—Express Contract—Implied in Fact Contract—Account Stated—Pleading Requirements

1. In a claim for breach of contract, the plaintiff must allege and prove that there was a contract, the defendant breached it and plaintiff suffered damages from the breach.

2. Where plaintiff's complaint asserts a cause of action for breach of a specific express written contract between the parties, the plaintiff's failure to present a copy of the contract, or its terms and conditions, fails to prove a case for breach of an express contract or entitlement to damages thereunder.

3. A contract implied in fact arises where the parties agree upon the obligations to be incurred, but their intention, instead of being expressed in words, is inferred from their acts in the light of the surrounding circumstances. An implied contract may be found to exist where the surrounding circumstances support a demonstrated intent to contract.

4. At trial, a plaintiff who has failed to prove breach of an express contract, as averred in the complaint, may not then attempt to demonstrate a contract implied in fact unless such cause of action is averred in the complaint, or a request to amend the pleadings is granted.

5. An account stated is a debt as a matter of contract implied by law.

6. The necessary averments in a complaint based upon an account stated is that there had been a running account, that a balance remains due upon that account, that the account has been rendered unto the defendant, that the defendant has assented to the account, and a copy of said account is attached to the complaint.

7. The essence of a common-law action for an account stated is an agreement, either expressed or implied, based upon prior transactions, between two parties as to the correctness of an amount due. This amount constitutes a new and independent cause of action, superseding and merging the antecedent causes of action represented by the preceding series of transactions.

8. Where a complaint fails to allege a cause of action for an account stated, an amendment of the pleadings, at trial, will not be permitted if it would result in unfair surprise or prejudice to the other party. If the amendment contains allegations which could have been included in the original pleading, as is the usual case, then the question of prejudice is presented by the **time** at which it is offered rather than by the substance of what is offered.

NO. 10-0451

JORDAN FELZER, Esquire—Counsel for the Plaintiff.

CYNTHIA S. RAY, Esquire—Counsel for the Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—December 7, 2012

As is often the case in credit card collection cases, the parties here dispute not only the amount, but also the obligation of the credit card holder for unpaid principal, interest, attorney fees and penalties claimed by the issuing bank. What distinguishes this case from a typical debt collection proceeding, and is critical to our decision, is the need to determine what cause or causes of action Plaintiff has set forth in its complaint.

At trial, the Plaintiff, American Express Centurion Bank ("Bank"), was unsure of its cause of action: whether for an account stated, for breach of contract, or for both. The Defendant, Alfonso Sebia ("Sebia"), argued neither cause of action was proven, but to the extent one was pled, it was for breach of contract.

PROCEDURAL AND FACTUAL BACKGROUND

Bank commenced this action by complaint filed on February 22, 2010. Preliminary objections alleging, **inter alia,** insufficient

specificity were filed and granted, with leave to file an amended complaint. This was duly filed on August 26, 2010. Therein, the Bank alleged that Sebia applied for and obtained a credit card from the Bank; that Sebia's credit card account was opened on or about January 17, 1994, pursuant to a written cardmember agreement in effect at all times relevant; that pursuant to the cardmember agreement, Sebia was given the right to make purchases for a promise to timely pay the unpaid principal balance plus interest, fees and penalties when applicable; that Sebia used the account which, as of January 2009, had an unpaid overdue balance of $10,073.92, with the most recent payment made on or about September 4, 2008, in the amount of $250.00;[1] and that Sebia had "failed to make timely payments on the account, although demand was made for said payments, thereby breaching the contract." Also attached to the complaint and incorporated by reference were monthly credit card statements on the account for the period beginning February 2008 and ending February 2009, and a cardmember agreement purported to be that for Sebia's account.[2]

The complaint consists of fifteen numbered paragraphs. All are beneath the heading "First Count," even though no additional counts are identified in the complaint. Sebia essentially denied all allegations of the complaint, in the process denying that he applied for, received, used, or made payments on the credit card which is the subject of these proceedings.

A non-jury trial was held on February 10, 2012. At this trial, Bank presented no witnesses and elected to try its entire case through the use of documents offered pursuant to Pa. R.C.P. 1311.1. These documents consisted of billing statements for the account from February 9, 2005 through April 10, 2009, Exhibits P-1 through P-47, and six checks making payments on the account at various times between June 21, 2005 and April 25, 2006,

[1] No other payments are alleged in the complaint or credited in any of the billing statements attached as exhibits. Nor is there any averment that Sebia at any time assented to the correctness of the account or that billing statements were submitted to him and retained for an unreasonable length of time without payment.

[2] The cardmember agreement attached to the complaint consisted of twelve typewritten pages, contained no signature or signature line, and bore a generation date of January 2009.

Exhibits P-48 through P-53, purportedly written by Sebia to the order of American Express. The unpaid balance evidenced by the account statements, as of the last statement, was $10,154.05.[3] Sebia presented no evidence in his defense and was not personally present at trial.

DISCUSSION

Count one of the complaint clearly sets forth a claim for breach of an express contract. "In a claim for breach of contract, the plaintiff must allege that there was a contract, the defendant breached it, and plaintiff suffered damages from the breach." **Discover Bank v. Stucka,** 33 A.3d 82, 87 (Pa. Super. 2011) (citation and quotation marks omitted). Here, the complaint identifies and attaches the professed contract which is the subject of the action —the cardmember agreement, alleges its terms were breached by Sebia's failure to make timely payments when due, and claims $10,073.92 is due and owing.

Notwithstanding these averments, at the time of trial, Bank failed to prove a breach of the cardmember agreement. In fact, Bank never sought to introduce or have admitted the cardmember agreement attached to the complaint, or to prove any other express agreement. Having failed to prove the existence or terms of an express contract whose terms were breached, Bank failed to prove a case for breach of an express contract and entitlement to damages thereunder.

What was proven was Sebia's acceptance of Bank's offer to open a credit card account by his use of the credit card issued to purchase goods and services. Also proven was that Sebia, on various specified dates, made payments on the credit card balance, as billed, and then continued to use the card. The Bank further proved that Sebia's course of conduct established his understanding and acceptance of certain terms and conditions for use of the credit card account and that Sebia breached these terms by failing to make required payments when due.

In accordance with the foregoing, while we believe the Bank's evidence, if accepted, establishes the existence of a contract implied

[3] No cardmember agreement was offered or admitted into evidence.

in fact and its breach, this cause of action was never pled nor did Bank ever seek to amend its pleadings to assert such claim.

> A contract implied in fact arises where the parties agree upon the obligations to be incurred, but their intention, instead of being expressed in words, is inferred from their acts in the light of the surrounding circumstances. An implied contract may be found to exist where the surrounding circumstances support a demonstrated intent to contract.

Id. at 88 (citations and quotation marks omitted). Absent the pleading of this claim, Bank is not entitled to recovery on this basis. **See Birchwood Lakes Community Association, Inc. v. Comis,** 296 Pa. Super. 77, 86, 442 A.2d 304, 308 (1982) (If a plaintiff fails to succeed in his claim based on an express contract he may not then attempt to demonstrate a contract implied in fact unless such has been averred in the complaint.); **see also, Allegheny Ludlum Industries, Inc. v. CPM Engineers, Inc.,** 278 Pa. Super. 201, 205, 420 A.2d 500, 501-502 (1980) ("The wrong which may be proved must be the wrong which has been alleged, not merely another wrong in the same legal category.").

Nor did Bank's complaint allege a **prima facie** case for a cause of action sounding in account stated. The essence of a common law action for an account stated is an agreement, either express or implied, based upon prior transactions, between two parties as to the correctness of an amount due. **Connolly Epstein Chicco Foxman Engelmyer & Ewing v. Fanslow,** 1995 WL 686045 at *5 (E.D. Pa. 1995); **see also, David v. Veitscher Magnesitwerke Actien Gesellschaft,** 348 Pa. 335, 341-42, 35 A.2d 346, 349 (1944) (finding that the essence of an account stated consists in the rendering of an account whose accuracy the other party has accepted, agreed to, or acquiesced in).

An account stated is an "account in writing, examined and accepted by both parties, which acceptance need not be expressly so, but may be implied from the circumstances." **Robbins v. Weinstein,** 143 Pa. Super. 307, 316, 17 A.2d 629, 634 (1941).

> An 'account stated' traditionally arises when two parties, who engage in a series of transactions with one another, come together to balance the credits and debits and fix upon a total

amount owed. **See David v. Veitscher Magnesitwerke Actien Gesellschaft,** 348 Pa. 335, 35 A.2d 346, 349 (1944). This final tally, once assented to, becomes the 'account stated,' and any further cause of action is based on this 'account stated' rather than on any of the underlying transactions. **Id.**

The effect of an account stated is that

[t]he amount or balance so agreed upon constitutes a new and independent cause of action, superseding and merging the antecedent causes of action represented by the particular items. It is a liquidated debt, as binding as if evidenced by a note, bill or bond. Though there may be no express promise to pay, yet from the very fact of stating the account the law raises a promise as obligatory as if expressed in writing, to which the same legal incidents attach as if a note or bill were given for the balance.

Richburg v. Palisades Collection LLC, 247 F.R.D. 457, 464-65 (E.D. Pa. 2008) (citations and quotation marks omitted).

A cause of action for an account stated, though sounding in contract, is separate and apart from the specific contractual claims one could bring on the underlying transactions. **Id.** at 465.

It is an agreement between debtors and creditors. The parties agree to a consolidated statement of debt, give up their right to bring suit on any of the underlying debts, and create a duty to pay. Restatement (Second) of Contracts § 282 (1981); Restatement of Contracts § 422(1) (1932). The 'account stated' is 'a debt as a matter of contract implied by law. It is to be considered as one debt, and a recovery may be had upon it without regard to the items which compose it.' 29 Williston on Contracts § 73:58 (2007).

Id.

In the context of setting forth the pleading requirements for a complaint alleging a cause of action for an account stated, the court in **Rush's Service Center, Inc. v. Genareo,** stated the following:

The idea behind an action upon account stated is that a preceding contract has been discharged and merged into a stated account which is based upon the earlier contract. **McKinney v. Earl L. Cump Inc.,** 2 Adams Leg. J. 132 (1961).

The necessary averments in a complaint based upon an account stated is that there had been a running account, that a balance remains due upon that account, that the account has been rendered unto the defendant, that the defendant has assented to the account and a copy of said account is attached to the complaint. Ryon v. Andershonis, 42 Pa. D.&C.2d 86 (1967). **See also, Fischer v. Hyland Davry Co.,** 56 Luzerne Leg. Reg. 255 (1966). ...

The complaint need not set forth the nature of the original transaction. **Fischer, supra; Erie Insurance Exchange v. Foltz,** 34 Beaver L.J. 61 (1974). Neither is the subject matter of the original debt nor a promise to pay necessary. **McKinney, supra.** The alleged facts upon which the averred acceptance of the account is based are also not obligatory in the complaint. **Snyder v. Blain,** 49 Luzerne Leg. Reg. 1 (1959). The acceptance need not be express, but may be implied. **Fischer, supra; Donahue v. Philadelphia,** 157 Pa. Super. 124, 41 A.2d 579 (1944).

The party relying upon the account stated need not individually set forth the items of which the account consist. **Fischer, supra; Erie Insurance Exchange, supra.** That is to say that plaintiff is not required to itemize the account. **Weiner v. Gable,** 26 Lehigh L.J. 387, 69 York Leg. Rec. 119 (1955); **Knedler v. Clouse,** 53 Dauphin Rep. 228 (1943). Details of the book account upon which the claim is founded are not indispensable to the complaint. **Datto v. Corrizan,** 47 Lacka. Jur. 241 (1946).

10 D. & C.4th 445, 447-48 (Lawrence Co. 1991) (emphasis added).

While Bank's complaint evidences a running account—an account opened in 1994 and billing statements for the period from February 2008 through February 2009 inclusive, and an unpaid balance as of February 2009 of $10,073.92, critically absent from the complaint is any averment that any account for the period ending in February 2009 was submitted to Sebia or that the correctness of such account was accepted, agreed to or acquiesced in by him. **See Citibank (South Dakota) N.A., Bank v. Ananiev,** 13 D. & C.5th 557, 559 (Monroe Co. 2010) ("[T]he complaint

must include allegations which would support a finding that the cardholder has agreed to, or acquiesced in the correctness of the account."); **Ryon v. Andershonis,** 42 D. & C.2d 86, 87 (Schuylkill Co. 1967) (holding that, at a minimum, the plaintiff must allege that the defendant "assented to the correctness of the account submitted to him."). This is essential since the **sine qua non** of a claim premised upon an account stated is mutual assent to the correctness of the computation. Moreover, when asserting assent, it is not enough to simply aver or prove that billing statements were mailed but not responded to by the cardholder. **Target National Bank v. Kilbride,** 10 D. & C.5th 489, 492 (Centre Co. 2010) (**quoting C-E Glass v. Ryan,** 70 D. & C.2d 251, 253 (Beaver Co. 1975)); **accord, Braverman Kaskey v. Toidze,** 2011 WL 4851069 at *4 (E.D. Pa. 2011) ("Under Pennsylvania law, [plaintiff's] allegation that [defendant] never contested its bills is not sufficient to show acquiescence in the correctness of the account.").

Again, as was the case for a potential claim for breach of a contract implied by law, Bank made no request at trial, or previously, to amend its pleadings to include a claim for account stated or to conform the complaint to the evidence offered and admitted. **See** Pa. R.C.P. 1033 (Amendment); **see also, Tindall v. Friedman,** 970 A.2d 1159, 1171 (Pa. Super. 2009) (noting that Rule 1033 has been interpreted to allow amendments at any stage of the trial proceedings with the caveat that amendment cannot result in "unfair surprise or prejudice to the other party" and further stating that "[i]f the amendment contains allegations which could have been included in the original pleading, as is the usual case, then the question of prejudice is presented by the **time** at which it is offered rather than by the substance of what is offered") (citations omitted and emphasis in the original). In this regard, it is important to add that neither Sebia nor anyone on his behalf appeared at trial to testify, the record is closed, and a verdict has been rendered.

CONCLUSION

The complaint upon which the Bank's claim is based asserts a cause of action for breach of a specific express written contract between the parties. Because Bank has failed to prove the existence of this contract, or any other express agreement, Bank's claim must fail. **See Commonwealth Financial Systems v. Smith,** 13 D. & C.5th 1 (Delaware Co. 2010) (denying plaintiff's motion for post-trial relief for, among other reasons, plaintiff's failure to present the original contract between the parties, thereby failing to establish the first element of its action for breach of contract).

NATIONAL GENERAL PROPERTIES, INC., Plaintiff vs. FRANKLIN TOWNSHIP and CARL E. FAUST, in His Capacity As Building Code Official, Defendants

Civil Law—Uniform Construction Code—Equity Jurisdiction—Administrative Remedies—Preliminary Injunction

1. A municipality which has adopted the state Uniform Construction Code ("UCC") as its municipal building code is required to create or designate an appeals board to hear and decide appeals taken from decisions made by the local building code official who administers and enforces the UCC.

2. A fundamental prerequisite to the exercise of equity jurisdiction is the unavailability of an adequate remedy at law. Consequently, absent some demonstrated constitutional, statutory or regulatory infirmity, a party challenging a decision of the local building code official is not entitled to equitable relief and must first exhaust his administrative remedies under the UCC (**i.e.,** appeal to the appeals board) before proceeding to court.

3. The need to exhaust administrative remedies before proceeding to court applies notwithstanding a property owner's belief that the appeals board is prejudiced and cannot fairly and impartially decide the appeal. Before the impropriety of an official hearing a case can be raised on appeal because of bias, unfairness or procedural irregularities, such claims must first be raised before the official or administrative body whose impartiality has been questioned.

4. A preliminary injunction will not be granted absent a **clear right** in the plaintiff and **immediate** and **irreparable harm** if interim relief is not granted. A failure to establish any one of these prerequisites is sufficient to deny the requested injunction.

5. The prerequisites for the grant of a preliminary injunction—immediacy, irreparable harm and a clear right—to enjoin enforcement of the UCC against a property owner who is occupying property without an occupancy permit have not been met where the owner's appeal of the building code official's order to show cause/order to vacate to the appeals board automatically stays enforcement; the owner has failed to establish any actual harm, much less harm incapable of being fully compensated by monetary damages; and the owner's right to an occupancy permit is unclear in light of pending issues with respect to the owner's need to have a valid highway occupancy permit and which question compliance with requirements of the Pennsylvania Sewage Facilities Act, both of which remain unanswered.

NO. 12-0948

F. PETER LEHR, Esquire—Counsel for the Plaintiff.

JOHN J. MAHONEY, Esquire—Counsel for the Defendants.

MEMORANDUM OPINION

NANOVIC, P.J.—December 31, 2012

National General Properties, Inc. ("Owner") has requested that we enjoin an administrative hearing scheduled before the UCC Joint Board of Appeals ("Appeals Board") on Owner's appeal of an order issued by the local building code official.[1] For the reasons which follow, we find it would be inappropriate to exercise equity jurisdiction or to grant injunctive relief.

FACTUAL AND PROCEDURAL BACKGROUND

On February 25, 2012, Carl E. Faust, in his capacity as the building code official for Franklin Township, Carbon County, Pennsylvania ("Township") issued an order to show cause to Owner as to why its building located at 450 Interchange Road in the Township should not be vacated.[2] The reason given for the order was Owner's

[1] Pursuant to Section 501 of the Uniform Construction Code Act ("Act"), 35 P.S. §§7210.101-7210.1103, a municipality which has adopted an ordinance for the administration and enforcement of the Act shall establish or designate a board of appeals to hear appeals from decisions of the code administrator. In order to administer and enforce the provisions of the Act, the municipality must enact an ordinance concurrently adopting the current Uniform Construction Code as its municipal building code. 35 P.S. §7210.501(a)(1).

On June 15, 2004, Franklin Township elected to administer and enforce the provisions of the Act, as amended from time to time, and its regulations. **See** Franklin Township Ordinance No. 2004-01. Simultaneously, the Township adopted the Uniform Construction Code ("UCC"), 34 Pa. Code, Chapters 401-405, as amended from time to time, as its municipal building code. The Township, together with nine other municipalities in Carbon County, also established a UCC Joint Board of Appeals for the purpose of hearing and ruling on appeals from determinations of building code officials in their respective municipalities.

[2] The parties dispute the proper characterization of Mr. Faust's letter dated February 25, 2012. (Owner's Exhibit 9.) The Township contends this letter is a notice of violations under UCC §403.82. The Owner contends the letter is an order to show cause/order to vacate pursuant to UCC §403.83. Although the letter is not a model of precision, it does state that action is being started to have all tenants in the building vacated, that the reason for this decision is the Owner's failure to obtain any legal occupancy permits for tenant spaces in the building, and that the Owner has thirty days to submit a written response and to appeal from "this order to vacate." The letter further states that if certain information previously requested was provided—**i.e.,** a building permit application for each tenant space, appropriate plans and a letter from the sewage enforcement officer pertaining to the septic system drain field—"the vacate proceeding will be temporarily stayed." Given this language, we believe the February 25, 2012 letter is properly termed as an order to show cause/order to vacate within the meaning of UCC §403.83.

alleged failure to obtain "any legal occupancy permits" for its tenants, a violation of Section 403.46(a) of the Uniform Construction Code ("UCC"), 34 Pa. Code §403.46(a), which states that a building may not be used or occupied without a certificate of occupancy.

The building was purchased by Owner in 2007 and subsequently renovated. It contains four rental suites. At the time the order was issued, three of these suites were occupied and being used for commercial purposes: (1) a pet store; (2) offices for an engineering firm; and (3) as a beauty salon and spa. The order also stated that under the UCC the Owner had thirty days to submit a written response.

On March 27, 2012, Owner appealed the building code official's decision to the Appeals Board using a form petition made available for this purpose by the Township. **See** UCC §403.122(a) (requiring a municipality to provide a form petition for filing appeals). As part of this appeal, Owner included correspondence from its counsel dated March 27, 2012, explaining the basis of the appeal. In this correspondence, counsel stated that the property was acquired by Owner on December 28, 2007; that Owner made various renovations to different sections of the building between 2008 and 2010, all pursuant to building permits issued by the Township; and that these renovations had been inspected and approved by the appropriate building code official. Consequently, counsel claimed the building code official was obligated to issue a certificate of occupancy for the property pursuant to UCC §403.46(b) (requiring a building code official to issue a certificate of occupancy within five business days of receipt of a final inspection report indicating compliance with the UCC).

On April 9, 2012, the Township Secretary sent to the Appeals Board the form petition Owner had completed in making its appeal. Also included in this mailing was a February 6, 2012 letter from Faust to a principal of Owner and a February 16, 2012 letter from Faust to Owner's counsel. These letters identified and documented specific information which had previously been requested by Faust before certificates of occupancy could be issued and which had only been alluded to in the February 25, 2012 vacate order. The information requested included building permit applications for each tenant space, completed architectural plans, and a letter from the sewage enforcement officer addressing the capacity of the

existing on-lot septic system to accept added loads to the system, as well as information pertaining to road access and storm water management. **See** UCC §§403.42 (requiring building permits prior to construction) and 403.42a(b) (requiring copies of Department of Transportation highway access permits to be attached to applications for building permits).[3] On April 12, 2012, the Township secretary also forwarded a copy of counsel's March 27, 2012 letter to the Appeals Board.

The Appeals Board originally scheduled a hearing on the Owner's appeal for May 9, 2012. This was later continued at Owner's request to June 20, 2012. Prior to this date, on May 2, 2012, Owner filed with the court a complaint in mandamus seeking to compel the issuance of a certificate of occupancy. This complaint, which names both the Township and Faust as defendants, alleges, in essence, that there is no basis in law or fact for Owner having been denied the issuance of a certificate of occupancy, and that UCC §403.46(b) requires the permit to be issued.

On the same date the mandamus complaint was filed, Owner also filed, to the same term and docket number, a petition for preliminary injunction seeking, **inter alia,** to stay the hearing before the UCC Appeals Board and to enjoin the Township and its officials from pursuing the pending enforcement action to vacate the building. In this petition, Owner contends that the procedural requirements of the UCC were not met, primarily because Owner's complete appeal (consisting of both the form petition and counsel's letter) was not forwarded to the Appeals Board within five business days as required by UCC §403.83(c), and that its rights to fundamental due process were infringed upon by the Board's receipt of copies of Faust's letters of February 6, 2012 and February 16, 2012. These letters, according to Owner, contain irrelevant and extraneous information which has irremediably prejudiced the Board and prevents Owner from receiving a full and fair hearing before the Board. Owner also claims the Board was never provided a copy of the order appealed from, Faust's letter of February 25, 2012.

[3] Section 403.43(d) of the UCC further provides:

> A building code official may not issue a permit for any property requiring access to a highway under the Department of Transportation's jurisdiction unless the permit contains notice that a highway occupancy permit is required under Section 420 of the State Highway Law (36 P.S. § 670-420) before driveway access to a Commonwealth highway is permitted.

A hearing on Owner's Petition for Preliminary Injunction was held on May 11, 2012. At this hearing, several issues arose which we requested counsel brief. These are discussed below.

DISCUSSION

Equity Jurisdiction

A fundamental prerequisite to the exercise of equity jurisdiction is the unavailability of an adequate remedy at law. **Commonwealth, Department of Public Welfare v. Eisenberg,** 499 Pa. 530, 534, 454 A.2d 513, 514-15 (1982). In this regard, UCC §403.122(a) permits an owner to appeal a building code official's decision to an appeals board. UCC §403.122(i) authorizes the board to deny the appeal, in full or in part; to grant the request, in full or in part; or to grant the request upon certain conditions being satisfied. Moreover, Owner did, in fact, file an appeal to the Appeals Board prior to filing its mandamus action and collateral request to enjoin proceedings before the Board. Therein, Owner asserted its compliance with the UCC and entitlement to a certificate of occupancy pursuant to UCC §403.46(b).[4] Significantly, this issue is within the scope of claims to be submitted to the Appeals Board for resolution.[5]

[4] Parenthetically, the grounds for appeal stated in Owner's petition to the Appeals Board are essentially the same as those set forth in its complaint in mandamus, which is an action at law. Though this itself raises the apparent incongruity of an equitable proceeding (**i.e.,** Owner's request for a preliminary injunction) issuing under the auspices of an action at law, more to the point is that a mandamus action, like one in equity, may not be maintained when another remedy or cause of action exists. "[M]andamus is an extraordinary writ which will only be granted to compel official performance of a ministerial act or mandatory duty where there is a clear legal right in the plaintiff, a corresponding duty in the defendant, and want of any other appropriate and adequate remedy." **Matesic v. Maleski,** 155 Pa. Commw. 154, 158, 624 A.2d 776, 778 (1993). Further, "[a] party challenging administrative decision-making that has not exhausted its administrative remedies is precluded from obtaining judicial review by mandamus or otherwise." **Id.**

[5] On this issue, UCC §403.121(b) provides:

> The board of appeals shall hear and rule on appeals, requests for variances and requests for extensions of time. An application for appeal shall be based on a claim that the true intent of the act or Uniform Construction Code has been incorrectly interpreted, the provisions of the act or Uniform Construction Code do not fully apply or an equivalent form of construction is to be used.

UCC §403.122(f) further provides:

> A board of appeals shall only consider the following factors when deciding an appeal under section 501(c)(2) of the act:

To the extent Owner claims the Appeals Board has been irreparably prejudiced by receipt of Faust's correspondence of February 6 and 16, 2012, and cannot fully and impartially decide its appeal, this fear is premature. First, it is unclear which members of the Board, if any, have received or reviewed such correspondence. It is also unclear whether the Board sits **en banc** or in panels. Before the impropriety of an official hearing a case can be raised on appeal because of bias, unfairness or procedural irregularities, such claims must first be raised in the first instance before the official or administrative body whose impartiality has been questioned. **HYK Construction Company, Inc. v. Smithfield Township,** 8 A.3d 1009 (Pa. Commw. 2010), **appeal denied,** 610 Pa. 623, 21 A.3d 1195 (2011).

> [R]ecusal motions are directed in the first instance to the official whose recusal is sought, for that official's self-assessment. ... It is only after that official's refusal to recuse, and some substantive action adverse to the movant, that the issue is ripe for review, for abuse of discretion, by another body.

Id. at 1017 n.9 (citations omitted).[6]

(1) The true intent of the act or Uniform Construction Code was incorrectly interpreted.

(2) The provisions of the act do not apply.

(3) An equivalent form of construction is to be used.

[6] Nor is it clear that the matters which Owner argues are unrelated to the UCC process are, in fact, unrelated. Faust testified that the Township has in place a resolution which prohibits the issuance of an occupancy permit unless all other laws and regulations are complied with. (N.T. 5/11/12, p. 109); **see also,** UCC §403.102(n) (requiring a municipality to provide a list of all other required permits necessary before issuance of the building permit, but stating that the municipality will not be liable for the completeness of any list). According to Faust, if a change in use occurs of property whose access is from a state highway, PennDOT must be notified and allowed to determine the need for or effect on any existing highway occupancy permit. Further, since sewage from the building flows into an on-lot septic system shared by three other properties, the capacity of this system to accept any changes in the type or volume of sewage effluent must be reviewed by the sewage enforcement officer. Complicating this matter is that waste from a beauty salon is considered industrial waste and, according to Faust, is prohibited from being deposited into a shared septic system. (N.T. 5/11/12, pp. 107-10.)

It is also worth noting that the reasons given in Faust's letters for not issuing a certificate of occupancy are not qualitatively different from the reasons cited in counsel's March 27, 2012 letter for why a certificate of occupancy should be

Owner has thus failed to demonstrate any constitutional, statutory or regulatory infirmities with respect to the administrative remedy available under the UCC. Rather than exhaust this administrative remedy, Owner now seeks, without adequate justification, to abort that which it initially invoked.[7]

Authority of Joint Municipal Appeals Board to Decide UCC Appeals

In **Middletown Township v. County of Delaware Uniform Construction Code Board of Appeal,** 42 A.3d 1196 (Pa. Commw. 2012) **(en banc),** the Commonwealth Court held that Section 501(c)(1) of the Uniform Construction Code Act ("Act"), 35 P.S. §7210.501(c)(1), requires a municipality which has adopted the UCC as its municipal building code and elected to administer and enforce the provisions of the Act in house, or through the employment of one or more construction code officials acting on its behalf, to establish its own board of appeals to hear appeals from the denial of a permit application, rather than designate an appeals board established by a separate municipality, or one created jointly by the adopting municipality with one or more other

issued, also forwarded to the Board. Both are arguments reinforced by facts which each side contends are important for the Board to know before making a decision. While we do not condone the unsolicited distribution of **ex parte** information to a hearing board, we ascribe no improper motives to the information forwarded to the Board by the Township secretary in her letter of April 9, 2012. The information contained in Faust's two letters provided further background to the order under appeal on why the certificates of occupancy were not issued, in contrast to that argued by the Owner in its appeal, and was not unknown to Owner. **See also,** UCC §403.122(d) (permitting an appeals board to base its decision on documents received and the written brief or argument of the parties, unless a hearing is requested). In sum, we have no difficulty in believing that the Appeals Board understands the distinction between advocacy and evidence and can decide for itself whether there is any need to recuse.

Finally, we do not see how any delay in forwarding Owner's appeal and counsel's letter which accompanied that appeal to the Appeals Board deprived Owner of fundamental due process to its prejudice. Nor have we been provided any legal authority to support this proposition. To the extent the underlying order to vacate may not have been provided to the Board, we do not understand why this is not easily corrected by simply providing a copy to the Board at this time.

[7] Moreover, in the event Owner feels aggrieved by any ruling or adjudication of the Board, pursuant to Section 752 of the Administrative Agency Law, 2 Pa. C.S.A. §752, Owner retains the right to file an appeal to this court.

municipalities.[8] At the time **Middletown** was decided, Section 501(c)(1) provided:

> A municipality which has adopted an ordinance for the administration and enforcement of this act or municipalities which are parties to an agreement for the joint administration and enforcement of this act shall establish a board of appeals as provided by Chapter 1 of the 1999 BOCA National Building Code, Fourteenth Edition, to hear appeals from decisions of the code administrator. Members of the municipality's governing body may not serve as members of the board of appeals.

As interpreted by the majority in **Middletown,** this language prevents a municipality which has decided to enforce the Act on its own from designating an appeals board created by another municipality, or established jointly with other municipalities, to hear appeals regarding its administration and enforcement of the Act. **Middletown, supra** at 1200 ("[T]his provision only authorizes municipalities to join with a board of appeals that it did not create when it enters into an agreement for the joint administration and enforcement of the Act.").

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[8] As to the manner and means by which the Act may be administered and enforced, the Act provides:

> Municipal administration and enforcement.—This act may be administered and enforced by municipalities in any of the following ways:
>
> (1) By designation of an employee to serve as the municipal code official to act on behalf of the municipality for administration and enforcement of this act.
>
> (2) By the retention of one or more construction code officials or third-party agencies to act on behalf of the municipality for administration and enforcement of this act.
>
> (3) Two or more municipalities may provide for the joint administration and enforcement of this act through an intermunicipal agreement under 53 Pa.C.S. Ch. 23 Subch. A (relating to intergovernmental cooperation).
>
> (4) By entering into a contract with the proper authorities of another municipality for the administration and enforcement of this act. When such a contract has been entered into, the municipal code official shall have all the powers and authority conferred by law in the municipality which has contracted to secure such services.
>
> (5) By entering into an agreement with the department for plan reviews, inspections and enforcement of structures other than one-family or two-family dwelling units and utility and miscellaneous use structures.

35 P.S. §7210.501(b).

Middletown Township had elected to administer and enforce the provisions of the Act itself and designated an appeals board created by Delaware County as its appeals board. Because of this election, the Commonwealth Court determined "[Middletown Township] was required to establish its own board of appeals under Section 501(c)(1)." **Id.** at 1200-1201. In consequence of its failure to do so, the court held that the Township's designation of the county board to hear UCC appeals was invalid and any decision made by that board was void and unenforceable for want of jurisdiction.

While Franklin Township, like **Middletown,** elected to administer and enforce the provisions of the UCC itself, and designated a joint board to hear appeals, Section 501(c)(1) has since been amended to provide:

> A municipality which has adopted an ordinance for the administration and enforcement of this act or municipalities which are parties to an agreement for the joint administration and enforcement of this act shall establish **or designate** a board of appeals as provided by Chapter 1 of the 1999 BOCA National Building Code, Fourteenth Edition, to hear appeals from decisions of the code administrator. Members of the municipality's governing body may not serve as members of the board of appeals. **A municipality may establish a board of appeals or may establish or designate a joint board of appeals in accordance with 53 Pa.C.S. Ch. 23 Subch. A (relating to intergovernmental cooperation).**

35 P.S. §7210.501(c)(1) (amended 2012) (emphasis on new language added to the statute).

This amendment, enacted on October 24, 2012, with an effective date of December 23, 2012, is now in full force. Its terms, by virtue of the Township's previous election to administer and enforce the provisions of the Act, as amended from time to time, are therefore inherently part of what is being administered and enforced by the Township. In consequence, the Appeals Board designated by the Township to hear appeals from decisions made by its building code officials is now authorized to do so.

Merits of Preliminary Injunction

The granting of a preliminary injunction is an extraordinary remedy. **A.M. Skier Agency, Inc. v. Gold,** 747 A.2d 936, 939 (Pa.

Super. 2000). A preliminary injunction will not be granted absent **a clear right** in the plaintiff and **immediate and irreparable harm** if interim relief is not granted. **Keystone Guild, Inc. v. Pappas,** 399 Pa. 46, 48-49, 159 A.2d 681, 683 (1960).

For a preliminary injunction to issue, the party requesting the injunction must establish (1) that an injunction is necessary to prevent an immediate and irreparable harm that cannot be adequately compensated by damages; (2) that greater injury would result from refusing an injunction than by granting it, and, concomitantly, that issuance of an injunction would not substantially harm other interested parties in the proceedings; (3) that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, that it is likely to prevail on the merits; (5) that the injunction it seeks is reasonably suited to abate the offending activity; and (6) that a preliminary injunction will not adversely affect the public interest. **Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.,** 573 Pa. 637, 646-47, 828 A.2d 995, 1001 (2003) (citations omitted). If a petitioner fails to establish any one of these prerequisites, there is no need to address the others. **County of Allegheny v. Commonwealth,** 518 Pa. 556, 560, 544 A.2d 1305, 1307 (1988).

Owner has not convinced us that these prerequisites have been met. As to immediacy, the filing of the appeal with the Appeals Board acts as a stay to the enforcement action. UCC §§403.83(e), 403.122(c).

Next, Owner's fear that it may lose tenants, and its tenants' customers, if a hearing before the Appeals Board is held and the Township is not enjoined from continuing its enforcement action, is speculative at this point. No actual harm, much less harm incapable of being fully compensated by monetary damages, has been shown. **New Castle Orthopedic Associates v. Burns,** 481 Pa. 460, 467, 392 A.2d 1383, 1387 (1978) (plurality) (stating that "actual proof of irreparable harm" required for a preliminary injunction, and concluding that injunction granted in that case was improper because record failed to indicate irreparable harm). This appears

particularly true when the aggrieved party, as here, will receive a hearing, which has yet to be held, and will be allowed to conduct its business in the interim.

Finally, it is by no means clear that Owner will succeed in its request for an occupancy permit. Section 403.46(b) of the UCC, upon which Owner relies, provides that a certificate of occupancy shall be issued within five business days after receipt of a final inspection report indicating compliance with the UCC. The final inspection upon which Owner relies identifies six open violations. (Owner's Exhibit 8.) Further, the need to have a valid highway occupancy permit and to comply with the requirements of the Pennsylvania Sewage Facilities Act, 35 P.S. §§750.1-750.20a, before a certificate of occupancy will issue, has not been answered.

CONCLUSION

In denying Owner's request for a preliminary injunction, we do not decide the merits of its claim to a certificate of occupancy. We hold only that because Owner has failed to exhaust its administrative remedies and failed to show that such remedies are inadequate, equity will not intervene. We have further determined that even if such administrative remedies did not exist, Owner has failed to establish its entitlement to relief.

SEDGWICK CLAIMS MANAGEMENT SERVICES a/s/o MICHELLE VEET, Plaintiff vs. CAPRIOTTI'S, INC., CAPRIOTTI'S INC. d/b/a CAPRIOTTI'S, CAPRIOTTI'S, INC. d/b/a CAPRIOTTI'S CATERING, THOMAS E. TRELLA, in His Official and Individual Capacity and ERICA'S, L.L.C., Defendants

Civil Law—Workers' Compensation Benefits—Subrogation—Third Party Recovery by Workers' Compensation Carrier—Need to Join Employee

1. Subrogation is the right of one, who has paid an obligation which another should have paid, to be indemnified by the other.

2. Section 319 of the Workers' Compensation Act subrogates the employer to whatever sum he pays the employee or his dependents on account of any injury for which a third party is responsible. As construed by case law, this section also permits the insurer of the employer to sue to enforce these subrogation rights.

3. The right of subrogation provided under Section 319 of the Workers' Compensation Act is derivative from the employee's cause of action and may not be split. This underlying cause of action is for one indivisible wrong, possessed by the employee alone, through whom the insurer must work out

its rights upon payment of the insurance, the insurer being subrogated to the rights of the employee upon payment being made.

4. For an employer or its insurer to enforce its subrogation rights, it must proceed in an action brought on behalf of the injured employee in order to determine the liability of the third party to the employee. Once such liability is determined, then the employer or its insurer may recover, out of this award, the amount it has paid in workers' compensation benefits.

5. Section 319 of the Workers' Compensation Act does not subrogate a workers' compensation carrier to the injured employee's cause of action, but only to any fund of money created by the employee asserting its cause of action and receiving either a verdict or settlement therefore.

6. Section 319 of the Workers' Compensation Act, as construed by the appellate courts of this Commonwealth, does not provide the employer, or its insurer, with a cause of action against a third party in its own right.

7. An action commenced by a workers' compensation carrier as subrogee of an injured employee is not an action by the employee or on his behalf. As such, the third-party defendants' preliminary objections in the nature of a demurrer to the plaintiff workers' compensation carrier's suit brought in its capacity as subrogee, and which seeks only recovery of workers' compensation benefits it paid to an injured employee, will be dismissed.

NO. 12-0227

JENNIFER L. RUTH, Esquire—Counsel for the Plaintiff.

SHAWNA R. LAUGHLIN, Esquire—Counsel for the Defendants.

MEMORANDUM OPINION

NANOVIC, P.J.—January 18, 2013

Herein, Sedgwick Claims Management Services ("Sedgwick") workers' compensation carrier, has commenced suit, as the subrogee of an injured employee, seeking reimbursement from a third party for what it has paid in workers' compensation benefits. The controlling question of law addressed below is whether the right of subrogation granted to an employer by Section 319 of the Workers' Compensation Act, 77 P.S. §671, allows an employer, or, as here, its insurance carrier, to sue a third-party tort-feasor responsible for injuries to an employee directly and independently of any claim made on behalf of the injured employee to recover wage and medical benefits it paid to the employee. Because we conclude that a workers' compensation carrier has no standing to commence a third-party action for these purposes in the absence of any claims made on behalf of the injured employee, Defendants' demurrer to the complaint will be sustained and the action dismissed.

FACTUAL AND PROCEDURAL BACKGROUND

On February 5, 2010, Michelle Veet ("Veet"), an employee of Sedgwick's insured, was injured in the course and scope of her employment while attending a work-related function at Capriotti's Restaurant in Tresckow, Carbon County, Pennsylvania. Veet injured her back when she slipped and fell on ice which had accumulated in the restaurant parking lot. Defendants Capriotti's, Inc., Capriotti's, Inc. d/b/a Capriotti's, Capriotti's, Inc. d/b/a Capriotti's Catering, Thomas E. Trella, in his official and individual capacity, and Erica's, L.L.C. (hereinafter collectively referred to as "Capriotti's"), are claimed to be responsible for the maintenance and safety of the parking lot. As the workers' compensation carrier for Veet's employer, Sedgwick paid indemnity and medical benefits to Veet and on her behalf in an amount in excess of $102,562.76.

Veet did not commence a private cause of action against Capriotti's. Instead, on February 3, 2012, Sedgwick, as the subrogee of Veet, commenced the instant proceedings by filing a praecipe for a writ of summons. Sedgwick's complaint was filed on June 1, 2012. Capriotti's preliminary objections in the nature of a demurrer were filed on June 11, 2012. Therein, Capriotti's contended that Pennsylvania law does not permit a workers' compensation carrier to subrogate against an alleged tort-feasor by filing a third-party action in its own right.

DISCUSSION

The question before us is one of law and procedure. To understand the answer to this question, we begin with Section 319 of the Workers' Compensation Act which provides, in pertinent part, as follows:

> Where the compensable injury is caused in whole or in part by the act or omission of a third party, the employer shall be subrogated to the right of the employe, his personal representative, his estate or his dependents, against such third party to the extent of the compensation payable under this article by the employer; reasonable attorney's fees and other proper disbursements incurred in obtaining a recovery or in effecting a compromise settlement shall be prorated between the employer and employe, his personal representative, his estate or his dependents. The employer shall pay that propor-

> tion of the attorney's fees and other proper disbursements that the amount of compensation paid or payable at the time of recovery or settlement bears to the total recovery or settlement. Any recovery against such third person in excess of the compensation theretofore paid by the employer shall be paid forthwith to the employe, his personal representative, his estate or his dependents, and shall be treated as an advance payment by the employer on account of any future installments of compensation.

77 P.S. §671. This section "subrogates the employer to whatever sum he pays the employee or his dependents on account of any injury for which a third party is responsible." **Scalise v. F. M. Venzie & Co.,** 307 Pa. 315, 319, 152 A. 90, 92 (1930). An insurer of the employer, like Sedgwick, may also sue to enforce these subrogation rights. **Reliance Insurance Company v. Richmond Machine Company,** 309 Pa. Super. 430, 434 n.4, 455 A.2d 686, 688 n.4 (1983).

"Subrogation is the right of one, who has paid an obligation which another should have paid, to be indemnified by the other." **Olin Corporation (Plastics Division) v. Workmen's Compensation Appeal Board,** 14 Pa. Commw. 603, 608, 324 A.2d 813, 816 (1974). It is "a doctrine governed by equity—the basis of the doctrine is the doing of complete, essential and perfect justice between all parties without regard to form." **Travelers Insurance Company v. Hartford Accident and Indemnity Co.,** 222 Pa. Super. 546, 551, 294 A.2d 913, 916 (1972) (citation and quotation marks omitted). Under the provisions of Section 319 of the Workers' Compensation Act, subrogation is enforceable by the employer only after compensation is paid or is payable. **Olin Coporation, supra.**

The employer's right of subrogation is derivative from the employee's cause of action and may not be split.

> The right of action is for one indivisible wrong, and this abides in the insured, through whom the insurer must work out his rights upon payment of the insurance, the insurer being subrogated to the rights of the insured upon payment being made. ... This right of the insurer against such other person is derived from the assured alone, and can be enforced in his right only. ... In support of this rule, it is commonly said that the wrongful act is single and indivisible and can give rise to but one liability.

Moltz to Use of Royal Indemnity Co. v. Sherwood Bros., 116 Pa. Super. 231, 234, 176 A. 842, 843 (1935) (citations and quotation marks omitted).

"[A]n injured party must consolidate into a single action against a wrongdoer all damages arising out of a tort. ... As a subrogee derives his right to recovery from the injured party, the prohibition against splitting of actions is no less binding where the interest of a subrogee is involved." **Travelers Insurance Co., supra** at 549, 294 A.2d at 915 (citations omitted). Section 319 of the Workers' Compensation Act, as construed by the appellate courts of this Commonwealth does not provide the employer, or its insurer, with a cause of action against a third party in its own right. **Reliance Insurance Co., supra** at 437, 455 A.2d at 690.

On this question, the Pennsylvania Supreme Court in **Scalise** stated:

> The right of action remains in the injured employee; suit is to be brought in his name; the employer may appear as an additional party plaintiff, as in **Gentile v. Phila. & Reading Ry.,** 274 Pa. 335, 118 A. 223; or, as useplaintiff [sic], as in **Mayhugh v. Somerset Telephone Co.,** [265 Pa. 496, 109 A.2d 213 (1920)], may intervene for the purpose of protection or he may do as suggested in **Smith v. Yellow Cab Co.,** [288 Pa. 85, 135 A 858 (1927)] notify the tort-feasor of the fact of employment and of the payments made or to be made. The employer, moreover, is not to be denied his right of suit because the employee does not sue, but may institute the action in the latter's name.

Id. at 320, 152 A. at 92.

"[F]or an employer or its insurer to enforce its subrogation rights, it must proceed in an action brought on behalf of the injured employee in order to determine the liability of the third party to the employee. If such liability is determined, then the employer or its insurer may recover, out of an award to the injured employee, the amount it has paid in worker's [sic] compensation benefits." **Reliance Insurance Co., supra** at 438, 455 A.2d at

690; **see also, Sentry Insurance a/s/o Donald J. Rettman v. Van DeKamp's,** No. 15346-2007 (CCP Erie 2007) (dismissing workers' compensation insurer's suit, as subrogee of an injured employee, against allegedly negligent third party on basis that suit was not brought on behalf of the insured employee), **affirmed,** 4 A.3d 669 (Pa. Super. 2010). Recovery is thus contingent upon the injured employee recovering compensation from the third party, either in suit or by settlement. **Olin Corporation, supra** at 609, 324 A.2d at 817; **see also, Liberty Mutual Insurance Co. a/s/o George Lawrence v. Domtar Paper Co.,** No. 2011-485 (CCP Elk 2012) ("Section 319 of the Worker's [sic] Compensation Act does not subrogate [a workers' compensation carrier] to the injured employee's cause of action, but only to any fund of money created by the employee asserting its cause of action and receiving either a verdict or settlement therefore ... .").

Here, Sedgwick has filed suit against Capriotti's in its own right as subrogee of Veet and claims only those benefits it has conferred upon her. There has been no recovery against a third party, nor has there been a compromise settlement. As presented by Sedgwick, this claim is untenable. Further, it impermissibly seeks to split the employee's cause of action, if any, for injuries sustained.

CONCLUSION

Because Sedgwick's complaint seeks only to enforce derivative rights, whose collection is dependant on the successful recovery of compensation by Veet, or on her behalf from the responsible party, it fails to state a cause of action. Moreover, as the statute of limitations on Veet's claim is two years, 42 Pa. C.S.A. §5524(2), it appears unlikely that the complaint can be amended to include Veet as a new party at this stage of the proceedings. **Prevish v. Northwest Medical Center—Oil City Campus,** 692 A.2d 192, 201 (Pa. Super. 1997) ("[A]n amendment the effect of which is to bring in new parties after the running of the statute of limitations will not be permitted.") (citation omitted); **see also, Reliance Insurance Co., supra** (holding that where the cause of action derives from the injured employee's negligence claim, the applicable statute of limitations is that which applies to the employee's cause of action against the third-party tort-feasor).

COMMONWEALTH OF PENNSYLVANIA vs. MICHAEL T. DEGILIO, Defendant

Criminal Law—Speedy Trial—Rule 600 (Prompt Trial)—Mechanical Run Date—Adjusted Run Date—Excusable Delay—Due Diligence—Burden of Proof

1. The defendant in a criminal proceeding has a constitutional right to a speedy trial.

2. Pa. R.Crim.P. 600 is designed, in part, to ensure a defendant's right to a speedy prosecution by requiring that a criminal defendant who is charged with a misdemeanor or felony offense, and who is at liberty on bail, be tried within 365 days of the filing of the criminal complaint. A violation of Rule 600 requires dismissal of the charges, with prejudice.

3. Rule 600 serves two equally important functions: (1) to protect a criminal defendant's right to a speedy trial and (2) to safeguard the state's interest in the effective prosecution of criminal cases in order to protect society by punishing those guilty of a crime and deterring those contemplating it.

4. To determine whether Rule 600 has been violated, a sequential three-step analysis is undertaken. First, the mechanical run date—the date 365 days after the filing of the complaint—is computed to ascertain whether trial has commenced within this period. If trial has not commenced by the mechanical run date, the adjusted run date—the mechanical run date plus any excludable time as defined by Rule 600(C)(1-3) is next computed. If trial has not commenced by the adjusted run date, before the charges will be dismissed, the court must determine whether any of the delay is "excusable" within the meaning of Rule 600(G), that is, whether notwithstanding the Commonwealth's exercise of due diligence, the delay is attributable to circumstances beyond the Commonwealth's control such that the adjusted run date should be extended.

5. Excludable delay under Rule 600(C)(3) includes delay caused by any continuance granted at the request of the defendant or the defendant's attorney and which is properly attributable to the defense.

6. At all stages of a criminal prosecution, the Commonwealth must exercise due diligence. The burden of proving, by a preponderance of the evidence, that it has acted with due diligence and that delay in the prosecution is not attributable to it is upon the Commonwealth. Consequently, if a defendant is forced to file a continuance request because the Commonwealth failed to act with due diligence in answering discovery needed by the defendant to proceed to trial, such delay is not excludable under Rule 600.

7. That period of delay as results from continuances requested by the Commonwealth, to which a defendant consents, and which effects an extension of the trial date beyond the mechanical or adjusted run dates is excusable time under Rule 600.

NO. 232 CR 2010

GARY F. DOBIAS, Esquire, District Attorney—Counsel for the Commonwealth.

JOHN J. WALDRON, Esquire—Counsel for the Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—March 18, 2013

On January 25, 2010 Michael T. Degilio ("Defendant"), a licensed psychologist, was charged with having inappropriate sexual contact with a patient. The case has been scheduled for trial on multiple occasions, most recently for January 7, 2013. On November 5, 2012, Defendant filed a Motion to Dismiss premised on Rule 600 (prompt trial). At the heart of Defendant's challenge is whether defense continuances necessitated because of the Commonwealth's delay in responding to requests for discovery count against the Commonwealth or the defense.

PROCEDURAL AND FACTUAL BACKGROUND

A criminal complaint charging the Defendant with involuntary deviate sexual intercourse (forcible compulsion),[1] indecent assault (forcible compulsion),[2] and indecent exposure[3] was filed on January 25, 2010. Defendant was arrested on January 28, 2010 and released the same date on $100,000.00 unsecured bail.

Defendant's preliminary hearing, originally scheduled for February 3, 2010, was continued at Defendant's request to March 26, 2010 and further continued, at the Commonwealth's request, to April 9, 2010. At the preliminary hearing, all charges were bound over. The same date Defendant waived formal arraignment; a pretrial conference was scheduled for May 13, 2010.

On May 12, 2010 Defendant submitted informal discovery to the Commonwealth. In consequence, Defendant requested a continuance of the May 13, 2010 pretrial conference, which was continued to June 22, 2010. Prior to that date, on May 28, 2010, Defendant filed an omnibus pretrial motion. A hearing on this motion was initially scheduled for August 13, 2010 but later continued, at Defendant's request, to September 30, 2010. The motion was denied on June 14, 2011. Pending disposition of the motion, Defendant requested eight continuances of the pretrial conference. Each was granted with the most recent date of the pretrial conference scheduled for June 21, 2011. Following the conference held on this date, trial was scheduled for August 1, 2011.

[1] 18 Pa. C.S.A. §3123(a)(1).

[2] 18 Pa. C.S.A. §3126(a)(2).

[3] 18 Pa. C.S.A. §3127(a).

On July 21, 2011 Defendant requested a continuance of the trial, which was continued to September 12, 2011. The stated reasons for the continuance were more time needed for preparation and Defendant's recent request for additional discovery from the Commonwealth. This request was made on July 19, 2011. In it, Defendant sought various documents, including the results of a forensic analysis of Defendant's computer and the results of attempts made by the Commonwealth to secure DNA from any seminal material, hairs or other matter found on the victim's clothing.

Three subsequent trial continuances were filed by Defendant—on August 31, 2011; September 22, 2011; and November 18, 2011—giving as the reason in each case that Defendant was waiting for responses to his additional discovery and that this information was needed for trial. As of the dates of these continuance requests, Defendant had not been provided the results of the examination of Defendant's computer and the Commonwealth's testing for DNA. Each request was granted, the most recent scheduling trial for January 9, 2012.

On December 12, 2011 Defendant filed a motion to compel discovery. Therein, Defendant asserted that on August 3, 2011 he requested missing pages from documents previously provided by the Commonwealth—the motion acknowledges that this information was later provided on August 17, 2011—and also was following up on his July 19, 2011 discovery requests, for which earlier inquiries had been made on August 26, 2011, October 27, 2011 and November 21, 2011 without success. This same date, December 12, 2011, we issued an order providing the Commonwealth twenty days to either provide the requested information, or explain why this could not be done.

On December 28, 2011 and February 21, 2012 Defendant filed additional continuances of trial, both times explaining the basis of the continuance as awaiting discovery. Both continuances were granted, with trial continued to March 5, 2012 and May 7, 2012, respectively. The forensic lab report regarding the computer examination was provided on January 24, 2012. (Defendant's Brief in Support of Motion, p. 3.) Though the DNA lab report was not provided until November 28, 2012 (Defendant's Brief in Support of Motion, p. 3), by letter dated December 30, 2011, the Commonwealth correctly advised the Defendant that both the forensic

analysis of Defendant's computer and the DNA testing yielded negative results.

On April 27, 2012 the Pennsylvania Department of State, Bureau of Professional and Occupational Affairs, filed a motion to quash a defense subpoena requesting a copy of its investigative report on behalf of the State Board of Psychology relating to the criminal accusations made against Defendant; the same date Defendant filed a motion to compel the production of a copy of this report. The Bureau sought to enforce the confidentiality of investigations made by licensure boards pursuant to 63 P.S. §2205.1, which privilege, Defendant claimed, must yield under **Pennsylvania v. Ritchie,** 480 U.S. 39, 58 (1987), to the due process rights of a criminal defendant to discover exculpatory material. At the same time, Defendant also filed a continuance requesting a delay of the May 7, 2012 trial date, citing as the basis for this continuance his outstanding discovery requests and the pending motion to compel disclosure of the Bureau's report. Trial was continued to July 16, 2012.

Argument on the Bureau's motion to quash and Defendant's motion to compel related to the Bureau's investigative report was scheduled for July 23, 2012, and continued to August 17, 2012, but then withdrawn on August 27, 2012.[4] During the pendency of this discovery issue with the Bureau, Defendant requested an additional trial continuance on June 27, 2012, which was granted, with trial rescheduled for September 10, 2012.

At the call of the trial list on September 4, 2012, the Commonwealth orally requested a continuance because the assistant district attorney assigned to the case was ill. This was unopposed by Defendant. A written request for continuance was filed by the Commonwealth on September 24, 2012 and trial was continued to November 5, 2012. The Defendant next filed a continuance request on October 24, 2012 due to the prior attachment of defense counsel in Lehigh County. The request was granted and trial was next scheduled for January 7, 2013. Prior to this date, on November 5, 2012, Defendant filed the instant motion to dismiss which is now before us.

[4] It is the court's understanding that a copy of the Bureau's investigative report was given to the Defendant. (Defendant's Brief in Support of Motion, p. 3.)

DISCUSSION

Rule 600 provides, in relevant part, as follows:

> Rule 600. Prompt Trial
>
> ***
>
> (A)(3) Trial in a court case in which a written complaint is filed against the defendant, when the defendant is at liberty on bail, shall commence no later than 365 days from the date on which the complaint is filed.
>
> ***
>
> (C) In determining the period for commencement of trial, there shall be excluded therefore:
>
> (1) the period of time between the filing of the written complaint and the defendant's arrest, provided that the defendant could not be apprehended because his or her whereabouts were unknown and could not be determined by due diligence;
>
> (2) any period of time for which the defendant expressly waives Rule 600;
>
> (3) such period of delay at any stage of the proceedings as results from:
>
> (a) the unavailability of the defendant or the defendant's attorney;
>
> (b) any continuance granted at the request of the defendant or the defendant's attorney.
>
> ***
>
> (G) For defendants on bail after the expiration of 365 days, at any time before trial, the defendant or the defendant's attorney may apply to the court for an order dismissing the charges with prejudice on the ground that this rule has been violated. A copy of such motion shall be served upon the attorney for the Commonwealth, who shall also have the right to be heard thereon.
>
> If the court, upon hearing, shall determine that the Commonwealth exercised due diligence and that the circumstances occasioning the postponement were beyond the control of the Commonwealth, the motion to dismiss shall be denied and the case shall be listed for trial on a date certain.
>
> ***

Pa. R.Crim.P. 600.

Rule 600 is designed to implement the constitutional guaranty of a speedy trial contained in our federal and state constitutions (United States Constitution, Sixth Amendment; Pennsylvania Constitution, Article I, section 9), balancing the accused's right to have his guilt or innocence fairly and timely decided, against the state's interest in a fair and just disposition. As stated in **Commonwealth v. Hunt,** 858 A.2d 1234 (Pa. Super. 2004):

> Rule [600] serves two equally important functions: (1) the protection of the accused's speedy trial rights, and (2) the protection of society. In determining whether an accused's right to a speedy trial has been violated, consideration must be given to society's right to effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it. However, the administrative mandate of Rule [600] was not designed to insulate the criminally accused from good faith prosecution delayed through no fault of the Commonwealth. ...
>
> So long as there has been no misconduct on the part of the Commonwealth in an effort to evade the fundamental speedy trial rights of an accused, Rule [600] must be construed in a manner consistent with society's right to punish and deter crime. In considering [these] matters ... , courts must carefully factor into the ultimate equation not only the prerogatives of the individual accused, but the collective right of the community to vigorous law enforcement as well.

Id. at 1239 **(en banc)** (internal citations and quotation marks omitted), **appeal denied,** 583 Pa. 659, 875 A.2d 1073 (2005).

In assessing a defense request for dismissal, with prejudice, premised upon a violation of Rule 600, a three-step analysis is undertaken. First, the court must determine the mechanical run date, which is three hundred and sixty-five days after the filing of the criminal complaint. If trial has not commenced by this date, the court must next compute the "adjusted run date," which is the mechanical run date plus any excludable time as that term is defined by Rule 600(C)(1-3). In the instant matter, this would be any period during the proceedings that resulted from the unavailability of the defendant or his attorney, or any continuance granted at the request of the defendant or his counsel. Finally, if trial has not commenced by the adjusted run date, the court must determine if any of the delay is "excusable" within the meaning of Rule 600(G) so as to extend the adjusted run date. "Excusable delay" is any delay that occurs despite the Commonwealth's exercise of due diligence, and which arose from circumstances beyond the Commonwealth's control. **Id.** at 1241.

> Due diligence is a fact-specific concept that must be determined on a case-by-case basis. ... Due diligence does not require perfect vigilance and punctilious care, but rather a showing by the Commonwealth that a reasonable effort has been put forth.

Id. at 1241-42 (internal quotation marks, emphasis and citations omitted).

The mechanical run date in this case is January 25, 2011—one year after the filing of the complaint. Although some disagreement exists between the parties, we find the following periods of time are excludable in computing the date when trial was to commence under Rule 600:

Period of Delay	Reason for Delay	Amount of Delay
2/3/10—3/26/10	Defense continuance of preliminary hearing originally scheduled for 2/3/10; rescheduled for 3/26/10	51 days
5/13/10—6/22/10	Defense continuance of pretrial conference originally scheduled for 5/13/10; continuance requested to obtain Commonwealth responses to discovery made on 5/12/10; conference rescheduled for 6/22/10	40 days
6/22/10—6/21/11	Defense omnibus pretrial motion filed 5/28/10, decided 6/14/11 (delay includes defense continuance of hearing first scheduled for	364 days

	8/13/10 due to personal commitment of defense counsel); pretrial conference delayed to 6/21/11	
8/1/11—9/12/11	Defense continuance of 8/1/11 trial date; continuance requested because of additional document requests made by Defendant on 7/19/11 and Defendant's need for additional time to prepare; trial rescheduled for 9/12/11	42 days
5/7/12—9/10/12	Defense continuance of 5/7/12 trial date due to dispute with Pennsylvania Department of State, Bureau of Professional and Occupational Affairs, over Bureau's investigative report; this delay was beyond the control of the District Attorney's office; next scheduled trial date 9/10/12	126 days
11/5/12—1/7/13	Defense continuance of 11/5/12 trial date because of counsel's attachment of trial in Lehigh County	32 days
	Total number of days excluded	655

The fifty-one day delay between February 3, 2010 and March 26, 2010 resulted from Defendant's requested continuance of the preliminary hearing scheduled for February 3, 2010. Similarly, the forty-day delay between May 13, 2010 and June 22, 2010 occurred when Defendant requested a continuance of the pretrial conference scheduled for May 13, 2010, in order to receive and review the Commonwealth's responses to Defendant's recent discovery requests—first made on May 12, 2010—before holding a conference.

The delay between June 22, 2010 and June 21, 2011 is attributable to Defendant's omnibus pretrial motion filed on May 28, 2010 and decided June 14, 2011. **See Commonwealth v. Hill,** 558 Pa. 238, 254-55, 736 A.2d 578, 587 (1999) (holding that the time intervening between a defendant's filing of a pretrial motion and the trial court's disposition of that motion is excludable to the extent the effect is to render the defendant unavailable for trial and/or to delay the commencement of trial, provided that, for the entire period to be excludable, the Commonwealth exercises due diligence throughout the entire period, such that none of the delay is attributable to it); **see also, Commonwealth v. Kearse,** 890 A.2d 388, 393 (Pa. Super. 2005) (holding that the Commonwealth must exercise diligence throughout the pendency of a criminal proceeding), **appeal denied,** 588 Pa. 788, 906 A.2d 1196 (2006), **cited with approval in Commonwealth v. Peterson,** 19 A.3d 1131, 1145 n.5 (Pa. Super. 2011) (Donohue, J., concurring). Although we also find, based upon our review of the record, that during this period the Commonwealth failed to diligently respond to the Defendant's discovery requests made on May 12, 2010, this failure did not contribute to or extend the delay attributed to the filing of Defendant's omnibus pretrial motion. **See** Defendant's Motion to Compel Discovery filed on November 15, 2010; Order of Court dated November 15, 2010, directing the Commonwealth to respond within seven days; **Hill, supra** at 266-67, 736 A.2d at 594 (Zappala, J., dissenting) (noting that the "court may properly take judicial notice of uncontested notations in the court record in determining whether the Commonwealth has exercised due diligence in attempting to bring an accused to trial.").[5] The omnibus motion was decided on June 14, 2011, with the Commonwealth's responses to discovery having been made months earlier—on November 24, 2010. **See** Motion to Dismiss, paragraph 14; (Defendant's Brief in Support of Motion, p. 2).

The delays between August 1, 2011 and September 12, 2011,[6] May 7, 2012 and September 10, 2012 and November 5, 2012 and

[5] At the December 18, 2012 evidentiary hearing on Defendant's Motion to Dismiss, the parties further stipulated that the court could review and rely upon the various exhibits attached to the Motion in making its decision.

[6] On July 21, 2011 Defendant requested the August 1, 2011 trial date be continued because he had recently requested additional documents from the

January 7, 2013,[7] are all attributable to continuances requested by the Defendant with none of the responsibility for this delay attributable to the Commonwealth. When each of these periods of excludable time is taken into account—a total of six hundred and fifty-five days—the adjusted run date for commencing trial is extended to November 10, 2012. Significantly, trial was scheduled

Commonwealth and needed time to prepare. This continuance request was granted and trial was rescheduled for September 12, 2011. Because this delay was at Defendant's request due to additional discovery requests made on the Commonwealth on July 19, 2011—two days before the continuance was requested—we have counted it against the Defendant. **See also, Commonwealth v. Williams,** 726 A.2d 389 (Pa. Super. 1999) (finding that a defense continuance which requests additional time to prepare is excludable under Rule 600), **appeal denied,** 560 Pa. 745, 747 A.2d 368 (1999).

Thereafter, Defendant filed continuance requests on August 31, 2011, September 22, 2011 and November 18, 2011: all because the Commonwealth had failed to respond to the July 19, 2011 discovery requests. In consequence, a motion to compel discovery was filed by Defendant on December 12, 2011. That same date we issued an order directing the Commonwealth within twenty days to either provide discovery or explain why it couldn't.

On December 28, 2011 and February 21, 2012, Defendant filed additional continuance requests claiming he was still awaiting responses to his discovery from the Commonwealth. Because the Commonwealth has not carried its burden of proving due diligence in responding to discovery during this period of time, none of the resulting delay between September 12, 2011 and May 7, 2012 has been counted against the Defendant. **Commonwealth v. Peterson,** 19 A.3d 1131, 1142 (Pa. Super. 2011) (Donohue, J., concurring) (noting that the burden of proving, by a preponderance of the evidence, that it acted with due diligence in complying with Rule 600 is upon the Commonwealth). Stated differently, a defendant's continuance request caused because the Commonwealth failed to act with due diligence in answering discovery needed by the defendant to proceed to trial is not excludable under Rule 600. **Commonwealth v. Edwards,** 528 Pa. 103, 110, 595 A.2d 52, 55 (1991) (holding that where the Commonwealth failed to demonstrate due diligence in responding to a defendant's uncontested discovery requests, a defense continuance necessitated thereby did not toll the allotted time period under Rule 1100, the predecessor to Rule 600). Rule 1100 was renumbered as Rule 600, effective April 1, 2001.

[7] Although Defendant claims in his motion to dismiss that he was not provided a copy of the DNA report until November 28, 2012, the Commonwealth had previously advised the Defendant by letter dated December 30, 2011 that it was having difficulty obtaining a copy of the report and that, in any case, there was no DNA obtained. **Cf. Commonwealth v. Taylor,** 409 Pa. Super. 589, 593, 598 A.2d 1000, 1002 (1991) (holding, with respect to the Municipal Court's counterpart to the speedy trial rule, that the Commonwealth's argument that its failure to provide timely discovery was beyond its control because of a delay in receiving a requested police report evidenced a lack of due diligence where the

to begin on November 5, 2012, five days before the deadline imposed by Rule 600.

The only reason trial did not begin on November 5, 2012 was because of Defendant's application for continuance filed on October 24, 2012. Since January 7, 2013 trial has been delayed because of Defendant's pending motion to dismiss filed on November 5, 2012. Consequently, at the time Defendant filed his November 5, 2012 Motion to Dismiss, he did not have a valid Rule 600 claim.

In addition to the foregoing, the Commonwealth claims that the period between September 12, 2011 and May 7, 2012 should be excludable from the Rule 600 computation. According to the Commonwealth, this delay resulted from continuances filed by the Defendant on August 31, 2011, September 22, 2011, November 18, 2011, December 28, 2011 and February 21, 2012. While these continuance requests were made, and granted, in each instance the request was made because of the Commonwealth's failure to respond and provide discovery which had been requested by Defendant on July 19, 2011. Though we do not attribute the delay between August 1, 2011 and September 12, 2011 to the Commonwealth—the continuance filed by the Defendant on July 21, 2011 was to allow time for the Commonwealth to respond to the discovery requested by the Defendant on July 19, 2011—we do find that the delay between September 12, 2011 and May 7, 2012 is attributable to the Commonwealth's failure to exercise due diligence in responding to Defendant's July 19, 2011 discovery requests.

Finally, the Commonwealth concedes, and we agree, that the delay in trial between September 10, 2012 and November 5, 2012, which was occasioned by the Commonwealth's continuance request on September 4, 2012, is not excludable even though consented to by the Defendant. (Commonwealth's Brief in Opposition to the Motion, p. 8.) This continuance was requested due to illness of the

Superior Court found "the Commonwealth could have done more in its attempt to secure the report from the police than merely requesting the report two or three times"), **appeal denied,** 531 Pa. 654, 613 A.2d 559 (1992). Further, the Defendant did not give this as a basis for his continuance request of the November 5, 2012 trial date filed on October 24, 2012. Consequently, we believe the real and actual reason for this continuance was that stated in the request, and not a need to review a DNA report which only confirmed what Defendant had previously been told by the Commonwealth, that there was no DNA found to be tested.

assistant district attorney assigned to the case, and was agreed to by defense counsel as a professional courtesy. Although the Superior Court in **Hunt,** supra at 1241, stated that "[i]f the defense does indicate approval or acceptance of the continuance, the time associated with the continuance is excludable under Rule 600 as a defense request," the question is really one of waiver.

In **Hunt,** defendant's counsel signed the consent section of the Commonwealth's application for postponement of trial which was then rescheduled from April 9, 2001 to April 23, 2001, three days after the adjusted run date. In doing so, the Superior Court held that defendant's counsel's "signature and lack of objection constitute[d] consent to the April 23, 2001 trial date, and a waiver of [defendant's] Rule 600 rights with respect to the three (3) calendar days between the adjusted run date of Friday, April 20, 2001 and the scheduled trial date of Monday, April 23, 2001." **Id.** at 1243.

While a defendant may well waive any later claim of a Rule 600 violation by agreeing to and not opposing a continuance which extends the date of trial beyond the adjusted run date, that is not what occurred here. According to our calculations, at the time the Commonwealth made its request, the adjusted run date was November 10, 2012. The rescheduled trial date, November 5, 2012, was prior to the adjusted run date.

Moreover, the record before us is devoid of any indication that when defense counsel consented to the Commonwealth's request there was any agreement to effect a waiver of Rule 600 which, for the reasons stated, was not exceeded by the grant. The burden of establishing a defense waiver is upon the Commonwealth and for a valid waiver to exist the record must demonstrate that the waiver was an informed and voluntary decision of the defendant. **Commonwealth v. Brown,** 875 A.2d 1128, 1135 (Pa. Super. 2005), **appeal denied,** 586 Pa. 734, 891 A.2d 729 (2005). Under the facts before us no waiver was effected or agreed to by Defendant's concurrence in the Commonwealth's request for a continuance of the September 10, 2012 trial date. **Id.** at 1137.[8]

[8] Because the record is insufficient to establish that the delay resulting from this continuance was excusable, and the Commonwealth has in any event not made this argument, this issue is not addressed.

CONCLUSION

Pursuant to Rule 600, a criminal defendant in a court case must be brought to trial within three hundred and sixty-five non-excludable days of the filing of the complaint against him. Under this standard, Defendant's right to a prompt and speedy trial under Rule 600 was not violated. Nevertheless, in denying Defendant's Motion to Dismiss, we caution the Commonwealth to be mindful of the applicable time constraints.

COMMONWEALTH OF PENNSYLVANIA
vs. DREW ALI MUSLIM, Defendant

Criminal Law—Possession With Intent to Deliver—Challenging the Sufficiency of the Evidence—How Raised (Motion for Judgment of Acquittal/Motion for Arrest of Judgment)—Totality of the Circumstances—Need for Expert Testimony—Weight of the Evidence

1. Challenges to the sufficiency of the evidence, regardless of when raised, are properly termed "motions for a judgment of acquittal." This terminology applies equally when the sufficiency challenge is made post-verdict and, for these purposes, replaces the former designation of the motion as a motion for arrest of judgment.

2. Evidence is deemed sufficient to support a guilty verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt.

3. The Commonwealth establishes the offense of possession with intent to deliver when it proves beyond a reasonable doubt that the defendant possessed a controlled substance with the intent to deliver it.

4. Possession with intent to deliver can be inferred from the quantity of the drugs possessed and other surrounding circumstances, such as lack of paraphernalia for consumption. The totality of the circumstances must be examined. Expert testimony to establish intent is not necessary where the evidence overwhelmingly supports the conclusion that the drugs were intended for distribution.

5. A motion for new trial on grounds that the verdict is contrary to the weight of the evidence concedes that there is sufficient evidence to sustain the verdict but contends, nevertheless, that the verdict is against the weight of the evidence.

6. Relief on a weight of the evidence claim is reserved for extraordinary circumstances, when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail.

NO. 611 CR 2011

MICHAEL S. GREEK, ESQUIRE, Assistant District Attorney—Counsel for Commonwealth.

MICHAEL P. GOUGH, ESQUIRE—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—April 1, 2013

On September 11, 2012, the Defendant, Drew Ali Muslim ("Defendant"), was convicted of one count of possession of a controlled substance,[1] one count of possession with intent to deliver a controlled substance (PWID),[2] and one count of possession of drug paraphernalia.[3] He was acquitted of criminal conspiracy to commit the offense of possession with intent to deliver a controlled substance.[4]

On November 26, 2012, Defendant was sentenced to a term of imprisonment of no less than twenty-eight nor more than eighty-four months in a state correctional facility. Following this sentence, on November 30, 2012, Defendant filed post-sentence motions for judgment of acquittal and in arrest of judgment challenging the sufficiency of the evidence to sustain his conviction of PWID,[5] together with a motion for a new trial on the basis that the jury's verdict finding him guilty of this offense was contrary to the weight of the evidence.

FACTUAL AND PROCEDURAL BACKGROUND

To convict Defendant, the Commonwealth presented the following evidence. On June 29, 2011, while searching for Defendant, Trooper Daniel Nilon of the Pennsylvania State Police went to Deanna Hoherchak's home at 86 Mountainview Drive, Bear Creek Lakes, located in Penn Forest Township, Carbon County, Pennsylvania. At the time, the police had reason to believe Defendant was using Hoherchak's vehicle.

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[1] 35 P.S. §780-113(a)(16).

[2] 35 P.S. §780-113(a)(30).

[3] 35 P.S. §780-113(a)(32).

[4] 18 Pa. C.S.A. §903.

[5] Historically, a post-verdict challenge to the sufficiency of the evidence to sustain a conviction was raised in a motion for arrest of judgment. This terminology was changed effective January 1, 1994, such that "[a]ll sufficiency challenges, regardless of the stage of the proceedings in which they are made, are termed 'motions for a judgment of acquittal.'" 16B West's Pa. Prac. Series **(Criminal Practice)** §30:4, n.2; **see specifically,** Pa. R.Crim.P. 606(A)(6) and 720(B)(1)(a)(ii). Nevertheless, because the grounds to arrest a judgment after a verdict of guilt were not limited to sufficiency challenges, but extended to any fatal defect in the prosecution, a motion to arrest judgment remains proper when a fatal defect—such as a challenge based on the court's jurisdiction, on double jeopardy, or on the statute of limitations—is claimed. **See** Pa. R.Crim.P. 606 cmt. and 720(B)(1)(a)(iii).

Nilon arrived at Hoherchak's home at approximately 7:00 P.M. Hoherchak was at home, but her vehicle was not there. When Nilon questioned Hoherchak about this, Hoherchak denied knowing where her vehicle was and initially claimed it was stolen. Nilon was skeptical of this claim and believed Hoherchak knew more than she was saying.

While speaking with Hoherchak, Nilon believed she was under the influence of drugs. (N.T., pp. 77, 109.) Also, when Nilon entered the home, he observed in plain view the empty corners of plastic sandwich bags coated with a white film in a garbage can near the kitchen door, which he testified were indicative of drug use. (N.T., pp. 79-80, 115-16.) Hoping to gain more information, Nilon asked Hoherchak if he could search her home. Hoherchak agreed. Approximately thirty to forty prescription pain pills were found in a brown paper bag in one of the bedrooms, as were additional corners of plastic baggies found in the kitchen garbage. (N.T., pp. 79-80, 117.)

When Nilon showed Hoherchak what was found and commented she could be in trouble, Hoherchak began to cooperate. (N.T., pp. 64, 81, 127.) She now told Nilon that she had given her car to Defendant to use, that she had expected him back earlier, and that she would contact Nilon when Defendant returned. Nilon left Hoherchak's home at approximately 8:00 P.M.

Shortly after returning to his barracks, Nilon received a call from Hoherchak that Defendant was at her home with his sister, and he was packaging cocaine at the kitchen table. (N.T., pp. 82-83, 133-34.) Hoherchak testified at trial that when Defendant returned to her home, she told Defendant she needed to use the car to pick up some cigarettes, immediately left, and used her cell phone to contact Nilon once she was out of the home. She also testified that when she left, Defendant gave her a bag of cocaine to deliver which she placed in her car console. (N.T., pp. 33, 65-66.)

Upon receiving Hoherchak's call, Nilon drove back to Hoherchak's home, together with Corporal Kathleen Temarantz. Arrangements were also made for backup with Patrolman Robert Carelli of the Jim Thorpe Police Department who met them a short distance from Hoherchak's home so as not to arouse Defendant's suspicion. All three were outside Hoherchak's home at approximately 9:00 P.M.

The three then walked up the driveway to Hoherchak's home and onto an outside deck. From this vantage point, Nilon was able to look through a window into the kitchen and observe Defendant at the kitchen table with a pile of loose crack cocaine in front of him which he was separating into smaller quantities, measuring on a digital scale, and placing into plastic sandwich bags whose corners he twisted off to individually wrap. (N.T., pp. 85, 142-43.) Over a period of three to five minutes, Nilon observed Defendant complete three to four packages in this manner. Carelli, who then switched places with Nilon, observed the same type of conduct. (N.T., pp. 143-44, 207-208.) As Nilon and Carelli looked into the window, they also saw Defendant's sister, who was sitting in the living room within several feet of Defendant watching television as Defendant divided and packaged the cocaine. No dividing wall existed between the kitchen and the living room.

The three officers next decided that Carelli should go to the rear of the home to prevent any escape from that direction as Nilon and Temarantz entered the home through the kitchen door. Once Carelli was in position, Nilon announced their presence and tried to open the kitchen door. When he was prevented from doing so because the door was locked, he tried unsuccessfully to kick the door in. As this was occurring, Nilon saw Defendant twice run down a hallway to the rear of the home carrying both the loose and packaged cocaine with him. (N.T., p. 88.) In the rear of the home, two bedrooms were located on the left side of the hallway, and a bathroom and back bedroom on the right side. Nilon also saw Defendant's sister run down the hallway and could see Defendant and his sister running back and forth between the back bedrooms. (N.T., pp. 90, 151.)

To enter the home, both Nilon and Temarantz went around the corner of the home and entered through a sliding glass door. Once inside the home, Defendant and his sister were ordered to come out of the bedrooms. After some delay, each exited from a separate bedroom, after which they were patted down and placed in handcuffs. (N.T., pp. 90-91, 153.) No additional drugs or paraphernalia were found on either, however, $1,715.00 in cash currency was found on Defendant's sister. (N.T., pp. 92, 101.)

While Carelli watched Defendant and his sister, Nilon and Temarantz searched the home. Fourteen packets containing crack cocaine wrapped in clear plastic baggie corners were found scattered throughout the home. (N.T., p. 156.) Two to three were found thrown on the floor of the right rear bedroom from which Defendant's sister had exited, with more found on the floor of the left rear bedroom exited by Defendant; several were in the living room; and one bag was found in the toilet. (N.T., pp. 91, 93, 155, 185, 202.) In addition, the bag of cocaine Defendant had asked Hoherchak to deliver was given to Nilon by Hoherchak after she returned to the home as the search was concluding; it was identical to the other bags. (N.T., pp. 93, 203.) The loose cocaine was placed in a separate bag by the officers. (N.T., p. 157.) All tested positive for cocaine at the state police lab. (N.T., p. 175.)

Before transporting Defendant to the state police barracks, as he was being led from the home to the police cruiser, Carelli noticed Defendant was sweating and did not look good. When Carelli asked if he was okay, Defendant responded by asking if a person could get sick from swallowing drugs. (N.T., pp. 161-62, 211.)

At the barracks, Defendant was placed in the interview room. While there, he was sweating, became ill and passed out. (N.T., pp. 165-66.) Nilon testified that the symptoms he observed were similar to those of someone who was overdosing. (N.T., p. 167.) Defendant was taken to the hospital and admitted to the intensive care unit where he remained for more than twelve hours. (N.T., p. 167.)

DISCUSSION

A. **Sufficiency of the Evidence: PWID**

A sufficiency of the evidence claim requires an assessment of whether the evidence introduced at trial established the offense charged.

> Evidence will be deemed sufficient to support [a guilty] verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to

> find every element of the crime beyond a reasonable doubt. In making a determination as to whether the evidence adduced at trial is legally sufficient to sustain a guilty verdict, we must evaluate the entire trial record and consider all the evidence actually received. [T]he facts and circumstances established by the Commonwealth need not be absolutely incompatible with the defendant's innocence, but the question of any doubt is for the trier of fact unless the evidence [is] so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances.

Commonwealth v. Davis, 799 A.2d 860, 865-66 (Pa. Super. 2002) (citations and quotation marks omitted).

> [T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction ... does not require a court to ask itself whether **it** believes that the evidence at the trial established guilt beyond a reasonable doubt. Instead, it must determine simply whether the evidence believed by the fact-finder was sufficient to support the verdict.

Commonwealth v. Ratsamy, 594 Pa. 176, 180, 934 A.2d 1233, 1235-36 (2007) (citations and quotation marks omitted) (emphasis in the original).

"The Commonwealth establishes the offense of possession with intent to deliver when it proves beyond a reasonable doubt that the defendant possessed a controlled substance with the intent to deliver it." **Commonwealth v. Little,** 879 A.2d 293, 297 (Pa. Super. 2005), **appeal denied,** 586 Pa. 724, 890 A.2d 1057 (2005). In determining whether drugs in a defendant's possession are for delivery or for personal use, the totality of the circumstances must be examined. Factors to be considered are the quantity of drugs, how it was packaged, the behavior of the defendant, the presence of drug paraphernalia, the presence of large sums of cash, and the existence of expert testimony to establish whether the drugs were intended for sale rather than personal use. **Commonwealth v. Jackson,** 435 Pa. Super. 410, 414, 645 A.2d 1366, 1368 (1994); **see also, Commonwealth v. Kirkland,** 831 A.2d 607, 612 (Pa. Super. 2003) (noting the importance of expert testimony to establish intent "where the other evidence does not overwhelmingly support the conclusion that the drugs were intended for distribution"), **appeal denied,** 577 Pa. 712, 847 A.2d 1280 (2004).

In this case, we find the evidence sufficient to sustain Defendant's PWID conviction. Defendant was observed by both Nilon and Carelli separating, weighing, and packaging crack cocaine from a loose pile into smaller, individually wrapped packets. To do so, Defendant placed measured amounts of cocaine into separate plastic sandwich bags whose corners he twisted off. Nilon testified this was a common way to package and distribute cocaine. (N.T., pp. 79-80.)

In addition to these observations, seized at the time of Defendant's arrest was the digital scale and box of sandwich bags used by Defendant for weighing and packaging the cocaine respectively. Also located in the home were three cell phones. One Thousand Seven Hundred Fifteen Dollars ($1,715.00) in cash was found on Defendant's sister. Defendant's sister was with Defendant when he returned to Hoherchak's home, was sitting within feet of Defendant as he packaged the cocaine, and fled with Defendant to the rear of the home and hid in a bedroom when the police entered. Defendant, who denied any interest in or knowledge of this money, could not explain the source of the money—his sister worked as a waitress at McDonald's—or why she would be carrying this amount of cash.

The evidence did not establish that Defendant was a drug user; rather, Defendant's questioning of Carelli about overdosing on drugs suggested the contrary. Further, no paraphernalia suggestive of personal use, such as a pipe or needles, were found on either Defendant or his sister. **See Commonwealth v. Jones,** 874 A.2d 108, 121 (Pa. Super. 2005) ("[P]ossession with intent to deliver can be inferred from the quantity of the drugs possessed and other surrounding circumstances, such as lack of paraphernalia for consumption."). While the total amount of cocaine seized, 6.92 grams, appears to be a relatively small quantity, and no expert testimony was presented to establish whether this amount, the size, and number of packets found was more consistent with PWID than with personal use, most damaging to Defendant was the actual delivery of one of the smaller packets by Defendant to Hoherchak for delivery to another. **See Ratsamy supra** at183, 934 A.2d at 1237 ("We emphasize that, if the quantity of the controlled substance is not dispositive as to the intent, the court may look to other factors."); **see also, Commonwealth v. Bess,** 789 A.2d 757, 761-62

(Pa. Super. 2002) (possession of significant sum of cash, $158.00, absence of drug paraphernalia associated with personal use, and 2.2 grams of cocaine, supported conviction of PWID).

B. **Weight of the Evidence: PWID**

> In contrast to a challenge to the sufficiency of the evidence, [a] motion for new trial on grounds that the verdict is contrary to the weight of the evidence concedes that there is sufficient evidence to sustain the verdict but contends, nevertheless, that the verdict is against the weight of the evidence. Whether a new trial should be granted on grounds that the verdict is against the weight of the evidence is addressed to the sound discretion of the trial judge, and his decision will not be reversed on appeal unless there has been an abuse of discretion. The test is not whether the court would have decided the case in the same way but whether the verdict is so contrary to the evidence as to make the award of a new trial imperative so that right may be given another opportunity to prevail.

Davis, supra at 865 (**quoting Commonwealth v. Merrick,** 338 Pa. Super. 495, 503, 488 A.2d 1, 5 (1985)). Further, in **Commonwealth v. Sanchez,** 614 Pa. 1, 36 A.3d 24 (2011), the Pennsylvania Supreme Court stated:

> The finder of fact—here, the jury—exclusively weighs the evidence, assesses the credibility of witnesses, and may choose to believe all, part, or none of the evidence. ... Issues of witness credibility include questions of inconsistent testimony and improper motive. ... A challenge to the weight of the evidence is directed to the discretion of the trial judge, who heard the same evidence and who possesses only narrow authority to upset a jury verdict. ... The trial judge may not grant relief based merely on some conflict in testimony or because the judge would reach a different conclusion on the same facts. ... Relief on a weight of the evidence claim is reserved for extraordinary circumstances, when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail. ...

Id., 36 A.3d at 39 (citations and quotation marks omitted).

Defendant testified that when he heard Nilon kicking at the kitchen door it sounded like gunshots going off and glass shattering, and that he ran to the rear of the home for safety. (N.T., p. 245.) He denied that the cocaine found in the house was his, that he had been packaging drugs or using a scale immediately prior to the police's entry, or that he had asked Carelli if someone could get sick from ingesting drugs. (N.T., pp. 247, 255-57.) According to Defendant, he simply fell asleep at the police barracks, no one tried to wake him up, and he did not know why he was strapped down in a gurney and taken by ambulance to the hospital. (N.T., pp. 248, 257.)

Defendant's story directly contradicted Nilon and Carelli's testimony of seeing Defendant sitting at the kitchen table weighing and packaging cocaine. As to the presence of drugs in the home, Defendant testified Hoherchak was a drug addict and prostitute; that she constantly had strangers in the home, one of whom he saw leaving on his return; and that drugs were scattered throughout the home when he got there. (N.T., pp. 252, 254-55.) Yet, the police testified the cocaine they found that evening was not there when they searched the home approximately an hour earlier, and Hoherchak testified she immediately left the home when Defendant returned and that it was Defendant who brought drugs with him. While Defendant testified he did not give a packet of cocaine to Hoherchak for delivery to another, she testified he did. (N.T., pp. 33, 65-66, 258.)

The inconsistencies and contradictions in the evidence, the credibility of the witnesses and their motives for testifying, and the weight of the evidence was all for the jury to decide. In crediting the Commonwealth's testimony over that of Defendant's, and in finding that Defendant was in fact in possession of cocaine with the intent to deliver, the jury did not act arbitrarily or reach conclusions unsupported by the evidence. The evidence here required no jury conjecture: it was clear and direct, and required only that the jury decide whom to believe. That the jury chose to find Defendant guilty based on the evidence before it does not shock our sense of justice.

CONCLUSION

For the reasons stated, the Commonwealth presented sufficient evidence to sustain Defendant's conviction of PWID crack cocaine. Further, the evidence of record is neither so unreliable nor contradictory nor inconclusive as to undermine the verdict as one based on speculation and conjecture. The evidence fairly and fully supports the jury's decision. Accordingly, Defendant's challenges are without merit.

COMMONWEALTH OF PENNSYLVANIA vs. BRAD MARK ONDROVIC, Defendant

*Criminal Law—Sentencing of a Minor—Life Without Parole—Eighth Amendment (Cruel and Unusual Punishment)—**Miller v. Alabama**—PCRA—Withdrawal of Counsel—Prior Court Approval*

1. In **Miller v. Alabama,** the United States Supreme Court held that a sentence of mandatory life imprisonment without parole for the crime of murder when committed by a defendant who, at the time, is less than eighteen years of age violates the Eighth Amendment's prohibition against cruel and unusual punishments.

2. The Eighth Amendment's prohibition against cruel and unusual punishment recognizes and requires that punishment be graduated and proportioned to both the offender and the offense.

3. Because of their age and age-related characteristics, children are constitutionally different from adults for purposes of sentencing. In recognition of this distinction, before a sentence of life without the possibility of parole may be imposed on a juvenile, the Eighth Amendment's ban on cruel and unusual punishment requires that consideration be given to a juvenile's "lessened capacity" to appreciate the consequences of his actions and greater "capacity for change."

4. Before counsel will be permitted to withdraw from representing a petitioner under the PCRA, counsel must first file and obtain approval of a "no-merit" letter pursuant to the mandates of **Turner-Finley.**

NO. 214 CR 2004

CYNTHIA DYRDA-HATTON, Esquire, Assistant District Attorney—Counsel for Commonwealth.

BRAD MARK ONDROVIC—Pro Se.

MEMORANDUM OPINION

NANOVIC, P.J.—May 3, 2013

Defendant was convicted of felony murder and sentenced to life imprisonment for a crime he committed when he was twenty-three years old. Because the standards for analyzing the appropriateness and constitutionality of a sentence of life without parole when imposed on a juvenile, as opposed to an adult, are different, Defendant's challenge to his sentence under **Miller v. Alabama** is without merit.

PROCEDURAL AND FACTUAL BACKGROUND

On December 19, 2006, the Defendant, Brad Mark Ondrovic, pled guilty to murdering Lynndell Schock on February 12, 2004, while engaged in the commission of a felony. This was a heinous crime in which Defendant and Derek Schock, Mrs. Schock's son, admitted to entering the victim's home during the early morning hours of February 12, 2004, brutally murdering her, and taking approximately $20.00 in currency and some jewelry, later discarded. The Defendant was twenty-three years old when this occurred.

The Defendant and Derek Schock were charged with criminal homicide and various other offenses on February 16, 2004. On April 19, 2004, a notice of intent to seek the death penalty was filed by the Commonwealth. Throughout the criminal prosecution, Defendant was at all times represented by counsel.

The plea Defendant entered on December 19, 2006, to second-degree murder was part of a plea agreement allowing Defendant to avoid the death penalty. It was preceded by a thorough plea colloquy. Defendant was told, and knew, at the time of his plea, that with death no longer an option, he would receive a mandatory sentence of life without parole. **See** 18 Pa. C.S.A. §1102(b); 61 Pa. C.S.A. §6137(a)(1). On the same date, this sentence was imposed. Defendant was twenty-six years old when he entered his plea and was sentenced.

Defendant did not file a direct appeal. However, on August 23, 2012, Defendant filed a **pro se** Petition for Collateral Relief under the Post Conviction Relief Act (PCRA), 42 Pa. C.S.A. §§9541-9546. Therein, Defendant contended that the United States Supreme Court's decision in **Miller v. Alabama,** 132 S. Ct. 2455 (2012), rendered his sentence of life imprisonment without the possibility of parole unconstitutional. In **Miller,** the court held that a sentence of mandatory life imprisonment without parole for the crime of murder when committed by a defendant who was less than eighteen years of age—with no consideration being given to the defendant's

"lessened capacity" to appreciate the consequences of his actions and greater "capacity for change" as a juvenile—violates the Eighth Amendment's prohibition against cruel and unusual punishments, made applicable to the States by the Fourteenth Amendment. Defendant theorized that by virtue of the Equal Protection Clause this holding applied with equal force to the circumstances of his case, since, according to Defendant, a twenty-three-year-old's brain is as immature as a seventeen-year-old's.

On August 30, 2012, counsel was appointed to represent Defendant on his Petition. In our order appointing counsel, counsel was directed to examine the merits and timeliness of Defendant's petition and, if appropriate, file an amended petition or seek to withdraw after filing a "no-merit" letter. On October 22, 2012, defense counsel filed a "no-merit" letter concluding that **Miller v. Alabama** was inapplicable to Defendant's case and that Defendant's challenge had no basis either in law or in fact. This same date, counsel also filed a petition to withdraw as counsel.

Following our review of the file, on December 28, 2012, we issued notice of our intent to dismiss Defendant's Petition finding likewise that **Miller v. Alabama** was inapplicable to Defendant's case, and that Defendant had asserted no cognizable claims which would not be barred by the PCRA's one-year time-bar on claims filed more than one year from the date the judgment becomes final.[1] By order dated February 7, 2013, we dismissed Defendant's Petition. That same date we granted counsel's petition for leave to withdraw as counsel. **See Commonwealth v. Willis,** 29 A.3d 393, 400 (Pa. Super. 2011) (noting that before counsel will be permitted to withdraw from representing a petitioner under the PCRA, counsel must first file and obtain approval of a "no-merit" letter pursuant to the mandates of **Turner/Finley**).

On March 8, 2013, Defendant filed a **pro se** notice of his intent to appeal our February 7, 2013 dismissal of his Petition. Treating Defendant's notice of intent to appeal as a notice of appeal, by order

[1] Defendant filed a **pro se** objection to our Notice of Intent to Dismiss on January 28, 2013. Since we had yet to rule on counsel's petition to withdraw and being cognizant of the policy against hybrid representation, we did not consider this filing. **See Commonwealth v. Willis,** 29 A.3d 393, 400 (Pa. Super. 2011) (prohibiting the court from allowing dual representation during the disposition of a PCRA petition).

dated March 18, 2013, we directed Defendant within twenty-one days to provide us with a concise statement of the matters complained of in his appeal to the Pennsylvania Superior Court. On April 11, 2013, Defendant filed his concise statement.

DISCUSSION

Defendant identifies two issues in his concise statement: (1) that he was coerced by counsel to plead guilty which violated his state and federal constitutional rights; and (2) that because recent scientific research shows that a person's brain is not fully developed until the age of twenty-five or older, Defendant's brain was not fully developed at the time he committed the offense and, therefore, Defendant should be treated the same as a juvenile.

(a) Guilty Plea—Ineffective Assistance of Counsel

As to the first issue, it is time-barred and cannot be considered by us. With certain exceptions, not applicable here, the PCRA requires that to be eligible for relief a challenge must be filed within one year of the date the judgment becomes final. 42 Pa. C.S.A. §9545(b)(1)(i)-(iii). A judgment becomes final at the conclusion of direct review, including discretionary review, or at the expiration of the time for seeking such review. 42 Pa. C.S.A. §9545(b)(iii).

"The PCRA's timeliness requirements are jurisdictional in nature, and a court may not address the merits of the issues raised if the PCRA petition was not timely filed." **Commonwealth v. Copenhefer,** 596 Pa. 104, 108, 941 A.2d 646, 648-49 (2007). "As such, when a PCRA petition is not filed within one year of the expiration of direct review, or not eligible for one of the three limited exceptions, or entitled to one of the exceptions, but not filed within 60 days of the date that the claim could have been first brought, the trial court has no power to address the substantive merits of a petitioner's PCRA claims." **Commonwealth v. Gamboa-Taylor,** 562 Pa. 70, 76, 753 A.2d 780, 783 (2000). Since Defendant's Petition was not filed until August 23, 2012, more than five years after Defendant's judgment of sentence became final, this court is without jurisdiction to consider the first issue raised by Defendant.[2]

[2] Nor was this issue raised in Defendant's Petition filed on August 23, 2012. The first time the issue was raised was in Defendant's concise statement filed on April 11, 2013, which was after Defendant's Petition was dismissed by our order of February 7, 2013. On this additional basis, Defendant's first issue has been waived. Pa. R.Crim.P. 902(B).

(b) **Applicability of** Miller v. Alabama

As to the second issue, Defendant misreads the holding in **Miller v. Alabama** and the requirements of the PCRA for an otherwise untimely petition to be considered timely where a constitutional right is at issue. Section 9545(b)(1)(iii) of the PCRA provides:

> § 9545. Jurisdiction and proceedings
>
> (b) Time for filing petition.—
>
> (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa. C.S.A. §9545(b)(1)(iii). For Section 9545(b)(1)(iii) to excuse an otherwise untimely petition, the constitutional right at issue must be first recognized after the one-year time period to make a challenge has passed and must be expressly determined by the same court to apply retroactively. **Commonwealth v. Wojtaszek,** 951 A.2d 1169, 1171 (Pa. Super. 2008), **appeal denied,** 600 Pa. 733, 963 A.2d 470 (2009).

The issue in **Miller** was the constitutionality of the sentence imposed on a juvenile (**i.e.,** the appropriateness of the punishment decreed): life without the possibility of parole. The court did not question the sufficiency of the evidence or the legitimacy of the conviction. Critical to the court's decision was defendant's status as a juvenile and the corollary postulate that "an offender's juvenile status can play a central role in considering a sentence's proportionality." **Miller, supra** at 2466 (citation and quotation marks omitted).

The holding in **Miller** is expressly premised upon the Eighth Amendment's prohibition against cruel and unusual punishment and its precept that punishment be graduated and proportioned to both the offender and the offense. **Id.** at 2463. Because of their immaturity and vulnerability, as well as the fundamental differences

which exist between adult and juvenile minds, "children are constitutionally different from adults for purposes of sentencing." **Id.** at 2464. The "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." **Id.** at 2466. In other words, a special, and different, analysis is at issue when a child is involved. Consequently, to argue, as Defendant does, that a juvenile and young adult are to be treated the same for sentencing purposes when the sentence is one of life without the possibility of parole, is to argue contrary to the bedrock principles on which **Miller** is built: that there is a difference between juvenile and adult offenders based on their age and age-related characteristics, that this difference has long been recognized in the manner the law has historically dealt with children under a different set of rules from those applicable to adults, and that, constitutionally, this distinction is recognized under the Eighth Amendment's ban on cruel and unusual punishment when a sentence of life without the possibility of parole is imposed on a juvenile.

The fundamental and inescapable distinction between this case and **Miller** is that Defendant was not a juvenile when he committed the offense. This alone justifies the different treatment at issue in **Miller** and shatters Defendant's reliance on the Equal Protection Clause. Moreover, at no time did the Supreme Court in **Miller** suggest that a sentence of mandatory life without parole is unconstitutional when applied to adults. To the contrary, it implicitly rebuffed such an argument when it noted that life without parole is not only constitutional for an adult when the crime is murder, but also in nonhomicide cases. **Id.** at 2470, **citing Graham v. Florida,** 130 S. Ct. 2011, 2030 (2010).

CONCLUSION

As a matter of law, Defendant may not be treated for sentencing purposes as a juvenile when he is not. Nor has Defendant alleged or proven any circumstances peculiar to him which would question the validity or constitutionality of his conviction and sentence. As such, Defendant's PCRA Petition was untimely filed, it does not qualify for the statutory exception to timeliness premised upon on a newly recognized constitutional right, and it was properly dismissed.

R.M. f/k/a R.K.B., Plaintiff vs. N.F., III, Defendant

Civil Law—Child Custody—Relocation—Statutory Factors—Mandatory Consideration—Appellate Deference—Primary Caretaker Doctrine—Separation of Siblings

1. While the statutory factors for child custody and relocation enumerated in Sections 5328(a) and 5337(h) of the Child Custody Act, respectively, must be considered by the trial court, the guiding principle throughout a custody proceeding is the best interest of the child.

2. In evaluating a parent's request to change the primary custodian under an existing order, courts must carefully consider the effect on the child: whether the development and growth of the child will be enhanced by a change in custody, whether a change in existing relationships and the development of new relationships will disrupt or promote stability in the child's life and whether the benefits to be gained by such a change outweigh the risks of loss. Courts should be reluctant to disturb custody arrangements which have satisfactorily served the best interests of the child.

3. Justified deference is to be accorded to a trial court's observations and judgment in a custody proceeding. The knowledge gained by a trial court in observing witnesses in a custody proceeding cannot adequately be imparted to an appellate court by a printed record.

4. When a request for relocation is made, the burden is upon the parent requesting relocation to establish that relocation will be in the child's best interests.

5. The personal happiness of a relocating parent cannot be the only or the predominant factor in justifying a relocation.

6. Because a request by one parent to relocate and separate a child from another parent will likely result in a significant change in established relationships, before such a change will be granted, it must be shown that reasonable alternative visitation exists and is available for the non-relocating parent and that the advantages of the move are substantial. Where the primary reason for the move is financial, premised on employment opportunities which may or may not occur, and the benefits of which to the child are unclear, and where the non-economic factors that will be sacrificed by the move are significant, the uncertainty and speculative nature of the benefits claimed are insufficient to overcome the benefits of existing established relationships and resulting stability under the existing custodial arrangement.

7. When both parents were fit, the primary caretaker doctrine required the trial court to give positive consideration to the parent who had been the primary caretaker. The considerations encompassed within the primary caretaker doctrine are woven into the recently enacted statutory factors, however, to the extent the doctrine required the court to give weighted consideration to this factor in favor of the primary caretaker, it is no longer the law of this Commonwealth.

8. The policy against separating siblings in a custody dispute, while a factor to be considered, is not controlling. This is especially true when a half sibling is born after the parents separate and are divorced, and the younger child is only sixteen months old, five years younger than the child who is the subject of the custody proceedings.

NO. 09-2791

STEVEN A. BERGSTEIN, Esquire—Counsel for Plaintiff.

ROBERT S. FRYCKLUND, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—May 17, 2013

The state legislature in Sections 5328(a) and 5337(h) of the Child Custody Act, 23 Pa. C.S.A. §§5328(a) and 5337(h), set forth sixteen custody and ten relocation factors to be considered by the court in deciding issues of child custody and requests for relocation respectively. Notwithstanding these checklists, the guiding principle in all child custody litigation is the best interests of the child. With this in mind, we review Mother's appeal from our decisions denying her request to relocate and granting, in part, Father's request to modify the existing custody order.

PROCEDURAL AND FACTUAL BACKGROUND

R.M. ("Mother") and N.F., III ("Father") are the parents of one child together, Abygail, age six. The parties separated in July of 2008, when Abygail was two years old. In the meantime, both have developed new relationships and have married: Mother married her current husband, J.M. ("Husband"), on January 21, 2011, with whom she has a sixteen-month-old daughter; and Father married his current wife, A.F. ("Wife"), on October 20, 2012. Father and Wife do not have any children together.

Following their separation, the parties reached agreement on the terms of a custody order, which agreement was decreed as such on August 12, 2010. Under this order, the parties shared legal custody; Mother held primary physical custody; and Father was permitted supervised custodial rights every other weekend, on Easter Sunday and such other holidays as the parties could agree upon, and two weeks of uninterrupted vacation time.

At the time of the original custody order, Abygail was four years old. Approximately two years earlier, Father had been involved in a motor vehicle accident, and sustained serious head and hip injuries. (N.T., p. 116.) It was because of these injuries and Abygail's youthful age that Father's visits were agreed to be supervised. (N.T., pp. 12, 60-61.) The August 12, 2010 order required Abygail's paternal grandparents to be present at all times during Father's visitations. Since Father's marriage to Wife, Wife has also served as supervisor. (N.T., p. 12.)

This custody arrangement has worked well. Abygail is a healthy child, well cared for and loved by both of her parents. She is in the first grade and doing well. (N.T., p. 37.) She has a good relationship with Husband, Wife, her half-sister and Father's parents, who live in a separate home from Father's, on the family farm, approximately thirty yards away. (N.T., p. 98.) Father's grandmother lives immediately to the rear of Father's home. (N.T., p. 98.)

Father's sister lives within approximately a mile and a half from Father. Her daughter, Abygail's cousin, often plays with Abygail when Abygail is visiting her Father. (N.T., pp. 47, 101, 124, 164-65.) Mother is an only child; her mother resides in Hamburg, Pennsylvania. (N.T., p. 45.)

On March 15, 2013, Father filed a petition for modification of the August 12, 2010 custody order. Therein, Father sought more time with his daughter, "as the present partial custody schedule does not provide Father adequate time to participate in the child's life in a meaningful way." Four days later, on March 19, 2013, Mother gave notice of her intent to relocate to Florida in June, and proposed the custody schedule be modified to allow Father to see his daughter twice a year—during the spring break from school and half the summer—and every other Christmas. Mother proposed Father maintain his relationship with Abygail during the remainder of the year through phone calls using Skype or other video calling software. (N.T., p. 33.) Father objected to both the relocation and proposed change in custody schedule.

On April 16, 2013 we held a consolidated custody hearing on both Mother's request for relocation and Father's petition for modification. By order dated April 19, 2013 we denied Mother's relocation request. That same day, we entered a modified order essentially continuing the existing custody order wherein Mother retained primary physical custody, but eliminating the requirement that Father's visits with his daughter be supervised, expanding the number of designated holidays throughout the year to be shared and dividing the summertime equally between the parents. In the event Mother nevertheless chose to move to Florida, we also entered an alternate order transferring primary physical custody to Father, with Mother to have visits every Thanksgiving holiday, for six consecutive weeks during the summer months and over the Christmas holiday for half of the school break.

Mother has appealed from our April 19, 2013 order.[1] In her concise statement which accompanied the appeal, Mother has identified eleven issues which she intends to raise on appeal. These issues have each been addressed within the body of our discussion below. For the reasons which follow, we believe the best interests of Abygail have been furthered by our decision and would be dramatically adversely affected if Mother were permitted to relocate to Florida with Abygail.

DISCUSSION

A. **Custody Order, As Modified**

To the extent Mother questions the modified custody order, contending we have not thoroughly examined each of the sixteen factors set forth in Section 5328, we have done so, albeit not explicitly. The April 19, 2013 order denying Mother's request for relocation makes multiple findings of fact which we found to be significant in our determination. Expanding on these factors in the sequence set out by Section 5328, we make the following findings and conclusions:

> 1. Both parents understand the importance of the other in Abygail's life and both have acted to assure that Abygail has a relationship with the other. Moreover, Father has agreed to reduce his time with Abygail when this was in her best interests.
>
> At the time the August 12, 2010 custody order was entered, Abygail did not attend school. (N.T., pp. 10-11.) The order provided Father partial custody on alternating weekends from Saturday at 11:00 A.M. until Tuesday at 11:00 A.M. When Abygail began school the following year, Father agreed to have his weekend visits end Sunday afternoon, rather than Tuesday morning. (N.T., pp.11, 49-50.)
>
> The converse has not happened. Father's ability to develop a full relationship with his daughter has been limited by the requirement that Father's visits be supervised. (N.T.,

[1] As indicated, three orders were entered on April 19, 2013: one denying Mother's request for relocation, one modifying the existing August 12, 2010 custody order and one in the alternative in the event Mother chose to relocate to Florida without Abygail. Mother's notice of appeal does not state which of these orders is being appealed from.

pp. 105-106.)[2] While there was reason for this limitation to exist at the time the order was entered, due to the extent and nature of Father's injuries and the age of Abygail, since then Father's mind and body have markedly improved such that there is no need for Father's visits with his daughter to continue to be supervised. (N.T., pp. 113-15, 117, 125, 128, 131-36, 152, 157, 166-69, 181.) Though Mother has never precluded Father from visiting Abygail, she is unable to accept the improvement in Father's health and is unwilling to allow Father to have unsupervised visits. (N.T., p. 80.)

2. There is no evidence that either parent currently or in the past abused the other or a member of their household.

3. Prior to Father's motor vehicle accident in 2008, when Abygail was two years old, Mother was Abygail's primary caretaker. (N.T., pp. 8-9.) At that time, Father worked five days a week, Monday through Friday, between the hours of 9:00 A.M. and 6:00 P.M. (N.T., p. 9.) Immediately following the accident, Father's injuries prevented him from being a primary caretaker. During the beginning of Father's recovery, Father was cared for by his mother, who also helped in the care of Abygail when Mother was at work. At the present time, Father has the ability and desire to provide full-time care for his daughter.

4. At the present time, Abygail has a good, stable relationship with both of her parents and their spouses, as well as with her paternal grandparents. (N.T., p. 101.) She is doing well in school, especially in reading, and is involved in various activities. (N.T., pp. 37, 40.) The court believes it important that this stability continue.

5. Abygail's paternal grandparents live within yards of her Father. Both have cared for Abygail in the past and acted as supervisors under the prior custody order. Abygail has a close relationship with her grandparents and visits them frequently

[2] In response to Mother's claim that Father does not take full advantage of the two weeks he is allotted for vacation under the current order, Father testified to the contrary. He did acknowledge, however, that in 2012 he was only able to use one week because neither his parents nor Wife were available to provide supervision for the second week. Father rarely, if ever, has missed any of his alternating weekend visits.

whenever she is with her Father. (N.T., pp. 62, 165.) Father's sister and grandmother also live nearby. (N.T., pp. 101-103, 120-21; Respondent's Exhibit 1.) In contrast, the closest nearby maternal relative is Abygail's maternal grandmother who lives in Hamburg, Pennsylvania.

6. Abygail's relationship with her half-sister was characterized as good, however, it must be remembered that Abygail's sister is only sixteen months old and Abygail is five years older. (N.T., pp. 62, 158.) No further detailed evidence was presented as to what Abygail and her sister do together.

7. At the request of the parties, the court did not interview Abygail. (N.T., pp. 73-75.) Nor was any other evidence presented as to her preference.

8. No evidence was presented that either parent has attempted to turn Abygail against the other.

9. The court finds that both parents are equally able and willing to maintain a loving, stable, consistent and nurturing relationship with Abygail adequate for her emotional needs.

10. The court finds that each parent is equally able and willing to attend to Abygail's daily physical, emotional, developmental and educational needs. There is no evidence of any special needs for Abygail. (N.T., pp. 71-72.)

11. The parties live within approximately fifteen minutes of one another. (N.T., p. 45.)

12. The court finds that each party is equally able to care for Abygail or to make appropriate childcare arrangements. Father is currently on social security disability and is available to care for Abygail. (N.T., p. 118.) Likewise, the court believes Abygail has been well cared for by her Mother and that she would continue to do so.

13. For the most part, the court finds both parties have communicated with one another and cooperated with one another in Abygail's best interests. Although Mother testified that they do not communicate well, and that most forms of communication were previously with Father's mother, and presently with Wife, Father testified that they do communicate with one another. (N.T., p. 100.) For instance, when Mother first sought

to set up a meeting to talk to Father about relocating to Florida, she contacted Wife to schedule this meeting without explaining the purpose. (N.T., p. 63.) Father was immediately in touch with Mother to find out what she wanted to meet about. (N.T., pp. 112, 140-41.) Although Mother's request to relocate has caused some friction in the relationship between Mother and Father, we believe this to be temporary. (N.T., p. 36.)

14. With the exception of Mother's testimony that Father's motor vehicle accident was alcohol related, there is no other evidence that either parent has abused drugs or alcohol, or has any substance abuse problems at the present time. (N.T., pp. 76-77.)

15. The only evidence of mental or physical limitations of any of the parties or members of their family are the injuries Father sustained in the 2008 motor vehicle accident. As to the current status of these injuries, we find that Father has made a good recovery and has no limitations at the present time that would affect his ability to safely care for Abygail or require that his visits be supervised. (N.T., p. 101.) In this regard, we also note that Father has an unrestricted driver's license. (N.T., p. 99.) Further, before his accident, Father was a counselor with Kids Peace where he worked with children. (N.T., pp. 160-61.)

16. The only other relevant factor brought to our attention is that Father and Wife take Abygail to church and Sunday school during Abygail's visits with them. (N.T., pp. 124, 165.) Similar evidence was not provided by Mother.

Based on the foregoing we concluded that Abygail's best interests would be served by continuing primary physical custody with Mother, but giving additional time to Father during the summer months, providing a better defined and more certain division of holiday visits and removing the requirement that all of the Father's time with Abygail be supervised. To the extent Mother is objecting to this latter aspect of our April 19, 2013 decision, her objection appears to be centered on her belief that Father continues to experience cognitive difficulties and physical limitations which could endanger Abygail if the visits are unsupervised. The record belies this fear.

In response to Mother's testimony that Father's cognitive abilities have not changed since 2010 and that he is unable to communicate and make decisions on his own, Father testified that he was released from medical care and therapy in 2010, that he has made vast improvements mentally and physically since then, that his memory has increased, that he drives without any restrictions on his operating privileges and that he has been looking for part-time employment for the past five to six months. (N.T., pp. 34, 52-53, 118-19, 131, 171.) Wife, who is a licensed practical nurse and works with special needs children, testified that Father has no limitations which would affect his ability to care for his daughter or require supervised visits. (N.T., pp. 165-68.) In our observations of Father, although he had a slight limp and exhibited some minor forgetfulness, he was thoughtful and responsive to the questions asked. Mother presented no medical evidence to contradict Father's testimony or that of Wife, and we believe the record fully supports our finding of Father's ability to safely have unsupervised visits with his daughter.[3]

B. **Relocation**

Section 5337(h) outlines the factors to be considered by the court in ruling on a proposed relocation. In the same sequence set forth in Section 5337(h), we make the following findings and conclusions:

1. Abygail has a good and close relationship with both of her parents, and loves both. (N.T., p. 170.) Although the evidence establishes that Mother was Abygail's primary caretaker until age two, and that both Mother and the paternal grandmother cared for Abygail when Father was unable to do so following his injuries in 2008, Father now has the ability to care for Abygail

[3] In **Ketterer v. Seifert,** 902 A.2d 533 (Pa. Super. 2006), the court commented on the deference to be accorded the trial court's observations and judgment as follows:

> [W]e consistently have held that the discretion that a trial court employs in custody matters should be accorded the utmost respect, given the special nature of the proceeding and the lasting impact the result will have on the lives of the parties concerned. Indeed, the knowledge gained by a trial court in observing witnesses in a custody proceeding cannot adequately be imparted to an appellate court by a printed record.

Id. at 540 (**quoting Jackson v. Beck,** 858 A.2d 1250, 1254 (Pa. Super. 2004)).

and is active in her life during the times he is with her. Father walks, rides bike, watches movies, plays board games, fishes and goes on vacations with Abygail. (N.T., p. 103.) He is also interested in her school progress, assists her in homework, attends parent/teacher conferences, and goes online to view her grades. (N.T., pp. 109, 128, 130, 148.) Mother is likewise active in Abygail's life and has had primary custody of Abygail since the parties separated in 2008.

Abygail also has a good and close relationship with Husband and Wife. She further has a close relationship with her paternal grandparents with whom she has had frequent contact since her Father was injured in 2008. Until her Father's recent marriage in October of 2012, Father's mother in particular had supervised Father's visits with Abygail. Since then, Abygail sees her paternal grandparents every weekend she is with her Father.

Although none of the details of Abygail's relationship with her half-sister were described, nothing was presented to believe that this relationship is other than that which would be expected between a sixteen-month-old infant and a sibling who is five years older.

2. At this time, Abygail is almost seven years old. Her birthdate is June 17, 2006. Both parties agreed that they preferred we not interview Abygail and we honored this request. There is nothing to suggest that Abygail is other than a typical six-year-old girl who is loved and cared for by both of her parents; who gets good grades in first grade, especially reading; and who is involved in various activities, including weekly gymnastics, Daisies, and swimming lessons. (N.T., pp. 19, 57-58.) Given the distance of the move proposed by Mother, and the close and frequent contact Abygail has had both with Father and her paternal grandparents, there is no question but that these relationships would be weakened by the move.

Although Mother testified that the schools in Florida have five star ratings, Father testified that the school Abygail now attends is a good one. (N.T., pp. 37, 42, 106.) There is no reason to believe that Abygail's physical, educational or emotional development would be better served in Florida than if Abygail continued residing in Carbon County.

3. Mother has suggested that if she were permitted to relocate with Abygail to Florida, Father would be allowed to have visits with Abygail during the Easter holiday, for half the summer, and every other Christmas. (N.T., pp. 54-55.) Mother agreed that she would be responsible for the transportation expenses. (N.T., pp. 33-34, 56.) She further testified that she believed Father could maintain continuing contact with Abygail through Skype or some other form of video conferencing.

The amount and quality of time Father would be permitted to have with his daughter under Mother's proposal is dramatically less than that which now exists. Presently, Father exercises partial custody every other weekend and is active with his daughter during these times. (N.T., p. 75.) He also testified that he takes his daughter to activities during the times she is with him and attends his daughter's activities on other times provided he is made aware of them. (N.T., pp. 19, 58, 82, 99, 128-29.)

It is also clear that Father has a close relationship with his parents and his family. Father and Wife, his parents, and his grandmother live on the family farm within yards of one another. His sister is approximately a mile and a half away. This is a close-knit family of which Abygail is an active member. She sees her grandparents whenever she visits with her Father and she plays with her cousin, Father's sister's daughter, during these visits.

4. For the reasons already stated herein, we did not question Abygail and no testimony was presented of her preference by either party.

5. From what we can determine, both parents encourage Abygail to have a good relationship with the other. However, as already stated, Mother does not believe Father should be permitted to have unsupervised visits with his daughter. There is no evidence that either parent criticizes or denigrates the other in Abygail's presence.

6. At this time, the extent of any benefit of the relocation to Mother is unclear and uncertain. The principal reason for the move is financial, for Husband to find better employment. (N.T., pp. 23, 36-37, 94.) Husband currently works as a security

guard at St. Luke's Hospital, Allentown Campus, and makes approximately $33,000.00 a year. (N.T., p. 91.) Husband has a bachelor's degree in criminal justice and believes he is overqualified to be a security guard. (N.T., p. 31.) While he would like to obtain employment in the fields of corrections, probation or law enforcement, he has been unsuccessful in locating employment in any of these fields in Pennsylvania. (N.T., pp. 86-87.) Husband has been interviewing for jobs in Florida and claims he has six strong prospects; however, to date Husband has not been offered a job. (N.T., pp. 42, 88-90.)

Husband also claims that he would like to obtain his master's degree in criminal justice and that this will enhance his prospects for employment as well as higher pay. (N.T., p. 91.) To obtain this degree, Husband attended a semester at West Chester College but did not pursue this course because of the time and expense of travel, roughly $400.00 to $500.00 per month, as well as $1,000.00 for the cost of tuition. (N.T., pp. 68, 94.) Husband testified he would like to pursue the degree at the University of Florida, near where his mother lives, and that the cost of this would be paid by one of his prospective employers, the State of Florida. (N.T., pp. 68, 93.) No evidence was presented that Husband has been accepted into the master's program for this degree at the University of Florida.

With respect to Mother's employment as a nurse, Mother testified that there is little difference in pay between her position in Pennsylvania and that which she hopes to obtain in Florida. (N.T., pp. 25, 29.) She did state, however, that because Florida has no income tax, this would result in a financial benefit. (N.T., p. 29.) Also, that she believed any employment she would obtain as a nurse in Florida would be closer to where she would be living and, therefore, her travel time and expenses would be decreased. (N.T., pp. 29-30, 66-67.) Again, as of the date of hearing, Mother had not secured nor been offered a job in Florida. (N.T., pp. 42, 83.)

7. Given the indefiniteness of Mother's and Husband's promise for employment in Florida, there is no clear financial benefit to Abygail from this move. Nor is there any evidence that Mother and her Husband are currently struggling financially or having any difficulty in making ends meet. Further, since Mother's current employment in Pennsylvania is on weekends, freeing Mother to spend weekdays with Abygail, and the work hours and work days of any employment she might obtain in Florida are unknown, there is a real possibility that any employment Mother obtains in Florida will limit the number of hours she has available to be with Abygail. (N.T., p. 7.)

8. The principle reason Mother has given for the move is financial. Yet, as already indicated, neither Mother nor Husband has secured employment in Florida. To the extent Mother testified that her educational opportunities would also be expanded by moving to Florida, again, nothing definite has been planned or secured. (N.T., pp. 30-31, 82.)

Father is opposed to the relocation because if Abygail is allowed to move, the time he can spend with Abygail will be lessened and the relationship he has worked to maintain will be weakened at a time when he is attempting to strengthen that relationship and become even more active in Abygail's life. (N.T., pp. 112-13, 148-49, 150-51, 170.)

9. There is no evidence that either party or a member of the parties' household has previously or is presently abusing another.

10. There are no other factors not already mentioned.

The foregoing addresses the first two issues raised by Mother: a showing that the court is aware of and considered the relocation factors set forth in Section 5337(h) and those custody factors set forth in Section 5328(a). **M.J.M. v. M.L.G.,** 63 A.3d 331, 336 (Pa. Super. 2013) (holding that while the Custody Act requires the trial court to articulate the reasons for its decision prior to the filing of a notice of appeal, there is no required amount of detail; "all that is required is that the enumerated factors are considered and that the custody decision is based on those considerations"). What is most important, however, is that the reason for considering these factors not be lost: to determine the best interests of the child. **Johns v. Cioci,** 865 A.2d 931, 936 (Pa. Super. 2004). "This standard requires a case-by-case assessment of all of the factors that may legitimately affect the 'physical, intellectual, moral and spiritual well-being' of the child." **C.M.K. v. K.E.M.,** 45 A.3d 417, 421 (Pa. Super. 2012) (**quoting Landis v. Landis,** 869 A.2d 1003, 1011 (Pa. Super. 2005)).

Implicit in our August 12, 2010 order modifying custody was that the best interest of Abygail was for primary physical custody to remain with Mother provided she did not relocate to Florida. Our findings that Abygail is a happy, healthy, well-adjusted six-year-old; that Abygail has a strong, stable and beneficial network of family, friends and relatives in Carbon County; and that Abygail is doing well physically, mentally and emotionally, all support this decision. **Wiseman v. Wall,** 718 A.2d 844, 846 (Pa. Super. 1998) (stating that courts should be "reluctant to disturb ... custody arrangements which have satisfactorily served the best interests of the child.").

To the extent we eliminated the restriction that Father's time with Abygail be supervised, the evidence and the facts found by us support this conclusion. Further, the more equal division of time between Mother and Father provided during the summer months and the broadening of the number of holidays recognizes the importance of developing fuller and better parent/child relationships by spending time together while celebrating special occasions and in having extended visits.

As to Mother's decision to relocate to Florida with Abygail, the burden was upon Mother to establish that relocation would be in Abygail's best interests. **See** 23 Pa. C.S.A. §5337(i)(1).[4] On this issue, both Mother and Husband testified that the primary reason for the move was financial, to better Husband's employment and

[4] In **Geiger v. Yeager,** 846 A.2d 691 (Pa. Super. 2004), the court stated the following which is clearly applicable in this case:

> The majority of relocation cases we receive are difficult. As the **Gruber** court observed, these cases are wrought with 'deep and almost irreconcilable competing interests' that our courts must balance in order to achieve the 'right' result. **Gruber,** 583 A.2d at 437. The interests that we must accommodate are:
>
> the custodial parent's desire to exercise autonomy over basic decisions that will directly affect his or her life and that of the children; a child's strong interest in maintaining and developing a meaningful relationship with the non-custodial parent; the interest of the non-custodial parent in sharing in the love and rearing of his or her children; and, finally, the state's interest in protecting the best interests of the children.

Id. at 438-39.

> While a quick reading of these interests show that they do conflict with one another, it can also be seen that they all boil down to one thing: the best interests of the child.

Id. at 696.

employment prospects.[5] Yet not only did neither Husband nor Mother have a firm job offer as of the time of hearing, the decision to move to Florida was made prior to engaging in any serious investigation concerning what employment and educational opportunities existed in Florida. (N.T., pp. 64-65.)

Discounting for the moment the speculativeness of the reasons given to relocate, even if Husband had secured a better paying job and Mother a comparable job to what she has now, and even if Husband had applied for and was accepted into the master's program at the University of Florida, at most this would establish that Mother's reasons for the move are realistic and that Mother will be better off financially. It does not establish, under the facts of this case, that a significant benefit would flow to Abygail. As to the personal happiness that might result for Mother, "the personal happiness of [a] relocating parent cannot be the only or the predominant factor" in justifying a relocation. **Graham v. Graham,** 794 A.2d 912, 917 (Pa. Super. 2002).

Critical to this case is the non-economic factors that are at stake. With the possible exception of Husband's mother, all of Abygail's family with whom she now has close personal ties are in Pennsylvania. While Mother suggests that Father could maintain his relationship with Abygail through two to three visits a year and internet communication, it is unrealistic to believe that such limited visits are a fair substitute for the frequent regular contact Father now has with Abygail, or that video conferencing through the internet is the same as face-to-face contact, particularly with a young child. **Marshall v. Marshall,** 814 A.2d 1226, 1233 (Pa. Super. 2002).[6]

[5] As an incidental benefit, Mother also noted the absence of a state income tax and the possibility that she might pursue graduate studies. As to the relative cost of living in Florida versus that which exists in Carbon County, no evidence was presented.

[6] We are also aware that "[t]he fact that a move of a considerable distance will increase the cost and logistical problems of maintaining contact between the noncustodial parent and child will not necessarily preclude relocation when other factors militate in favor of it." **Ketterer v. Seifert,** 902 A.2d 533, 539 (Pa. Super. 2006). On this point, the court in **Dranko v. Dranko,** 824 A.2d 1215 (Pa. Super. 2003), further stated:

> The court should not insist that the advantages of the move be sacrificed and the opportunity for a better and more comfortable life style [sic] for the [custodial parent] and children be forfeited solely to maintain weekly visita-

We do not question that Abygail has a good relationship with her Mother. That it is a good and beneficial relationship was considered by us and was, without question, a factor in our decision to continue primary physical custody with Mother, if she remains in Pennsylvania.[7] However, this is not the only relationship Abygail has. Her relationship with Father is a good and important one, as is her relationship with her paternal grandparents, her Father's extended family and Wife. While not considered a critical factor in a custody case, it is nevertheless a factor that Father and Wife are providing for Abygail's religious upbringing, with no evidence having been presented that Mother does likewise. **See Zummo v. Zummo,** 394 Pa. Super. 30, 574 A.2d 1130 (1990) (confirming the long-standing legal principle that the court will not interfere with the religious preferences of either parent). To find that all of this should be sacrificed, and that Abygail's progress in school, involvement in activities and existing friendships, should be placed at risk, together with the concomitant potential dangers of disruption of established patterns, for what we believe has not been a well thought out decision, is not in Abygail's best interests.

To the extent Mother argues that our decision did not take into account Abygail's relationship with her half-sister, it did. What is important in this analysis is that Abygail's half-sister is sixteen months old, Abygail is five years older, and the relationship which

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tion by the [non-custodial parent] where reasonable alternative visitation is available and **where the advantages of the move are substantial.**

Id. at 1220 (emphasis in original) (**quoting Gruber v. Gruber,** 583 A.2d 434, 439-40 (Pa. Super. 1990)). The factors enunciated in **Gruber** are incorporated in the Section 5337(h) factors, specifically the third, sixth, seventh and eighth factors. **C.R.F., III v. S.E.F.,** 45 A.3d 441, 445 (Pa. Super. 2012). Here, the avowed advantages of the move are speculative at best and, in any event, not substantial.

[7] In her appeal, Mother complains that we have not given proper consideration to her status as the primary caregiver of Abygail. In this regard, we first note that while "the primary caretaker doctrine requires the trial court to give positive consideration to the parent who has been the primary caretaker, and is one of many factors for the trial court to consider when determining the best interest[s] of a child," **Marshall v. Marshall,** 814 A.2d 1226, 1231 (Pa. Super. 2002) (quotation marks omitted), the considerations encompassed by the doctrine have been "woven into the statutory factors, such that they have become part and parcel of the mandatory inquiry." **M.J.M. v. M.L.G.,** 63 A.3d 331, 339 (Pa. Super. 2013). "[T]he primary caretaker doctrine, insofar as it required positive emphasis on the primary caretaker's status, is no longer viable." **Id.**

exists between them, while typical of that between a sixteen-month-old and six-year-old sibling, does not carry the same weight as if Abygail's half-sister were closer in age to Abygail or the two had a more equally balanced relationship.

While the policy against separating siblings does not distinguish between half-siblings and siblings who share both biological parents, the policy is only one factor, and not a controlling factor, in the ultimate custody decision. **Johns, supra** at 942-43. In **Johns,** the Superior Court stated:

> In the majority of cases in which this doctrine has been invoked, the children have been reared together prior to separation or divorce of the parents. ... In cases where the siblings have not been reared in the same household, the force of the doctrine is less compelling. ...
>
> In the present case, the child has never lived in the same household with her younger sister. Furthermore, the younger child was born to Father and step-mother [sic] following the divorce of Mother and Father. We do not believe that the divorced parent who has another child by a subsequent relationship should thereby be favored in a custody decision regarding any older children, based on the whole family doctrine. Such an application of the doctrine would imply an unacceptable policy: that the parent who subsequently has additional children with a different partner is automatically favored in a custody dispute. This would be blatantly unfair to the parent who, by choice or fate, has no additional children. We therefore refuse to extend the laudable whole family doctrine to the present facts.

Id. (citations omitted). Similar concerns exist here.

The driving force behind Mother's decision to relocate to Florida is Husband's desire to move to pursue his master's degree and to better his job prospects. That Mother is supporting Husband in this decision and desires to move with him is understandable. That the benefits to Abygail are uncertain and questionable are evident. That Mother is aware of the risks involved was acknowledged, in a candid moment, when she confided to Father that she was not happy with the move. (N.T., p. 159.)

CONCLUSION

While there may be some potential advantages to Mother and Husband in moving to Florida, they are speculative, and far outweighed by the actual advantages which exist now and will continue to exist if Abygail remains in Carbon County. The record does not support a finding that the quality of Abygail's life will be substantially improved if she relocates to Florida with Mother; that the strength and development of her relationships with Father, Wife, paternal grandparents and Father's extended family can be maintained or furthered by the custody arrangement proposed by Mother; or that the best interest of Abygail will be served by relocating to Florida. In sum, Mother has not met her burden of proving that relocating Abygail to Florida with her will be in Abygail's best interests.

IN RE: ESTATE OF LAWRENCE A. LaVEGLIA, DECEASED

Civil Law—Testamentary Capacity—Undue Influence—Investment Accounts—Transfer on Death Beneficiary Designation—Presumption of Undue Influence (Confidential Relationship, Weakened Intellect, Substantial Benefit)

1. A payable on death provision on an investment account is testamentary in nature and analyzed under the same standards which apply to a will contest.

2. Testamentary capacity exists when a donor has an intelligent knowledge regarding the natural objects of his bounty, the general composition of his estate and what he desires done with it.

3. Neither old age, nor its infirmities, including untidy habits, partial loss of memory, inability to recognize acquaintances, and incoherent speech, will deprive a person of the right to dispose of his own property.

4. Testamentary capacity is to be ascertained as of the date of execution of the contested document.

5. The burden of establishing testamentary incapacity is upon the person challenging the validity of the contested document. To meet this burden, clear and convincing evidence is required.

6. Testamentary incapacity represents a greater level of impairment than weakened intellect. That is, a weakened mentality as relevant to undue influence need not amount to testamentary incapacity.

7. Undue influence is influence over another to such an extent that it virtually destroys that person's free agency.

8. A presumption of undue influence exists when the evidence demonstrates: (1) that a person or persons in a confidential relationship with a testator or grantor has (2) received a substantial portion of the grantor's property, and (3) that the grantor suffers from a weakened intellect.

9. The essence of a confidential relationship is trust and reliance on one side, and a corresponding opportunity to abuse that trust for personal gain on the other. The parties in a confidential relationship do not deal with one another on equal terms, either because of an overmastering dominance on one side, or weakness, dependence or justifiable trust, on the other.

10. Whether a substantial benefit has been conferred is determined on a case-by-case basis.

11. A weakened intellect is one which under all the circumstances of a particular situation is inferior to normal minds in reasoning power, factual knowledge, freedom of thought and decision, and other characteristics of a fully competent mentality.

12. Once a presumption of undue influence attaches, the burden of proof shifts to the proponent of the document to disprove undue influence by clear and convincing evidence that one or more of the factors giving rise to the presumption has not been established.

13. The presumption of undue influence is rebutted when the evidence establishes that even though the grantor was possessed of a weakened intellect, his decision to confer a substantial benefit on one in a confidential relationship was, under all of the circumstances, an intentional, deliberate decision on his part, here giving recognition to one of two sons who cared, assisted and attended to his needs, at a time when he was in need of care, assistance and attendance, over his other son who ignored such needs and did not visit the grantor for more than five years before the challenged change in beneficiary was made.

NO. 11-9066

AMANDA K. DiCHELLO, Esquire—Counsel for Michael A. LaVeglia.

ANTHONY ROBERTI, Esquire—Counsel for Lawrence M. LaVeglia.

MEMORANDUM OPINION

NANOVIC, P.J.—June 21, 2013

On February 6, 2011 Lawrence A. LaVeglia ("Decedent"), age ninety, died, leaving to survive his two sons: Lawrence M. LaVeglia ("Lawrence"), age 60 (D.O.B. 7/06/50), and Michael A. LaVeglia ("Michael"), age 53 (D.O.B. 11/23/57). Michael is the Petitioner and Lawrence the Respondent in these proceedings. At issue are changes Decedent made in October 2009 to the beneficiary designation for three investment accounts he held with Vanguard, effectively removing Michael as a joint equal beneficiary and naming Lawrence as the sole primary beneficiary of these accounts upon his death. In his Petition, Michael asserts Decedent lacked the necessary testamentary capacity to execute the change of ben-

eficiary forms, and that the execution of these forms was procured by undue influence.

PROCEDURAL AND FACTUAL BACKGROUND

At the time of Decedent's death, Michael and Lawrence were not speaking to one another—for more than thirty-five years—and were virtual strangers. (N.T. 4/23/12, pp. 27-30, 48.) Why is unimportant and was never made clear on the record. What is important is that Decedent knew of this breach and, at least until the beneficiary changes which are in dispute, appears to have treated his sons as equals in the distribution of his estate. (N.T. 4/23/12, p. 31; N.T. 7/12/12, p. 317.)

Also important is the discrepancy in the relationships each son separately maintained with their parents, especially during the final five years of Decedent's life. Early on, Michael and Lawrence were raised in New York. In 1962 their parents divorced. (N.T. 4/23/12, p. 68; N.T. 7/12/12, p. 203.) Michael was five years old and Lawrence twelve. From that point forward, Michael's mother was his primary caretaker and the parent with whom he remained closest.

Michael's mother and her husband, his stepfather, relocated to North Carolina in the 1980s. Michael moved there in 1995. (N.T. 4/23/12, pp. 9, 71.) Before Michael left New York, he saw Decedent approximately three to four times a year, mostly on holidays. (N.T. 4/23/12, pp. 8, 37-38.) In the beginning, when Michael moved to North Carolina, he saw Decedent approximately once or twice a year and would also be in contact by telephone three to four times a year. (N.T. 4/23/12, pp. 37-39.)[1] However, while Michael maintained telephone contact, he last saw Decedent sometime in 2004 or 2005, approximately six years before Decedent's death. (N.T. 4/23/12, pp. 72, 76.)

In contrast, Lawrence left his mother's home when he was eighteen years old, in part because of strained relations with his stepfather. Since then, Lawrence's relationship with his mother

[1] Michael is a commercial truck driver and has resided in either North Carolina or South Carolina for seventeen years. As a driver, Michael spends most of his time on the road and is able to be home only two or three times a month, primarily on weekends. (N.T. 4/23/12, pp. 36-37.)

has been minimal. In fact, for over thirty-five years prior to his father's death, Lawrence did not speak with or visit his mother. (N.T. 4/23/12, pp. 49-50.)[2]

Shortly after Decedent and his wife divorced, Decedent moved to Guantanamo Bay in Cuba where he had obtained a civilian job with the Navy overseeing ship repairs. (N.T. 7/12/12, pp. 203-204.) He worked in Guantanamo Bay for the next sixteen years, rarely returning to New York. (N.T. 4/23/12, pp. 69-70.) In 1978, Decedent retired and moved to Greenport, New York on Long Island.

Although there were difficulties in their relationship earlier, after Decedent returned from Guantanamo Bay and was retired, a normal parent-child relationship developed between Lawrence and his father. (N.T. 7/12/12, pp. 216-18.) By this time in his life, Lawrence had been married and divorced and had a son, Jason, born in 1974. Lawrence frequently visited his father, often on holidays, and Lawrence and his son would go boating and fishing with Decedent.

Until the changes which are the subject of this litigation, Decedent treated his sons equally in terms of gifting and his estate planning. In 2001, he transferred title of his home in Greenport to both of his sons and retained a life estate. In March 2007, the home was sold. Decedent received Eighty Thousand Dollars ($80,000.00), and each of his sons approximately One Hundred and Twenty Thousand Dollars ($120,000.00). (N.T. 4/23/12, pp. 21-22.)

On August 3, 2006, Decedent executed his last will and testament. (Petitioner Exhibit No. 6.) Decedent's will names Lawrence as executor and Michael as successor executor in the event

[2] Coincidentally, Michael and Lawrence's mother died in January 2011, approximately two weeks before their father. She was predeceased by her husband. Michael was the executor of her estate which had a total net value of approximately $100,000.00 and was divided four ways: 25 percent to Michael, 25 percent to Lawrence's son, Jason and 25 percent to each of her husband's two children. (N.T. 4/23/12, pp. 74, 80, 82.) Although Lawrence severed contact with his mother, Jason's mother, Lawrence's ex-wife, made sure her son knew and visited his paternal grandmother. (N.T. 4/23/12, pp. 80-81.)

Before her death, Michael and Lawrence's mother suffered from Alzheimer's disease which required her admission to a nursing home. Michael and his family did what they could to assist his mother in her final years and Michael made the arrangements for her admission to the nursing home. (N.T. 4/23/12, pp.49-50, 65-66, 73-74.) Lawrence did not attend his mother's funeral services.

Lawrence was unable to serve in this capacity. Therein, Decedent divided his entire estate equally between his sons. That same date, he also executed a durable general power of attorney with Lawrence named as primary agent and Michael as successor in the event Lawrence was unable or unwilling to serve. (Petitioner Exhibit No. 10.) At about this same time, in March 2005, Decedent, who previously had his investments relatively equally divided between two separate brokerage accounts, with Michael the beneficiary of one and Lawrence the beneficiary of the other, transferred all of his investments to Vanguard, into three existing accounts. (N.T. 7/12/12, p. 300; Petitioner Exhibit No. 33 (Lawrence's Deposition), pp. 83-85, 89.) The beneficiary designation of these accounts was changed to name both Michael and Lawrence as equal primary beneficiaries of all three Vanguard Accounts.[3]

In September of 2006, Decedent moved from his home in Greenport to Peconic Landing Assisted Living Facility ("Peconic Landing"), an independent and assisted senior living community, also in Greenport, about a mile from Decedent's home. (N.T. 7/12/12, p. 232.) This move was prompted after Decedent was hospitalized at Eastern Long Island Hospital for one week in June 2006 for fever, dehydration and dizziness. During this hospitalization, Decedent was diagnosed by Dr. Caroline Gatewood, a board-certified neurologist, with mild dementia, probably of the Alzheimer's type. (Petitioner Exhibit No. 30 (Gatewood Deposition), p. 38.) Dr. Gatewood advised Lawrence that Decedent should not drive or live alone. (Petitioner Exhibit No. 30 (Gatewood Deposition), pp. 28-29.) Thereafter, Lawrence and Decedent made arrangements for Decedent to stay at Peconic Landing. (N.T. 4/23/12, p. 87.)

Decedent was at Peconic Landing until March of 2009. During this time, Decedent's ability to take medication on his own was called into question. It was also noted that Decedent needed assistance using kitchen equipment and would not eat if left alone. Dr. Mel B. Kaplan, who had been Decedent's primary care physician since 1988, observed on September 24, 2007 that Decedent's hearing, which was already poor, was getting worse, to the point

[3] This equal division of assets also extended to a life insurance policy Decedent maintained on his life with Michael and Lawrence as equal beneficiaries. (N.T. 4/23/12, p. 90.)

where Decedent needed to read lips. (Petitioner Exhibit No. 31 (Kaplan Deposition), p. 20.)

While Decedent was at Peconic Landing, Dr. Kaplan became concerned that Decedent was showing signs of dementia, cognitive impairment. This decline in Decedent's cognitive functioning, which was slow at first, accelerated in 2007 and 2008. (Petitioner Exhibit No. 31 (Kaplan Deposition), pp. 75-76.) In consequence, Decedent's level of care at Peconic Landing was increased in October 2008 from independent living to assisted living. (Petitioner Exhibit No. 31 (Kaplan Deposition), pp. 56-61; Petitioner Exhibit No. 30 (Gatewood Deposition), pp. 48-49.) As of December 2008, Dr. Kaplan estimated Decedent's level of dementia on a scale of zero to ten, with ten being end-stage dementia, at six or seven. (Petitioner Exhibit No. 31 (Kaplan Deposition), p. 70.)

At the time of Decedent's admission to Peconic Landing, Lawrence was living in Boston, Massachusetts. In June 2007, he retired and moved to Albrightsville, Carbon County, Pennsylvania. Lawrence and his son regularly visited Decedent at Peconic Landing and Lawrence accompanied his father to doctor visits. (N.T. 7/12/12, pp. 167, 237, 241-42.) Michael never visited Decedent at Peconic Landing, although he did telephone every three to four months. (N.T. 4/23/12, pp. 23, 72.)

In December 2008 Decedent suggested he move to Pennsylvania to be closer to Lawrence and his son, Jason. (N.T. 7/12/12, pp. 242, 244-45, 250.) This move occurred on March 16, 2009, when Decedent was admitted to Sacred Heart Senior Living by Saucon Creek ("Sacred Heart") in Center Valley, Lehigh County, Pennsylvania. Lawrence selected and made arrangements for Decedent's admission to this facility. Michael was not made aware of the move beforehand and did not learn that Decedent had moved until June 2009, when he attempted to reach Decedent by telephone at Peconic Landing. (N.T. 4/23/12, pp. 24-26.) That same month, Michael also received a letter from Decedent advising him of Decedent's new address and telephone number. (N.T. 4/23/12, p. 31; Petitioner Exhibit No. 5.)

On the date of Decedent's physical admission to Sacred Heart, he was accompanied by Lawrence. The two met with Tatiana Gula, Sacred Heart's director of admissions, who performed an initial assessment to ascertain Decedent's needs and his suitability for

independent living versus assisted living or a nursing home. As part of this assessment, Ms. Gula sought to determine whether Decedent could independently perform the activities of daily living (ADL's), or required assistance. Lawrence had asked that Decedent be placed in independent living.

During her assessment, Ms. Gula purposely directed her questions to Decedent as part of the evaluation process. Decedent was confused and unable to answer. (N.T. 4/23/12, pp. 114-15.) Instead, Lawrence provided the information requested regarding Decedent's medical history, his current medications and his financial status. (N.T. 4/23/12, pp. 113-15.) While completing a resident fact sheet, Lawrence asked to be and was designated as the "responsible party" and emergency contact for Decedent. (N.T. 4/23/12, pp. 125-26.)

As a result of her assessment, Ms. Gula concluded that Decedent was not able to independently care for himself and required assisted living. Consequently, Ms. Gula admitted Decedent to the assisted living quarters at Sacred Heart. (N.T. 4/23/12, pp. 119-21.) Within three days of this admission, at Lawrence's prodding and based, in part, on an evaluation completed by Dr. John R. Manzella, who determined that Decedent was suitable for independent living with in-home supports, Decedent was moved to independent living. (Petitioner Exhibit No. 17.)[4]

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[4] Ms. Gula testified that as a licensed facility, the Pennsylvania Department of Public Welfare requires a completed form MA55 (**see** 55 Pa. Code §2600.141) before a resident is admitted. This form, completed by a doctor, certifies whether the resident is suitable for independent living, or requires assisted living or skilled nursing care. (N.T. 4/23/12, pp. 109-10.) On March 16, 2009 a completed MA55 was not provided, however, Lawrence did provide the New York equivalent which state law allowed Ms. Gula to accept on a thirty-day interim basis, provided a completed MA55 was received within thirty days of admission. (N.T. 4/23/12, p. 112.) This is the form which Dr. Manzella completed. (N.T. 4/23/12, p. 165.)

Ms. Gula further testified that the New York medical form she was provided disclosed a diagnosis of dementia and that Decedent required weekly injections of Procrit for anemia and overall weakness. (N.T. 4/23/12, pp. 101, 118-19, 168.) For reasons which were unexplained, the New York form Ms. Gula was provided on the date of Decedent's admission was removed from Decedent's file at Sacred Heart and is not part of the Sacred Heart records which Petitioner moved into evidence. Also unexplained was the appearance in Decedent's Sacred Heart file of the MA55 form completed by Dr. Manzella and which is dated January 19, 2009, almost two months prior to Decedent's admission to Sacred Heart. This form was not previously seen by Ms. Gula and was not provided to her at the time of Decedent's admission.

Between March 16, 2009 and his death on February 6, 2011, Decedent was a resident at Sacred Heart. During this time he was visited often by Lawrence, who continued to accompany Decedent to medical appointments and provide assistance. (N.T. 7/12/12, p. 268; Petitioner Exhibit No. 33 (Lawrence's Deposition), pp. 15-16.) As with Decedent's stay at Peconic Landing, Michael telephoned but did not personally visit Decedent. Decedent was observed by staff to be mentally alert and able to act on his own. This is not to say that Decedent did not show signs of aging or of cognitive decline. He did.

In May of 2009, Decedent was admitted to the Lehigh Valley Hospital for dizziness and weakness. An MRI scan of his brain revealed that Decedent had experienced a number of transient ischemic attacks, commonly described as "mini strokes." On November 10, 2009 Decedent was taken to the hospital after experiencing difficulty rousing from sleep and appearing confused.

On November 13, 2009 Decedent fell while in his room at Sacred Heart and fractured his hip. He was hospitalized at Lehigh Valley Hospital and later admitted to the Sacred Heart transitional center for physical therapy where he remained until December 7, 2009. During an exam at the hospital on November 14, 2009, Decedent displayed "slow mentation." (N.T. 7/10/12, p. 52; N.T. 7/12/12, p. 129.) Upon discharge he returned to Sacred Heart.

In December 2010 Decedent again fell and fractured his hip. Also on January 21, 2011. On January 30, 2011 he was hospitalized for an acute myocardial infarction. On February 4, 2011 he was discharged and returned to Sacred Heart. On February 6, 2011 he died at age ninety. Decedent's certificate of death listed his immediate cause of death as myocardial infarction, with failure to thrive and end stage dementia as underlying causes. (Petitioner Exhibit No. 1.)

On or about October 1, 2009 Decedent executed a Transfer on Death (TOD) Plan Form to change the beneficiary designation of his accounts with Vanguard. (Petitioner Exhibit No. 7.) On this form, Decedent designated Lawrence as the sole primary beneficiary and Michael as contingent beneficiary of his Vanguard accounts. The form was incorrectly dated July 13, 1920, Decedent's date of birth.

On October 2, 2009 Decedent signed a second TOD Plan Form again designating Lawrence as the sole primary beneficiary of his Vanguard accounts, but this time listing Lawrence's son, Jason LaVeglia, as the contingent beneficiary. (Petitioner Exhibit No. 8.) The effect of these changes was to completely remove Michael as a beneficiary of Decedent's Vanguard accounts. No further beneficiary changes were made to these accounts prior to Decedent's death.

At the time of Decedent's death, the value of his Vanguard accounts was Two Million Three Hundred Fifteen Thousand Three Hundred Sixty-Two Dollars and Forty-Eight Cents ($2,315,362.48). This figure represents the overwhelming majority of the date of death value of Decedent's assets. The value of his probate estate was less than Ten Thousand Dollars ($10,000.00).

It is unknown from whom Decedent received the TOD forms or whether anyone assisted him in making the changes described. The forms were available both on-line and by making a telephone request. (N.T. 7/12/12, pp. 286-87.) Since Decedent was not computer literate and required assistance to access his Vanguard accounts on-line, it appears unlikely that Decedent obtained the forms on-line—at least without assistance. (N.T. 7/12/12, p. 301.) Though Lawrence admitted to helping Decedent access his accounts on-line on other occasions and to being familiar with the balance in these accounts, he denied obtaining the forms for Decedent, asking Decedent to make the changes, assisting Decedent in completing the forms, or even being aware before July 2010 of the beneficiary changes made by Decedent. (N.T. 7/12/12, pp. 279-80, 300-301, 325.) Michael did not become aware of the changes until after Decedent's death. (N.T. 4/23/12, pp. 52-53.)

DISCUSSION

In these proceedings, Michael seeks to void the beneficiary designations made by Decedent in October 2009 on two grounds, lack of capacity and undue influence. Each is discussed below.

1. **Capacity**

In **In re Estate of Angle,** 777 A.2d 114 (Pa. Super. 2001), the court stated:

> The test for determining the existence of testamentary capacity, a quality every person **sui juris** is presumed to possess, is whether a man or woman has an intelligent knowledge regarding the natural objects of his bounty, the general composition of his estate, and what he desires done with it, even though his memory may have been impaired by age or disease. **In re Brantlinger's Estate,** 418 Pa. 236, 247, 210 A.2d 246, 252 (1965).

Id. at 125 (quotation marks omitted) (**quoting In re Estate of Ziel,** 467 Pa. 531, 536, 359 A.2d 728, 731 (1976)). The effect of this presumption is to place on the party challenging a testamentary disposition, here a change of beneficiary designation, the burden of proving the grantor's incapacity.[5]

This is not an easy task.

> Neither old age, nor its infirmities, including untidy habits, partial loss of memory, inability to recognize acquaintances, and incoherent speech, will deprive a person of the right to dispose of his own property.

In re Bosley, 26 A.3d 1104, 1112 (Pa. Super. 2011) (**citing Estate of Hastings,** 479 Pa. 122, 129, 387 A.2d 865, 868 (1978)). Further,

> [o]ld age, sickness, distress or debility of body neither prove nor raise a presumption of incapacity. ... Nor will inability to transact business ..., physical weakness ... or peculiar beliefs and opinions ... . Failure of memory does not prove incapacity unless it is total [and] so extended as to make incapacity practically certain. A testator may not be able at all times to recollect the names of persons or families of those with whom he has been intimately acquainted. He may ask idle questions and repeat himself, and yet his understanding of the ordinary transactions of his life may be sound. He may not have the strength and vigor of a man able to digest all the parts of a contract, yet he may be competent to distribute his property by will. ...

Estate of Marie Lista, 2006 WL 321189 at *14 (Phila. C.P. 2006) (**quoting In re Lawrence Estate,** 286 Pa. 58, 132 A. 786, 789

[5] In analyzing these claims, a payable on death provision on an investment account is testamentary in nature and analyzed under the same standards which apply to a will contest. **See e.g., Fulkroad v. Ofak,** 317 Pa. Super. 200, 205, 463 A.2d 1155, 1157 (1983) (equating the capacity to designate a beneficiary on a life insurance policy with the requirements for testamentary capacity); **Life Insurance Company of North America v. O'Brien,** 3 Phila. Co. Rptr. 529 (1980) (adopting the same burden-shifting standards applied in evaluating the validity of testamentary transfers to a change in beneficiary designation made by the owner of a life insurance policy less than two months prior to death).

(1926) (citations omitted)). Equally important, the evidence of incapacity must be clear, strong and compelling. **In re Kuzma's Estate,** 487 Pa. 91, 95, 408 A.2d 1369, 1371 (1979).

"Testamentary capacity is to be ascertained as of the date of execution of the contested document." **Bosley, supra** at 1112. Hence, the critical dates before us are those on which Decedent executed the transfer on death forms: on or about October 1, 2009 and October 2, 2009. As to the execution itself, there is no evidence of a witness being present nor any evidence of Decedent ever being questioned about why the changes were made or his understanding of the effect of the changes. While it is clear Decedent was eighty-nine years old at the time, was unable to perform unassisted all of the activities of daily living, experienced memory lapses, and exhibited other characteristics of old age and declining mental health, such as a change in gait, inattentiveness to eating accompanied by weight loss, difficulty keeping track of medications, slow mentation, and times of confusion and disorientation, these marks of an impaired intellect are insufficient in and of themselves to take away from Decedent the basic right of an individual to dispose of his property as he chooses. In reaching this conclusion, while we believe Decedent's mental abilities were reduced, we also believe Decedent's basic understanding of his family, his property and his wishes respecting the two were intact when he last changed the beneficiary to his Vanguard accounts.

Decedent was admitted to the Eastern Long Island Hospital on June 19, 2006 because of weakness, dizziness and fever. (Petitioner Exhibit No. 31 (Kaplan Deposition), pp. 25-26.) He was discharged on June 26, 2006. CAT scans of his brain taken on June 20, 2006 detected multiple lacunar infarcts—small strokes to the brain—a common finding associated with individuals who have dementia. (N.T. 7/10/12, p. 42.) These results evidenced progressive brain atrophy from an earlier MRI taken on November 21, 2003 and which showed early or mild atrophy of the cortex—the outer layer of the brain. (Petitioner Exhibit No. 30 (Gatewood Deposition), pp. 16-17, 27; Petitioner Exhibit No. 31 (Kaplan Deposition), pp. 89-90; N.T. 7/10/12, pp. 34, 42-43.)

Dr. Caroline Gatewood, a board-certified neurologist, who previously evaluated Decedent in 2003, examined Decedent in the hospital on June 21, 2006, followed by two office visits on July

11, 2006 and August 31, 2006. She noted a marked decline in Decedent's cognitive functions between 2003 and 2006: he exhibited slow mentation, had an unsteady gait and evinced memory deficits. (Petitioner Exhibit No. 30 (Gatewood Deposition), pp. 26-27, 35.) He also evinced aphasia—a reduction in vocabulary and expressive language—a cardinal symptom of Alzheimer's. (Petitioner Exhibit No. 30 (Gatewood Deposition), p. 41; N.T. 7/10/12, pp. 171-72.) From the results of her evaluation and review of the 2006 CAT scan, Dr. Gatewood concluded Decedent had mild dementia, probably of the Alzheimer's type. (Petitioner Exhibit No. 30 (Gatewood Deposition), p. 38.)[6]

Dr. Gatewood recommended Decedent not live alone and that he should either receive home care or reside in an assisted living facility. (Petitioner Exhibit No. 30 (Gatewood Deposition), pp. 28-29.) This opinion served as the basis for Decedent's move to Peconic Landing. Namenda, a medication to slow the progression of dementia, was prescribed. (Petitioner Exhibit No. 30 (Gatewood Deposition), p. 40; Petitioner Exhibit No. 31 (Kaplan Deposition), pp. 30-31.)

Dr. Gatewood's diagnosis is supported by the evidence available then, as well as by subsequent events. (N.T. 7/10/12, pp. 39-40.) Decedent's medical records and the evidence presented at trial is replete with examples of Decedent's declining cognitive abilities.

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[6] Dementia is a loss of cognitive function which manifests itself in deficits in memory, language, problem-solving abilities, insight and judgment. (N.T. 7/10/12, p. 34.) A generic finding of dementia alone does not reveal the cause of the dementia. Here, Dr. Gatewood diagnosed the probable cause of Decedent's dementia as Alzheimer's disease. This form of dementia is progressive and incurable. (Petitioner Exhibit No. 30 (Gatewood Deposition), p. 37; N.T. 7/10/12, pp. 38, 120; N.T. 7/12/12, p. 15.) As testified to by Dr. Rovner, dementia of the Alzheimer's type is termed probable because actual confirmation can only be made by brain biopsy or upon autopsy. (N.T. 7/10/12, pp. 140-42.) There was no autopsy in this case. (N.T. 7/12/12, p. 154.)

At both the July 11, 2006 and August 31, 2006 office visits, Dr. Gatewood administered a mini-mental status examination. (Petitioner Exhibit No. 30 (Gatewood Deposition), pp. 41, 48.) The mini-mental status examination is a screening test for dementia. It assesses cognitive functions through a series of thirty questions. (N.T. 7/10/12, pp. 40-41.) Decedent scored 25 out of 30 in the first examination and 28 out of 30 in the second. (Petitioner Exhibit No. 30 (Gatewood Deposition), pp. 41, 48.) Dr. Gatewood opined this was consistent with her diagnosis of mild dementia. (Petitioner Exhibit No. 30 (Gatewood Deposition), p. 41.)

Dr. Mel B. Kaplan was Decedent's primary care physician for more than twenty years—between 1988 and 2008. (Petitioner Exhibit No. 31 (Kaplan Deposition) pp. 13-14, 19.) Between 2006, when Decedent was first diagnosed with dementia, and December 5, 2008, Decedent's last visit with Dr. Kaplan, Dr. Kaplan noted and documented Decedent's worsening memory: his inability to recall why he was present for appointments, not knowing what medications he was taking or when to take them, and loss of weight and malnutrition, frequently caused because of lack of attention to good eating habits. (Petitioner Exhibit No. 31 (Kaplan Deposition), pp. 35, 37-39, 48-51, 54-57, 58-59, 61, 63-65, 67, 70, 74-76, 103.)

In telephone conversations Decedent had with Michael in June and September 2009, Decedent did not recall that Michael had a back operation in 2008, notwithstanding this was a frequent topic of conversation between them in the past. (N.T. 4/23/12, pp. 23-40.) Tatiana Gula noted Decedent's inability to provide background information upon his admission to Sacred Heart, his need for assistance with personal care, his dependence and reliance upon Lawrence and on at least one occasion, his inability to distinguish the door to his room from eight others surrounding a central parlor area. (N.T. 4/23/12, pp. 127, 139-40, 146.)[7] At medical appointments to which Decedent was taken by Lawrence, the providers frequently looked to Lawrence to provide requested information, rather than to Decedent. (N.T. 7/10/12, pp. 50-51, 143.) In addition, Dr. Barry Rovner, Michael's medical expert,[8] testified that people who suffer from cognitive dysfunction or cognitive disabilities are prone to falling and losing their balance because of problems with perception and being unable to overcome obstacles they encounter. (N.T. 7/10/12, pp. 56-57, 59-60.) In November 2009, Decedent fell and fractured his hip and did so again in December 2010. Decedent fell once more on January 21, 2011 prior to his final hospital admission.

[7] Ms. Gula's observations of Decedent occurred between March 16, 2009, Decedent's date of admission to Sacred Heart, and August 23, 2009, the last day Ms. Gula was employed at Sacred Heart. (N.T. 4/23/12, p. 94.)

[8] Dr. Rovner, who is board certified in neurology, is a professor in the Department of Psychiatry and Neurology at Thomas Jefferson Hospital in Philadelphia. He is an expert in the field of dementia, memory loss and Alzheimer's disease. (N.T. 7/10/12, p. 22.)

Notwithstanding this evidence of weakened intellect, we are not convinced that Decedent did not possess testamentary capacity when the beneficiary changes were made. As of July 2006 and December 2008, both Drs. Gatewood and Kaplan respectively agreed Decedent knew who his children were and was aware of his investment holdings. (Petitioner Exhibit No. 30 (Gatewood Deposition), pp. 53-54; Petitioner Exhibit No. 31 (Kaplan Deposition), pp. 95-96.) In July 2008, Decedent gave informed consent to cataract surgery. (Petitioner Exhibit No. 31 (Kaplan Deposition), p. 55; N.T. 7/10/12, pp. 83-84.)

Three months after moving to Sacred Heart, on June 22, 2009, Decedent wrote to Michael and provided the address and telephone number at which he could be reached. (Petitioner Exhibit No. 5.) In August 2009, less than two months before the Vanguard forms were signed, Decedent and Lawrence visited Jason LaVeglia at his new home in Yardley, Pennsylvania. Jason testified Decedent was coherent and his normal self. (N.T. 7/12/12, pp. 173-75.) Finally, while Decedent was a resident at Sacred Heart, he kept track of his stocks and taught staff how to manage their finances. (N.T. 7/11/12, pp. 167-68.)

Decedent was examined three times by Dr. John R. Manzella, a primary care physician board certified in internal medicine and pediatrics, and board eligible in hospice and palliative care. Dr. Manzella first examined Decedent on January 19, 2009 prior to Decedent's admission to Sacred Heart. In this examination, Dr. Manzella assessed Decedent's mental status and found him to be very sharp. (N.T. 7/11/12, pp. 23-25, 62.) This exam was outside the presence of Lawrence. It was at this time that Dr. Manzella completed a DPW form assessing Decedent's physical and mental status and found him capable of independent living. (N.T. 7/11/12, pp. 72-74.)

In two subsequent examinations, on May 21, 2009 and October 8, 2009, Dr. Manzella noticed no cognitive problems nor any changes from his initial examination. (N.T. 7/11/12, pp. 27-32.) With respect to the examination on October 8, 2009, several days after the beneficiary changes, Dr. Manzella opined that on that date Decedent was capable of understanding that he had two sons, was capable of understanding the assets he owned and was capable of

making decisions about his health care. (N.T. 7/11/12, pp. 34-35.) Dr. Anthony Giampolo, Lawrence's medical expert,[9] opined that Decedent knew the nature of his assets and the objects of his bounty in October 2009 when the beneficiary forms were signed. (N.T. 7/12/12, pp. 68-69.)

Joseph Eckstein, a family practice nurse practitioner, saw Decedent seven times between June 23, 2009 and March 24, 2010. (N.T. 7/11/12, p. 104.) At all times, and in particular at his examination on September 17, 2009, the one closest in time to when the beneficiary changes were made, Mr. Eckstein found Decedent to be of sound mind, coherent and lucid. (N.T. 7/11/12, p. 108.) Mr. Eckstein never noticed any hemiparesis or speech problems, memory loss or red flags for dementia. (N.T. 7/11/12, pp. 111, 118, 129.)

Most telling is the beneficiary forms themselves. In completing these forms, Decedent was able to properly follow the instructions and complete the appropriate sections for making a change of beneficiary, to correctly state the ten-digit money market settlement account number needed for making the changes, and to provide his own social security number, as well as the birth dates of his two sons and grandson.

As a legal standard, testamentary incapacity represents a greater level of impairment than weakened intellect. **Estate of Angle, supra,** 777 A.2d at 123 (noting that weakened intellect does not rise to the level of testamentary incapacity). That is, people with a weakened intellect may well retain testamentary capacity. (N.T. 7/10/12, p. 74; N.T. 7/12/12, p. 63.) A determination that Decedent lacked the testamentary capacity in October 2009 to make beneficiary changes requires proof that is so strong as to enable us to determine without hesitancy that Decedent did not know the objects of his bounty, the general composition of his estate and what he desired done with it. The evidence does not meet this standard.

2. **Undue Influence**

Upon proof of proper execution of the change of beneficiary forms by Decedent, a presumption of lack of undue influence arose, placing the burden of rebutting this presumption with evidence to

[9] Dr. Giampolo is a board-certified neurologist in private practice, active in teaching and lecturing medical students and residents. (N.T. 7/12/12, p. 4.)

the contrary upon the contestant. **Life Insurance Company of North America v. O'Brien, supra** at 533; **cf. In Re Thompson's Estate,** 387 Pa. 82, 88, 126 A.2d 740, 744 (1956) (discussing the same with respect to a properly executed will). "[T]he effect is that the risk of non-persuasion and the burden of coming forward with evidence of undue influence shift to the contestant." **In Re Clark's Estate,** 461 Pa. 52, 58, 334 A.2d 628, 631 (1975).

In describing what is meant by undue influence, the Supreme Court stated:

> The term 'influence' does not encompass every line of conduct capable of convincing a self-directing person to dispose of property in one's favor. **In re Estate of Ziel,** 467 Pa. 531, 359 A.2d 728 (1976). The law requires that the influence be control 'acquired over another that virtually destroys [that person's] free agency.' **Id.,** 467 Pa. at 540, 359 A.2d at 733. Conduct constituting influence must consist of 'imprisonment of the body or mind, fraud, or threats, or misrepresentations, or circumvention, or inordinate flattery or physical or moral coercion, to such a degree as to prejudice the mind of the testator, to destroy his free agency and to operate as a present restraint upon him in the making of a will.' **Id.** A parent-child relationship does not establish the existence of a confidential relationship nor does the fact that the proponent has a power of attorney where the decedent wanted the proponent to act as attorney-in-fact. **In re Estate of Jakiella, supra.**

Estate of Angle, supra.

Undue influence, "may be, and often can only be" proven by circumstantial evidence. **Estate of Ziel,** 467 Pa. 531, 541, 359 A.2d 728, 734 (1976).

> '[U]ndue influence is a "subtle," "intangible" and "illusive" thing,' **In re Estate of Clark,** 461 Pa. 52, 334 A.2d 628, 635 (1975), 'generally accomplished by a gradual, progressive inculcation of a receptive mind,' **id.** at 634. Consequently, its manifestation 'may not appear until long after the weakened intellect has been played upon.' **Id.** Because the occurrence of undue influence is so often obscured by both circumstance and design, our Courts have recognized that its existence is best measured by its ultimate effect. Thus, the Courts' hold-

> ings establish a presumption of undue influence when the evidence demonstrates: (1) that a person or persons in a confidential relationship with a testator or grantor has (2) received a substantial portion of the grantor's property, and (3) that the grantor suffers from a weakened intellect. **See id.** at 632; **see also, In re Estate of Glover,** 447 Pa.Super. 509, 669 A.2d 1011, 1015 (1996). Once the presumption has attached, the burden of proof shifts to the defendant to disprove undue influence by clear and convincing evidence that one of the foregoing criteria is not established. **See Clark,** 334 A.2d at 632; **Glover,** 669 A.2d at 1015.

Owens v. Mazzei, 847 A.2d 700, 706 (Pa. Super. 2004).

Further, whereas testamentary capacity focuses on a grantor's state of mind at the time the document in question was executed, undue influence takes into account the effects of conduct on a weakened intellect over time. On this point, our Supreme Court stated:

> [W]here testamentary capacity is at issue, the real question is the condition of the testator at the very time he executed the will, and, although evidence as to capacity which is reasonably distant from the time of execution is admissible as indicative of capacity on the particular day, testimony as to testatrix's condition close to that time must be considered more significant. **Brantlinger Will,** 418 Pa. 236, 248, 210 A.2d 246, 253 (1965); **Lanning Will,** 414 Pa. 313, 317, 200 A.2d 392 (1964). However sound that rule is, it cannot be imposed upon the law of undue influence. As we said before, weakened mentality as relevant to undue influence need not amount to testamentary incapacity. Undue influence is generally accomplished by a gradual, progressive inculcation of a receptive mind. The 'fruits' of the undue influence may not appear until long after the weakened intellect has been played upon. In other words, the particular mental condition of the testatrix on the date she executed the will is not as significant when reflecting upon undue influence as it is when reflecting upon testamentary capacity. More credence and weight may be given to the contestant's remote medical testimony.

Estate of Clark, supra at 64-65, 334 A.2d at 634. We next examine in greater detail each of the elements required for a **prima facie** showing of undue influence.

(a) **Confidential Relationship**

There is no specific formula by which to define a confidential relationship.

> Our Supreme Court has acknowledged that '[t]he concept of a confidential relationship cannot be reduced to a catalogue of specific circumstances, invariably falling to the left or right of a definitional line.' **In re Estate of Scott,** 455 Pa. 429, 316 A.2d 883, 885 (1974). The Court has recognized, nonetheless, that '[t]he essence of such a relationship is trust and reliance on one side, and a corresponding opportunity to abuse that trust for personal gain on the other.' **Id.**

Owens, supra at 709.

> [It] is marked by such a disparity in position that the inferior party places complete trust in the superior party's advice and seeks no other counsel, so as to give rise to a potential abuse of power.

In Re Estate of Fritts, 906 A.2d 601, 608 (Pa. Super. 2006), **appeal denied,** 591 Pa. 673, 916 A.2d 1103 (2007).

> A confidential relationship exists '... as a matter of fact whenever one person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms, either because of an overmastering dominance on one side, or weakness, dependence or justifiable trust, on the other.'

In Re Clark's Estate, 467 Pa. 628, 635, 359 A.2d 777, 781 (1976). Either an overmastering influence or weakness, dependence or trust, justifiably reposed, will support a confidential relationship, because, in either, the situation is ripe for unfair advantage. **In re Estate of Button,** 459 Pa. 234, 239, 328 A.2d 480, 483 (1974).

Whether a confidential relationship exists depends on the facts; it is not presumed; and it must be proven.

> The burden is initially on the party seeking to set aside a transaction to prove that a confidential relationship existed between the parties. **Thomas v. Seaman,** 451 Pa. 347, 304 A.2d 134 (1973). '[W]here undue influence and incompetency do not appear and the relationship between the parties is not one ordinarily known as confidential in law, the evidence to sustain

> a confidential relationship must be certain, it cannot arise from suspicion or from infrequent or unrelated acts.' **Weir, supra** 556 A.2d at 825. If it is established that a confidential relationship existed at the time the alleged gift was made, the burden shifts to the donee to show that the alleged gift was free of any taint of undue influence or deception. **Id.; Banko, supra.**

Hera v. McCormick, 425 Pa. Super. 432, 447, 625 A.2d 682, 690 (1993).

> Each relationship must [ ] be analyzed on a fact by fact basis. Pennsylvania courts have observed, for instance, that a confidential relationship is not established merely because a proponent performs business services for a testator. Nor is a confidential relationship established merely because a proponent draws checks or pays the testator's bills. **Brantlinger Will,** 418 Pa. at 250, 210 A.2d at 254. On the other hand, a business relation may be the basis of a confidential relationship 'if one party surrenders substantial control over some portion of his affairs to the other.' **Estate of Scott,** 455 Pa. at 433, 210 A.2d at 886.

Estate of Marie Lista, supra, 2006 WL 321189 at *9.

> In **Scott,** the decedent, although physically infirm, had retained sufficient mental capacity to direct her own affairs and had continued to do so in substantial measure, employing others merely to act at her direction. **See** 316 A.2d at 886. The court recognized accordingly that the evidence provided no basis on which to discern a confidential relationship. **See id.**

Owens, supra at 710.

The presence of a power of attorney is a factor but not conclusive in determining whether a confidential relationship exists. In **Foster v. Schmitt,** 429 Pa. 102, 108, 239 A.2d 471, 474 (1968), the court stated:

> [I]f there be any clearer indicia of a confidential relationship than the giving by one person to another of a power of attorney over the former's entire life savings, this Court has yet to see such indicia.

Still,

> the mere fact a person holds a power of attorney does not establish a prima facie case of a confidential relationship with the donor of the power. Instead, the proponents assert, the underlying facts must be examined to see if there was any overmastering influence. Thus, in **[Estate of] Ziel** the Pennsylvania Supreme Court observed that while 'no clearer indication of a confidential relationship could exist than giving another person the power of attorney over one's life savings,' on the facts of **Ziel** a power of attorney did not evidence a confidential relationship where the testator was active in handling his business affairs and 'the contestant's evidence does not demonstrate convincingly that' the testator 'was subject to any overmastering influence.' **[Estate of] Ziel,** 467 Pa. at 542-43, 359 A.2d at 734.

Estate of Marie Lista, supra.

Decedent's grant of a general power of attorney to Lawrence is not critical to our decision on this element. The power of attorney is dated the same date as Decedent's will, August 3, 2006, shortly after Decedent was diagnosed with mild dementia. It names both Lawrence and Michael as agents with authority to act on Decedent's behalf and was clearly part of Decedent's end of life planning in which both his sons were being treated equally. We do not believe the giving of a power of attorney to the natural objects of one's bounty under these circumstances signifies a confidential relationship.

Far more important is the relationship which existed between Decedent and Lawrence during the next three years. Lawrence attended many, if not most, of Decedent's appointments with Dr. Kaplan. He was present and must have observed the same decline in Decedent's mental and physical health as was observed by Dr. Kaplan, yet when Lawrence described Decedent's mental status to Sacred Heart for purposes of evaluating the level of care Decedent required, he inexplicitly stated that Decedent was "very with it." (Petitioner Exhibit No. 12.) Moreover, Lawrence not only insisted, he demanded, that Decedent be placed in independent living.

The decision for Decedent to move to Pennsylvania and to be closer to his family was a logical one. Decedent no longer had any close relatives in New York. Lawrence and his son, Jason, were the only ones who visited Decedent at Peconic Landing. Michael appears to have been either unable or unwilling to visit; in any event,

he didn't. Nevertheless, once the decision to move was made, the level of confidence Decedent placed in Lawrence to find him a new home was evident. Decedent told Lawrence, "If you like it, I will do it. I am going to leave it to you. If you like, I will do it." (N.T. 7/12/12, p. 245.)

When Decedent was being physically admitted at Sacred Heart and assessed by Tatiana Gula, Lawrence was with him. Decedent's dependence on Lawrence, as described by Ms. Gula, has already been discussed. While at Sacred Heart, Lawrence frequently visited Decedent, and Decedent's reliance on Lawrence was obvious and visible. In this respect, Ms. Gula testified to multiple occasions when she would see Decedent sitting by himself with nothing to do, waiting for Lawrence to arrive, and asking where Lawrence was and when he would be coming. (N.T. 4/23/12, pp. 140-41, 170.) Decedent further depended on Lawrence not only to take him to his doctor appointments but to be there and speak on his behalf and provide the information requested by medical providers.

In describing Lawrence's concern and care for Decedent, we are not being critical or suggesting that Lawrence acted wrongly. Decedent was frail and his mental faculties were declining; he needed help; and he needed someone to trust. Decedent had nowhere else to go and Lawrence was there to help. Under the circumstances, it was natural for Decedent to turn to Lawrence, to rely upon him and to place his trust in him; and he did.

(b) **Substantial Benefit**

As to this element,

> 'Substantial benefit' has not been specifically defined by Pennsylvania courts, and whether one receives a substantial benefit is determined on a case-by-case basis. **In re Estate of LeVin,** 419 Pa.Super. 89, 615 A.2d 38, 41-42 (1992), **appeal denied,** 534 Pa. 639, 626 A.2d 1158 (1993) (**citing In re Adams' Estate,** 220 Pa. 531, 69 A. 989, 990 (1908)).

Estate of Fritts, supra, 906 A.2d at 609.

In the instant case, however, we believe no two reasonable persons would disagree that a substantial benefit was conferred on Lawrence by the change of beneficiary. Not only has his share of Decedent's investment accounts increased from half to a hundred percent of $2,315,362.48, the balance of Decedent's assets as represented by his probate estate, separate and apart from these investments, is less than $10,000.00.

(c) **Weakened Intellect**

This element, too, has been the subject of much discussion in our case law.

> 'Although our cases have not established a bright-line test by which weakened intellect can be identified to a legal certainty, they have recognized that it is typically accompanied by persistent confusion, forgetfulness and disorientation.' **Owens, supra** at 707 (**citing In re Estate of Glover,** 447 Pa.Super. 509, 669 A.2d 1011, 1015 (1996), **appeal denied,** 547 Pa. 728, 689 A.2d 233 (1997)). In a case of undue influence, a trial court has greater latitude to consider medical testimony describing a decedent's condition at a time remote from the date that the contested will was executed.

Id. at 607. What is certain is that "[f]or purposes of the undue-influence [sic] test, a weakened intellect does not rise to the level of testamentary incapacity." **Estate of Angle, supra,** 777 A.2d at 123. It is also clear that weakened intellect in an undue influence case is a relative concept.

> The closest we can come therefore to a definition of weakened intellect is that it is a mind which, in all the circumstances of a particular situation, is inferior to normal minds in reasoning power, factual knowledge, freedom of thought and decision, and other characteristics of a fully competent mentality. It should be viewed essentially as a **relative state** as the term is applied to cases of undue influence, as these cases always involve the effect of one intellect upon another.

Estate of Marie Lista, supra at *11 (**quoting Heffner Will,** 19 Fid.Rep. 542, 546-57 (Mont. Cty. OC. 1969)).

This issue was more fully discussed under testamentary capacity. In brief, in 2006 Dr. Gatewood diagnosed Decedent with dementia. Dr. Kaplan testified that Decedent's mental faculties had declined substantially in the time he was at Peconic Landing, particularly the last two years and was obvious. (Petitioner Exhibit No. 31 (Kaplan Deposition), pp. 74-76, 103.) Both Drs. Gatewood

and Kaplan testified that their practices deal primarily with the elderly and that they have vast experience in treating this population. Both testified they can distinguish between inappropriate or incomplete responses caused by hearing loss and those attributable to a cognitive disability, and that both were aware of the severity of Decedent's hearing loss and accounted for it in their evaluations. Both of these physicians personally examined and treated Decedent and both were in the best position to diagnose whether Decedent had a weakened intellect.

Dr. Barry Rovner culled Decedent's medical records and reviewed the testimony of various witnesses and opined, after this review, that Decedent had dementia which was progressive and incurable, and which affected Decedent's medical processes and cognitive abilities, and impaired his decision-making capacity. (N.T. 7/10/12, p. 30.)[10]

Based on these findings, a presumption of undue influence exists, with the burden on Lawrence to rebut.

3. **Undue Influence—Rebutting the Presumption**

This is a difficult case both because of what we know and what we don't know. We know Decedent suffered from failing health and progressive dementia between his 2006 hospitalization at Eastern Long Island Hospital and his death, that he looked to and relied heavily upon his son Lawrence in the final years of his life, placing complete faith and trust in his oldest child, and that he changed the beneficiary of his Vanguard accounts—the bulk of his estate—slightly more than one year before his death, removing Michael and making Lawrence the sole beneficiary. From these facts alone, a presumption of undue influence is raised under the three-part test set forth in **Estate of Clark, supra,** 461 Pa. at 59, 60, 334 A.2d at 631-32. Importantly, this presumption is based upon circumstantial

[10] Dr. Anthony Giampolo testified that the medical records did not support a clinical diagnosis of dementia but, in each instance where confusion, memory loss or disorientation was reported, was better characterized as being caused by acute delirium—an impairment of cognition due to some external factor such as infection, fever or overmedication. (N.T. 7/10/12, pp. 77-78; N.T. 7/12/12, pp. 52-54, 72, 133, 156.) Given the duration and progression of Decedent's declining cognitive faculties, and the explanations provided by Drs. Gatewood, Kaplan and Rovner, we are not persuaded by Dr. Giampolo's testimony.

evidence. No direct evidence was presented of undue influence or that Lawrence bore down and, in fact, exercised an overmastering influence on Decedent for financial gain.

We know also, even before Decedent's admission to Peconic Landing, that Lawrence routinely spent time with his father throughout the year while Michael would spend a few hours with Decedent when he happened to be in the area transporting a boat (N.T. 4/23/12, p. 38), and that Lawrence's son maintained regular contact and had an ongoing relationship with Decedent, whereas we don't know if Decedent ever met Michael's children and, if he did, when was the last time he saw them. (N.T. 7/12/12, pp. 200-201.)

We know that in 2001 Decedent titled his home in both of his sons' names, and that in 2007 the home was sold and each son received $120,000.00, but we don't know whether Michael ever expressed any gratitude for this gift. We know that Decedent was diagnosed with dementia in 2006 and admitted to Peconic Landing because of his declining ability to care for himself and that Lawrence was the one who came to see him and assisted him in this transition. We know that Lawrence was the only one of his sons who visited him while he was at Peconic Landing and that, in December 2008 he asked to move closer to Lawrence and that Lawrence assisted him with this move.

We know that Lawrence routinely visited his father at Sacred Heart, that he took him to all his medical appointments (N.T. 7/12/12, p. 209), that he visited him in the hospital for at least two hospitalizations and was close by when his father died. And we know that Michael didn't visit his father once for more than six years before his death even though he knew his father was in failing health, was in assisted living, was forgetful and getting worse, and was hospitalized twice for falling and breaking his hip in the last two years of his life. Nor did Michael have the time to attend his father's funeral services. (Petitioner Exhibit No. 33 (Lawrence's Deposition), p. 17.)

Of course we don't know, for sure, why Decedent changed the beneficiary of his Vanguard accounts, but we don't have to guess. There were two sons. One was there when Decedent needed him. One wasn't. And this made all the difference.

This was not a spur of the moment decision. It was a difficult decision, one which required serious thought and one which the Decedent chose not to discuss at length with others or to explain his reasons.[11] So while the effect of the change made in the beneficiary of Decedent's Vanguard accounts is belied by the simplicity with which it was made, the reason for the change was years in the making—at least five years.

Lawrence knew what was at stake. (N.T. 7/12/12, p. 328.) Should he have done more to change his father's mind? In a better world, the answer is obvious. But clearly the law does not require this.

It's a conversation Lawrence will have to live with for the rest of his life. It is also a conversation Lawrence never had to reveal. It's a conversation that we believe occurred. And it's a conversation that says so much more than what was said.

The "concept of undue influence is predicated on the assumption that the influence of a strong and predatory character close to the testator who is possessed of a weakened mental state will prey insidiously on the weakened intellect in order to extract testamentary benefactions that would not otherwise be forthcoming." **Estate of Ziel, supra,** 467 Pa. at 543, 359 at 734-35. This is not what happened here.

The presumption of undue influence raised under **Estate of Clark** is not irrebuttable. Stated differently, not every child who is entrusted with the care of an elderly parent of diminished mental capacity and upon whom is bestowed a substantial benefit by that parent has exerted undue influence. It happens all the time and it happened here.

> It is important not to penalize or stigmatize the person who assists an ill and dying person in her last days. As the Pennsylvania Supreme Court observed: 'What offends against an innate sense of justice, decency and fair play offends against good law. And if a testatrix rewards a benefactress who cared for her when her need was great and others passed her by, the courts will not find her bequest offending against nature or law.' **King Will,** 369 Pa. at 531-32, 87 A.2d at 474.

Estate of Marie Lista, supra at *13.

[11] In a revealing moment in July 2010, while Lawrence was returning his father to Sacred Heart from Lehigh Valley Hospital, Decedent told Lawrence of the change. The conversation was short. As testified to by Lawrence, as they were leaving the hospital, out of the blue, Decedent said "I took Michael off my Vanguard and put on your son." Lawrence asked his father if he was sure he wanted to do this and Decedent said, "That is up to me." (N.T. 7/12/12, pp. 281-82, 325-31.)

CONCLUSION

In denying Michael's Petition, **in toto,** we do not do so lightly. For good reason the law requires strict proof, clear and convincing evidence, before a testamentary gift can be set aside on the basis of incapacity or undue influence. Our decision respects this burden, comprehends the nature of the presumption of undue influence as an evidentiary shortcut and only that, and, we believe, honors Decedent's intentions.

LEHIGHTON AREA SCHOOL DISTRICT, Petitioner vs. CARBON COUNTY BOARD OF ASSESSMENT APPEALS, ARTEMIS MORRIS and EMMANUEL SEGENTAKIS, Respondents

Civil Law—Real Estate—Tax Assessment Appeal—Special Assessment—Agricultural Use—Challenging Clean and Green Eligibility—Harvesting of Wild Plants for Medicinal Use

1. The Clean and Green Act permits land which is devoted to agricultural use, agricultural reserve use or forest reserve use to be preferentially assessed at its use value, rather than its fair market value, for purposes of computing real estate taxes.

2. For property to qualify for preferential assessment as an agricultural use under the Act, it must be devoted to an agricultural use for the three-year period immediately preceding an application for Clean and Green treatment, and must be either not less than ten contiguous acres in size or have an anticipated yearly gross income of not less than two thousand dollars.

3. For land to qualify as an agricultural use under the Act, it must be used to produce an agricultural commodity.

4. As a matter of statutory construction, a statute which creates a preferential tax assessment is to be construed narrowly and against a taxpayer.

5. The definitions of agricultural use and agricultural commodity contained in the Act, when construed narrowly, imply the active cultivation of land to produce a product, rather than the gathering of indigenous vegetation growing wild on the property.

6. The harvesting of naturally growing wild plants from native soil for use in medicinal products does not qualify as an agricultural use within the meaning of the Clean and Green Act.

NO. 10-2641

VINCENT R. GARVEY, JR., Esquire—Counsel for Petitioner.

ROBERT FRYCKLUND, Esquire—Counsel for Carbon County Board of Assessment Appeals.

ARTEMIS MORRIS—Pro Se.

EMMANUEL SEGENTAKIS—Pro Se.

MEMORANDUM OPINION

NANOVIC, P.J.—August 13, 2013

The Lehighton Area School District ("District") appeals the preferential tax treatment under the Pennsylvania Farmland and Forest Land Assessment Act of 1974, commonly known as the Clean and Green Act, 72 P.S. §§5490.1-5490.13 (the "Act"), of 18.47 acres of land located in Mahoning Township, Carbon County, Pennsylvania, owned by Artemis Morris and Emmanuel Segentakis ("Owners").

FACTUAL AND PROCEDURAL BACKGROUND

The Owners purchased the property which is the subject of this appeal on March 21, 2009. Two months later, on May 28, 2009, they submitted an application to the chief assessor for Carbon County asking that the property be approved for preferential use assessment under the Act's provisions as they relate to agriculture use property.[1] The assessor granted the request effective for the 2010 tax year to which the District filed an appeal with the Carbon County Board of Assessment Appeals ("Board") on March 26, 2010.[2] 72 P.S. §5490.9(a); 7 Pa. Code §137b.133.

On August 13, 2010, the Board upheld the county assessor's earlier decision to assess the property at its use value. Thereafter, on September 9, 2010, the District filed a statutory appeal with this court challenging the property's preferential assessment for the taxable year 2011 and subsequent years. In this appeal, the District expressly challenges the eligibility of the property for preferential assessment.

The basis on which the Owners claim preferential tax treatment of their property is its agricultural use. In their application, the Owners stated the property was presently devoted to the production of an agricultural product. However, as to its prior usage, the Owners acknowledged that the property had not been actively devoted to agricultural use for the previous three years. (Application, question 10.)

A hearing on the District's appeal to this court was held on November 19, 2012. At this hearing, the evidence established that the property is divided between woodland and open space. There

[1] "The Act provides for land devoted to agricultural use, agricultural reserve use or forest reserve use to be assessed at the value it has for that use **rather than** at fair market value." 7 Pa. Code §137b.1(a) (emphasis added); **see also, Feick v. Berks County Board of Assessment Appeals,** 720 A.2d 504, 506 n.7 (Pa. Commw. 1998) ("Pursuant to [72 P.S. §5490.3], for taxation purposes, qualifying land must be assessed at its present use value, not at its fair market value."). Although not defined in the Act, "use value" is the "value established by the utility of an object, not its sale or exchange value." **Herzog v. McKean County Board of Assessment Appeals,** 14 A.3d 193, 195 n.4 (Pa. Commw. 2011) (citing **Black's Law Dictionary** (9th ed. 2009)).

To assist counties in determining the value of land at its qualifying use, the Department of Agriculture annually determines the use value of each use category eligible for preferential assessment (**i.e.,** agricultural use, agricultural reserve use, or forest reserve use) and provides this information to county assessors by May 1 of each year. 72 P.S. §5490.4a; 7 Pa. Code §137b.51(a). These land use values as determined by the Department of Agriculture are county specific. **Id.** Section 137b.51(b). In determining county specific agriculture use values, the income approach is the exclusive methodology to be used. 72 P.S. §5490.4a; **see also,** 7 Pa. Code §137b.51(b)(1).

To determine the total use value for land in agriculture use, the county assessor multiplies the total acres of agricultural land by its use value. This product is then multiplied by the county's established predetermined ratio to determine the preferential assessed value of the property. 7 Pa. Code §137b.51(d).

The state constitutional authority for the Act rests upon Article VIII, Section 2(b)(i) of the Pennsylvania Constitution. This provision gives the legislature the authority to pass laws that make special provision for the taxation of land devoted to agricultural and agricultural reserve use. **Hess v. Montgomery County Board of Assessment Appeals,** 75 Pa. Commw. 69, 73, 461 A.2d 333, 335 (1983). As a result, taxation for these purposes is not subject to the general requirement found in Article VIII, Section 1 that all taxes be uniform upon the same class of subjects. **Id.**

[2] The actual date the county assessor approved the property for preferential treatment was not made part of the record, however, this had to occur sometime in 2009 since the chief assessor testified the change was effective for 2010. Moreover, approval in 2009 is consistent with the Act which requires that an application submitted on or before June 1 be acted upon so as to become effective for the tax year of each taxing body which commences in the calendar year immediately following the application deadline. 72 P.S. §5490.4(a.1), (b); 7 Pa. Code §§137b.42(a), 137b.44. Given the timing of the assessor's decision, the District's appeal filed on March 26, 2010 was for the 2011 tax year. This conclusion is supported in the District's appeal filed with this court on September 9, 2010 wherein the District expressly states that it is appealing the Board's decision for the taxable year 2011 and subsequent years.

are no cultivated areas on the property other than a vegetable garden, approximately thirty feet by thirty feet in size; an herb garden, approximately one hundred and eighty feet by twenty-five feet; and a grape arbor with ten plants. Two homes, one the Owners' principal residence, and a barn in disrepair are also located on the property. Also present are a poultry pen, approximately six feet by ten feet in size, and a rabbit pen, approximately eight feet round.

Ms. Morris is a naturopathic physician licensed in Connecticut. She testified that there are at least forty different varieties of herbs in the herb garden which she and her husband, Mr. Segentakis, process and sell for medicinal use to a wellness center located in Connecticut. She further testified that there is an abundance of wild vegetation on the property such as elderberries, hawthorn berries, blueberries, blackberries, dandelions, black walnut trees, chicory and lettuce which they harvest and prepare for sale for medicinal purposes. Ms. Morris was unable to provide any estimate as to the amount of revenue generated from these sales. In addition, the Owners grow squash, corn, tomatoes, collard greens, pumpkins and garlic, as well as raise poultry, quail and rabbits for their personal consumption, though they plan to eventually sell some of these products at the local farmers market.

With regard to the prior use of the property before its purchase by the Owners, the Owners did not know. As testified to by Ms. Morris, when she and her husband completed question 10 of the application—asking whether the land had been dedicated to agricultural use for the preceding three years, they answered no as they were unaware of what use had been made of the land before their purchase.

DISCUSSION

Under the Act, to be eligible for preferential assessment as an agricultural use, property must have been devoted to an agricultural use for the three years immediately preceding the application for preferential assessment and must be either not less than ten contiguous acres in area, including farmstead land and wood lots, or have an anticipated yearly gross income of not less than two thousand dollars. 72 P.S. §5490.3(a)(1); 7 Pa. Code §137b.12. The Act defines "agricultural use" as "[l]and which is used for the purpose of producing an agricultural commodity. ..." 72 P.S. §5490.2. "Agricultural commodity" is, in turn, defined as any of the following:

> (1) Agricultural, apicultural, aquacultural, horticultural, floricultural, silvicultural, viticultural and dairy products.
>
> (2) Pasture.
>
> (3) Livestock and the products thereof.
>
> (4) Ranch-raised furbearing animals and the products thereof.
>
> (5) Poultry and the products of poultry.
>
> (6) Products commonly raised or produced on farms which are:
>
> (i) intended for human consumption; or
>
> (ii) transported or intended to be transported in commerce.
>
> (7) Processed or manufactured products of products commonly raised or produced on farms which are:
>
> (i) intended for human consumption; or
>
> (ii) transported or intended to be transported in commerce.
>
> (8) Compost.

72 P.S. §5490.2; **see also,** 7 Pa. Code §137b.2.[3]

That the property is greater than ten acres in size is not in dispute.[4] In question, however, is whether the current use of the

[3] Significantly, this definition is narrower than that which originally appeared when the Act was first enacted wherein an agricultural commodity was defined as "[a]ny and all plant and animal products including Christmas trees produced in this State for commercial purposes." The definition was first changed with the Act of December 21, 1998, P.L. 1225, No. 156, §1, which was effective immediately.

[4] The property consists of two contiguous parcels both titled in the names of the Respondents Artemis Morris and Emmanuel Segentakis. Parcel No. 84-35-A5 consists of approximately 15.97 acres; Parcel No. 84-35-A5.02 consists of approximately 2.5 acres. The Act expressly permits these parcels to be combined in order for both to qualify for preferential assessment, even though they might not independently qualify. 72 P.S. §5490.3(a.1)(1). On this point, 7 Pa. Code §137b.19(1) provides:

> A landowner seeking preferential assessment under the act may include more than one tract in a single application for preferential assessment, regardless of whether the tracts on the application have separate deeds, are identified by separate tax parcel numbers or are otherwise distinct from each other.
>
> (1) Contiguous tracts.
>
> (i) A landowner seeking preferential assessment under the act may include in the application individual contiguous tracts that would not—if considered individually—qualify for preferential assessment.

property qualifies as an "agricultural use" within the meaning of the Act, and whether the property was devoted to agricultural use during the three years immediately preceding the filing of the Owners' application.

As to the first question, very little of the property is actively cultivated for agricultural use. What is cultivated—the vegetable garden, herb garden and grape arbor—represents less than one percent of the total acreage. Furthermore, the produce and products from the vegetable garden and the poultry and rabbit pens are used only for the personal benefit of the Owners and their family. **Cf. Way v. Berks County Board of Assessment Appeals,** 990 A.2d 1191, 1194-95 (Pa. Commw. 2010) (holding that the value of hay grown for personal use only, and not sold, cannot be counted towards the $2,000.00 gross income threshold required for agricultural use property of less than ten acres to qualify under the Act for a preferential assessment).

By far, the largest areas of the property are covered with native trees, shrubs and vegetation, or open yard and grass. With respect to the gathering of wild plants and vegetation from these areas for medicinal purposes, we do not believe this qualifies as an agricultural use as intended by the Act. The definitions of agricultural use and agricultural commodity contained in the Act imply active cultivation of land to produce a product, rather than the collecting of indigenous vegetation growing wild. **See Herzog v. McKean County Board of Assessment Appeals,** 14 A.3d 193, 201 (Pa. Commw. 2011) ("[A] statute creating a preferential tax treatment must be construed narrowly and against taxpayers."). Property cannot be truly considered as devoted to an agricultural use if the agricultural use in question naturally occurs without human intervention and is not in some manner actively cultivated.

As to the second question, absolutely no evidence was presented that the property was used or devoted to any agricultural

(ii) If two or more tracts on a single application for preferential assessment are contiguous, the entire contiguous area shall meet the use and minimum size requirements for eligibility.

See also, 7 Pa. Code §137b.17 (common ownership required) ("A landowner seeking preferential assessment under the act shall be the owner of every tract of land listed on the application.").

use for the three years immediately preceding the Owners' application. To the extent the Board argues the use now made by the Owners can be presumed to have preexisted their purchase since the varieties of native vegetation existing on the property and used by Ms. Morris in her profession would have also grown wild before the Owners' acquisition, this reasoning assumes not only that the natural growth of native vegetation is an agricultural use—which we have rejected—it also assumes that the previous owner used the property for this purpose. Were this not the case, we would have to accept that the natural growth of indigenous plant life on a tract of land at least ten acres in size, some of which is either edible or has a medicinal value, satisfies the definition of an agricultural use, notwithstanding the absence of any evidence that such vegetation was ever actually used for these purposes. Yet that is exactly what the Board asks us to accept, since there is no evidence that during the three-year period preceding the Owners' application the land was used by their predecessors for the purpose of harvesting edible wild plants, or those with a medicinal value. We do not accept the Board's assumptions. While use of the property as an agricultural reserve or forest reserve might be a possibility, this was not the basis of the special assessment requested by the Owners or that approved by the Board.[5]

Having found that the property does not qualify for preferential tax assessment status under the Act, the Consolidated County Assessment Law, 53 Pa. C.S.A. §§8801-8868, requires that we determine the fair market and assessed values of the property as of the date the appeal was filed before the Board, and for each

[5] The term "agricultural reserve" is defined in the Act as:

[n]oncommercial open space land used for outdoor recreation or the enjoyment of scenic or natural beauty and open to the public for such use, without charge or fee, on a nondiscriminatory basis. The term includes any land devoted to the development and operation of an alternative energy system, if a majority of the energy annually generated is utilized on the tract.

72 P.S. §5490.2. The Act further defines "forest reserve" as:

[l]and, ten acres or more, stocked by forest trees of any size and capable of producing timber or other wood products. The term includes any land devoted to the development and operation of an alternative energy system, if a majority of the energy annually generated is utilized on the tract.

Id.

subsequent year during which the appeal was taken. 53 Pa. C.S. §8854(a)(2), (5).[6] In this respect, the chief assessor testified that the fair market value of Parcel No. 84-35-A5 for the tax year 2011 was $264,248.00 and the fair market value of Parcel No. 84-35-A5.02 for the same year was $95,472.00. No other evidence of fair market value was presented by any party.[7] **See Expressway 95 Business Center, L.P. v. Bucks County Board of Assessment,** 921 A.2d 70, 76 (Pa. Commw. 2007) (placing the burden of establishing fair market value for all years in issue on appeal upon the challenger). Accordingly, taking this as the property's fair market value and using the applicable ratio of assessed to market value as directed by 53 Pa. C.S.A. §8854(a)(3), the order which accompanies this opinion sets the assessed value for each of the years which is the subject of this appeal. **See** 53 Pa. C.S.A. §8854(a)(2), (5).[8]

[6] This includes not only the years 2011, 2012 and 2013, but also the tax year 2014, since the tax roll has already been prepared for this year, 53 Pa. C.S.A. §8841(a) (tax roll to be prepared annually on or before July 1), and since the date for filing an appeal for this year is now ripe, 53 Pa. C.S.A. §8844(c) (setting the annual appeal deadline as on or before September 1). **See Kmart Corporation v. Washington County Board of Assessment Appeals,** 950 A.2d 1089, 1092-93 (Pa. Commw. 2008).

[7] This is understandable given that the parties' dispute did not center on fair market value, but on the sole issue of whether the property qualified for special treatment under the Act.

[8] Although it is common in a tax assessment appeal for both the official assessment records and the testimony of an assessment officer to be presented by the taxing authority to meet its initial burden of establishing a **prima facie** case for the validity of the assessment, this was not done in the instant case. **Herzog, supra** at 200. Instead, while the Board presented testimony from the chief assessor, the only document presented was the Board's denial of the District's appeal. (**See** Board Exhibit Nos. 1 and 2.)

Section 5(a)(1) of the Act, 72 P.S. §5490.5(a)(1), requires the county assessor on property record cards, assessment rolls, or other appropriate records to indicate, **inter alia,** the fair market value and normal assessed value, as well as the preferentially assessed value of each parcel, and annually to record on these records any change in the fair market value, normal assessed value and preferentially assessed value. **See also,** 7 Pa. Code §§137b.102, 137b.105. Had this information been provided, it would have been helpful to the court.

Lastly, we note that when property is removed from a preferential assessment under the Act, it is typically subject to roll-back taxes plus interest on each year's roll-back tax at the rate of six percent per annum. 72 P.S. §5490.5a; **see also,** 7 Pa. Code §137b.89. It is the duty of the county assessor to compute the amount

CONCLUSION

In accordance with the foregoing, we enter the attached order.

ORDER OF COURT

AND NOW, this 13th day of August, 2013, it is hereby

ORDERED and DECREED that the assessed value of the following properties owned by Artemis Morris and Emmanuel Segentakis in Mahoning Township, Carbon County, Pennsylvania, as determined by the applicable ratio of assessed to market value directed by 53 Pa.C.S.A. §8854(a)(3), shall be as indicated below for each of the following tax years:

	Tax Year	Fair Market Value	County Established Predetermined Ratio	Annual STEB Common Level Ratio	Assessed* Value
Tax Parcel No. 84-35-A5	2011	$264,248.00	.5	0.367647059	$ 97,150.00
	2012	$264,248.00	.5	0.429184549	$ 132,124.00
	2013	$264,248.00	.5	0.458715596	$ 132,124.00
	2014	$264,248.00	.5	0.515463918	$ 132,124.00

	Tax Year	Fair Market Value	County Established Predetermined Ratio	Annual STEB Common Level Ratio	Assessed* Value
Tax Parcel No. 84-35-A5.02	2011	$ 95,472.00	.5	0.367647059	$ 35,100.00
	2012	$ 95,472.00	.5	0.429184549	$ 47,736.00
	2013	$ 95,472.00	.5	0.458715596	$ 47,736.00
	2014	$ 95,472.00	.5	0.515463918	$ 47,736.00

of these roll-back taxes and to so notify the owners and interested parties. 72 P.S. §5490.5(b); **see also,** 7 Pa. Code §137b.110. With respect to the Owners' liability for roll-back taxes, we note the provisions of 7 Pa. Code §137b.52(f) which provide:

> (f) Termination of preferential assessment on erroneously-enrolled [sic] land. If a county assessor erroneously allowed the enrollment of land that did not, at the time of enrollment, meet the minimum qualifications for preferential assessment, the county assessor shall, in accordance with section 3(d)(2) of the act provide the landowner written notice that preferential assessment is to be terminated. The notice shall state the reasons for termination and afford the landowner the opportunity for a hearing. If the use of the land was not an eligible use at the time it was enrolled, and preferential assessment is terminated for that reason, no roll-back taxes shall be due from the landowner as a result.

* With the exception of the year 2011, the difference between the county's established predetermined ratio and the corresponding common level ratio is less than fifteen percent. Accordingly, pursuant to 53 Pa. C.S.A. §8854(a)(3), the applicable assessed values for each year have been computed from the county's established predetermined ratio, excepting only the year 2011 for which the common level ratio was used.

WELLS FARGO BANK, N.A., Plaintiff vs. ROBERT SUAREZ, JR. a/k/a ROBERT SUAREZ and PATRICIA A. CUNNINGHAM, Defendants

Civil Law—Mortgage Foreclosure—Motion for Summary Judgment—Standing of Plaintiff—Assignment of Mortgage—Subject Matter Jurisdiction—Compliance With Act 91 As a Condition Precedent to Commencement of Suit—Homeowner Assistance Settlement Act

1. Where a complaint in mortgage foreclosure fails to identify plaintiff's authority to enforce the mortgage, when plaintiff is not the original mortgagee and plaintiff's entitlement to prosecute the action is **dehors** the record as of the date judgment is taken, the judgment is properly stricken.

2. A non-moving party to summary judgment who disputes evidence presented by the moving party may not rest upon the pleadings, but must set forth specific facts demonstrating a genuine issue for trial. Consequently, a party who first raises the issue of the validity of signatures to a mortgage assignment or the identification in a document of record that a mortgage holder is the successor by merger to a prior mortgage holder after a motion for summary judgment has been granted, waives the issue.

3. A defendant in a mortgage foreclosure action who admits that Act 91 notices were sent, but denies, as a conclusion of law, that the notices comported with Pennsylvania law, without at any time identifying any deficiencies or defects in the notices, copies of which were attached to the motion for summary judgment, fails to raise an issue of disputed fact sufficient to overcome the motion for summary judgment.

4. Prior to enactment of the Homeowner Assistance Settlement Act, existent case law held that a failure to comply with Act 91's notice requirements deprived the trial court of subject matter jurisdiction over an ensuing mortgage foreclosure action. Under the Homeowner Assistance Settlement Act, a failure to comply with Act 91 does not automatically deprive the court of subject matter jurisdiction. Instead, this statute requires the beneficiary of Act 91's notice requirements to identify and raise as an issue in the case in what respects the statute has not been complied with. If the court determines the statute has not been complied with and the owner has been prejudiced thereby, the court is authorized by the statute to exercise its discretion and to devise an appropriate remedy.

5. A property owner is not eligible for Act 91 assistance where the mortgaged property is not his principal residence and is not owner-occupied.

NO. 12-1315

COURTENAY R. DUNN, ESQUIRE—Counsel for Plaintiff.

Robert Suarez, Jr. and Patricia A. Cunningham—Pro Se.

MEMORANDUM OPINION

NANOVIC, P.J.—September 5, 2013

The Defendant, Robert Suarez, Jr., has appealed our order of June 18, 2013, granting Plaintiff's Motion for Summary Judgment in this mortgage foreclosure action. This Opinion is written in accordance with Pa. R.A.P. 1925(a).

PROCEDURAL AND FACTUAL BACKGROUND

On June 19, 2012, the Plaintiff, Wells Fargo Bank, N.A. ("Bank"), commenced the instant action by complaint filed against the Defendants, Robert Suarez, Jr. and Patricia A. Cunningham. The complaint avers, **inter alia,** that the Defendants are the mortgagors and real owners of the property subject to these mortgage foreclosure proceedings; that the mortgage, dated February 25, 1994, is recorded in mortgage book 547, page 163, names as the mortgagee, America's Wholesale Lender, and was assigned to Bank by an assignment recorded on April 24, 2007, in mortgage book 1572, page 93; that monthly payments owed on the mortgage have not been paid, beginning with the payment due and owing on August 1, 2010; that the total amount due as of May 21, 2012, as itemized in paragraph 6 of the complaint, is $46,705.71; and that a notice of intention to foreclose in accordance with Act 6 of 1974 was sent to the Defendants on the dates set forth thereon. In answer to the averments identifying the mortgage and its assignment to Plaintiff, the Defendant, Robert Suarez, Jr. ("Husband") responded that the documents speak for themselves; as to the averment that the mortgage was in default for failure to make any payments, beginning with that due and owing on August 1, 2010, Husband asserted this was a conclusion of law; as to the amount owed, Husband answered he did not know; and as to the sending of the notice of intent to foreclose, Husband again responded that the documents speak for themselves, but that the balance of the averment was admitted. Husband was represented by legal counsel at the time this answer was filed.

The Defendant, Patricia A. Cunningham ("Wife"), did not file an answer to the complaint. In consequence, a judgment was entered against Wife only on January 21, 2013, with damages to be assessed at a later date.

A scheduling order was entered on November 5, 2012. In that order, the deadline for completing discovery was set at December 16, 2012, and the deadline for filing pretrial motions at February 14, 2013. A milestone, an approximate date, for a non-jury trial was set for April 15, 2013.

By order dated February 5, 2013, the case was scheduled for a non-jury trial on April 5, 2013. Prior to this date, on March 28, 2013, the Bank requested a continuance averring that the case

was currently being reviewed for loss mitigation alternatives to foreclosure, that a continuance of ninety days was sought, and that opposing counsel joined in the request. The continuance was granted by order dated April 1, 2013, wherein we rescheduled the matter for trial on July 19, 2013.

On April 5, 2013, the Bank requested the deadline originally set for filing pretrial motions, February 14, 2013, be extended an additional ninety days to allow the filing of a motion for summary judgment and permit Husband time to respond. In this motion, the Bank further indicated that the case was still under review for loss mitigation alternatives to foreclosure. By order dated April 5, 2013, we granted the Bank's request and extended the original date for filing pretrial motions by ninety days.

On April 24, 2013, the Bank filed its motion for summary judgment, to which Husband, represented by counsel, filed a response on May 14, 2013. In this motion, the Bank identified and attached copies of the original mortgage and promissory note dated February 25, 1994; identified and attached a copy of the assignment of the mortgage and note to Fleet Real Estate Funding Corp., on October 14, 1994; identified and attached a copy of the assignment of the mortgage and note from Washington Mutual Bank f/k/a Washington Mutual Bank, FA, successor to Washington Mutual Home Loans, Inc. f/k/a Fleet Mortgage Corp. f/k/a Fleet Real Estate Funding Corp., to Wells Fargo Bank, N.A. on April 13, 2007; attached an affidavit of its vice president of loan documentation stating the amount due on the loan as of December 6, 2012, was $51,120.21, including an itemization of this figure; attached a copy of Husband's loan history evidencing the last payment made by Defendants was on August 2, 2010; and attached a copy of the Act 91 notices sent to Defendants at both their home address and the mortgaged premises on October 3, 2010, further averring that Husband was not eligible for Act 91 assistance because the mortgaged premises was vacant and was not the principal residence of Husband. In response, Husband asserted that all of the documents identified and attached to the Bank's motion spoke for themselves, and while admitting that the Act 91 notices were sent, denied, as a conclusion of law, that the notices comported with Pennsylvania law.

On June 18, 2013, we heard argument on the Bank's motion for summary judgment. At that time, the Bank was represented by counsel, however, Husband appeared on his own, without counsel. Although we extended Husband the courtesy of addressing the court, our order of April 26, 2013, which scheduled the matter for argument, clearly stated that counsel who failed to file briefs would not be permitted to orally argue in court. Husband's counsel had not previously filed a brief on his behalf.

Following argument, by order dated June 18, 2013, and filed on June 19, 2013, judgment was entered in favor of the Bank and against Husband in the amount of $51,120.21, plus interest from December 6, 2012, and costs. On July 18, 2013, Husband filed his Notice of Appeal from the June 18, 2013, order. That same date, Husband also filed a petition for reconsideration of the grant of summary judgment. This petition was not acted upon as we were without jurisdiction to do so given the thirty-day limitation imposed by 42 Pa. C.S.A. §5505 and the pending appeal. **PNC Bank, N.A. v. Unknown Heirs,** 929 A.2d 219, 226 (Pa. Super. 2007).

By order dated July 19, 2013, we directed Husband to file a concise statement of the matters complained of on appeal within twenty-one days of the date of entry of the order. Husband failed to do so, however, in response to Husband's request for an extension of this deadline, an extension was granted by order dated August 16, 2013. Within the time permitted by this extension, Husband filed his concise statement. We address each of the issues raised in Husband's concise statement below.

DISCUSSION

An action in mortgage foreclosure is an **in rem** proceeding and does not impose personal liability. **Newtown Village Partnership v. Kimmel,** 424 Pa. Super. 53, 55, 621 A.2d 1036, 1037 (1993); **Signal Consumer Discount Company v. Babuscio,** 257 Pa. Super. 101, 109, 390 A.2d 266, 270 (1978). Consequently, the **prima facie** elements of an action in mortgage foreclosure require proof of the existence of a valid mortgage, that plaintiff is the current holder of the mortgage entitled to enforcement, that the original mortgagor and current real owner of the property are named defendants, that there exists a default, and that an itemization of the amount claimed to be due is provided. **Cf.** Pa. R.C.P. No. 1144 (Parties. Release of Liability.); Pa. R.C.P. No. 1147 (the Complaint.).

In the current appeal, Husband does not dispute that he is a mortgagor and a present real owner of the property, that the mortgage is in default, or that the amount claimed in the complaint to be due is due. Instead, Husband appears to question whether the Bank is the current holder of the mortgage entitled to prosecute this action, and whether an Act 6 notice was sent, contending that the failure to do so would deprive this court of subject matter jurisdiction.

As to the Bank's interest in the mortgage, the complaint avers that the mortgage was assigned to it by an assignment recorded on April 24, 2007, and docketed in mortgage book 1572, page 93. (Complaint, paragraph 3.) The motion for summary judgment attaches a copy of this assignment which is marked as Exhibit A-3. Consequently, as of the date the mortgage foreclosure complaint was filed (June 19, 2012), and the date of entry of summary judgment (June 18, 2013), a completed and recorded written assignment of the subject mortgage to the Bank was identified in the complaint and was a matter of public record. **Cf. Wells Fargo Bank, N.A. v. Lupori,** 8 A.3d 919, 922 (Pa. Super. 2010) (holding that where the complaint failed to identify an assignment of mortgage to the plaintiff, which was not the original mortgagee, the existence of an assignment was **dehors** the record as of the date default judgment was taken, requiring that the judgment be stricken).[1]

[1] In his motion for reconsideration, Husband questioned the validity of the signatures on the assignment from Washington Mutual Bank to Bank, and the lack of a separate assignment from Fleet Real Estate Funding Corp. to Washington Mutual Bank. Neither of these issues were raised by Husband as affirmative defenses in the pleadings, nor did Husband by any evidence of record demonstrate that a genuine issue of fact existed concerning the validity of these assignments, or that Washington Mutual Bank succeeded to the interest of Fleet Real Estate Funding Corp. **DeSantis v. Frick Company,** 745 A.2d 624, 626 (Pa. Super. 1999) (holding that a non-moving party to summary judgment may not rest upon the pleadings, but must set forth specific facts demonstrating a genuine issue for trial).

Nor has Husband questioned how ownership of the mortgage passed from the original mortgagee, America's Wholesale Lender, to Countrywide Funding Corporation, the assignor to Fleet Real Estate Funding Corp. (Motion for Summary Judgment, Exhibit A-2.) In this respect we note that unlike in **Lupori,** the Bank here has clearly claimed to be the owner by assignment of the mortgage, which assignment was pled in the complaint and is a document of record. In addition, Husband's pretrial memorandum filed on April 1, 2013, explicitly acknowledged that the mortgage to America's Wholesale Lender had been assigned to the Bank and further acknowledged the mortgage was in default.

As to the sending of an Act 6 notice, Husband's answer to the complaint conclusively admitted that such a notice was sent, although the sufficiency or content of the notice was not admitted. (Complaint, paragraph 8 and Husband's answer thereto.) Similarly, Husband's answer to the motion for summary judgment admitted the sending of the Act 91 notices to him, but did not concede that the contents of the notices comported with Pennsylvania law. (Motion for Summary Judgment, paragraph 9 and Husband's response thereto.)[2] Furthermore, at no time has Husband identified to this court any deficiencies or defects in the notices the Bank attached to its motion for summary judgment.

Next, while the Superior Court in **Beneficial Consumer Discount Company v. Vukman,** 37 A.3d 596 (Pa. Super. 2012), **appeal granted,** 55 A.3d 100 (Pa. 2012), held that a failure to comply with Act 91's notice requirements deprived the trial court of subject matter jurisdiction over the ensuing mortgage foreclosure action, subsequent to that decision, the Homeowner Assistance Settlement Act ("Act"), 35 P.S. §§1681.1-1681.7, was enacted. This Act, which is retroactive to June 5, 1999, expressly provides that the failure of a mortgagee to comply with the notice requirements of Sections 402-C and 403-C of the Housing Finance Agency Law (**i.e.,** Act 91) does not deprive a court of jurisdiction over a subsequent legal action, including one for foreclosure. 35 P.S. §§1681.5(3), 1681.7. The Act further provides that if there has been a failure to comply with the notice requirements of Act 91, such failure must be properly identified and raised as an issue in the case, and if the mortgagor has been prejudiced thereby, "the court may dismiss the action without prejudice, order the service of the corrected notice during the action, impose a stay on [the] action or impose other appropriate remedies [ ] to address the interests, if any, of the mortgagor." 35 P.S. §1681.5(1).

As is evident from the above-cited provisions of the Act, a failure to comply with the notice requirements of Act 91 no longer deprives the court of jurisdiction in an action to foreclose, as is argued by Husband. Further, the Act specifically requires the manner or area of noncompliance to be identified in order that the

[2] Act 160 of 1998 authorizes a combined Act 6/Act 91 notice which was done in this case. 35 P.S. §1680.403c(b)(1).

court can devise an appropriate remedy. Here, Husband's answer to the complaint and to the motion for summary judgment admitted that notice had been given, but as to the sufficiency of such notice, responded only that the documents speak for themselves and that whether the notices comport with Pennsylvania law is a conclusion of law. At no time has Husband identified in what respects he contends the notices are defective. Finally, Husband is ineligible for Act 91 assistance since the mortgaged property is not his principal residence and is not owner occupied. 35 P.S. §1680.401c(a)(1), (2).[3]

[3] The remaining issues identified in Husband's concise statement are addressed as follows:

(1) The court acted within its discretion in granting a continuance of the originally scheduled April 5, 2013, trial date upon application of the Bank, joined in by Husband's counsel.

(2) The court acted within its discretion in extending the deadline for filing pretrial motions requested by the Bank to permit the filing of a motion for summary judgment, which motion recited that loss mitigation alternatives to foreclosure were then under review and that the original trial date had been continued for ninety days to allow time for this review and for the Bank to file a motion for summary judgment.

(3) Husband's contention that at the time summary judgment was granted, the deadline to complete discovery was still open, is mistaken. The Bank's motion to extend the milestone dates and the resulting April 5, 2013, order, were limited to extending the date to file pretrial motions. The deadline for discovery originally set in the November 2, 2012, order, December 16, 2012, remained in place.

(4) Husband's contentions that the complaint did not comply with the requirements of Rule 1019 (Contents of Pleadings), 1024 (Verification), 1147 (Contents of Complaint, Mortgage Foreclosure) and 2002 (Real Party in Interest) are nonspecific, fail to preserve any issue for review, were not raised by preliminary objection, and are waived.

(5) Husband's request for discovery at the time of argument on the Bank's motion for summary judgment was untimely. Pursuant to our order of November 2, 2012, the deadline for discovery was December 16, 2012. Further, copies of the assignments of mortgage and Act 6/91 Notices were attached to the motion for summary judgment. Service of the complaint was clearly made on Husband as a counseled answer and new matter was filed on his behalf on October 9, 2012, with no issue being raised as to the propriety of service.

(6) The issue of subject matter jurisdiction has been addressed within the body of this opinion.

CONCLUSION

In accordance with the foregoing, the Bank's Motion for Summary Judgment filed on April 24, 2013 was properly granted by our order of June 18, 2013.

(7) To the best of the court's recollection, no request was made at the time of argument on the Bank's motion for summary judgment to amend Husband's answer to the complaint based on a recent monetary settlement by the foreclosure review board. In what may be helpful to better understand this claim, paragraph 25 of Husband's petition for reconsideration of summary judgment appears to raise the same issue and attaches a copy of an April 26, 2013, letter from Paying Agent—Rust Consulting, Inc. advising Husband of his eligibility to receive a $2,000.00 payment as a result of an enforcement action related to deficient mortgage servicing and foreclosure processes. The extent and nature of the deficiencies are not identified, nor has Husband properly raised or identified to any reasonable degree what effect, if any, such deficiencies would have on this litigation.

(8) Husband has failed to identify any issues of material fact which would preclude the entry of summary judgment.

(9) The amount of the judgment entered was not excessive in comparison to the amount claimed in the complaint. The complaint filed on June 19, 2012, sought judgment in the amount of $46,705.71 as of May 21, 2012. The amount of the judgment actually entered on June 18, 2013, was $51,120.21. As appears in the affidavit attached to Bank's motion for summary judgment, this latter figure includes additional interest and expenses incurred between May 21, 2012, and the date of entry of judgment.

(10) Husband has failed to identify, much less preserve for the record, any basis for his claim of **res judicata.** Nevertheless, we note that attached to Husband's petition for reconsideration of summary judgment is a copy of the docket entries for a mortgage foreclosure action by the Bank against the Defendants, Robert Suarez, Jr. and Patricia A. Cunningham. These docket entries indicate that the action was voluntarily discontinued by the Bank by a praecipe filed on November 14, 2011, and ended without prejudice.

TWO RIVER COMMUNITY BANK, Successor by Merger to THE TOWN BANK, Plaintiff vs. FOX FUNDING PA, LLC, Defendant, FOX FUNDING, LLC; DENNIS and ELSIE WASELUS; JOSEPH F. SINISI; MELO ENTERPRISES, LLC; and 1400 MARKET STREET, LLC, Respondents

Civil Law—Mortgage Foreclosure—Requirement That Real Owner of Property Be Named As a Party Defendant—Consequences of Failure to Join an Indispensable Party—Execution Upon a Judgment Which Is Void Ab Initio*—Standard for Setting Aside Sheriff's Sale After Delivery of Sheriff's Deed—Applicability of Deficiency Judgment Act When Sheriff Without Authority to Convey Interest in Property Sold at Sheriff's Sale—Applicability of Six-Month Statute of Limitations to Suit Seeking to Challenge Judicial Sale on a Judgment Void* Ab Initio *for Lack of Subject Matter Jurisdiction*

1. An action in mortgage foreclosure is an **in rem** proceeding and does not impose personal liability.

2. Pennsylvania Rule of Civil Procedure 1144 requires that the real owner of property be named as a party defendant to an action in mortgage foreclosure.

3. An indispensable party is one whose rights are so connected with the claims of the litigants that no decree can be made without impairing those rights.

4. In assessing whether a party is indispensable to a proceeding, the following factors must be considered: (1) whether absent parties have a right or an interest related to the claim; (2) if so, what is the nature of that right or interest; (3) whether that right or interest is essential to the merits of the issue; and (4) whether justice can be afforded without violating the due process rights of absent parties. **Mechanicsburg Area School District v. Kline,** 494 Pa. 476, 481, 431 A.2d 953, 956 (1981).

5. The failure to join an indispensable party to a proceeding deprives the court of jurisdiction to decide the matter and renders any substantive decision made by the court void for lack of jurisdiction.

6. The real owner of property which is the subject of a mortgage foreclosure proceeding is indispensable to that proceeding. Consequently, a judgment entered in a mortgage foreclosure action in which the real owner was not joined is a legal nullity and execution thereon conveys nothing.

7. A sheriff's sale may be set aside after delivery of the sheriff's deed based on either fraud which vitiates the transaction or a lack of authority to make the sale.

8. A petition to set aside a sheriff's sale invokes the equitable powers of the trial court.

9. A petition to set aside a sheriff's sale after delivery of the sheriff's deed is properly granted where the judgment executed upon was a legal nullity and where the sheriff was without authority to convey any interest in the real estate which was the subject of the sheriff's sale.

10. The Deficiency Judgment Act conditions the filing of a petition for a deficiency judgment, as well as a petition to satisfy a judgment after execution thereon, upon the sale of the real property executed upon, either directly or indirectly, to the judgment creditor.

11. Where the judgment creditor was the successful bidder at a sheriff's sale on a judgment which was void **ab initio** and, therefore, nothing was conveyed upon execution, the Deficiency Judgment Act has no applicability.

12. The six-month statute of limitations applicable to an action or a proceeding to set aside a judicial sale of property presupposes the existence of a valid judgment, or, at a minimum, a voidable judgment, not one which is void **ab initio** for lack of subject matter jurisdiction. Where the judgment is a legal nullity from its inception for lack of jurisdiction, the six-month statute of limitations is inapplicable.

NO. 09-0006

SCOTT M. ROTHMAN, Esquire—Counsel for Two River Community Bank and 1400 Market Street, LLC.

ANTHONY ROBERTI, Esquire—Counsel for Melo Enterprises, LLC.

FOX FUNDING PA, LLC—Pro se.

FOX FUNDING, LLC—Pro se.

DENNIS and ELSIE WASELUS—Pro se.

JOSEPH F. SINISI—Pro se.

MEMORANDUM OPINION

NANOVIC, P.J.—September 10, 2013

Melo Enterprises, LLC ("Melo") has appealed two orders entered by us on July 9, 2013: one setting aside a sheriff's sale which occurred on November 6, 2009, the other denying Melo's request to satisfy the underlying judgment upon which the sale was based.

This opinion is filed in accordance with Pa. R.A.P. 1925(a).

PROCEDURAL AND FACTUAL BACKGROUND

This is a mortgage foreclosure action. The mortgage foreclosed upon (the "Bank Mortgage") was executed by Fox Funding PA, LLC ("Mortgagor"), a Pennsylvania limited liability company, on October 21, 2005, in favor of The Town Bank ("Bank"), which later merged with Two River Community Bank. Upon default in payment of the indebtedness secured by the mortgage, an action in mortgage foreclosure was commenced by Bank against Mortgagor on January 2, 2009. Pursuant to Pa. R.C.P. 2352(a), Two River Community Bank, as successor by merger to The Town Bank, was substituted as plaintiff on April 13, 2009.[1]

On August 31, 2009, Bank's motion for judgment on the pleadings was granted and a judgment **in rem** was entered in favor of Bank and against Mortgagor in the amount of $1,126,126.55, plus interest, costs of suit, and reasonable attorney fees in an amount to be determined by the court. Upon praecipe, a writ of execution to satisfy this judgment was issued on September 10, 2009, against Mortgagor with respect to the property listed as the collateral in the Bank Mortgage (the "Mortgaged Property"). A sheriff's sale of this property was held on November 6, 2009. The purchaser was 1400 Market Street, LLC, to whose use Bank's judgment, and its rights under the Bank Mortgage and underlying note, were as-

[1] Because Two River Community Bank's interest in the mortgage is the same as that previously held by The Town Bank, for ease of reference the term Bank as used in this opinion also includes The Town Bank's successor, Two River Community Bank.

signed immediately prior to the sheriff's sale. On November 30, 2009, a sheriff's deed for the Mortgaged Property was issued to 1400 Market Street and was duly recorded in the Carbon County Recorder of Deeds Office on December 7, 2009, in Carbon County Document Book 1810, page 652.

It is undisputed that Mortgagor never held title to or an ownership interest in the Mortgaged Property, either at the time the Bank Mortgage was executed or later. Instead, the real owner of the property was Fox Funding, LLC ("Owner"), a New Jersey limited liability company, separate and distinct from Mortgagor, although both are allegedly owned or controlled by the same person, James P. Harrison, who is also the managing member for both. In separate proceedings docketed in this court at No. 12-0788, 1400 Market Street seeks to rescind and reform the Bank Mortgage and the note it secures, both executed by Mr. Harrison as the managing member of Mortgagor at a settlement held on October 21, 2005, to reflect the averred true and intended borrower, Owner, to whom title to the Mortgaged Property was transferred at the same time.

At the settlement held on October 21, 2005, two deeds conveying title to the Mortgaged Property were delivered to Owner: one from Harry, Catherine, John, and Linda Roscoe for thirty-six acres (the "Roscoe Parcels") and one from Dennis and Elsie Waselus for one hundred thirty-two acres (the "Waselus Parcels").[2] As part of the purchase price for their property, the Waseluses took back a mortgage from Owner in the face amount of $372,000.00. This mortgage (the "Waselus Mortgage"), which correctly identified Owner as the borrower, and was executed by Mr. Harrison in his capacity as the managing member of Owner, expressly stated that it was

> UNDER AND SUBJECT, in both lien and payment, to a construction and purchase loan mortgage to secure the payment of the principle sum of ONE MILLION SEVENTY-FIVE THOUSAND AND 00/100 ($1,075,000.00) DOLLARS given by [Owner] to Town Bank dated October 21, 2005, and intended to be recorded forthwith.[3]

Nevertheless, because the Bank Mortgage named and was executed by Mortgagor, as the mortgagor therein, rather than by Owner, to whom title to both the Roscoe and Waselus Parcels (the mortgaged premises described in the Bank Mortgage) had been conveyed, the mortgage was in fact executed by a party which had no record or real interest in the Mortgaged Premises.

On November 8, 2010, Melo purchased the Waselus Mortgage for $1,000.00. At the time, the unpaid principal balance owed was in excess of $360,000.00. Not only did Melo know at the time of purchase that the Waselus Mortgage was intended to be a second mortgage to the Bank's first mortgage in the amount of $1,075,000.00, Melo also knew that the title 1400 Market Street acquired to the Mortgaged Premises by virtue of the November 30, 2009, sheriff's deed was subject to challenge since the Bank Mortgage was not executed by the true property owner.[4]

On December 3, 2010, Melo commenced a foreclosure action against Owner docketed to No. 10-3538 in this court seeking to foreclose on the Waselus Mortgage. 1400 Market Street was permitted to intervene. In response to 1400 Market Street's contention that the Waselus Mortgage was discharged in the foreclosure proceedings on the Bank Mortgage, Melo argued that Mortgagor,

[2] This was in accordance with a $1,300,000.00 loan commitment from Bank to Owner dated October 13, 2005, pursuant to which Owner was to acquire title to the Roscoe and Waselus Parcels which in turn were to be used by Owner as collateral for a first lien mortgage to Bank to secure payment of the loan. Between the date of execution of the loan commitment and the date of closing, it was agreed to break the loan into two separate amounts: $1,075,000.00 to be secured by the first lien mortgage, and $225,000.00 to be secured by a second mortgage existing as a second lien on the Roscoe Parcels and a third lien on the Waselus Parcels.

[3] Joseph Sinisi, whose name appears in the caption of this case, is a junior mortgage holder to whom Owner granted a mortgage on or about December 30, 2008. Mr. Sinisi's mortgage describes multiple parcels, in addition to those identified in the Bank Mortgage, as securing the debt owed to him. The Sinisi Mortgage expressly references the Bank and Waselus Mortgages, and ostensibly constitutes a fourth lien mortgage on the Waselus parcels. **See** Petition to Set Aside Sheriff's Sale, paragraphs 19-22. The existence of the Sinisi mortgage does not affect our analysis of the issues under appeal.

[4] In this context, it is worth noting that "[a] petition to set aside a sheriff's sale invokes the equitable powers of the trial court." **Jefferson Bank v. Newton Associates,** 454 Pa. Super. 654, 662, 686 A.2d 834, 838 (1996). Though Bank repeatedly raises whether Melo should be barred by the doctrine of unclean hands from opposing its petition, we found it unnecessary to reach this issue in our resolution of the petition and Melo's request to have the mortgage judgment marked satisfied.

as a stranger to title, had neither the power nor the authority to grant a mortgage on the Waselus Parcels, and that the sheriff's deed which issued upon execution could convey no better title to this property than that held by Mortgagor. We accepted Melo's argument and held that the Waselus Mortgage was not extinguished by the sheriff's sale, but remained as a valid, enforceable lien. **See Melo Enterprises v. Fox Funding,** 18 Carbon Co. L.J. 595 (Memorandum Opinion of February 15, 2012).

On February 28, 2013, Melo filed its petition in these proceedings to have Bank's August 31, 2009, foreclosure judgment marked satisfied under the Deficiency Judgment Act, 42 Pa. C.S.A. §8103. On March 8, 2013, Bank filed its petition seeking to set aside the November 6, 2009, sheriff's sale. By order dated July 9, 2013, we set aside the sheriff's sale held on November 6, 2009, and vacated the **in rem** judgment taken on August 31, 2009. In a separate order of the same date, we also denied Melo's petition to mark the judgment satisfied. Both orders are the subject of Melo's appeal taken on August 7, 2013.

DISCUSSION

In resolving both appeals,[5] we believe the controlling question is whether the real owner of property is an indispensable party to a mortgage foreclosure proceeding. An action in mortgage foreclosure is strictly an **in rem** proceeding based on the mortgage. **Newtown Village Partnership v. Kimmel,** 424 Pa. Super. 53, 55, 621 A.2d 1036, 1037 (1993). In consequence, the Pennsylvania Rules of Civil Procedure require the real owner of property, as well as the mortgagor—unless the plaintiff releases such person from liability for the debt secured by the mortgage—be named as defendants. Pa. R.C.P. No. 1144.

An indispensable party is one whose rights are so connected with the claims of the litigants that no decree can be made without impairing those rights. **Campanaro v. Pennsylvania Electric Company,** 440 Pa. Super. 519, 522, 656 A.2d 491, 493 (1995) (**quoting Sprague v. Casey,** 520 Pa. 38, 48, 550 A.2d 184, 189

[5] Melo filed one Notice of Appeal appealing two separate orders. This practice is at best frowned upon, and, at worst, may result in one or more appeals being quashed. **Sulkava v. Glaston Finland Oy,** 54 A.3d 884, 888 (Pa. Super. 2012); **M.R. Mikkilineni v. Amwest Surety Insurance Co.,** 919 A.2d 306, 311 (Pa. Commw. 2007).

(1988)). "[U]nless all indispensable parties are made parties to an action, a court is powerless to grant relief. Thus, the absence of such a party goes absolutely to the court's jurisdiction." **Id.** at 521-22, 550 A.2d at 493. "The absence of an indispensable party renders any decree or order in the matter void for lack of jurisdiction." **Hubert v. Greenwald,** 743 A.2d 977, 980 (Pa. Super. 1999).

As a matter of law, a real property owner cannot be deprived of his property in an action of mortgage foreclosure in which he is not a party. **Commercial Banking Corporation v. Culp,** 297 Pa. Super. 344, 348, 443 A.2d 1154, 1156 (1982). As the real owner of the property subject to this mortgage foreclosure, Owner (Fox Funding LLC) was a necessary and indispensable party to this action. **Biernacki v. Redevelopment Authority of City of Wilkes-Barre,** 32 Pa. Commw. 537, 379 A.2d 1366 (1977) (owner of real estate is an indispensable party to proceedings seeking transfer of title to the property to another); **Hart v. O'Malley,** 436 Pa. Super. 151, 165, 647 A.2d 542, 549 (1994) ("Appellate courts have consistently held that property owners are indispensable parties in lawsuits concerning the owners' property rights."). Without Owner's joinder, no relief was possible since an action in mortgage foreclosure is **in rem** and binds only the mortgaged property. In consequence, Bank's failure to name Owner as a defendant, deprived this court of jurisdiction to act **vis-à-vis** the Mortgaged Premises and renders the judgment entered on August 31, 2009, a legal nullity. This error was compounded when execution was attempted on the judgment.

In our February 15, 2012, Memorandum Opinion, we wrote:

> In its simplest terms, the Bank mortgage was not executed by either the real or record owner of the property. Further, the **in rem** judgment which the Bank sought to obtain in its mortgage foreclosure action against Fox Funding PA, LLC was against an entity which never held an interest in the property. It necessarily follows that the sheriff's deed which issued upon execution on this judgment and which purported to convey such title in the property as was held by Fox Funding PA, LLC to Buyer, in reality conveyed nothing. A sheriff's deed can convey no better title than that held by the judgment debtor. **Tonge v. Radford,** 156 A. 814, 815 (Pa.Super. 1931) ('A purchaser of land at sheriff's sale buys at his own risk and acquires only

> the interest which the defendant in the execution had, and no more.') (construing **Weidler v. Farmer's Bank of Lancaster,** 11 Serg. & Rawle 134 (Pa. 1823)).

Melo Enterprises v. Fox Funding, 18 Carbon Co. L.J. 595, 599 (2012). This is equally relevant to the present discussion.

Because the judgment upon which the sheriff's execution emanated was a nullity and because the sheriff was without authority to convey any interest in real estate in an **in rem** proceeding in which the defendant/debtor never owned or held an interest, our order setting aside the sheriff's sale and vacating the **in rem** judgment was appropriate. **Mortgage Electronic Registration Systems, Inc. v. Ralich,** 982 A.2d 77, 80 (Pa. Super. 2009) ("A sheriff's sale may be set aside after delivery of the sheriff's deed based on fraud and lack of authority to make the sale."); **see also, Workingmen's Savings and Loan Association of Dellwood Corporation v. Kestner,** 438 Pa. Super. 186, 189, 652 A.2d 327, 328 (1994) ("After delivery of a sheriff's deed to a purchaser, the only attacks possible on the sheriff's sale are those based on fraud which vitiates the transaction or a lack of authority to make the sale.").

Our order denying Melo's petition to mark the judgment satisfied is a necessary corollary of the foregoing. Having determined that this court was without jurisdiction to act in a mortgage foreclosure action in which the real owner of the property was not joined, that the judgment entered in that action was void **ab initio,** and that the sheriff's deed which thereafter issued conveyed nothing, to argue, as Melo does, that the judgment should be satisfied, defies logic. How legally can a judgment be satisfied which never validly existed and which was never paid?

To the extent Melo relies upon the Deficiency Judgment Act in requesting satisfaction, Melo's reliance is misplaced. That Act conditions the filing of a petition for a deficiency judgment, as well as a petition to satisfy a judgment after execution thereon, upon the sale of the real property executed upon, either directly or indirectly, to the judgment creditor. 42 Pa. C.S.A. §8103(a), (d). Here, as already stated, neither Bank nor 1400 Market Street acquired anything in the sheriff's sale held on November 6, 2009, much less any title or ownership interest in the property being foreclosed upon. Under these circumstances, where no valid **in rem** judgment existed and nothing was conveyed upon execution, the Deficiency Judgment Act has no applicability.

To the extent Melo argues Bank's petition to set aside the sheriff's sale is barred by the six-month statute of limitations applicable to an action or proceeding to set aside a judicial sale of property, 42 Pa. C.S.A. §5522(b)(5), the issue has been waived. This issue was never raised by Melo as a defense to Bank's petition to set aside the sheriff's sale, nor was it raised at the argument held on July 9, 2013, or at any time prior to the entry of our orders dated July 9, 2013.[6] Moreover, and perhaps more importantly, it is intellectually dishonest to argue that a legal proceeding which is void at its inception for lack of subject matter jurisdiction can somehow be magically transformed from one having no effect to an effect which is decisive simply by the passage of time and the failure to make an earlier challenge to its validity. **Biernacki, supra** at 540, 379 A.2d at 1368. ("No court may grant relief in the absence of an indispensable party.") Perhaps the easier answer, is to simply state that because no valid judicial sale of property occurred on November 6, 2009, the period of limitations provided in 42 Pa. C.S.A. §5522(b)(5) is inapplicable to these proceedings.

CONCLUSION

It is often said that bad facts make bad law. Equally true is that unusual facts often make the application of general principles of law flawed. In this case, what simple common sense and fairness dictate has been unduly complicated by a multitude of errors, beginning with the preparation and execution of the Bank Mortgage, and exacerbated by the opportunistic efforts of Melo to take advantage of what appears, at its most basic level, to be a scrivener's error. In the end, we believe the rulings we have made comport with the law and fairly adjust the rights of the parties.

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[6] To the extent Melo argued the petition to set aside the sheriff's sale was untimely, it did so on the basis of Pa. R.C.P. No. 3132 which provides:

> Upon petition of any party in interest **before delivery** of the personal property or **of the sheriff's deed to real property,** the court may, upon proper cause shown, set aside the sale and order a resale or enter any other order which may be just and proper under the circumstances.

(Emphasis added.) **See** Melo's Memorandum of Law Opposing Plaintiff's Petition to Set Aside Sheriff's Sale filed on April 5, 2013. While it is true that the delivery of a sheriff's deed generally divests the court of the authority to set aside a sheriff's sale, as noted in the **Ralich** and **Kestner** cases cited in the body of this opinion, an exception to this limitation is where the sheriff was without the authority to make the sale.

JILL TURKO, Plaintiff/Respondent vs.
PETER J. TURKO, Defendant/Petitioner

Civil Law—Propriety of Issues Raised Sua Sponte *by the Court—Property Settlement Agreement—Interpretation of Contracts—Reasonableness of Attorney Fees—Doctrine of Necessary Implication*

1. As a general rule, except where a question of subject matter jurisdiction exists, it is error for the trial court to **sua sponte** raise an issue not raised by the parties and decide the substantive merits of the case on that issue. However, where the issue raised by the court is encompassed within a broader issue already raised by the parties and is necessary to the determination of that issue, there is no error.

2. A property settlement agreement, even if incorporated by reference and made part of a divorce decree, is at its core a contract and is to be interpreted in accordance with the law of contracts.

3. The primary objective of contract interpretation is to ascertain the intent of the parties as expressed in the language of the contract. Where that intent is apparent from the words of the contract, the words of the contract control. Where, however, the words are ambiguous or the intent otherwise unclear, it is proper for the court in ascertaining the intent of the parties to take into account attendant circumstances such as the situation of the parties, the objects they apparently have in view and the nature of the subject matter of the agreement.

4. The question of whether a contract is ambiguous is a question of law.

5. Pursuant to the terms of a contract which provide for the payment of attorney fees, the court may consider the reasonableness of such fees when making an award for attorney fees, even if the contract does not specifically state that such fees are to be reasonable.

6. In the absence of an express term, the doctrine of necessary implication may act to imply a requirement necessitated by reason and justice without which the intent of the parties is frustrated.

7. The court properly interpreted the parties' settlement agreement when it allocated the costs of litigation incurred in the dissolution of husband's partnership with a third party between the marital and non-marital portion of the partnership interest, rather than against the value of the marital interest only as argued by husband.

NO. 08-1501

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MELISSA T. PAVLACK, Esquire—Counsel for Defendant/Petitioner.

MEMORANDUM OPINION

NANOVIC, P.J.—September 19, 2013

This is a case where Peter J. Turko ("Husband") asks us to enforce a provision of the parties' property settlement agreement but argues we have no authority to question what it means. This is also a case where Husband contends his interpretation must control, no matter how unconscionable, because, according to Husband, his interpretation is what the parties intended.

FACTUAL AND PROCEDURAL BACKGROUND

The parties were married on May 9, 1992. After sixteen years of marriage, on June 16, 2008, Jill Turko ("Wife") filed for divorce. On November 23, 2009, we entered a decree divorcing Husband and Wife under 23 Pa. C.S.A. §3301(c).

The divorce decree incorporated, but did not merge, a property settlement agreement ("Agreement") dated October 19, 2009. At issue in this litigation is Paragraph 7(p) of that Agreement, which addresses pending litigation between Husband and his business partner, James Everett, over the dissolution of their business partnership and the parties' agreement that any marital interest Husband held in this partnership would be divided equally between Husband and Wife. **Id.** Paragraph 7(p) of the Agreement states:

> Prior to the parties' marriage, Husband entered into a business partnership in the following business entities:
>
> • Blue Ridge Insulators, Inc.
> • North Ridge Associates
> • Palmerton Construction Company
>
> Husband is now involved in the dissolution of these entities with his business partner. The parties acknowledge that resolution of the dissolution of these entities has not been completed as of the date of execution of this Property Settlement Agreement. The parties acknowledge that Wife has a marital interest in the increase in value of Husband's share of these business entities from the date of the parties' marriage (May 9, 1992) until the date of dissolution of these business entities. Upon the dissolution of these business entities and after reducing the value of Husband's interest by the total of the attorney fees, costs and expert fees, Wife shall receive Fifty (50%) Percent of the marital interest.

Property Settlement Agreement, Paragraph 7(p).

In an arbitrator's decision dated May 15, 2011, Husband was awarded $599,052.00 in the partnership dissolution proceedings. Because payment of this award was not made by Mr. Everett until

July 2012, Husband was also awarded an additional $25,769.00 in interest for this delay. At a court proceeding on June 13, 2012, the parties agreed that $90,000.00 of the payment Husband was to receive from Mr. Everett would be placed in a non-interest bearing escrow account held by Husband's counsel to secure the payment of any monies owed to Wife pursuant to Paragraph 7(p) of the Property Settlement Agreement.

The parties were unable to agree on what amount Wife was entitled to receive from the monies held in escrow. Consequently, on November 21, 2012, Husband filed a Petition to Enforce the Property Settlement Agreement pursuant to 23 Pa. C.S.A. §3502(e) and 23 Pa. C.S.A. §3323(f). In his petition, Husband claimed that Wife was not entitled to any money, as the marital interest was a negative number, and requested that all of the monies held in escrow be released to him. (Petition, Paragraphs 7 and 8.) In response to Husband's petition, Wife answered, **inter alia,** that "[p]ursuant to Paragraph 7(p) of the Agreement, upon dissolution of certain businesses in which Defendant Husband had an interest, and reducing Defendant Husband's share by attorney fees and expert fees, Plaintiff Wife was to receive a fifty percent (50%) share of the marital interest." (Answer and Counterclaim, Paragraph 13.)

Hearings on Husband's petition were held on March 15, July 11, and July 12, 2013. At these hearings, the parties disagreed on the value of Husband's partnership interest as of the date of marriage,[1] as well as the reasonableness of the expenses Husband incurred in litigating the dissolution of the business partnership with Mr. Everett.[2] We accepted Husband's date of marriage value of

[1] The primary factual dispute on this issue was the date of marriage value of property located at 1965 Forest Inn Road titled in both Husband's and Mr. Everett's names. Husband's appraiser opined that the fair market value of the property on May 9, 1992, was $400,000.00. Wife's expert valued the property at $167,000.00. We accepted Husband's value and used this figure in determining the value of Husband's business interests as of the date of marriage.

[2] These expenses totaled $319,967.79 and consist of $241,519.54 in attorney fees owed to the firm of Gross McGinley, of which $217,588.91 was paid by the time of hearing; $65,837.00 in accounting fees paid to Bruce Loch; $3,400.00 in appraisal fees paid to Ray Geiger; and $9,211.25 paid to the arbitrator who heard and decided the litigation between Husband and Mr. Everett, the Honorable Edward N. Cahn. Of these fees and expenses, only the amount of attorney fees was disputed by Wife.

Although the parties' property settlement agreement does not expressly require that the attorney fees incurred by Husband be reasonable before their deduction, our Supreme Court held in **McMullen v. Kutz** that "courts may consider reasonableness when making a counsel fee award, regardless of the precise verbiage of the document authorizing such award." 603 Pa. 602, 605, 985 A.2d 769, 770-71 (2009). In particular, "facts and factors to be taken into consideration in determining the fee or compensation payable to an attorney include: the amount of work performed; the character of the services rendered; the difficulty of the problems involved; the importance of the litigation; the amount of money or value of the property in question; the degree of responsibility incurred; whether the fund involved was 'created' by the attorney; the professional skill and standing of the attorney in his profession; the results he was able to obtain; the ability of the client to pay a reasonable fee for the services rendered; and, very importantly, the amount of money or the value of the property in question." **Id.** at 610, 985 A.2d at 774 (**quoting In re Estate of LaRocca,** 431 Pa. 542, 246 A.2d 337, 339 (1968)).

his partnership interest and agreed with Husband that the marital value of his partnership interest was $278,602.00. We also agreed the litigation expenses Husband incurred in the dissolution of the partnership, $319,967.79, were a proper deduction under the parties' Agreement. Where we differed from Husband was on how to allocate the litigation expenses between the marital and non-marital portion of his partnership interest.

Husband argued that the litigation expenses were to be subtracted first from the marital value before being deducted against his non-marital interest in the partnership. Because the litigation expenses exceed the marital value, if this approach is taken, there is nothing to be distributed to Wife. At the hearing, we questioned whether deducting the litigation expenses against only the marital interest is required by Paragraph 7(p). In deciding against this application of the Agreement, we did not accept Husband's premise that Paragraph 7(p) places the entire burden of paying the litigation expenses on the parties' marital interest before any portion of these expenses is borne by Husband's premarital interest. Instead, we found the intent of Paragraph 7(p) of the Agreement was to spread the burden of paying the litigation expenses across the entire award Husband received in the arbitration proceedings, with no distinction being made between what portion of the recovery was marital and what portion non-marital. When the expenses are allocated in this manner, Wife is entitled to $64,897.05 as the net value of her marital interest in the Husband's partnership share. We also determined that Wife was entitled to $5,992.51 as her

share of interest.[3] By order dated July 19, 2013, we directed that of the $90,000.00 held in escrow, $70,889.26 (**i.e.,** $64,897.05 plus $5,992.51) be distributed to Wife and the balance, $19,110.74, to Husband.

On July 24, 2013, Husband appealed our order. In his Concise Statement of Matters Complained of on Appeal, Husband presents two issues. First, Husband claims we "erred in raising an issue **sua sponte** that had not been raised by either party." This issue concerns whether Paragraph 7(p) of the Agreement is subject to interpretation by the court. Second, Husband claims we "erred in modifying the plain and accepted meaning relied upon by both parties for the calculation of the Wife's interest under the guise of interpretation." This issue concerns how we interpreted Paragraph 7(p).

[3] Our calculations were as follows:

1. Computation of Wife's Marital Interest		
a. Computation of Gross Marital Interest		
Date of Dissolution Value		$599,052.00
Date of Marriage Value	-	$320,450.00
Marital Interest		$278,602.00
b. Marital Interest As a		
Percentage of Dissolution Value		$278,602.00
	÷	$599,052.00
	=	.46507148
	=	46.507148%
c. Computation of Wife's 50% Share of Marital Interest		
Date of Dissolution Value		$599,052.00
Litigation Expenses	-	$319,967.97
Net Distribution to Husband From Arbitration		$279,084.21
Marital Interest As a Percentage of Net Distribution	x	.46507148
Net Marital Interest		$129,794.11
Wife's 50% Share of Net Marital Interest		$64,897.05
2. Computation of Interest Amount Owed Wife		
Computation of Wife's Gross Marital Interest		$139,301.00
As a percentage of Gross Dissolution Value	÷	$599,052.00
	=	.23253574
	=	23.253574%
Wife's Share of Interest Payment		$25,769.00
	x	.23253574
		$5,992.21

DISCUSSION

1. Whether the Court Erred in Sua Sponte **Raising an Issue That Was Not Before It?**

Husband claims we **sua sponte** raised an issue that was not before us, namely whether the language of Paragraph 7(p) requires that the litigation expenses be borne fully by the marital interest rather than being prorated against the full amount of Husband's arbitration award. We disagree.

As a general principle, excepting an issue of subject matter jurisdiction, it is inappropriate for a trial court to raise an issue **sua sponte. Orange Stones Co. v. Borough of Hamburg Zoning Hearing Board,** 991 A.2d 996, 999 (Pa. Commw. 2010). However, a distinction exists between a court's legitimate refinement or parsing of an issue placed before it by the parties, and cases where the court **sua sponte** raises an unrelated issue. **Compare Balicki v. Balicki,** 4 A.3d 654, 661-62 (Pa. Super. 2010) (holding the court acted within its authority in considering the tax ramifications of an alimony award, even though the issue was not specifically raised by either party, since alimony is taxable as income to the recipient and understanding this was necessary to the court's determination of a proper alimony award) **with Harrington v. Commonwealth, Department of Transportation,** 784 A.2d 871, 874 (Pa. Commw. 2001) (holding that the trial court committed reversible error by **sua sponte** raising an issue which had not been raised by the parties in a driver's license suspension appeal—the accuracy of the information contained in an out-of-state conviction report—and then deciding the case based on that issue). Stated differently, where the court addresses an issue within the ambit of a claim before it, the issue is properly considered. **Dunkle v. Middleburg Municipal Authority,** 842 A.2d 477, 481 n.7 (Pa. Commw. 2004) (holding that whether a cognizable common-law cause of action existed was within the ambit of a municipal authority's claim of governmental immunity and, therefore, was properly considered by the court in ruling on the authority's motion for summary judgment asserting the defense of governmental immunity).

Our questions to counsel as to how the litigation expenses were to be treated under the Property Settlement Agreement vis-à-vis Husband's arbitration award did not advocate or create any new

issue. How the litigation expenses incurred by Husband were to be allocated under Paragraph 7(p) were necessarily part and parcel of the decision of whether Wife was entitled to any of the monies held in escrow. While neither party questioned whether the Agreement required us to first deduct Husband's litigation expenses from the entirety of the arbitration award he received for his share in the partnership, this issue was necessarily encompassed within the ambit of the legal question before us: what amount, if any, was Wife entitled to receive under Paragraph 7(p) of the Agreement. The issue was neither irrelevant, nor could it be ignored.

2. Whether the Court's Interpretation of Paragraph 7(p) of the Agreement Is Contrary to the Plain Meaning As Relied Upon and Accepted by the Parties?

We begin this discussion by noting first that notwithstanding the incorporation of the Property Settlement Agreement into the parties' divorce decree, this case is governed by the law of contracts. "[P]roperty settlement agreements incorporated but not merged into divorce decrees are considered independent contracts, interpreted according to the law of contracts." **Chen v. Chen,** 586 Pa. 297, 307, 893 A.2d 87, 93 (2006).

Expounding further, in **Stamerro v. Stamerro,** 889 A.2d 1251 (Pa. Super. 2005), the court stated:

> Marital settlement agreements are private undertakings between two parties, each having responded to the 'give and take' of negotiations and bargained consideration. ... A marital support agreement incorporated but not merged into the divorce decree survives the decree and is enforceable at law or equity. ... A settlement agreement between [spouses] is governed by the law of contracts unless the agreement provides otherwise. ... The terms of a marital settlement agreement cannot be modified by a court in the absence of a specific provision in the agreement providing for judicial modification.

Id. at 1258 (citations and quotation marks omitted).

Fundamental to interpreting a contract is a determination of the parties' intent as expressed in the language of the contract.

> A fundamental rule in construing a contract is to ascertain and give effect to the intent of the contracting parties. ... It is firmly settled that the intent of the parties to a written contract is contained in the writing itself. When the words of a contract are clear and unambiguous, the meaning of the contract is ascertained from the contents alone.

Chen, supra (citations and quotation marks omitted).

"In determining the intent of the parties to a written agreement, the court looks to what they have clearly expressed, for the law does not assume that the language was chosen carelessly." **Stamerro, supra** (**quoting Melton v. Melton,** 831 A.2d 646, 653-54 (Pa. Super. 2003)).

> The court must construe the contract only as written and may not modify the plain meaning of the words under the guise of interpretation. When the terms of a written contract are clear, [the] Court will not re-write it or give it a construction in conflict with the accepted and plain meaning of the language used.

Habjan v. Habjan, 73 A.3d 630, 640 (Pa. Super. 2013) (**quoting Lang v. Meske,** 850 A.2d 737, 739-49 (Pa. Super. 2004)) (citations omitted). "If left undefined, the words of a contract are to be given their ordinary meaning." **Kripp v. Kripp,** 578 Pa. 82, 90, 849 A.2d 1159, 1163 (2004).

A court has neither the power nor the authority to modify or vary the terms of a written agreement which are clear and unambiguous, absent fraud, accident or mistake. **Habjan, supra.**

> Where the parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only, evidence of their agreement. ... The court might consider extrinsic or parol evidence to determine the parties' intent only where the language of the agreement is ambiguous.

Step Plan Services, Inc. v. Koresko, 12 A.3d 401, 409-10 (Pa. Super. 2010) (citations and quotation marks omitted). Further, where the language is not ambiguous, the court cannot, under the guise of interpretation, construe contractual terms in a manner which the court believes are fairer or more equitable than those appearing in the contract. **Kripp, supra** at 93, 849 A.2d at 1165.

Where the language of a contract is unclear as to the parties' intent, the court may take into account attendant circumstances in determining the parties' intent.

> In other words, the intent of the parties is generally the writing itself. ... In ascertaining the intent of the parties to a contract when unclear from the writing itself, the court considers the parties' outward and objective manifestations of assent, as opposed to their undisclosed and subjective intentions. Thus, [t]he court may take into consideration the surrounding circumstances, the situation of the parties, the objects they apparently have in view, and the nature of the subject-matter [sic] of the agreement. The court will adopt an interpretation that is most reasonable and probable bearing in mind the objects which the parties intended to accomplish through the agreement.
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> ... Before a court will interpret a provision in ... a contract in such a way as to lead to an absurdity or make the ... contract ineffective to accomplish its purpose, it will endeavor to find an interpretation which will effectuate the reasonable result intended.

Stamerro, supra at 1258-59 (citations and quotation marks omitted).

> When the terms of a contract are clear and unambiguous, the intent of the parties is to be ascertained from the document itself. ... When, however, an ambiguity exists, parol evidence is admissible to explain or clarify or resolve the ambiguity, irrespective of whether the ambiguity is patent, created by the language of the instrument, or latent, created by extrinsic or collateral circumstances. ... A contract is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense.

Kripp, supra at 90-91, 849 A.2d at 1163 (citations omitted). When a term in a contract is clear and cannot reasonably be interpreted to the contrary, there is no ambiguity. **Tuthill v. Tuthill,** 763 A.2d 417, 420 (Pa. Super. 2000) **(en banc).**

"The court, as a matter of law, determines the existence of an ambiguity and interprets the contract whereas the resolution of conflicting parol evidence relevant to what the parties intended by the ambiguous provision is for the trier of fact." **Keystone Dedicated Logistics, LLC v. JGB Enterprises, Inc.,** 77 A.3d 1, 6 (Pa. Super. 2013) (**quoting Missett v. Hub Intern. Pennsylvania, LLC,** 6 A.3d 530, 541 (Pa. Super. 2010)).[4]

> While unambiguous contracts are interpreted by the court as a matter of law, ambiguous writings are interpreted by the finder of fact. ... [T]he question of whether a contract is ambiguous is a question of law.

Kripp, supra at 91 and n.5, 849 A.2d at 1163-64 and n.5. Finally, the existence of different opinions on the interpretation of a contract does not render it ambiguous. **Krizovensky v. Krizovensky,** 425 Pa. Super. 204, 2012-13, 624 A.2d 638, 643 (1993).

As discussed in the preceding issue, whether Wife was entitled to receive any of the monies held in escrow necessarily required a determination and valuation of what, if any, portion of Husband's partnership interest with Mr. Everett constituted a marital asset, and how the litigation expenses Husband incurred in the dissolution proceedings should be allocated between marital and non-marital assets. Paragraph 7(p) of the Property Settlement Agreement defines the marital interest and its worth as being the increase in value of Husband's share of the partnership business between the date of the parties' marriage and the date of dissolution of the businesses. Under this formula, we determined the marital increase in value to be $278,602.00. This figure is not in dispute in this appeal.

We also determined the amount of the litigation expenses to be accounted for under Paragraph 7(p) as $319,967.97. Again, this figure is not in dispute. Husband then argues that under the plain language of Paragraph 7(p), and as interpreted and relied upon by the parties, the full amount of the litigation expenses are to be subtracted from the marital interest. **See** Husband's Exhibit P-7. Because these expenses exceed the value of the marital interest, Husband contends Wife is entitled to nothing.

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[4] When faced with questions of contractual interpretation, the applicable standard and scope of review is well settled.

> Because contract interpretation is a question of law, this Court is not bound by the trial court's interpretation. Our standard of review over questions of law is **de novo** and to the extent necessary, the scope of our review is plenary as [the appellate] court may review the entire record in making its decision. ... With respect to factual conclusions, we may reverse the trial court only if its findings of fact are predicated on an error of law or are unsupported by competent evidence in the record.

Step Plan Services, Inc. v. Koresko, 12 A.3d 401, 408 (Pa. Super. 2010) (citations omitted).

The problem with Husband's argument is that the language of the contract does not support this approach, and the evidence does not show that this is what the parties intended or agreed to. Specifically, the last sentence of Paragraph 7(p) states:

> Upon the dissolution of these business entities and after reducing the value of Husband's interest by the total of the attorney fees, costs and expert fees, Wife shall receive Fifty (50%) Percent of the marital interest.

This language categorically does not deduct the litigation expenses solely from the marital interest. **Allstate Fire and Casualty Insurance Company v. Hymes,** 29 A.3d 1169, 1172 (Pa. Super. 2011) (noting that when interpreting contracts, we assume the parties chose the language used carefully). Instead, it directs that the litigation expenses be deducted from Husband's interest. When Paragraph 7(p) is read in its entirety, it is evident that Husband's interest is synonymous with Husband's share in the partnership, which is inclusive of both the marital and non-marital interest of Husband's share. **401 Fourth Street, Inc. v. Investors Insurance Group,** 583 Pa. 445, 455, 879 A.2d 166, 171 (2005) (noting that when interpreting a contractual term, a court looks not only at the term itself but at the entire provision and the context in which it is used).

As to what the parties intended, the parties are bound by the clear and unambiguous language of the Agreement which expresses that intent. Husband's Exhibit P-7, in which Husband offers his self-serving illustration of how he believes the contract should be interpreted, cannot alter the actual language of the Agreement which is not ambiguous on its face. **Habjan, supra** at 641 (**citing Brown v. Cooke,** 707 A.2d 231, 233 (Pa. Super. 1998)). In addition, not only is there no evidence that Wife ever agreed to this approach, it flatly contradicts the actual language of the contract.[5]

[5] At the conclusion of the evidence, and before the record was closed, counsel were offered an opportunity to argue their respective positions. As to these arguments, they are not evidence. In addition, we note that Wife's Answer and Counterclaim to Husband's petition specifically challenged the approach taken by Husband, referencing Paragraph 7(p) of the Agreement. (Answer and Counterclaim, Paragraph 13.)

In our computation, we followed the plain language of the contract. The litigation expenses ($319,967.97) were subtracted from the dissolution value of Husband's share of the partnership ($599,052.00), with the difference being the net amount Husband realized from the arbitration award ($279,084.21). In computing how much of this figure accounted for the marital interest alone, $279,084.21 was multiplied by the correlative ratio of the parties' unreduced marital interest in the arbitration award to the gross value of the award. This product, $129,794.11, represents the net value of the marital interest. We then determined that half of this figure represented the fifty percent interest in the net marital property to which Wife was entitled under the contract.

The effect of this approach was to allocate the litigation expenses proportionately between the marital and non-marital interests of Husband's share in the partnership. In contrast to the apportionment argued by Husband, this approach does not arbitrarily or unfairly, and without any basis in the contract, place the entire burden and source of payment of the litigation expenses first and primarily upon the marital interest. Because Paragraph 7(p) is not susceptible of any other reasonable interpretation, the Agreement is not ambiguous, and the construction we have applied, not only conforms with the language chosen by the parties, it definitionally reflects their true intent. **See also,** Property Settlement Agreement, Paragraph 7(a) asserting the parties' intent to provide a fair and equitable distribution of marital property after consideration of those factors enumerated in 23 Pa. C.S.A. §3502(a). **See also,** 23 Pa. C.S.A. §3102(a)(6) (**citing** various legislative findings and objectives to be considered in construing the Divorce Code, including effectuating economic justice between parties who are divorced and ensuring a fair and just determination and settlement of their property rights).[6]

[6] Alternatively, had we found Paragraph 7(p) ambiguous for failure to specifically state how the litigation expenses are to be allocated against Husband's arbitration award, we would have reached the same conclusion. **See Amerikohl Mining Company, Inc. v. Peoples Natural Gas Co.,** 860 A.2d 547, 550 (Pa. Super. 2004) (noting that courts favor the construction of ambiguous contracts in a manner "which makes it fair and rational, not the construction which makes it unusual or inequitable"); **see also, Harrity v. Medical College of Pennsylvania Hospital,** 439 Pa. Super. 10, 21, 653 A.2d 5, 10 (1994) ("The court will

CONCLUSION

The Agreement which is the subject of these proceedings is a property settlement agreement entered as part of the parties' divorce proceedings for the purpose of equitably dividing their marital property. It is an agreement within which the parties have expressly stated their intent to make a fair and just division of marital property after having considered the statutory factors enumerated in Section 3502(a) of the Divorce Code, 23 Pa. C.S.A. §3502(a), which is concerned with the equitable distribution of marital property. In making the decision we did, we believe we acted fully within our authority, if not our responsibility, as a court to question the language of a contract which the parties seek to enforce and, specifically in this case, to question how Husband's litigation expenses were to be allocated in order to correctly decide the amount due to Wife. We further believe that the allocation we made of these litigation expenses properly reflected the parties' intent as expressed in the Property Settlement Agreement.

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adopt an interpretation that is most reasonable and probable bearing in mind the objects which the parties intended to accomplish through the agreement ... .") and 23 Pa. C.S.A. §3323(f) (granting the court full equity power and jurisdiction in all matrimonial causes, with authority to issue orders necessary to protect the interests of the parties or to effectuate the purposes of the Divorce Code and to grant such relief or remedy as equity and justice require).

Similarly, in the absence of an express provision to the contrary, the "doctrine of necessary implication" implies

> an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made and to refrain from doing anything that would destroy or injure the other party's right to receive the fruits of the contract.

Stamerro v. Stamerro, 889 A.2d 1251, 1259 (Pa. Super. 2005) (**quoting Palmieri v. Partridge,** 853 A.2d 1076, 1079 (Pa. Super. 2004). The doctrine avoids injustice "by inferring contract provisions that reflect the parties' silent intent." **Id.** "In the absence of an express term, the doctrine of necessary implication may act to imply a requirement necessitated by reason and justice without which the intent of the parties is frustrated." **Id.** (**quoting Somers v. Somers,** 418 Pa. Super. 131, 613 A.2d 1211, 1214 (1992)).

COMMONWEALTH OF PENNSYLVANIA vs. JOHN ANTHONY VEGA, Defendant

Criminal Law—Sufficiency of Defendant's Palm Prints Found at Crime Scene to Identify Defendant As the Perpetrator of the Crime—Imposition of Consecutive Sentences—Cruel and Unusual Punishment —Legality of Sentence—Megan's Law—Classification As a Sexually Violent Predator—Sixth Amendment Right to a Jury Trial—Witness Credibility—Prior Consistent Statement

1. In the absence of evidence to the contrary, the presence of a defendant's fingerprint or palm print at the scene of a crime, freshly made, and with no innocent explanation as to its presence, is sufficient to identify defendant as the perpetrator of the crime.

2. The Eighth Amendment's ban on cruel and unusual punishment applies to not only barbaric punishments, but also sentences that are disproportionate to the crime committed. Strict proportionality is not required. Rather, the amendment forbids only extreme sentences which are **grossly disproportionate** to the crime.

3. A claim that the sentence imposed was cruel and unusual is a challenge to the legality of the sentence and is non-waivable on direct appeal.

4. In examining the proportionality between the crime for which defendant was convicted and the sentence imposed, a three-part test exists pursuant to which the court considers: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals for the commission of the same crime in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions.

5. Application of the second and third prongs of this test is not required where no inference of gross disproportionality is found following the comparison of the crime committed to the sentence imposed under the first prong.

6. An aggregate sentence consisting of standard range consecutive sentences is not clearly unreasonable or grossly disproportionate where, as here, the court relies on the defendant's prior history and a finding that he was a high risk to reoffend.

7. In **Apprendi,** the United States Supreme Court held that "any judicial finding which results in **punishment** beyond a statutory maximum must be submitted to a jury and proven beyond a reasonable doubt." While the lifetime registration and publication requirements of Megan's Law to which Defendant is subject extend beyond the statutory maximum of the crimes for which he was convicted, because the registration, notification, and counseling requirements of Megan's Law are not a punishment, Defendant was not entitled to have the issue of whether he was a sexually violent predator decided by a jury.

8. Whether a witness is credible, that is, is both accurate and honest, is a question which must be answered in reliance on the ordinary experiences of life, common knowledge of the actual tendencies of human nature, and observations of the character and demeanor of the witness. Therefore, whether a witness is lying or mistaken is for the jury to assess.

9. Evidence of a witness's prior consistent statement is admissible to rehabilitate the witness's credibility if the statement is offered to rebut an express or implied charge of fabrication or faulty memory and the statement was made before that which has been charged existed or arose.

NO. CR 395-2009

JEAN ENGLER, Esquire—Counsel for the Commonwealth.

KENT WATKINS, Esquire—Counsel for the Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—November 21, 2013

On January 9, 2013, a jury found John Anthony Vega ("Defendant") guilty of two counts of attempted rape by forcible compulsion,[1] two counts of burglary,[2] two counts of criminal trespass,[3] two counts of indecent assault by forcible compulsion[4] and one count of simple assault.[5] We subsequently found Defendant to be a sexually violent predator under Megan's Law,[6] sentenced Defendant to a total sentence of thirteen to thirty-one years' incarceration, and denied Defendant's post-sentence motion. Defendant has appealed. We submit this opinion in accordance with Pa. R.A.P. 1925(a). For the reasons discussed below, we believe the judgment of sentence should be affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

Evidence at trial established that on two separate dates an intruder broke into June Fields' ("Ms. Fields") home during the early morning hours and sexually assaulted her. At the time of these assaults, Ms. Fields was a seventy-seven-year-old widow. The assaults occurred on October 21, 2007 ("2007 assault") and May 31, 2008 ("2008 assault").

On October 21, 2007, Ms. Fields was in the living room of her home in Palmerton, Carbon County, Pennsylvania watching television. (N.T. 1/8/2013, p. 99.) At around one o'clock in the morning, she left the living room to use the bathroom. **Id.** During

[1] 18 Pa. C.S.A. §§901, 3121(a)(1).

[2] 18 Pa. C.S.A. §3502(a)(1).

[3] 18 Pa. C.S.A. §3503(a)(1)(i).

[4] 18 Pa. C.S.A. §3126(a)(2).

[5] 18 Pa. C.S.A. §2701(a)(1).

[6] **See** 42 Pa. C.S.A. §§9799.10-9799.41.

this time, a masked intruder entered the home and followed her into the bathroom. **Id.** Ms. Fields testified that the intruder was wearing all black and a mask from the movie **Scream. Id.** at 100. Further, Ms. Fields testified that the intruder was around five foot seven and spoke with a slight Spanish or Puerto Rican accent.[7] **Id.** at 101, 102.

Inside the bathroom, the intruder told Ms. Fields that "he came to rape [her]." **Id.** at 101. The intruder then approached Ms. Fields and a struggle began causing both to fall to the floor. **Id.** at 102, 136. Once on the floor, Ms. Fields continued to resist. **Id.** at 136. This notwithstanding, the intruder fondled Ms. Fields' vagina. **Id.** at 102. As the struggle continued, Ms. Fields told the intruder that if he raped her, she could die because she was suffering from Parkinson's disease, high blood pressure, and high cholesterol. **Id.** at 101. After hearing this, the intruder ended the attack and left. **Id.** at 104. Before he left, he said "I'll be back." **Id.**

Once the intruder left, Ms. Fields noticed that her phone wires were disconnected and that her underwear had been taken from a laundry basket and hung on various objects throughout the home. **Id.** at 104-105. The Pennsylvania State Police were called to investigate. (N.T. 1/7/2013, p. 27.) Unfortunately, no evidence was found that identified the intruder.[8] **Id.** at 28-29, 31.

Seven months later an intruder again entered Ms. Fields' home. This occurred during the early morning hours of May 31, 2008, while Ms. Fields was watching television. (N.T. 1/8/2013, p. 106.) As she was going to the kitchen, she was attacked in the hallway. **Id.** at 107. At trial, Ms. Fields identified her assailant as the same person from the 2007 assault. **Id.** This time, however, the intruder was wearing all black and a ski mask. **Id.** Ms. Fields testified that

[7] Trooper Raymond Judge testified at trial that Defendant was between five foot six and five foot eight inches tall, and that he spoke with a slight Hispanic accent. (N.T. 1/9/2013, p. 258.)

[8] The Pennsylvania State Police did find a makeshift mask at the crime scene. (N.T. 1/7/2013, p. 32.) This mask was created from a pair of Ms. Fields' shorts that were left in a laundry basket. **Id.** Someone cut out a piece of fabric from the shorts, created eyeholes, and tied a knot in the fabric. **Id.** The mask was submitted for testing, but nothing was found to identify the wearer. **Id.** at 33-34. Moreover, this mask did not meet the description of the mask Ms. Fields testified the intruder wore. **Compare id.** at 32, **with** N.T. 1/8/2013, p. 100.

the intruder said, "I'm back. I'm here to finish what I came for before, the first time." **Id.** The intruder then grabbed Ms. Fields and forced her to the ground. **Id.** 107-108. While on the ground, the two wrestled. **Id.** The intruder fondled Ms. Fields' vagina, and he removed her underwear. **Id.** 110-11.

Fortunately, Ms. Fields was not living alone when this second assault occurred. **Id.** at 111. In the seven months since the first assault, Ms. Fields rented a room in her home to Jamie Rodgers ("Ms. Rodgers"). **Id.** at 112. Ms. Fields' screams for help during the attack awoke Ms. Rodgers. **Id.** at 154. Ms. Rodgers ran out of her room into the hallway. **Id.** at 112. As she did so, the intruder ended the attack and ran out of Ms. Fields' home. **Id.**

The Pennsylvania State Police were called a second time to investigate. This time police discovered two pieces of evidence that identified the intruder as Defendant. First, police lifted a palm print from a windowsill on the outside of Ms. Fields' home. (N.T. 1/7/2013, pp. 70-72.) Police found a step stool beneath the window and determined the intruder entered the home at this location. **Id.** at 58, 171. Two experts for the Commonwealth testified that the palm print found matched the Defendant's. **Id.** at 82, 236. While the experts could not determine the exact time Defendant left this print, one of the experts, Trooper Barletto, testified that outdoor elements easily destroy finger and palm prints, implying the print was fresh. **Id.** at 92. Further, no evidence was presented to provide an innocent explanation why Defendant's palm print would be on the outside of Ms. Fields' windowsill when neither she nor Ms. Rodgers knew Defendant or gave him permission to be at the home. (N.T. 1/8/2013, pp. 116, 159.)

Second, on the interior windowsill of the same window from which the police lifted the palm print, police found an unopened box of condoms. **Id.** at 172. The condoms were manufactured by Associated Wholesalers, Incorporated. **Id.** at 72, 181. Police contacted Associated, who advised they distributed condoms of the type found to a Convenient Food Mart in Palmerton. **Id.** at 181-83. Sales receipts from this store were obtained which showed that a box of condoms was purchased at 11:14 P.M. on the night of the 2008 assault. **Id.** at 188. Next, police obtained surveillance video from the Convenient Food Mart for the time of this purchase. **Id.** at 190. The video depicted a customer who strongly resembled

Defendant and was wearing a shirt with the words "encendido" printed across the front buying condoms of the same type as those found in the victim's home. Later, police found a shirt matching that in the video in a search of Defendant's home. (N.T. 1/9/2013, pp. 251-52.)[9]

Based on this evidence, on March 27, 2009, the Commonwealth filed a criminal complaint against Defendant for both the 2007 and 2008 assaults. In this complaint, Defendant was charged for each date with one count of attempted rape by forcible compulsion, burglary, criminal trespass, and indecent assault. He was also charged with one count of simple assault related to the 2008 assault. A jury trial began on January 7, 2013 and ended on January 9, 2013. At its conclusion, the jury found Defendant guilty of all charges.

Subsequently, we ordered the Sexual Offenders Assessment Board to assess whether Defendant was a sexually violent predator under Megan's Law. We also ordered a presentence investigation report. On April 30, 2013, we conducted a sexual assessment hearing and sentenced Defendant.

At the sexual assessment hearing, Dr. Mary Muscari of the Sexual Offenders Assessment Board opined to a reasonable degree of professional certainty that Defendant met the criteria to be classified as a sexually violent predator. At the conclusion of this assessment hearing, we found Defendant to be a sexually violent predator under Megan's Law. **Id.** at 61.

Following the sexual assessment hearing, Defendant was immediately sentenced to an aggregate sentence of thirteen to thirty-one years' incarceration in a state correctional facility.[10] Defendant was then thirty years old. The sentence was made consecutive to sentences Defendant was then serving in Northampton[11] and

[9] At the time of sentencing, Defendant admitted that he was the person in the video. (N.T. 4/20/2013, p. 87.)

[10] With respect to his convictions for attempted rape by forcible compulsion, Defendant was sentenced to five to fifteen years' incarceration for the 2008 assault and five to ten years for the 2007 assault, consecutive to one another. Defendant also received a sentence of three to six years' incarceration for the 2007 assault consecutive to the sentences imposed for attempted rape.

[11] **See** Docket Sheet, **Commonwealth v. Vega,** CP-48-CR-1649-2009. The total sentence Defendant received in Northampton County was eighteen to thirty-six months in a state correctional institution, with an offense date of January 11, 2006.

Lehigh[12] counties for similar offenses. At the time of sentencing, Defendant was also serving a forty-six-month sentence in a federal penitentiary.

On May 10, 2013, Defendant filed a timely post-sentence motion which was denied by order dated September 3, 2013. Following this denial, Defendant filed the instant appeal from the judgment of sentence on September 9, 2013. In his concise statement filed pursuant to Pa. R.A.P. 1925(b), Defendant identifies eight issues which he intends to raise in this appeal. We address each below in the order raised.

DISCUSSION

A. Whether the Verdict Is Against the Weight of the Evidence

Defendant claims initially that we erred in denying his post-sentence motion for a new trial because the verdict was against the weight of the evidence. A defendant is entitled to a new trial when the evidence is "so tenuous, vague and uncertain that the verdict shocks the conscience of the court." **Commonwealth v. Sullivan,** 820 A.2d 795, 806 (Pa. Super. 2003). Because this standard was not met, we denied the motion.

For purposes of his appeal, Defendant has broken this claim into three separate but overlapping subcategories questioning whether the weight of the evidence supports a finding that he was the perpetrator of the crimes charged. Our discussion of this claim follows Defendant's breakdown.

(1) Significance of Defendant's Palm Print Found at the Point of Entry for the 2008 Assault.

Defendant claims the evidence placing Defendant's palm print on Ms. Fields' windowsill should be given little or no weight because the Commonwealth offered no evidence to establish when the print was made. In rejecting this claim, we find its premise unsound.

In several recent cases, the Pennsylvania Superior Court discussed the standard courts should apply when determining whether the presence of a fingerprint, or palm print, is sufficient to identify a defendant as the perpetrator. **See Commonwealth**

[12] **See** Docket Sheet, **Commonwealth v. Vega,** CP-39-CR-1177-2009. The aggregate sentence Defendant received in Lehigh County was no less than thirty years nor more than sixty-four years in a state correctional institution, with an offense date of November 9, 2008.

v. Donohue, 62 A.3d 1033 (Pa. Super. 2013); **Commonwealth v. Pettyjohn,** 64 A.3d 1072 (Pa. Super. 2013); **Commonwealth v. Sloan,** 67 A.3d 808 (Pa. Super. 2013). While admittedly these cases question the sufficiency of the evidence, their relevance is clear since, without evidence to the contrary, Defendant's first challenge appears to be little more than a challenge to the sufficiency of the evidence in disguise.[13]

[13] While Defendant designates this challenge as one to the weight of the evidence, the challenge appears to more directly question the sufficiency of the evidence than it does the weight of the evidence.

> A claim challenging the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. Where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law. When reviewing a sufficiency claim the court is required to view the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence.

Commonwealth v. Fisher, 47 A.3d 155, 157 (Pa. Super. 2012). In contrast,

> [a] challenge to the weight of the evidence concedes that there is sufficient evidence to sustain the verdict. Thus, the trial court is under no obligation to view the evidence in the light most favorable to the verdict winner. An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. A trial judge must do more than reassess the credibility of the witnesses and allege that he would not have assented to the verdict if he were a juror. Trial judges, in reviewing a claim that the verdict is against the weight of the evidence do not sit as the thirteenth juror. Rather, the role of the trial judge is to determine that notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice.

Id. at 158. (brackets deleted). Additionally, in **Commonwealth v. Brown,** the court stated:

> [A] claim alleging the verdict was against the weight of the evidence is addressed to the discretion of the trial court. Accordingly, an appellate court reviews the exercise of the trial court's discretion; it does not answer for itself whether the verdict was against the weight of the evidence. It is well settled that the [jury] is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses, and a new trial based on a weight of the evidence claim is only warranted where the [jury's] verdict is so contrary to the evidence that it shocks one's sense of justice. In determining whether this standard has been met, appellate review is limited to whether the trial judge's discretion was properly exercised, and relief will

To determine the significance of finding a fingerprint or palm print at a crime scene, we look to the circumstances of the case. **Commonwealth v. Cichy,** 227 Pa. Super. 480, 483, 323 A.2d 817, 818 (1974). When the circumstances establish that a fingerprint found at the scene of a crime was left when the crime was committed—and there is no innocent explanation for the print—then the fingerprint is sufficient to establish both that the defendant was present and committed the crime. **Donohue, supra** at 1036. Conversely, when the circumstances reasonably leave open a possible innocent explanation for the print, such as that the print was found in a public area, or the print was on a readily moveable object in common usage, and there is no evidence establishing when the print was made, then the presence of the defendant's print alone is insufficient to support a conviction. **Id.**

In **Donohue,** the Superior Court held that the presence of defendant's fingerprint on a soda bottle inside the victim's property was sufficient to convict defendant of the crime of burglary and related charges, when the evidence established that there was no innocent explanation for the print and the print was proven to have been made during the time when the crime occurred. **Id.** at 1034-35, 1037. Similarly, in **Commonwealth v. Pettyjohn, supra,** the Superior Court held that the presence of defendant's fingerprint was sufficient to convict defendant of burglarizing a private home when the print was found at the point of illegal entry to the home without any innocent explanation. A conviction will be upheld "where fresh fingerprints are found at the place of illegal entry to private burglarized premises where a defendant's presence is unexplained." **Donohue, supra** at 1036. Both factors—no innocent explanation for the presence of Defendant's palm print at the point of entry and the freshness of the print—support Defendant's conviction for the May 31, 2008 assault.

First, evidence ruled out any innocent explanation for the print. Ms. Fields and Ms. Rodgers did not give Defendant permission to be in or around the home, and they, in fact, did not know Defendant. (N.T. 1/8/2013, pp. 116, 159.) Moreover, the window was not located in an area of public access. The window at issue was in the back of the home. (N.T. 1/7/2013, p. 58.) The back of the home was fenced in and only accessible through two gates. **Id.** at 55. Additionally, like in **Pettyjohn,** police lifted the print from the point of illegal entry. **Id.** at 58, 171.

Second, contrary to Defendant's argument, the evidence supports a finding that this print occurred at the time of the crime. Although Trooper Phillip Barletto, an expert in palm and fingerprints, admitted he was unable to determine the exact age of the print (N.T. 1/7/2013, p. 84), he also testified that outside elements rapidly destroy prints. **Id.** at 92. Specifically, Trooper Barletto testified that it is "rare to find fingerprints at a crime scene especially on an outdoor portion of a crime scene." **Id.** at 61. Expounding further, he stated:

> Well, again, as I described earlier, with atmospheric conditions, sunshine, rain, exposure to the elements on the outside of a window, when you're dealing with that, obviously, if you're adding more moisture to it, if you're dealing with heat, humidity, moisture can kill a fingerprint. Sunshine can kill a fingerprint because it's going to dry it right out. So when you apply your powder to it, it's not going to adhere to it because your moisture is then gone.
>
> I found through my experience that the sooner you can get to a crime scene to process it or the sooner you can process items from a crime scene, if items have been collected from a crime scene, the sooner you get to those, the better off you're going to be simply because the moisture is not going to be absorbed into the atmosphere or it's not going to be exposed to elements outside.

Id. at 92.

The recency of Defendant's palm print was reinforced by the unopened box of condoms left by the intruder which were found inside the home on the opposite side of the same window from which the palm print was processed, with the fact that condoms of the same type were shown to have been purchased by Defendant hours before Ms. Fields' home was broken into. Taken together,

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only be granted where the facts and inferences of record disclose a palpable abuse of discretion.

71 A.3d 1009, 1013 (Pa. Super. 2013) (**quoting Commonwealth v. Karns,** 50 A.3d 158, 165 (Pa. Super. 2012)).

the evidence was sufficient to establish not only that Defendant was recently at Ms. Fields' home but that it was Defendant who left his palm print when he entered Ms. Fields' home on May 31, 2008, to sexually assault her.

(2) The Weight of the Evidence Supports Defendant's Convictions for Both the 2007 and 2008 Incidents.

In addressing this argument, we begin with the 2008 assault. The facts establishing Defendant as the intruder in the 2008 assault are similar to the facts in **Commonwealth v. Childs,** 63 A.3d 323 (Pa. Super. 2013), **appeal denied,** ___ A.3d ___ (2013). In **Childs,** the Superior Court held that a verdict convicting defendant of burglary was not against the weight of the evidence where defendant's palm and hand prints were found on the outside of a partially opened living room window, along with other corroborating evidence which established that defendant took personal property from the victim's home. **Id.** at 327.

Like in **Childs,** Defendant's palm print and corroborating evidence of a surveillance video of Defendant purchasing the same type of condoms left in Ms. Fields' home the date of the break-in, as well as Ms. Fields' description of the intruder, were more than sufficient to support the jury's verdict. Police lifted a palm print matching Defendant's palm print on the outside of the windowsill of Ms. Fields' home. As described in detail above, there was no evidence providing an innocent explanation as to why a recently placed imprint of Defendant's palm print was on the windowsill.

Moreover, the surveillance video supports the jury's finding that Defendant was the intruder. This video showed Defendant, wearing a t-shirt that police found in a search of Defendant's home, purchasing condoms hours before the incident a short distance from the victim's home. Police found the same type of condoms on the interior windowsill of the same window from which they lifted Defendant's palm print on the outside of the home. (N.T. 1/8/2013, p. 172.)

Turning to the 2007 assault, Ms. Fields unequivocally identified the intruder in the 2008 assault as the same intruder who assaulted her in 2007. **Id.** at 107. Her identification of Defendant is

supported by other evidence as well. She testified the intruder was around five foot seven inches tall. **Id.** at 101. Trooper Raymond Judge testified Defendant is between five foot six and five foot eight inches in height. (N.T. 1/9/2013, p. 258.) In addition, Ms. Fields testified the intruder spoke with a slight Spanish or Puerto Rican accent. (N.T. 1/8/2013, p. 102.) Trooper Judge testified Defendant has a slight Hispanic accent. (N.T. 1/9/2013, p. 258.)

The intruder's statements themselves back up this conclusion. Ms. Fields testified that at the end of the 2007 assault the intruder said "I'll be back." (N.T. 1/8/2013, p. 104.) During the 2008 assault, Ms. Fields testified the intruder said "[w]ell, I'm back. I'm here to finish what I came for before, the first time." **Id.** at 107.

(3) The Evidence Establishes Defendant Was Present at the Scene of the Crime.

Finally, Defendant claims the verdict was against the weight of the evidence because the Commonwealth presented no evidence to prove Defendant was at the crime scene. Given our discussion of the preceding two related issues, nothing further needs to be said on this issue.

B. Whether the Sentences Imposed Contravene Either the Eighth Amendment's Proscription Against Cruel and Unusual Punishment or the Sentencing Guidelines

Defendant challenges the sentence imposed. He makes two arguments in support of this challenge. First, he claims that the imposition of consecutive sentences constituted cruel and unusual punishment violating the Eighth Amendment of the United States Constitution.[14] Second, he claims we erred during sentencing by considering crimes Defendant was convicted of after he committed the crimes at issue.

[14] This challenge "raises a legality of sentencing claim since he is challenging the trial court's authority in imposing [this] sentence." **Commonwealth v. Yasipour,** 957 A.2d 734, 740 n.3 (Pa. Super. 2008). Such a claim is non-waivable. **Commonwealth v. Howard,** 373 Pa. Super. 246, 248, 540 A.2d 960, 961 (1988) (stating that because "no court may legally impose cruel and unusual punishment [...,] [a] contention that the sentence imposed constitutes cruel and unusual punishment is a challenge to the legality of sentence which may be appealed as of right on direct appeal.") (citations omitted).

(1) The Eighth Amendment's Proscription Against Cruel and Unusual Punishment Was Not Violated by Running Defendant's Sentences for the October 21, 2007 and the May 31, 2008 Incidents Consecutive to One Another and Consecutive to All Other Sentences Defendant Was Then Serving.

We begin with Defendant's constitutional argument. The Eighth Amendment's ban on cruel and unusual punishment applies to "not only barbaric punishments, but also sentences that are disproportionate to the crime committed." [15] **Solem v. Helm,** 463 U.S. 277, 284 (1983). This said, "the Eighth Amendment does not require strict proportionality between crime and sentence. Rather it forbids only extreme sentences which are **grossly disproportionate** to the crime." **Harmelin v. Michigan,** 501 U.S. 957, 1001 (1991) (citation omitted) (emphasis added); **see also, Commonwealth v. Yasipour,** 957 A.2d 734, 743 (Pa. Super. 2008) ("The Eighth Amendment's cruel and unusual punishments clause prohibits sentences which are wholly and irrationally disproportionate to the crime.").

In **Commonwealth v. Parker,** 718 A.2d 1266, 1268 (Pa. Super. 1998), the Superior Court set forth the appropriate "criteria for examining the proportionality of a sentence."

> Relying on the United States Supreme Court decision in **Harmelin v. Michigan,** [501 U.S. 957 (1991)], the **Spells** Court [612 A.2d 458 (Pa.Super. 1992)] found no disproportionality. **Harmelin** recognized that the criteria for examining the proportionality of a sentence were established in **Solem v. Helm,** 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). **Solem** instructed that a court must consider: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals for the commission of the same crime in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions. In **Harmelin, supra,** Justice Kennedy held that the **Solem** criteria did not form a mandatory and rigid three-part test. Rather, in determining whether a punishment is disproportionate, the comparative test of **Solem** may not be necessary, and is required only after a showing that raises an inference of gross disproportionality. Following Justice Kennedy in **Harmelin, Spells** held that when such gross disproportionality is not shown, the second and third prongs of **Solem** are not necessary.

Parker, id. at 1268-69 (footnotes omitted). In fact, seldom is it necessary to consider all three parts of the test. **Commonwealth v. Baker,** 24 A.3d 1006, 1028 (Pa. Super. 2011). Consideration of the second and third prongs is appropriate only "in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." **Id.** (**citing Harmelin v. Michigan,** 501 U.S. 957, 1004-1005 (1991) (Kennedy, J. concurring)). For this reason, we consider first whether there exists an inference of gross disproportionality based upon the crimes committed and the sentences imposed.

Our analysis of gross disproportionality is guided by a recent Superior Court case, **Commonwealth v. Barnett,** 50 A.3d 176 (Pa. Super 2012). In **Barnett,** the trial court sentenced the defendant to twenty-five to fifty years' incarceration for sexually abusing two twelve-year-old girls. Defendant had previously been convicted of unlawful contact with a minor, indecent assault, and corruption of minors. **Id.** at 180-81. Consequently, this was defendant's second offense for sentencing purposes and, pursuant to 42 Pa. C.S.A. §9718.2, required a minimum sentence of at least twenty-five years' incarceration. On appeal, the Superior Court held that despite the severity of the sentence, there existed no inference of gross disproportionality. Having failed to meet this threshold inquiry, the court concluded the sentence was not cruel and unusual as applied. **Id.** at 203.[16]

[15] The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." We note that the Superior Court has held that "'[t]he Pennsylvania prohibition against cruel and unusual punishment is coextensive with the Eighth and Fourteenth Amendments of the United States Constitution' and, thus, 'the Pennsylvania Constitution affords no broader protection against excessive sentences than that provided by the Eighth Amendment to the United States Constitution.'" **Commonwealth v. Barnett,** 50 A.3d 176, 197 (Pa. Super. 2012) (citation omitted). **But see Commonwealth v. Baker,** 78 A.3d 1044 (Pa. 2013) (Castille, C.J., concurring).

[16] Defendant has not asserted in either his concise statement or memorandum in support of his post-sentence motion that such an inference exists. Absent such assertion or more direct proof, Defendant has "failed [to] show that his sentences violate the prohibition against cruel and unusual punishment." **Commonwealth**

In finding no inference of gross disproportionality, the Court noted that "[t]he United States Supreme Court has continuously upheld longer sentences, for less serious crimes, against Eighth Amendment challenges." **Id.** at 200. Three cases were cited. First was **Rummel v. Estelle,** 445 U.S. 263 (1980), where the Supreme Court upheld a sentence of life imprisonment, with the possibility of parole after twelve years, under a three-strike recidivism statute; the offense for which defendant was sentenced was obtaining $120.75 by false pretenses, his third non-violent felony conviction. Next was **Hutto v. Davis,** 454 U.S. 370 (1982), a case in which the Supreme Court upheld two consecutive twenty-year sentences for possession with intent to distribute nine ounces of marijuana. Finally, the Court considered **Ewing v. California,** 538 U.S. 11 (2003), where the defendant was sentenced to twenty-five years to life on a third strike offense for the theft of three golf clubs. Comparing these cases to the case before it, the **Barnett** court found defendant's crimes were far more severe in gravity and concluded there was no disproportionality between the sentence and the offenses for which defendant was convicted. **Barnett, supra** at 200-203.

The sentences imposed in this case were all within the standard range of the Pennsylvania Sentencing Guidelines and backed by a pre-sentence investigation.[17] That we ran several of these sentences consecutive to one another and to other sentences Defendant was serving was within our discretion. **Commonwealth v. Marts,** 889 A.2d 608, 612 (Pa. Super. 2005) ("Long standing precedent of this Court recognizes that 42 Pa. C.S.A. section 9721 affords the sentencing court discretion to impose its sentence concurrently or

v. Baker, 24 A.3d 1006, 1029 (Pa. Super. 2011). Nevertheless, because the issue is non-waivable, we have elected to discuss it further, albeit such discussion is necessarily limited, not knowing the basis on which Defendant might rely to make this claim. **Cf. Commonwealth v. Barnett,** 50 A.3d 176, 199 (Pa. Super. 2012), wherein the reasons for appellant's claim of gross disproportionality were identified and, therefore, able to be specifically addressed.

[17] The standard guideline range for the offenses of which Defendant was convicted were as follows: attempted rape by forcible compulsion, fifty-four to seventy-two months' incarceration; burglary, thirty to forty months' incarceration; criminal trespass, restorative sanction to less than one year incarceration; indecent assault by forcible compulsion, six to sixteen months' incarceration; and simple assault, restorative sanction to less than one year incarceration. **See** 204 Pa. Code §§303.15-.16.

consecutively to other sentences being imposed at the same time or to sentences already imposed."). Defendant fails to cite any specific provision of the Sentencing Code or any particular norm underlying the sentencing process which has been violated in the exercise of this discretion, **Commonwealth v. Mouzon,** 571 Pa. 419, 431, 812 A.2d 617, 624-25 (2002), or otherwise show that this sentence is manifestly excessive. **Commonwealth v. Perry,** 883 A.2d 599, 603 (Pa. Super. 2005).

During sentencing we noted Defendant's lengthy criminal history with the severity of his attacks on elderly women escalating over time, and that there appeared little likelihood Defendant would be rehabilitated. (N.T. 4/30/2013, pp. 124-25.) In classifying Defendant as a sexually violent predator, we also found that Defendant was likely to reoffend due to mental illness, specifically antisocial personality disorder. **Id.** at 61. In this context, the Superior Court recently cited the Supreme Court's decision in **Commonwealth v. Klueber,** 588 Pa. 401, 904 A.2d 911 (2006), wherein the Supreme Court "indicated that standard range consecutive sentences are not clearly unreasonable where the trial court relies on the defendant's prior history and a finding that he was a high risk to re-offend." **Commonwealth v. Dodge,** 77 A.3d 1263, 1277 (Pa. Super. 2013) (upholding a sentence of forty years seven months' to eighty-one years and two months' incarceration against a challenge that the imposition of consecutive sentences was disproportionate to the crimes).

The severity of the crimes and the fact Defendant deliberately broke into Ms. Fields' home on two separate occasions to sexually assault her justifies running the sentences consecutive to one another. Similarly, as offenses independent of those committed in Lehigh and Northampton counties against different victims, running the sentences consecutive to those imposed by these counties was neither illogical nor inappropriate.

As in **Barnett,** the nature and quality of Defendant's conduct in relation to the sentence imposed does not raise an inference of gross disproportionality. Instead, we believe the sentence was commensurate with the gravity of the offense. These were planned crimes of sexual violence against an elderly person in her home late at night. That it happened once is depraved; that it happened

twice was "reprehensible and [acts] no civilized normal person would commit." (N.T. 4/30/2013, p.124 (sentencing).) Expounding further at sentencing, we stated:

> The most vulnerable people in society are children and elderly individuals who have a right to spend their final years in peace and enjoyment and not to have to fear someone coming into their home at late hours and basically attacking them and threatening their lives and doing acts against them that they can never forget.

Id. at 125-26.

Because no gross disproportionality has been shown between the gravity of the offenses of which Defendant was convicted and the length of the sentence he received, no further inquiry or analysis is required. Accordingly, we conclude there has been no violation of the Eighth Amendment's prohibition against cruel and unusual punishment.[18]

(2) Defendant's Prior Record Score Was Properly Computed.

In contending the sentence imposed relied improperly on other crimes of which he was convicted, Defendant argues the computation of his prior record score included crimes of which he was convicted after he committed the offenses for which he was sentenced.[19] To support this argument, Defendant cites 204 Pa. Code §303.8. Section 303.8 provides: "In order for an offense to be considered in the Prior Record Score, both the commission of and conviction for the previous offense must occur before the commission of the current offense." **Id.**

[18] Of note, in 1994, after upholding an aggregate prison sentence of two hundred thirty-five to four hundred seventy years for a defendant who was found guilty of more than one hundred fifty counts arising from sexual, physical and emotional abuse and neglect of his children, the Pennsylvania Superior Court observed that it was "unaware of any case in this Commonwealth in which the term of imprisonment in a noncapital case was found to be 'cruel and unusual.'" **Commonwealth v. Gaddis,** 432 Pa. Super. 523, 545-46, 639 A.2d 462, 473 (1994).

[19] The crimes Defendant is referring to occurred in Lehigh and Northampton counties. Defendant was convicted of aggravated assault, attempted rape by forcible compulsion, involuntary deviate sexual intercourse by forcible compulsion, burglary, and aggravated indecent assault in Lehigh County on August 10, 2012. **See** Docket Sheet, **Commonwealth v. Vega,** CP-39-CR-1177-2009. Defendant also pled guilty to burglary in Northampton County on April 1, 2011. **See** Docket Sheet, **Commonwealth v. Vega,** CP-48-CR-1649-2009. In this later case, Defendant had also been charged with the rape of an elderly woman.

The simple response to this argument is that its premise is incorrect. The prior record score used in sentencing Defendant did not include any crimes of which he was convicted after the commission of the current offenses. While the sentence imposed ran consecutive to sentences Defendant was then serving for convictions which occurred after the commission of the offenses in issue here, this is properly within the sentencing court's discretion. **See Commonwealth v. Prisk,** 13 A.3d 526, 533 (Pa. Super. 2011) ("Pennsylvania law 'affords the sentencing court discretion to impose its sentence concurrently or consecutively to other sentences being imposed at the same time or to sentences already imposed.'").

C. Whether Defendant's Conviction of Indecent Assault in Reference to the 2007 Attack Is Supported by the Evidence.

Defendant next claims that the evidence was insufficient to support his conviction of indecent sexual assault by forcible compulsion for the 2007 assault. To evaluate this claim, "we must determine whether, viewing the evidence in the light most favorable to the Commonwealth as verdict winner, together with all reasonable inferences therefrom, the trier of fact could have found that each and every element of the crimes charged was established beyond a reasonable doubt." **Commonwealth v. Sloan,** 67 A.3d 808, 814 (Pa. Super. 2013) (citation omitted).

"A person is guilty of indecent assault if the person has indecent contact with the complainant ... for the purpose of arousing sexual desire in the person or the complainant and ... the person does so by forcible compulsion." 18 Pa. C.S.A. §3126(a)(2). Indecent assault by forcible compulsion requires the Commonwealth to prove two elements beyond a reasonable doubt: indecent contact and forcible compulsion. **See Commonwealth v. Hawkins,** 419 Pa. Super. 37, 43, 44, 614 A.2d 1198, 1201-1202 (1992).

As to the first of these, indecent contact is defined by statute as "[a]ny touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire in either person." 18 Pa. C.S.A. §3101. Indecent contact thus has two elements. **See Commonwealth v. McClintic,** 851 A.2d 214, 216 (Pa. Super. 2004), **reversed on other grounds,** 589 Pa. 465, 909 A.2d 1241 (2006). First, the defendant must physically touch the

"sexual or other intimate parts" of the victim. **See id.** Second, the defendant must do so for "the purpose of arousing or gratifying sexual desire." **See id.**

Viewing the evidence in the light most favorable to the Commonwealth, both elements of indecent contact were established. At trial, Ms. Fields testified that Defendant reached into her pants and fondled her vagina. (N.T. 1/8/2013, p. 102.) **See Commonwealth v. Smith,** 863 A.2d 1172, 1177 (Pa. Super. 2004) (holding that fondling of the breast and vagina sufficient for indecent contact). That this touching was for "the purpose of arousing or gratifying sexual desire" was a permissible inference the jury was entitled to make given its intentional nature. **See G.V. v. Department of Public Welfare,** 52 A.3d 434, 439 (Pa. Commw. 2012) (holding that the purpose of the contact can be inferred as sexual when the defendant intentionally touches the victim's vagina and buttock), **appeal granted,** 66 A.3d 252 (Pa. 2013).

Additionally, Defendant's intent was apparent from what he said. On the night of the incident, Defendant told Ms. Fields he was there to rape her. (N.T. 1/8/2013, p. 101.) This statement clearly establishes Defendant fondled Ms. Fields for the purpose of "arousing or gratifying sexual desire."

With respect to the requirement of forcible compulsion, forcible compulsion is defined as "[c]ompulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied." 18 Pa. C.S.A. §3101.[20] Whether the evidence is sufficient to establish forcible compulsion is made on a case-by-case basis looking at the totality of the circumstances. **Commonwealth v. Rhodes,** 510 Pa. 537, 555, 510 A.2d 1217, 1226 (1986).

Forcible compulsion exists when the defendant uses physical force to complete the sexual act. **See Commonwealth v. Eckrote,** 12 A.3d 383, 387 (Pa. Super. 2010) (holding that there was sufficient evidence for forcible compulsion when defendant used physical force to overcome victim's resistance to commit the rape).

[20] Because this statutory definition applies equally to forcible compulsion for rape and involuntary deviate sexual intercourse, **see Commonwealth v. Smolko,** 446 Pa. Super. 156, 162, 666 A.2d 672, 675 (1995), we also include in our discussion cases involving forcible compulsion for rape and involuntary deviate sexual intercourse.

It also exists when the force used to complete the act was solely psychological. **See Commonwealth v. Frank,** 395 Pa. Super. 412, 432, 577 A.2d 609, 619 (1990) (holding that there was forcible compulsion for rape when defendant used position of authority and pressure from victim's mother to commit rape of a teenage victim). Conversely, forcible compulsion does not exist "where there is a lack of consent, but no showing of either physical force, a threat of physical force, or psychological coercion." **Commonwealth v. Berkowitz,** 537 Pa. 143, 149, 641 A.2d 1161, 1164 (1994).

In the instant case, Defendant physically overpowered Ms. Fields and forced himself upon her. Ms. Fields testified that she struggled against Defendant and wrestled with him on the floor, but was unable to prevent being fondled. (N.T. 1/08/2013, pp. 102, 136). These facts alone establish the element of forcible compulsion.

D. Whether the Record Is Insufficient to Support Defendant's Classification As a Sexually Violent Predator.

In this claim, Defendant challenges the determination that he is a sexually violent predator ("SVP") within the meaning of Megan's Law. Defendant makes two arguments. First, he argues that this determination was flawed because it was supported only by the oral testimony of Dr. Mary Muscari, a member of the Sexual Offenders Assessment Board, without admission of the records reviewed and relied upon by her in expressing her opinion. Second, Defendant argues that our determination violated his Sixth Amendment right to a trial by jury which, according to Defendant, must be made by a jury under **Apprendi v. New Jersey,** 530 U.S. 466 (2000).

We begin with Defendant's first argument. Defendant claims Dr. Muscari's expert testimony, standing alone, is insufficient to sustain the determination that he is an SVP because the records upon which this opinion is based were not admitted into evidence. Defendant's argument, that the Commonwealth must admit records into evidence to support a board member's determination that a defendant is an SVP, is incorrect.

To establish that a defendant is an SVP, the Commonwealth must establish two elements. **Commonwealth v. Whanger,** 30 A.3d 1212, 1215 (Pa. Super. 2011). First, the Commonwealth must establish that the defendant was convicted of a sexually violent

offense as set forth in 42 Pa. C.S.A. §9799.14.[21] **Id.** Second, the Commonwealth must establish that the defendant has "a mental abnormality or personality disorder that makes the individual likely to engage in predatory sexually violent offenses." 42 Pa. C.S.A. §9799.12. Both elements must be established by clear and convincing evidence. 42 Pa. C.S.A. §9799.24(e)(3).

The Pennsylvania Superior Court has routinely held that the testimony of a member of the Sexual Offenders Assessment Board, without admission of the records reviewed, is sufficient to meet the clear and convincing standard. **See Commonwealth v. Stephens,** 74 A.3d 1034, 1041-42 (Pa. Super. 2013) (holding that the expert opinion of an Assessment Board member was sufficient to meet the requisite standard for an SVP determination); **Commonwealth v. Whanger, supra** at 1215-18 (holding that expert opinion of Assessment Board member was sufficient to meet the required standard for an SVP determination).

In **Commonwealth v. Whanger,** the court found a defendant was an SVP based solely on the testimony of an Assessment Board member that the defendant was a pedophile. The expert premised this opinion on what he characterized as "ample evidence." **Id.** at 1216. On appeal, the Superior Court held the evidence was sufficient to sustain the finding because what the "ample evidence" consisted of was explained in the Board member's report which was admitted into evidence. **Id.**

At the hearing held on April 30, 2013, after first being qualified to express opinions on whether Defendant met the definition of an SVP (N.T. 4/30/2013, p. 7), Dr. Muscari opined to a reasonable degree of professional certainty that Defendant was an SVP. **Id.** at 32. Dr. Muscari testified that Defendant suffers from the mental illness of antisocial personality disorder. **Id.** at 23, 25-26. She also testified that Defendant, based on this mental illness, was likely to engage in predatory sexually violent offenses in the future. **Id.** at 30. Further, she gave detailed testimony describing how she analyzed the various factors set forth in 42 Pa. C.S.A. §9799.24(b) to arrive at this opinion. **Id.** at 7-32.

[21] This element is not in dispute. The only issue at the hearing was whether Defendant met the definition of an SVP.

Finally, as in **Whanger,** Dr. Muscari's report was admitted into evidence. (N.T. 4/30/2013, p. 48.) In this report, Dr. Muscari described in detail the information she relied upon to reach her conclusions. **See** Sexually Violent Predator Assessment, **Commonwealth v. Vega,** CP-13-CR-0000395-2009.

We next turn to Defendant's argument that our finding that he was an SVP violated his Sixth Amendment right to a jury trial under **Apprendi.** In **Apprendi,** the United States Supreme Court held that "any judicial finding which results in **punishment** beyond a statutory maximum must be submitted to a jury and proven beyond a reasonable doubt." **Apprendi v. New Jersey,** 530 U.S. 466, 490 (2000) (emphasis added).

Defendant argues that, under **Apprendi,** the determination whether he is an SVP must be submitted to a jury because the lifetime registration and publication requirements of Megan's Law are punishments beyond the statutory maximum. However, in **Commonwealth v. Williams,** 574 Pa. 487, 832 A.2d 962 (2003), the Pennsylvania Supreme Court held that the registration, notification, and counseling requirements under Megan's Law are not a punishment and, therefore, need not be tried before a jury.

E. Whether the Victim's Testimony Concerning the Incidents Was So Conflicting and Contradictory It Cannot Support the Verdict.

Defendant claims Ms. Fields' testimony was so confusing and contradictory it cannot support the verdict. In effect, Defendant claims Ms. Fields was not credible and what she said is so facially unreliable it will not support his convictions.

Questions of witness credibility are within the exclusive province of the jury. **Commonwealth v. Davis,** 518 Pa. 77, 82, 541 A.2d 315, 317 (1988). Whether a witness is lying or mistaken is for the jury to assess. **Id.** This is so because "the veracity of a particular witness is a question which must be answered in reliance on the ordinary experiences of life, common knowledge of the natural tendencies of human nature, and observations of the character and demeanor of the witness." **Id.** As a matter of law, we can only upset a jury's credibility assessment when the testimony is so contradictory on the essential issues as to make the verdict obviously the result of conjecture or guess. **Commonwealth v. DeJesus,** 580 Pa. 303, 311, 860 A.2d 102, 107 (2004).

While some inconsistencies do exist in Ms. Fields' testimony, these conflicts do not make her testimony speculative or render the verdict the "result of conjecture or guess." **Commonwealth v. Heistand,** 454 Pa. Super. 482, 488, 685 A.2d 1026, 1029 (1996) (holding that a mere conflict in a witness's testimony does not render the evidence insufficient). It is the function of the trial judge to determine whether the evidence was sufficiently certain to support the jury's verdict, not to substitute its judgment for that of the jury. **Commonwealth v. Sanchez,** 614 Pa. 1, 27, 36 A.3d 24, 39 (2011). As to the reliability of Ms. Fields' testimony implicating Defendant as her assailant, at least three reasons exist in its favor.

First, Ms. Fields' identification of Defendant was corroborated by other evidence. Ms. Fields identified Defendant as the intruder in both assaults and testified he was around five foot seven and had a slight Spanish or Puerto Rican accent. (N.T. 1/8/2013, p. 101.) Both the palm print police lifted from her windowsill and the surveillance tape from the Convenient Food Mart support this identification of Defendant as the intruder. (N.T. 1/8/2013, p. 82; Commonwealth Exhibit No. 15.) Further, Trooper Judge confirmed Ms. Fields' description of her assailant. (N.T. 1/9/2013, p. 258.)

Second, Defendant points to only four challenges to the accuracy of Ms. Fields' trial testimony.[22] Of these, one is trivial and one relates to a relatively minor matter.[23] The other two concern differences between Ms. Fields' initial statement to police and her trial testimony.

[22] In Defendant's brief submitted in support of his post-sentence motion, Defendant identified the following inconsistencies. First, that Ms. Fields testified the intruder wore a ski mask before immediately correcting herself to say that the intruder wore a **Scream** mask. (N.T. 1/8/2013, p. 100.) Second, Defendant noted Ms. Fields testified the intruder ran out of the house when Ms. Fields' roommate, Ms. Rodgers, entered the hallway. **Id.** at 112. Yet, Ms. Rodgers testified she never saw the intruder, only Ms. Fields, in the hallway. **Id.** at 154. Finally, Defendant pointed to two inconsistencies between Ms. Fields' initial statement to police and her testimony at trial: (1) Ms. Fields told police in her initial statement that the intruder never touched her vagina during the 2007 assault (N.T. 1/9/2013, pp. 266, 267); and (2) Ms. Fields never told police in the initial statement that the intruder said "I'll be back" at the end of the 2007 assault. **Id.**

[23] The difference in Ms. Fields' testimony as to the type of mask worn was immediately changed and does not detract from the basic fact that a mask was worn. As to the possible inconsistency in the testimony of Ms. Fields and Ms. Rodgers, these differences are not necessarily inconsistent, were presented to the jury, and, in any event, do not negate the underlying fact that an intruder was in the home and it was Defendant.

Ms. Fields' initial statement concerning the 2007 attack was given only hours after she was surprised in her own home in the early morning hours and threatened with rape. (N.T. 1/9/2013, p. 267.) Trooper Silliman, the trooper who took the statement, testified that when Ms. Fields gave this statement, she was visibly distraught. **Id.** at 268. This evidence alone offers at least one explanation for any discrepancy between Ms. Fields' first statement and her trial testimony. The jury could reasonably conclude that the strain she was under at the time she gave her initial statement affected her ability to give a completely accurate and thorough description of what happened, which, on further reflection, was more precise later in time. Finally, other than these two differences, her testimony was largely consistent with what she initially told the police. **Compare** N.T. 1/8/2013, pp. 97-117, **with** N.T. 1/9/2013, pp. 267-74.

F. Whether the Court Erred in Sustaining the Commonwealth's Objection to What Ms. Fields Told Trooper Silliman in His Initial Contact With Her at the Scene, Which Statements Formed the Basis, in Part, for His Arrest of the Defendant.

Trooper Silliman was the first witness called to testify by the Commonwealth. Trooper Silliman was dispatched to Ms. Fields' home at approximately 4:30 A.M. on October 21, 2007, for a report of an attempted sexual assault. In direct examination, Trooper Silliman testified to what he did and found at the scene. Also that he provided statement forms to be completed by the victim. He did not testify to the content of any statements given by Ms. Fields.

On cross-examination, Defendant asked Trooper Silliman what Ms. Fields told him that morning, arguing this was not offered for the truth of the matter asserted, but for the fact that it was said. (N.T. 1/7/2013, p. 36.)[24] The Commonwealth raised a hearsay objection which was sustained, the Court finding that to the extent Defendant sought to use the statement to impeach Ms. Fields' anticipated testimony that she was sexually assaulted, Defendant

[24] In response to the court's inquiry, defense counsel advised that Ms. Fields told the trooper "that she was not sexually assaulted, basically, that he did not touch her private parts." (N.T. 1/7/2013, p. 35.)

would have to wait until Ms. Fields testified, but that the Court would allow proper impeachment at the appropriate time. (N.T. 1/7/2013, pp. 37-38.) Defendant claims this was error.

Under Pennsylvania Rule of Evidence 613, a party may impeach a witness's credibility "by introducing evidence that the witness has made one or more statements inconsistent with his trial testimony." **McManamon v. Washko,** 906 A.2d 1259, 1268 (Pa. Super. 2006). When determining if the prior statement is admissible, the trial court must assess whether the statement is truly inconsistent with the witness's trial testimony. **Id.** ("[M]ere dissimilarities or omissions in prior statements do not suffice as impeachable evidence; the dissimilarities or omissions must be substantial enough to cast doubt on a witness's testimony to be admissible as prior inconsistent statements.").

It is a necessary prerequisite that for a prior inconsistent statement to be admissible, the witness must first testify in order for the court to determine if the prior statement is in fact inconsistent. Thus, requiring Defendant to do this was not error. Moreover, any claimed error was harmless as Defendant was permitted to introduce this evidence after Ms. Fields testified. (N.T. 1/9/2013, pp. 266-67.)

G. Whether the Court Erred in Allowing Jamie Rodgers to Testify Whether She Thought the 2008 Incident Was Staged.

Penultimately, Defendant claims we erred by allowing Ms. Rodgers to testify that it was her belief the 2008 assault was not staged. (N.T. 1/8/2013, pp. 165-67.) While Ms. Rodgers' belief about whether Ms. Fields accurately reported what occurred on May 31, 2008, would ordinarily be irrelevant, Defendant made this evidence relevant by what he asked.[25] In effect, Defendant opened the door to this testimony.

The Commonwealth was permitted to inquire about Ms. Rodgers' belief only after Defendant asked Ms. Rodgers on cross-

[25] The specific objection Defendant made was that the belief was speculative. (N.T. 1/8/2013, p. 165.) Technically speaking, assuming a witness's belief is relevant to an issue in the case, a witness does not speculate when testifying to his belief or understanding.

examination if she told police that she thought the incident was staged and defense counsel represented to the Court his intent to elicit from Trooper Hudzinski that Ms. Rodgers told him this was her belief. (N.T. 1/8/2013, pp. 163, 166.) Moreover, this, in fact, is what transpired. (N.T. 1/8/2013, pp. 206-207.)[26] Based on defense counsel's representation, we acted within our discretion in allowing this question to be asked of Ms. Rodgers. **See** Pa. R.E. 611(a) (allowing the court to control the order in which evidence is presented). Finally, any error would be harmless as the evidence did not question the identity of Ms. Fields' assailant, and the overwhelming evidence established an intruder entered Ms. Fields' home and assaulted her.

H. Whether in Response to Inconsistent Statements Elicited by Defendant, the Court Erred in Allowing Trooper Silliman to Testify to the Victim's Complete Statements.

Finally, Defendant claims we erred by overruling his objection and allowing Trooper Silliman to testify about statements Ms. Fields made to him shortly after the 2007 assault which were documented in his report of the investigation. (N.T. 1/9/2013, pp. 268-70.) Defendant claims this testimony should have been excluded because it was beyond the scope of his direct examination and improperly bolstered Ms. Fields' testimony. **Id.** at 268, 269.

First, the testimony in question was not beyond the scope of Defendant's direct examination. On direct examination, Trooper Silliman was questioned about a report he prepared of what Ms. Fields told him shortly after the 2007 assault. In this report, Trooper Silliman reported Ms. Fields as stating her assailant did not place his hands on her private areas. Trooper Silliman further testified that if Ms. Fields had told him the assailant said "I'll be back" at the end of the encounter, this would have been included in his report. It was not.

Trooper Silliman's interview with Ms. Fields occurred on October 21, 2007, at approximately 4:40 A.M., as part of the police

[26] More precisely, when asked by Trooper Hudzinski if she had considered the possibility that the 2008 incident was staged, Ms. Rodgers responded that she had. (N.T. 1/8/2013, p. 207.)

investigation into the 2007 assault. Consequently, allowing the Commonwealth to question Trooper Silliman about what Ms. Fields told him about the assault in this same interview was within the scope of cross-examination.

Second, to the extent the statements elicited by Defendant were offered to show that Ms. Fields' private areas were never touched during the 2007 assault and that the assailant never threatened to come back, and, therefore, that Ms. Fields was either confused when she testified and could not accurately recall what had happened, or worse, that she fabricated her trial testimony, the testimony elicited from Trooper Silliman on cross-examination was admissible under Pa. R.E. 613 to rebut the charge of faulty memory and recent fabrication made by Defendant.[27] Specifically, in response to these assertions, Trooper Silliman testified to the detail contained in Ms. Fields' statement to him which was repeated by her in her trial testimony. (N.T. 1/8/2013, pp. 270-72.)

As with respect to some of the other evidence raised by Defendant, any error in this respect is harmless given the overwhelming evidence against Defendant.

CONCLUSION

Based on the above analysis, we respectfully request Defendant's judgment of sentence be affirmed.

[27] Rule 613(c) provides:

(c) Witness's Prior Consistent Statement to Rehabilitate. Evidence of a witness's prior consistent statement is admissible to rehabilitate the witness's credibility if the opposing party is given an opportunity to cross-examine the witness about the statement and the statement is offered to rebut an express or implied charge of:

(1) fabrication, bias, improper influence or motive, or faulty memory and the statement was made before that which has been charged existed or arose. ...

See also, Commonwealth v. Busanet, 54 A.3d 35, 66 (Pa. 2012).

PENNSY SUPPLY, INC. d/b/a SLUSSER BROTHERS, Plaintiff vs. PANTHER VALLEY SCHOOL DISTRICT, ZARTMAN CONSTRUCTION, INC., YANUZZI, INC. and ROSENCRANS EXCAVATING, INC., Defendants

Civil Law—Quantum Meruit—*Indemnification—Contribution—Breach of Contract—Negligence—Cause in Fact—Declaratory Judgment*

1. Plaintiff is a subcontractor on a construction project for the building of a new school at which an oil spill occurred. In this suit, Plaintiff has asserted various claims of **quantum meruit,** indemnification, contribution, breach of contract, negligence and declaratory judgment against the school district, as property owner, the general contractor for the project, another subcontractor, and a separate third party who contracted directly with the school district.

2. A cause of action for **quantum meruit,** which is a claim for unjust enrichment, requires a claimant to prove the following three elements: (1) a benefit conferred on the defendant by the plaintiff; (2) appreciation of such benefit by the defendant; and (3) acceptance and retention of such benefit under circumstances that would create an inequity if the defendant retained the benefit without payment of value. To sustain this claim, plaintiff must show that the party against whom recovery is sought either wrongfully secured or passively received a benefit that it would be unconscionable to retain.

3. Where unjust enrichment is found, the law implies a **quasi**-contract which imposes a duty on the defendant to pay to plaintiff the value of the benefit conferred. This duty, premised upon equitable considerations, arises not as a result of any agreement, but in spite of the absence of an actual agreement, in order to prevent one party from being unjustly enriched at the expense of another.

4. The doctrine of unjust enrichment is inapplicable when the relationship between the parties is founded upon an actual agreement, whether express or implied.

5. The right to indemnification is founded on either a contractual provision or by operation of law.

6. Indemnity by operation of law rests upon a difference between the primary and secondary liability of two persons each of whom is made responsible by the law to an injured party. Secondary as distinguished from primary liability rests upon a fault that is imputed or constructive only. Principles of indemnity apply when a person who is solely liable to an injured party by operation of law seeks to recover his loss from a defendant who is actually responsible for the accident which occasioned the loss.

7. To establish a claim for contribution, the plaintiff must prove: (1) the parties combined to produce the plaintiff's injury; (2) the parties are each liable in tort to the plaintiff; and (3) a tortfeasor has discharged the common liability by paying more than his **pro rata** share.

8. In order to maintain a cause of action for breach of contract, a plaintiff must establish three elements: (1) the existence of a contract, including its essential terms; (2) a breach of a duty imposed by the contract; and (3) resultant damages.

9. Negligence is established by proving the following four elements: (1) a duty or obligation recognized by law; (2) a breach of that duty; (3) a causal connection between the conduct and the resulting injury; and (4) actual damages.

10. Where an injury may be the result of one of several possible causes and the defendant would be liable for only one of those causes, the onus is on the plaintiff to establish that the cause for which the defendant is responsible is the actual cause of plaintiff's injury.

11. An action seeking declaratory judgment is not an optional substitute for established or available remedies and should not be granted where a more appropriate remedy is available.

NO. 09-2312

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MEMORANDUM OPINION

NANOVIC, P.J.—December 27, 2013

On August 27, 2007, a massive oil spill was discovered at the Panther Valley Middle School, days before construction of the School was to be completed. What caused the spill, when it occurred, and who was responsible, if anyone, were all unknown. Whether the Defendants are responsible, or more accurately whether sufficient evidence exists to find each Defendant liable, is the subject of this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

In 2006, the Panther Valley School District ("District") began construction of a new middle school in the Borough of Summit Hill, Carbon County, Pennsylvania ("School"). Under the Separations Act, 24 P.S. §7-751(a),[1] the District contracted directly with

[1] Section 751(a) states in relevant part:

§7-751. Work to be done under contract let on bids; exception

(a) All construction, reconstruction, repairs, maintenance or work of any nature, including the introduction of plumbing, heating and ventilating, or lighting systems, upon any school building or upon any school property, or upon any building or portion of a building leased under the provisions of section 703.1, made by any school district, where the entire cost, value, or amount of such construction, reconstruction, repairs, maintenance or work, including labor and material, shall exceed ten thousand dollars ($10,000), shall be done under separate contracts to be entered into by such school district with the lowest responsible bidder. ...

four separate contractors for different phases of the construction: Zartman Construction, Inc. ("Zartman"), was the project's general contractor; Albarell Electric, Inc., the electrical contractor; Jay R. Reynolds, Inc., the plumbing contractor; and Yanuzzi, Inc. ("Yanuzzi"), the heating, ventilation and air conditioning (HVAC) contractor. Like Zartman, Albarell Electric, Inc., Jay R. Reynolds, Inc. and Yanuzzi all contracted directly with the District and were separate prime contractors; none of these entities were subcontractors of one another. As the general construction contractor, Zartman contracted with various subcontractors, including Rosencrans Excavating, Inc. ("Rosencrans") for excavation and grading services, and Pennsy Supply, Inc., d/b/a Slusser Brothers ("Plaintiff") to install the School's concrete curbs and sidewalks. The facts set forth below are those viewed in the light most favorable to the Plaintiff.

During the week of July 23, 2007, as the project neared completion, Plaintiff laid in place and secured the framework for approximately thirty-one linear feet of a six-foot-wide concrete sidewalk between the rear of the building and an enclosed area set aside for the District's dumpsters. Ten-foot-long steel forms were used to frame the majority of the sidewalk, with wooden two-by-four boards used for the remainder. Each ten-foot-long form was held in place by thirty-six-inch long steel pins driven into the ground.

The forms have three positions, or slots, along their length through which the pins are inserted. Measuring from one end of a form, the slots are at one, five, and nine feet. The form and pin design permits the forms to be vertically held in place even if there is no soil supporting the forms. The pins are hammered into place using sledge hammers.

The length of the pins, thirty-six inches, was chosen, in part, because the area had not been subgraded beforehand by Rosencrans. The normal sequence for installing sidewalks on a construction project is to first provide subgrading to bring the grade to the designed height for installation of the sidewalks and to level the surface, to next set the forms and fill them with stone, and to

24 P.S. §7-751(a). When separate contracts are entered, the contracts are sometimes referred to as multi-prime contracts. When separate contracts are not entered, the contract entered is sometimes referred to as a single-prime contract.

then pour the concrete. This sequence was not followed because the project was behind schedule, the deadline for substantial completion was July 29, 2007, and the contractors were instructed to accelerate their work. As part of an expedited schedule, Zartman directed Plaintiff to proceed with setting the forms in place before the area was subgraded. In consequence, when the forms were set at the elevation at which the sidewalks were designed to be located, the forms were elevated above the surface of the ground in anticipation of Rosencrans' grading to raise the ground surface to the level on which the sidewalks would rest. According to Plaintiff's foreman, Rosencrans had failed to grade up to the appropriate elevation, as much as twelve to eighteen inches in some areas. These circumstances required the use of longer pins than would otherwise have been selected to hold the forms in place—the standard length is twelve to eighteen inches—in order to reach stable soil and to account for the added elevation between the surface level of the ground before subgrading and the level at which the forms were set.

After the forms were in place, Plaintiff left the site for several weeks. During Plaintiff's absence, Rosencrans subgraded the area and spread 2B stone in and around the forms. Although Rosencrans denies disturbing the forms while doing this work, Plaintiff's foreman for the sidewalks testified that when Plaintiff returned during the week of August 20, 2007, to complete its work on the sidewalks, the form closest to the School was out of place and leaning against the building, the middle form was pushed inward at a forty-five degree angle, and the third form was leaning slightly. (Troiani Dep., pp. 47:1-48:25, 8/9/11.) Plaintiff reset the forms before pouring the concrete for the sidewalks. Once this occurred and the concrete hardened, the forms were stripped and removed by Plaintiff. This sequence of events occurred between Thursday, August 23, 2007, and Saturday, August 25, 2007.

Two days later, on August 27, 2007, the heating oil spill was discovered by the District's building and grounds supervisor. In excess of six thousand gallons of heating oil escaped from a punctured underground oil-return line and permeated the soil. The return line was part of a heating system installed by Yanuzzi which included a ten thousand gallon underground storage tank for heating oil, with supply and return lines.[2] The supply lines provided oil to the School's furnace and boiler room, and the return lines carried unburnt heating oil from the boiler room to the storage tank.

The location and size of the puncture corresponded perfectly with the location and size (1.5 inches in diameter) of one of the steel pins inserted in the center slot of the middle sidewalk form. The return line was buried twenty-one inches below the top of the concrete sidewalk (**i.e.,** within the length of the steel pins used to secure the form work).

The storage tank and supply and return lines were installed by Yanuzzi in 2006. During construction, the tank was rotated from its original design position to avoid conflicts with other utility lines. This field change placed the tank approximately twelve to thirteen feet from its original design position and resulted in both the tank and fuel lines being located beneath where the sidewalks were to be installed. Seventy-five hundred gallons of heating oil was delivered to the School in August 2006, and the oil supply and return lines were pressurized and put in use by the beginning of August 2007 to provide fuel for the School's hot water heaters.

The new location of the lines was not marked by Yanuzzi,[3] nor did it pour a concrete cover over the tank and lines for protection. Further, "as-built" drawings, for the new location of the lines were neither prepared nor provided.[4] Although Plaintiff was aware of the general location of the storage tank and fuel lines when it set the sidewalk forms in place—in fact, Plaintiff's foreman for the sidewalk crew testified to seeing three of the oil lines—the exact location of all of the lines was not known. In directing Plaintiff

[2] This installation was part of Yanuzzi's HVAC prime contract.

[3] According to Zartman's project manager, the marking of the fuel lines was Yanuzzi's responsibility. (Renn Dep., p. 107:10-16, 11/2/11.) Although the lines would not necessarily have been marked if they were installed in accordance with the original contract documents, because this did not occur, they should have been marked. (Renn Dep., p. 108:5-24, 11/2/11.)

[4] Plaintiff's expert report states that "[t]he custom and practice of the industry is that lines that are buried must be able to be located by measuring from given visible points on the surface of the finished construction." (McCue Expert Report, p. 10.) Moreover, because the lines were routed in a large arc, their actual location was much more difficult to determine absent markings or visual reference points. **Id.**

to proceed in the face of this uncertainty, knowing that the area had not been subgraded and that longer pins would be needed to secure the forms, Zartman cautioned only that Plaintiff be careful in driving the pins into the ground.

By letter dated August 31, 2007, the Pennsylvania Department of Environmental Protection ("DEP") notified both the Plaintiff and the District that it was aware of the spill and that "[w]hen a spill or release of a hazardous substance occurs at a property, the owners or operators are required to perform a cleanup." (Complaint, Exhibit "B.") According to Plaintiff, when the District refused to assume responsibility, it did so to avoid additional harm to the environment, people, and property, and contacted Datom Products, Inc. to perform a site assessment and to begin clean-up efforts. By the end of September 2007, Plaintiff advised both the District and Zartman that it was unwilling to pay any additional costs of clean-up and forwarded Datom's invoices to Zartman. When Datom threatened in October 2007 to walk off the job for non-payment, Zartman directed Plaintiff by letter dated December 10, 2007, to continue the clean-up relying on Section 3.15 of its contract with Plaintiff which provided that "[s]hould the Subcontractor cause damage to the Work or Property of the Owner, the Contractor or others, the Subcontractor shall promptly remedy such damage to the satisfaction of the Contractor." (Complaint, Exhibit "C.") In addition, DEP later determined and so advised Plaintiff that it was legally obligated to continue these efforts.

As of the filing date of its complaint, Plaintiff had paid Datom in excess of $459,000.00 for clean-up services and monitoring, and expected these costs to exceed $600,000.00 due to continued monitoring it was required to provide at the site until 2013 pursuant to its DEP NPDES permit issued on November 17, 2008. Plaintiff seeks to recover from the Defendants all monies paid by it for clean-up and remediation.

Plaintiff commenced the instant action by filing a **praecipe** for a writ of summons on August 6, 2009. In a nine-count complaint filed on September 15, 2009, Plaintiff asserts a number of causes of action seeking recovery of the amount it has spent for site assessment and clean-up activities. The complaint named Zartman, Rosencrans, Yanuzzi, the School District and the Architectural Studio,

Ltd. as Defendants. Against all Defendants, Plaintiff asserts a claim for **quantum meruit**—Count II,[5] indemnification—Count III, and contribution under 42 Pa. C.S.A. Section 8342—Count VIII. In Count IX, Plaintiff seeks declaratory relief as to who is responsible for future clean-up costs and monitoring. The complaint also includes claims for breach of contract—Count I (against Zartman), negligence—Count IV (against Rosencrans), negligence—Count V (against Zartman), negligence—Count VI (against Yanuzzi) and negligence—Count VII (against The Architectural Studio, Ltd).[6] All Defendants have filed motions for summary judgment as to all claims filed against them.

DISCUSSION

Before analyzing each Defendant's contentions, we note the standard for summary judgment. When deciding a motion for summary judgment, we "examine the record, which consists of all pleadings, as well as any depositions, answers to interrogatories, admissions, affidavits, and expert reports, in a light most favorable to the non-moving party, and [the court] resolve[s] all doubts as to the existence of a genuine issue of material fact against the moving party." **LJL Transportation, Inc. v. Pilot Air Freight Corporation,** 599 Pa. 546, 559, 962 A.2d 639, 647 (2009). We are to enter summary judgment under two circumstances. First, "whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense." Pa. R.C.P. No. 1035.2(1). Second, "if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense." Pa. R.C.P. No. 1035.2(2). "Thus, a record that supports summary judgment either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a **prima facie** cause of action or defense." **Petrina v. Allied Glove Corporation,** 46 A.3d 795, 798 (Pa. Super. 2012) (**quoting Chenot v. A.P. Green Services, Inc.,** 895 A.2d 55, 61 (Pa. Super. 2006)).

[5] By order dated July 16, 2010, this claim was dismissed against Yanuzzi.

[6] The Architectural Studio, Ltd was the District's architect for the project. On March 5, 2010, Plaintiff discontinued its claims against the Architectural Studio.

In evaluating the facts of the case, the trial court must view those facts "in the light most favorable to the party opposing the motion and resolve all doubts as to the existence of a genuine issue of material fact in favor of the non[-]moving party." **Drelles v. Manufacturers Life Insurance Company,** 881 A.2d 822, 830 (Pa. Super. 2005) (citation omitted). All reasonable inferences must be drawn in favor of the party opposing the motion for summary judgment. **See Rosenberry v. Evans,** 48 A.3d 1255, 1261 (Pa. Super. 2012).

In its consideration of whether there exists a genuine issue of material fact, "the court does not weigh the evidence, but determines whether a reasonable jury, faced with the evidence presented, could return a verdict for a non-moving party." **401 Fourth Street, Inc. v. Investors Insurance Group,** 583 Pa. 445, 461 n.4, 879 A.2d 166, 175 n.4 (2005). Conversely, summary judgment may be granted when the facts are so clear that reasonable minds could not differ on a factual question. **Kvaerner Medals Division of Kvaerner U.S., Inc. v. Commercial Union Insurance Company,** 589 Pa. 317, 329, 908 A.2d 888, 896 (2006). Nevertheless, only when "the right to such judgment is clear and free from doubt" may the court grant summary judgment. **401 Fourth Street, Inc., supra.**

A. Quantum Meruit

A claim of **quantum meruit** is a claim of unjust enrichment and is governed by equitable principles. **Northeast Fence & Iron Works, Inc. v. Murphy Quigley Co., Inc.,** 933 A.2d 664, 667 (Pa. Super. 2007). "Where unjust enrichment is found, the law implies a quasi-contract which requires the defendant to pay to plaintiff the value of the benefit conferred." **Id.** at 669. "A quasi-contract imposes a duty, not as a result of any agreement, whether express or implied, but in spite of the absence of an agreement, when one party receives unjust enrichment at the expense of another." **Discover Bank v. Stucka,** 33 A.3d 82, 88 (Pa. Super. 2011) (**quoting Stoeckinger v. Presidential Fin. Corp. of Delaware Valley,** 948 A.2d 828, 833 (Pa. Super. 2008)).

To establish a claim for damages under the theory of **quantum meruit,** a plaintiff is required to prove the following three elements: (1) a benefit conferred on the defendant by the plaintiff; (2) appreciation of such benefit by the defendant; and (3) acceptance

and retention of such benefit under circumstances that would create an inequity if the defendant retained the benefit without payment of value. **Limbach Company, LLC v. City of Philadelphia,** 905 A.2d 567, 575 (Pa. Commw. 2006). "To sustain a claim of unjust enrichment, a claimant must show that the party against whom recovery is sought either wrongfully secured or passively received a benefit that it would be unconscionable [] to retain." **Torchia on Behalf of Torchia v. Torchia,** 346 Pa. Super. 229, 233, 499 A.2d 581, 582 (1985) (quotation marks and citation omitted). "[T]he most significant element of [unjust enrichment] is whether the enrichment of the defendant is **unjust.** The doctrine does not apply simply because the defendant may have benefitted as a result of the actions of the plaintiff." **Stoeckinger v. Presidential Financial Corp. of Delaware Valley,** 948 A.2d 828, 833 (Pa. Super. 2008). Finally, as an equitable remedy, the doctrine of unjust enrichment is inapplicable when the relationship between the parties is founded upon an actual agreement, whether express or implied. **Wilson Area School District v. Skepton,** 586 Pa. 513, 520, 895 A.2d 1250, 1254 (2006).

As to Plaintiff's claim against Zartman for **quantum meruit,** it is undisputed that Plaintiff and Zartman are in contractual privity: Zartman as the general contractor for the school project subcontracted with Plaintiff for Plaintiff to install the project's sidewalks and curbing. Consequently, this claim against Zartman fails as a matter of law.[7]

With respect to Rosencrans, Plaintiff has also failed to establish a **prima facie** case of unjust enrichment. Accepting for the moment that Rosencrans was responsible in whole or in part for the oil spill, and accepting that Plaintiff's assumption of the cost of clean-up therefore benefitted Rosencrans, Plaintiff has failed to establish that Rosencrans in any manner misled Plaintiff to its detriment or passively sat by and received benefits under circumstances which are unconscionable and require restitution. To the contrary, Plaintiff

[7] This is not a case of allowing a party to plead inconsistent causes of action in the alternative as Plaintiff suggests **citing Lugo v. Farmers Pride, Inc.,** 967 A.2d 963, 969-70 (Pa. Super. 2009), **appeal denied,** 602 Pa. 668, 980 A.2d 609 (2009). A cause of action for **quantum meruit** is predicated upon the non-existence of an express contract. Because there is no dispute that a valid, enforceable contract exists, (**see** Complaint and Zartman's answer, paragraphs 9, 55), Plaintiff's claim for **quantum meruit** is not viable.

assumed responsibility for the cost of clean-up after both it and the District were notified by DEP that a site assessment and remediation needed to be undertaken and the District failed to act, after being directed by Zartman pursuant to its subcontract to assume responsibility for the clean-up, and after being advised by DEP that it had a legal obligation to continue its clean-up efforts. As to Rosencrans, Plaintiff's expenditures were voluntary and unsolicited.

In contrast, we find Plaintiff's claim for unjust enrichment against the District to have arguable merit. As the owner of the property, the District clearly benefitted from the clean-up. Further, as the owner of the property, Pennsylvania's Clean Streams Law, 35 P.S. §§691.1-691.1001, authorizes the DEP to hold the District legally responsible for the clean-up, while, unless Plaintiff can be shown to be responsible for the discharge, Plaintiff would not be a responsible party under this Act. **See** 35 P.S. §§691.316 (Responsibilities of landowners and occupiers), 691.307(c) (Industrial waste discharge), 691.601(a) (Abatement of nuisances; restraining violations). The District and Plaintiff were notified by DEP of the need to assess and remediate the damage, and the District failed to act, in effect, forcing Plaintiff's hand with DEP. Under these circumstances, including the threat of an enforcement action by DEP and the need to prevent further contamination, and assuming Plaintiff is able to convince the factfinder that it is not responsible for the leak, the elements of a claim for **quantum meruit** have been met.[8]

[8] The District's reliance on H**azleton Area School District v. Krasnoff,** 672 A.2d 858 (Pa. Commw. 1996), for the proposition that a claim of unjust enrichment is barred by Section 508 of the Pennsylvania Public School Code, 24 P.S. §5-508, is misplaced. Section 508 provides, in pertinent part, that:

> The affirmative vote of a majority of all the members of the board of school directors in every school district, duly recorded, showing how each member voted, shall be required in order to take action on the following subjects:
>
> °°°°°
>
> Entering into contracts of any kind, including contracts for the purchase of fuel or any supplies, where the amount involved exceeds one hundred dollars ($100).
>
> °°°°°
>
> Failure to comply with the provisions of this section shall render such acts of the board of school directors void and unenforceable.

24 P.S. §5-508.

B. Indemnification

The right to indemnification is founded on either a contractual provision or by operation of law. **City of Wilkes-Barre v. Kaminski Brothers, Inc.,** 804 A.2d 89, 92 (Pa. Commw. 2002). "An agreement to indemnify is an obligation resting upon one person to make good a loss which another has incurred or may incur by acting at the request of the former, or for the former's benefit." **Szymanski-Gallagher v. Chestnut Realty Company,** 409 Pa.

In **Krasnoff,** plaintiff, an architect, entered into two contracts with a school district for architectural services. Both provided for the payment of a flat fee, with additional compensation to be paid for extra work that was authorized or confirmed in writing by the school district. The plaintiff, at the request of the president of the school board and other individual board members, performed substantial additional work not within the scope of the work covered by the flat fee. In upholding the trial court's denial of plaintiff's claim for additional compensation for this extra work because the requirements of Section 508 had not been met—a majority of the school board had not voted to approve payment for the additional work—the Commonwealth Court held that the requirements of Section 508 applied to both the initial contract, as well as any subsequent modifications which would increase the school district's indebtedness, and that absent the approval by an affirmative vote of the majority of the school board there could be no recovery against the school district, "even on claims of **quantum meruit.**" **Krasnoff, supra** at 862. **See also, In Re Sykesville Borough,** 91 Pa. Super. 335 (1927) (holding that a failure to abide by Section 403 of the School Code of 1911, the predecessor to Section 508, precluded a claim of **quantum meruit** against a school district for construction work which had not been properly bid).

In each of these cases, at issue was the enforceability of a claim for services provided to a school district which had not been approved by a majority of the school board. In each, the court held that because this statutory requirement had not been met, a positive rule of law had been violated and therefore "all equities and implied liabilities are excluded," including recovery in **quantum meruit. In Re Sykesville Borough, id.** at 341. In each, the private claimants doing business with the school districts had an affirmative responsibility to "inquire into the powers of the [school district] and its agents to enter into any contracts." **City of Scranton v. Heffler, Radetich & Saitta, LLP,** 871 A.2d 875, 879 (Pa. Commw. 2005), **appeal denied,** 587 Pa. 708, 897 A.2d 1184 (2006).

In the instant case, unlike in **Krasnoff** and **Sykesville Borough,** no contract existed between the Plaintiff and the District: the two were not in privity. In undertaking clean-up of the oil spill, Plaintiff was not seeking to enter a contract with the School District, or to modify an existing contract, but was accepting responsibility for the clean-up with reservations, because the School District would not, and something had to be done.

The Plaintiff's claim is premised upon equitable principles, which in order to prevent unjust enrichment, imply a contract as a matter of law and not as a matter of fact. In no real sense does this equate to entering into a contract, which is what the words of Section 508 require, and which traditionally requires a meeting of the minds and an exchange of consideration.

Super. 323, 329, 597 A.2d 1225, 1228 (1991) (**quoting Potts v. Dow Chemical Co.,** 272 Pa. Super. 323, 415 A.2d 1220, 1221 (1980)). Plaintiff makes no claim for indemnification based upon a contractual provision.

With respect to indemnity by operation of law:

> There is ... a fundamental difference between indemnity and contribution. The right of **indemnity** rests upon a difference between the primary and secondary liability of two persons each of whom is made responsible by the law to an injured party. **It is a right which enures to a person who, without active fault on his own part, has been compelled, by reason of some legal obligation, to pay damages occasioned by the initial negligence of another and for which he himself is only secondarily liable.** The difference between primary and secondary liability is not based on a difference in **degrees** of negligence or on any doctrine of **comparative** negligence. ... It depends on a difference in the **character** or **kind** of the wrongs which cause the injury and in the nature of the legal obligation owed by each of the wrongdoers to the injured person. Secondary liability exists, for example, where there is a relation of employer and employee, or principal and agent. ... Without multiplying instances, ... **the important point to be noted in all the cases is that secondary as distinguished from primary liability rests upon a fault that is imputed or constructive only,** being based on some legal relation between the parties, or arising from some positive rule of common or statutory law or because of a failure to discover or correct a defect or remedy a dangerous condition caused by the act of the one primarily responsible. ...

Kemper National P & C Companies v. Smith, 419 Pa. Super. 295, 299-300, 615 A.2d 372, 374-75 (1992) (**quoting Vattimo v. Lower Bucks Hospital, Inc.,** 502 Pa. 241, 250-51, 465 A.2d 1231, 1236 (1983)) (emphasis in original).

Indemnity thus comes into play as a remedy when a defendant has been held liable not because it had any role in the harm, but solely because it has a legal relationship to the actual party at fault that made the defendant liable as a matter of law. **Kaminski Bros., supra** at 92 n.5 ("there can be no indemnity between parties who each bear responsibility for the wrong, albeit of varying degrees"). Unlike the doctrines of comparative negligence and contribution, the common-law right of indemnity is not a fault-sharing mechanism from one who is predominantly responsible for an accident and one whose negligence is relatively minor. "Rather, it is a fault shifting mechanism, operable only when a defendant who has been liable to a plaintiff solely by operation of law, seeks to recover his loss from a defendant **who was actually responsible for the accident which occasioned the loss.**" **Walton v. Avco Corporation,** 530 Pa. 568, 579, 610 A.2d 454, 460 (1992) (emphasis in original) (**quoting Sirianni v. Nugent Bros., Inc.,** 509 Pa. 564, 570-71, 506 A.2d 868, 871 (1986)).

Indemnity is available only to a party who, "without active fault on his own part," has been compelled to pay damages. **Builders Supply Co. v. McCabe,** 366 Pa. 322, 325, 77 A.2d 368, 370 (1951). The question for the court is "whether the party seeking indemnity had any part in causing the injury." **Sirianni v. Nugent Bros., Inc.,** 509 Pa. 564, 571, 506 A.2d 868, 871 (1986) (emphasis omitted). The party seeking indemnification must prove that it paid only because it was liable by operation of law and not because it had any part in causing the injury.

On the record before us, whether Plaintiff can establish that it was without fault in causing the oil spill is for the finder of fact to determine. Plaintiff claims that its expert

> has completed a preliminary test where a steel spike was attempted to be driven into a portion of the pipe obtained by [its expert] from the damaged portion of the line that was re-

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The Pennsylvania Supreme Court has never held that Section 508 poses an absolute bar to a subcontractor recovering against a school district on a claim for unjust enrichment, and we do not believe it would do so under the circumstances of this case. For purposes of the School District's motion, these circumstances include: (1) that the School District was the owner of the property and, by virtue of this status, under a legal obligation to clean up the spill; (2) that Plaintiff was wholly without fault for the spill and accepted responsibility for the clean-up because the School District refused to take any action and DEP was threatening enforcement proceedings; (3) that immediate action was necessary to protect the public and the environment; and (4) that the School District was aware of Plaintiff's clean-up efforts and its disavowal of responsibility for the spill. To find otherwise would result in a fundamental injustice. **Contra Wayne Moving & Storage of New Jersey, Inc. v. The School District of Philadelphia,** 625 F.3d 148 (3d Cir. 2010). As a decision of the federal courts, this latter case is not binding on this court, although its reasoning may be followed if considered persuasive. **Reeser v. NGK North American, Inc.,** 14 A.3d 896, 899 n.3 (Pa. Super. 2011).

moved from the site. The initial attempt failed and it is noted that the double wall pipe is extremely resistant to penetration by hand tools.

(McCue Expert Report, p. 15.) From this Plaintiff argues that its use of hand tools in driving the steel pins into the ground could not be the cause of the puncture of the return line.

Nevertheless, fatal to Plaintiff's claim of indemnification is its failure to establish as between itself and each Defendant a relationship of secondary and primary liability. In other words, a party seeking indemnity must be able to prove that it could have been held liable to the injured party and could have been compelled to satisfy the claim. **Tugboat Indian Co. v. A/S Ivarans Rederi,** 334 Pa. 15, 21, 5 A.2d 153, 156 (1939); **Martinique Shoes, Inc. v. New York Progressive Wood Heel Company,** 207 Pa. Super. 404, 408-409, 217 A.2d 781, 783 (1966) (a person who is liable for injuries caused by the negligence or wrongful act of another may pay the claim and need not wait for the result of a suit in order to be entitled to indemnity from the wrongdoer, but in doing so the person assumes the risk, in an action against the wrongdoer for indemnity, of being able to prove the actionable facts on which his liability depends, as well as the reasonableness of the amount which he pays).[9] As between Plaintiff and Zartman, the relationship is one between a subcontractor and a general contractor; between Plaintiff and Rosencrans, that between two subcontractors to the same general contractor; between Plaintiff and Yanuzzi, that between a subcontractor and a third party prime contractor; and between Plaintiff and the District, that between a subcontractor and a property owner. In none of these relationships, as a matter of law, is liability imputed or constructive as to Plaintiff and primary as to the Defendant.[10]

[9] Payments that are made voluntarily—even under a threat of litigation—are not subject to indemnification. **Tugboat Indian Co. v. A/S Ivarans Rederi,** 334 Pa. 15, 20, 5 A.2d 153, 155 (1939) ("Pennsylvania cases are unanimous in denying restitution to a person who, contending that another has no valid claim against him, nevertheless makes payment solely because of the threat or the institution of litigation to enforce the demand.")

[10] Moreover, the concept of indemnification implies at a minimum the existence of three parties: an injured party, a party having secondary liability and a party having primary liability. In the context of Plaintiff's claim for indemnification against the District, the District itself is the injured party. Alternatively, in this context, even if the public is considered the injured party, with enforcement by the Department of Environmental Protection, Plaintiff's liability would be dependent upon a finding of tortious misconduct on its part, and not on a relational status with the District, such that indemnification would lie.

C. Contribution

In Count VIII of its complaint, Plaintiff seeks contribution under the Uniform Contribution Among Tort-feasors Act, 42 Pa. C.S. §§8321-8327 ("Act") for those monies it has expended in clean-up costs. The Act provides for a right of contribution among joint tortfeasors and defines joint tortfeasors as "two or more persons jointly or severally liable in tort for the same injury to persons or property. ..." 42 Pa. C.S. §§8322, 8324. Two actors are jointly liable for an injury "if their conduct 'causes a single harm which cannot be apportioned ... even though [the actors] may have acted independently." **Mattia v. Sears, Roebuck & Co.,** 366 Pa. Super. 504, 507, 531 A.2d 789, 791 (1987) (**quoting Capone v. Donovan,** 332 Pa. Super. 185, 198, 480 A.2d 1249, 1251 (1984)), **appeal denied,** 519 Pa. 660, 546 A.2d 622 (1988). Under the Act, joint tortfeasors are entitled to contribution if they have paid more than their **pro rata** share of this common liability. 42 Pa. C.S. §8324(b). Where, as here, there has been no prior adjudication of the parties' respective liabilities, "the party seeking contribution ... stand[s] in the shoes of [the] original plaintiff and [must] prove that the new defendant was a joint tortfeasor and that his tortious conduct also caused the harm at issue." **Mattia, supra** at 508, 531 A.2d at 791; **accord Stone & Webster Engineering Corporation v. Heyl & Patterson, Inc.,** 261 Pa. Super. 150, 395 A.2d 1359 (1978).

To establish a claim for contribution, the plaintiff must prove: "(1) the parties combined to produce the plaintiff's injury; (2) the parties are each liable in tort to the plaintiff; and (3) a tortfeasor has discharged the common liability by paying more than his **pro rata** share." **Mattia, supra.** In making this claim, Plaintiff necessarily concedes, for purposes of the claim, that it is liable and asserts that each of the other Defendants is also liable for the oil spill. **See Besser Co. v. Paco Corp.,** 671 F. Supp. 1010, 1015 (M.D. Pa. 1987). Plaintiff claims it has paid more than its **pro rata** share of the clean-up costs and thus seeks contribution from the other Defendants. Each Defendant claims that the evidence is insufficient to establish its liability.

Plaintiff claims in each instance that Defendants were negligent. Negligence is established by proving the following four elements: "(1) a duty or obligation recognized by law; (2) a breach of that duty; (3) a causal connection between the conduct and the resulting injury; and (4) actual damages." **Brandon v. Ryder Truck Rental, Inc.,** 34 A.3d 104, 108 (Pa. Super. 2011). As to these elements, viewing the evidence in a light most favorable to Plaintiff, we find the record is sufficient to support a finding of negligence against three of the Defendants.

Zartman, as the general contractor for the project, was responsible for coordinating, monitoring, and controlling the sequence in which the work of its subcontractors was performed, and to make sure such work complied with the contract documents. Zartman had a duty to exercise reasonable care in overseeing the work of its subcontractors. **See** School/Zartman Contract, §3.3.1;[11] **see also, Farabaugh v. Pennsylvania Turnpike Commission,** 590 Pa. 46, 69-79, 911 A.2d 1264, 1278-84 (2006); **Reeser v. NGK North American, Inc.,** 14 A.3d 896, 901 (Pa. Super. 2011). In directing Plaintiff to set the framework for the sidewalks out of sequence, before Rosencrans provided subgrading, while at the same time knowing that this would necessitate the use of longer pins to anchor the forms in an area where the underground storage tank and fuel lines were located, which were known to be at a shallow depth, and which lines were not clearly marked and were only partially visible, Zartman made a decision whose reasonableness and relation to the spill is certainly subject to question.[12]

[11] Section 3.3.1 of the contract between the School District and Zartman provides that "[t]he Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the contract. ..."

[12] We do not believe, contrary to Plaintiff's argument, that Zartman can be held vicariously liable for any negligence by Rosencrans. Our Commonwealth has long adopted the general rule that a general contractor cannot be vicariously liable for the negligence of an independent contractor. **See Beil v. Telesis Construction, Inc.,** 608 Pa. 273, 289, 11 A.3d 456, 466 (2011). An exception to this general rule is under the Restatement of Torts (Second) §414, where a general contractor will remain liable for a subcontractor's negligence when the general contractor exercises "control over the means and methods of the contractor's work." **Farabaugh v. Pennsylvania Turnpike Commission,** 590 Pa. 46, 62, 911 A.2d 1264, 1273 (2006).

Rosencrans was responsible for subgrading the area where the sidewalks were installed. Its unexplained failure to set the grade to the appropriate elevation prior to installation of the sidewalk forms, impacted Plaintiff's use of longer pins than those normally used to hold the forms in place and prevented Plaintiff from immediately pouring concrete once the forms were initially set.[13] Additionally, after the forms were first set by Plaintiff, Rosencrans was on site and provided grading in and around the forms. Although Rosencrans denies responsibility for moving the forms while its workers performed this work, Plaintiff also denies having done so. In resolving this conflict in the light most favorable to Plaintiff, Rosencrans' grading activities may be found to have caused the disturbance of the forms.

Given the shallow depth at which the lines were buried, the length of the pins used to set the concrete forms in place, the fact that the lines were not marked, and Rosencrans' awareness that the work was proceeding out of sequence, Rosencrans knew, or should have known, that caution was required to ensure that the exposed fuel lines were not damaged while grading. In addition, Rosencrans used heavy equipment to do grading at other areas of the project site and was observed using this equipment, a Bobcat, near where the sidewalk forms had been set up. (Kuniega Dep., pp. 39:1-40:4, 8/9/11.) Though Rosencrans denies that it used heavy equipment to grade for the sidewalks,[14] if a jury found otherwise, this would provide a plausible explanation of what caused the forms to move, as well as supply a source with enough force to cause one of the pins to be driven into the return line.

Yanuzzi was responsible for installing the underground storage tank and the lines to and from the school building. During

[13] According to Rosencrans, it did not perform its work in the sidewalk area earlier because no grades had been marked. (Rosencrans Dep., pp. 49:3-52:4, 10/27/11.)

[14] In its brief opposing Defendants' Motions for Summary Judgment, Plaintiff asserts that in response to discovery requesting Rosencrans' Daily Job Reports and Weekly Progress Reports for the time period when Rosencrans graded for the sidewalks, which reports would document what work its employees were doing and what equipment was being used, Rosencrans claims the reports were misplaced by its insurance carrier and were unavailable. (Plaintiff's Brief Opposing Defendants' Motions for Summary Judgment, p. 17.)

the installation of these items, Yanuzzi relocated the fuel lines and re-routed the supply and return lines such that they were located beneath the area where the sidewalks were to be installed. The lines as re-routed were not marked as to their location, were at a shallow depth, and were not protected by any overlying cover, concrete or otherwise. No "as-built" drawings were prepared or provided to Zartman or its subcontractors, Rosencrans and Plaintiff. The placement of fuel lines at a shallow grade, into an area where steel pins were to be driven into the ground to secure sidewalk forms, and where the fuel lines were neither readily identifiable, nor protected, nor in the locations in which they were designed to be found, created a situation in which it was foreseeable that the lines would be damaged, whether or not heavy machinery or equipment would be used for grading.

The claimed negligence against Yanuzzi also includes operating the fuel system before the fuel oil leak detection system was operational.[15] Further, Yanuzzi placed the oil pumps into manual control rather than the "auto" mode which Plaintiff claims directly contributed to the volume of fuel discharged from the fuel oil tank before the leak was discovered and increased the resulting costs of clean-up. (McCue Expert Report, p. 14.)[16]

[15] One of the primary purposes of a leak detection system is to detect at an early stage the existence of leaks so as to limit the amount of damage. Yanuzzi pressurized and put the fuel system in service in late July 2007 to provide hot water to the School. The supply of oil to the water heaters resulted in the fuel system being operated without any monitoring by the leak detection system, which prevented any alerts from being initiated or any measures from being taken to minimize the damage from the release.

[16] Yanuzzi acknowledges in its brief in support of its motion for summary judgment that Plaintiff's claims pertaining to the fuel oil leak detection system and automatic operation system are not included in its motion. (**See** Yanuzzi Brief in Support of Motion for Summary Judgment, p. 7.)

In a cross claim against the School District related to this aspect of Plaintiff's negligence claim against Yanuzzi, Yanuzzi alleges that the startup of the fuel system prior to the fuel oil leak detection system being operational was done at the request and with the knowledge of the School District. Yanuzzi claims the District, through its representatives, was present at all key meetings concerning the completion of construction of the middle school, knew the project was behind schedule, and knew that work was being accelerated and taken out of sequence. Specifically, Yanuzzi claims the District was aware that Yanuzzi turned on the fuel oil transfer system without the protection of a leak monitoring system to allow the hot water tanks to operate so that the scheduled L&I inspections could take place and to utilize the kitchen facilities for school activities. On this basis, Yanuzzi seeks contribution and/or indemnification from the District in its cross claim.

Plaintiff has made no direct claim of negligence against the School District in its complaint, nor has it alleged any negligence attributable to the District. Its claim for contribution from the District is premised solely upon its earlier claim for **quantum meruit.** As a claim founded on a contract implied by law, the nature of the claim and the conduct which forms its basis, as identified in the complaint, do not rise to the level of a tort or make the School District subject to a claim of contribution under the Uniform Contribution Among Tort-Feasors Act.[17]

D. Negligence—Zartman, Rosencrans and Yanuzzi.

For the reasons discussed in the previous issue, we find there is sufficient evidence to sustain Plaintiff's claims of negligence against Zartman, Rosencrans and Yanuzzi, and will deny Defendants' Motions for Summary Judgment on these claims.

E. Breach of Contract

Count I of the complaint sets forth a claim against Zartman for breach of contract. Plaintiff contends Zartman breached the

[17] It is also worth noting that the School District is the injured party for whose damages Plaintiff is claiming a right of contribution. Were the School District, as the injured party, bringing this claim and were the District also found to be a responsible party for its own injuries, a reduction in the amount of damages awarded would be appropriate under the Comparative Negligence Act. **See** 42 Pa. C.S.A. §7102. The procedural posture of this case, however, is different. The injured person is not the party bringing the claim and the claim is for contribution not compensation. We are unaware of any case where an injured party whose injuries have been compensated has been held liable for a claim of contribution under the Contribution Among Tort-Feasors Act, nor has Plaintiff provided us with any authority to support this position. Moreover, as the term contribution is commonly understood, it does not contemplate recovery in tort from the injured party. In **McMeekin v. Harry M. Stevens, Inc.,** 365 Pa. Super. 580, 530 A.2d 462 (1987), the Superior Court stated:

> [C]ontribution is not a recovery for the tort [committed against the plaintiff,] but the enforcement of an equitable duty to share liability for the wrong done. ... Thus, a tortfeasor's right to receive contribution from a joint tortfeasor derives not from his liability to the claimant but rather from the equitable principle that once the joint liability of several tortfeasors has been determined, it would be unfair to impose the financial burden of the plaintiff's loss on one tortfeasor to the exclusion of the other ... . So long as the party seeking contribution has paid in excess of his or her share of liability, it would be inequitable under the Act to deny that party's right to contribution from a second tortfeasor who also contributed to the plaintiff's injury.

Id. at 586, 530 A.2d at 465 (citation and quotation marks omitted).

subcontract between the two by holding Plaintiff responsible for the clean-up and ordering it to bear this expense. This work, according to Plaintiff, was beyond the scope of work required of Plaintiff under their contract such that Plaintiff is entitled to additional compensation for this extra work. Zartman claims that Section 3.15 of the subcontract provides this authority and places the expense of clean-up on Plaintiff. Section 3.15 provides that "[s]hould the Subcontractor cause damage to the Work or Property of the Owner, the Contractor or others, the Subcontractor shall promptly remedy such damage to the satisfaction of the Contractor." Section 3.20 of the subcontract further provides that "[t]he Subcontractor shall lay out and be strictly responsible for the accuracy of the Subcontract Work and for any loss or damage to the Contractor or others by reason of the Subcontractor's failure to lay out or perform Subcontract Work correctly."

In order to maintain a cause of action for breach of contract, a plaintiff must establish three elements: "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract, and (3) resultant damages." **Guerra v. Redevelopment Authority of the City of Philadelphia,** 27 A.3d 1284, 1289 (Pa. Super. 2011). If Zartman is correct and Plaintiff punctured the return line and is solely responsible for the spill, there has been no breach. However, if Plaintiff is correct and Zartman required Plaintiff to clean up a spill which it did not cause, a breach exists. On this issue a genuine issue of material fact exists which precludes the granting of Zartman's Motion.

F. Declaratory Judgment

In Count IX of its complaint, Plaintiff requests a judicial determination under 42 Pa. C.S. §7532 that one or more of the Defendants have the responsibility to pay all or some of the continuing monitoring costs for cleaning up the oil spill. The grant of a declaratory judgment is within the discretion of the court. **Gulnac v. South Butler County School District,** 526 Pa. 483, 487, 587 A.2d 699, 701 (1991). In exercising this discretion, the Pennsylvania Supreme Court has set forth the following principles to guide the lower courts:

> (1) [T]hat a declaratory judgment proceeding is not an optional substitute for established and available remedies;
>
> (2) [T]hat it should not be granted where a more appropriate remedy is available;
>
> (3) [T]hat it should not be granted unless compelling and unusual circumstances exist;
>
> (4) [T]hat it should not be granted where there is a dispute of facts, or such controversy may arise; and
>
> (5) [T]hat it should not be granted unless there is a clear manifestation that the declaration sought would be a practical help in terminating the controversy.

State Farm Mutual Automobile Insurance Company v. Semple, 407 Pa. 572, 575, 180 A.2d 925, 927 (1962).

"[A]n action seeking declaratory judgment is not an optional substitute for established or available remedies and should not be granted where a more appropriate remedy is available." **Pittsburgh Palisades Park, LLC v. Pennsylvania State Horse Racing Commission,** 844 A.2d 62, 67 (Pa. Commw. 2004). Because, at a minimum, critical and material issues of fact exist, including not only the extent of Plaintiff's role in causing the leak, but the role of each Defendant, with liability and the extent of damages both at issue, Plaintiff's request for declaratory relief as to who is liable for the ongoing clean-up costs of the fuel spill will be denied.[18]

CONCLUSION

Our decisions on Plaintiff's claims for breach of contract (Count I), **quantum meruit** (Count II), indemnification (Count III), and declaratory judgment (Count IX) are relatively straight forward under the law. More difficult, because the identity of the person or party who drove the form pin into the fuel line and under what circumstances is unclear, are Plaintiff's claims for negligence and, by extension, contribution.

This difficulty necessarily raises questions of causation, actual and legal. This notwithstanding, and while any one version of the evidence may not be sufficient to find all of the Defendants

[18] At this time, it is also unclear whether Plaintiff has any ongoing costs. In paragraph 127 of its complaint, Plaintiff alleged that it was "being required to pay for continued monitoring at the site until 2013 pursuant to the DEP NPDES Permit issued to [it] on November 17, 2008." This date has now passed.

simultaneously negligent, there is enough variability in the evidence—when viewing the evidence in the light most favorable to the Plaintiff **vis-à-vis** each Defendant separately—to find each of the Defendants negligent.

Having said this, where an injury may be the result of one of several possible causes and the defendant would be liable for only one of those causes, the onus is on the plaintiff to establish that the cause for which the defendant is responsible is the proximate cause. **Cohen v. Penn Fruit Company, Inc.,** 192 Pa. Super. 244, 251, 159 A.2d 558, 561 (1960). Concomitantly, it is also for the plaintiff to exclude the other possible causes suggested by the evidence which would otherwise seem equally likely as the cause of injury. **Foley v. Pittsburgh-Des Moines Co.,** 363 Pa. 1, 24-25, 68 A.2d 517, 528 (1949). Where it is just as likely that the injury was the result of one cause for which defendant was responsible as another for which defendant was not responsible, the plaintiff cannot recover. **Bannon v. The Pennsylvania Railroad Company,** 29 Pa. Super. 231, 238 (1905).

This of course will be for the factfinder to decide. At this stage of the proceedings, the question is not whether there is sufficient evidence to simultaneously find against all Defendants, but whether there is sufficient evidence to find each Defendant liable. On this question, we find the evidence is sufficient.[19]

[19] Because we have denied the School District's Motion for Summary Judgment on Plaintiff's claim for **quantum meruit,** we do not address Yanuzzi's argument that the District should not be dismissed from the suit because of Yanuzzi's contribution/indemnification claim against it. In this cross claim, Yanuzzi seeks contribution and/or indemnification on Plaintiff's allegations pertaining to the fuel oil leak detection system and automatic operations system.

RICHARD DAWSON, JOHN MONTAGNO and JOHN NELSON, Plaintiffs vs. HOLIDAY POCONO CIVIC ASSOCIATION, INC. and HANK GEORGE, Defendants

Civil Law—Private Residential Community—Restrictive Covenants—Interpretation—Abandonment/Acquiescence—Property Owners' Association—Amendment of Rules and Regulations Affecting Property Rights—Zoning Ordinance—Strict Construction—Enforcement—Private Cause of Action—Motion for Summary Judgment—Issues of Material Fact—Nanty-Glo *Rule*—Sua Sponte *Raising of Issues by Court*

1. Restrictive covenants on the use of land are not favored by the law and are to be strictly construed against persons seeking to enforce them and in favor of the free and unrestricted use of property.

2. A restrictive covenant restricting the use of property for residential purposes only does not prevent leasing of the property for residential purposes, notwithstanding this will generate the receipt of income.

3. As a general rule, a restrictive covenant may be discharged if there has been acquiescence in its breach by others, or an abandonment of the restriction. Abandonment is a question of intent, whether expressly stated or inferred by implication from surrounding facts and circumstances.

4. A restrictive covenant which prohibits the renting or leasing of property within a private residential community only to persons first approved for membership in the community's property owners' association, which covenant has never been enforced and its violation actively acquiescing in for more than forty years, has been abandoned and its enforcement is barred.

5. Restrictive covenants, bylaws or other provisions affecting property or contractual rights in a private residential community cannot be repealed or altered without the consent of the parties whose interests are thereby impaired.

6. The right to lease real estate is an inherent right of ownership which a property owners' association cannot prohibit absent the consent of the affected owners.

7. Section 617 of the Municipalities Planning Code authorizes an aggrieved owner of property who demonstrates that his property would be substantially affected by a zoning violation to institute a private action to prevent the violation.

8. A zoning ordinance must be strictly construed and a permitted use therein must be afforded the broadest interpretation so that a landowner may have the benefit of the least restrictive use and enjoyment of his land.

9. A zoning ordinance which allows as a permitted use in an R-2 Residential Medium Density District single family houses in which one family or household may reside, as those terms are defined in the ordinance, does not prohibit a group of unrelated persons from residing together in a single family home which meets the housekeeping needs of that group.

10. In ruling on a motion for summary judgment, the credibility and reliability of the oral testimony of a party is as much a fact in issue as is any other fact upon which the parties do not agree.

11. It is inappropriate for a trial court to **sua sponte** raise an issue that has not been raised by the parties and then grant summary judgment premised on that issue.

NO. 12-1809

JAMES BRANDO, Esquire—Counsel for Plaintiffs.

RAYMOND A. SWAN, Esquire—Counsel for Defendants.

MEMORANDUM OPINION

NANOVIC, P.J.—January 21, 2014

Whether property owners in a private residential community hold the basic right to lease their property or whether this right is subject to regulation under the restrictive covenants applicable to the community—to the point of prohibiting any lease for a term of less than one year—is the primary issue at stake in these proceedings. In resolving this issue, the meaning, significance, and enforceability of various deed covenants, bylaws, and rules and regulations in effect for the community, as well as their relationship to the governing municipality's zoning ordinance and state statutes, are critical.

FACTUAL AND PROCEDURAL BACKGROUND

The Plaintiffs, Richard Dawson, John Montagno and John Nelson, own property in Holiday Pocono ("Development"), a private residential subdivision in Kidder Township, Carbon County, Pennsylvania.[1] The Development consists of approximately fifteen hundred lots on which four hundred thirty-nine homes have been built. (George Dep., pp. 69-71, 5/17/13.)[2] Each lot in the Development is subject to a common set of restrictive covenants. Covenants 1, 12, and 13 are directly at issue in these proceedings. They provide as follows:

> 1. The premises hereby conveyed, shall be used for residential purposes only. No building shall be erected, altered, placed or permitted to remain on the premises hereby conveyed other than one (1) detached single-family dwelling, not to exceed two (2) and one-half stories in height, and a private garage for not more than two (2) cars.
>
> ...
>
> 12. An association of all property owners is to be formed by the Grantor and designated by such name as may be deemed appropriate, and when formed, the buyer covenants and agrees that he, his executors, heirs or assigns, shall be bound by the bylaws, rules and regulations as may be duly formulated and adopted by such association and that they shall be subject to the payment of annual dues and assessments of the same.
>
> 13. The buyer agrees not to sell, rent, lease or permit the premises hereby conveyed, excepting to persons first approved for membership in the aforementioned association, nor shall signs for advertising purposes be erected or maintained on the premises.

Located on each of Plaintiffs' properties is a single-family residential dwelling which Plaintiffs do not use as their primary residence. In the past, Plaintiffs have rented their properties to third parties as vacation homes, or otherwise for short periods of time (**i.e.,** monthly, weekly or weekends), and desire to do so in the future. The parties do not dispute that Plaintiffs purchased their properties with the intent of renting to others and in which they would reside for only brief periods of time each year.

By letter dated January 15, 2011, Holiday Pocono Civic Association, Inc. ("Association"), the property owners' association for the Development,[3] notified two of the Plaintiffs, Richard Dawson and John Montagno, that the renting of their properties on a transient or short-term basis was prohibited by the Development's restrictive covenants, the Association's bylaws, and the Township's zoning ordinance. This notice did not cite to any specific provisions of the deed covenants, bylaws, or Kidder Township Zoning Ordinance that Plaintiffs were allegedly violating. The letter, bearing the caption "Warning Notice," further stated that "[i]f you continue with this type of rental, you will be subject to fines and/or further legal action for the day the violation occurs. Please be advised that the

[1] Richard Dawson is the owner of Lot No. C-271; John Montagno, the owner of Lot No. D-404; and John Nelson, the owner of Lot No. C-274.

[2] Many of the homes in the Development are second homes used by the owners as vacation homes. (George Dep., p. 69, 5/17/13.) The Development also includes a network of roads, two lakes, a clubhouse, pavilions, bath houses, and a garage building, title to which is held by the property owners' association for the Development. (Complaint and Answer, ¶12, Exhibit "F" (Association Bylaws, Article IV, entitled "Assets of the Association").)

[3] Holiday Pocono Civic Association, Inc. is a non-profit Pennsylvania corporation incorporated on January 10, 1964 under the Pennsylvania Non-Profit Corporation Law of 1933, 15 P.S. §§2851-1-207 (originally enacted as the Act of May 5, 1933, P.L. 289) (now found at 15 Pa. C.S.A. §§5101-5997).

penalty for a second violation of this nature will result in a $300.00 a day fine and a third violation will result in a $400.00 a day fine. All similar subsequent violations will result in a $500.00 a day fine." Plaintiff, John Montagno, was later advised by letter dated March 21, 2011, that the Association would allow him to honor his existing rental agreements through December 31, 2011, without incurring any transient rental fines. In consequence, Plaintiffs claim they have been prevented from renting their properties on a short-term basis since January 1, 2012.

After several attempts to resolve their differences proved unsuccessful, Plaintiffs commenced the present action against the Association and Hank George[4] by complaint filed on August 17, 2012. Therein, Plaintiffs request a declaratory judgment against the Association confirming Plaintiffs' right to lease their properties as they have in the past (Count I), an injunction enjoining Defendants from preventing the short-term rental of Plaintiffs' properties (Count II), compensatory and punitive damages on behalf of the Plaintiffs, Richard Dawson and John Montagno, for alleged fraudulent misrepresentation in directing these Plaintiffs to terminate the short-term leasing of their properties (Count III) and, in the alternative to Count III, compensatory and punitive damages for negligent misrepresentation (Count IV). Both parties have taken discovery and both have filed motions for summary judgment.[5]

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[4] Mr. George is a director and the corporate secretary of the Association. The letters of January 15, 2011, and March 21, 2011, were sent under Mr. George's signature.

[5] In **Murphy v. Duquesne Univ. of the Holy Ghost,** 565 Pa. 571, 777 A.2d 418 (2001), the Pennsylvania Supreme Court set forth the following standard for granting summary judgment:

> [W]here there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law, summary judgment may be entered. Where the non-moving party bears the burden of proof on an issue, he may not merely rely on his pleadings or answers in order to survive summary judgment. 'Failure of a non-moving party to adduce sufficient evidence on an issue essential to his case and on which it bears the burden of proof ... establishes the entitlement of the moving party to judgment as a matter of law.' ... Lastly, we will view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.

Id. at 590, 777 A.2d at 429 (**citing Young v. PennDOT,** 560 Pa. 373, 744 A.2d 1276, 1277 (2000)) (citations omitted).

DISCUSSION

Covenant 1—Residential Use

The parties do not dispute that Covenant 1 restricts the use of Plaintiffs' properties to that for residential purposes. Plaintiffs contend that this, in fact, is what the properties have been used for: that both they and their tenants use the properties as a dwelling within which to reside, albeit on a temporary or short-term basis. The Association argues that the rental of the properties for short periods transforms what would otherwise be a residential use to a commercial use for generating income, and that the rental of these properties on a short-term basis is incompatible with the residential character of the Development sought to be protected by the deed covenants.

Accordingly, the validity and enforceability of Covenant 1 is not in issue, but rather its interpretation. As to the interpretation of Covenant 1, deed covenants are a form of contract and are to be interpreted as such.

> The interpretation of any contract is a question of law for the Court. **Currid v. Meeting House Restaurant, Inc.,** 869 A.2d 516, 519 (Pa.Super.2005). As a general rule of contract interpretation, the intention of the parties at the time the contract is entered into governs. **Baumgardner v. Stuckey,** 735 A.2d 1272, 1274 (Pa.Super.1999). The same is true in interpreting restrictive covenants. **Id.** However, there is an important difference in the rule of interpretation as applied to restrictive covenants on the use of land. **Id.** Restrictive covenants are limitations on a person's 'free and unconstrained use of property.' **Richman v. Mosites,** 704 A.2d 655, 657 (Pa.Super.1997). They are not favored by the law, yet they are legally enforceable. **Logston v. Penndale, Inc.,** 394 Pa.Super. 393, 576 A.2d 59, 62 (1990). As such, they are to be strictly construed against persons seeking to enforce them and in favor of the free and unrestricted use of property. **Baumgardner,** 735 A.2d at 1274.

Pocono Summit Realty, LLC v. Ahmad Amer, LLC, 52 A.3d 261, 269 (Pa. Super. 2012). Further, "[i]n [the] absence of fraud, accident or mistake, parol evidence is inadmissible to vary or limit the scope of a deed's express covenants, and the nature and quantity

of the interest conveyed must be ascertained by the instrument itself ... ." **Kimmel v. Svonavec,** 369 Pa. 292, 295, 85 A.2d 146, 148 (1952).

Fifty-eight years ago former Chief Justice Stern succinctly and accurately summarized what is still the law today with respect to restrictions on the use of land:

> In order properly to consider and determine the question involved it is important at the outset to have in mind the applicable legal principles that have been enunciated, frequently reiterated, and consistently applied, through a long succession of cases decided by this court.[] However variously phrased, they are, in substance, that restrictions on the use of land are not favored by the law because they are an interference with an owner's free and full enjoyment of his property; that nothing will be deemed a violation of a restriction that is not in plain disregard of its express words; that there are no implied rights arising from a restriction which the courts will recognize; that a restriction is not to be extended or enlarged by implication; that every restriction will be construed most strictly against the grantor and every doubt and ambiguity in its language resolved in favor of the owner.

Jones v. Park Lane for Convalescents, Inc., 348 Pa. 268, 271-72, 120 A.2d 535, 537-38 (1956) (footnote omitted).

Under these standards, the residential use of the Plaintiffs' properties is not restricted to owner-occupied residential use; the rental of the properties is not prohibited; and no distinction is made between short-term and long-term rentals.[6] Not only does Covenant 1 not explicitly, or even implicitly, bar the rental of property, that the Plaintiffs' properties could be rented was expressly contemplated in Covenant 13 to which we now turn. **Vernon Township Volunteer Fire Department, Inc. v. Connor,** 579 Pa. 364, 375, 855 A.2d 873, 879 (2004) ("It is a fundamental rule of contract interpretation that the intention of the parties at the

[6] Nevertheless, in restricting the type of building to be erected to one detached single-family dwelling, Covenant 1 further limits the residential use to that of a private nature, thereby excluding residential purposes of a public character such as general public boarding or apartment houses. **Kauffman v. Dishler,** 380 Pa. 63, 68 n.1, 110 A.2d 389, 392 n.1 (1955).

time of contract governs and that such intent must be ascertained from the entire instrument.").

Covenant 13—Tenant Membership in Association

Covenant 13 conditions the renting or leasing of property within the Development only to persons first approved for membership in the Association. Defendants claim that none of Plaintiffs' tenants have ever been approved for membership in the Association and that Plaintiffs are prohibited from renting to non-members. Plaintiffs do not dispute that their tenants have not been members of the Association, but counter that this limitation on leasing has been abandoned. According to Plaintiffs, since the Association's inception in 1964, and until its letter of January 15, 2011, the Association has never enforced this aspect of Covenant 13, has been aware of and knowingly allowed the rental of properties to non-members, and has gone so far as amending its Bylaws in 1990 to provide for an additional assessment on property owners who rent for the additional burden on the common property in the Development attributable to tenants. (George Dep., pp. 71-77, 5/17/13.)[7]

Specifically, Article XII of the Association's Bylaws, which is captioned "Leasing Rights," was amended in 1990 to provide:

> A. Any member has the right to rent or lease his property **to adults of their choice** so long as they comply with the provisions of this Article and the remainder of the Bylaws.
>
> B. Since the leasing of a property puts an added burden on the Association and its facilities, it shall be the responsibility of the member to collect a fee from the lessee and pay this fee to the Association to cover their added expenses, all in accordance with a fee schedule established by the Board of Directors.
>
> C. Any member who leases or rents his property accepts responsibility and liability for the conduct of the lessee.

[7] The Association has approximately nine hundred members, all of whom are property owners within the Development. Each property owner, by virtue of his ownership status, is automatically a member in the Association. (George Dep., pp. 71-72, 5/17/13.)

In his deposition, Mr. George testified that the Association has never admitted tenants as members and that although property owners who lease their property register their leases with the Association, they have not been required to seek membership approval for their tenants. (**Id.** at 71-77.)

> D. Members shall obtain 'Lessee Privilege Cards' from the Administrative Secretary or such other person designated by the Board of Directors. The 'Lessee Privilege Card' shall be purchased in advance for a specific period of time, and the lessee shall carry the card on his person for identification purposes.
>
> E. The Association reserves the right to cancel a 'Lessee Privilege Card' in the event the lessee violates the Rules and Regulations of the Association or any of the provisions of these Bylaws. In the event the Association cancels a 'Lessee Privilege Card', there will be no refund of the fee and the lessee will be required to move out of Holiday Pocono immediately.

Association Bylaws, revised 1990 (emphasis added) (Complaint and Answer, ¶12, Exhibit "F").[8] In addition, Section 2 of the Association's rules and regulations promulgated by the Board of Directors, as amended on August 17, 2007, provided that property owners in leasing their properties should be aware that the provisions of the Township zoning ordinance governing an R-2 Residential Medium-Density District are applicable to the Development. (Complaint and Answer, ¶19, Exhibit "H.")[9]

"As a general rule, a restrictive covenant may be discharged if there has been acquiescence in its breach by others, or an abandonment of the restriction." **Vernon Township Volunteer Fire Department, Inc., supra** at 376, 855 A.2d at 880. Abandonment is a question of intent, whether expressly stated or inferred by implication from surrounding facts and circumstances. The burden of proving that the holder of a right has knowingly relinquished its enforcement is upon the party asserting abandonment. **See Benner v. Tacony Athletic Ass'n,** 328 Pa. 577, 581-82, 196 A. 390, 393 (1938); **Rieck v. Virginia Manor Company,** 251 Pa. Super. 59, 64-65, 380 A.2d 375, 378 (1977). It is not enough to merely show that the right has not been enforced or that the holder has simply tolerated noncompliance. "It is only when violations are permitted to such an extent as to indicate that the [right] has been abandoned that objection to further violations is barred. Nor will indulgence work a waiver or estoppel against the enforcement of restrictions which are distinct and separate from those previously violated." **Benner, supra.**

[8] Notwithstanding this amendment, it appears the Association has never established a fee schedule for renters. (Complaint and Answer, ¶14.) In allowing members to rent "to adults of their choice," Article XII, paragraph A, at a minimum calls into question the continuing validity of the membership requirement for a tenant contained in Covenant 13. In noting this variance, we are not suggesting that an amendment to the Bylaws takes precedence over an inconsistent deed covenant. **Wilkins v. Lake Meade Property Owners Assn., Inc.,** 60 D. & C.2d 670, 672 (Adams Co. 1972) (holding that bylaw amendments cannot impair or alter property or contractual rights without the consent of the affected parties). However, as discussed further in the text, this Bylaw change is clear evidence of acquiescence to the breach and an abandonment of the membership requirement for tenants contained in Covenant 13.

[9] The Association's Bylaws are not the same as the Association's Rules and Regulations. The Bylaws are adopted by the property owners and are subject to change only by a majority vote of the property owners. In contrast, the Rules and Regulations are adopted by the Association's Board of Directors, and are consequently subject to change by a majority vote of the Board of Directors. (Complaint and Answer, ¶21.)

Whether enforcement of a restriction should be barred by acquiescence or abandonment requires an analysis of the number, extent and character of violations that have occurred, over what time, and the reason why no action was taken. **Moore v. Gangemi,** 1 D. & C.2d 58, 65 (Phil. Co. 1952). Here, Plaintiffs each purchased their properties with the expectation and intent of renting, and listed and rented their properties through real estate agents for several years prior to 2011. After reviewing the prior rental history and the Association's covenants, Bylaws, and Rules and Regulations, Richard Dawson purchased his property in February of 2007 for the purpose of renting and in fact rented the property between 2007 and 2011 (Dawson Dep., pp. 7-14, 5/25/13); John Montagno, whose property had also been used for rental purposes prior to his purchase, purchased his property in 2005 believing the same could be freely rented (Montagno Dep., pp. 8-9, 14-20, 5/25/13); John Nelson purchased his property in 1997 and rented the property from that time until the Association changed its Bylaws in October 2012 to prohibit short-term rentals. (Nelson Dep., pp. 8-10, 5/25/13.) Before purchasing his present property, Mr. Nelson had previously built another home in the Development in 1986 which he also leased. (**Id.** at 10.)

Moreover, the Association has knowingly allowed property owners to rent their properties without requiring tenant membership in the Association. As of February 11, 2011, approximately nineteen property owners were renting their properties on weekends and at least thirty-five property owners were renting their properties

for other terms. (George Dep., pp. 32-34, 5/17/13.) None of these tenants became members in the Association. (**Id.** at 71-72.)

At no time has Covenant 13's requirement that a tenant first be approved for membership been invoked or enforced. This despite members employing realtors for rental purposes, members advertising their property for rental purposes, and buyers relying upon the Association's Rules and Regulations, as well as its Bylaws, as they existed prior to 2011, in their decision to buy and rent properties within the Development. The breadth and extent of the Association's acquiescence and abandonment of Covenant 13's restriction prohibiting rental to tenants other than those approved for membership in the Association was expressly recognized and confirmed by the 1990 Amendment to Article XII of the Bylaws, necessarily voted upon by a majority of the members themselves, which allowed property owners to rent or lease their property to adults of their choosing so long as they complied with the provisions of Article XII and the remainder of the Bylaws. This amendment was existing and in effect for more than twenty years before the Association's enforcement notices sent to the Plaintiffs, Richard Dawson and John Montagno, on January 15, 2011.

Given these facts, we conclude that the Association and its members have acquiesced in the open and notorious violation of the requirement of tenant membership in the Association under circumstances evidencing an unmistakable intent not to enforce this provision such that any objection to further violation at this time is now barred.[10]

[10] In the context of deed restrictions which have become outdated, the Superior Court in **Rieck v. Virginia Manor Company,** 251 Pa. Super. 59, 380 A.2d 375 (1977) stated:

> In order to effect a release or discharge of the real covenants the burden of proof is upon the owners of the servient tenements to show that the original purpose and intent of the restrictions have been materially altered or destroyed by changed conditions and that substantial benefit and advantage may not inure to the owners of the dominant tenement by the enforcement of the restrictions.

Id. at 64, 380 A.2d at 378. While Plaintiffs have not specifically claimed that the membership requirement for a tenant is outdated, the original purpose and intent of this restriction is unclear. To the extent registration or a background check of tenants was sought, this could easily have been accomplished by means other than membership approval, which appears from the face of the deed covenants

Validity of Unconsented to Amendments to the Association's Bylaws, and Rules and Regulations, Which Affect Property Rights

Since the January 15, 2011, enforcement notice sent by the Association, the Association on February 18, 2011, amended its Rules and Regulations to prohibit short-term leasing. (Complaint and Answer, ¶20, Exhibit "I.") Further, the Bylaws were amended on October 13, 2012, to prohibit property owners from leasing their property for a term of less than one year in duration. Plaintiffs argue these changes are not binding on them.

Covenant 12 does not allow the Association to alter the Plaintiffs' property rights at will. To the contrary, "provisions affecting property or contractual rights cannot be repealed or altered without the consent of the parties **whose interests are thereby impaired**." **Schaad v. Hotel Easton Co.,** 369 Pa. 486, 492, 87 A.2d 227, 230 (1952) (emphasis added). This is particularly true where actual rights of property ownership are affected. In **Weona Camp, Inc. v. Gladis,** 72 Pa. Commw. 318, 320, 457 A.2d 153, 154 (1983), the Commonwealth Court expressly held that property rights of the members of a non-profit corporation may not be affected without their unanimous consent. That a prohibition on the short-term leasing of real estate works as a restriction and curtailment of inherent rights of ownership cannot be disputed. Consequently, such limitation is not judicially enforceable unless consented to by the affected owners.

Township Zoning Ordinance

Defendants argue that the short-term rental of a single family residence for use as a temporary residence violates the Kidder

to place a tenant on equal standing with an owner as a member of the Association. (George Dep., p. 69, 5/17/13.) Whether this was fully intended and thought through is not apparent from the record.

We believe it also important to note that even absent a finding of abandonment, to the extent Defendants argue that Plaintiffs are not entitled to summary judgment because none of Plaintiffs' tenants have been approved for membership in the Association, this is disingenuous. (**See** Defendants' Brief in Support of their Motion for Summary Judgment, pp. 2, 4-5.) The Association does not and has never approved tenants as members. **See Craig Coal Mining Company v. Romani,** 355 Pa. Super. 296, 301, 513 A.2d 437, 440 (1986) ("[A party] may not ... take advantage of an insurmountable obstacle placed, by himself, in the path of the other party's adherence to an agreement. By preventing performance he also excuses it.").

Township Zoning Ordinance.[11] Defendants do not argue that the Ordinance prohibits property from being rented, but rather that if the tenant is other than a traditional family unit, such as several couples renting a home for a weekend skiing trip, or a group of students for spring break, this usage is not permitted under the Zoning Ordinance. Specifically, Defendants argue that when Plaintiffs lease their properties to groups of individuals who are not families, the property is being used as a rooming or boarding house which is prohibited in the zoning district in which the Development is located.[12]

The Development is located in an R-2 Residential Medium-Density District. Permitted uses in this district include single-family and two-family houses. (Zoning Ordinance, §180-14.) A single-family house is defined in the Zoning Ordinance as "[a] dwelling unit accommodating a single household and having two side yards." (Zoning Ordinance, §180-6 (Definitions).) A dwelling unit is defined as "[a] building or portion thereof providing complete housekeeping facilities for one family or household." **Id.** A family is defined as "[o]ne or more persons who live together in one dwelling unit and maintain a common household. A family may consist of a single person or two or more persons, whether or not related by blood, marriage or adoption. Family may also include domestic servants and gratuitous guests. A family shall not include residents of a group residence, boarding home and/or personal care home." **Id.**

From these definitions we conclude that a group of people who reside together in a single-family home which meets the housekeeping needs of that group, including the sharing of common areas (**e.g.,** kitchen, dining room, living room, and bathroom facilities), is a permitted use in an R-2 District, regardless of whether the occupants of the home are related by blood, marriage, or adoption. This reading comports with the standard that a zoning ordinance must be strictly construed and that "a permitted use must be af-

[11] At the outset, we are hesitant to address this issue because Defendants appear to be positing hypotheticals rather than concrete examples, stating only that "Plaintiffs have no idea who their properties are leased by as they all work through agents" (Defendants' Brief in Support of their Motion for Summary Judgment, p. 8), and also on grounds of standing. Neither the Association's Bylaws nor its Rules and Regulations incorporate as its own the Township's zoning ordinance. Instead, the Rules and Regulations simply advise members and their guests that even though the Development is a private community bound by deed covenants and managed by an association of property owners, federal, state, and local laws also apply, including the provisions of the Township's zoning ordinance, which property owners must abide by. Therefore, were the Association to take action to enforce the provisions of the Township's zoning ordinance, the authority for such action would likely be premised upon 53 P.S. §10617, rather than enforcement of a rule or regulation of the Association allegedly prohibiting property owners within the Development from leasing in violation of the Township's zoning ordinance. **See Parker v. Hough,** 420 Pa. 7, 12, 215 A.2d 667, 670 (1966) (noting that the differences between a zoning regulation and a covenant restriction are significant).

Section 617 of the Municipalities Planning Code authorizes an aggrieved owner of property who demonstrates that his property would be substantially affected by a zoning violation to institute an appropriate action to prevent the violation, provided notice of the action is first "served upon the municipality at least 30 days prior to the time the action is begun by serving a copy of the complaint on the governing body of the municipality." 53 P.S. §10617. Failure to serve this notice is fatal to the commencement of a private claim predicated directly on the violation. **Karpiak v. Russo,** 450 Pa. Super. 471, 482, 676 A.2d 270, 275 (1996); **see also, Bowers v. T-Netix,** 837 A.2d 608 (Pa. Commw. 2003). In **Bowers,** the court stated:

> Generally, standing is not an issue of subject matter jurisdiction and, therefore, may not be raised by the court **sua sponte.** ... However, where, as here, a statute creates a cause of action and designates who may sue, the issue of standing is so interwoven with that of subject matter jurisdiction that it becomes a jurisdictional prerequisite to an action.

Id. at 613 n.14 (citation omitted).

Procedurally, the Association is a defendant in these proceedings and has not commenced an action against Plaintiffs. Therefore, Section 617 of the Municipalities Planning Code is not technically in play. And while it does not appear from our reading of the Association's Rules and Regulations that the Association has the authority under these Rules and Regulations alone to enforce the provisions of the Township's zoning ordinance, Plaintiffs have not questioned Defendants' standing to do so and have not argued that Defendants' concerns about the type of tenants Plaintiffs select is speculative. As to such issues, it is inappropriate for a trial court to **sua sponte** raise an issue that has not been raised by the parties. **See Shamis v. Moon,** 81 A.3d 962, 970 (Pa. Super. 2013) (noting that "a trial court cannot raise an argument in favor of summary judgment **sua sponte** and grant summary judgment thereon."). We are also cognizant that part of Plaintiffs' claim is for declaratory judgment. Accordingly, we will address the issue.

[12] The Zoning Ordinance defines a rooming and boarding house as follows:

> Any dwelling in which more than three but not more than 20 persons, either individually or as families, are housed or lodged for hire with or without meals. A rooming house or a furnished-room house shall be deemed a boardinghouse.

(Zoning Ordinance, §180-6 (Definitions).)

forded the broadest interpretation so that a landowner may have the benefit of the least restrictive use and enjoyment of his land." **JALC Real Estate Corporation v. Zoning Hearing Board of Lower Salford Township,** 104 Pa. Commw. 605, 609, 522 A.2d 710, 712 (1987).

Tort Liability

Counts 3 and 4 of the complaint assert claims of fraudulent misrepresentation and negligent misrepresentation, respectively, on behalf of the Plaintiffs, Richard Dawson and John Montagno. To establish a **prima facie** case of fraud, a plaintiff must show: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance. **Blumenstock v. Gibson,** 811 A.2d 1029, 1034 (Pa. Super. 2002), **appeal denied,** 573 Pa. 714, 828 A.2d 349 (2003). "Scienter, or the maker's knowledge of the untrue character of his representation, is a key element in finding fraudulent misrepresentation." **Weston v. Northampton Personal Care, Inc.,** 62 A.3d 947, 960 (Pa. Super. 2013). Further, the standard of proof is clear, precise and convincing evidence. **Yoo Hoo Bottling Company of Pennsylvania, Inc. v. Leibowitz,** 432 Pa. 117, 119, 247 A.2d 469, 470 (1968).

The elements of a **prima facie** case for negligent misrepresentation are "(1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter ought to have known its falsity; (3) with an intent to induce another to act on it; and (4) which results in injury to a party acting in justifiable reliance on the misrepresentation." **Heritage Surveyors & Engineers, Inc. v. National Penn Bank,** 801 A.2d 1248, 1252 (Pa. Super. 2002). The differences between a fraudulent misrepresentation and negligent misrepresentation are the state of mind of the person making the misrepresentation and the standard of proof that must be met by the plaintiff. **Kerrigan v. Villei,** 22 F. Supp. 2d 419, 429 (E.D. Pa. 1998). With a negligent misrepresentation claim, the misrepresentation must concern a material fact and the speaker need only have failed to make a reasonable investigation of the truthfulness of the

representation (**i.e.,** failure to exercise reasonable care in supplying the information). **Gibbs v. Ernst,** 538 Pa. 193, 209, 647 A.2d 882, 890 (1994). Furthermore, whereas fraudulent misrepresentation must be demonstrated by clear and convincing evidence, negligent misrepresentation may be established by a preponderance of the evidence. **Kerrigan, supra** at 429.

Defendants argue that the Defendant, Hank George, acted with reasonable skill and due care and, therefore, cannot be said to have intentionally or negligently misled the Plaintiffs when he sent the January 15, 2011, enforcement notice threatening to fine the Plaintiffs, Richard Dawson and John Montagno, for violating the deed covenants, Association's Bylaws, and Township zoning ordinance. In making this argument, Defendants refer specifically to Mr. George's deposition testimony in which he testified that prior to sending this warning, he reviewed the Development's deed covenants, Association's Bylaws, and Township zoning ordinance, as well as the Uniform Planned Communities Act, Municipalities Planning Code, Uniform Construction Act, and Pennsylvania Code Chapters 73 and 109, relating to sewers, septic systems, and drinking water. (George Dep., pp. 88-89, 5/17/13.) Additionally, Mr. George testified that he received and relied on advice from two different solicitors for the Development and participated in a meeting with the Kidder Township Zoning Board and its solicitor. (**Id.** at 88-90.)

While all of this may be true, whether it is and whether Mr. George reasonably relied upon it is for the fact-finder to determine. In ruling on a motion for summary judgment, the credibility and reliability of the oral testimony of a party is as much a fact in issue as is any other fact upon which the parties do not agree. **Borough of Nanty-Glo v. American Surety Co. of New York,** 309 Pa. 236, 238, 163 A. 523, 524 (1932).

> The **Nanty–Glo** rule means the party moving for summary judgment may not rely solely upon its own testimonial affidavits or depositions, or those of its witnesses, to establish the non-existence of genuine issues of material fact. ... Testimonial affidavits of the moving party or his witnesses, not documentary, even if uncontradicted, will not afford sufficient basis for the entry of summary judgment, since the credibility of the testimony is still a matter for the [factfinder]. ...

> If, however, the moving party supports its motion for summary judgment with admissions by the opposing party, **Nanty–Glo** does not bar entry of summary judgment. ... To carry the weight of a binding judicial admission, however, the opposing party's acknowledgment must conclusively establish a material fact and not be subject to rebuttal.

DeArmitt v. New York Life Insurance Company, 73 A.3d 578, 595 (Pa. Super. 2013) (internal quotation, citations, and corrections omitted).

Further standing in opposition to Defendants' Motion is that the schedule of fines cited in Mr. George's January 15, 2011, enforcement notice is not provided for in the Association's Bylaws, its Rules and Regulations, or any other source binding on the property owners, and apparently was designed to coerce Plaintiffs into ending their short-term rentals. (George Dep., pp. 36-41, 5/17/13.) Added to this is that in Mr. George's position as a director and officer of the Association he stood in a fiduciary relation to the Association and its members, and was required to act not only with the care which a person of ordinary prudence would use under similar circumstances, but also to perform his duties in good faith. 68 Pa. C.S.A. §5303(a); **see also, McMahon v. Pleasant Valley West Association,** 952 A.2d 731, 736 (Pa. Commw. 2008) (**quoting** Restatement (Third) of Property (Servitudes) §6.13 (2000) for the proposition that a homeowners' association owes a duty to treat its members fairly and to act reasonably in the exercise of its discretionary powers, including rulemaking, enforcement, and design control powers). Because the facts are not undisputed, on this issue both parties' Motions for Summary Judgment will be denied.

CONCLUSION

In general, an owner of property is entitled to use his property in any way he desires, "**provided he does not** (1) violate any provision of the Federal or State Constitutions; or (2) create a nuisance; or (3) **violate any covenant, restriction** or easement; or (4) violate any laws of zoning or police regulations which are constitutional." **Parker v. Hough,** 420 Pa. 7, 11, 215 A.2d 667, 669 (1966) (emphasis in original) (citation omitted). When, however, a restriction or covenant limits the use of real estate, the limitation is narrowly construed in favor of the owner and may, over time, dissipate and be lost.

Holiday Pocono is a private community held together by a common set of restrictive covenants which bind some, but do not nullify all, rights of ownership. The Development is located in the Poconos with many of the homes being second homes used as vacation properties by their owners. Common sense dictates that the right to lease these homes, especially on a short-term basis, is important. To relinquish this right by covenant requires an express clear statement that the right does not exist. To do so either in an association's bylaws or the rules and regulations of its board of directors requires the express consent of all affected owners. To do so by zoning is prohibited as a matter of law since the regulation of the exercise of ownership rights is distinct from the regulation of how property is used. **County of Fayette v. Cossell,** 60 Pa. Commw. 202, 204, 430 A.2d 1226, 1228 (1981) ("[I]f a use is permitted, a municipality may not regulate the manner of ownership of the legal estate."). Because none of these conditions have been met, we find that the Plaintiffs are not barred from the short-term rental of their properties in Holiday Pocono to tenants who use the property for residential purposes for their sole and exclusive use.

In re: TERMINATION of PARENTAL RIGHTS of A.M. and C.R. in and to F.M., a Minor

Civil Law—Termination of Parental Rights—Grounds for Termination—Abandonment—Neglect—Removal—Best Interest Analysis—Significance of Dependency Court's Change in Goal From Reunification to Adoption—Impact of the Federal Adoption and Safe Families Act on Termination Proceedings—Children's Fast Track Appeal—Failure to File Timely Concise Statement

1. By statute, a two-step analysis must be undertaken by the court when making a determination whether parental rights should be terminated. First, the court determines whether the parent's conduct satisfies at least one of the nine statutory grounds for termination. Next, the court determines whether the best interests of the child will be served if parental rights are terminated.

2. Termination of parental rights under Section 2511(a)(1) of the Adoption Act requires that for a period of at least six months immediately preceding the filing of a petition for termination the parent either (1) demonstrated a settled purpose of relinquishing parental rights or (2) refused or failed to perform parental duties.

3. Notwithstanding that a parent's conduct would justify termination under Section 2511(a)(1) of the Adoption Act, before parental rights will be terminated, the court must consider whether the totality of the circumstances clearly warrant termination. When looking at the totality of the circumstances,

three factors are primarily considered: (1) the parent's explanation for his or her conduct; (2) any post-abandonment contact between the parent and child; and (3) the effect termination will have on the child as required by Section 2511(b) of the Adoption Act.

4. Termination of parental rights under Section 2511(a)(2) of the Adoption Act requires that the following parental conduct be established by clear and convincing evidence: (1) repeated and continued incapacity, abuse, neglect or refusal; (2) that such incapacity, abuse, neglect or refusal caused the child to be without essential parental care, control or subsistence; and (3) that the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied.

5. The grounds for termination of parental rights under Section 2511(a)(2) are not limited to affirmative misconduct. Such grounds may include acts of refusal as well as incapacity to perform parental duties. A parent who is incapable of performing parental duties is just as parentally unfit as one who refuses to perform the duties.

6. In contrast to the grounds for termination set forth in Section 2511(a)(1) of the Adoption Act, Section 2511(a)(2) does not emphasize a parent's refusal or failure to perform parental duties, but instead emphasizes the child's present and future need for essential parental care, control or subsistence necessary for his physical or mental well-being.

7. Termination of parental rights under Section 2511(a)(5) of the Adoption Act requires that the following be established: (1) the child has been removed from parental care for at least six months; (2) the conditions which led to the child's removal or placement continue to exist; (3) the parents cannot or will not remedy the conditions which led to removal or placement within a reasonable period of time; (4) the services reasonably available to the parents are unlikely to remedy the conditions which led to removal or placement within a reasonable period of time; and (5) termination of parental rights would best serve the needs and welfare of the child.

8. A dependency court's decision in dependency proceedings to change the goal from reunification to termination and adoption is binding on the orphans' court in a termination proceeding as to the same factual issues, namely, that Children & Youth Services has provided adequate services to the parent but that the parent is nonetheless incapable of caring for the child.

9. Following an adjudication of dependency and placement in foster care, the child's best interests, not those of the parents, are given primary consideration when deciding between parental reunification or termination of parental rights. In the case of a child who has been in foster care fifteen out of the most recent twenty-two months, and provided reasonable efforts at reunification have been made, the Federal Adoption and Safe Families Act contemplates that termination proceedings will have been begun and that the entire process will have been completed within eighteen months.

10. Once it has been established that a parent's conduct would justify terminating parental rights, termination nevertheless will not be granted unless the court also determines that the best interests of the child will be served by termination, taking into primary consideration the developmental, physical and emotional needs and welfare of the child.

11. The rules of appellate procedure require that in a children's fast track appeal a concise statement of the errors complained of on appeal be filed and served with the notice of appeal. Because of the unique nature of parental termination cases a failure to comply with this requirement will not automatically result in a finding of waiver.

NO. 12-9172

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MEMORANDUM OPINION

NANOVIC, P.J.—February 19, 2014

A.M. (Father) and C.R. (Mother) (collectively Parents) are two young parents suffering from serious mental health conditions, complicated by drug and alcohol dependency. These conditions hindered Parents in adequately caring for their newborn daughter, F.M. For over a year and a half, Carbon County Children and Youth Services (CYS) offered Parents the services needed to cope with their circumstances and enable them to care for their daughter. Unfortunately, Parents did not take advantage of these services and their parental rights in F.M. were terminated. Father now appeals that termination.[1] For the reasons explained below, we recommend that our Order terminating Father's parental rights be affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

F.M. was born on October 27, 2010. (N.T., 2/19/13, p. 5.) She is the biological daughter of Mother, who was seventeen years old at the time, and Father, who was then eighteen years of age. **Id.** On December 9, 2010, less than two months after F.M. was born, she was admitted to Gnaden Huetten Memorial Hospital with multiple bruises and a fractured left radius. **Id.** Because Parents could not explain F.M.'s injuries, CYS placed F.M. in emergency shelter care and filed a child abuse report against both Mother and Father. **Id.** at 8. In this report, both parents were indicated as having physically abused F.M.[2] **Id.**

[1] Mother has not appealed this decision.

[2] Mother appealed this finding, which was ultimately dismissed because CYS declined to proceed with her appeal. (N.T., 2/19/13, p. 8.) Father also appealed but later withdrew his challenge. **Id.** Accordingly, Father's status remains as indicated for physical abuse of F.M. **Id.**

On January 24, 2011, F.M. was adjudicated dependent.[3] **Id.** at 9. At this time a Family Service Plan (FSP) was implemented that Parents needed to comply with in order for F.M to be returned to their care. **Id.** The FSP required Parents to participate in in-home services offered by JusticeWorks[4] and complete a parenting assessment, and required Father to complete an anger management assessment. **Id.** Parents initially complied with the FSP. **Id.** at 12. Consequently, after six months in foster care, on June 23, 2011, F.M. was returned to their care. **Id.** at 10. Nevertheless, F.M.'s status remained that of a dependent child. **Id.** at 11.

At first, F.M.'s return to Parents' care appeared successful. Parents had stable housing with Father's family, Father supported Mother and F.M. by working at a grocery store, and they continued to receive services from JusticeWorks. (N.T., 5/16/13, pp. 182-83.) However, problems arose within a month of F.M.'s return, when on July 17, 2011, Mother overdosed on blood pressure medication in an attempted suicide. (N.T., 2/19/13, p. 12.)

A week after this suicide attempt, CYS asked Doctor John Seasock to perform a psychological evaluation of Parents. **Id.** Dr. Seasock's evaluation revealed that Parents suffered from serious mental health issues as well as drug and alcohol dependency that limited their ability to adequately care for F.M. Dr. Seasock diagnosed Mother with severe depression, psychotic features such as auditory and visual hallucinations, and borderline personality disorder. (N.T., 5/16/13, pp. 8-10.) These conditions caused Mother to not understand F.M.'s cues to respond to her needs. **Id.** at 11, 13. They also severely limited Mother's ability to care for herself. **Id.** at 12-13. Consequently, Dr. Seasock recommended, and the FSP then required, that another adult supervise Mother when she cared for F.M. **Id.**

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[3] In the dependency proceedings, this Court, per the Honorable Steven R. Serfass, found that aggravated circumstances existed due to the Father's physical abuse of F.M. **Id.** at 28; **see also,** 42 Pa. C.S.A. §§6302 (Definition of "Aggravated Circumstances") and 6341(c.1) and 6351(f)(9) (effect of court finding of aggravated circumstances on dependency adjudication and disposition).

[4] These services included helping Parents with budgeting, making the home safe for F.M., teaching parenting skills, aiding Father in finding a job, providing drug screenings, and transporting Parents to various services. (N.T., 2/19/13, pp. 68-70.)

Dr. Seasock diagnosed Father with bipolar disorder and poly-substance dependence. **Id.** at 19. Father suffered mood swings that caused him to turn violent and aggressive. **Id.** at 16. By the age of nineteen, Father had been psychiatrically hospitalized seven times, starting at the age of six, for violent and aggressive behavior. **Id.** at 16-17. Father abused drugs and alcohol to control his mood swings. **Id.** at 17. Unlike Mother, Dr. Seasock found that Father, while limited, was able to adequately care for F.M. **Id.** at 19-20.

Based on his evaluation, Dr. Seasock found the family to be at high risk because, with Mother's inability to care for F.M., Father had to shoulder the majority of the parenting responsibilities. **Id.** at 21-22. Dr. Seasock feared that the stress of this responsibility would cause Father to turn aggressive or abandon the family, leaving Mother by herself with F.M. **Id.** at 22.

Based on Dr. Seasock's evaluation, the court-ordered FSP was amended to include the following conditions: (1) Parents to continue with JusticeWorks and follow its recommendations, (2) Parents to complete parenting classes, (3) Parents to seek mental health treatment and follow any recommendations made, (4) Mother not to be left alone with F.M. for more than four hours, and (5) Father to complete anger management classes. The FSP was clear that if Parents failed to comply with these conditions, CYS would remove F.M. from their care.

To assist Parents in complying with the FSP, CYS offered Parents multiple services. In addition to the programs offered by JusticeWorks, CYS referred Parents to parenting classes offered by Right From the Start, referred Parents to mental health services through ReDCo, referred Father to drug and alcohol rehabilitation services, and referred Father to anger management classes through Care Net. (N.T., 2/19/13, pp. 13-18, 20.)

Unfortunately, Parents did not utilize the services provided and did not comply with the FSP. First, Parents frequently prevented JusticeWorks from entering their home to provide services. **Id.** at 73. On occasions when JusticeWorks was allowed into the home, only Mother would participate, and on several visits, Father was verbally abusive to JusticeWorks' employees. **Id.** at 74-75. Second, Parents refused to participate in the parenting classes offered by

Right From the Start. **Id.** at 14. Parents told CYS they did not need the classes. **Id.** at 15. Third, because Parents did not attend recommended outpatient counseling, they were unsuccessfully discharged from ReDCo's mental health treatment. **Id.** at 17-19. Fourth, because Father did not attend the required sessions, he was unsuccessfully discharged from anger management classes. **Id.** at 15-16. Finally, Father did not complete drug and alcohol treatment, which was later added to the FSP. **Id.** at 20, 31. This condition was added after Father tested positive for drugs on numerous occasions.[5] **Id.** at 19.

Because of Parents' hollow efforts to comply with the FSP, on December 22, 2011, CYS removed F.M. from Parents' care and returned her to emergency care. **Id.** at 20. F.M. has not been in Parents' care since that date. **Id.**

After F.M. was removed from their home, Parents' lives deteriorated. Father lost his job in December 2011, and he did not find employment for the next six months. (N.T., 6/17/13, pp. 73-74.) By January 2012, Parents were homeless. (N.T., 2/19/13, p. 23.) **Id.** at 23. During this time, they lived in their car, a motel, or with Mother's grandmother in Lehigh County, Pennsylvania. **Id.** at 23-24. JusticeWorks attempted to provide services to help Parents find shelter but Parents refused. **Id.** at 79-81. On February 1, 2012, JusticeWorks discharged Parents from its program for noncompliance. **Id.** at 79. Parents then stopped communicating with CYS from February 1, 2012, to the end of March. **Id.** at 23. During this two-month period, Parents had no contact with F.M. **Id.** at 25. From March 2012 to June 2012, despite having visitation rights, Parents' visits and contact with F.M. were infrequent. **Id.** at 27. Parents also continued not to comply with the FSP.

After close to a year of noncompliance with the FSP, and sixteen months after F.M. was adjudicated dependent, on June 1, 2012, F.M.'s placement goals in the dependency proceedings were changed from reunification to adoption. **Id.** at 34. Seven days later,

[5] Father tested positive for Vicodin, Xanax, Ativan, and marijuana on September 16, 2011; November 2, 2011; November 22, 2011; December 7, 2011; December 22, 2011; and January 25, 2012. (N.T., 2/19/13, p. 19.) He also refused to take a drug test on October 21, 2011. **Id.** Father did not submit to drug tests from January 2012 to January 2013. (N.T., 6/17/13, p. 58.)

on June 8, 2012, CYS petitioned to have Parents' parental rights over F.M. terminated. **Id.** At this time, the FSP required (1) Parents to complete parenting classes, (2) Parents to seek mental health treatment and follow recommendations, (3) Father to complete anger management classes, (4) Parents to submit to random drug tests, (5) Father to complete drug and alcohol treatment, (6) Parents to maintain financial stability, and (7) Parents to obtain and maintain stable housing. As of June 8, 2012, Parents complied with none of these requirements. **Id.** at 31-32.

On December 8, 2012, six months after the termination petition was filed, Dr. Seasock performed a second evaluation of Parents. (N.T., 5/16/13, p. 25.) Dr. Seasock again diagnosed Mother with depression, psychotic features, and borderline personality disorder. **Id.** at 26, 28. He found that these conditions still prevented Mother from meeting F.M.'s needs as a parent. **Id.** at 29-30. He opined that there was a low probability that Mother would ever develop the ability to adequately care for F.M. **Id.** at 30.

In his evaluation of Father, Dr. Seasock again diagnosed Father with bipolar disorder and polysubstance dependence. **Id.** at 39. He found that Father continued to use drugs and alcohol to deal with his anger and mood swings. **Id.** at 38. Dr. Seasock observed that Father's condition had deteriorated to the point that he was no longer able to adequately care for F.M. **Id.** at 40-41. While Dr. Seasock believed that with drug, alcohol, and mental health treatment Father would be able to adequately care for F.M. in the future, Dr. Seasock also noted that Father had demonstrated a pattern of not complying with drug and alcohol programs and not complying with mental health treatment. **Id.**

As part of his evaluation, Dr. Seasock performed a bonding assessment of the relationship between Parents and F.M. He found that no parental bond existed between F.M. and either Parent. **Id.** at 32-33, 43-44. Rather, he described the relationship which existed between F.M. and Parents as that which exists between playmates. **Id.**

Based on his evaluation, Dr. Seasock opined that F.M. should not be reunited with Parents. **Id.** at 36. Dr. Seasock testified that as of December 2012, Parents were unable to take care of themselves,

much less F.M. **Id.** at 42. He concluded that since F.M. was not attached to either parent, she would suffer no harm if her Parents' rights were terminated.[6] **Id.** at 44.

Since December 22, 2011, when F.M. was removed from Parents' care for the second time, she has thrived living with her foster parents. F.M. was placed in the home of D.M. and E.M., who also take care of F.M.'s biological sister, K.M.[7] **Id.** at 22. When F.M. initially began living with D.M. and E.M., she threw screaming tantrums. (N.T., 5/16/13, p. 94.) After several months, these tantrums stopped, and she has become a much more outgoing, confident, and happier child. **Id.** at 94, 96-97. F.M. has developed a strong relationship with D.M. and E.M., as well as with K.M. and a third child living with them. D.M. and E.M. would like to adopt all three children. **Id.** at 97, 99, 111. While in E.M. and D.M.'s care, F.M. has undergone ear surgery and received speech therapy to treat speech issues. **Id.** at 94-96, 101.

We held hearings on CYS' petition to terminate Parents' parental rights on February 19, 2013; May, 16, 2013; and June 17, 2013. At the close of the June hearing, Parents requested a third evaluation from Dr. Seasock and an opportunity to provide proposed findings of facts and conclusions of law. We allowed Parents to submit these findings. After carefully reviewing the record and these findings, we denied the request for a third evaluation and terminated Parents' parental rights. Father then timely appealed our termination. We now file this opinion in accordance with Pa. R.A.P. 1925(a).

[6] Dr. Seasock was also concerned with the dangers of reuniting F.M. with Parents after she had been removed from their home for such a long period of time. (N.T., 5/16/13, p. 45.) According to Dr. Seasock, when a child is between the ages of zero and five and is removed from the home for a period of eighteen to twenty-four months, the child suffers significant emotional, psychiatric, and bonding issues if the child is then reunited with his or her parents. **Id.** at 34. As of the June 17, 2013, hearing date, F.M. had been removed from Parents' home for eighteen straight months and twenty-four total months. **Id.** at 45. As of the date of this appeal, F.M. has been removed from Parents' home for twenty-five straight months and thirty-one total months.

[7] On October 11, 2011, Parents had a second child, K.M. (N.T., 2/19/13, p. 22.) Parents voluntarily terminated their parental rights with regard to K.M. **Id.** As of May 2013, E.M. and D.M. were in the process of adopting K.M. (N.T., 5/16/13, p. 93.)

DISCUSSION

We begin our discussion by noting that Father did not file a Concise Statement of Matters Complained of on Appeal with his Notice of Appeal. Father's appeal has been designated a children's fast track appeal. Under Pa. R.A.P. 1925(a)(2)(i), in a fast track appeal, "[t]he concise statement of errors complained of on appeal shall be filed and served with the notice of appeal required by Rule 905." When an appellant does not comply with this provision, the appeal is defective. **In re K.T.E.L.,** 983 A.2d 745, 747 (Pa. Super. 2009). This defect, however, does not cause the appeal to be automatically dismissed. **Id.** Rather, an appeal will be dismissed on this basis only if there has not been substantial compliance with the rules and the other party has been prejudiced thereby. **Id.; see also, In re J.T.,** 983 A.2d 771, 774-75 (Pa. Super. 2009) (recognizing "unique nature" of parental termination cases and holding that a "late filing of a required [rule] 1925 statement does not mandate a finding of waiver").

After Father failed to file a timely concise statement, we ordered him to file a concise statement within twenty-one days. Provided Father complies with this order, we anticipate CYS will suffer no prejudice and the appeal should proceed. However, because of the limited time we have had to file this opinion, the delay in receiving Father's concise statement has prevented us from addressing any specific issues Father may raise.[8] Accordingly, we are limited in this opinion to setting forth the reasons why Father's parental rights were terminated.[9]

Grounds for Termination

> The termination of parental rights is controlled by statute, 23 Pa.C.S.A. § 2511 **et seq.** ... Under Section 2511, the trial court must engage in a bifurcated process. The initial focus is on the conduct of the parent. ... The party seeking termination must prove by clear and convincing evidence that the parent's conduct satisfies at least one of the nine statutory grounds in

[8] By notice dated January 30, 2014, we were advised by the Deputy Prothonotary for the Superior Court that receipt of the original record in this case is due February 21, 2014.

[9] We also refer the Superior Court to our Final Decree of December 27, 2013, wherein we made thirty-four separate findings of fact.

Section 2511(a). If the trial court determines that the parent's conduct warrants termination under Section 2511(a), it must engage in an analysis of the best interests of the child under Section 2511(b), taking into primary consideration the developmental, physical, and emotional needs of the child.

In re B.C., 36 A.3d 601, 606 (Pa. Super. 2012) (citations omitted).

We terminated Father's parental rights under 23 Pa. C.S.A. Sections 2511(a)(1), (2), and (5).[10] These sections and Section 2511(b) provide:

(a) General rule.—The rights of a parent in regard to a child may be terminated after a petition filed on any of the following grounds:

(1) The parent by conduct continuing for a period of at least six months immediately preceding the filing of the petition either has evidenced a settled purpose of relinquishing parental claim to a child or has refused or failed to perform parental duties.

(2) The repeated and continued incapacity, abuse, neglect or refusal of the parent has caused the child to be without essential parental care, control or subsistence necessary for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent.

****

(5) The child has been removed from the care of the parent by the court or under a voluntary agreement with an agency for a period of at least six months, the conditions which led to the removal or placement of the child continue to exist, the parent cannot or will not remedy those conditions within a reasonable period of time, the services or assistance reasonably available to the parent are not likely to remedy the conditions which led to the removal or placement of the child within a reasonable period of time and termination of the parental rights would best serve the needs and welfare of the child.

****

(b) Other considerations.—The court in terminating the rights of a parent shall give primary consideration to the developmental, physical and emotional needs and welfare of the child. The rights of a parent shall not be terminated solely on the basis of environmental factors such as inadequate housing, furnishings, income, clothing and medical care if found to be beyond the control of the parent. With respect to any petition filed pursuant to subsection (a)(1), (6) or (8), the court shall not consider any efforts by the parent to remedy the conditions described therein which are first initiated subsequent to the giving of notice of the filing of the petition.

23 Pa. C.S.A. §2511(a)(1), (2), (5), and (b). The evidence offered overwhelmingly supported terminating Father's parental rights under these provisions.

(1) Section 2511(a)(1)

We begin with our analysis under Section 2511(a)(1). Under this provision, parental rights can be terminated if "[t]he parent by conduct continuing for a period of at least six months immediately preceding the filing of the petition either has evidenced a settled purpose of relinquishing parental claim to a child or has refused or failed to perform parental duties." **Id.** To terminate parental rights under this provision, CYS must first prove that during this six-month period Father either (1) demonstrated a settled purpose of relinquishing parental rights **or** (2) refused or failed to perform parental duties. **In re J.T., supra** at 776-77.

Once CYS makes this showing, we must consider whether the totality of the circumstances clearly warrant termination. **In re B.,N.M.,** 856 A.2d 847, 855 (Pa. Super. 2004), **appeal denied,** 582 Pa. 718, 872 A.2d 1200 (2005). When looking at the totality of the circumstances, our courts primarily look at three factors. **In re J.T., supra** at 777. First, the court analyzes the parent's explanation for his or her conduct. **Id.** Second, the court analyzes

[10] We note the standard of review for an appeal of an order terminating parental rights. For an appeal from such an order, an appellate court "is limited to determining whether the order of the trial court is supported by competent evidence, and whether the trial court gave adequate consideration to the effect of such a decree on the welfare of the child." **In re Z.P.,** 994 A.2d 1108, 1115 (Pa. Super. 2010) (citation omitted). "Absent an abuse of discretion, an error of law, or insufficient evidentiary support for the trial court's decision, the decree must stand." **Id.**

post-abandonment contact between parent and child. **Id.** Finally, the court analyzes the effect termination will have on the child as required by 23 Pa. C.S.A. §2511(b). **Id.**

Consistent with this approach, we found that Father evidenced a settled purpose of relinquishing his parental claim and refused or failed to perform parental duties during the applicable six-month period. These duties are broad, and involve both the tangible and intangible aspects of being a parent.

> There is no simple or easy definition of parental duties. Parental duty is best understood in relation to the needs of a child. A child needs love, protection, guidance, and support. These needs, physical and emotional, cannot be met by a merely passive interest in the development of the child. Thus, [courts have] held that the parental obligation is a positive duty which requires affirmative performance.
>
> This affirmative duty encompasses more than a financial obligation; it requires continuing interest in the child and a genuine effort to maintain communication and association with the child.
>
> Because a child needs more than a benefactor, parental duty requires that a parent 'exert himself to take and maintain a place of importance in the child's life.'

In re B.,N.M., supra at 855.

CYS filed its petition to terminate Father's parental rights on June 8, 2012. Thus, the applicable six-month period is December 8, 2011 to June 8, 2012. During this time, Father performed few, if any, parental duties.

CYS removed F.M. from Father's custody, on December 22, 2011, and she continues to live in foster care until the present. (N.T., 2/19/13, p. 20.) Despite having visitation rights with F.M. while she was in foster care, Father did not visit or contact F.M. at all for two months, and for the remaining four months, his visits and contact were infrequent and limited. **Id.** at 25, 27.

Nor for more than six months did Father provide F.M. with any of the basic physical necessities of subsistence: food, shelter or clothing. Between December 8, 2011 and June 8, 2012, and since, Father played little to no part in F.M.'s life and performed little

to no parental duties. This lack of interaction has diminished his relationship with his daughter to the point that she no longer views him as her father, but as a playmate. (N.T., 5/16/13, pp. 43-44.)

In examining a parent's explanation for failing to perform parental duties, we must consider all explanations offered. **In re K.Z.S.,** 946 A.2d 753, 758 (Pa. Super. 2008). "The pertinent inquiry is not the degree of success a parent may have had in reaching the child, but whether, under the circumstances, the parent has utilized all available resources to preserve the parent-child relationship." **In re Shives,** 363 Pa. Super. 225, 230, 525 A.2d 801, 803 (1987) (citation omitted). Included in this effort is the need for the parent to exercise reasonable firmness in resisting obstacles placed in the path of maintaining a parent-child relationship. **In re B.,N.M., supra** (citation omitted).

At the hearing, Father testified he did not perform his parental duties because he lacked transportation to visit F.M. or to get to services made available to him. (N.T., 6/17/13, pp. 34, 41.) However, JusticeWorks offered to transport Father to visit F.M., or to any appointment he needed to attend to comply with the FSP. (N.T., 2/19/13, pp. 58, 81.) Father refused this assistance. **Id.** at 81. Father also testified that his family was willing to provide transportation and did provide transportation. (N.T., 6/17/13, p. 48.) Clearly, the issue was not one of transportation.

We are also cognizant that Father struggled to perform his parental duties because of financial difficulties, mental health issues, and drug and alcohol dependency. While these issues certainly impacted Father's ability to perform his parental duties, and while CYS was responsible for providing Father with services and did provide Father with services to cope and overcome these problems, CYS is not a "guarantor of the success of efforts to help parents assume their parental duties." **In re Diaz,** 447 Pa. Super. 327, 337, 669 A.2d 372, 377 (1995) (citation omitted). It was Father's responsibility to take advantage of the services provided by CYS to address his personal difficulties and to maintain an active role in his daughter's life. He did not do so. Consequently, Father's explanation for not performing his parental duties is unavailing.

We next look at Father's post-abandonment contact with F.M.

> To be legally significant, the [post-abandonment] contact **must be steady and consistent** over a period of time, contribute to the psychological health of the child, and must demonstrate a serious intent on the part of the parent to recultivate a parent-child relationship and must also demonstrate a willingness and capacity to undertake the parental role. The parent wishing to reestablish his parental responsibilities bears the burden of proof on this question.

In re Z.P., 994 A.2d 1108, 1119 (Pa. Super. 2010) (emphasis added). Legally significant post-abandonment contact can either rebut an inference that a parent had an intent to relinquish parental rights or explain why a parent did not perform parental duties. **In re Adoption of Durham,** 320 Pa. Super. 508, 515-16, 467 A.2d 828, 831-32 (1983).

Here, Father's post-abandonment contact with F.M. was anything but steady and consistent. Rather, of the weekly one-hour visits which were scheduled for Father to spend time with F.M. after December 22, 2011, Father inexplicably missed roughly a third.[11] (N.T., 2/19/13, pp. 40-41.) By inconsistently attending these weekly visits with F.M. and by not complying with the FSP for eight months after the termination petition was filed, Father demonstrated neither a serious intent to recultivate a parental relationship with F.M. nor the capacity to undertake a parental role in F.M.'s life. Instead, Father's actions suggest at best only a tangential interest in F.M.'s welfare.

The final question is whether terminating Father's parental rights was in the best interests of F.M. This analysis focuses on "whether termination of parental rights would best serve the developmental, physical, and emotional needs and welfare of the child." **In re T.D.,** 949 A.2d 910, 920 (Pa. Super. 2008) (citation omitted), **appeal denied,** 601 Pa. 684, 970 A.2d 1148 (2009). "The emotional needs and welfare of the child have been properly interpreted to include '[i]ntangibles such as love, comfort, security, and stability.'" **In re T.S.M.,** 71 A.3d 251, 267 (Pa. Super. 2013) (citation omitted). The court must also "discern the nature and status of the parent-child bond, paying close attention to the effect on the child of permanently severing the bond." **In re T.M.T.,** 64 A.3d 1119, 1127 (Pa. Super. 2013) (citation omitted). On this question, it was in F.M.'s best interests to terminate Father's parental rights.

[11] Father missed several visits because of conflicts with his work schedule, because either he or F.M. was sick, because of weather, and because Father was incarcerated. (N.T., 2/19/13, pp. 40-41.) We did not count these missed visits for this calculation. If we had, Father would have missed more than half of his scheduled post-abandonment visits with F.M.

While living with her foster parents, F.M. has thrived. F.M. has developed a strong relationship with her foster parents and the two other children living with them, one of whom is F.M.'s biological sister, K.M. F.M.'s foster parents, E.M. and D.M., plan to adopt all three of the children now in their care. (N.T., 5/16/13, pp. 97, 99.)

For almost half her life, E.M. and D.M. have provided for F.M.'s developmental, physical, and emotional needs. They have ensured that she received needed medical treatment. When F.M. entered E.M. and D.M.'s care, she struggled with her speech. **Id.** at 94. E.M. and D.M. arranged for F.M. to have ear surgery and receive speech therapy, which combined to greatly improve her speech. **Id.** at 94-96, 101. Since F.M. has been living with E.M. and D.M., she is a more outgoing, confident, and happier child. **Id.** at 94, 96-97.

Dr. Seasock testified that if Father's parental rights are terminated, F.M. will suffer no negative effects. Dr. Seasock stated that a parental bond did not exist between Father and F.M. **Id.** at 43-44. Rather, he described the relationship between Father and F.M. as that between playmates. **Id.** Because no parental bond exists, Dr. Seasock opined F.M. would suffer no trauma or emotional harm if Father's rights were terminated. **Id.** at 44.

By comparison, F.M. considers D.M. and E.M. to be her parents. A parental bond has developed between them which is beneficial to F.M.'s continued physical, mental, and emotional development. We believe this relationship will be strengthened by allowing D.M. and E.M. to adopt F.M. and for F.M. to become a firm part of their family, together with K.M. and the other child now in their care. (N.T., 2/19/13, p. 35.)

After taking these facts into consideration, we found it was in F.M.'s best interests to terminate Father's parental rights. F.M. has developed a strong bond with her foster care parents, who

have provided F.M. with a stable and loving home, and treat her as their own. She will suffer no negative effects from the termination. Rather, her best interests will be promoted by allowing her to remain with her foster parents, by allowing her foster parents to adopt her, and by allowing the bond between them to grow. **See In re J.F.M.,** 71 A.3d 989, 997-98 (Pa. Super. 2013) (holding it was in a child's best interests to terminate parental rights when child would not suffer negative effects from termination and child had bonded with foster parents who had provided for child's needs).

(2) Section 2511(a)(2)

Next, we found the evidence established grounds for termination under Section 2511(a)(2). To terminate parental rights under this provision, the evidence must establish: "(1) repeated and continued incapacity, abuse, neglect or refusal; (2) that such incapacity, abuse, neglect or refusal caused the child to be without essential parental care, control or subsistence; and (3) that the causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied." **In re Z.P., supra** at 1117.

> Unlike subsection (a)(1), subsection (a)(2) does not emphasize a parent's refusal or failure to perform parental duties, but instead emphasizes the child's present and future need for essential parental care, control or subsistence necessary for his physical or mental well-being. Therefore, the language in subsection (a)(2) should not be read to compel courts to ignore a child's need for a stable home and strong, continuous parental ties, which the policy of restraint in state intervention is intended to protect. This is particularly so where disruption of the family has already occurred and there is no reasonable prospect for reuniting it.

Id. (citation and emphasis omitted).

Further, "[t]he grounds for termination of parental rights under Section 2511(a)(2) ... are not limited to affirmative misconduct." **Id.** (citation and quotation marks omitted). Such "grounds may include acts of refusal as well as incapacity to perform parental duties." **In re A.L.D.,** 797 A.2d 326, 337 (Pa. Super. 2002). "[A] parent who is incapable of performing parental duties is just as parentally unfit as one who refuses to perform the duties." **In re Adoption of S.P.,** 616 Pa. 309, 327, 47 A.3d 817, 827 (2012) (citation and quotation marks omitted). "Thus, while sincere efforts to perform parental duties, can preserve parental rights under subsection (a)(1), those same efforts may be insufficient to remedy parental incapacity under subsection (a)(2)." **In re Z.P., supra** (citation and quotation marks omitted).

Applying these principles to the facts before us, first, the evidence established that Father was incapable, neglected, or refused to parent F.M. when he did not comply with the FSP for almost a year before the termination petition was filed. **See In re Adoption of W.J.R.,** 952 A.2d 680, 687-88 (Pa. Super. 2008) (holding that a parent's failure to comply with the FSP established requisite incapacity, abuse, neglect or refusal to parent); **In re K.Z.S., supra** at 761 (holding mother's failure to comply with FSP and ISP goals and objectives established continued incapacity). Second, Father's failure to comply with the FSP and to address the issues sought to be addressed therein caused F.M. to be removed from the home and to be without essential parental care, control and subsistence.

Finally, Father's repeated inability to comply with the FSP for almost two years as of the date of the last hearing held established that Father cannot or will not remedy the conditions described therein, including his mental health and drug and alcohol dependency. **See In re A.S.,** 11 A.3d 473, 482 (Pa. Super. 2010) (holding that "[t]he scope of CYS's involvement with the family indicates that Father has been and remains unable or unwilling to remedy the conditions that led to Children's placement"); **In re K.Z.S., supra** at 761-62 (holding mother's repeated and prolonged failure to comply with FSP requiring mother to obtain housing and employment established mother could not or would not remedy this condition).

While Father has recently taken steps to comply with the FSP, we regard the steps he has taken as disingenuous because, as our courts have repeatedly stated, a "parent's vow to cooperate, after a long period of uncooperativeness regarding the necessity or availability of services, may properly be rejected as untimely or disingenuous." **In re Z.P., supra.** This characterization is supported by Dr. Seasock's testimony that Father has shown a pattern of not complying with mental health or drug and alcohol treatment. **See also, In re Adoption of S.P., supra** at 331, 47 A.3d

at 830 (**quoting** with approval statement that "where a [parent's] ability to parent his child in the foreseeable future is 'speculative at best,' ... termination of parental rights under section 2511(a)(2) [is justified] even if the parent expresses a willingness to parent the child"). In short, "Father's overall parenting history revealed no genuine capacity to undertake his parental responsibilities, and [CYS's] evidence was sufficient to terminate his parental rights under subsection (a)(2)." **In re Z.P., supra** at 1126.

(3) Section 2511(a)(5)

We also found that the evidence supported terminating Father's parental rights under Section 2511(a)(5). To terminate parental rights under this provision, the evidence must establish:

> (1) the child has been removed from parental care for at least six months; (2) the conditions which led to the child's removal or placement continue to exist; (3) the parents cannot or will not remedy the conditions which led to removal or placement within a reasonable period of time; (4) the services reasonably available to the parents are unlikely to remedy the conditions which led to removal or placement within a reasonable period of time; and (5) termination of parental rights would best serve the needs and welfare of the child.

In re B.C., supra at 607.

Under the first element, we consider whether the child has been removed from the parent's care for a period of at least six months. **In re A.S., supra** at 482. F.M. has been removed from Father's care twice. The first time was from December 10, 2010, to June 23, 2011, for a period of six months. (N.T., 2/19/13, p. 10.) More recently, F.M. was removed from Father's care on December 22, 2011, and has remained so until the present time. By the time of the first hearing held on February 19, 2013, F.M. had been removed from parental care for almost fourteen months.

The second element requires us to determine whether the conditions which led to F.M.'s removal continue to exist. F.M. came into the care of CYS because of her parents' inability to provide appropriate parental care. Several FSPs were implemented to address identified parenting deficits. Specifically as to Father, as of F.M.'s most recent removal Father was in violation of the following

requirements of the existent FSP: (1) he refused to participate or cooperate with the in-home services offered by JusticeWorks;[12] (2) he had not completed parenting classes; (3) he had not obtained mental health treatment and followed recommendations; (4) he had not completed anger management classes; and (5) he had not completed drug and alcohol treatment.

None of these requirements, which were later supplemented prior to the filing of the termination petition to include the need to maintain financial stability and stable housing, had been met as of the first day of hearing. Nevertheless, as of the final hearing held on June 17, 2013, Father had completed programs at White Deer Run that included drug and alcohol treatment, as well as classes for parenting and anger management. (N.T., 6/17/13, pp. 41-43.) He was also receiving by this date treatment which began in April of 2013 for his mental health issues. **Id.** at 38. Father's participation and acceptance of this treatment were all conditions of his release on bail after he was arrested for breaking into two churches, a bar, and twenty cars. **Id.** at 67, 71. As of the date of this final hearing, Father had not been convicted or sentenced on these charges.

Notwithstanding this last minute treatment which occurred more than two years after F.M. was removed from Parents' care the first time, and more than a year after her removal the second time, it is at best uncertain, and more likely doubtful, given Father's longstanding history of drug and alcohol abuse and struggles with mental health, that these issues have been put to rest. The program at White Deer Run was a total of two months, as was Father's treatment for mental health. As of the June 2013 hearing, Father had maintained sobriety from drugs and alcohol for only one month. (N.T., 6/17/13, pp. 41-43.) Additionally, as of this date, he had attended psychological counseling for only two months. **Id.** at 38. While this treatment was important, we are not convinced that either Father's drug and alcohol, or mental health issues, have been resolved.

This belief is backed by Dr. Seasock's testimony. Dr. Seasock testified that Father had a history of relapses with drugs and al-

[12] As a result, Parents were unsuccessfully discharged from this program on February 1, 2012. This was significant given the services provided. **See** note 4 **supra.**

cohol, and of not maintaining mental stability. (N.T., 5/16/13, pp. 40-41.) To show stability and progression, Dr. Seasock testified Father would need to abstain from drugs and alcohol and evidence psychological constancy for a minimum of six months. **Id.** at 62. At the time of the June hearing, Father's short period of compliance, together with his past history of unsuccessful treatment and the compulsory nature of the treatment he received secondary to his criminal charges, was not enough to convince us that these conditions no longer exist. **See In re S.H.,** 879 A.2d 802, 806-807 (Pa. Super. 2005) (holding that parent's drug and alcohol abuse continued to exist despite parent completing treatment because parent needed to show a sober lifestyle for several years), **appeal denied,** 586 Pa. 751, 892 A.2d 824 (2005).

The next step requires us to determine whether Father is likely to remedy the conditions which led to F.M.'s removal or placement within a reasonable period of time. As already noted, more than two years passed after F.M. was first removed from Father's care before he made any serious effort to address his drug and alcohol and related mental health issues, and only then when his physical freedom was at stake. By the age of nineteen Father had been hospitalized seven times for violent and aggressive behavior. He self-medicated on drugs and alcohol, and when tests were requested to assess abuse, he frequently tested positive or refused to be tested. **See** footnote 5 **supra.** Moreover, Father has a past history of not remaining sober or maintaining mental stability. (N.T., 5/16/13, pp. 40-41.) Consequently, it appears unlikely that Father's most recent treatment will break that pattern.

To show real progress, Dr. Seasock testified Father would need to abstain from drugs and alcohol and maintain mental stability for six months. **Id.** at 62. Considering the amount of time F.M. had been out of Father's care by the time of the June 17, 2013 hearing—eighteen months—and the likely effect of this absence,[13] we found that to delay these proceedings further to again evaluate Father's status after four or five months would be unreasonable. We were unwilling to place F.M.'s life on hold for another four to five months, concluding that Father had not and likely would not remedy the conditions which led to F.M.'s placement within a reasonable time period. **See In re Adoption of M.E.P.,** 825

[13] **See** note 6 **supra.**

A.2d 1266, 1276 (Pa. Super. 2003) ("A child's life simply cannot be put on hold in the hope that the parent will summon the ability to handle the responsibilities of parenting.") (citation omitted); **see also, B.,N.M., supra** ("[A] parent's basic constitutional right to the custody and rearing of his or her child is converted, upon the failure to fulfill his or her parental duties, to the child's right to have proper parenting and fulfillment of his or her potential in a permanent, healthy, safe environment."). **See also, In re K.Z.S.** wherein the court stated:

> [A]lthough Mother has worked hard and may have improved the conditions that led to the removal and placement of [Child], Mother did not begin to remedy these conditions within a reasonable time. She did not begin to improve these conditions until six months after the Petition for Involuntary Termination was filed.

Id. at 761-62.[14]

For the fourth element, we review whether the services reasonably available to Father were unlikely to remedy the conditions which led to F.M.'s removal or placement within a reasonable period of time. These services include those made available to Father by CYS. As to such services, we first note the legal signifi-

[14] There is a direct correlation between Pennsylvania law on the termination of parental rights and the Federal Adoption and Safe Families Act ("ASFA"). At some point, to wit eighteen months, the process of either reunification or adoption for a child who has been placed in foster care is to be completed. As stated in **In re J.T.:**

> The Adoption and Safe Families Act, 42 U.S.C. § 671-675, imposes upon states the requirement to focus on the child's needs for permanency rather than the parent's actions and inactions. The amendments to the Juvenile Act, 42 Pa.C.S. § 6301, **et seq.,** provide that a court shall determine certain matters at the permanency hearing, including whether the child has been placed into foster care for 15 out of the last 22 months. **See** 42 Pa. C.S. § 6351(f)(9). With regard to permanency planning, the Legislature contemplated that, after reasonable efforts have been made to reestablish the biological relationship, the process of the agency working with foster care institutions to terminate parental rights should be completed within eighteen months. **See In re N.W.,** 859 A.2d 501, 508 (Pa. Super. 2004).

Id., 983 A.2d 771, 776 n.9 (Pa. Super. 2009). The AFSA "was designed to curb an inappropriate focus on protecting the rights of parents when there is a risk of subjecting children to long term [sic] foster care or returning them to abusive families." **In re C.B.,** 861 A.2d 287, 295 (Pa. Super. 2004), **appeal denied,** 582 Pa. 692, 871 A.2d 187 (2005).

cance of F.M.'s goal change from reunification to adoption in the dependency proceedings.

> As a practical and legal matter, an order by the juvenile court changing the child's placement goal from reunification to adoption ends any dispute that may exist between CYS and the parent as to the adequacy of CYS's services aimed at reuniting the parent with his/her children and, of course, as to whether CYS had selected the most appropriate goal for this family. By allowing CYS to change its goal to adoption, the trial court has decided that CYS has provided adequate services to the parent but that he/she is nonetheless incapable of caring for the child and that, therefore, adoption is now the favored disposition. In other words, the trial court order is the decision that allows CYS to give up on the parent.

Interest of M.B., 388 Pa. Super. 381, 565 A.2d 804, 807-808 (1989), **appeal denied,** 527 Pa. 602, 589 A.2d 692 (1990). The dependency court's factual finding that CYS provided adequate services for reunification and Father was nonetheless incapable of providing for F.M., is binding upon us. **In re J.A.S.,** 820 A.2d 774, 781 (Pa. Super. 2003); **see also, In the Interest of Lilley,** 719 A.2d 327, 332 (Pa. Super. 1998) ("[I]f a parent fails to cooperate or appears incapable of benefiting from reasonable efforts supplied over a realistic period of time, the agency has fulfilled its mandate and upon proof of satisfaction of the reasonable good faith effort, the termination petition may be granted.").

In addition, "once a child is removed from the care of the parent, the burden is on the parent to take action to regain parental rights." **In re B.C., supra** at 609. When a child is in foster care, the parent has an affirmative parental duty to complete the services CYS requires to have the child returned. **In re Julissa O.,** 746 A.2d 1137, 1141 (Pa. Super. 2000). This duty, "at minimum, requires a showing by the parent of a willingness to cooperate with the agency to obtain the rehabilitative service necessary for the performance of parental duties and responsibilities." **In re Adoption of Steven S.,** 417 Pa. Super. 247, 257, 612 A.2d 465, 470 (1992) (citation omitted), **appeal denied,** 533 Pa. 661, 625 A.2d 1194 (1993).

The FSP required Father to complete classes with JusticeWorks, to complete parenting classes, to seek mental health treatment and comply with recommendations from that treatment, to complete drug and alcohol rehabilitation, to complete anger management classes, to maintain financial stability, and to obtain and maintain stable housing. CYS made available to Father the services he needed to comply with the FSP, including parenting classes by Right From the Start, mental health services through ReDCo, drug and alcohol rehabilitation services, anger management classes through Care Net, and JusticeWorks services to help Father find a job and housing. (N.T., 2/19/13, pp. 13-18, 20, 68-70.) Despite CYS' good faith efforts, Father either refused or stopped participating in the services made available. **Id.** As a result, Father did not comply with a single FSP requirement. **Id.** at 31. **See In re A.R.M.F.,** 837 A.2d 1231, 1239-40 (Pa. Super. 2003) (holding that evidence of parent not utilizing past services established that future services would not reasonably be effective). Given the protracted history of this case and Father's failure to comply with the FSPs established by CYS, we concluded that the assistance and services provided by CYS and while Father was on bail, were not likely to remedy Father's parenting deficits.

Finally, as already discussed above, terminating Father's parental rights will serve F.M.'s best interests. Accordingly, the grounds for terminating Father's parental rights under Section 2511(a)(5) were met.

CONCLUSION

Parents needed help to care for F.M. Their mental health and drug and alcohol dependency limited their ability to adequately care for her, with the end result establishing grounds for the removal of their daughter from their care and for the filing of a termination petition.

For over a year, CYS offered Parents help to overcome their parenting deficits, including various parenting, mental health, and drug and alcohol services. It was Parents' responsibility to use these services to overcome the conditions which led to the removal of their daughter from their care and to perform their parental duties. When Parents failed to do so, the best interests of their daughter required termination of their parental rights.

Based on the foregoing, we recommend that our Order terminating Father's parental rights be affirmed.

COMMONWEALTH OF PENNSYLVANIA vs.
BRUCE L. WISHNEFSKY, Defendant

Criminal Law—PCRA—Jurisdictional Time Limits—Alleyne—*Mandatory Minimum Sentence—Foundational Facts—Jury vs. Court Determination—Retroactive Application*

1. A court is without subject matter jurisdiction to decide the merits of a PCRA petition which is untimely.

2. As a general rule, with three exceptions, a PCRA petition must be filed within one year from the date defendant's judgment of sentence became final. The three exceptions are: (1) claims of interference by government officials in the presentation of the claim; (2) claims of newly-discovered facts; and (3) claims of an after-recognized constitutional right found by the deciding court to apply retroactively.

3. In those circumstances where an exception to the one-year time-bar applies, the PCRA further requires that defendant's petition for relief be filed within sixty days of the date the claim could have been presented. For the newly recognized constitutional right exception, the sixty-day period begins to run upon the date of the underlying judicial decision.

4. In **Alleyne v. United States,** 133 S. Ct. 2151 (2013), the United States Supreme Court held that any fact that mandates the imposition of a mandatory minimum sentence is an "element" of the crime, not a "sentencing factor," and must be submitted to the jury and found beyond a reasonable doubt.

5. The rule announced in **Alleyne** is a procedural rule since rules that allocate decision-making authority are prototypical procedural rules. For a procedural rule to have retroactive application the rule must implicate the fundamental fairness and accuracy of the criminal proceeding. To meet this standard, the rule must both (1) be necessary to prevent an impermissibly large risk of an inaccurate conviction, and (2) must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.

6. A procedural rule which predicates the imposition of a mandatory minimum sentence on a factual finding required to be made by the jury, rather than by the court, is not a watershed rule having retroactive application since judicial fact-finding, as opposed to jury fact-finding, does not seriously diminish the accuracy of the conviction and this change in who makes the decision is not essential for the proceeding to be fundamentally fair.

7. Because the right recognized in **Alleyne** is not retroactive, the decision in **Alleyne** does fall within the category of constitutional rights which qualify as an exception to the PCRA's one-year time-bar.

8. A PCRA petition filed more than sixty days after the date of a judicial decision announcing a newly recognized constitutional right, which is held by the deciding court to apply retroactively, is untimely and prevents the merits of the petition from being examined.

NO. 188 CR 1996

GARY F. DOBIAS, Esquire, District Attorney—Counsel for the Commonwealth.

BRUCE L. WISHNEFSKY—Pro se.

MEMORANDUM OPINION

NANOVIC, P.J.—March 5, 2014

Defendant, Bruce Wishnefsky, appeals our dismissal of his Post Conviction Relief Act (PCRA)[1] Petition that collaterally challenged his sentence based on the recent United States Supreme Court decision of **Alleyne v. United States,** 133 S. Ct. 2151 (2013). Because **Alleyne** has not been held to apply retroactively, and because Defendant did not file his petition within sixty days of the date **Alleyne** was announced, Defendant's petition was untimely, requiring dismissal for lack of subject matter jurisdiction. For these reasons, we recommend our dismissal be affirmed.

PROCEDURAL AND FACTUAL BACKGROUND

On numerous occasions between 1987 and 1992, two young girls, whose ages during this time period ranged from five years old to twelve years old, were forced by their father to have sexual intercourse with Defendant. As a result, on April 24, 1998, a jury convicted Defendant of eight counts of forcible rape,[2] eight counts of statutory rape,[3] seven counts of indecent assault,[4] two counts of corruption of minors,[5] six counts of involuntary deviate sexual intercourse,[6] four counts of aggravated indecent assault,[7] and two counts of conspiracy to commit rape.[8]

The Honorable Richard W. Webb sentenced Defendant to an aggregate sentence of not less than forty-five years' nor more than ninety years' incarceration in a state correctional institution. This sentence consisted of eight consecutive sentences of five to ten years for the eight counts of rape and two consecutive sentences of two and one-half to five years for the two counts of conspiracy.[9]

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[1] 42 Pa. C.S.A. §§9541-9546.

[2] 18 Pa. C.S.A. §3121(1).

[3] 18 Pa. C.S.A. §3122.1.

[4] 18 Pa. C.S.A. §3126(1), (2), (3).

[5] 18 Pa. C.S.A. §6301.

[6] 18 Pa. C.S.A. §3123(1), (2), (4), (5).

[7] 18 Pa. C.S.A. §3125(1), (2), (3), (6).

[8] 18 Pa. C.S.A. §§903, 3121(1).

[9] The other crimes either merged for sentencing purposes or were run concurrently to the sentences for rape.

At the time of Defendant's sentencing, 42 Pa. C.S.A. §9718(a)(1) required a person convicted of forcible rape of a victim less than sixteen years of age to be sentenced to a five-year mandatory minimum sentence. The five- to ten-year sentence Defendant received for each count of rape was imposed by Judge Webb in accordance with this mandatory minimum.

Defendant appealed the sentence imposed by Judge Webb, which appeal was denied. Defendant's sentence thereafter became final when the United States Supreme Court denied his writ of **certiorari** on October 16, 2000. Defendant next collaterally challenged his conviction and sentence by filing two PCRA petitions, the first filed on August 13, 2001, and the second filed on March 1, 2006. Both petitions were denied.

On September 6, 2013, Defendant filed the instant PCRA petition, his third. In this petition, Defendant challenges his sentence, not his conviction. Specifically, Defendant contends that the United States Supreme Court's decision in **Alleyne** undermined the legality of his sentence by its holding that any fact that mandates the imposition of a mandatory minimum sentence is an "element" of the crime, not a "sentencing factor," and must be submitted to the jury and found beyond a reasonable doubt. Defendant claims that his sentence violated **Alleyne** because the age of his victims was a fact that pursuant to statute required a mandatory minimum sentence of no less than five years' imprisonment and was not submitted to or determined by the jury.

After reviewing Defendant's petition, we filed a notice of our intention to dismiss the petition without hearing pursuant to Pa. R.Crim.P. 907(1). Our notice stated that we intended to dismiss Defendant's petition because it was untimely, depriving us of subject matter jurisdiction. In conformance with Pa. R.Crim.P. 907(1), we gave Defendant twenty days to respond to our notice. Defendant filed a response on December 24, 2013, however, his response did not establish that we had subject matter jurisdiction. Accordingly, on December 31, 2013, we dismissed Defendant's petition for lack of subject matter jurisdiction. Defendant timely appealed this dismissal. We now file this opinion in accordance with Pa. R.A.P. 1925(a).

DISCUSSION

Before addressing the merits of a PCRA petition, we must first determine whether we have subject matter jurisdiction. **Commonwealth v. Taylor,** 933 A.2d 1035, 1038 (Pa. Super. 2007). In order for a court to have subject matter jurisdiction over a PCRA petition, the petition must be timely. **Commonwealth v. Taylor,** 67 A.3d 1245, 1248 (Pa. 2013). To be timely, the general rule, with three exceptions, is that the defendant must file his petition within one year from the date defendant's judgment of sentence became final. 42 Pa. C.S.A. §9545(b)(1).

The three exceptions to this time-bar are: (1) claims of interference by government officials in the presentation of the claim; (2) claims of newly-discovered facts; and (3) claims of an after-recognized constitutional right found by the deciding court to apply retroactively. 42 Pa. C.S.A. §9545(b)(1)(i)-(iii). To establish any of these exceptions, the defendant must plead and prove facts establishing their applicability. **Commonwealth v. Lark,** 560 Pa. 487, 493-94, 746 A.2d 585, 588 (2000). Additionally, if the defendant invokes one of these exceptions, the petition must "be filed within sixty days of the date the claim could have been presented." 42 Pa. C.S.A. §9545(b)(2).

Since Defendant's petition was filed more than a decade after his judgment of sentence became final, to be timely, Defendant needed to establish the availability of at least one of the statutory exceptions to the one-year time-bar. Defendant claims the third exception is applicable, namely a claim of an after-recognized constitutional right that applies retroactively. Defendant's reliance on this exception is misplaced for two reasons.

(1) Requirement That a Newly Recognized Constitutional Right Be Applied Retroactively

First, for this exception to be applicable, the newly recognized constitutional right must be determined by the deciding court to apply retroactively. **Commonwealth v. Moss,** 871 A.2d 853, 856 (Pa. Super. 2005). The right recognized in **Alleyne** has not been determined by the United States Supreme Court to apply retroactively. Moreover, when separately examined, the rule announced in **Alleyne** is not of that class which apply retroactively.

(a) Substantive Rights

In general, new constitutional rules do not apply retroactively to criminal cases on collateral review. **Teague v. Lane,** 489 U.S. 288, 310 (1989). However, both the federal and our state Supreme

Courts have adopted two exceptions to this rule.[10] **Schriro v. Summerlin,** 542 U.S. 348, 351 (2004); **Commonwealth v. Cunningham,** 81 A.3d 1, 4 (Pa. 2013). The first exception is for new substantive rules that either "place particular conduct or persons covered by the statute beyond the State's power to punish" (**id.** at 19) or "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." **Id.** at 4. We apply these rules retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him." **Schriro, supra** at 352.

(b) Procedural Rules

The second exception is for new rules of procedure which, with one exception,[11] do not apply retroactively. **Id.** Such rules do not apply retroactively because they "do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." **Id.** The exception to not applying procedural rules retroactively is for "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." **Cunningham, supra** at 4 (**citing Teague v. Lane,** 489 U.S. 288, 310 (1989)). The United States Supreme Court stated that these types of rules are rare and that no such rule has yet to emerge. **Schriro, supra** at 352.

Applying this test for retroactivity to the facts before us, **Alleyne** does not fit either of the two exceptions providing for retroactivity. First, the Supreme Court in **Alleyne** did not announce a

[10] The Pennsylvania Supreme Court noted that it may adopt a broader test for retroactivity than the test created by the United States Supreme Court in **Teague v. Lane,** 489 U.S. 288 (1989), because "the **Teague** rule of nonretroactivity was fashioned to achieve the goals of federal habeas while minimizing federal intrusion into state criminal proceedings." **Commonwealth v. Cunningham,** 81 A.3d 1, 8 (Pa. 2013). Nevertheless, our Supreme Court has yet to adopt such a test and continues to apply the **Teague** test. **Id.** Accordingly, we applied the **Teague** test to Defendant's petition.

[11] In **Cunningham,** the court stated that there are two exceptions to the general rule that new rules of procedure do not apply retroactively. **supra** at 4. However, the court also recognized that the United States Supreme Court in **Schriro v. Summerlin,** 542 U.S. 348 (2004), merged one of these exceptions with the rule related to the retroactivity of new substantive rules, leaving only a single exception. **Id.** at 5.

new substantive rule, but a new constitutional rule of procedure. **Alleyne** clearly did not apply to the first type of substantive rule because it did not place certain conduct or persons beyond the State's power to punish.

Nor is it the second kind of substantive rule, one prohibiting a certain category of punishment for a class of defendants. In **Schriro,** the court held that the rule it created in **Ring v. Arizona,** 536 U.S. 584 (2002)—that the Sixth Amendment required a jury to find aggravating circumstances to support a death penalty—was a new rule of procedure. **Id.** at 353. The court reasoned that

> [**Ring**] did not alter the range of conduct Arizona law subjected to the death penalty. It could not have; it rested entirely on the Sixth Amendment's jury-trial guarantee, a provision that has nothing to do with the range of conduct a State may criminalize. Instead, **Ring** altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment. Rules that allocate decisionmaking [sic] authority in this fashion are prototypical procedural rules, a conclusion we have reached in numerous other contexts.

Id. (citations omitted). Similarly, our state Supreme Court in **Cunningham,** held that the United States Supreme Court decision in **Miller v. Alabama,** 132 S. Ct. 2455 (2012)—that the Eighth Amendment forbids a sentencing scheme that mandates a sentence of life imprisonment without the possibility of parole for juvenile offenders—was a procedural rule because that decision did not categorically bar life sentences for juvenile offenders but only prescribed how such sentences can be imposed. **Cunningham, supra** at 10.

Similar to **Ring** and **Miller, Alleyne** did not categorically bar mandatory minimum sentences, but only altered how those sentences can be imposed. By holding that the Sixth Amendment requires a jury to find beyond a reasonable doubt any fact increasing a mandatory minimum sentence, **Alleyne** merely reallocated the decision-making authority in imposing mandatory minimum

sentences. **Alleyne, supra** at 2163. In the language of **Schriro,** such a rule is a "prototypical procedural rule."

As a rule of procedure, **Alleyne** was not a watershed rule. For a rule of procedure to be watershed it must both (1) be necessary to prevent an impermissibly large risk of an inaccurate conviction and (2) "must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." **Whorton v. Bockting,** 549 U.S. 406, 418 (2007). **Alleyne** does neither.

The rule in **Alleyne** is not necessary to prevent an impermissibly large risk of an inaccurate conviction because, as the Supreme Court held in **Schriro,** judicial fact-finding, as opposed to jury fact-finding, does not seriously diminish the accuracy of the conviction. **Schriro, supra** at 356.

Nor does the rule set forth in **Alleyne** alter our understanding of bedrock procedural elements because it did not profoundly and sweepingly change our understanding of the Sixth Amendment. **See Whorton, supra** at 421 (holding that for a new rule of procedure to alter our understanding of elements essential to fairness the rule must effect a profound and sweeping change). Rather, **Alleyne** simply extended the court's holding in **Apprendi v. New Jersey,** 530 U.S. 466 (2000). **See Alleyne, supra** at 2163 (extending **Apprendi** to apply to mandatory minimum sentences). Based on the foregoing, **Alleyne** was not the rare rule of procedure that can be classified as watershed.

Consequently, since **Alleyne** was neither a substantive rule nor a watershed rule of procedure, it does not apply retroactively. Such a holding has been reached by every federal circuit court that has addressed this question. **See United States v. Redd,** 735 F.3d 88, 91-92 (2nd Cir. 2013); **Simpson v. United States,** 721 F.3d 875, 876 (7th Cir. 2013); **In Re Payne,** 733 F.3d 1027, 1030 (10th Cir. 2013); **In re Kemper,** 735 F.3d 211, 212 (5th Cir. 2013). Because **Alleyne** does not apply retroactively, it cannot form the basis for a timely PCRA petition under section 9545(b)(1)(iii).

(2) Requirement That Petition Be Filed Within Sixty Days of Judicial Decision

Even if we were to determine that **Alleyne** should be applied retroactively, this would be of no benefit to Defendant. Since Defendant did not file his petition within sixty days of when it

could have been filed as required by 42 Pa. C.S.A. §9545(b)(2), his petition was untimely under the PCRA. Under the newly recognized constitutional right exception, "the sixty-day period begins to run upon the date of the underlying judicial decision." **Commonwealth v. Brandon,** 51 A.3d 231, 235 (Pa. Super. 2012). A defendant's ignorance about a decision will not toll the commencement of this sixty-day period. **Commonwealth v. Baldwin,** 789 A.2d 728, 731 (Pa. Super. 2001). This includes an inmate's lack of knowledge attributable to the prison library not being updated. **See Commonwealth v. Leggett,** 16 A.3d 1144, 1147 (Pa. Super. 2011) ("[n]either the court system nor the correctional system is obliged to educate or update prisoners concerning changes in case law.").

Since **Alleyne** was decided on June 17, 2013, for Defendant's petition to be timely it was required to be filed on or before August 16, 2013. Defendant's petition was not filed in the clerk's office until September 6, 2013, twenty-one days beyond this deadline.[12] Defendant claims this delay is excused because he did not learn of the **Alleyne** decision until August 25, 2013, since the prison library was not kept current. Under **Leggett** this is an insufficient basis on which to excuse a late filing.

CONCLUSION

In sum, not only is the exception provided for in Section 9545(b)(1)(iii) inapplicable to Defendant's circumstances, regardless, Defendant's petition was untimely, not having been filed within sixty days from the date the **Alleyne** decision was announced. Consequently, Defendant's petition filed almost thirteen years after his judgment of sentence became final was clearly too late. Accordingly, we lacked subject matter jurisdiction and Defendant's petition required dismissal.

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[12] Defendant's petition was filed with our Clerk of Courts on September 6, 2013. Under the mailbox rule, an imprisoned defendant is deemed to have filed a PCRA petition on the date the defendant gives the petition to the proper prison authority. **Commonwealth v. Castro,** 766 A.2d 1283, 1287 (Pa. Super. 2001). Defendant claims he gave his petition to the proper prison official on September 3, 2013, making his petition filed on that date. Regardless of whether Defendant's petition was filed on September 3 or 6, it is untimely.

COMMONWEALTH of PENNSYLVANIA vs.
JOSEPH JOHN PAUKER, Defendant

Criminal Law—Final Judgment of Sentence—Authority to Modify After Thirty Days—42 Pa. C.S.A. §5505—Challenge to Discretionary Aspect of Sentence

1. Section 5505 of the Judicial Code prohibits the rendering of a new or different sentence thirty days or more after the entry of the original sentence.

2. Section 5505 of the Judicial Code does not prohibit a trial court through exercise of its inherent, common-law judicial authority from clarifying or correcting a written sentencing order, even though thirty or more days have passed since its entry.

3. A written sentencing order which is ambiguous on its face may be later clarified by the trial court by examining the text of the order itself and construing it in its entirety according to established canons of construction.

4. A written sentencing order which is shown to contain a clear clerical mistake, one which is patently and obviously at odds with the sentence actually imposed and announced in open court, as made evident by review of the sentencing transcript, may be later corrected by the trial court to conform to the actual sentence imposed.

5. A sentence within the standard guideline range is presumptively valid and will not be overturned, unless the defendant demonstrates that application of the guidelines is clearly unreasonable pursuant to 42 Pa. C.S.A. §9781(c)(2).

NO. 752 CR 2010

GARY F. DOBIAS, Esquire, District Attorney—Counsel for Commonwealth.

KENT D. WATKINS, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—March 20, 2014

As a general rule, a final judgment of sentence, once given, may not be changed by the trial court thirty days or more after its imposition. Whether this limitation applies to the oral pronouncement of the sentence in open court or to the written order subsequently prepared and filed, and if to the written order, whether this rule bars its amendment more than thirty days after its entry in those circumstances where it incorrectly recites the sentence as decreed, are issues now before us.

PROCEDURAL AND FACTUAL BACKGROUND

On November 13, 2012, Defendant entered a plea to one count of possession with intent to deliver a controlled substance,[1] a felony offense. That same day, we sentenced Defendant to no less than one nor more than three years' incarceration in a state correctional institution, followed by one year of probation. (N.T. 11/13/12, pp. 23-24.) Notwithstanding the sentence actually announced in court, the written order of sentence dated November 13, 2012, and filed on November 15, 2012, did not include the one-year probationary term. When this was brought to the court's attention, a new written order was prepared and filed on January 2, 2013. This corrected order included the one-year period of probation as part of the sentence.

[1] 35 P.S. §780-113(a)(30).

Defendant objected to the amendment of the written order by filing a **pro se** Motion to Modify and Reduce Sentence on January 31, 2013. In this Motion, Defendant asked that the term of incarceration be reduced and also asked that the period of probation be removed.[2] Because this Motion was filed more than thirty days after the sentencing date of November 13, 2012, we treated Defendant's Motion as a request for PCRA relief and immediately appointed PCRA counsel.[3]

On March 1, 2013, PCRA counsel filed an Amended Motion in which Defendant challenged the Amended Order of Sentence filed on January 2, 2013, as violating the time restraints imposed by 42 Pa. C.S.A. §5505. At a hearing held on February 28, 2014, to address Defendant's request for PCRA relief, no evidence was

[2] Previously, on November 16, 2012, Defendant filed a counseled Petition for Reconsideration of the Sentence in which Defendant acknowledged that the sentence pronounced at the sentencing hearing was for a period of imprisonment of one to three years followed by one year probation, but asked that the term of incarceration be reduced to one to two years. (Petition for Reconsideration, paragraph 4.) This Petition was denied by order dated November 16, 2012.

[3] In **Commonwealth v. Green,** 862 A.2d 613 (Pa. Super. 2004), **appeal denied,** 584 Pa. 692, 882 A.2d 477 (2005), the court held that a written post-sentence motion must be filed no later than ten days after the date of imposition of sentence regardless of the date the sentence was entered on the docket. Accordingly, even though Defendant filed a timely Petition for Reconsideration on November 16, 2012, which we denied that same date, both the time to file either a post-sentence motion or a direct appeal had already lapsed by the time Defendant filed his **pro se** Motion to Modify and Reduce Sentence. **See also, Commonwealth v. Lamonda,** 52 A.3d 365, 371 (Pa. Super. 2012) (noting that "[i]ssues challenging the discretionary aspects of a sentence must be raised in a post-sentence motion or by presenting the claim to the trial court during the sentencing proceedings," otherwise they are waived), **appeal denied,** 75 A.3d 1281 (Pa. 2013).

taken, both the Defendant and Commonwealth agreeing that the two issues before the court—the timeliness of the January 2, 2013 written order of sentence and the propriety of the period of incarceration—did not require the taking of additional evidence.

DISCUSSION

Section 5505 of the Judicial Code provides:

> Except as otherwise provided or prescribed by law, a court upon notice to the parties may modify or rescind any order within 30 days after its entry, notwithstanding the prior termination of any term of court, if no appeal from such order has been taken or allowed.

42 Pa. C.S.A. §5505. This section, as construed by our courts, prohibits the rendering of a new or different sentence thirty days or more after the entry of the original sentence. **Commonwealth v. Borrin,** 12 A.3d 466, 476 (Pa. Super. 2011), **aff'd,** 80 A.3d 1219 (Pa. 2013). However, two instances have been recognized where the trial court is permitted to clarify or correct a written sentencing order, even though thirty days has passed from its entry. Both reflect a legitimate exercise of the court's inherent judicial authority.[4]

The first instance, not applicable here, is where the written sentencing order is ambiguous on its face, that is, is susceptible to two or more reasonable but different interpretations. **Commonwealth v. Borrin,** 80 A.3d 1219, 1229 (Pa. 2013). When this occurs, the court has the inherent authority to issue an amended order clarifying its intent. **Id.** at 1227 (noting that in clarifying a written order it had issued, the trial court should have focused on the text of the order itself and construed it in its entirety according to established canons of construction). This exception applies only to an ambiguity on the face of the written sentencing order, not in the verbal pronouncement of that sentence, which if ambiguous when stated, but clear in the written order which follows, no longer requires further clarification. **Borrin, supra,** 12 A.3d at 473.

The second exception, which does apply, is where the sentence actually imposed and announced in court was clear and unambiguous, but was incorrectly recited in the written order.[5] In those circumstances where the discrepancy between what was stated in court and what is provided for in the written order manifests a patent and obvious mistake in the written order, a clear clerical error exists, one which the court has the authority, if not the duty, to correct once the error is brought to its attention. **See Commonwealth v. Rusic,** 229 Pa. 587, 591, 79 A. 140, 141 (1911) (acknowledging a trial court's inherent authority to amend its record so as to make it conform to the truth).[6]

The transcript of the sentencing hearing prepared by the court stenographer, as well as a review of the official court recording made at the time of sentencing, show clearly that Defendant's sentence included a one-year probationary tail. (N.T. 11/13/12, pp. 23-24.) This probationary term was erroneously omitted from the written order prepared by the clerk's office[7] and filed on November 15, 2012. As to this omission, we properly exercised our inherent power to correct the error in the written order such that it spoke "the truth" and accurately reflected what in fact took place in open court at the time of sentencing. **Borrin, supra,** 80 A.3d at 1227.

[4] "[T]he inherent power to correct errors does not extend to reconsideration of a court's exercise of sentencing discretion. A court may not vacate a sentencing order merely because it later considers a sentence too harsh or too lenient." **Commonwealth v. Holmes,** 593 Pa. 601, 617, 933 A.2d 57, 67 (2007).

[5] In **Commonwealth v. Borrin,** the Pennsylvania Superior Court observed that once a sentence as stated in the sentencing order has been fully served, double jeopardy prohibits a court from correcting errors in the written order which have the effect of increasing the sentence, even though a comparison of the written order with the sentence actually imposed in court discloses a patent and obvious error in the written order. 12 A.3d 466, 472 (Pa. Super. 2011). As this observation was unnecessary to the court's decision, it was clear **dicta,** which the Pennsylvania Supreme Court on appeal declined to address. **Commonwealth v. Borrin,** 80 A.3d 1219, 1225 n.10 (Pa. 2013). Likewise, principles of double jeopardy are inapplicable in the instant matter, since Defendant had not served even his minimum sentence at the time the amended order was entered.

[6] "The term 'clerical error' has been long used by our courts to describe an omission or a statement in the record or an order shown to be inconsistent with what in fact occurred in a case, and, thus, subject to repair." **Borrin, supra,** 80 A.3d at 1227. **See also, Commonwealth v. Kubiac,** 379 Pa. Super. 402, 426, 550 A.2d 219, 231 (1988) ("[A]n oral sentence which is on the record, written incorrectly by the clerk of courts, and then corrected by the trial judge, is [ ] a clerical error."), **appeal denied,** 522 Pa. 611, 563 A.2d 496 (1989).

[7] It is the practice in Carbon County for a representative of the Clerk of Courts' office to attend sentencing hearings and prepare the written order of sentence to be signed by the court.

As to the duration of Defendant's period of confinement, the standard range applicable to Defendant's circumstances under the sentencing guidelines is twelve to eighteen months. (N.T. 11/13/12, p. 8.) The minimum end of the one- to three-year sentence Defendant received was within this range and is therefore presumptively valid. **Commonwealth v. Ventura,** 975 A.2d 1128, 1135 (Pa. Super. 2009), **appeal denied,** 604 Pa. 706, 987 A.2d 161 (2009). To rebut this presumption requires that defendant prove the application of the guidelines to his situation was clearly unreasonable pursuant to 42 Pa. C.S.A. §9781(c)(2).[8] This Defendant did not do. **See also, Commonwealth v. Lamonda,** 52 A.3d 365, 372 (Pa. Super. 2012) ("where a sentence is within the standard range of the guidelines, Pennsylvania law views the sentence as appropriate under the Sentencing Code"), **appeal denied,** 75 A.3d 1281 (Pa. 2013).

Moreover, at the time Defendant committed the offense for which he was sentenced, he was on parole in Lehigh County after being convicted of driving under the influence and possession of drugs. Because Defendant's current offense was a violation of the terms of his parole, as an aggravating factor it was within our discretion to have sentenced Defendant to an aggravated sentence.[9]

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[8] Section 9781(c) of the Judicial Code provides:

> (c) Determination on appeal.—The appellate court shall vacate the sentence and remand the case to the sentencing court with instructions if it finds:
>
> (1) the sentencing court purported to sentence within the sentencing guidelines but applied the guidelines erroneously;
>
> (2) the sentencing court sentenced within the sentencing guidelines but the case involves circumstances where the application of the guidelines would be clearly unreasonable; or
>
> (3) the sentencing court sentenced outside the sentencing guidelines and the sentence is unreasonable.
>
> In all other cases the appellate court shall affirm the sentence imposed by the sentencing court.

42 Pa. C.S.A. §9781(c).

[9] The stipulation entered by the Commonwealth and Defendant prior to Defendant's sentencing included a provision that the Commonwealth requested a standard range sentence of twelve to twenty-four months. **See** Stipulation dated August 27, 2012 and filed August 30, 2012. When questioned at the time of sentencing, both the Commonwealth and Defendant acknowledged that this request by the Commonwealth was not a plea agreement and that the court was not bound by it. (N.T. 11/13/12, pp. 11, 22.)

CONCLUSION

Both the Commonwealth and the Defendant have a right to expect that the sentence imposed on the Defendant at the time of sentencing is the sentence served. Where the sentence a defendant receives in open court is clear from the face of the sentencing transcript, but the written order does not conform with this sentence, the court has the inherent, common-law authority to correct patent and obvious errors in the written order. **Borrin, supra,** 12 A.3d at 473. ("[F]or a trial court to exercise its inherent authority and enter an order correcting a defendant's written sentence to conform with the terms of the sentencing hearing, the trial court's intention to impose a certain sentence must be obvious on the face of the sentencing transcript."). As such, we properly acted in entering the Amended Order of Sentence on January 2, 2013, to accurately reflect the sentence Defendant in fact received. Further, Defendant has failed to present a substantial question that we abused our discretion in the imposition of this sentence.

COMMONWEALTH of PENNSYLVANIA vs.
JOSEPH WOODHULL OLIVER, JR., Defendant

Criminal Law—Bail Eligibility—Pretrial Versus Post-Verdict Standard—Court Discretion—Detention Pending Gagnon Proceedings for New Criminal Charges—Habeas Corpus—Inherent Judicial Authority—Exceptional Circumstances

1. Prior to conviction in a non-capital case in Pennsylvania, an accused has a constitutional right to bail which is conditioned upon the giving of adequate assurances that he or she will appear for trial. In contrast, once a defendant's guilt has been established, there exists no state or federal constitutional right to bail, the granting of bail being discretionary with the court.

2. Neither a parolee nor probationer against whom a detainer has been lodged for violating the terms of supervision has a right to bail pending revocation proceedings.

3. In the context of a habeas corpus proceeding, a trial court has the inherent authority to grant bail while awaiting the outcome of pending probation revocation proceedings for new criminal charges when exceptional circumstances exist, such as when the probationer establishes a high probability of success on a substantial constitutional challenge. This authority arises from the power vested in the trial court by virtue of habeas corpus jurisdiction and is not a right vested in the probationer.

4. Release on bail pending the resolution of probation revocation proceedings for a new criminal offense is not only discretionary with the court, but limited to a showing of exceptional circumstances and for compelling reasons.

NOS. 216 CR 2010 and 592 CR 2010

SARAH E. MODRICK, Esquire, Assistant District Attorney—Counsel for Commonwealth.

GEORGE T. DYDYNSKY, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—April 11, 2014

Whether an individual who is detained for criminal acts allegedly committed while serving a probationary sentence has a **right** to bail pending revocation hearings and, if not, whether the court nevertheless has the discretionary authority to grant bail and under what circumstances, are issues not previously addressed by our appellate courts which we now consider.

FACTUAL AND PROCEDURAL BACKGROUND

On February 24, 2014, Defendant was charged with driving under the influence[1] for an incident which occurred on February 5, 2014. At the time of the incident, Defendant was on probation pursuant to two separate sentences previously imposed by this court on unrelated charges. On May 7, 2012, Defendant pled guilty to one count of possessing an instrument of crime[2] and was immediately sentenced to two years of county probation. Eight months later, on January 4, 2013, Defendant pled guilty to two counts of recklessly endangering another person[3] for which he was sentenced to a total of four years' county probation, concurrent to the sentence imposed on May 7, 2012.

Both sentences Defendant received included as a condition of continued probation that Defendant not violate any state or federal criminal law.[4] As a result of the new criminal charges filed against Defendant, the Carbon County Probation Department

[1] 75 Pa. C.S.A. §3802(a)(1).

[2] 18 Pa. C.S.A. §907(a).

[3] 18 Pa. C.S.A. §2705.

[4] The Conditions of Supervision that Defendant signed at the time he was placed on probation advised Defendant that in the event of any violation of the conditions of his probation, the County's Probation Department had the authority "to cause [his] detention in a correctional facility pending appropriate hearings." These conditions further advised Defendant that if he was arrested while on probation and committed to prison, the Department was authorized to place a detainer against him which would, in effect, prevent his release from prison if he posted bail on the new criminal charges; also that if he was arrested while on probation and posted bail or was granted ROR bail, the Department was authorized to issue a warrant for his arrest and have him committed to prison pending appropriate revocation hearings or other specific court action.

("Department") arranged with Defendant's counsel for Defendant's detention in the Carbon County Correctional Facility on February 28, 2014, and further filed on the same date a petition to revoke Defendant's probation claiming Defendant violated the terms of his probation when he drove under the influence.[5] Also on this date, Defendant filed a "Motion for Habeas Corpus Relief/Motion to Set Bail" requesting that he be released on bail pending the disposition of the probation revocation proceedings.

A hearing on Defendant's Motion was held on March 6, 2014. At this hearing, Defendant denied he was driving under the influence, argued that the granting of bail was discretionary with the court, and asked that bail be set. In opposing the Motion, the Commonwealth contended Defendant was not legally entitled to bail and alternatively requested that if the issue involved an exercise of our discretion, we deny bail. At the hearing on Defendant's Motion, Defendant additionally waived his right to a Gagnon I hearing; this hearing had been previously scheduled for March 10, 2014.[6]

DISCUSSION

To begin, we first distinguish between Defendant's new arrest for driving under the influence and his detention for a claimed

[5] It is the practice of the County's Probation Department to immediately arrest and detain an individual who, while on probation or parole under the Department's supervision, is arrested and charged with a new criminal offense. The Department has the authorization to detain as an agent of the Court. **Commonwealth vs. Kelly,** 931 A.2d 694, 697-98 (Pa. Super. 2007), **appeal denied,** 596 Pa. 727, 945 A.2d 168 (2008).

Following detention, as occurred here, a petition for revocation identifying the new charges as the basis for revocation is filed. This filing prompts the scheduling of a Gagnon I hearing. In the instant petition filed by the Department against Defendant, the Department further requested the issuance of a warrant to keep Defendant detained pending a revocation hearing. This petition was later amended on March 5, 2014 to include failure to pay court costs and complete required community service as additional bases for violation. Pending disposition of the revocation proceedings, the individual is generally considered not eligible for bail.

[6] In **Gagnon v. Scarpelli,** 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973), the United States Supreme Court held that due process requires a two-step process for revocation of probation or parole: first, a probable cause hearing at or near the time of the initial detention (Gagnon I); and later a final determination hearing (Gagnon II).

By waiving the Gagnon I proceeding, Defendant conceded probable cause existed to detain him for violating the terms of his probation. To date, Defendant's Gagnon II hearing has not been held.

violation of the terms of his probation. "Prior to conviction, in a non-capital case in Pennsylvania, an accused has a constitutional right to bail which is conditioned only upon the giving of adequate assurances that he or she will appear for trial." **Commonwealth v. McDermott,** 377 Pa. Super. 623, 635-36, 547 A.2d 1236, 1242 (1988).[7] Here, following his arrest on February 5, 2014, Defendant was released pursuant to Pa. R.Crim.P. 519(B) and is awaiting a preliminary hearing on April 23, 2014, at which time bail will be set. **See** Pa. R.Crim.P. 510(B)(2).

In contrast, once guilt has been determined, "a defendant has no state or federal constitutional right to bail." **McDermott, supra** at 636, 547 A.2d at 1242 (**citing Commonwealth v. Fowler,** 304 A.2d 124, 127 and n.6 (Pa. 1973)); **Commonwealth v. Keller,** 433 Pa. 20, 248 A.2d 855, 856 (1969). Whereas the right to release on bail before conviction is fundamental because it promotes the presumption of innocence, avoids the infliction of punishment prior to trial and conviction, and provides the accused the maximum opportunity to prepare his defense, **Commonwealth v. Truesdale,**

[7] Article I, Section 14, of the Pennsylvania Constitution provides:

> All prisoners shall be bailable by sufficient sureties, unless for capital offenses or for offenses for which the maximum sentence is life imprisonment or unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community when the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion the public safety may require it.

Accordingly, with the exception of capital offenses and those for which a sentence of life imprisonment is a possibility, every person charged with a crime in this Commonwealth has a right to bail. In **Mastrian v. Hedman,** 326 F.2d 708 (8th Cir. 1964), **cert. denied,** 376 U.S. 965 (1964), **cited with approval in Commonwealth v. Fowler,** 451 Pa. 505, 508, 304 A.2d 124, 126 (1973), the court stated:

> While it is inherent in our American concept of liberty that a right to bail shall generally exist, this has never been held to mean that a state must make every criminal offense subject to such a right or that the right provided as to offenses made subject to bail must be so administered that every accused will always be able to secure his liberty pending trial. Traditionally and acceptedly, there are offenses of a nature as to which a state properly may refuse to make provision for a right to bail.

Id. at 710. **See also, Carlson v. Landon,** 342 U.S. 524, 545-46 (1952) (holding that the language "[e]xcessive bail shall not be required," which appears in the Eighth Amendment to the United States Constitution, does not create an absolute right to bail).

449 Pa. 325, 335-36, 296 A.2d 829, 834-35 (1972), "an individual's legitimate interest in remaining at large on bail diminishes, and the Commonwealth's legitimate interest in incarcerating the individual increases correspondingly, as the individual passes from suspect, to accused, to appellant, to **allocator** petitioner, to **certiorari** petitioner, to [PCRA] petitioner." **McDermott, supra** at 637, 547 A.2d at 1243. Even further removed from the presumption of innocence is a proceeding for parole revocation where the validity of the original conviction and sentence are not in issue, but only the import of subsequent collateral events. **Id.** As such, "when a parolee is properly held on a detainer for parole violations, the parolee has no right to bail." **Id.** at 638, 547 A.2d at 1243.[8]

Though parole and probation are different, as are the consequences and options available to the court when a violation is found and revocation granted, the validity of both the original conviction and sentence is presupposed when a detainer is issued for violation of the terms of either parole or probation. Likewise, an accused's liberty interests while on probation, as is the case with parole, are severely circumscribed by the conditions of supervision and are of a wholly different nature than an accused's liberty interests prior to trial.[9] Consequently, although we have found no appellate case stating so expressly, absent any constitutional provision or statute creating a right to bail pending resolution of probation revocation proceedings, and relying directly upon those authorities from other

[8] In **McDermott,** the Superior Court expressly held that the Rules of Criminal Procedure applicable to presentence and post-sentence bail on direct appeal are inapplicable to parole revocations. **Commonwealth v. McDermott,** 377 Pa. Super. 623, 637, 547 A.2d 1236, 1243 (1988). **See also, Commonwealth v. McMaster,** 730 A.2d 524, 526-27 (Pa. Super. 1999) (interpreting rules governing bail for post-verdict release as allowing bail pending appeal after a finding of guilt, so long as an avenue of direct appeal is open), **appeal denied,** 563 Pa. 613, 757 A.2d 930 (2000) and Pa. R.Crim.P. 521 (relating to bail after finding of guilt). The Pennsylvania Supreme Court in **Fowler** further noted that the Rules of Criminal Procedure do not confer substantive rights and that such rights must arise from the statutory or decisional law of this Commonwealth, independent of the Rules. **Fowler, supra** at 511, 304 A.2d at 127.

[9] In **Morrissey v. Brewer,** speaking with reference to a defendant supervised on parole, the United States Supreme Court stated: "Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions." 408 U.S. 471, 480 (1972).

jurisdictions cited in **McDermott** which address proceedings to revoke probation, as well as parole, we conclude there exists no **right** to bail for a probationer who is being detained for probation violations. **McDermott, supra** at 638, 547 A.2d at 1243; **see also, United States v. Sample,** 378 F. Supp. 43 (E.D. Pa. 1974) ("There exists no constitutional right to bail pending revocation of probation.").[10]

Absent such right, the question remains whether and under what circumstances bail may nevertheless be granted by the court, not as a matter of right, but as an exercise of the court's inherent discretion under the common law. Again, as noted in **McDermott,** the courts which have considered this issue are divided. **Supra** at 639, 547 A.2d at 1244. These jurisdictions differ between allowing bail pending formal revocation of probation or parole, except in exceptional cases, **Martin v. State,** 517 P.2d 1389, 1398 (Alaska 1974); to denying any legal authority in the courts to grant bail, unless expressly permitted by statute, **State v. Garcia,** 474 A.2d 20, 21-22 (New Jersey 1984) and **People ex rel. Calloway v. Skinner,** 300 N.E.2d 716, 720 (New York 1973); to prohibiting bail for a felon parolee whose alleged violation is the commission of a felony, while allowing bail, at the trial court's discretion, of other alleged parole violators. **Miller v. Toles,** 442 So. 2d 177, 180 (Florida 1983).

While this precise issue has not been decided in Pennsylvania, in **Commonwealth v. Bonaparte,** 366 Pa. Super. 182, 190, 530 A.2d 1351, 1354-55 (1987), the Superior Court held that in exceptional cases the trial court has the discretion to release a PCHA[11]

[10] Defendant's right to bail on the driving under the influence charge is not violated if notwithstanding the setting of bail on this charge, he is ineligible for release based on the Department's detainer for the pending probation revocation. **See Whitest v. Commonwealth, Pennsylvania Board of Probation and Parole,** 39 Pa. Commw. 254, 256-57, 395 A.2d 314, 316 (1978) (holding defendant's constitutional right to bail for a pending criminal charge is not violated if defendant remains detained based on pending parole revocation).

[11] At the time **Bonaparte** was decided, the Post Conviction Hearing Act, 42 Pa. C.S.A. §§9541 **et seq.,** was in effect. This Act has since been replaced by the Post-Conviction Relief Act, 42 Pa. C.S.A. §§9541-9546. We also note that while **Bonaparte** is non-precedential, having been decided by one judge, with two judges concurring in the result, its reasoning has been accepted by other panels of the Superior Court. **See e.g., Commonwealth v. McDermott, supra** at 636, 547 A.2d at 1242.

petitioner on bail pending disposition of the post-conviction petition pursuant to the court's inherent common-law powers in habeas corpus proceedings.[12] **See also, United States v. Stewart,** 127 F. Supp. 2d 670, 671 (E.D. Pa. 2001) ("[B]ail pending post-conviction habeas corpus review is available only when the petitioner has raised substantial constitutional claims upon which he has a high probability of success, and also when extraordinary or exceptional circumstances exist which make the grant of bail necessary to make the habeas remedy effective."). Consequently, notwithstanding the diminished liberty interest enjoyed by a probationer, which is nevertheless often greater than that of a PCRA petitioner, we similarly conclude that in the context of a habeas corpus proceeding we retain the inherent authority to grant bail pending resolution of probation revocation proceedings, at least in exceptional cases, such as when the probationer establishes a high probability of success on a substantial constitutional challenge or when extraordinary or exceptional circumstances make the grant of bail necessary.[13] **Cf. Siegel v. U.S. Parole Com'n,** 613 F. Supp. 127, 128 (S.D. Fla. 1985) (recognizing the court's inherent power to grant bail pending review of a parole revocation provided a showing of exceptional circumstances is made).

We narrow release to exceptional circumstances, in part because, having been found guilty, a probationer no longer enjoys the presumption of innocence; in part because of the nature of the violation alleged, a new criminal offense, which militates against the successful rehabilitation of the offender while on probation; and in part because of the constitutional due process requirement that the Gagnon I hearing "be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly

[12] The Court specifically noted that this discretion emanated from the power vested in the trial court by virtue of habeas corpus jurisdiction and not a right vested in the petitioner. **Commonwealth v. Bonaparte,** 366 Pa. Super. 182, 190, 530 A.2d 1351, 1354-55 (1987).

[13] The Commonwealth does not dispute that Defendant's request for habeas corpus relief is the proper vehicle by which Defendant may obtain judicial review of the detainer. **See** 42 Pa. C.S.A. §6503; **see also, Commonwealth ex rel. Johnson v. Myers,** 194 Pa. Super. 452, 453, 169 A.2d 319, 321 (1961) ("Habeas-corpus is a writ of liberty and not of error and it will issue not for the purpose of correcting errors in a proceeding of court of competent jurisdiction but rather is for the purpose of determining the legality of the restraint.").

as convenient after arrest while information is fresh and sources are available." **Morrissey v. Brewer,** 408 U.S. 471, 485 (1972); **Gagnon v. Scarpelli,** 411 U.S. 778, 782 (1973) (extending **Morrissey**'s two-step process for revocation of parole to revocation of probation). The court in **Morrissey** made clear that although it contemplated that a parolee would be confined from the time of his arrest as an alleged violator until the parole revocation hearing, as a procedural due process guarantee, the time before a probable cause hearing was held before an independent officer would be relatively short. **Id.** It is also not without significance in limiting release to a showing of exceptional circumstances that, as in the present case, a **prima facie** violation has been determined to exist at either an earlier Gagnon I hearing, or its equivalent, waiver.

CONCLUSION

Although the right to bail in a criminal proceeding is constitutionally guaranteed an accused pretrial, no constitutional right to bail exists for a defendant who has been previously found guilty and sentenced pending a probation revocation hearing whose purpose is to adjudicate neither the defendant's guilt or innocence of the underlying offense. Instead, absent statutory or decisional law to the contrary, release on bail pending the resolution of probation revocation proceedings for a new criminal offense is not only discretionary with the court, but limited to a showing of exceptional circumstances and for compelling reasons.

KEYSTONE PELLET INCORPORATED
d/b/a GREAT AMERICAN PELLETS, Plaintiff
vs. CT PELLET LLC, Defendant

Civil Law—Unauthorized Practice of Law—In-Court Representation of a Corporation or Similar Business Entity by a Non-Attorney—Criminal Sanctions

1. In determining what constitutes the practice of law, the court must keep the public interest of primary concern, both in terms of the protection of the public to ensure competent professional representation is provided in matters which require the exercise of legal judgment, as well as ensuring that the regulation of the practice of law is not so strict that the public good suffers.

2. Because the practice of law may well be used in a different sense for various purposes, what constitutes the unauthorized practice of law requires a case-by-case determination, taking into consideration the character of the activities engaged in and the nature of the proceedings at issue.

3. The unlicensed, in-court representation of another constitutes the practice of law within the meaning of Pennsylvania's statute proscribing the unauthorized practice of law and making such conduct criminal.

4. A corporation or similar business entity (**e.g.,** a limited liability company) may appear in court only through an attorney-at-law admitted to practice before the court.

5. A corporate or company representative, or its principal owner, may not act as counsel for the business in a judicial proceeding.

6. A court is without jurisdiction to consider claims made by the owner or representative of a corporation or similar business entity who is not an attorney licensed to practice law in this Commonwealth.

7. Motions and pleadings filed by a non-attorney on behalf of a corporation or similar business entity engaged in litigation before the courts of common pleas of this Commonwealth are a legal nullity.

8. As the Defendant, a limited liability company, appeared in court without counsel, the court properly precluded Defendant from being represented by a non-attorney at a hearing scheduled on Defendant's motion to vacate a default judgment previously entered by Plaintiff against Defendant for want of an answer to the complaint.

NO. 13-1731

GRETCHEN L. GEISSER, Esquire—Counsel for Plaintiff.

CT PELLET LLC—Pro se.

MEMORANDUM OPINION

NANOVIC, P.J.—May 1, 2014

The law is contextual. Therefore, when we ask whether the sole owner and officer of a corporation or similar business entity is entitled to represent the business of which he is a part, we necessarily must further ask, under what circumstances: before whom, in what capacity, doing what.

PROCEDURAL AND FACTUAL BACKGROUND

Defendant, CT Pellet LLC ("Defendant"), is a limited liability company organized under the laws of Connecticut. Its sole owner and member is Scott Olson. Mr. Olson is not licensed to practice law in Pennsylvania, or elsewhere.

On August 29, 2013, the Plaintiff, Keystone Pellet Incorporated d/b/a Great American Pellets ("Plaintiff"), commenced suit against the Defendant in the Carbon County Court of Common Pleas with the filing of its complaint for breach of contract and unjust enrichment. Therein, Plaintiff claimed Defendant defaulted on the payment of $24,416.60 it owed Plaintiff for the purchase of wood pellets. Defendant attempted to file an answer to the complaint on September 30, 2013, which answer was returned by the Carbon

County Prothonotary's Office for want of the requisite filing fee. Subsequently, a default judgment in the amount of $24,664.05 was taken on October 16, 2013. This amount included the unpaid principal balance claimed in the complaint, together with service fees of $70.00 and filing fees of $177.45.

On December 17, 2013, Defendant filed a **pro se** Motion to Vacate Default Judgment prepared and signed by Mr. Olson in his capacity as the sole owner of Defendant wherein Defendant claimed to have filed an answer to the complaint, as evidenced by a time-stamped copy of the answer it received from the Prothonotary, which answer, Defendant contended, precluded Plaintiff from taking a default judgment. In response to this Motion, Plaintiff denied the filing of any answer to the complaint before default judgment was taken.

A hearing on Defendant's Motion was originally scheduled for March 10, 2014. At this hearing, Mr. Olson appeared on Defendant's behalf. As a preliminary matter, Plaintiff, through counsel, objected to Mr. Olson's representation of Defendant, claiming he was not a licensed attorney or admitted to practice law in this Commonwealth. Plaintiff argued that to allow Mr. Olson to represent Defendant would countenance the unauthorized practice of law and that the Motion to Vacate, as well as any answer allegedly filed by Mr. Olson on Defendant's behalf, was a legal nullity and should be dismissed with prejudice.

Mr. Olson acknowledged he was not an attorney and was unsure how to respond to Plaintiff's objection. Because this issue had not been raised earlier, we granted Mr. Olson's request for a continuance to allow Defendant an opportunity to obtain counsel and respond to Plaintiff's request that Defendant's Motion and Answer be dismissed.[1] We also advised Mr. Olson that he would not be allowed to serve as counsel for the Defendant at the rescheduled hearing.

[1] At the time of this hearing, Plaintiff's counsel provided the court with a memorandum of law opposing Defendant's Motion to Vacate the Default Judgment. In this memorandum, counsel noted that upon investigation with the Prothonotary's Office, Plaintiff learned that the Prothonotary prematurely time stamped an answer it received to the complaint which was not accompanied by the required filing fee. Upon realizing this error, Plaintiff claimed the Prothonotary crossed out the time stamp and returned the answer to Defendant with instructions that the answer could not be accepted without payment of the filing fee. We further note that this answer was never docketed of record by the Prothonotary.

The hearing on Defendant's Motion was rescheduled for April 21, 2014. At this hearing neither Mr. Olson nor anyone else appeared on Defendant's behalf. Accordingly, we granted Plaintiff's Motion to Dismiss Defendant's Motion to Vacate the Default Judgment for Defendant's failure to proceed on its Motion. Because of the importance and recurring nature of the authority of a corporate or company representative, or its principal owner, to act as counsel for the business in a judicial proceeding, we have elected to file this memorandum opinion addressing the issue.

DISCUSSION

In **Walacavage v. Excell 2000, Inc.,** the Pennsylvania Superior Court held that a corporation may not be represented in court by a corporate officer or shareholder who is not an attorney. 331 Pa. Super. 137, 139, 480 A.2d 281, 282 (1984). In **Walacavage,** two separate actions between the same parties were consolidated on appeal. In the first, following a non-jury trial on a collection matter, the trial court entered a verdict in favor of plaintiff and against the defendant corporation. In the second, the trial court granted plaintiff's request to strike preliminary objections filed by the defendant corporation to plaintiff's complaint. In each case, both before the trial court and on appeal, the defendant corporation was represented by a non-attorney corporate officer and shareholder.

The Superior Court affirmed the non-jury verdict and quashed the appeal from the trial court's dismissal of defendant's preliminary objections, both on procedural grounds. In addition, the court, as an issue of first impression, also addressed whether the trial court erred in denying defendant corporation the right to be represented in court by a non-lawyer who was a corporate officer.[2] In holding that

[2] According to the Superior Court's opinion, at the non-jury trial, the trial court neither granted the corporate officer permission to conduct the corporation's defense nor prevented him from doing so, but did advise this officer that if he cross-examined witnesses or called any witness on the corporation's behalf, he would expose himself to the risk of criminal prosecution for the unauthorized practice of law. **Walacavage v. Excell 2000, Inc.,** 331 Pa. Super. 137, 141, 480 A.2d 281, 283 (1984), **See also,** 42 Pa. C.S.A. §2524(a) (penalty for unauthorized practice of law). This statute provides:

> [A]ny person ... who within this Commonwealth shall practice law ... without being an attorney at law ... commits a misdemeanor of the third degree upon a first violation. A second or subsequent violation of this subsection constitutes a misdemeanor of the first degree.

42 Pa. C.S.A. §2524(a) (Supp. 2014). In consequence, the officer remained silent at the trial except for making a few generalized objections to the proceedings.

"a corporation may appear and be represented in our courts only by an attorney duly admitted to practice law," the court explained the reasoning for this rule: "[A] corporation can do no act except through its agents and that such agents representing the corporation in Court must be attorneys at law who have been admitted to practice, are officers of the court and subject to its control." **Id.** at 142, 480 A.2d at 284 (**quoting MacNeil v. Hearst Corp.,** 160 F. Supp. 157, 159 (D. Del. 1958)); **see also, Estate of Rowley,** 84 A.3d 337 (Pa. Commw. 2013) (holding that a non-attorney administrator of a decedent's estate could not represent the estate in court on the estate's challenge to a judicial tax sale of estate property).[3]

The court further stated that "the purpose of the rule was not [for] the protection of stockholders but the protection of the courts and the administration of justice, and that a person who accepts the advantages of incorporation for his or her business must also bear the burdens, including the need to hire counsel to sue or defend in court." **Walacavage, supra** at 142, 480 A.2d at 284 (internal quotation marks and citation omitted). In addition, the court observed that pleadings, motions and briefs drawn by laypersons are often awkwardly drafted and inarticulable, thereby demonstrating the wisdom of the rule. **Id.** at 142-43, 430 A.2d at 284.[4]

[3] In **Estate of Rowley, quoting Williams v. USP-Lewisburg,** No. 3: CV-09-1715, 2009 WL 4921316 (M.D. Pa., Dec. 11, 2009), the court explained:

> Like a corporation, an estate can only act through an agent; in this case, an administrator. An estate by its very nature cannot represent itself and, therefore, must be represented by a licensed attorney, regardless of the relation between the administrator and the decedent. To permit an unlicensed lay administrator to appear pro se would be to permit the unauthorized practice of law.

84 A.3d 337, 341 (Pa. Commw. 2013). Similar principles apply to a limited liability company. **See e.g.,** 15 Pa. C.S.A. §§8991 (parties to actions), 8992 (authority to sue); Pa. R.C.P. 2176 (defining the term "corporation or similar entity" to include a limited liability company). **Cf., In re Lawrence County Tax Claim Bureau,** 998 A.2d 675 (Pa. Commw. 2010) (holding that a general partner in a partnership was allowed to represent the partnership **pro se** in court proceedings, in part because, as a general partner, he was in effect protecting his own interests, and in part because, as a general partner, he was expressly authorized by the Pennsylvania Rules of Civil Procedure to prosecute a partnership matter in his own name or in the name of the partnership).

[4] In the instant case, the answer proffered by Defendant to Plaintiff's seventeen-paragraph complaint consisted of one sentence: "All paragraphs of Plaintiff's complaint are denied by Defendant." The effect of this answer, had it been accepted by the Prothonotary's office, would have resulted almost wholly in deemed admissions. **See** Pa. R.C.P. 1029(b) ("[a]verments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by necessary implication").

The **Walacavage** court identified two exceptions to the rule which had been adopted by other states: (1) in "special small claims courts with informal rules of procedure in which corporate as well as individual litigants are permitted or even required to appear without an attorney"; and (2) in stockholder's derivative actions where the "non-lawyer individual stockholder plaintiff may proceed pro se on the theory that it is the stockholder's own action even though brought for the corporation's benefit." **Id.** at 143, 480 A.2d at 284. Since **Walacavage** was decided, Pennsylvania has recognized the exception for small claims and before some administrative agencies. **See** Pa. R.C.P.M.D.J. 207(A)(3) (allowing corporate officers to represent corporations in proceedings before magisterial district judges); **Harkness v. Unemployment Compensation Board of Review,** 591 Pa. 543, 920 A.2d 162 (2007) (plurality opinion) (allowing non-attorney representative to represent an employer in unemployment compensation proceedings before a referee).[5] In **Walacavage** both exceptions were found inapplicable, as they are here.

In **The Spirit of the Avenger Ministries v. Commonwealth of Pennsylvania,** the Commonwealth Court went one step further holding, **sua sponte,** that the court was without jurisdiction to consider the claims made in an appeal by the appellant's pastor, a non-lawyer, on behalf of a nonprofit association claiming tax-

[5] In **Harkness v. Unemployment Compensation Board of Review,** the court explained:

> [T]he unemployment compensation system must operate quickly, simply, and efficiently. The proceedings are by design, brief and informal in nature. ... Thus, the claims for benefits are not intended to be intensely litigated. Unemployment compensation proceedings are not trials. The rules of evidence are not mandated; there is no pre-hearing discovery; the parties have no right to a jury trial; indeed there is no requirement that the referee be a lawyer. Also, and importantly, there are only minimal amounts of money in controversy. ... Issues arising in these matters are generally questions of fact not requiring complex legal analysis. Requiring employers to be represented by counsel will not only undermine the informal, speedy and low cost nature of these proceedings, it may dissuade many employers from defending claims for benefits leading to the possibility of an unwarranted drain on the system.

591 Pa. 543, 553, 920 A.2d 162, 168 (2007) (citations omitted).

exempt status as a charitable organization under the Institutions of Purely Public Charity Act, 10 P.S. §§371-385. 767 A.2d 1130 (Pa. Commw. 2001). The court further cited with approval the Commonwealth Court decision in **McCain v. Curione,** 106 Pa. Commw. 552, 558, 527 A.2d 591, 594 (1987) for the proposition that "proceedings commenced by persons unauthorized to practice law are a nullity." **The Spirit of the Avenger Ministries, supra,** at 1131. **See also, Commonwealth v. Woodland Trust,** 2008 WL 9408011 *2 (Pa. Commw. 2008) (holding that the Commonwealth Court was without jurisdiction to consider the merits of an appeal filed by a non-attorney trustee on behalf of a trust).

What constitutes the practice of law must be determined on a case-by-case basis. **Harkness, supra** at 550, 920 A.2d at 166.[6] In **Harkness,** the court considered various factors before deciding that a non-attorney representative of a corporate employer could represent the employer in proceedings before an unemployment compensation referee. These included the informal nature of the proceedings, the amount in controversy, and the complexity of the legal issues involved. Ultimately, the court found that "in determining what constitutes the practice of law, [the Court] must keep the public interest of primary concern, both in terms of the protection of the public as well as ensuring that the regulation of the practice of law is not so strict that the public good suffers." **Id.** at 551, 920 A.2d at 167.[7]

[6] In **Harkness,** the court identified three broad categories of activities that **may** constitute the practice of law:

> (1) the instruction and advising of clients in regard to the law so that they may pursue their affairs and be informed as to their rights and obligations; (2) the preparation of documents for clients requiring familiarity with legal principles beyond the ken of ordinary laypersons; and (3) the appearance on behalf of clients before public tribunals in order that the attorney may assist the deciding official in the proper interpretation and enforcement of the law.

Supra at 551, 920 A.2d at 167.

[7] The need for competent legal representation by licensed counsel to protect the public was expounded upon by the Pennsylvania Supreme Court in **Dauphin County Bar Association v. Mazzacaro** as follows:

> When a person holds himself out to the public as competent to exercise legal judgment, he implicitly represents that he has the technical competence to analyze legal problems and the requisite character qualifications to act in a representative capacity. When such representations are made by persons not adequately trained or regulated, the dangers to the public are manifest:

> "While the public interest is certainly served by the protection of the public, it is also achieved by not burdening the public by too broad a definition of the practice of law, resulting in the overregulation of the public's affairs." **Id.** at 550, 920 A.2d at 167.
>
> There are times, of course, when it is clearly within the ken of lay persons [sic] to appreciate the legal problems and consequences involved in a given situation and the factors which should influence necessary decisions. No public interest would be advanced by requiring these lay judgments to be made exclusively by lawyers. Where, however, a judgment requires the abstract understanding of legal principles and a refined skill for their concrete application, the exercise of legal judgment is called for. ... While at times the line between lay and legal judgments may be a fine one, it is nevertheless discernible. Each given case must turn on a careful analysis of the particular judgment involved and the expertise that must be brought to bear on its exercise.

Dauphin County Bar Association v. Mazzacaro, 465 Pa. 545, 553, 351 A.2d 229, 233 (1976) (citation omitted). **See e.g., Shortz v. Farrell,** 327 Pa. 81, 88-90, 193 A. 20, 23 (1937) (holding that the preparation and filing of workmen's compensation pleadings does not constitute the practice of law because the forms are pre-

> 'A layman who seeks legal services often is not in a position to judge whether he will receive proper professional attention. The entrustment of a legal matter may well involve the confidences, the reputation, the property, the freedom, or even the life of the client. Proper protection of members of the public demands that no person be permitted to act in the confidential and demanding capacity of a lawyer unless he is subject to the regulations of the legal profession.' EC 3-4, Code of Professional Responsibility, adopted by the Supreme Court of Pennsylvania, February 27, 1974, 455 Pa. ___ (1974).
>
> Indeed, 'the bar itself actually arose out of a public demand for the exclusion of those who assume to practice law without adequate qualifications therefor.' **Vom Baur, An Historical Sketch of the Unauthorized Practice of Law,** 26 Unauthorized Practice News 1, 2 (Fall 1958). To practice law a person must demonstrate a reasonable mastery of legal skills and principles, be a person of high moral character and maintain a continuing allegiance to a strict code of professional conduct. **See e.g.,** Rules 7, 8, 9, 12, 14 and 17-3 of the Rules of the Supreme Court of Pennsylvania. ... It is to guard against the impairment of this interest that the practice of law by persons who are not authorized to do so is forbidden.

465 Pa. 545, 551-52, 351 A.2d 229, 232-33 (1976).

pared by the Workmen's Compensation Board, are elementary in character, and do not rise to the dignity of "pleadings" as that term is understood in other judicial proceedings).

Returning to the undisputed facts in this case, the Defendant, CT Pellet LLC, has been sued by the Plaintiff; the Plaintiff has taken a default judgment; and Scott Olson, a representative of the Defendant, has filed on its behalf a motion seeking to either strike or open the default judgment which, given the nature of the procedural history preceding the entry of that judgment, requires a hearing and the development of an evidentiary record. Mr. Olson is not authorized to practice law in this Commonwealth or before this court. CT Pellet LLC is a legal entity separate and apart from Mr. Olson.

These facts alone evidence the unauthorized practice of law by Mr. Olson. **Kohlman v. Western Pennsylvania Hospital,** 438 Pa. Super. 352, 358, 652 A.2d 849, 852 (1994) (**citing** 7 Am.Jur.2d Attorneys at Law §1 (1980) ("practice of law ... embraces the preparation of pleadings and other papers incident to actions and special proceedings, the management of such actions and proceedings on behalf of clients **before judges and courts**")); **see also, Shortz, supra** at 88, 193 A. at 23 (noting that for the proper development of a record upon which the ultimate rights of the parties are to be decided legal knowledge and training is highly requisite). The fact that he is the sole owner and member does not alter this conclusion. **See Walacavage, supra** at 142, 480 A.2d at 284 (**citing Shamey v. Hickey,** 433 A.2d 1111 (D.C. App. 1981)); **see also, Concilio DeIglesias Ministetio Marantha Pentecostal, Inc. v. Zoning Hearing Board of the City of Scranton,** 2012 WL 8681514 (Pa. Commw. 2012) (holding that even though there is no relevant distinction between representation by a non-lawyer sole proprietor, which is allowed, and representation by a non-lawyer sole shareholder of a corporation who, like the sole proprietor, risks only his own interests should he forego adequate counsel, as a policy determination, the rule in **Walacavage,** that a corporation may appear in court only through licensed counsel, must be followed).

CONCLUSION

Under this state's Constitution, our Supreme Court is vested with the exclusive power to regulate the practice of law, which

includes the power to define what constitutes the practice of law, (Pa. Const. Art. V, §10(c)), and by statute, 42 Pa. C.S.A. §2524(a), the practice of law by a person who is not a member of the bar is a misdemeanor. **Harkness, supra** at 549 n.3, 4, 920 A.2d at 166 n.3, 4. Unfortunately, defining the exact boundaries of what is the "practice of law" is an elusive, complex task "more likely to invite criticism than to achieve clarity." **Shortz, supra** at 84, 193 A. at 21. "This is so because the practice of law may well be used in a different sense for various purposes." **Kohlman, supra** at 357, 652 A.2d at 851.

Instead, as construed by our Supreme Court, the determination must be made on a case-by-case basis, "considering the character of the activities engaged in, as well as the nature of the proceedings at issue." **Harkness, supra** at 552, 920 A.2d at 167. Under this standard, the preparation and filing of pleadings and motions on behalf of one litigant against another, and the in-court representation of a party at a hearing before a trial court, are core functions of an attorney-at-law for which the exercise of legal judgment quintessential to the "practice of law" is at the forefront—a judgment requiring an abstract understanding of legal principles melded with the knowledge and skill necessary for their application to the concrete facts of any given claim. **Kohlman, supra** at 357-58, 652 A.2d at 851-52.

To have allowed Mr. Olson to represent CT Pellet LLC at the hearing scheduled for August 10, 2010, to overlook conduct before the court which is made criminal by the laws of this Commonwealth, and to acquiesce in such conduct by overruling Plaintiff's objection, cannot be countenanced by a court of law. This we would not do and, therefore, we sustained Plaintiff's objection to Defendant's representation by its sole owner and member, a non-attorney.

COMMONWEALTH OF PENNSYLVANIA vs.
MERRICK STEVEN KIRK DOUGLAS, Defendant

*Criminal Law—PCRA—Ineffectiveness of Counsel—*Per Se *Ineffectiveness—Alibi—Defendant's Decision Not to Testify—Advice of Counsel*

1. In **Commonwealth v. Pierce,** the Pennsylvania Supreme Court established a three-part test for evaluating a defendant's claim of ineffective assistance of defense counsel under the PCRA. Under this test, Defendant

must prove each of the following elements: (1) that the underlying legal claim has arguable merit, (2) that counsel's actions lacked an objective reasonable basis, and (3) that he was prejudiced by counsel's acts or omissions. A failure to establish any of these three elements will defeat a claim of ineffective assistance of counsel.

2. The element of prejudice requires Defendant to demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding.

3. Ordinarily, a claim of ineffective assistance of counsel must be examined and evaluated under the **Pierce** test. However, in certain circumstances, counsel's conduct will be deemed to be **per se** ineffective. One such circumstance is where counsel's deficient conduct is a failure to follow procedural rules required to perfect appellate review, which failure results in a waiver of all appellate issues. When counsel's conduct entirely deprives the Defendant of his right to a direct appeal under these circumstances, Defendant has, in effect, been constructively deprived of all counsel, and prejudice is presumed.

4. The **per se** rule of ineffectiveness and presumed prejudice in a case of this type is inapplicable when counsel's procedural errors waive some, but not all, of the issues presented for appellate review. When this occurs, Defendant continues to bear the burden of establishing that the issues waived on appeal were prejudicial to Defendant.

5. Defense counsel's failure to raise or present an alibi defense does not rise to the level of ineffectiveness necessary to set aside a conviction where counsel was reasonably unaware of the defense prior to trial and where the facts in support of an alibi defense undermine an equally viable, if not more viable, defense which was presented.

6. Before defense counsel will be found ineffective for advising Defendant not to testify, Defendant must prove that counsel either interfered with his right to testify or that counsel gave specific advice so unreasonable as to vitiate a knowing and intelligent decision not to testify on his own behalf.

NO. 289-CR-2008

JEAN ENGLER, Esquire, Assistant District Attorney—Counsel for the Commonwealth.

MICHAEL P. GOUGH, Esquire—Counsel for the Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—June 13, 2014

Before the court is Defendant's Post Conviction Relief Act (PCRA)[1] petition wherein the primary issue raised is whether trial counsel was ineffective for not having discovered or presented at trial an alibi defense. For the reasons which follow, we hold that

[1] 42 Pa. C.S.A. §§9541-46.

where counsel did not learn of facts supporting a possible alibi defense until the witness testified at trial, at variance with earlier statements made by the witness and inconsistent with information previously provided by the Defendant to both police and defense counsel, counsel will have rendered effective assistance.

PROCEDURAL AND FACTUAL BACKGROUND

The instant PCRA petition filed by the Defendant, Merrick Douglas, on May 31, 2013, collaterally attacks his convictions for sexually assaulting his boss' seventeen-year-old daughter. The facts of this case occurred in 2007 when Defendant worked for an electrical contracting business that the owner operated out of his home in Albrightsville, Carbon County, Pennsylvania. On July 10, 2007, at the end of his shift, Defendant went to the owner's home to punch a time clock. Defendant was accompanied by a co-worker, Nelson Soto, who was likewise finishing work for the day and intending to punch out. Upon entering the home, both Defendant and Soto went upstairs and punched out. (N.T. 12/8/2009, pp. 68-69; 230-31.) Defendant's time card documented the time as 3:37 P.M. (N.T. 12/8/2009, p. 54; N.T. 11/18/2011, p. 41; N.T. 8/13/2013, p. 25.)

While Soto left the home immediately after punching out, Defendant remained, talking to A.D., the owner's seventeen-year-old daughter, who was by herself in the home. Soto returned to the home approximately five minutes later to return keys to the work van which he had inadvertently taken with him.[2] On his return, Soto observed the Defendant and A.D. for only a brief time—they were talking with one another—and then left. When Soto left the home the second time he was alone and sure Defendant was still in the home. (N.T. 12/8/2009, pp. 231-32.) When asked, Soto did not know when Defendant exited the home. (N.T. 12/8/2009, p. 234.)

According to A.D., when Soto left the second time, she and Defendant were sitting on a living room couch engaged in small talk. Shortly after this time, A.D. went into the kitchen to get a glass of water. Defendant followed, complimented her on her appearance, and started to lift up the bottom of her dress. A.D. testified she pushed Defendant's hand away and asked him to leave. Defen-

[2] At trial Soto testified he returned within a minute or so to return the keys. (N.T. 12/8/2009, p. 232.) A.D. recalled the time lapse before Soto's return to be approximately five to ten minutes. (N.T. 12/8/2009, pp. 69, 129.)

dant commented that they were alone in the home and should go down to the basement; he then placed one arm around her upper body, picked her legs up with the other, and physically carried her downstairs against her will.

Once in the basement, Defendant pinned A.D. against a pool table with his body, lifted up her dress, pulled down her underwear, penetrated her vagina with his fingers, and attempted to penetrate her vagina with his penis. During this entire time, A.D. testified she was screaming for him to stop. The assault ended when A.D.'s dog barked, alerting Defendant to the possibility that A.D.'s parents were home, at which time A.D. escaped from Defendant's grasp. At this point, A.D. ran upstairs to her bedroom and locked the door behind her. Defendant followed. When he was unable to open the door, he left.

A.D. told her parents about the assault the next day, whereupon they immediately contacted the Pennsylvania State Police. Although the State Police came to A.D.'s home that evening, and questioned what had happened, for reasons which are inexplicable, it appears that no written record of this meeting on July 11, 2007, was made and/or retained by the police.

During further investigation by the police on July 13, 2007, Defendant gave a written statement wherein he admitted that he was at the home and spoke with A.D., but denied that he sexually assaulted her. In this statement, Defendant also told the police that he left the victim's home at approximately 4:00 P.M., "right behind Soto." (N.T. 11/8/2009, pp. 182-83.) After the police completed their investigation, Defendant was charged with rape by forcible compulsion,[3] indecent assault by forcible compulsion,[4] unlawful contact with a minor,[5] indecent exposure,[6] attempted rape by forcible compulsion,[7] and various related inchoate offenses.

Paul Levy, Esq. ("Trial Counsel") represented Defendant in pretrial proceedings and at trial. In a meeting shortly after Defendant's preliminary hearing, Defendant told Trial Counsel that he was at the victim's home on the day of the alleged assault and left the home at 4:00 P.M.[8] With the Commonwealth claiming the assault occurred between 3:30 P.M. and 4:00 P.M.[9] and the information provided by Defendant, Trial Counsel did not foresee an alibi defense and did not file a notice of alibi pursuant to Pennsylvania Rule of Criminal Procedure 567. Instead, the defense position was not that Defendant was not there, but that the assault did not occur.

To support this position, Defendant advised Trial Counsel that his mother was a potential witness because he drove to her workplace immediately after the assault was alleged to have occurred. An investigator employed by Trial Counsel interviewed Defendant's mother shortly before trial. At this interview, Defendant's mother told the investigator that her son arrived at her workplace between 4:30 P.M. and 4:40 P.M. (N.T. 8/13/2013, pp. 20-21.) With her workplace a thirty- to forty-minute drive from the crime scene,[10] her statement reinforced the information Defendant provided to Trial Counsel, that he left the victim's home at 4:00 P.M. and drove directly from that location to his mother's place of employment. Defendant's mother also told the investigator that when she saw her son, there was nothing about his appearance, his clothing or physical condition, or his demeanor that indicated he had been involved in an assault. Based on this interview, Trial Counsel planned to call Defendant's mother as a witness to testify to Defendant's demeanor and condition within an hour after the alleged assault occurred.

A two-day jury trial began on December 8, 2009. At trial, the Commonwealth relied primarily on the testimony of A.D. to prove its case. She gave a detailed account of the assault as described

[3] 18 Pa. C.S.A. §3121(a)(1).

[4] 18 Pa. C.S.A. §3126(a)(2).

[5] 18 Pa. C.S.A. §6318(a)(1).

[6] 18 Pa. C.S.A. §3127(a).

[7] 18 Pa. C.S.A. §901(a).

[8] At the PCRA hearing, Trial Counsel testified Defendant told him he left the victim's home at 4:00 P.M. (N.T. 8/13/2013, p. 12.) This agreed with the victim's timeline. (N.T. 12/8/2009, p. 103.) Defendant also testified at an earlier hearing that after he clocked out he spoke briefly with the victim and that he left the victim's home after Mr. Soto. (N.T. 11/18/2011, pp. 41-42.)

[9] **See** Affidavit of Probable Cause attached to the criminal complaint filed on March 18, 2008.

[10] Defendant's mother testified the distance was "a good 40 minutes" drive. (N.T. 12/8/2009, p. 241.) Attorney Levy recalled the driving time to be approximately 25 to 35 minutes based upon a Google search he had performed. (N.T. 8/13/2013, pp. 21-22.)

above. As presented by the Commonwealth, with Defendant clocking out at 3:37 P.M. and leaving the victim's home at approximately 4:00 P.M., Defendant had a window of opportunity of approximately twenty-three minutes during which the assault occurred.

After the Commonwealth rested, Defendant offered his mother as his sole witness. Defendant's mother testified to a time frame different from that which she had told the investigator. She testified that on the day of the assault her son arrived at her workplace not between 4:30 and 4:40 P.M., but between 4:00 and 4:15 P.M., and certainly no later than 4:30 P.M. (N.T. 12/8/2009, p. 241.) This testimony established a possible alibi for Defendant in that if he arrived at his mother's workplace at 4:00 P.M., or shortly thereafter, given the time needed to travel between the victim's home and his mother's workplace, he would have been on the road at the time the Commonwealth claimed the assault occurred. The Commonwealth objected to this testimony as Defendant had not filed a notice of alibi. The objection was sustained and the testimony stricken. Defendant's mother then testified, as planned, about her son's demeanor and condition on the day of the assault.

Defendant did not testify in this case. Prior to resting, Trial Counsel met with Defendant to discuss whether Defendant should testify. At this meeting, Trial Counsel advised Defendant not to testify for two reasons. First, Trial Counsel advised Defendant that if he testified, the Commonwealth would impeach him with his prior conviction for forgery.[11] Second, Trial Counsel advised Defendant that he did not believe the jury would find Defendant's testimony credible. According to Trial Counsel, Defendant planned on testifying that A.D. fabricated her testimony about the assault because Defendant declined her sexual advances. Based on this advice, Defendant decided not to testify and the defense rested. Defendant was found guilty by the jury the following day of all charges, except rape by forcible compulsion.

Following his convictions, but prior to sentencing, Defendant's parents hired Mark Schaffer, Esquire and Kenneth Young, Esquire (collectively "Appellate Counsel") to represent Defendant at sentencing and for the purpose of taking a direct appeal. With Appellate Counsel representing Defendant, Defendant was sentenced to an aggregate term of imprisonment in a state correctional facility of not less than six nor more than twelve years.

[11] Prior to the taking of evidence, we granted the Commonwealth's motion **in limine** to allow the Commonwealth to present evidence of Defendant's conviction for forgery, a felony of the third degree, if he testified. (N.T. 12/8/2009, p. 4.)

On April 9, 2010, Appellate Counsel appealed the judgment of sentence to the Pennsylvania Superior Court. On this appeal, Appellate Counsel raised six claims: (1) whether the Commonwealth failed to provide the defense with requested and mandatory discovery, (2) whether the Trial Court erred in allowing the Commonwealth to ask A.D. leading questions on direct examination, (3) whether the Trial Court erred in denying Defendant's request for a mistrial after the investigating trooper testified that Defendant had volunteered to take a polygraph test, (4) whether the evidence was insufficient to sustain Defendant's convictions, (5) whether the verdict was against the weight of the evidence, and (6) whether Trial Counsel was ineffective both before and during trial.

On May 3, 2011, the Superior Court affirmed Defendant's judgment of sentence. In doing so, the court addressed only the merits of the claim related to the polygraph test; the remaining claims were deemed either waived or premature. It held that Defendant waived the claims of discovery violations and leading questions because Defendant did not include them in his court-ordered Pa. R.A.P. 1925(b) statement of matters complained of on appeal. Next, it held that Defendant waived the weight of the evidence claim because he did not properly preserve the issue by making either an oral or post-sentence motion with the trial court. It also held that he waived the sufficiency of the evidence claim because he did not properly brief the issue. Finally, the court did not address the claim for ineffectiveness of counsel because it was premature. Defendant did not appeal the Superior Court's decision.

On August 2, 2011, Defendant filed his first PCRA petition, claiming that both Trial Counsel and Appellate Counsel rendered ineffective assistance of counsel. Defendant raised four claims in this petition: (1) that Trial Counsel failed to raise and preserve an alibi defense, (2) that Appellate Counsel failed to preserve several appellate issues, (3) that Trial Counsel ineffectively advised Defendant not to testify, and (4) that Appellate Counsel failed to

petition the Pennsylvania Supreme Court for allowance of appeal from the Superior Court's May 3, 2011 decision.

In an opinion dated August 17, 2012, we found Appellate Counsel rendered ineffective assistance of counsel by failing to seek review of the Superior Court's decision. Consequently, we reinstated Defendant's right to file a petition for allowance of appeal with the Pennsylvania Supreme Court **nunc pro tunc.** At the same time, we dismissed Defendant's first, second, and third claims without prejudice, holding Defendant could raise those issues in a subsequent PCRA petition if needed.

Defendant filed his petition for allowance of appeal with the Supreme Court on September 5, 2012. On May 14, 2013, the court denied this petition. Subsequently, on May 31, 2013, Defendant filed his Second Amended PCRA petition now before us.[12] In this petition, Defendant raises the remaining three issues from his first PCRA petition which we previously dismissed without prejudice.[13]

On August 13, 2013, we held a hearing to allow Defendant to present evidence in support of his petition.[14] Following this hearing, and after receiving briefs on behalf of both the Commonwealth and Defendant, we are now ready to address the merits of Defendant's claims. We do so in the order advanced.

[12] Because Defendant filed this petition within a year of the date the Supreme Court denied his appeal, we have jurisdiction over his petition. We have no jurisdiction over an untimely PCRA petition. **Commonwealth v. Frey,** 41 A.3d 605, 610 (Pa. Super. 2012). To be timely, the general rule, with three exceptions, is that the petition must be filed within one year from the date the judgment of sentence becomes final. 42 Pa. C.S.A. §9545(b)(1). "[A] judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." §9545(b)(3). When appellate rights are reinstated **nunc pro tunc,** a judgment becomes final when appellate rights on the reinstated appeal are exhausted. **See Commonwealth v. Karanicolas,** 836 A.2d 940, 944-45 (Pa. Super. 2003). Here, we reinstated Defendant's appellate rights **nunc pro tunc** and he exhausted those rights on May 14, 2013, when the Pennsylvania Supreme Court denied his petition for allowance of appeal. Defendant then timely filed this petition seventeen days later on May 31, 2013.

[13] Defendant also raised the issue that Trial Counsel rendered ineffective assistance by failing to object to the admission of photographs. Defendant withdrew this issue at the conclusion of the August 13, 2013 hearing. (N.T. 8/13/2013, p. 71.)

[14] Based on an agreement of the parties, we also incorporated as part of the record for this petition the transcript from the hearing held on November 18, 2011, for Defendant's first PCRA petition. (N.T. 8/13/2013, p. 6.)

DISCUSSION

1. Whether Appellate Counsel Rendered Ineffective Assistance of Counsel by Waiving Several Appellate Issues

Defendant first claims that Appellate Counsel was ineffective by failing to preserve on direct appeal all but two issues for appellate review. Appellate Counsel waived four of the six issues appealed from by not including two issues in Defendant's 1925(b) statement, not properly briefing an issue, and not preserving an issue in either an oral or post-sentence motion. Because Appellate Counsel failed to preserve these issues, Defendant asks us to reinstate his direct appeal **nunc pro tunc.**

Defendant argues that he does not need to establish the three elements for ineffective assistance of counsel as articulated in **Commonwealth v. Pierce,** 515 Pa. 153, 527 A.2d 973 (1987), to have his direct appeal reinstated. He claims Appellate Counsel's waiver of these four claims was **per se** ineffective assistance of counsel.

Generally, to determine if counsel has rendered ineffective assistance, we apply a three-part test based on our Supreme Court's interpretation of **Strickland v. Washington,** 466 U.S. 668 (1984) in **Pierce.** In **Strickland,** the United States Supreme Court held that to establish a claim of ineffective assistance of counsel the defendant must show that counsel's performance was deficient and that this deficient performance prejudiced the defense. **Id.** at 687. Our Supreme Court divided this test into a three-part test under which the defendant must establish: (1) that the underlying legal claim has arguable merit, (2) that counsel's actions lacked an objective reasonable basis, and (3) that he was prejudiced by counsel's acts or omissions. **Pierce, supra** at 157-58, 527 A.2d at 975. A failure to establish any of these three elements will defeat a claim of ineffective assistance of counsel. **Commonwealth v. Walker,** 613 Pa. 601, 611, 36 A.3d 1, 7 (2011).

However, in some circumstances, counsel's conduct will be deemed to be **per se** ineffective. **Commonwealth v. Allen,** 48 A.3d 1283, 1286 (Pa. Super. 2012). One such circumstance occurs when counsel fails to perfect a direct appeal because counsel fails to follow procedural rules. **Commonwealth v. Bennett,** 593 Pa. 382, 397, 930 A.2d 1264, 1273 (2007). When counsel waives appellate

issues because of a failure to follow procedural rules, the first two parts of the **Pierce** test, arguable merit and unreasonableness, are established. **Commonwealth v. Johnson,** 889 A.2d 620, 622 n.3 (Pa. Super. 2005) (holding that the first two prongs of the **Pierce** test "are clearly met where counsel fails to follow procedural rules to ensure requested appellate review of a criminal defendant's claims.").

As for the final element of prejudice, when the conduct of counsel results in the waiver of all appellate issues—causing the defendant to be deprived of his right to a direct appeal—prejudice is presumed. **Commonwealth v. Halley,** 582 Pa. 164, 171, 870 A.2d 795, 800 (2005). This presumption of prejudice is founded on our courts' interpretation of the United States Supreme Court decision in **United States v. Cronic,** 466 U.S. 648 (1984), which our courts have relied upon to find that the "actual or constructive denial of the assistance of counsel falls within a narrow category of circumstances in which prejudice is legally presumed." **Commonwealth v. Lantzy,** 558 Pa. 214, 225, 736 A.2d 564, 571 (1999). Our courts find that when counsel fails to perfect a direct appeal, a defendant is constructively denied the assistance of counsel. **Bennett, supra** at 398, 930 A.2d at 1273 ("we have repeatedly indicated that the failure to file a requested direct appeal or a 1925(b) statement in support thereof is the functional equivalent of having no counsel at all"). Therefore, when counsel waives all appellate issues, entirely depriving a defendant of his right to a direct appeal, counsel is said to render **per se** ineffective assistance of counsel. **Halley, supra.**

However, this **per se** rule is not applicable when counsel's errors do not **entirely** deprive a defendant of his right to a direct appeal because counsel only waived some—but not all—of the issues presented. **Commonwealth v. Grosella,** 902 A.2d 1290, 1293-94 (Pa. Super. 2006). When this occurs, our courts do not deem the defendant to have been constructively deprived of counsel. **Halley, supra** at 173, 870 A.2d at 801. Thus, in these circumstances, the presumption of prejudice dissipates. **Grosella, supra** at 1293. When only some of the appellate issues are waived, we must determine if the waiver of appellate issues prejudiced the defendant. **Id.** at 1294.

Here, Appellate Counsel raised six issues on appeal. The Superior Court held that four of those issues were waived. The remaining two were either addressed or deemed premature. Therefore, because Appellate Counsel's waiver of these issues did not entirely deprive Defendant of his right to a direct appeal, prejudice is not presumed. Consequently, counsel was not **per se** ineffective and we must determine if Defendant was prejudiced.

"To demonstrate prejudice, the [defendant] must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" **Commonwealth v. King,** 618 Pa. 405, 57 A.3d 607, 613 (2012) (**quoting Strickland,** 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding." **Id.** Here, such probability does not exist because the issues Appellate Counsel waived were meritless.

The first claim waived was that the Commonwealth violated mandatory discovery rules by failing to turn over a police report documenting their July 11, 2007 visit to A.D.'s home. This claim is meritless since no evidence was presented to establish that such a report exists. (N.T. 8/13/2013, pp. 44-45.) Further, counsel acknowledged at the PCRA hearing that this claim was being withdrawn. (N.T. 8/13/2013, pp. 68-69.)

The second waived appellate claim was that we erred in allowing the Commonwealth to ask leading questions of A.D. Trial Counsel only objected once on the basis of a leading question. The question was "[o]kay. Did his penis penetrate your genitals?" (N.T. 12/8/2009, p. 76.) This issue is meritless because the question is not leading: it does not suggest an answer. **See Commonwealth v. Johnson,** 373 Pa. Super. 312, 321, 541 A.2d 332, 336-37 (1998) (holding that a question that does not suggest an answer is not a leading question because a leading question "puts the desired answer in the mouth of the witness"). Further, even if it was error to permit this question, the error was harmless in that whether or not Defendant's penis penetrated A.D.'s vagina was relevant only to the rape charge for which Defendant was acquitted.

The third waived appellate claim was that the evidence was insufficient to support the convictions. We find this claim meritless

because A.D.'s testimony was sufficient to establish all elements on all convicted crimes beyond a reasonable doubt. Defendant has not shown otherwise.

Finally, the last waived appellate claim was that the verdict was against the weight of the evidence. Like with the other claims, this claim lacks merit. It does not shock our conscience that the jury relied on A.D.'s detailed testimony of the assault to find Defendant guilty on all convicted crimes. **Commonwealth v. Boyd,** 73 A.3d 1269, 1274-75 (Pa. Super. 2013) **(en banc).**

Because we find the issues Appellate Counsel waived on appeal to be without merit, Defendant's first claim of error is denied.

2. Whether Trial Counsel Rendered Ineffective Assistance of Counsel by Failing to Investigate and Present An Alibi Defense

Next, Defendant claims Trial Counsel rendered ineffective assistance by failing to present an alibi defense. To determine if counsel was ineffective for failing to pursue a defense, we apply the three-part **Pierce** test discussed above. **See Commonwealth v. Spotz,** 587 Pa. 1, 45-48, 896 A.2d 1191, 1217-19 (2006). As to the first part of this test, there is no dispute that failing to interview an alibi witness, to file notice of an alibi defense, and to present an alibi defense when one exists, are claims of arguable merit. **See Commonwealth v. Stewart,** 84 A.3d 701, 712 (Pa. Super. 2013); **Commonwealth v. Washington,** 361 A.2d 670, 674 (Pa. Super. 1976). Instead, it is the second and third parts of the test, namely whether Trial Counsel had a reasonable basis for his actions and whether these actions caused prejudice, which are in dispute.

In answering whether counsel's actions lacked an objective reasonable basis, we must determine "whether no competent counsel would have chosen that action or inaction, or, [whether] the alternative[ ] not chosen, offered a significantly greater potential chance of success." **Stewart, supra** at 707. When determining whether a reasonable basis for counsel's actions exists, we must make "all reasonable efforts to avoid the distorting effects of hindsight," while also avoiding "**post hoc** rationalization of counsel's conduct." **Commonwealth v. Sattazahn,** 597 Pa. 648, 675, 952 A.2d 640, 656 (2008) (citations omitted). We must evaluate

counsel's performance based on counsel's perspective at the time the conduct occurred. **Commonwealth v. Carson,** 590 Pa. 501, 592, 913 A.2d 220, 274 (2006).

Trial Counsel testified that before trial he did not believe his client had a viable alibi defense. (N.T. 8/13/2013, p. 20.) This belief was based on his discussions with Defendant in which Defendant told Trial Counsel that he left the scene of the crime at 4:00 P.M.[15] With this knowledge, and with the Commonwealth claiming the assault was over by 4:00 P.M., Trial Counsel had no reason to believe that Defendant was not present when the assault occurred.

That Trial Counsel accepted what Defendant told him about his whereabouts and when he left the victim's home, and that Trial Counsel did not prepare an alibi defense, was reasonable. Our Supreme Court has routinely held that counsel does not act unreasonably by not investigating possible defenses, or mitigating evidence, of which he is unaware, has no reason to suspect, and which is not suggested by what Defendant tells counsel. **See Commonwealth v. Miller,** 605 Pa. 1, 28-29, 987 A.2d 638, 654-55 (2009) (holding counsel had reasonable basis not to investigate a witness' mental condition when defendant, as the witness' cell mate for two months, never told counsel about the witness' condition); **Commonwealth v. Brown,** 582 Pa. 461, 479-80, 872 A.2d 1139, 1149-50 (2005) (holding counsel had reasonable basis not

[15] Defendant gave a statement to police that is ambiguous on its face as to when Defendant left the victim's home. It reads in part as follows: "[o]n July 10th reported to the office got to the office about 3:37 went inside [A.D.] opened the door entered the home with another co worker [sic] went upstairs and punched-out came back down and wash my hands because it had glue on it said a few words to [A.D.] then when Nelson left I left right behind him about 4 pm received a phone call from the office." Commonwealth Exhibit No. 2. The lack of punctuation in this statement makes it unclear whether Defendant left at 4:00 P.M. or received a phone call at 4:00 P.M. Trial Counsel read the statement to be that Defendant left the victim's home at 4:00 P.M. (N.T. 8/13/2013, pp. 12, 25.) This interpretation was supported by his conversations with Defendant. (N.T. 8/13/2013, p. 12.)

It was also reinforced by what Defendant's mother told a private investigator employed by Trial Counsel. When interviewed shortly before trial by this investigator, Defendant's mother told the investigator that her son arrived at her workplace sometime between 4:30 P.M. and 4:40 P.M. (N.T. 8/13/2013, p. 21.) This time fit well with what Defendant had told Trial Counsel about when he left the victim's home.

to investigate preexisting evidence of defendant's mental health to support self-defense theory when defendant never told counsel about his mental health history); **Commonwealth v. Bracey,** 568 Pa. 264, 279, 795 A.2d 935, 944 (2001) (holding counsel had reasonable basis to not investigate mitigating evidence of abuse when defendant never told counsel about abuse).

This rule is particularly relevant under the facts of this case where, if the Defendant was not present when the assault occurred at the location claimed, it would be natural and expected that he would tell his counsel this crucial fact. Excluding the victim, Defendant is the only other person who truly knows when he left the victim's home on July 10, 2007. Under the facts known to him, Trial Counsel acted reasonably in relying on Defendant's recall of when he left the victim's home and centering the defense that no assault occurred on the lack of physical evidence, brief time frame, and perceived shoddy police investigation.[16] **See Commonwealth**

[16] This evidence included the following: that notwithstanding the struggle described by the victim, neither party had any torn clothing; there was no evidence of any property damage in the home; Defendant exhibited no cuts, bruises or scratches; and when Defendant's mother observed him within 25 to 40 minutes after the assault, there was nothing untoward about his appearance or demeanor. Similarly, the injuries claimed by the victim were relatively minor, some faint scuff marks on her knees and elbows.

The highly circumscribed time for the assault to occur and the chance return of Soto were also to Defendant's advantage. Soto's return to the victim's home was unexpected and could not have been anticipated by the Defendant, yet when Soto returned he observed the Defendant and the victim engaged in friendly conversation, nothing indicative of a brewing assault. Given these observations by Soto, the time for the assault to occur was abridged even further, making it arguably more questionable whether everything the victim described after Soto left the second time could have occurred within this short time span: continued talking between the victim and Defendant immediately after Soto left; the victim struggling and Defendant carrying her to the basement; the attack in the basement, removal of the victim's underwear and the attempt at intercourse; and the victim's escape and flight upstairs, where the victim testified Defendant remained momentarily outside her bedroom door before, after being unsuccessful in gaining access to her bedroom, he decided to leave.

Added to these weaknesses in the Commonwealth's case were numerous apparent deficiencies in the police investigation as pointed out by the defense: no record kept of the July 11, 2007 response to the victim's home, no attempt to examine the victim's or Defendant's clothing for evidence of the assault, no attempt to examine the victim's home or the pool table for evidence of the assault, including possible pubic hair or semen, and no DNA evidence or other forensic tests taken.

v. Rivers, 567 Pa. 239, 252, 786 A.2d 923, 930 (2001) (**quoting Commonwealth v. Laird,** 555 Pa. 629, 726 A.2d 346, 357 (1999) ("Counsel will not be deemed ineffective for pursuing a particular strategy as long as the course chosen was reasonable.")).

Nor has Defendant met the third prong of the **Pierce** test on this issue. The alibi evidence which Defendant contends was not presented was contradictory in some respects to other evidence in the case, in other respects did not disprove the occurrence of an assault, and overall did not create a reasonable probability that the outcome of the trial would have been different for several reasons.

First, the variances in the different times Defendant sought to present leaves open the possibility that Defendant committed the assault and still arrived at his mother's workplace by no later than 4:30 P.M., one of the times given by Defendant's mother. Accepting the Commonwealth's evidence that the assault lasted less than twenty-three minutes (**i.e.,** the difference between when Soto left the second time and 4:00 P.M.), there is still sufficient time for Defendant to have assaulted A.D. using the victim's time estimates, left the home by 4:00 P.M., and arrived at his mother's workplace no later than 4:30 P.M., a twenty-five to forty-minute drive.

Alternatively, if we accept the earliest time at which Defendant's mother claims he arrived at her place of employment, 4:00 P.M., this would conflict with the time stamped on Defendant's time card[17] and directly contradict Defendant's own statements to police and his counsel that he left the victim's home at 4:00 P.M. (N.T. 12/8/2009, pp. 182-83.) Such time would further contradict the testimony of Nelson Soto, Defendant's co-worker, who testified that he saw Defendant talking with A.D. as he left that day at 3:37 P.M., that Defendant was still there when he returned approximately five minutes later, and that Defendant did not leave with him at that time. **Id.** at 231. To have presented this testimony to the jury, that Defendant arrived at his mother's place of employment by 4:00 P.M., would have devastated and undermined the entire timeline of the defense and its argument that Defendant was present, but there was no assault. Given the strength of this

[17] Assuming a twenty-five to forty-minute drive to his mother's place of employment, Defendant could not have been at the victim's home at 3:37 P.M. and still arrived at his mother's workplace by 4:00 P.M.

other evidence, it appears unlikely that if counsel had been aware beforehand of what Defendant's mother intended to testify to and if given the choice, counsel would have proceeded with an alibi defense. (N.T. 8/13/2013, p. 48.)

On this issue, Defendant was not deprived of effective assistance of counsel. Accordingly, the claim is denied.

3. Whether Trial Counsel Rendered Ineffective Assistance of Counsel by Advising Defendant Not to Testify

Finally, Defendant claims Trial Counsel was ineffective for advising him not to testify.

> The decision of whether or not to testify on one's own behalf is ultimately to be made by the defendant after full consultation with counsel. In order to sustain a claim that counsel was ineffective for failing to advise the appellant of his rights in this regard, the appellant must demonstrate either that counsel interfered with his right to testify, or that counsel gave specific advice so unreasonable as to vitiate a knowing and intelligent decision to testify on his own behalf.

Commonwealth v. Michaud, 70 A.3d 862, 869 (Pa. Super. 2013) (**quoting Commonwealth v. Nieves,** 560 Pa. 529, 746 A.2d 1102, 1104 (2000)). Like with other ineffective assistance of counsel claims, the defendant must also demonstrate that his failure to testify caused prejudice. **Commonwealth v. Alderman,** 811 A.2d 592, 596 (Pa. Super. 2002).

Defendant has failed to establish that Trial Counsel either interfered with his right to testify or that Trial Counsel gave unreasonable advice. First, the evidence established that, after consulting with Trial Counsel, Defendant alone decided not to testify. (N.T. 11/18/2011, pp. 47-48; N.T. 8/13/2013, pp. 42-44.)

Second, Trial Counsel's advice not to testify was reasonable. Counsel acts reasonably in advising a defendant not to testify when the defendant's testimony would allow the Commonwealth to impeach the defendant with prior **crimen falsi** convictions. **See Commonwealth v. Daniels,** 999 A.2d 590, 596 (Pa. Super. 2010); **Commonwealth v. Thomas,** 783 A.2d 328, 335 (Pa. Super. 2001). Additionally, counsel reasonably advises a defendant not to testify when counsel believes the jury would not find defendant's testimony credible. **See Commonwealth v. O'Bidos,** 849 A.2d 243, 250-51 (Pa. Super. 2004) (holding trial counsel reasonably advised his client not to testify on the basis that the jury would not believe his testimony that he had a past relationship with the rape victim).

Trial Counsel advised Defendant not to testify for two reasons. First, Trial Counsel advised Defendant not to testify because if he did the Commonwealth would impeach him with evidence of his prior conviction for forgery. (N.T. 8/13/2013, pp. 41, 54.) Although this crime was unrelated to the instant offense and occurred several years earlier, Trial Counsel was justified in advising Defendant about the negative impact evidence of a criminal conviction could have on the jury. Second, Trial Counsel advised Defendant not to testify because he believed the jury would not believe Defendant's testimony. **Id.** at 39. Trial Counsel did not believe the jury would find credible Defendant's testimony that A.D. fabricated her testimony about the assault because Defendant declined her sexual advances. **Id.** at 40-41.

Trial Counsel's advice to Defendant not to testify was not "so unreasonable as to vitiate a knowing and intelligent decision to testify on his own behalf." Rather, Trial Counsel reasonably advised Defendant about the risks of Defendant taking the stand, which it was his professional obligation to do and which Defendant properly factored into his decision not to testify. Because this advice was reasonable, Defendant "must bear the burden of his decision not to testify and cannot shift the blame to his attorney." **Commonwealth v. Harper,** 419 Pa. Super. 1, 17, 614 A.2d 1180, 1188 (1992). Consequently, we find this final claim to also be without merit.[18]

CONCLUSION

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." **Strickland v. Washington,** 466

[18] Defendant also failed to establish prejudice. Our Superior Court has held that to establish prejudice the defendant must "articulate what testimony he would have given had he testified at trial" so the court can assess whether this testimony creates a reasonable probability of a different result. **Commonwealth v. Alderman,** 811 A.2d 592, 596 (Pa. Super. 2002). Defendant has not articulated what his testimony would have been at trial, thus, he has failed to establish prejudice.

U.S. 668, 686 (1984). Against this standard, we find that no act or omission of counsel rendered Defendant's convictions unreliable. Therefore, Defendant's Second Amended PCRA Petition will be denied.

SHAWN NALESNIK, Plaintiff vs.
UNITED NATIONAL INSURANCE COMPANY
and BLUE LABEL PROPERTIES, LLC, Defendants

Civil Law—Interpretation of Insurance Policy—Question of Coverage—Declaratory Judgment—Third-Party Suit—Standing

1. Standing is a judicially created prerequisite to maintaining suit by one party against another. The standing requirement ensures that the claimant has a direct interest in the controversy at issue and thus that there is a legitimate controversy before the court.

2. For standing to exist, the claimant must have a substantial, direct and immediate interest in the outcome of the litigation.

3. A "substantial" interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law.

4. A "direct" interest requires that the matter complained of caused harm to the party's interest.

5. An "immediate" interest concerns the nature of the causal connection between the action complained of and the injury such that the connection is not too remote.

6. In general, the duty of an insurance company runs only to its insured, not to third parties who are not a party to the contract. An exception applies if the third party is a third-party beneficiary of the policy.

7. In order for a third-party beneficiary to have standing to recover on a contract, both contracting parties must have expressed an intention that the third party be a beneficiary, and that intention must be affirmatively stated in the contract itself. An exception to this requirement exists under Restatement (Second) of Contracts §302, which has been approved by the Pennsylvania Supreme Court. Under this Section of the Restatement, a party is an intended third-party beneficiary if: (1) recognition of the beneficiary's right to performance is appropriate to effectuate the intention of the parties, and (2) either (a) the party is a creditor beneficiary because performance under the contract satisfies an obligation of the promisee to pay money to the beneficiary or (b) the party is a donee beneficiary because the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

8. An injured third party has no standing to file a declaratory judgment action against a defendant's liability insurance company to determine whether the injured party's claim against the defendant is covered under the defendant's liability insurance policy, whether the insurer is obligated under the policy to provide a defense to the third party's personal injury suit, and whether the insurer is obligated to pay the amount of any judgment obtained against the defendant within the policy limits.

NO. 12-1671

ABRAHAM P. KASSIS, Esquire—Counsel for Plaintiff.

EVELYN RODRIGUEZ DEVINE, Esquire—Counsel for United National Insurance.

Blue Label Properties, LLC—Unrepresented.

MEMORANDUM OPINION

NANOVIC, P.J.—June 18, 2014

Frequently, when a dispute arises between an insured and an insurer over whether a policy for liability insurance provides coverage for a particular event, a declaratory judgment action is filed by either the insured or the insurer to resolve this issue. In this case, a suit requesting declaratory and injunctive relief as to the terms of coverage under a liability policy has been filed against the insurer by the injured party. Whether the injured party is entitled to bring this claim is the issue in this case.

FACTUAL AND PROCEDURAL BACKGROUND

On January 2, 2008, Shawn Nalesnik ("Plaintiff") fell from a ladder and injured himself while doing renovation work on property owned by Defendant Blue Label Properties, LLC ("Insured") located at 347 North Second Street, Lehighton, Carbon County, Pennsylvania. At the time, Blue Label had in full force and effect with Defendant United National Insurance Company ("Insurer") a commercial lines policy containing commercial general liability coverage which provided, **inter alia,** liability coverage with respect to bodily injury caused by an accident occurring at the Insured's property.

On November 9, 2009, Plaintiff commenced a personal injury suit against the Insured for the injuries he sustained. When notified of this claim, the Insurer refused to provide Insured with a defense claiming coverage was excluded under the Independent Contractors Endorsement to the policy. This endorsement provides:

> This endorsement modifies insurance provided under the following:
>
> COMMERCIAL GENERAL
> LIABILITY COVERAGE PART
>
> This insurance does not apply and we have no duty to defend or investigate any claim, 'suit' or demand alleging 'bodily injury', including psychological injury 'personal injury', 'adver-

tising injury', 'property damage' or medical payments arising from operations performed for 'you' or on 'your' behalf, by any volunteer, independent contractor or subcontractor of 'yours'.

'Volunteer' is defined as a person that is working for 'you' of his own free will, is not being paid as a contractor and has no legal interest in the property or services provided.

The Insured has not challenged this decision by the Insurer. Instead, on July 31, 2012, Plaintiff commenced the present suit against the Insurer in which the Insured has been joined as an indispensable party. In this suit, Plaintiff seeks a declaratory judgment finding that the Insurer is obligated to provide its Insured a defense to Plaintiff's personal injury suit and that if Plaintiff obtains a judgment against the Insured in that suit, the Insurer is obligated under the policy to pay the judgment amount, subject however to the policy limits of $1,000,000.00.

As Plaintiff is neither a named insured nor an insured by definition under the policy between the Insured and the Insurer, the Insurer has filed a demurrer to Plaintiff's suit against it claiming Plaintiff has no standing to present this claim.[1]

DISCUSSION

In **In re: Hickson,** our Supreme Court stated:

> [A]s a general policy ... '[a] party seeking judicial resolution of a controversy in this Commonwealth must, as a prerequisite, establish that he has standing to maintain the action.' ... Our Commonwealth's standing doctrine is not a senseless restriction on the utilization of judicial resources; rather, it is a prudential, judicially-created tool meant to winnow out those matters in which the litigants have no direct interest in pursuing the matter. ... Such a requirement is critical because only when 'parties have sufficient interest in a matter [is it] ensure[d] that there is a legitimate controversy before the court.'

Id., 573 Pa. 127, 135-36, 821 A.2d 1238, 1243 (2003) (citations and footnote omitted).

[1] In evaluating a preliminary objection in the nature of a demurrer, our inquiry goes only to determining the legal sufficiency of the complaint, and we may only decide whether sufficient facts have been pleaded which would permit recovery if ultimately proven. **Fizz v. Kurtz, Dowd & Nuss, Inc.,** 360 Pa. Super. 151, 152, 519 A.2d 1037, 1038 (1987). In order to sustain this objection, we must be able to state with certainty that upon the facts averred, the law will not permit recovery by the Plaintiff. **Id.** (citation and quotation marks omitted).

"Standing requires that the person bringing a cause of action be adversely affected by the matter in order to assure that the person is the appropriate party to bring the matter to judicial resolution." **Koresko v. Farley,** 844 A.2d 607, 616 (Pa. Commw. 2004) (citation and quotation marks omitted). A plaintiff has standing if he can show that he has a substantial, direct and immediate interest in the outcome of the litigation. **In re: Hickson, supra** at 136, 821 A.2d at 1243. "A 'substantial' interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law." **Id.** A "direct" interest requires that the matter complained of caused harm to the party's interest. **Id.** An "immediate" interest concerns the nature of the causal connection between the action complained of and the injury such that the connection is not too remote. **Id.; see also, Wm. Penn Parking Garage, Inc. v. City of Pittsburgh,** 464 Pa. 168, 195-200, 346 A.2d 269, 282-85 (1975). These requirements apply equally to a matter under the Declaratory Judgments Act, 42 Pa. C.S.A. §§7531-7541. **Stilp v. Commonwealth,** 910 A.2d 775, 782 (Pa. Commw. 2006).

Plaintiff contends that the Insurer is required by the terms of its insurance policy with the Insured to defend the Insured and to pay any judgment which may result from Plaintiff's personal injury suit against the Insured. Hence, Plaintiff claims the Insurer has breached the terms of the policy.

In general, the duty of an insurance company runs only to its insured, not to third parties who are not a party to the contract. **Hicks v. Saboe,** 521 Pa. 380, 383, 555 A.2d 1241, 1243 (1989). Plaintiff is admittedly not a party to the policy in issue. **See** Plaintiff's Amended Complaint, paragraph 5. Consequently, in order for Plaintiff to establish that he is aggrieved by breach of the insurance policy and entitled to have its terms enforced, he must show a legal duty owed to him as a third-party beneficiary of the policy. **Fizz v. Kurtz, Dowd & Nuss, Inc.,** 360 Pa. Super. 151, 154, 519 A.2d 1037, 1039 (1987).

In 1950, the Pennsylvania Supreme Court held in **Spires v. Hanover Fire Ins. Co.,** 364 Pa. 52, 56-57, 70 A.2d 828, 830-31 (1950) (plurality opinion) that "in order for a third party [sic] beneficiary to have standing to recover on a contract, both contracting parties must have expressed an intention that the third party be a

beneficiary, and that intention must have affirmatively appeared in the contract itself." **Scarpitti v. Weborg,** 530 Pa. 366, 370, 609 A.2d 147, 149 (1992). Here, Plaintiff is not a named insured or an insured by definition in the policy. Nor is Plaintiff at any point in the policy expressly identified as a third-party beneficiary.

In **Scarpitti,** the Supreme Court carved out an exception to **Spires** by adopting Restatement (Second) of Contracts §302 (1979) as a guide for the analysis of third-party beneficiary claims. **Id.** This Section provides:

> Intended and Incidental Beneficiaries
>
> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
>
> (b) circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Restatement (Second) of Contracts §302 (1979).

Under the Restatement, an intended third-party beneficiary need not be expressly identified and recognized as such in the contract. Rather, a party is an intended third-party beneficiary if: (1) recognition of the beneficiary's right to performance is "appropriate to effectuate the intention of the parties," and (2) either (a) the party is a creditor beneficiary because performance under the contract "satisf[ies] an obligation of the promisee to pay money to the beneficiary" or (b) the party is a donee beneficiary because "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." **Guy v. Liederbach,** 501 Pa. 47, 60, 459 A.2d 744, 751 (1983).[2]

[2] In **Scarpitti v. Weborg,** the Supreme Court stated:

> The first part of the test sets forth a standing requirement which leaves discretion with the court to determine whether recognition of third party [sic] beneficiary status would be appropriate. The second part defines the two types of claimants who may be intended as third party [sic] beneficiaries.

Id., 530 Pa. 366, 371, 609 A.2d 147, 150 (1992).

The Restatement exception to **Spires,** however, is only applicable where "the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties, and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." **Scarpitti, supra** at 373, 609 A.2d at 150-51; **see also, Burks v. Federal Insurance Company,** 883 A.2d 1086, 1088 (Pa. Super. 2005) (noting that even when the contract does not expressly state that the third party is intended to be a beneficiary, in order to be a third-party beneficiary to a contract under the Restatement test, it is still necessary to show that both parties to the contract so intended, and that such intent was within the parties' contemplation at the time the contract was formed).

Plaintiff is not a third-party beneficiary under the Restatement. First, Plaintiff is neither a creditor nor a donee beneficiary. At the time the contract was entered into, the Insured owed no money to the Plaintiff and the Insurer did not obligate itself to make any payment to the Plaintiff for an existing debt. Further, there is no evidence to suggest that the Insured intended to confer on the Plaintiff the benefit of its bargain. To the contrary, such insurance was obtained exclusively for the benefit of the Insured to protect itself against claims by third parties. **Fizz, supra** at 155-56, 519 A.2d at 1039-40. These circumstances clearly evidence that the intended beneficiary of the Insurer's performance was the Insured, not Plaintiff, and that no rights under the policy were intended to be conferred on Plaintiff. In addition, not only is the Insured's liability to Plaintiff speculative at this time, in the event Plaintiff succeeds on his claim, it is equally speculative whether recovery will be from the Insured personally, or its Insurer.[3]

[3] Plaintiff's legal status **vis-à-vis** the Insured is unclear. Plaintiff alleges in its Amended Complaint that prior to January 2, 2008, Plaintiff was retained by the Insured to perform electrical work as an independent contractor. (Amended Complaint, Paragraph 13.) Nevertheless, Plaintiff contends the "Independent Contractor" exclusion in the Insured's liability policy is inapplicable because he was not performing the work for which he had been engaged as an independent contractor when he was injured, but was performing other work, which work and its manner of performance, was controlled by the Insured. (Amended Complaint, Paragraph 14.) However, even if the Plaintiff's status is that of a common-law "employee" or "subcontractor," rather than an independent contractor, coverage for employer liability is likewise specifically excluded from the policy.

CONCLUSION

In general, an injured party has no standing to compel the insurer of a general liability insurance policy to provide insurance coverage to the named insured in the policy. This is so because the duty of an insurer runs only to its insured. An injured party who is not a contracting party to the liability policy is ordinarily not intended by the parties to be a third-party beneficiary and thus has no cause of action against the insurer under a contractual third-party beneficiary theory. Instead, the insurance protection provided by the policy is intended to primarily benefit the insured against claims by third parties. Consequently, the Insurer's Preliminary Objection to Plaintiff's Amended Complaint in the nature of a demurrer will be granted.[4]

In the event Plaintiff is successful in his claim against the Insured, Plaintiff would clearly have a right to seek recovery from the Insured. The Insured may in turn have a right under the policy to have this amount paid by the Insurer, however, Plaintiff is owed no legal duty by the Insurer as a third-party beneficiary to the policy.

[4] Plaintiff may have standing in the future to enforce this contract under the Pennsylvania Insurance Insolvency Act, 40 Pa. C.S.A. §117. This statute provides for a direct cause of action against the insurer of a defendant but only when a judgment has been entered against that defendant and the plaintiff is unable to execute that judgment because the defendant is bankrupt or insolvent. **See Kollar v. Miller,** 176 F.3d 175, 181 (3d Cir. 1999) (stating basis for cause of action under the Pennsylvania Insurance Insolvency Act).

LORRIE STANG Individually and As Administratrix of the Estate of John Stang, Deceased, Plaintiff vs. DEBORAH ANN SMITH, M.D., NEIL LESITSKY, M.D., JOSEPH MICHAEL McGINLEY, D.O., PATRICK J. HANLEY, D.O. and RAJINISH CHAUDHRY, M.D., Defendants

Civil Law—Medical Malpractice—Joint and Several Liability—Effect of Joint Tort-Feasor Release on Trial Status of the Settling Defendants—Participation of Settling Defendants As Parties for Purposes of Determining and Apportioning Comparable Fault—Applicability of Uniform Contribution Among Tort-Feasors Act—Expert Witnesses—Scope of Cross-Examination—Use of Opinions Elicited on Cross-Examination for Substantive Purposes

1. The term "joint tort-feasors" as defined in the Uniform Contribution Among Tort-Feasors Act refers to two or more persons jointly or severally liable in tort for the same injury to persons or property. Two actors are jointly liable for an injury if their conduct causes a single harm which cannot be apportioned even though the actors may have acted independently.

2. A **pro rata** joint tort-feasor release acts to reduce the amount of all monies jointly owed by joint tort-feasors to a plaintiff by a percentage equal to the settling defendants' allocated share of the liability.

3. When a **pro rata** release has been executed by a plaintiff in favor of a settling defendant, the non-settling defendants are entitled to set off against the total award of damages an amount equal to the apportioned comparative fault of any jointly liable settling defendant.

4. Whether two or more defendants are jointly or solely liable in tort for a plaintiff's injuries and the percentages of comparative fault attributable to each are questions of fact for the jury. Consequently, where a **pro rata** release has been executed in favor of the settling defendants, the non-settling defendants are entitled to have the settling defendants remain as parties to the litigation in order that the amount of damages for which the non-settling defendants may ultimately be held responsible can be determined at trial.

5. Cross-claims for contribution are unnecessary in order to retain the settling defendants as parties to the litigation for the sole purpose of determining the extent, if any, of a non-settling defendant's right, pursuant to the joint tort-feasor release, to a reduction in any verdict rendered against him by the jury.

6. In those cases where non-settling defendants have the right to retain the settling defendants as parties to the litigation for purposes of apportioning liability, before the settling defendants will be included on the verdict slip, the evidence, when read in the light most favorable to the non-settling defendants, must establish a **prima facie** case of negligence against the settling defendants.

7. Cross-examination generally may embrace any matter germane to the direct examination of a witness, qualifying or destroying it, or tending to develop facts which have been improperly suppressed or ignored by the plaintiff.

8. An expert witness who in pretrial discovery has previously opined to the joint liability of both the settling and non-settling defendants may be cross-examined on his opinions regarding the settling defendants, even though such opinions were not elicited on the direct examination of the witness, where such opinions raise a factual question as to the cause of plaintiff's injuries.

9. The opinions of a medical expert properly elicited on cross-examination as to the responsibility of a settling defendant for plaintiff's claimed injuries are admissible both as substantive evidence that a party other than the non-settling defendants is liable for the plaintiff's harm and for impeachment purposes.

NO. 09-3311

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MEMORANDUM OPINION

NANOVIC, P.J.—July 28, 2014

The basic facts at issue in these proceedings are not uncommon. The negligence of multiple persons is alleged to have combined and caused injury to another—here death. Decedent's estate files suit against all defendants. None of the defendants files a cross-claim against any other defendant. Prior to trial plaintiff settles with some, but not all of the defendants.

Under these circumstances, whether the names of the settling defendants should be included on the jury verdict slip in order that the liability of each defendant and the degree of their comparative fault can be assessed and determined by the jury, and whether an expert witness called by plaintiff to testify as to the causal negligence of a non-settling defendant, but who opined in response to pretrial discovery that the causal negligence of both settling and non-settling defendants was responsible for plaintiff's injuries, can be cross-examined at trial on the witness' earlier opinions critical of the settling defendants, are issues requiring the court's attention. We address these issues below.

FACTUAL AND PROCEDURAL BACKGROUND

On November 21, 2007, John Stang ("Decedent") was found dead lying on the floor of the Intensive Care Unit ("ICU") of the Gnaden Huetten Memorial Hospital ("Hospital"). The cause of death was DVT/PE, pulmonary embolism caused by deep vein thrombosis from the lower extremities. In layman's terms, he died of suffocation from clots in his pulmonary arteries which prevented the exchange of oxygen between his blood and lungs.

What caused Decedent's death is not in dispute; why, is. This dispute begins with the events of November 15, 2007. On that date, during the early morning hours, Decedent awoke, dizzy and disoriented, and began to vomit. His wife, Lorrie Stang, contacted Dr. Neil Lesitsky, a primary care physician, who saw Decedent for the first time on November 2, 2007, for a physical examination. The results of this examination were characteristic of those expected for a fifty-six-year-old white male who was overweight and out of shape: hypertension, hyperlipidemia (high blood fats), hyperglycemia (high blood sugar) and diabetes. All are risk factors for stroke. Medication was prescribed.

When Mrs. Stang spoke with Dr. Lesitsky on November 15, 2007, she described Decedent's symptoms. Dr. Lesitsky made a preliminary diagnosis of benign positional vertigo and recommended that Decedent lie down and get rest. Dr. Lesitsky also advised that if Decedent's condition continued or worsened, he should be taken to the Hospital for further evaluation. This conversation occurred at approximately 2:00 A.M.

Later that morning, between 6:00 and 6:30 A.M., Mrs. Stang left for work. She was employed as a pilot driver—an escort for oversized over-the-road motor vehicles—and was scheduled to be out of state. Expecting to be away most of the day, Mrs. Stang arranged for her sixteen-year-old son, Edward Curtis,[1] a sophomore in high school, to stay at home and watch Decedent. Edward was instructed that if Decedent's condition worsened to immediately call 911.

While she was away Mrs. Stang periodically checked with her son as to Decedent's condition. No change was noted. When Mrs. Stang returned home at 5:30 P.M., she immediately noticed that Decedent's condition had worsened—he was paler than when she left—and took him to the Hospital.

Decedent arrived at the Hospital at 6:08 P.M. and was examined by Dr. Frank Penater, an emergency room physician, at 6:15 P.M. Dr. Penater found Decedent to be dehydrated and suspected he had the flu. As a precautionary measure, Decedent was admitted to the Hospital by Dr. Deborah Smith, an internist, for continued observation.

Dr. Smith was Decedent's attending physician upon his admission to the Hospital. During her initial assessment of Decedent at 8:16 P.M., Dr. Smith detected signs of nystagmus and disconjugate gaze, and Decedent reported experiencing double vision. Dr. Smith ordered a brain CT scan. The results of this exam revealed that Decedent had suffered an acute ischemic stroke in the posterior inferior cerebellar artery, more commonly referred to as a PICA stroke. At this point, Decedent was transferred to the Hospital's ICU upon Dr. Smith's order. Also on this date, November 15, 2007,

[1] Mr. and Mrs. Stang were married on November 10, 2006. This was the third marriage for each. Mr. Curtis was Decedent's stepson.

at 10:45 P.M., Dr. Smith requested a neurological consult from Dr. Rajinish Chaudhry, the on-staff neurologist for the Hospital.

Between his admission on November 15, 2007, and his death on November 21, 2007, Decedent was under the care of three separate attending physicians: Dr. Smith from November 15, 2007 to November 17, 2007; Dr. Joseph McGinley from November 17, 2007 to November 19, 2007; and Dr. Patrick Hanley, from November 19, 2007 to November 21, 2007. During this time, Decedent's attending physicians neither ordered nor provided prophylactic preventive care against DVT and PE (**e.g.,** anticoagulation therapy such as low dose Heparin) to Decedent.

Decedent was examined by Dr. Chaudhry on November 19, 2007, at 7:30 P.M., four days after the neurological consult was requested by Dr. Smith and two days before Decedent's death. Dr. Chaudhry ordered aspirin to prevent clot formation. He also recommended transfer to a tertiary care hospital to rule out vertebral artery dissection. As noted above, Decedent died on November 21, 2007.

Decedent's wife ("Plaintiff"), individually and in her capacity as administratrix of Decedent's estate, commenced the instant suit by praecipe for writ of summons filed on November 2, 2009. Named as Defendants were the Hospital; Drs. Smith, McGinley, Hanley, Lesitsky and Chaudhry; and Neil Wesner, M.D.[2] In her pleadings and in pretrial proceedings, including medical expert reports, Plaintiff claimed that all of the Defendants were negligent in their care and treatment of the Decedent, that the Hospital was liable on either a respondeat superior or corporate negligence theory, and that the negligence of each caused or contributed to Decedent's death. Each of the Defendants contested liability and obtained expert reports in support of their respective positions. No cross-claims were filed by any Defendant against any other Defendant.

Shortly before trial was scheduled to commence on December 3, 2012, Plaintiff reached settlement with the Hospital and Decedent's attending physicians, Drs. Smith, McGinley and Hanley ("Settling Doctors"). (The Hospital and Settling Doctors are collectively referred to herein as the "Settling Defendants.") As part of this settlement, Plaintiff executed a **pro rata** joint tort-feasor

[2] By order dated April 13, 2011, entered pursuant to stipulation, Dr. Wesner was dismissed as a Defendant prior to trial.

release on November 27, 2012 (the "Release"), in accordance with the Uniform Contribution Among Tort-Feasors Act ("UCATA"), 42 Pa. C.S.A. §§8321-8327. This Release provided that if Drs. Lesitsky and Chaudhry ("Non-Settling Defendants") were found to be joint tort-feasors with the Settling Defendants, the damages the Non-Settling Defendants would be required to pay would be reduced in proportion to the extent fault was attributed to the Settling Defendants.

After settlement was reached, Plaintiff moved to discontinue the action against the Settling Defendants, to preclude evidence that Plaintiff had sued the Settling Defendants, and to bar the Non-Settling Defendants from cross-examining her medical experts at trial about opinions they had previously rendered against the Settling Defendants. These motions were denied.

Following a two-week trial which began on September 30, 2013,[3] the jury returned a verdict in favor of all Defendants (excluding the Hospital, for whom a compulsory nonsuit was granted),[4] finding none were negligent. Before us is Plaintiff's Motion for Post-Trial Relief seeking a new trial.[5]

[3] At Plaintiff's request, a last minute continuance of the trial scheduled for December 3, 2012, was granted due to a family emergency of Plaintiff's counsel. As part of counsels' agreement to continue trial, all counsel agreed to maintain the status quo as it existed for the trial which was to commence on December 3, 2012.

[4] At the close of Plaintiff's case, Plaintiff moved for a compulsory nonsuit as to each of the Settling Defendants. We denied the motion as to the Settling Doctors and granted the motion as to the Hospital. No party has appealed our decision to dismiss the Hospital from this suit.

[5] Plaintiff has preserved four primary issues for post-trial relief. **See** Motion for Post-Trial Relief filed on October 21, 2013, letter dated December 6, 2013, withdrawing multiple issues from consideration, and Plaintiff's Brief in Support of Post-Trial Motion filed on January 13, 2014. Of these four issues, three are discussed below. The fourth concerns our order dated October 4, 2012, barring Decedent's son, Andrew Stang, from testifying at trial as a discovery sanction. The reasons for that order were set forth in a footnote opinion to the order and will not be repeated here.

Since the October 4, 2012, order, two events have occurred rendering any error of which Plaintiff complains, and we see none, harmless. First, ever since Decedent's death, Andrew Stang has been withdrawn and emotionally unable to cope with his father's death. Andrew was eighteen years old when his father died. At trial, Plaintiff's counsel placed in evidence a certification signed by Andrew (Plaintiff's Exhibit No. 80) which states, **inter alia,** that he "find[s] it extraordinarily difficult to talk about his father and the time surrounding his death" and that he does "not have the will or emotional fortitude to sit in the court and relive

DISCUSSION

1. Denial of Plaintiff's Motion to Discontinue Her Claims Against the Settling Defendants and to Have the Settling Defendants Dismissed As Parties

Plaintiff claims we erred by denying her Motion to Discontinue her suit against the Hospital and Drs. Smith, Hanley and McGinley, as well as placing the Settling Doctors' names on the jury verdict slip in order that the jury could determine the comparative liability of the Settling Doctors vis-à-vis the Non-Settling Defendants. We disagree.

Section 8326 of the UCATA, the provision which controls set-off, provides:

> A release by the injured person of one joint tort-feasor, whether before or after judgment, does not discharge the other tort-feasors unless the release so provides, but reduces the claim against the other tort-feasors in the amount of the consideration paid for the release or in any amount or proportion by which the release provides that the total claim shall be reduced if greater than the consideration paid.

42 Pa. C.S.A. §8326. Here, the Release executed by Plaintiff and given to the Settling Defendants stated in pertinent part:

> It is understood that I, Lorrie Stang ... am not hereby releasing any claims or demands that I have against Neil Lesitsky, M.D. and Rajinish Chaudhry, M.D. It is further understood and agreed, however, that if it should be determined that Neil Lesitsky, M.D. and Rajinish Chaudhry, M.D. are jointly or severally liable in tort to the plaintiffs with any person or entity herein released, the claim against and damages recoverable from Neil Lesitsky, M.D. and Rajinish Chaudhry, M.D. shall be reduced to the extent of the pro-rata [sic] share of legal responsibility or legal liability for which the parties herein released are found to be liable for as a consequence of the aforesaid medical care or treatment. It is intended that this Release shall comply with and be interpreted in accordance with the Uniform Contribution Among Joint Tortfeasor [sic] Act as enacted and amended in Pennsylvania.

The effect of this provision was to allow the Non-Settling Defendants to reduce the amount of any monies jointly owed by them and the Settling Defendants to the Plaintiff in an amount equal to the Settling Defendants' apportioned share of the verdict. **Baker v. ACandS,** 562 Pa. 290, 297, 755 A.2d 664, 668 (2000).

In this case, Plaintiff alleged and supported with expert reports claims that the Defendants failed to properly evaluate and treat Decedent's stroke, and further failed to take proper steps to prevent or, at a minimum, reduce the risk of the deep vein thrombosis/pulmonary embolism that ultimately caused Decedent's death. The claims as alleged in Plaintiff's Amended Complaint and supported by her expert reports set forth claims of liability in tort against the Defendants for the damages claimed by Plaintiff, making them, under Plaintiff's pleadings and expert reports, joint tort-feasors as defined in the UCATA. **See** 42 Pa. C.S. §8322.[6]

Under settled Pennsylvania law, the Non-Settling Defendants were entitled to have the Settling Defendants remain as parties to this action in order to establish their status as joint tort-feasors and, if found to be joint tort-feasors, to have the jury apportion or allocate liability among them in order that the amount of damages

the nightmare of [his] father's death." Andrew Stang Certification, paragraphs 8 and 10. This inability of Andrew Stang to appear in court or testify is wholly independent of our order.

Second, had Andrew Stang testified his testimony would have been relevant only to the issue of damages. As the jury found no liability against any Defendant and never reached this issue, our October 4, 2012, order could have had no effect on the jury verdict.

[6] The Act defines the term "Joint Tort-feasors" as "two or more persons jointly or severally liable in tort for the same injury to persons or property ... ." 42 Pa. C.S.A. §8322. Two actors are jointly liable for an injury if their conduct "causes a single harm which cannot be apportioned ... even though [the actors] may have acted independently." **Mattia v. Sears, Roebuck & Co.,** 366 Pa. Super. 504, 507, 531 A.2d 789, 791 (1987) (**quoting Capone v. Donovan,** 332 Pa. Super. 186, 189, 480 A.2d 1249, 1251 (1984)), **appeal denied,** 519 Pa. 660, 546 A.2d 622 (1988); **Neal v. Bavarian Motors, Inc.,** 882 A.2d 1022, 1027 (Pa. Super. 2005). That the Settling and Non-Settling Defendants are joint tort-feasors appears as well to be acknowledged by Plaintiff in her Amended Complaint. **See** Plaintiff's Amended Complaint, first unnumbered paragraph and paragraph 87; the **ad damnum** clauses of each numbered count, which demand judgment against the named Defendant "jointly and severally with co-defendants"; and the **ad damnum** clauses of Count IX (Wrongful Death) and Count X (Survival), which demand "judgment in [Plaintiff's] favor against Defendants, jointly and severally."

the Non-Settling Defendants might be liable to pay could be determined. Thus, the inclusion of the Settling Defendants as parties at trial was necessary for the jury to evaluate the respective fault of all tort-feasors alleged to have been negligent and responsible for Decedent's death and, if applicable, apportion liability to the Settling Defendants. **See Baker, supra** at 299-300, 755 A.2d at 669 (noting that in negligence actions liability is allocated among joint tort-feasors according to percentages of comparative fault, **citing** 42 Pa. C.S.A. §7102). Only by permitting the jury to consider the conduct of all Defendants for whom a **prima facie** case was proven could comparative fault be fairly and intelligently apportioned. Inclusion of the Settling Defendants for these purposes is implicit in the UCATA and was contemplated by the language of the Release quoted above.

In **Davis v. Miller,** 385 Pa. 348, 123 A.2d 422 (1956), the Pennsylvania Supreme Court held that a defendant had the right to keep a settling additional defendant at trial for purposes of apportionment under the then current version of UCATA. In **Davis,** the plaintiff, Davis, sued Miller, the driver of the car which struck the vehicle in which Davis was riding; Miller in turn named as an additional defendant Richardson, the driver of the car in which Davis was a passenger. Davis subsequently entered into a joint tort-feasor release with Richardson, pursuant to which the trial court discharged her from the case. The Supreme Court reversed based upon comparable language of the UCATA, stating:

> It is therefore clear that an important factor in the determination of the amount of damages that Miller may be required to pay to plaintiffs is whether or not Mary Richardson would also have been liable to them had they not released her—in other words, whether she was a joint tortfeasor [sic] with Miller. If such she was, then, under the Act and the terms of the releases which plaintiffs gave her, they can recover from Miller only his **pro rata** share, in this case half, of the amount to which they otherwise would have been entitled; if, on the other hand, she was not a joint tortfeasor [sic], the releases given her by plaintiffs would not inure to Miller's benefit. ...
>
> Therefore, **although Miller cannot recover contribution from the additional defendant, he does have an extremely valuable right in retaining her in the case,** because, if the jury should find her to be a joint tortfeasor [sic], his liability to plaintiffs would be cut in half. **Her continuance in the case is therefore necessary, even though no recovery can be had against her either by plaintiffs or by defendant, in order to determine the amount of damages that defendant may be obliged to pay plaintiffs in the light of the situation created by their releases of the additional defendant's liability.**

Id. at 351-52, 123 A.2d at 424 (emphasis added) (citations omitted). **See also, Slaughter v. Pennsylvania X-Ray Corp.,** 638 F.2d 639, 643-44 (3d Cir. 1981) ("Pennsylvania cases hold that even though he has settled with the plaintiff and obtained a **pro rata** release, a defendant must nevertheless participate in the trial so that the jury may determine the issue of joint or sole liability.") (**citing Davis v. Miller,** 123 A.2d 422 (Pa. 1956)).[7]

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[7] The Uniform Contribution Among Tort-Feasors Act "is a comprehensive act which dictates the effect of a release as to other tortfeasors [sic], the method for computing set-off, and under what circumstances an action in contribution is to be allowed." **Baker v. ACandS,** 562 Pa. 290, 296, 755 A.2d 664, 667 (2000).

> Where a plaintiff and a settling defendant sign a **pro tanto** release, then the plaintiff's ultimate recovery against the nonsettling [sic] joint tortfeasors [sic] is the total award of damages reduced by the amount of consideration paid for the release. In contrast, if the parties sign a **pro rata** release (which is also known as an 'apportioned share set-off' release), then the plaintiff's ultimate recovery against the non-settling tortfeasors [sic] is the total award of damages reduced by the settling party's allocated share of the liability.

Id. at 291 n.1, 755 A.2d at 666 n.1. Nevertheless, "a non-settling defendant is not entitled to a set-off in light of the settling defendant's release unless the settling and non-settling defendants are both deemed to be joint tortfeasors [sic]. 42 Pa.C.S. §8326." **Id.** at 304, 755 A.2d at 671.

Because joint tort-feasors are jointly and severally liable, meaning that one joint tort-feasor may be compelled to satisfy the entire money judgment, the UCATA is designed with the equitable goal that a joint tort-feasor pay only his fair share of the plaintiff's injuries for which he is responsible. To achieve this result, a "joint tortfeasor's [sic] recourse for paying more than its proportionate share of the verdict is to sue the nonpaying joint tortfeasors [sic] in contribution. **See** 42 Pa.C.S. §7102; 42 Pa.C.S. §§8324(c) and 8327." **Id.** at 300, 755 A.2d at 669.

As to the right of contribution provided for under Section 8324(b) of the UCATA, the **Mattia** court stated:

> The right of contribution may be asserted during the original proceeding via joinder of a third-party defendant. **See** Pa.R.Civ.P. 2252. Or it may be pursued in a separate action brought by a tortfeasor [sic] who has previously been held liable to the original plaintiff. ... In the latter instance, the party

The right to retain the Settling Defendants as parties to the litigation is not dependent upon whether cross-claims have been filed by the Non-Settling Defendants against them. On this issue, the court in **National Liberty Life Insurance Company v. Kling Partnership,** 350 Pa. Super. 524, 504 A.2d 1273 (1986) stated that "[c]ross-claims for contribution are [ ] unnecessary in order to retain the settling defendants as parties to the litigation for the sole purpose of determining the extent, if any, of [a non-settling defendant's] right, pursuant to the joint tortfeasor [sic] release, to a reduction in any verdict rendered against it after trial ... ." **Id.** at 532-33, 504 A.2d at 1277-78. **See also, Hyrcza v. West Penn Allegheny Health System, Inc.,** 978 A.2d 961 (Pa. Super. 2009) (discussing, in a case where no defendant filed a cross-claim against any other defendant, the right of a non-settling defendant to have a settling defendant included on the verdict slip), **appeal denied,** 604 Pa. 706, 987 A.2d 161 (2009); **Herbert v. Parkview Hospital,** 854 A.2d 1285 (Pa. Super. 2004) (affirming the trial court's inclusion of the settling defendants on the verdict slip, thus allowing the jury

seeking contribution must stand in the shoes of that original plaintiff and prove that the new defendant was a joint tortfeasor [sic] and that his tortious conduct also caused the harm at issue.

Mattia, supra at 508, 531 A.2d at 791 (citation omitted).

Requiring the Settling Defendants to remain as parties to the litigation and thus allowing the jury to potentially apportion liability to the Settling Defendants was necessitated further by the terms of the Release which would otherwise prohibit the Non-Settling Defendants from seeking contribution. **See** 42 Pa. C.S.A. §8327 (liability to make contribution as affected by release) which provides:

> A release by the injured person of one joint tortfeasor [sic] does not relieve him from liability to make contribution to another tortfeasor [sic], **unless the release is given before the right of the other tortfeasor** [sic] **to secure a money judgment for contribution has accrued** and provides for a reduction to the extent of the **pro-rata** [sic] share of the released tortfeasor [sic] of the injured person's damages recoverable against all the other tortfeasors [sic].

(Emphasis added.) **Compare National Liberty Insurance Company v. Kling Partnership,** 350 Pa. Super. 524, 504 A.2d 1273 (1986) where the court found that late joinder of an additional defendant was appropriate because the defendant's right to institute a separate action for contribution against the additional defendant was destroyed by a settlement between the plaintiff and the additional defendant. **See also, Mattia, supra** at 508, 531 A.2d at 792 (noting that in a claim for contribution, the statute of limitations does not begin to run until the date of entry of judgment in favor of the original plaintiff).

to apportion liability, where the plaintiff and settling defendants entered a joint tort-feasor release which provided, **inter alia,** that in the event the non-settling defendant was determined to be jointly or severally liable with a settling defendant any damages recoverable against the non-settling defendant would be reduced by the **pro rata** share of legal responsibility or legal liability for which the settling defendants were found to be liable; no cross-claim was made by the non-settling defendant against the settling defendants), **appeal denied,** 582 Pa. 710, 872 A.2d 173 (2005). **Cf.** 42 Pa. C.S.A. §7102 (b.2) (apportionment of responsibility among certain nonparties and effect). We proceed next to examine whether the evidence was sufficient to establish the elements of a **prima facie** case of medical malpractice against the Settling Doctors.

2. Existence of Prima Facie **Case Against Settling Doctors**

Although a non-settling defendant has a right to require a settling defendant to remain as a party in the case during trial, there is no absolute right to have the settling defendant on the verdict slip. **Hyrcza, supra** at 968. For a settling defendant to be included on the verdict slip, the evidence, when read in the light most favorable to the non-settling defendant, must establish a **prima facie** case of negligence against the settling defendant. **Id.** at 969.[8] This standard was met as to the Settling Doctors.

Plaintiff's expert, Dr. Mark Graham, board certified in internal medicine, testified unequivocally that the Settling Doctors were negligent in their care of Decedent and, further, that this negligence

[8] The four elements that a plaintiff must prove to support a claim of medical malpractice are:

> (1) that the medical practitioner owed a duty to the patient,
>
> (2) that the practitioner breached that duty,
>
> (3) that that breach was a proximate cause of, or a substantial factor in, bringing about the harm suffered by the patient, and
>
> (4) that the damages suffered by the patient were a direct result of the harm.

Herbert v. Parkview Hospital, 854 A.2d 1285, 1290 (Pa. Super. 2004). Further, where a medical expert opines that a treating physician's failure to act deviated from the standard of care and thereby increased the risk of harm, which harm in fact occurred, the element of causation has been made out. **Hamil v. Bashline,** 481 Pa. 256, 262, 268, 392 A.2d 1280, 1283, 1286 (1978).

increased the risk of harm, including death, to Decedent. (N.T. 10/2/13, pp. 176-78, 180-83, 186-91.) As to Dr. Smith, Dr. Graham testified that she deviated from the standard of care in failing to order aspirin and other anticoagulation therapy for Decedent (N.T. 10/2/13, pp. 180, 183), which increased the risk for Decedent's stroke progression and DVT or PE (N.T. 10/2/13, pp. 182-83), and that Dr. Smith's negligence in failing to provide DVT prophylaxis deprived Decedent of his "best chance" to prevent DVT. (N.T. 10/2/13, p. 186.) As to Drs. McGinley and Hanley, Dr. Graham testified that they deviated from the standard of care by failing to order DVT prophylaxis, low-dose Heparin, and compression boots (N.T. 10/2/13, p. 188), thereby depriving Decedent of his best chance to prevent DVT and/or PE and substantially increasing his risk of death. (N.T. 10/2/13, p. 189.) Dr. Graham further characterized the judgment of Drs. McGinley and Hanley that anticoagulation therapy was contraindicated due to Decedent's hypertension as "wrong" and "without merit." (N.T. 10/2/13, pp. 189-90.) In Dr. Graham's view, there was "no question" that Drs. McGinley and Hanley "deviated" in their care of Decedent. (N.T. 10/2/13, p. 191.)

Dr. David Rosenbaum, a board-certified neurologist employed by Plaintiff, testified that Dr. Chaudhry deviated from the standard of care for a neurologist by not seeing the Decedent within twenty-four hours of the requested consult; that a neurologist should be aware that DVT prophylaxis is required by the standard of care for a stroke patient; that a neurologist who fails to prescribe aspirin and DVT prophylaxis for a stroke victim, if not prescribed by others, deviates from the standard of care; and that the failure to provide any DVT prophylaxis to Decedent while he was in the Hospital and the failure to provide aspirin or to transfer Decedent to a stroke center at an earlier point in time, all caused or contributed to Decedent's death. In addition, Dr. Rosenbaum testified that Drs. Smith, McGinley and Hanley were each aware of the increased risk of DVT and PE due to stroke and their failure to provide or order any anticoagulation therapy caused or contributed to Decedent's death.

As the foregoing shows, during Plaintiff's case in chief the evidence presented clearly allowed the jury to conclude that the

Settling Doctors deviated from the applicable standard of care and that each of these deviations caused or contributed to Decedent's death. Under **Herbert,** this was sufficient to include the Settling Doctors on the verdict slip. Moreover, to the extent Plaintiff's experts' attribution of negligence to the Non-Settling Defendants was predicated on facts and conduct equally applicable to the Settling Doctors, even absent any explicit attribution of fault to the Settling Doctors, the jury was entitled to take such information into account in assessing liability on the Settling Doctors. Here, as in **Herbert,** the Plaintiff's expert testimony offered as to the Non-Settling Defendants' liability "cast an equally damning light on the performance of every physician who had a hand in treating Decedent." **Herbert, supra** at 1290.

3. Scope of Cross-Examination of Plaintiff's Expert Witnesses

Prior to trial, Plaintiff's medical experts opined that not only the Non-Settling Defendants, but also the Settling Defendants, were negligent and responsible for Decedent's death. In particular, in Dr. Graham's expert report he criticized the care provided by both the Non-Settling and Settling Defendants, opining that such care deviated from the applicable standard of care, and concluding that this deviation caused or contributed to Decedent's death. Dr. Rosenbaum, who was critical of Dr. Chaudhry's neurological care of the Decedent, also opined that the delay in getting Decedent to the Hospital which resulted from Dr. Lesitsky's failure to advise Mrs. Stang to take her husband to the Hospital immediately for stroke evaluation both increased the risk of harm and caused or contributed to the Decedent's death. Absent settlement of Plaintiff's claims against the Settling Defendants, these experts were scheduled to testify on Plaintiff's behalf against the Settling Defendants.

Once settlement was reached, Plaintiff requested that the testimony of Drs. Graham and Rosenbaum be limited to their opinions critical of the Non-Settling Defendants only and that the Non-Settling Defendants be barred from cross-examining Plaintiff's experts as to any opinions held by them critical of the Settling Defendants. By Order dated September 16, 2013, we refused to restrict the scope of the Non-Settling Defendants' cross-examination of Plaintiff's medical experts as requested by Plaintiff.

In **Boucher v. Pennsylvania Hospital,** 831 A.2d 623 (Pa. Super. 2003), the court stated:

> Generally, every circumstance relating to the direct testimony of an adverse witness or relating to anything within his or her knowledge is a proper subject for cross-examination, including any matter which might qualify or diminish the impact of direct examination. ... Specifically regarding medical experts, the scope of cross-examination involving a medical expert includes reports or records which have not been admitted into evidence but which tend to refute that expert's assertion. ...

Id. at 629 (citations and quotation marks omitted), **appeal denied,** 577 Pa. 705, 847 A.2d 1276 (2004). **See also, Kemp v. Qualls,** 326 Pa. Super. 319, 324, 473 A.2d 1369, 1371 (1984) (holding that "[e]very circumstance relating to the direct testimony of an adverse witness or relating to anything within his or her knowledge [wa]s a proper subject for cross-examination, including any matter which might qualify or diminish the impact of direct examination"); **Rose v. Hoover,** 231 Pa. Super. 251, 258, 331 A.2d 878, 882 (1974) (stating that "cross-examination may embrace any matter germane to the direct examination, qualifying or destroying it, or tending to develop facts which have been improperly suppressed or ignored by the plaintiff").

Without question, cross-examination of Plaintiff's medical experts with respect to the entirety of their opinions as expressed in their expert reports was permissible for impeachment purposes: the manner in which Plaintiff sought to limit the testimony of her medical experts in her case in chief would otherwise have been skewed and given the false impression that these experts were of the opinion that the Non-Settling Defendants alone were responsible for Decedent's death. **Conley v. Mervis,** 324 Pa. 577, 188 A. 350 (1936) (explaining that the limitations of cross-examination are not intended to provide a cloak for the concealment of material facts pertaining to issues touched upon in direct examination and that any limitation on the scope of cross-examination that would allow a party to ignore or otherwise suppress facts of an adverse and harmful character would defeat one of the vital reasons for cross-examination), overruled in part on other grounds by **DeWaele v. Metropolitan Life Ins. Co.,** 358 Pa. 574, 58 A.2d 34 (1948); **see also,** Pa. R.E. 611(a)(1) (requiring that the trial court's control over the mode and order of examining witnesses and presenting

evidence allow for effective determination of the truth). The Non-Settling Defendants had every right to point the finger and elicit evidence through Plaintiff's experts that the cause of Decedent's death was not the failure by Dr. Lesitsky to immediately refer Decedent to the emergency room for a physical evaluation or any delay in Dr. Chaudhry's neurological consult or treatment—the Non-Settling Defendants' experts being of the opinion that Decedent would have ultimately fully recovered from his stroke—but the failure to provide DVT prophylaxis once Decedent was admitted to the Hospital, for which the Non-Settling Doctors argued they were not responsible.

Moreover, this evidence was also admissible to prove the substantive liability of the Settling Defendants. First, the evidence was not hearsay. The opinions being elicited were those of the witness on the stand being cross-examined and they were clearly subject to questioning by all parties. Nor did such questioning run afoul of the rule that one party may not compel an expert for the opposing party to offer an opinion against his will. **Boucher, supra** at 632. "The basis for this rule is an acknowledgment of an expert's proprietary interest in his own opinion, and the recognition that he should not be required to relinquish it without his consent." **Id.** In contrast, the opinions at issue here were independently subject to disclosure for impeachment such that any proprietary interest against disclosure claimed by Plaintiff's medical experts is illusory. Nor was there any question that these experts were competent to express the opinions on which they were cross-examined: the experts were employed by Plaintiff; the opinions were prepared at Plaintiff's behest, with the intent of having them offered at trial against the Settling Defendants; the opinions were identical to those which Plaintiff intended to present against the Settling Defendants had settlement not been reached; and, understandably, no objection to competency was raised by Plaintiff.[9]

[9] In addition, at no time did Plaintiff request a limiting instruction that the Non-Settling Defendants' cross-examination of Plaintiff's medical experts be restricted to impeachment purposes. **See** Plaintiff's Motion to Preclude Evidence of, References to and Examination of Plaintiff's Expert Witnesses and the Settling Defendants on DVT/PE prophylaxis; Non-Settling Defendants' responses thereto; court order dated September 16, 2013, ruling on the Motion; and Plaintiff's objection at the time of trial (N.T. 10/2/13, p. 3) (making no distinction in Plaintiff's objection to the Non-Settling Defendants' cross-examination of Plaintiff's medical witnesses between cross-examination for substantive or impeachment purposes).

CONCLUSION

The standard for granting a new trial for rulings made by the court requires not only technical error, but also demonstrated harm. **Harman ex rel. Harman v. Borah,** 562 Pa. 455, 466, 756 A.2d 1116, 1122 (2000). For the reasons already stated, we find no error. In addition, Plaintiff has failed to identify any harm.

The jury concluded that none of the individual Defendants were negligent in their care of Decedent. Consequently, not only did the jury find that neither Non-Settling Defendant was responsible for any harm to Plaintiff's Decedent, it simultaneously found that even if one or both Non-Settling Defendants had been at fault, no amount would be set off against any recovery from the Non-Settling Defendants for conduct attributable to the Settling Doctors. Given this verdict, we see no harm to Plaintiff by our rulings which retained the Settling Defendants in the case and which ultimately allowed the names of the Settling Doctors to be placed on the verdict slip. **See also, Kol v. Trinh,** 2005 WL 4717493 (C.P. Phila.Cty. 2005) (denying plaintiff's motion to discontinue and dismiss a settling doctor as a party defendant in a medical malpractice suit, placing the settling defendant's name on the verdict slip for purposes of apportioning damages, and permitting non-settling defendant's counsel to cross-examine plaintiff's expert witness with respect to the negligence of the settling defendant).[10]

[10] This case is remarkably similar to the instant case on the key issues we address, including the jury's verdict finding none of the defendants, settling or non-settling, negligent. The trial court's opinion in **Kol** was affirmed by the Superior Court at 902 A.2d 988 (Pa. Super. 2006). Nevertheless, because this occurred in an unpublished memorandum opinion, we recognize it is of no precedential value. **Reed v. Pennsylvania National Mutual Casualty Insurance Company,** 342 Pa. Super. 517, 521-22, 493 A.2d 710, 712 (1985) (holding that Superior Court's affirmance of a trial court opinion by unpublished memorandum opinion is of no precedential value).

1400 MARKET STREET, LLC, Plaintiff vs. FOX FUNDING, LLC, FOX FUNDING PA, LLC, MELO ENTERPRISES, LLC, DENNIS WASELUS and ELSIE WASELUS, JOSEPH F. SINISI and TWO RIVER COMMUNITY BANK s/b/m to THE TOWN BANK, Defendants

TWO RIVER COMUNITY BANK, SUCCESSOR by MERGER to THE TOWN BANK, Plaintiff vs. FOX FUNDING PA, LLC, Defendant

MELO ENTERPRISES, LLC, Plaintiff vs. FOX FUNDING, LLC, Defendant, 1400 MARKET STREET, LLC, Intervenor

Civil Law—Real Estate—Reformation of Mortgage—Mutual Mistake As Basis for Reformation—Correcting the Name and Identity of the Mortgagor—Effect of Fee Title Conveyance of Mortgaged Property to Mortgage Holder—Doctrine of Merger—Discharge of Mortgage Lien—Question of Intention

1. When the words of a written agreement do not accurately reflect what the parties have agreed upon—because of fraud, accident or mutual mistake—the agreement may be reformed to accurately state that which was in fact agreed to. The object of reformation is not to change the parties' agreement but to conform the written manifestation of that agreement to what was in fact agreed to.

2. A mutual mistake is one common to both or all parties, wherein each labors under the same misconception respecting a material fact, the terms of the agreement, or the provisions of the written instrument prepared to embody such agreement.

3. Before a mortgage will be reformed to correct the name and identity of the mortgagor on the basis of mutual mistake, it must be shown by clear and convincing evidence that both parties to the mortgage intended and had agreed prior to execution of the mortgage on who was to be the mortgagor, and that at the time of execution, both parties labored under the same but mistaken belief that the mortgage prepared and executed actually named that party as the mortgagor.

4. Where the identity of the mortgagor given in a mortgage is clearly in error and the identity of the intended mortgagor is clear—the named mortgagor not being the owner of the property pledged as collateral, the name of the actual owner of the property and intended mortgagor being confusingly similar to the name of the mortgagor as stated in the mortgage, and both the named mortgagor and intended mortgagor being owned and controlled by the same principals and being affiliated entities—absent injury to an innocent third party, reformation of the mortgage to correct the name and identity of the mortgagor to comport with the actual agreement of the parties and their intent will be granted.

5. In Pennsylvania, a mortgage acts to grant defeasible title of the mortgaged premises to the mortgagee as security for an underlying debt or obligation.

6. Whether the conveyance of fee title to real estate to one holding a mortgage on the same property causes the defeasible title of the mortgage to merge

with the fee interest thus acquired, so as to extinguish the mortgage, is a question of intent. Where the mortgage holder intends there shall be no merger, the mortgage will be kept alive.

7. Where the holder of a mortgage accepts title to the mortgaged property by quitclaim deed in order to better protect its interest in the property, and where extinguishment of the mortgage would be against the holder's interest in maintaining the mortgage as a basis on which to commence foreclosure proceedings in order to discharge mortgages which are junior in lien to the mortgage held, and thereby secure better title to the property than that acquired through the quitclaim deed, the lien of the mortgage will not be extinguished.

NOS. 12-0788, 09-0006, 10-3538

SCOTT M. ROTHMAN, Esquire—Counsel for 1400 Market Street.

ANTHONY ROBERTI, Esquire—Counsel for Melo Enterprises LLC and Dennis and Elsie Waselus.

FOX FUNDING, LLC, FOX FUNDING PA, LLC, JOSEPH F. SINISI and TWO RIVER COMMUNITY BANK—Pro se.

MEMORANDUM OPINION

NANOVIC, P.J.—November 10, 2014

On October 21, 2005, James Harrison executed two mortgages in favor of The Town Bank on property located in Carbon County, Pennsylvania. Both mortgages identified Fox Funding PA, LLC, a Pennsylvania limited liability company of which Harrison was the principal owner and managing agent, as the mortgagor. This was a mistake. Fox Funding PA was not the owner of the properties pledged as security; rather, Fox Funding LLC, a New Jersey limited liability company, also owned and controlled by Harrison, was the owner. This fact has resulted in extensive litigation, including the instant proceedings for reformation asking that the name of the mortgagor in the larger of the two mortgages, that for $1,075,000.00, be corrected to Fox Funding, LLC, the actual owner of the property and intended mortgagor.

FACTUAL AND PROCEDURAL BACKGROUND

On October 18, 2005, the Bank[1] extended a loan commitment to Fox Funding, LLC ("Fox Funding") for $1,300,000.00. (Plaintiff's Exhibit No. 1, Loan Commitment.) The purpose of this loan was to finance Fox Funding's purchase and development of 168 acres of property located along the Maury Road in Penn Forest Township, Carbon County, Pennsylvania ("Property"). At the time, the Property was owned in part by Harry, Catherine, John and Linda Roscoe (the "Roscoe Parcels") and in part by Dennis and Elsie Waselus (the "Waselus Parcels"). The loan was to be secured by a valid first lien mortgage on the Property. Fox Funding accepted the loan terms as presented.

[1] The Town Bank later merged with Two River Community Bank whose name appears in the caption of this case. For purposes of this litigation, no meaningful distinction exists between the two. Hence, our reference to "the Bank" is inclusive of both The Town Bank and Two River Community Bank.

Between Fox Funding's acceptance of the loan commitment and the date of closing, the parties agreed to divide the loan proceeds into two different loan amounts to be secured by separate mortgages. The sum of $1,075,000.00 was to be secured by a first lien mortgage on the Property. The balance, $225,000.00, was to be secured by a second mortgage intended to be a third lien on the Waselus Parcels—subordinate to a purchase money mortgage held by the Waseluses—and a second lien on the Roscoe Parcels.

Closing on the loan was held at the offices of Bank's counsel in Pennsylvania on October 21, 2005. At that time, two deeds were delivered for recording: one for 132 acres from Dennis and Elsie Waselus (**i.e.,** the Waselus Parcels), and one for 36 acres from Harry, Catherine, John and Linda Roscoe (**i.e.,** the Roscoe Parcels). The grantee named in both deeds was Fox Funding.

At closing, Harrison signed two mortgages with the Bank as mortgagee—one for $1,075,000.00 (the "Bank Mortgage") and one for $225,000.00—both listing the Property as collateral. The mortgage documents were provided by the Bank and prepared by its counsel. What Harrison did not realize was that each of the bank mortgages incorrectly identified the mortgagor as Fox Funding PA, LLC ("Fox Funding PA"), rather than the actual and intended mortgagor, Fox Funding, the owner of the Property. The notes secured by these two mortgages also mistakenly identified the borrower as Fox Funding PA, rather than Fox Funding. (Stipulated Facts, No. 13.)[2]

[2] Fox Funding was formed by Harrison in 2004 for the purpose of acquiring and developing real estate in its name. Fox Funding PA was formed in 2005 as a construction firm to build the required improvements on property acquired by Fox Funding. Fox Funding PA was to make separate arrangements for financing its construction equipment with the Bank.

In addition to the two mortgages given to the Bank at closing, Harrison also signed a third mortgage to the Waseluses in the amount of $372,000.00, using as collateral the Property conveyed by them to Fox Funding. This mortgage correctly identified Fox Funding as the mortgagor. The Waselus Mortgage expressly stated on its face that it was:

> UNDER AND SUBJECT, in both lien and payment, to a construction and purchase loan mortgage to secure the payment of the principal sum of ONE MILLION SEVENTY-FIVE THOUSAND AND 00/100 ($1,075,000.00) DOLLARS given by [Fox Funding] to [the] Bank dated October 21, 2005, and intended to be recorded forthwith.

On October 24, 2005, the settlement documents were recorded in the Carbon County Recorder of Deeds Office in the following sequence at the record book and page numbers indicated:

1. Deed from the Roscoes to Fox Funding—Record Book 1385, at page 709;

2. Deed from the Waseluses to Fox Funding—Record Book 1385, at page 713;

3. Mortgage from Fox Funding PA to the Bank in the amount of $1,075,000.00—Record Book 1385, at page 720;[3]

4. Mortgage from Fox Funding to the Waseluses in the amount of $372,000.00—Record Book 1385, at page 731; and

5. Mortgage from Fox Funding PA to the Bank in the amount of $225,000.00—Record Book 1385, at page 743.

The intended effect of this recording was to create a first lien mortgage on the Property in favor of the Bank in the amount of $1,075,000.00, a second lien mortgage on the Waselus Parcels in favor of the Waseluses in the amount of $372,000.00, and a second lien mortgage on the Roscoe Parcels and third lien mortgage on the Waselus Parcels in favor of the Bank in the amount of $225,000.00.[4]

[3] Notwithstanding that this mortgage identified the mortgagor as Fox Funding PA, the mortgage was indexed against Fox Funding by the Recorder of Deeds. (Stipulated Facts, No. 26.)

[4] On December 30, 2008, Fox Funding executed a mortgage encumbering multiple parcels, including the Property, in favor of Joseph Sinisi in the amount of $860,000.00. This mortgage was recorded on January 9, 2009, in the Carbon County Recorder of Deeds Office in Record Book 1739, at page 784.

Payments on the Bank Mortgage became delinquent as of August 31, 2008. Prior to this date, the mortgage was paid by Fox Funding. As a result of this default, the Bank filed a mortgage foreclosure complaint against Fox Funding PA, the named mortgagor in the Bank Mortgage, on January 2, 2009. This action is docketed to No. 09-0006 in the Carbon County Prothonotary's Office.

An in rem judgment was entered against Fox Funding PA in the amount of $1,126,126.55 on September 1, 2009, and a writ of execution issued on September 10, 2009. All interested parties, including the Waseluses, were given notice of the execution proceedings. (Stipulated Facts, Nos. 49, 52.) On November 6, 2009, the Property was sold at sheriff's sale to the Bank's assignee, 1400 Market Street, LLC, for costs.[5] A sheriff's deed for the Property dated November 30, 2009, with 1400 Market Street named as the grantee, was duly recorded in the Recorder of Deeds Office on December 7, 2009, in Book 1810, at page 652. (Stipulated Facts, Nos. 62-65.)

1400 Market Street placed the Property for sale and an agreement was reached with Melo Enterprises, LLC ("Melo") to purchase the Property for $580,000.00. This sale did not occur after Melo questioned the ability of 1400 Market Street to convey good title since 1400 Market Street's source of title was that obtained at the sheriff's sale and Fox Funding PA, the party executed upon, never held title to the Property. Once aware of this concern and at the suggestion of Melo's counsel, 1400 Market Street requested and obtained from Fox Funding a quitclaim deed conveying title to 1400 Market Street.[6] This deed dated November 29, 2010, was

[5] All of the Bank's interest in the Bank Mortgage and underlying note was assigned to 1400 Market Street by Assignment of Note and Mortgage dated November 3, 2009, and recorded on November 4, 2009, in the Carbon County Recorder of Deeds Office in Record Book 1804, at page 513. The Bank also assigned all of its interest in the September 1, 2009, judgment to 1400 Market Street the same date. (Stipulated Facts, Nos. 55-56.)

1400 Market Street is a wholly-owned subsidiary of Atlantic Central Bankers Bank ("ACBB"). ACBB was a one hundred percent participant with respect to the Bank Mortgage since closing. (Stipulated Facts, Nos. 57-58.)

[6] This issue appears to have been first brought to 1400 Market Street's attention in a letter from Melo's counsel dated October 19, 2010. In this letter Melo's counsel suggested either a quitclaim deed from Fox Funding or reformation of the Bank Mortgage followed by a new foreclosure action on the reformed mortgage

recorded on December 27, 2010, and is filed in the Carbon County Recorder of Deeds Office in Record Book 1883, at page 847.

Though the effect of this quitclaim deed was to transfer whatever title was retained by Fox Funding in the Property to 1400 Market Street, 1400 Market Street was nevertheless unable to convey good and marketable title to Melo due to the Waselus and Sinisi Mortgages, both constituting valid liens properly entered against Fox Funding as the mortgagor. Neither the Waselus nor Sinisi mortgages were discharged in the Bank's foreclosure on the Bank Mortgage as the mortgagor named therein, Fox Funding PA, never held title to the Property.[7]

When 1400 Market Street and Melo were unable to resolve this title issue—Melo wanted to reduce the $580,000.00 purchase price by the balance owed on the Waselus Mortgage, an amount in excess of $360,000.00—Melo purchased the Waselus Mortgage for $1,000.00 and began foreclosure proceedings against Fox Funding in which 1400 Market Street intervened. These proceedings are docketed No. 10-3538 in the Carbon County Prothonotary's Office.[8]

as options for 1400 Market Street to gain title. Counsel's October 19, 2010 letter was followed by a second letter two days later advising that after further reflection foreclosure on the reformed mortgage would be necessary to discharge the Waselus and Sinisi mortgages. (Stipulation to Supplement Trial Exhibits, Plaintiff Exhibit Nos. 39, 40.)

[7] By order dated July 9, 2013, and docketed to No. 09-0006, we granted the Bank's petition to set aside the sheriff's sale and vacated the in rem judgment entered on September 1, 2009. We did so on the basis that the sheriff's sale and underlying judgment were void **ab initio** as the named mortgagor, Fox Funding PA, did not have title to the Property and the party with title, Fox Funding, was an indispensable party who had not been joined in the foreclosure proceedings, thus depriving the Court of jurisdiction. **See Two River Community Bank v. Fox Funding PA,** 19 Carbon Co. L.J. 233 (Memorandum Opinion dated September 10, 2013); **cf. M&P Management, L.P. v. Williams,** 594 Pa. 489, 494, 937 A.2d 398, 401 (2007) (holding that a judgment which the court does not have the power to enter is void and does not become valid through the lapse of time).

[8] In these foreclosure proceedings, 1400 Market Street filed a motion for summary judgment arguing that as a second lien mortgage, the Waselus Mortgage was discharged in the foreclosure proceedings commenced by the Bank against Fox Funding PA on the first lien Bank Mortgage. Finding that as a stranger to title, Fox Funding PA had neither the power nor the authority to grant a mortgage to the Bank, and that the sheriff's deed which was issued upon execution could convey no better title to the Property than that held by Fox Funding PA, we denied this motion. **See Melo Enterprises v. Fox Funding,** 18 Carbon Co. L.J. 595 (Memorandum Opinion dated February 15, 2012).

By agreement of the parties, Melo's suit against Fox Funding has been stayed pending the outcome of the instant action for reformation of the Bank Mortgage. **See** Consent Decree dated May 31, 2012, docketed to No. 10-3538.

On April 13, 2012, 1400 Market Street commenced the present action in equity to reform the Bank Mortgage and the underlying note[9] claiming that the intended and true mortgagor was Fox Funding, not Fox Funding PA. This action is docketed to No. 12-0788 in the Carbon County Prothonotary's Office. Named as defendants in this suit are Fox Funding, Fox Funding PA, Melo, the Waseluses, Joseph Sinisi, and the Bank. The only party who has responded to this suit and filed an answer opposing 1400 Market Street's requested relief is Melo. A bench trial in this matter was held on March 7, 2014.

DISCUSSION

When the words of a written agreement do not accurately state what the parties have agreed upon—because of fraud, accident or mistake—the agreement may be reformed to reflect that which was in fact agreed to. **Alderfer v. Pendergraft,** 302 Pa. Super. 210, 216, 448 A.2d 601, 604 (1982).[10] As an equitable remedy,

[9] Although 1400 Market Street's complaint does not specifically request reformation of the note, it does contain a prayer for general relief. As to the breadth of relief available when such a prayer is made, our Supreme Court in **Lower Frederick Township v. Clemmer,** 518 Pa. 313, 543 A.2d 502 (1988) stated:

> A prayer for general relief is as broad as the equitable powers of the court. ... Under such a prayer a chancellor in equity may grant any relief that is consistent with the theory and purpose of the action. ...

Id. at 332, 543 A.2d at 512 (citations omitted). Given the interconnection between a note and mortgage, the specific request for reformation of the mortgage, and the parties' treatment of the two as one and the same in analyzing the issues in the case, we believe it appropriate to also allow for reformation of the note in the event reformation of the mortgage is granted.

[10] In **Alderfer,** the court stated:

> Courts of equity have the power to reform written instruments where there is an error in or an omission from the writing as a result of fraud, accident or mutual mistake. ... Additionally, if the mistake is unilateral but the other party knows of the mistake, the party with such knowledge is estopped from relying on the mistake and relief is warranted as fully as in the case of a mutual mistake. ...

Alderfer v. Pendergraft, 302 Pa. Super. 210, 215-16, 448 A.2d 601, 604 (1982) (citations omitted). As later explained in **Dudash v. Dudash,** 313 Pa. Super. 547, 460 A.2d 323 (1983), "[a] party seeking reformation on the basis of [a] unilateral

reformation allows the terms of a document to be corrected to conform to the agreement and intention of the parties, not binding the parties to what has been mistakenly inserted in or omitted from the document. **Broida, in Own Right and for Use of Day v. Travelers' Ins. Co.,** 316 Pa. 444, 447, 175 A. 492, 493-94 (1934) ("It is a well-known general rule that where parties have come to a mutual understanding as to the terms to be embodied in a proposed written contract or conveyance, and the writing executed is at variance with that understanding, it will be reformed to express their intention."); **see also, In re Mellinger's Estate,** 334 Pa. 180, 185, 5 A.2d 321, 323 (1939) (directing the reformation of a written agreement which did not embody sufficient provisions to put into execution the real intent of the parties' oral understanding in order that such intent could be carried out). Where a mutual mistake has occurred, both parties believing at the time of execution that a document says something different than what it actually says, and both parties being in agreement as to what the document should say, reformation is appropriate, in the absence of intervening rights of innocent third parties or other considerations which would make reformation inequitable. **Uniontown Savings & Loan Co. v. Alicia Land Co.,** 338 Pa. 227, 320, 13 A.2d 65, 66 (1940).

In contrast to the remedy of rescission, applicable when an agreement is found unenforceable, whether through a mutual mistake which precludes a meeting of the minds, or otherwise, reformation presupposes the existence of an enforceable agreement, albeit one whose written expression needs to be corrected. **Perry Ross Coal Co. Leasehold Condemnation,** 48 D. & C.2d 771, 775 (Lawrence Co. 1970). The object of reformation is not to change the parties' agreement but to conform the written manifestation of that agreement to what was in fact agreed to. Whether reformation is granted is a question of discretion with the court, and not a matter of right in the parties. Further, "to justify reformation of a contract on the basis of 'mutual mistake,' evidence of the mistake must be 'clear and convincing.'" **Jones v. Prudential Property & Casualty Insurance Company,** 856 A.2d 838, 844 (Pa. Super. 2004).

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mistake may be granted relief if the party against whom reformation is sought has such knowledge of the mistake as to justify an inference of fraud or bad faith." **Id.** at 554, 460 A.2d at 327.

That Fox Funding was intended to be the mortgagor in the Bank Mortgage and that the parties acted as though Fox Funding was the borrower and mortgagor, is clear on the record before us. The initial loan commitment by the Bank dated October 18, 2005, and accepted by Fox Funding identified Fox Funding as the borrower and the purpose of the loan Fox Funding's acquisition and development of the Property. (Stipulated Facts, No. 15.) This commitment was signed by Harrison as the managing member of Fox Funding. The deeds delivered at closing named Fox Funding as the grantee. The mortgage given at closing to the Waseluses was properly executed in the name of Fox Funding and expressly stated that it was under and subject to a first mortgage being given that same date by Fox Funding to the Bank. Thereafter, the payments on the mortgage were made by Fox Funding.

At the March 7, 2014 hearing, Harrison testified the intended borrower and mortgagor was Fox Funding and he executed the mortgage believing he was signing in his capacity as manager for Fox Funding. This only makes sense since Fox Funding PA was neither the intended owner of the Property nor the intended borrower of the loan proceeds, as further evidenced on the settlement statement executed by the Waseluses and by Harrison on behalf of Fox Funding. (Plaintiff's Exhibit No. 3.) It strains credulity to believe that the Bank would loan 1.3 Million Dollars, request the loan be secured by a mortgage on the Property being purchased, and then have the mortgage executed by an entity which had no interest in the Property.

In determining whether a mistake occurred in the identification of the mortgagor named in the mortgage, the court may properly consider the subject matter of the document in issue, the apparent object or purpose of the parties, and the conditions existing when it was executed. **Voracek v. Crown Castle USA Inc.,** 907 A.2d 1105, 1108 (Pa. Super. 2006) (**citing Hart v. Arnold,** 884 A.2d 316, 333 (Pa. Super. 2005)); **Rusciolelli v. Smith,** 195 Pa. Super. 562, 568, 171 A.2d 802, 806 (1961). All support our conclusion here that the misidentification of the mortgagor in the Bank Mortgage was the result of mutual mistake.

As to this conclusion, Melo does not dispute that the Bank Mortgage and underlying note mistakenly identified the mortgagor

and borrower as Fox Funding PA and that this error occurred when the drafter of these documents inadvertently added the letters "PA" to Fox Funding's name. (Stipulated Facts, Nos. 13, 16-19; Melo Brief Opposing Petition to Reform the Note and Mortgage, pp. 11-12.) Melo, however, characterizes this error as a unilateral mistake because the error was made by the Bank's attorneys, and there is no evidence to show that Fox Funding knew or had reason to know of the mistake. While we agree that 1400 Market Street failed to present evidence to suggest that Fox Funding was the cause of the drafting error, or knew or should have known of the error at or prior to closing, we disagree with Melo's contention that a mutual mistake did not result.

In **Regions Mortgage, Inc. v. Muthler,** 585 Pa. 464, 889 A.2d 39 (2005), the Pennsylvania Supreme Court defined a mutual mistake as "1. A mistake in which each party misunderstands the other's intent. ... 2. A mistake that is shared and relied on by both parties to a contract." **Id.** at 468, 889 A.2d at 41 (**quoting Black's Law Dictionary** 1023 (8th ed. 2004)).[11] While there exists no evidence that either the Bank or Fox Funding misunderstood the other's intent—both intended that Fox Funding would be the mortgagor and borrower for the Bank's loan, with the Property as collateral—both also believed and intended at the time these documents were executed by Harrison that Fox Funding was the designated mortgagor and borrower named in each. This mistake under which both labored at the time of closing was a shared mistake caused by a drafting error which was contrary to what in fact had been previously agreed to by the parties.

With respect to such an error, the Pennsylvania Superior Court in **Gailey v. New Castle Elastic Pulp Plaster Company,** stated:

> It is undoubtedly the law, that where an instrument is drawn and executed which professes, or is intended to carry into execution an agreement previously entered into, but which by mistake of the draftsman, either as to fact or law, does not fulfill that intention, or which violates it, equity will correct the mistake so as to produce a conformity with the instrument intended[.]

34 Pa. Super. 533, 537 (1907); **see also, Armstrong County Building & Loan Ass'n of Ford City v. Guffey,** 132 Pa. Super. 19, 200 A. 160 (1938) (granting reformation of a deed to correct an admitted mistake in the lot numbers of certain lots intended to be conveyed where the mistake was an unintentional mistake of the grantors, or their scrivener).

In **Regions Mortgage** the Supreme Court specifically held that "when a mortgagee fails to properly secure a loan, the equitable remedy of reformation is unavailable unless bad faith, accident, or mutual mistake can be shown, and in the case of unilateral mistake, the party against whom reformation is sought must be shown to have knowledge of the mistake sufficient to justify an inference of fraud or bad faith." **Supra** at 469, 884 A.2d at 42. Because we find the misnaming of the borrower and mortgagor in the instant note and mortgage was an unintentional accident or mistake by the Bank, or its scrivener, of which both the Bank and Fox Funding were unaware at the time of closing, contrary to what both believed was stated in these two documents and what had been agreed to—that is, a mutual mistake—the holding in **Regions Mortgage** does not bar reformation in this case.[12] **See also, Voracek, supra** (reforming

[11] A mutual mistake has also been defined as "... one common to both or all parties, wherein each labors under the same misconception respecting a material fact, the terms of the agreement, **or the provisions of the written instrument designed to embody such agreement.**" 8 P.L. Encyc., Contracts §74 (emphasis added) (**quoted in East Girard Savings and Loan Association v. Dinerman,** 39 D. & C.2d 211, 219 (Montg. Co. 1965)). The current edition of the **Pennsylvania Law Encyclopedia** states that "[a] mutual mistake occurs when the written instrument fails to set forth the true agreement of the parties." 12 P.L.E.2d Contracts §84.

[12] Melo relies heavily on the Supreme Court's decision in **Regions Mortgage, Inc. v. Muthler,** 585 Pa. 464, 889 A.2d 39 (2005), in opposing the requested reformation. In **Regions Mortgage,** a mortgage on entireties property named the husband as the sole mortgagor. The successor to the original mortgagee sought reformation to include wife as a named mortgagor, claiming that a mistake had been made when its predecessor unilaterally requested and removed wife's name from the mortgage originally prepared for closing. In denying reformation, the court noted first that if the failure to include wife's name on the mortgage was the result of a bad decision—it being clear from the circumstances that entireties property was involved, yet the originating lender insisted that wife's name be removed—rather than a mistake, reformation was not appropriate since "bad decisions are not mistakes that entitle one to reform legal obligations." **Id.** at 469, 889 A.2d at 42. At best, the court continued, the removal of wife's name from the mortgage was a unilateral mistake by the lender, not a mutual one. While both parties to this financing had agreed that the loan was to be secured by a mortgage on husband and wife's jointly owned property, how this was to be done was decided by the lender, with husband and wife merely relying on the lender's instructions to have husband alone execute the mortgage. The court further noted

an employment contract to include a severance pay provision which was expressly discussed prior to and at the employee's interview with employer's hiring agent at which the employee was provided a copy of the employer's executive contract whose terms—including the severance pay provision—were reviewed and approved by him, but which provision was not included in the employer's standard form contract made part of an employment package prepared by the employer's human relations department and forwarded to the employee for signature, both the hiring agent and the employee believing that the contract enclosed in the employment package and signed by the employee contained the severance provision).[13]

That granting reformation will place the Waselus Mortgage now held by Melo subordinate to the Bank Mortgage does not cause injury to an innocent third party. The Waseluses bargained for, expected, and expressly agreed to have their mortgage second to the first lien position of the Bank Mortgage. Further, Melo had both constructive and actual knowledge of the subordination clause contained in the Waselus Mortgage before its purchase, thus obviating any claim of being an innocent third party affected by reformation. To the contrary, Melo purchased a mortgage with an unpaid principal balance in excess of $360,000.00 for $1,000.00 with the intent of acquiring the Waselus Parcels through foreclosure free and clear of the Bank Mortgage on which was owed more than 1.1 Million Dollars.[14]

that for reformation to be available due to a unilateral mistake, the plaintiff was required to show that wife had "such knowledge of the mistake as to justify an inference of fraud or bad faith." **Id.** at 468, 889 A.2d at 42. Being unable to meet this standard, reformation was denied.

[13] Nor will any negligence attributable to the Bank in the drafting of these documents bar reformation. **Broida, in Own Right and for Use of Day v. Travelers' Ins. Co.,** 316 Pa. 444, 448, 175 A. 492, 494 (1934) ("[W]here the elements required for reformation are otherwise present, even negligent failure of plaintiff to discover the variance between the instrument as written and the mutual understanding of the parties is not fatal to his right to have it reformed."); **Bugen v. New York Life Insurance Company,** 408 Pa. 472, 478, 184 A.2d 499, 502 (1962) ("If all of the elements necessary for the reformation of a written contract are present, mere negligent conduct on the part of one of the parties thereto in failing to discover the mistake will not bar reformation in the absence of prejudice or a violation of a positive legal duty.").

[14] In addition to this $1,000.00 payment, the agreement between Melo and the Waseluses provided for an additional payment of $49,000.00 in the event Melo obtained good, marketable and insurable title to the Waselus Parcels by foreclosing on the Waselus mortgage. (Stipulated Facts, No. 72.)

Melo accurately notes that if reformation is granted, 1400 Market Street will own the mortgage by virtue of the Bank's assignment, and also be the title owner of the Property by virtue of Fox Funding's quitclaim deed. The effect, Melo argues, is for the mortgage lien to merge in 1400 Market Street's fee. In response, 1400 Market Street argues first, that its acceptance of title was never intended to work a merger, and that if this were the case, equitable principles require that the quitclaim deed be rescinded.

In form, a mortgage grants defeasible title of real estate titled in the name of the mortgagor to the mortgagee.[15] The grant is conditioned upon repayment of the debt or performance of an obligation secured by the mortgage. In those circumstances where fee title to property is later acquired by one holding a mortgage on the property, whether the defeasible title held by the mortgage holder merges with the fee title subsequently acquired, thereby extinguishing the mortgage lien, is "a question of intention."

In **Landis, to Use of Security Savings & Trust Co. v. Robacker,** 313 Pa. 271, 169 A. 891 (1933), the court stated:

> [W]here one who holds a mortgage, either as mortgagee or assignee, becomes the purchaser of the land covered by the mortgage, the latter is merged in the title. The mortgage is extinguished by law. ... It has been stated, however, that merger is a question of intention, and, where the intention is to keep

[15] Conceptually, a mortgage acts to grant defeasible title of the mortgaged premises to the mortgagee as security for an underlying debt or obligation. In **Pines v. Farrell,** 577 Pa. 564, 848 A.2d 94 (2004), the Pennsylvania Supreme Court stated:

> A mortgage is a pledge of an estate in real property as collateral security for payment of money or performance of some other act. In form, it recites an obligation by the mortgagor to pay a certain sum of money to the mortgagee ... and to keep certain other covenants. ... To secure performance of these obligations, the real property described in the mortgage is conveyed to the mortgagee, provided that the conveyance is defeasible (**i.e.,** is to become void) if and when all of the covenants have been performed. ...

Id. at 573-74, 848 A.2d at 99 (**quoting Ladner on Conveyancing in Pennsylvania,** §12.01 at 3-4 (4th ed. 1979 & 2003 Supp.)) (emphasis omitted). **See also, Hahnemann Medical College and Hospital of Philadelphia v. Commonwealth,** 52 Pa. Commw. 558, 564, 416 A.2d 604, 607 (1980) ("A mortgage is in essence a defeasible deed, requiring the grantee to reconvey the property held as security to the grantor upon satisfaction of the underlying debt or the fulfillment of established conditions.").

> the mortgage alive, there will be no merger, ... but such intention must be manifest from the surrounding circumstances.

Id. at 275, 169 A. at 893 (citations omitted). This "question of intention" was expounded upon in **Fair Oaks Building & Loan Ass'n of Leet Tp. v. Kahler,** 320 Pa. 245, 181 A. 779 (1935) as follows:

> Merger is always a question of intention, and where the mortgagee intends there shall be no merger, the mortgage will be kept alive. ... Moreover, merger will not take place where it is against the interest of the mortgagee or when it is to his advantage to keep it alive, ... it being presumed that there was an intention in such cases to keep it alive.

Id. at 249, 181 A. at 780 (citations omitted). Here, the existence of the Waselus and Sinisi mortgages at the time 1400 Market Street took title by reason of the quitclaim deed and the need for their discharge furnishes a clear basis for non-merger.

Following the sheriff's sale, 1400 Market Street believed it had acquired good title to the Property free and clear of the Waselus and Sinisi mortgages. Only after Melo brought to its attention that the mortgagor named in the mortgage, Fox Funding PA, did not hold title to the property, did it request and obtain a quitclaim deed from Fox Funding. This was clearly done with the intent of protecting its interests, not diminishing them by extinguishing a mortgage whose validity it had expressly relied upon in proceeding to sheriff's sale expecting to purchase the Property free and clear of any junior encumbrances, but whose validity was now in question.

Moreover, the doctrine of merger presupposes the existence of a valid mortgage. Previously, in our decision dated February 15, 2012, and docketed to No. 10-3538, we determined that Fox Funding PA, which was neither the real nor record owner of the Property at the time the Bank Mortgage was granted, nor subsequently acquired any interest in the Property, had neither the power nor the authority to grant the mortgage. From this it logically follows that there could be no merger at the time 1400 Market Street obtained the quitclaim deed since there was no valid mortgage lien—no defeasible title—to be merged.

Nor is there any merit to the argument that with reformation merger becomes automatic. Although the effective date of a reformed document often times relates back to the date of execution of the original document, this is within the discretion of the court. **Alderfer v. Pendergraft,** 302 Pa. Super. 210, 213-14, 448 A.2d 601, 603 (1982). In any event, even if an effective date of October 21, 2005 were adopted, it would be absurd to argue that 1400 Market Street's intent at the time it received the quitclaim deed in late November, early December, 2010 was to subsequently engage in protracted litigation to reform the mortgage for the senseless purpose of having the defeasible title of that reformed mortgage merge. **Cf. Sparrow, to Use of Geiger v. Mowers,** 315 Pa. 460, 463, 173 A. 273, 273-74 (1934) ("A further reason why the conveyance to [the mortgage holder] did not effect a merger of the fee and his interest in the mortgage and bond is that the record discloses no evidence of intention to secure this result.").

Because we have found that the Bank Mortgage was not extinguished by the quitclaim deed, 1400 Market Street's request to rescind the quitclaim deed is moot. Even were this not the case, we would deny the request. Procedurally, no basis or request for rescission was made in 1400 Market Street's complaint for reformation. Substantively, as between the parties to the deed—Fox Funding as grantor and 1400 Market Street as grantee—there is no evidence of fraud or mistake upon which to base a claim for rescission. That 1400 Market Street may have been mistaken in its belief that Melo would purchase the property if it acquired a quitclaim deed is attributable, at most, to Melo and not to Fox Funding.[16]

[16] Although we agree with Melo that our decision to grant reformation and deny merger will result in the awkward situation where 1400 Market Street, as mortgagee, may of necessity have to name itself, its agent, or another grantee, as terra tenant in foreclosure proceedings to discharge the liens created by the Waselus and Sinisi mortgages, this is no reason to deny the requested relief. That 1400 Market Street is allowed to maintain separately the distinct titles it acquired to the Property as grantee under the quitclaim deed and assignee of the Bank mortgage in order to better through foreclosure the title it received by quitclaim is evident from the following discussion in **Bryar's Appeal:**

> A mortgage does not necessarily merge or become extinct by being united in the same person with the fee. When a person becomes entitled to an estate subject to a charge for his own benefit, he may take the estate and keep up the charge. The question in such case is upon the intention, actual or presumed, of the person in whom the estates are united. ...
>
> * * * *
>
> The question is not whether he could purchase the mortgage and use it to compel the debtor to pay it, but whether he can use it to protect him-

CONCLUSION

Unfortunately, what began as a simple but fundamental error in drafting—the misnaming of the mortgagor in a mortgage—has become unduly complicated by the failure of multiple parties to recognize this error earlier and by the conduct of Melo seeking to take unfair advantage of a clear mistake. The net effect of our various rulings in these consolidated proceedings has been to set aside a sheriff's sale of property which was not owned by the defendant named in those proceedings, to prevent Melo from exploiting an innocent error and being unjustly enriched at the Plaintiff's expense, and to place the parties in the position which they intended and reasonably believed was created by the documents signed at settlement. The equities of the case before us demand no less to avoid a gross miscarriage of justice.

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self against adverse claims which could not avail against the mortgagee, or any one holding under him. At the sheriff's sale upon the judgment on the mortgage, all persons were as free to bid as if there had been no sale by the assignee, and the purchaser took title under the mortgagee.

2 A. 344, 346-47 (1886).

See also, First Nat. Bank of Sunbury v. Rockefeller, 333 Pa. 553, 5 A.2d 205 (1939), where the court reinstated the liens of two mortgages held by a bank to whom the mortgagor's estate had transferred title, thus allowing the bank, if necessary, to foreclose on the mortgages in order to discharge various judgments junior in lien to the mortgages. Relevant to the instant proceedings and as explained by the court, had it failed to do so, the result "would grievously penalize and cause undeserved injury to the plaintiff for its careless but innocent error, and at the same time would result in an unjust enrichment of the defendants at plaintiff's expense." **Id.** at 554, 5 A.2d at 206. After also noting that defendants had not changed their position in reliance of anything plaintiff had done and that defendants had "not parted with anything of value to secure the advantage which they are now seeking to retain," the court concluded:

> The injustice and hardship which will be suffered by plaintiff afford grounds for granting equitable relief, upon the fundamental principle that no one shall be allowed to enrich himself unjustly at the expense of another by reason of an innocent mistake of law.

Id. at 560, 5 A.2d at 207.

JOHN DOWD and TINA DOWD, Plaintiffs vs. SCENIC VIEW FARMS INC., SCENIC VIEW FARMS, PAUL MARTIN and PETER MARTIN, Defendants

Civil Law—Real Estate—Agreement of Sale—Time of the Essence—Requirement That Deed Be Tendered—Waiver—Cloud on Title—Effect of Deed Conveyance to a Non-Existent Grantee

1. An agreement of sale for the purchase of real estate which designates the time set for settlement as being of the essence of the agreement is materially breached and the buyer's right to performance forfeited if the buyer fails to tender the purchase price by the date set forth in the agreement, unless the time for settlement has been extended by agreement or has been waived.

2. Unless expressly waived in the agreement of sale, the seller's delivery of a deed and the buyer's payment of the purchase price are mutual, concurrent and dependent covenants. In consequence, where neither the obligation to tender a deed or to tender payment has been waived, and neither party tenders performance by the settlement date, compliance with the date of settlement set forth in the agreement has been waived. Under such circumstances, neither party can terminate the agreement without first tendering performance on his part and providing reasonable notice to the other and an opportunity to cure the default, notwithstanding that the terms of the agreement are stated to be of the essence of the agreement.

3. A buyer's obligation to tender payment of the purchase price on or before the settlement date designated in an agreement of sale is a condition precedent to its enforcement by the buyer, which condition will be waived if the seller is unable to complete its performance as required by the agreement—here the conveyance of good and marketable title to the property—by the settlement date, as the buyer's tender under such circumstances would be a futile act.

4. A deed that purports to convey real estate to a nonexistent corporation is of no effect.

5. A deed purporting to convey title to real estate to a corporation which does not exist, articles of incorporation having never been filed, and which does not have a **de facto** existence before articles of incorporation are filed, is a nullity.

NO. 13-0576

RICHARD S. BISHOP, Esquire—Counsel for Plaintiffs.

THOMAS R. ELLIOTT, JR., Esquire—Counsel for Defendants.

MEMORANDUM OPINION

NANOVIC, P.J.—December 15, 2014

Whether an agreement to sell real estate is enforceable by the buyer when neither the buyer nor the seller has tendered performance by the closing date set forth in the agreement, which date is expressly stated to be of the essence of the agreement, is the primary issue in this litigation. A secondary issue is what becomes

of the title to real estate when the grantee named in a deed of conveyance does not exist, here a corporation which had never been incorporated.

PROCEDURAL AND FACTUAL BACKGROUND

On Saturday, February 2, 2013, John and Tina Dowd, husband and wife ("Buyers"), and Peter Martin, in his capacity as sole shareholder and officer of Scenic View Farms, Inc., a Pennsylvania corporation ("Seller"), signed an agreement for the purchase and sale respectively of a 115 plus-acre farm owned by Scenic View Farms, Inc. to the Dowds for a purchase price of $500,000.00 (the "Agreement"). The Agreement called for the conveyance of title by general warranty deed, did not contain a waiver of formal tender of the deed of transfer or of the purchase price, provided that "[s]ettlement shall take place within 30 days of the signing [of the Agreement] at a time and place agreed to by the parties," and stated that "[t]ime is of the essence of this Agreement." Title to the real estate which was the subject of the Agreement was to be "good and marketable and free and clear of all liens, restrictions, easements, encumbrances, leases, tenancies and other title objections, except for the 'Clean and Green' designation … and [ ] public utility easements whether or not recorded." The Agreement was signed by Peter Martin under seal in his capacity as president of the Seller and had been prepared by Mr. Martin's counsel.

Settlement was not held by March 4, 2013 (**i.e.,** within thirty days of February 2, 2013), nor has it occurred to the present time. Why, is the subject of the instant action for specific performance commenced by the Buyers by praecipe for writ of summons filed on April 1, 2013.

On the same date the Agreement was signed, after its execution, Mr. Martin told the Buyers he would be in touch with them about settlement. (N.T., 10/9/14, p. 91.) The next communication the Buyers received was an e-mail from Mr. Martin's son, Paul Martin, on February 13, 2013, who advised that they had met with Peter Martin's accountant and would be meeting that same day with Peter Martin's attorney, that some paperwork needed to be put in order which might take a few weeks, and that he would keep the Buyers updated on their progress. Next, the Buyers received a

second e-mail from Paul Martin on February 26, 2013, asking on behalf of Peter Martin and his immediate family that the Agreement be canceled. A third e-mail sent by Paul Martin on March 2, 2013, inquired as to whether the Buyers had made a decision on the earlier request to rescind the Agreement.

After receipt of the second e-mail, Mr. Dowd spoke with Peter Martin, asked if this was his desire, and was told by Mr. Martin that his son, Paul Martin, had full authority to act on his behalf. (N.T., 10/9/14, pp. 53, 95-96.) On March 3, 2013, Mr. Dowd e-mailed the Buyers' response to the Seller's request to void the Agreement. In this response, Mr. Dowd wrote that while he understood the importance of the property to the Martin family, it was also important to his family; that the property was the only large piece of land adjacent to the home where he and his wife resided and that they hoped someday to have their children live near them; and that the discussions between him and Peter Martin for the sale of the property had been ongoing for several years, were not spontaneous, and that it was Mr. Martin who had approached him in late 2012, at which time an oral agreement was reached, which was reduced to writing by Mr. Martin's attorney and signed two to three months later. Mr. Dowd concluded his e-mail by expressing his interest to have closing in March.

On March 12, 2013, the Buyers' settlement agent forwarded a deed, settlement statement, seller's affidavit, and several other settlement documents to be signed by Peter Martin to the Seller, tentatively scheduled closing for March 20, 2013, and asked that the enclosed documents be returned prior to closing. In a typewritten response dated March 15, 2013, signed by Peter Martin, in which he referred to himself as the Seller's president, Mr. Martin wrote that because closing had not occurred within thirty days of the date the Agreement was signed, and because time was of the essence, Buyers were in breach of the Agreement which he was thereby terminating. At this point, Buyers, who had previously not been represented by counsel, obtained counsel who sent a letter dated March 19, 2013, to the Seller wherein Buyers disputed that they had violated the Agreement and requested that settlement proceed in accordance with their settlement agent's letter of March 12, 2013.

When this did not occur, Buyers commenced the present action for specific performance as previously stated. Buyers' complaint was filed on July 18, 2013. A bench trial was held before the court on October 9, 2014 and November 20, 2014.

DISCUSSION

Performance As a Condition to Enforcement—Who Bears the Burden

Implied in every contract in Pennsylvania is an obligation on each party to act in good faith and to deal fairly with the other party. **Somers v. Somers,** 418 Pa. Super. 131, 136, 613 A.2d 1211, 1213 (1992). If the contract is silent as to the time of performance, the law implies a reasonable period. **Field v. Golden Triangle Broadcasting, Inc.,** 451 Pa. 410, 418, 305 A.2d 689, 694 (1973). If the contract states a date by which performance is to occur and this date is not met, the law allows a reasonable period to cure, unless there is some additional factor, such as a willful refusal to perform or injury to the non-breaching party which cannot be compensated for in damages. **Morrell v. Broadbent,** 291 Pa. 503, 505-506, 140 A. 500, 501 (1928). However, where the settlement date fixed in an agreement is stated to be of the essence of the agreement, "courts will ordinarily accept the agreement as made and refuse to decree performance in the event of failure to make payment within the stipulated time," **id.** at 506, 140 A. at 501, unless such time is extended by agreement or waived by the conduct of the parties, in which event, "where the parties treat the agreement as in force after the expiration of the time specified for settlement it becomes indefinite as to time and neither can terminate it without reasonable notice to the other." **Davis v. Northridge Development Associates,** 424 Pa. Super. 283, 289, 622 A.2d 381, 385 (1993) (**quoting Warner Company v. MacMullen,** 381 Pa. 22, 29, 112 A.2d 74, 78 (1955)). "It is also well settled that a buyer's tender of performance is excused where the seller has expressly repudiated the contract or has indicated that he is unwilling or unable to perform." **Id.** at 290, 622 A.2d at 385.

In this case, both parties agreed that settlement would occur no later than March 4, 2013. With respect to their obligations under the Agreement, delivery of the deed and payment of the purchase price were mutual, concurrent and dependent covenants.

Yet, within this period neither party did what was necessary to consummate settlement: Seller failed to tender a deed and other documents reasonably requested for good and marketable title to pass, and Buyers failed to tender the purchase money. (N.T., 10/9/14, pp. 66-67, 86.)

Instead, after initially advising Buyers that it needed additional time to get its paperwork in order, Seller not only failed to advise Buyers that it could not meet the Agreement's closing date, but deliberately failed to communicate this fact believing that if Buyers did not demand that settlement be held on or before March 4, 2013, it retained the right to terminate the Agreement, which was its intention for reasons independent of when settlement was held. After Peter Martin signed the Agreement on February 2, 2013, and told his son and daughter of the pending sale, they opposed the sale and wanted to prevent its occurrence for a variety of reasons important to them: the price was too low, the tax implications of sale,[1] and their desire to keep the property within the family. (N.T., 10/9/14, pp. 50-51, 54, 71, 96.) This notwithstanding that Peter Martin had been trying to sell the property for more than three years; that during this time the property had been listed with several real estate brokers and in fact was listed for sale at the time the Agreement with the Buyers was reached;[2] that the best offer previously received was $450,000.00 (N.T., 10/9/14, p. 44; Plaintiff Exhibit No. 20 (Deposition of Peter Martin, pp. 56-57)); and that Peter Martin was elderly, in his mid-eighties, and in poor health.

In contrast to Seller, who was looking for a way out of the Agreement, within a week of signing the Agreement, Buyers con-

[1] At trial, the Buyers presented evidence from an accountant that projected the difference in the federal and state income tax consequences of the sale of the property to the Buyers if the transfer were from the Seller, Scenic View Farms, Inc., versus from the individual, Peter Martin. (Plaintiff Exhibit No. 25.) The total projected tax on the sale of the farm by the corporation, including tax on the distribution of the net cash proceeds from the sale by the Corporation to Peter Martin, was $223,155.00. In comparison, if the farm were determined to be owned by Peter Martin and transferred by him directly to the Buyers, the total projected tax was $111,511.00. The difference between these two figures is $111,644.00.

[2] Four listing agreements with the Seller, Scenic View Farms, Inc., identified as the owner, were admitted in evidence. The earliest is dated July 22, 2009. (Plaintiff's Exhibit No. 5.) The most recent is dated February 9, 2012. (Plaintiff's Exhibit No. 8.) This last agreement lists the property at a price of $699,900.00 and provides for the listing to expire at 11:59 P.M. on February 9, 2013.

tacted their settlement agent, an abstract company, to prepare for settlement. (N.T., 10/9/14, pp. 49-50, 76.) Buyers did not press Seller for a settlement date when told Seller needed time to put its paperwork in order, gently deflected Paul Martin's overtures to cancel the Agreement, and timely suggested on March 3, 2013, that settlement occur that month. At no time prior to March 15, 2013, did Seller insist on settlement occurring on or before March 4, 2013.

Seller never told Buyers it would insist on time being of the essence until after the date for closing specified in the Agreement had passed. To the contrary, Seller's conduct reasonably led Buyers to believe the date set for settlement in the Agreement was not critical and would not be enforced. (N.T., 10/9/14, pp. 97-98, 104-105; Plaintiff Exhibit No. 20 (Deposition of Peter Martin, pp. 52, 59).) By stating Seller's paperwork for settlement would take several weeks to complete, failing to keep Buyers advised of the progress of this paperwork, playing on Buyers' sympathy to cancel the deal, and then being silent in response to Mr. Dowd's March 3, 2013 letter, knowing Buyers were intent on buying the property, yet deliberately waiting until after the settlement date called for in the Agreement before notifying Buyers of its decision to terminate the Agreement, and having made no tender of a deed before the agreed upon deadline for settlement, Seller engaged in a course of conduct upon which Buyers reasonably relied in believing that settlement by March 4, 2013 was not imperative, and then Seller used this belief as the basis to declare the Agreement void. This the law will not countenance. More to the point, by its conduct Seller implicitly waived and/or is estopped from insisting on strict compliance with the Agreement's settlement date.

At a minimum, common decency and fair dealing required that when Mr. Dowd turned down Seller's request to cancel the deal on March 3, 2013, and advised Buyers would like to complete settlement in March, Seller should have replied that the deadline for settlement is tomorrow, March 4, and that unless closing is held by that time, there will be no settlement, rather than remaining silent for eleven days and responding only after receiving the settlement package from Buyers' agent. Under the circumstances, Buyers were justified in accepting Seller's silence as an indication of its willingness to settle after March 4, 2013.

While courts of equity have the power to grant specific performance, the exercise of this power is discretionary.

> The discretion which a court of equity has to grant or refuse specific performance, and which is always exercised with reference to the circumstances of the particular case before it, ... may, and of necessity must often be controlled by the conduct of the party who bases his refusal to perform the contract upon the failure of the other party to strictly comply with its conditions. ... [Specific performance] is frequently ordered in favor of a party who has been for a considerable period in default, if he has never abandoned the contract, and the other party has suffered nothing from the delay for which he cannot be compensated in the decree. ... Whether time is or is not of the essence of the contract, if the vendor has waived strict compliance with its terms as regards time of payment, he cannot thereafter rescind or forfeit the contract, without notifying the purchaser of his intention to do so unless payment is made, and allowing him a reasonable time for performance.

Cohn v. Weiss, 356 Pa. 78, 82-84, 51 A.2d 740, 742-43 (1947) (quotation marks and citations omitted). This, Seller never did.

The Agreement was not contingent on financing and this was never an issue for Buyers who at all times had the necessary funds available for settlement. Moreover, and critical to Buyers' obligation to tender payment, Seller never tendered a deed.

> Where a contract imposes reciprocal duties on the parties and the ability of one to perform depends on performance by the other, it would seem plain that the latter's failure to perform within the time fixed for performance by the former would be a waiver of the time limitation. A party who is himself in default has no right to insist on rescission while in default, and where there has been indulgence on both sides, one party cannot suddenly rescind without notice to the other[.] ... After waiver, or where the agreement was originally indefinite, time does not become of the essence until notice be given by one of the parties, insisting on compliance within a reasonable time.

Ephrata Water Company v. Ephrata Borough, 20 Pa. Super. 149, 155 (1901) (citations omitted).

Specifically addressing the issue of the obligation to tender payment when a deed has not been tendered, when the agreement of sale does not contain an express waiver of formal tender, and when the agreement makes the date of settlement material to its performance, the Pennsylvania Supreme Court in **Cohn** stated:

> Another important element in this case is the fact, as found by the court below, that the defendants never tendered a duly executed general warranty deed nor the necessary affidavits as to existing judgments required to remove the objections of the title company. If the vendor intended to hold the vendee to a strict compliance to the terms of the agreement in respect to the time of settlement, he should have been meticulous about his own readiness to perform his part of the agreement at the time fixed for settlement. In **Lefferts v. Dolton,** 217 Pa. 299, 66 A. 527, 118 Am.St.Rep. 913, this court held that before a vendee is called upon to pay his money, he is 'entitled to see that the conveyance was properly signed, sealed, and acknowledged, and that the description of the land to be conveyed was correct.'
>
> In the instant case the court below correctly said: 'In the absence of an express waiver of formal tender, the vendors were under a duty to appear at the stipulated time and place for performance and produce a duly executed instrument. Until this was done, the vendee could not be called upon to make payment or to proceed in the performance of her covenant. ... **We are confronted, therefore, with a situation in which both parties permitted the time for performance to pass. ... Having allowed the stated time to go by, neither party could terminate the contract suddenly without giving the other an opportunity to perform.' ...**
>
> In **Irvin v. Bleakley,** 67 Pa. 24, which was an action of assumpsit for breach of contract for the purchase and sale of property, this court said: '*** whichever of the parties first desired to enforce performance was bound to regard his part of the contract as a condition precedent, and perform or offer performance in order to enable him to proceed to enforce the contract.' ... This doctrine was reiterated by this court in **Heights Land Co. v. Swengel's Estate et al.,** 319 Pa. 298, 179 A. 431, 432, where it said: 'It is equally well established that a tender of performance on the part of plaintiff is prerequisite to a decree for the specific performance of a contract for the sale of real estate ... ; he who seeks equity must do equity.'

Cohn, supra at 84-85, 51 A.2d at 743-44 (citations omitted) (emphasis added). **Cf. Moser v. Jacob Brown Building & Loan Ass'n,** 320 Pa. 371, 378, 182 A. 531, 533-34 (1936) (holding that in an agreement of sale in which time was of the essence, and tender of deeds and of purchase money were expressly waived, waiver of time is of the essence of the agreement would not result from a failure to tender, because the parties had agreed that neither tender of deed nor tender of purchase money was required to put the other in default).

A second reason why tender of payment of the purchase price by Buyers on or before March 4, 2013 is not a precondition to specific performance is that Seller was not in a position to convey good title by this date. Although Buyers were not told of this fact, Paul Martin acknowledged this inability due to the title issue discussed below. On this point, our Superior Court stated:

> [A] court may grant specific performance if a contract specifies that 'time is of the essence' even if the buyer fails to tender where it is uncontradicted that any such tender would have been a futile act. Specific performance is foreclosed as a remedy if two elements are present: (1) the buyer has not tendered by the specified date; and (2) the seller has effectively denied that such tender would have been futile. In the instant case, the sellers have not denied that they were unable to convey good title on May 2, 1983. Tender by the buyer would have been futile.

Messina v. Silberstein, 364 Pa. Super. 586, 593, 528 A.2d 959, 962 (1987). This futility is dramatically illustrated in this case since, as explained below, as of March 4, 2013, Seller was no longer in a position to convey good and marketable title.

Deeding Property to a Nonexistent Corporation—What Is the Effect on Title

The second issue which needs to be decided in order that good and marketable title will be conveyed to the Buyers is from whom title to the property should be transferred. This issue arises because after the Agreement was signed, by deed dated February

24, 2013 and recorded on March 15, 2013, the Seller conveyed title to the property to "Scenic View Farms, a **de facto** partnership, Albert Misciagna and Peter Martin, general partners." This deed, according to Seller, in fact conveyed no interest in the property, but was a deed of correction whose sole purpose was to have the records in the Recorder of Deeds Office properly reflect who was the real owner of the property.

As explained by the Seller, included in the recorded chain of title for the property is a deed dated August 20, 1974, from Elmer E. Shoenberger and Florence G. Shoenberger, predecessor owners, to Scenic Farms, Inc. (Plaintiff Exhibit No. 1.) Scenic Farms, Inc. was a nonexistent corporation, as articles of incorporation had never been filed. In a second deed dated August 2, 1976, and designated as a deed of correction, the Shoenbergers purported to reconvey title to the property to Scenic View Farms, Inc., a Pennsylvania corporation, the designated seller in the Agreement. Scenic View Farms, Inc. was incorporated on September 15, 1975. (Plaintiff Exhibit Nos. 2, 3.) Defendants contend that this second deed from the Shoenbergers was a nullity; that having previously conveyed title to the property to Scenic Farms, Inc., on August 20, 1974, the Shoenbergers were no longer the owners of the property; and that even though Scenic Farms, Inc. was a nonexistent corporation, the effect of this transfer was to convey title to a **de facto** partnership consisting of Peter Martin and his brother, Albert Misciagna. Consequently, Defendants contend the February 24, 2013 deed from Seller to Scenic View Farms, a **de facto** partnership, did nothing more than create a paper trail on the public record to evidence who the real owner of the property was.

Buyers claim that the transfer from the Shoenbergers to Scenic Farms, Inc., a nonexistent corporation, was a legal nullity, and that the subsequent transfer by the Shoenbergers to Scenic View Farms, Inc. actually conveyed title to the property to the Seller. Consequently, Buyers argue that the February 24, 2013 transfer by the Seller to Scenic View Farms, a **de facto** partnership, was not only unnecessary, but in fact transferred title to the property to Albert Misciagna and Peter Martin, and acted to frustrate, if not

prevent, the transfer of good and marketable title to the property by Seller to Buyers as required by the Agreement.

In reviewing this history, we agree with the Buyers' assessment of the law, but disagree that Seller acted in bad faith, finding instead that Seller's reliance on the advice of counsel was in good faith, albeit in error. "A deed that purports to convey real estate to a nonexistent corporation has no effect." **Borough of Elizabeth v. Aim Sher Corporation,** 316 Pa. Super. 97, 99, 462 A.2d 811, 812 (1983) (holding that where an owner of property deeded the property to a corporation which had not been incorporated, no articles of incorporation having been filed, and which did not have any **de facto** existence before the filing of articles of incorporation over a year later, the transfer was void **ab initio**); **see also, Lester Associates v. Commonwealth,** 816 A.2d 394 (2003) **(en banc)** (holding that where the grantee, a named corporation, did not exist at the time of the purported conveyance and was not capable of taking title, title to real estate did not pass and no real estate transfer tax was owed). Seller's reliance on **In re Gibbs' Estate,** 157 Pa. 59, 27 A. 383 (1893) is misplaced.

In **Gibbs' Estate** the court discussed whether evidence presented by a bank customer was sufficient to establish that the bank, which had failed and was in receivership, was a general partnership, not a corporation which it purported to be, in order that the customer could proceed against the individual assets of the estate of one of the bank's shareholders, whom the customer claimed was a general partner. Without deciding whether the bank was properly incorporated, the court held only that the customer failed to make out a **prima facie** case that either the deceased shareholder was a partner, or the bank a general partnership. The court did not hold that a failure to incorporate (or an imperfect incorporation) **ipso facto** results in a **de facto** partnership.

In the instant case, the evidence presented showed that Peter Martin and his brother, Albert Misciagna, intended that title to the property be in the name of a corporation whose shares they owned. Although no corporation existed in 1974 when the transfer to Scenic Farms, Inc. was made, Scenic View Farms, Inc. was incorporated a little more than a year later and a second deed conveying title to

the property from the Shoenbergers to this corporation was filed of record. No evidence was presented to the contrary.[3]

In any event, whether Peter Martin is the owner of the property by virtue of the 1974 deed transfer from the Shoenbergers to Scenic Farms, Inc., or the 2013 transfer from Scenic View Farms Inc. to Scenic View Farms, a **de facto** partnership, as of this date, he is the owner of the property and the grantor from whom title should be transferred to the Buyers.[4]

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[3] The 1976 deed from the Shoenbergers to Scenic View Farms, Inc. states, **inter alia**:

> AND the original Deed into Scenic Farms, Inc. dated August 20, 1974, was erroneous in that said Corporation had not been legally incorporated at the time the Deed was executed and delivered and when the Charter was granted, it was granted in the name of Scenic View Farms, Inc. The purpose of this Deed is to correct the name of the grantee, Scenic View Farms, Incorporated.

(Plaintiff Exhibit No. 3.) The Articles of Incorporation for Scenic View Farms, Inc. expressly state that Albert Misciagna and Peter Martin are each the owner of 10 shares in this corporation and, in the Registry Statement, Albert Misciagna is identified as the President and Peter Martin the Secretary of the corporation. (Plaintiff Exhibit No. 2.) Since its incorporation, property taxes have been billed to the Seller in its corporate name (Plaintiff Exhibit Nos. 17, 18) and Seller has a clean lien certificate (Plaintiff Exhibit No. 23) which, according to Buyers' accountant, signifies that corporate tax returns are being timely filed on Seller's behalf.

[4] At the outset of the first day of trial on October 9, 2014, the following stipulation between counsel was made part of the record:

> MR. ELLIOTT: Let me say this, the purpose for correction deed was to abate the possibility of there being a problem actually closing. You will notice that in my pleadings—and this was a thing that was specifically considered—we felt it was disingenuous on our part to argue that even though Mr. Martin was a principal and had been principal since very beginning, whether partnership or president of corporation, to us it didn't matter because we were prepared to close based upon correction deed. In other words, we weren't going to say if they were on time, we were not going to say; guess what, you have a problem, the deed is in wrong party, title was never fixed. We would have given them a deed from the current owner as reflected in the correction deed.
>
> THE COURT: Okay. So are you able to stipulate for these proceedings that in term of enforcement of the agreement if it should be specifically enforced, which is that they are seeking here, that who the owner of the property is, is non-issue.
>
> MR. ELLIOTT: Yes, because I think that's the right thing.

(N.T. 10/9/14, pp. 17-18.)

In addition, pursuant to a Transfer Agreement between Peter Martin and Albert Misciagna dated February 2, 2009, Mr. Misciagna transferred "all of [his] 50% interest in Scenic View Farms, Inc." to Peter Martin. (Plaintiff Exhibit No. 4.) In an Acknowledgment, Ratification and Release Agreement dated November 5, 2010, Albert Misciagna acknowledged and ratified the transfer of his shareholdings in Scenic View Farms, Inc. pursuant to the February 2, 2009 Transfer Agreement. (Defendant Exhibit No. 4.) Finally, as to any individual interest Mr. Misciagna may have acquired by the February 24, 2013 transfer from the Seller to Scenic View Farms, a **de facto** partnership, any such interest was transferred, assigned and relinquished to Peter Martin on February 25, 2013 by the First Supplement to the February 2, 2009 Transfer Agreement and Acknowledgment, Ratification, and Release Agreement. (Plaintiff Exhibit No. 13, paragraph 1.)

CONCLUSION

The date for settlement provided in an agreement of sale imposes duties upon both parties to the transaction. When the agreement expressly makes the date of settlement of the essence of the agreement, this date is waived when neither party tenders performance by the settlement date and neither tender of the deed nor tender of the purchase money has been waived in the agreement. Under these circumstances, neither seller nor buyer has the right to do absolutely nothing when the other proposes a settlement date beyond the period called for in the agreement and then refuse to perform.

Specific performance should only be granted "where the facts clearly establish the plaintiff's right thereto; where no adequate remedy at law exists; and, where the chancellor believes that justice requires it." **Payne v. Clark,** 409 Pa. 557, 561, 187 A.2d 769, 771 (1963). Here, both the Seller's conduct in deliberately allowing the settlement date to pass with the intent of voiding the Agreement, having led Buyers in the meantime to reasonably believe that settlement by this date was no longer material to performance, and the Seller's failure to tender a deed, with no proven evidence of prejudice to Seller by the delay, persuade us that we should permit the Buyers a reasonable period from the date of this decision within which to complete settlement.

Finally, we believe it is not without significance that Seller's decision to terminate the Agreement had nothing to do with the settlement date being scheduled approximately two weeks after March 4, 2013. This was a subterfuge for the real reason underlying the decision, Peter Martin's change of heart because his son and daughter were against the sale. We understand the dilemma Mr. Martin faced, making a choice between what he had agreed to and what his children wanted, however, the law does not excuse performance because of second thoughts.

WELLS FARGO BANK, N.A., Plaintiff vs. JACQUELINE MICELI, Defendant

Civil Law—Real Estate—Mortgage Foreclosure—Residential Mortgage—Act 6—Act 91—Home Affordable Modification Program ("HAMP")—Standard for Granting Summary Judgment—Waiver of Issues (Failure to Brief)—Pa. R.C.P. 1029(c)—Admissions

1. A record that supports summary judgment either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a **prima facie** cause of action or defense.

2. In opposing a motion for summary judgment on the basis of disputed issues of material fact, the non-moving party may not rely solely upon the averments contained in its pleadings, but must point to evidence in the record controverting the evidence cited in support of the motion, or challenge the credibility of witnesses testifying in support of the motion.

3. Issues not briefed are waived.

4. A party is not permitted under the guise of Pa. R.C.P. 1029(c) to deny an averment whose truth or falsity it must know. Consequently, general denials by a mortgagor in a mortgage foreclosure action that the mortgagor is without information sufficient to form a belief as to the truth of the averments as to principal and interest owed will be deemed an admission of those facts.

5. Where a mortgagee strictly complies with the service requirements of Act 6 and Act 91, a defendant's averments that she did not receive notice are insufficient to establish that the notice sent was defective or to deny the grant of summary judgment on this basis.

6. The Home Affordable Modification Program ("HAMP") is a federally sponsored Fannie Mae program with participating lenders pursuant to which homeowners in default, or likely to be in default, on their mortgage payments are evaluated for a loan modification to reduce their mortgage payments to affordable levels, without discharging any of the underlying debt, with the object of avoiding foreclosure. For those loans which meet the regulations and guidelines of HAMP, upon successful completion of a trial period, the homeowners are offered a permanent loan modification.

7. A borrower does not have a private cause of action to seek enforcement of the HAMP regulations and guidelines against a lender. Nor may a defendant in a mortgage foreclosure proceeding raise as a defense noncompliance with HAMP regulations or guidelines.

NO. 13-2051

THOMAS M. FEDERMAN, Esquire—Counsel for Wells Fargo Bank, N.A.

JASON M. RAPA, Esquire—Counsel for Jacqueline Miceli.

MEMORANDUM OPINION

NANOVIC, P.J.—December 29, 2014

Plaintiff seeks summary judgment in this suit to foreclose on a residential mortgage executed by Defendant. For the reasons which follow, Plaintiff's motion will be granted.

FACTUAL AND PROCEDURAL BACKGROUND

On March 24, 2008, Defendant, Jacqueline Miceli, borrowed $232,000.00 from Wachovia Mortgage, FSB ("Wachovia"), mortgaging her home at 255 Brittany Drive, Penn Forest Township, Carbon County, Pennsylvania, as security. This loan was evidenced by a Fixed Rate Mortgage Note ("Note") and first lien Mortgage ("Mortgage") of the same date, both of which named Wachovia as the lender. Under the Note, Defendant was obligated to make specified monthly payments on or before the first day of each calendar month, with the first payment due on May 1, 2008. Plaintiff, Wells Fargo Bank, N.A. ("Wells Fargo"), is the successor by merger to Wachovia.

On October 8, 2013, Plaintiff filed a complaint in mortgage foreclosure against Defendant alleging, **inter alia,** that the Mortgage was in default for failing to pay all monthly mortgage payments beginning with the payment due January 1, 2013, and seeking an **in rem** judgment against the mortgaged premises. Defendant filed preliminary objections on October 29, 2013. On November 15, 2013, Plaintiff filed an Amended Complaint asserting substantially the same claims as in the original complaint. Defendant filed her Answer and New Matter on December 19, 2013, to which Plaintiff filed a Reply on January 7, 2014.

On March 14, 2014, Plaintiff filed a verified Motion for Summary Judgment ("Motion"), alleging that there are no genuine issues of material fact as Defendant's general and/or ineffective denials are deemed to be admissions under the Pennsylvania Rules of Civil Procedure. The Motion was supported by Plaintiff's Vice President of Loan Documentation's affidavit attesting that Defendant owes $283,284.88 on the Mortgage, plus **per diem** interest in the amount of $55.21 accruing from February 14, 2014, forward. Attached to the Motion and incorporated by reference were copies of various documents marked as supporting exhibits.

Defendant filed an unverified response in opposition to the Motion on April 17, 2014, wherein Defendant disputed (1) that there are no genuine issues of material fact; (2) that Plaintiff is the current holder of the Note and entitled to enforce the Mortgage;[1]

[1] Defendant subsequently waived this issue at oral argument. Defendant had earlier argued that Wells Fargo was a separate legal entity from Wachovia and, absent an assignment from Wachovia, was not the real party in interest. At

(3) that Plaintiff complied with the notice requirements of Act 6, 41 P.S. §403(a), and Act 91, 35 P.S. §1680.401c, before commencing its suit; and (4) that Plaintiff has complied with the guidelines of the federal Home Affordable Modification Program ("HAMP").

In response to Defendant's fourth claim, Plaintiff argued it had complied with the HAMP guidelines but that Defendant failed to make application for a mortgage modification under HAMP. Additionally, on June 20, 2014, Plaintiff filed a second affidavit attaching copies of two HAMP solicitation letters it sent to Defendant on February 26, 2013, and April 30, 2013, respectively, and asserting that because Defendant failed to formally apply for assistance, there was no active review for HAMP and no HAMP denial letter. The parties presented oral argument before this court on June 13, 2014.

DISCUSSION

Before analyzing each of the parties' contentions, we note the standard for summary judgment. When deciding a motion for summary judgment, we "examine the record, which consists of all pleadings, as well as any depositions, answers to interrogatories, admissions, affidavits, and expert reports, in a light most favorable to the non-moving party, and [the court] resolve[s] all doubts as to the existence of a genuine issue of material fact against the moving party." **LJL Transportation, Inc. v. Pilot Air Freight Corporation,** 599 Pa. 546, 559, 962 A.2d 639, 647 (2009); Pa. R.C.P. 1035.1. We are to enter summary judgment under two circumstances. First, "whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense." Pa. R.C.P. 1035.2(1). Second, "if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense. ..." Pa. R.C.P. 1035.2(2). "Thus, a record that supports summary judgment either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a prima facie cause of action or defense." **Petrina v. Allied**

argument Defendant acknowledged that Wells Fargo was the successor by merger with Wells Fargo Bank Southwest, N.A., formerly known as Wachovia Mortgage, FSB, and that, consequently, Wells Fargo owned the Note and was entitled to enforce the Mortgage.

Glove Corporation, 46 A.3d 795, 798 (Pa. Super. 2012) (**quoting Chenot v. A.P. Green Services, Inc.,** 895 A.2d 55, 61 (Pa. Super. 2006)). A motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law. **See Fine v. Checcio,** 582 Pa. 253, 870 A.2d 850 (2005); Pa. R.C.P. 1035.2.

The burden of proving that there exists no genuine issue of material fact is upon the moving party. **Kafando v. Erie Ceramic Arts Company,** 764 A.2d 59, 61 (Pa. Super. 2000). Furthermore, the court may not consider any assertion of fact made by a party that is not supported by the record. **Scopel v. Donegal Mutual Insurance Company,** 698 A.2d 602, 606 (Pa. Super. 1997) (**citing Erie Indemnity Co. v. Coal Operators Casualty Co.,** 441 Pa. 261, 263-66, 272 A.2d 465, 466-67 (1971)). "Bold unsupported assertions [of conclusory accusations] cannot create genuine issues of material fact." **Botkin v. Metropolitan Life Insurance Company,** 907 A.2d 641, 647 (Pa. Super. 2006) (citation omitted).

In ruling on a motion for summary judgment, the court must restrict its review to material filed in support of and in opposition to the motion, and to uncontroverted allegations in the pleadings. **Overly v. Kass,** 382 Pa. Super. 108, 111-12, 554 A.2d 970, 972 (1989); **Washington Federal Savings & Loan Association v. Stein,** 357 Pa. Super. 286, 289, 515 A.2d 980, 981 (1986). In opposing a motion for summary judgment on the basis of disputed issues of material fact, the non-moving party may not rely solely upon the averments contained in its pleadings, but must point to evidence in the record controverting the evidence cited in support of the motion, or challenge the credibility of witnesses testifying in support of the motion. **Phaff v. Gerner,** 451 Pa. 146, 150, 303 A.2d 826, 829 (1973); **Adamski v. Allstate Insurance Company,** 738 A.2d 1033, 1035 (Pa. Super. 1999); Pa. R.C.P. 1035.3.

To be deemed a material fact, the fact must be both material in the sense of bearing on an essential element of the plaintiff's claim and genuine in the sense that a reasonable jury could find in favor of the non-moving party. **U.S. ex rel. Cantekin v. University of Pittsburgh,** 192 F.3d 402, 408 (3d. Cir. 1999) (**citing Anderson v. Liberty Lobby, Inc.,** 477 U.S. 242, 248-51 (1986)). A fact is

material if it directly affects the disposition of the case. **See Zuppo v. Commonwealth, Department of Transportation,** 739 A.2d 1148, 1156 (Pa. Commw. 1999).

In evaluating the facts of the case, the trial court must view the facts "in the light most favorable to the party opposing the motion and resolve all doubts as to the existence of a genuine issue of material fact in favor of the nonmoving [sic] party." **Drelles v. Manufacturers Life Insurance Company,** 881 A.2d 822, 830 (Pa. Super. 2005) (citation omitted). All reasonable inferences must be drawn in favor of the party opposing the motion for summary judgment. **See Rosenberry v. Evans,** 48 A.3d 1255, 1261 (Pa. Super. 2012).

In its consideration of whether there exists a genuine issue of material fact, "the court does not weigh the evidence, but determines whether a reasonable jury, faced with the evidence presented, could return a verdict for a non-moving party." **401 Fourth Street, Inc. v. Investors Insurance Group,** 583 Pa. 445, 461 n.4, 879 A.2d 166, 175 n.4 (2005). Conversely, summary judgment may be granted when the facts are so clear that reasonable minds could not differ on a factual question. **Kvaerner Metals Division of Kvaerner U.S., Inc. v. Commercial Union Insurance Company,** 589 Pa. 317, 329, 908 A.2d 888, 896 (2006). Nevertheless, only when "the right to such judgment is clear and free from doubt" may the court grant summary judgment. **401 Fourth Street, Inc., supra.**

A. Genuine Issues of Material Fact

Plaintiff contends there are no genuine issues of material fact, in part because the Defendant made several general denials in her Answer which should be viewed as admissions. Defendant contends her denial that the mortgage payments are in default and denial of the amount due present genuine issues of material fact that preclude the entry of summary judgment.[2]

[2] Defendant's brief in opposition to Plaintiff's Motion addresses only one issue: whether its alleged application for modification stays foreclosure, which we discuss below. Because Defendant has not briefed the remaining issues raised in her response to Plaintiff's Motion, they are waived. **Browne v. Commonwealth,** 843 A.2d 429, 434-35 (Pa. Commw. 2004). Nevertheless, we review what we perceive to be the most significant of these in the discussion which follows.

We address first Defendant's contention that the Mortgage is not in default. Paragraph 7 of the Amended Complaint avers that Defendant is in default under the terms of the Mortgage for, **inter alia,** failing to make the monthly payment of principal and interest due January 1, 2013. In his affidavit in support of the Motion, Michael Reynosa, Vice President of Loan Documentation at Wells Fargo, deposes and states that Defendant's mortgage payments due January 1, 2013, and each month thereafter are due and unpaid. (Plaintiff's Motion for Summary Judgment, ¶9; Exhibit B (Affidavit, ¶5).) This statement is supported by Defendant's payment history also attached to the Motion. (Plaintiff's Motion for Summary Judgment, ¶10; Exhibit B1.)

Defendant responded to Paragraph 7 of the Amended Complaint as follows:

> 7. Denied. Calls for a conclusion of law to which no response is necessary. To the extent a response is deemed necessary, Defendant has requested a modification of the mortgage and Plaintiff has failed to address Defendant's requests. A modification of the mortgage would cure any default, which Defendant specifically denies.

Plaintiff argues this response is a general denial, which should be treated as an admission. On this point, Pa. R.C.P. 1029 provides:

> (a) A responsive pleading shall admit or deny each averment of fact in the preceding pleading or any part thereof to which it is responsive. A party denying only a part of an averment shall specify so much of it as is admitted and shall deny the remainder. Admissions and denials in a responsive pleading shall refer specifically to the paragraph in which the averment admitted or denied is set forth.
>
> (b) Averments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by necessary implication. A general denial or a demand for proof, except as provided by subdivisions (c) and (e) of this rule, shall have the effect of an admission.
>
> (c) A statement by a party that after reasonable investigation the party is without knowledge or information sufficient to form a belief as to the truth of an averment shall have the effect of a denial.

Although Defendant's response to Paragraph 7 of the Amended Complaint uses the phrase "specifically denies," she does not specifically deny the averment that she failed to pay the monthly installment due on January 1, 2013. Nor does she aver that the payment was made. At a minimum, Defendant should know what payments were made on the Mortgage and when the last payment was made. Her averment that she has requested a modification and Plaintiff failed to respond to that request is irrelevant. **Cf. U.S. Bank v. Cox,** 11 D. & C.5th 179, 189 (2010) (holding a bank has no obligation to modify a borrower's mortgage). Paragraph 7 of Defendant's Answer is therefore a general denial which has the effect of admitting that the January 1, 2013, monthly installment was not paid. Pursuant to the Mortgage this is a default rendering the entire debt collectible immediately.

In conjunction with Defendant's denial of a default, we also consider Defendant's response to Plaintiff's Motion wherein Defendant states that if there was a default, it was cured by a modification of the Mortgage. Defendant avers that the parties, after negotiations and payments by the Defendant, agreed to a modification of the Mortgage which constituted a novation and cured any alleged default. (Defendant's Response in Opposition to Plaintiff's Motion for Summary Judgment, ¶¶3, 9, 19.) Defendant also alleges that the loan history that Plaintiff has attached to its Motion is inaccurate because she made payments pursuant to the alleged modification agreement. **Id.** at ¶10.

> The party opposing summary judgment:
>
> may not rest upon the mere allegations or denials of the pleadings but must file a response ... identifying one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion ... .

Pa. R.C.P. 1035.3(a); **see also, Banks v. Trustees of the University of Pennsylvania,** 446 Pa. Super. 99, 103, 666 A.2d 329, 331 (1995). Defendant has identified nothing in the record that controverts Plaintiff's averments that the Mortgage has been in default since January 1, 2013.

As the party opposing the Motion, Defendant is allowed to supplement the record with evidence to justify her opposition or set forth the reasons why she is unable to do so. **See** Pa. R.C.P. 1035.3(b). Defendant has not submitted any depositions, affidavits, documents, or other evidence to support her averments that the Mortgage was modified or that the default was cured, nor has she given any reason why this evidence cannot be presented. Viewing the evidence in the light most favorable to Defendant as the party opposing the Motion, there are no genuine issues of material fact that Defendant has failed to make the monthly payments secured by the Mortgage, starting with the payment due on January 1, 2013, or that the Mortgage has not been modified.

Next, we address Defendant's contention that her denial of the amount alleged by Plaintiff to be due on the Mortgage is a genuine issue of material fact. In Paragraph 8 of the Amended Complaint, Plaintiff avers the unpaid principal balance due as of November 12, 2013 was $256,715.55 and that the total amount then due and owing—consisting of the unpaid principal balance, accumulated interest, late charges and other fees—is $278,191.62. In her answer to this averment, Defendant states:

> 8. Denied. After reasonable investigation, Defendant is without sufficient information to admit or deny this averment, as Plaintiff has not provided proof of alleged expenditures. Strict proof is demanded at time of trial.

Defendant does not aver what she believes to be the correct amount or any reason to believe that the amounts averred by Plaintiff are incorrect.

Pursuant to the affidavit of Michael Reynosa attached to the Motion, the total amount due and owing as of February 13, 2014 was $283,284.88, plus **per diem** interest in the amount of $55.21 accruing from February 14, 2014. (Plaintiff's Motion for Summary Judgment, ¶¶9, 11, Exhibit B (Affidavit, ¶6).) These statements contained in Mr. Reynosa's affidavit are also corroborated by Defendant's payment history. (Plaintiff's Motion for Summary Judgment, ¶10; Exhibit B1.)

As discussed **supra,** Pa. R.C.P. 1029(c) permits a party to deny an averment by stating that after reasonable investigation, it is without knowledge or information sufficient to form a belief as to the truth of the averment. Nevertheless, a party cannot deny under Rule 1029(c) allegations whose truth or falsity it must know. **Cercone v. Cercone,** 254 Pa. Super. 381, 388, 386 A.2d 1, 4 (1978).

In mortgage foreclosure actions, "general denials by mortgagors that they are without information sufficient to form a belief as to the truth of the averments as to principal and interest ow[ed] must be considered an admission of those facts." **First Wisconsin Trust Company v. Strausser,** 439 Pa. Super. 192, 199, 653 A.2d 688, 692 (1995) (**citing New York Guardian Mortgage Corp. v. Dietzel,** 362 Pa. Super. 426, 429, 524 A.2d 951, 952 (1987)). **See also, In re Carmichael,** 443 B.R. 698, 702 (Bankr. E.D. Pa. 2011) ("[I]n a mortgage foreclosure action, the mortgagors, aside from the mortgagee or assignee, are the only parties with sufficient knowledge to base a specific denial."). Under our case law, Paragraph 8 of Defendant's Answer admits the amount claimed to be due by Plaintiff.

B. Notice of Intent to Foreclosure

Defendant avers in her Answer to the Amended Complaint that she does not recall receiving notice of Plaintiff's intent to foreclosure and alleges that Plaintiff has not provided proof that such notice was mailed. (Answer, ¶9.) On this issue, Defendant challenges at most Plaintiff's compliance with the service requirements of Act 6 and Act 91, not its compliance with the substantive requirements of either statute.

Act 6 provides that before a mortgagee commences a legal action against the grantor of a residential mortgage, it must first send written notice, by registered or certified mail, to the mortgagor at her last known address and, if different, at the residence which is the subject of the residential mortgage. 41 P.S. §403(b). This written notice must be sent to the mortgage debtor by registered or certified mail at least thirty days in advance of commencing an action in mortgage foreclosure, and the debtor must be allowed to cure the default and thus avoid foreclosure proceedings within this prescribed time frame. 41 P.S. §§403(a) and 404(c). The Section 403 notice is mandatory. **See General Electric Credit Corporation v. Slawek,** 269 Pa. Super. 171, 176, 409 A.2d 420, 422 (1979); **see also, Potter Title & Trust Co. v. Berkshire Life Ins. Co.,** 156 Pa. Super. 1, 5, 39 A.2d 268, 270 (1944) ("Where notice in a specified manner is prescribed by statute, that method is exclusive."); and **Ertel v. Seitzer,** 31 D. & C.3d 332, 333 (1982) ("The service requirements of Act 6 must be strictly construed.").

Similarly, Act 91 requires a mortgagee who intends to foreclose to send written notice to the mortgagor at her last known address before beginning a foreclosure action. 35 P.S. §1680.403c(a). The Act 91 notice is to be sent by regular mail, and if the mailing is documented by a certificate of mailing obtained from the United States Postal Service, the notice is deemed to have been received on the third business day following the date of mailing. 35 P.S. §1680.403c(e); **cf. Donegal Mutual Insurance Company v. Insurance Department,** 719 A.2d 825 (Pa. Commw. 1998) (discussing the "mailbox rule"). The written notice under the combined Act 6/91 provisions of Act 160 of 1998 must be sent to the homeowner's last known residence by regular and either registered or certified mail, and to the mortgaged premises, if different. 12 Pa. Code §31.203(a)(1).

Defendant's purported failure to receive notice is not grounds for denying summary judgment in favor of the Plaintiff. A copy of the notice and proof of mailing was attached to Plaintiff's Motion. (Plaintiff's Motion for Summary Judgment, Exhibit F.) This exhibit evidences that the combined Act 6/91 notice of intention to foreclose was sent to Defendant at 255 Brittany Drive, Penn Forest Township, PA 18219 on July 15, 2013 via certified mail, which address is the same as that given for the property encumbered by the Mortgage and which was identified as Defendant's residence in the original Complaint, at which location service of the Complaint was made on Defendant by the Carbon County Sheriff's Office. Since Defendant's last known address was the same as that for the mortgaged premises, the combined notice required by Acts 6 and 91 was required to be sent to this address alone. Plaintiff also submitted a certificate of mailing, thereby entitling Plaintiff to the statutory inference that the notice was deemed to have been received by Defendant as of July 18, 2013, three business days after the date of mailing. **See** 35 P.S. §1680.403c(e).

The Complaint was filed on October 8, 2013, more than thirty days after the notice of foreclosure was deemed to have been received. Defendant has not alleged that the address on the notice was incorrect, nor has she submitted any evidence to support her averment that service was defective. **See** Pa. R.C.P. 1035.3(b). Absent a fatal defect in service appearing on the face of the record,

Defendant's averments that she did not receive notice are insufficient to establish that the notice sent was defective. **See Peoples Bank v. Dorsey,** 453 Pa. Super. 94, 104, 683 A.2d 291, 296 (1996) **appeal denied,** 548 Pa. 628, 693 A.2d 967 (1997); **see also, First Federal Savings & Loan Association of Wilkes-Barre v. Van Why,** 29 D. & C.3d 675, 682 (1983) (holding that when a plaintiff has strictly complied with the service requirements of Act 6, service is valid unless defendant alleges that the address on the notice was incorrect). Having found that Plaintiff strictly complied with the service requirements of Act 6 and Act 91, Defendant's unsupported averments that she does not recall receiving notice are insufficient to deny the grant of summary judgment.

C. Plaintiff's Compliance With HAMP Guidelines

Defendant avers that Plaintiff is a participant in the federal Home Affordable Modification Program ("HAMP").[3] Defendant further alleges that Plaintiff has failed to comply with HAMP guidelines that require a participating lender, upon request of the mortgagor, to evaluate a mortgage in default for modification before bringing a foreclosure action. Defendant argues that she made a request for modification and Plaintiff failed to comply with the HAMP guidelines by not issuing a written denial on her request before proceeding with the foreclosure **sub judice.** This noncompliance, according to Defendant, prevents Plaintiff from proceeding with the foreclosure.

Before we evaluate the merits of Defendant's claim, a brief review of HAMP is helpful. The United States Court of Appeals for the First Circuit summarized the history of HAMP as follows:

> In an effort to mitigate the destabilizing effects of the financial crisis of 2008, Congress enacted the Emergency Economic Stabilization Act of 2008 ('EESA'), [12 U.S.C. § 5201, **et seq.,**] Pub. L. No. 110-343, 122 Stat. 3765. EESA authorized the Secretary of the Treasury to, **inter alia,** 'implement a plan that seeks to maximize assistance for homeowners and ... encourage the servicers of the underlying mortgages' to minimize foreclosures. To effectuate these goals, the Secretary was given the power to 'use loan guarantees and credit enhancements to facilitate loan modifications to prevent avoidable foreclosures.' Pursuant to this authority, the Secretary created an array of programs designed to identify likely candidates for loan modifications and encourage lenders to renegotiate their mortgages. HAMP is one of these programs.
>
> HAMP urges banks and loan servicers to offer loan modifications to eligible borrowers with the goal of 'reducing [their] mortgage payments to sustainable levels, without discharging any of the underlying debt.' The Secretary, through Fannie Mae, entered into agreements with numerous home loan servicers, including Wells Fargo, pursuant to which the servicers 'agreed to identify homeowners who were in default or would likely soon be in default on their mortgage payments, and to modify the loans of those eligible under the program.' The servicers are to conduct an initial evaluation of a particular homeowner's eligibility for a loan modification using a set of guidelines promulgated by the Treasury Department. If the borrower meets those criteria, 'the guidelines direct the servicer to offer that individual a Trial Period Plan ("TPP")' as a precursor to obtaining a permanent modification. If the borrower complies with the TPP's terms, including making required monthly payments, providing the necessary supporting documentation, and maintaining eligibility, the guidelines state that the servicer should offer the borrower a permanent loan modification. Loan servicers receive a $1,000 payment for each permanent modification, in addition to other incentives.

Young v. Wells Fargo Bank, N.A., 717 F.3d 224, 228-29 (1st Cir. 2013) (internal citations omitted).

Defendant cites a Servicer Participation Agreement ("SPA") template, which she avers is the basis for the agreement that Plaintiff entered into with Fannie Mae when it chose to participate in HAMP. Although Defendant has not submitted a copy of the actual SPA entered between Plaintiff and Fannie Mae, this is not fatal to her claim because Plaintiff admits that it participates in HAMP insofar that it acknowledges that it sent letters to Defendant soliciting her to seek an evaluation of her mortgage for

[3] Sometimes referred to as the "Home Affordable Mortgage Program." **See e.g., Wigod v. Wells Fargo Bank, N.A.,** 673 F.3d 547, 554 (7th Cir. 2012); **Nevada v. Bank of Am. Corp.,** 672 F.3d 661, 665 (9th Cir. 2012).

HAMP eligibility. (Affidavit of Jorge Salamanca, ¶2, Exhibit A.)[4] Additionally Plaintiff's participation in HAMP is a matter of record in numerous published federal cases. **See e.g., Young v. Wells Fargo Bank, N.A., supra; Corvello v. Wells Fargo Bank, N.A.,** 728 F.3d 878, 880 (9th Cir. 2013); **Wigod v. Wells Fargo Bank, N.A.,** 673 F.3d 547, 556 (7th Cir. 2012).

The implementation of HAMP has spawned a plethora of litigation in both federal and state courts. Borrowers have brought actions alleging that lenders have violated the HAMP guidelines and requested that the courts order the lenders to comply with the guidelines. **See e.g., Spaulding v. Wells Fargo Bank, N.A.,** 714 F.3d 769, 775 (4th Cir. 2013); **Miller v. Chase Home Finance, LLC,** 677 F.3d 1113, 1116 (11th Cir. 2012); **Pfeifer v. Countrywide Home Loans, Inc.,** 150 Cal.Rptr.3d 673 (Cal. App. 2012), **review denied,** 150 Cal.Rptr.3d 673 (Cal. App. 2013); **JPMorgan Chase Bank, Nat. Ass'n v. Ilardo,** 940 N.Y.S.2d 829, 36 Misc.3d 359 (N.Y. Sup. 2012). Almost universally state and federal courts have held that a borrower does not have a private cause of action[5] to seek enforcement of the HAMP regulations and guidelines against a lender.[6] **See e.g., Spaulding, supra** at 776 n.4; **Miller, supra**

[4] Plaintiff denies that it has not complied with HAMP. To the contrary, through Mr. Salamanca's affidavit, Plaintiff alleges not only that it informed Defendant about HAMP, but asked her to contact it to determine if she was eligible for a loan modification. As represented in Mr. Salamanca's affidavit, because Plaintiff did not formally apply for assistance, there was no active review for HAMP and no HAMP denial letter. Again, Defendant has presented no evidence to contradict Mr. Salamanca's representations. Notwithstanding this absence of evidence by Defendant, Plaintiff argues that even if Defendant's unverified response to Plaintiff's Motion created a material issue of fact, as a matter of law, noncompliance with HAMP does not provide a defense to foreclosure.

[5] The Court of Appeals in **Wigod** noted that in cases where borrowers brought HAMP-related claims, they relied on at least one of three different legal theories: (1) a private cause of action under HAMP, (2) a right to enforce the HAMP SPAs as third-party beneficiaries to those agreements, and (3) claims arising out of TPP Agreements between the borrower and the lender. **Supra** at 559 n.4. As neither Plaintiff nor Defendant allege that a TPP Agreement was entered between them, this third basis for enforcement of the HAMP guidelines is inapplicable.

[6] The HAMP guidelines refer to participating mortgage holders as "servicers," as do several of the published cases examining this issue. However, many of the cases cited herein use the term "lenders" to refer to the participating mortgage holders. We use the term "lender" throughout, except for quotations from those cases that use the term "servicer."

at 1116; **Sinclair v. Citi Mortg., Inc.,** 519 F. App'x. 737, 739 (3d Cir. 2013), **cert. denied,** 134 S. Ct. 245, 187 L. Ed. 2d 182 (U.S. 2013), **reh'g denied,** 134 S. Ct. 1054, 188 L. Ed. 2d 140 (U.S. 2014); **Pfeifer, supra** at 698 n.17; **Ilardo, supra** at 837, 839.

Defendant raises Plaintiff's noncompliance with HAMP guidelines as a defense against the foreclosure, instead of as a cause of action in its own right or as a counterclaim. Defendant argues that the HAMP guidelines prohibit Plaintiff from foreclosing on Defendant's home until it has evaluated her mortgage for a modification pursuant to HAMP. Defendant further argues that if Defendant was subsequently found to be ineligible for a modification, Plaintiff must provide Defendant with written notice of this determination before proceeding with its foreclosure action. (Defendant's Brief in Opposition to Plaintiff's Motion for Summary Judgment, pp. 2-3 (**citing** HAMP guidelines, §§2.3.2.1, 3.1).)[7]

In contrast to the hundreds of cases filed in state and federal courts asserting a private right of action under HAMP, very few cases involve an assertion of HAMP as a defense to a foreclosure action, as is raised here. Recently, however, the Pennsylvania Superior Court held that a defendant in a foreclosure action may not raise as a defense compliance with HAMP guidelines. **HSBC Bank, NA v. Donaghy,** 101 A.3d 129, 136-37 (Pa. Super. 2014). In **Donaghy,** the court concluded that because a borrower has no right to bring a private cause of action against a lender to enforce compliance with the HAMP guidelines, it is equally futile for a borrower to raise noncompliance as a defense. **Id.** In reaching this conclusion, the Court noted that HAMP is not codified as public law and is neither a federal statute nor regulation. **Donaghy, supra** at 131 n.5. **Accord Charter Bank v. Francoeur,** 287 P.3d 333 (N.M.Ct.App. 2012), **cert. granted,** 296 P.3d 491 (N.M. 2012), and **cert. quashed,** 301 P.3d 859 (N.M. 2013) (holding that because a defendant borrower cannot maintain a cause of action to enforce the lender's HAMP

[7] We note that the URL for the HAMP guidelines Defendant cites in her brief is no longer functioning and appears to refer to an obsolete version of the guidelines (**i.e.** Version 3.0). The HAMP guidelines in effect at the time this foreclosure action was initiated can be found in the Making Home Affordable Program Handbook for Servicers of Non-GSE Mortgages (MHA Handbook), Version 4.3, pp. 84-85, 88 (September 16, 2013), **available at** http://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_43.pdf.

SPA, the lender's failure to comply with HAMP requirements does not provide a meritorious defense to foreclosure); **see also, CitiMortgage, Inc. v. Carpenter,** 2012-Ohio-1428, 2012 WL 1079807 (Ohio App. Mar. 30, 2012) (concluding that a borrower may not assert a defense based on noncompliance with the HAMP guidelines because a borrower is not a third-party beneficiary to the lender's HAMP SPA and the HAMP guidelines do not have the force and effect of law). Pursuant to **Donaghy,** Plaintiff's alleged noncompliance with HAMP guidelines on the theory that HAMP provides Defendant with a private cause of action against Plaintiff cannot serve as a basis to preclude the granting of summary judgment. Nor do we believe the result would be different if Defendant's defense were premised upon Defendant being a third-party beneficiary to Plaintiff's HAMP SPA, which Defendant has not argued. **See Donaghy, supra** at 136.

CONCLUSION

On the record before us, the material facts are undisputed that Plaintiff is the real party in interest with standing to bring suit for breach of the Defendant's obligations under the Mortgage, that Defendant has breached the payment terms of the Mortgage, and that the amount claimed by Plaintiff is the amount Defendant owes. Nor does a factual dispute exist that Plaintiff has not served notice of its intent to foreclose as required by Act 6 and Act 91. To the extent Defendant claims it has requested a mortgage modification and Plaintiff has failed to comply with HAMP, not only is this claim unsupported by the record, as a matter of law the claim does not raise a cognizable defense to Plaintiff's action. Based on the foregoing, we conclude, as a matter of law, that Wells Fargo is entitled to summary judgment in its favor.

MICHAEL JOHNSON and KAREN JOHNSON Plaintiffs vs. DONEGAL MUTUAL INSURANCE COMPANY, Defendant

Civil Law—Insurance Bad Faith—42 Pa. C.S.A. §8371—Contractual Bad Faith—Implied Covenant of Good Faith and Fair Dealing—Restatement (Second) of Contracts §205—Malicious Use of Process—Wrongful Use of Civil Proceedings Act—42 Pa. C.S.A. §§8351-54—Abuse of Process

1. To establish statutory bad faith under 42 Pa. C.S.A. §8371, an insured must establish by clear and convincing evidence that the insurer (1) did not have a reasonable basis for its actions and (2) knew of or recklessly disregarded its lack of a reasonable basis. Both elements must be met for bad faith to exist.

2. The first prong of the test for statutory bad faith entails an objective analysis of the insurer's conduct: regardless of the insurer's actual motive, is there an objectively reasonable basis for the insurer's conduct. If there is a reasonable basis for the insurer's actions, even if it is clear that the insurer did not rely on that reason, there cannot, as a matter of law, be bad faith.

3. The second prong of the test for statutory bad faith is subjective: what is the real reason for the insurer's conduct and does it import a dishonest purpose. Whether the insurer was motivated by self-interest or ill will is probative of this second element.

4. In the absence of evidence of a dishonest purpose or ill will, an insurer does not act in bad faith in taking a stand with a reasonable basis or in aggressively investigating and protecting its interests in the normal course of litigation.

5. In order for an insured to recover for bad faith stemming from delay, an insured must demonstrate that the delay is attributable to the insurer, that the insurer had no reasonable basis for the actions it undertook which resulted in the delay, and that the insurer knew or recklessly disregarded the fact that it had no reasonable basis to delay payment.

6. A low offer by an insurer evidences bad faith when the offer bears no reasonable relationship to the insured's losses.

7. Not every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. However, where a duty of good faith arises, it arises under the law of contracts, not under the law of torts.

8. A duty of good faith will not be implied where (1) a plaintiff has an independent cause of action to vindicate the same rights with respect to which the plaintiff invokes the duty of good faith; (2) such implied duty would result in defeating a party's express contractual rights specifically covered in the written contract by imposing obligations that the party contracted to avoid; or (3) there is no confidential or fiduciary relationship between the parties.

9. A cause of action for malicious use of process is a tort which arises when a party institutes a lawsuit with a malicious motive and lacking probable cause. A prerequisite to recovery under this cause of action is that the underlying civil proceedings have terminated in favor of the party bringing suit.

10. To establish a claim for abuse of process, it must be shown that the defendant (1) used a legal process against the plaintiff, (2) primarily to accomplish a purpose for which the process was not designed, and (3) harm has been caused to the plaintiff.

11. Malicious use of civil process has to do with the wrongful initiation of such process, while abuse of civil process is concerned with a perversion of a process after it is issued.

NO. 09-3616

JAMES J. CONABOY, Esquire—Counsel for Plaintiffs.

JEFFREY A. WOTHERS, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—January 20, 2015

On June 27, 2007, lightning struck Michael and Karen Johnson's ("Plaintiffs") home causing damage to four computers and related

equipment ("Computers"), as well as other property in the home. The loss was reported to Plaintiffs' homeowners' insurer, Donegal Mutual Insurance Company ("Defendant"), the following day, and loss payment requested. Believing that their claim was being unreasonably delayed and processed, Plaintiffs commenced suit by writ of summons against Defendant on June 2, 2008.

In their complaint filed on August 20, 2009, Plaintiffs presented two claims: (1) for breach of contract (Count I) and (2) for bad faith pursuant to 42 Pa. C.S.A. §8371 (Count II). In Count I Plaintiffs averred, **inter alia,** that Defendant had failed "to investigate, evaluate and negotiate [Plaintiffs'] property damage in good faith and to arrive at a prompt, fair and equitable settlement." This claim was resolved pursuant to the adjustment, appraisal, and settlement process set forth in Plaintiffs' homeowners' policy. As to Count II, before us is Defendant's request for summary judgment not only on this claim, but also on its counterclaims for (1) breach of contract, wherein Defendant contends Plaintiffs violated the covenant of good faith and fair dealing implied by law as part of the homeowners' policy, (2) malicious use of process, and (3) abuse of process, the latter two founded on the alleged lack of merit of Plaintiffs' suit against Defendant and its continued prosecution.

PROCEDURAL AND FACTUAL BACKGROUND

At the time of the lightning strike, Plaintiffs resided at 240 Lamontage Drive, Palmerton, Carbon County, Pennsylvania. There is no dispute that Plaintiffs' home was struck by lightning; that electronic equipment, including Plaintiffs' Computers, was damaged as a result; that Plaintiffs' homeowners' policy with Defendant ("Policy") was in full force and effect at the time; and that the Policy expressly covered property damaged by a lightning strike. The delay in resolving Plaintiffs' claim resulted from checking what use Plaintiffs made of the Computers and determining their actual cash value: specifically, on whether two of the computers had been used at any time or in any manner for business purposes as Defendant alleged Plaintiffs originally claimed (**see** Defendant's Counterclaim for Declaratory Judgment, ¶15; Defendant's Counterclaim and Plaintiffs' Reply, ¶4), which use, if proven, would limit the amount of coverage available under the Policy, and how to fairly value this loss since the Computers were homemade.

After receiving Plaintiffs' insurance claim, Defendant hired GAB Robins, an independent adjuster, to investigate the claim. GAB Robins inspected the damaged property and reported that the Computers and the other property in Plaintiffs' home for which loss was claimed were damaged by lightning. Based on GAB Robins' investigation, Defendant accepted that Plaintiffs' loss was covered under the Policy, subject, however, to possible coverage limits. To evaluate the extent of the loss, Defendant requested Plaintiffs submit repair or replacement estimates, which the Policy allowed Defendant to request. **See** Policy (Section I—Conditions, ¶2(e)).

Excepting the loss claimed for the Computers, the Plaintiffs and Defendant reached agreement on the loss to Plaintiffs' other property and these amounts were paid. Quantifying the loss to the Computers was more difficult. Plaintiffs had built the Computers themselves using parts and components from different manufacturers. As a result, the Computers were not able to be valued by reference to other computers of the same make and model. (Motion and Answer, ¶4; Defendant's Counterclaim and Plaintiffs' Reply, ¶8.) When Plaintiffs first reported their claim, they placed a value on the Computers at approximately $50,000.00. (N.T. 2/25/14 (Jennifer Tunitis Deposition), pp. 29-30, 59; Deposition Exhibit 1, p. 36, 6/28/07 entry.)

To obtain a more detached and detailed estimate, Plaintiffs employed KeyTech Group, Incorporated ("KeyTech"), a business with expertise in computers. In its estimate, KeyTech considered the value of each of the individualized parts, along with the time and labor expended by Plaintiffs in building the Computers. Including parts and labor, KeyTech estimated the value of the Computers to be $20,537.58.

On September 19, 2007, Plaintiffs sent KeyTech's estimate to Defendant. The adjuster assigned to Plaintiffs' claim, Jennifer Tunitis, an in-house employee of Defendant, had limited knowledge about computers and was uncomfortable evaluating the accuracy of KeyTech's estimate. To get a second opinion, she employed Dial Electronics, Incorporated ("Dial"), an expert in electronics, to inspect the Computers and provide an independent estimate. (Motion and Answer, ¶4.) This was permitted under the Policy. **See** Policy (Section I—Conditions, ¶2(f)(1)).

Beginning in October 2007, Dial attempted to arrange an inspection of the Computers. Initially, Plaintiffs refused. (Defendant's Counterclaim and Plaintiffs' Reply, ¶11.) Why is unclear, however, Defendant suspected this may have been related to Plaintiffs' admission when originally reporting their loss that the Computers were used in part for business purposes, a statement Plaintiffs deny having ever made. Under the Policy, the limit of liability for personal property used for business purposes is capped at $2,500.00, not its actual cash value. **See** Policy (Section I—Property Coverages, Coverage C—Personal Property, Special Limits of Liability, ¶8). In any event, soon after Plaintiffs' refusal, on October 16, 2007, Defendant sent Plaintiffs a reservation of rights letter explaining Plaintiffs' obligation to permit the inspection and that a $2,500.00 coverage limit existed under the Policy for property used for business purposes. Ultimately, Defendant—"in an exercise of good faith"—elected to give Plaintiffs the benefit of the doubt on this issue and did not invoke this limitation. (N.T. 2/25/14 (Jennifer Tunitis Deposition), p. 45; Defendant's Counterclaim for Declaratory Judgment and Plaintiffs' Reply, ¶30.)

Shortly after receiving Defendant's reservation of rights letter, Plaintiffs filed a complaint against Defendant with the Pennsylvania Insurance Department. Among other grievances, Plaintiffs complained about Defendant's request to inspect their Computers. In a letter to the Insurance Department dated November 15, 2007, Defendant explained the reasons for its request, stating in part:

> The insureds have presented numerous estimates for damages related to the loss. All of the estimates were paid with the exception of the computer bill the insureds provided to us for damage to four computers totaling $20,351.08. The insureds were unable to provide details on the quality including the make, model, features as the insured built the computers. We requested that Dial Electronics inspect the computers on our behalf to determine cause, reparability, and amount of damages. Upon receipt of the results of the evaluation of the computers, we will be in a position to make payment on the personal property claim.

Following its review, the Pennsylvania Insurance Department found no merit in Plaintiffs' complaint.

During the next seven months, Defendant attempted on multiple occasions to arrange through Dial to inspect the Computers. (Motion and Answer, ¶5; Defendant's Counterclaim and Plaintiffs' Reply, ¶¶13, 14.) At first, Dial sought to take the Computers from Plaintiffs' home for its inspection. After it became apparent Plaintiffs would not allow the Computers to be removed, Dial repeatedly attempted to schedule a convenient time to inspect the Computers at Plaintiffs' home. This proved difficult due to Plaintiffs' work schedule which always appeared to conflict with the times Dial suggested. (Motion, ¶9.) Finally, in May 2008, Plaintiffs agreed to allow Dial to inspect the Computers on May 31, 2008, eight months after KeyTech submitted its initial estimate. (Defendant's Counterclaim for Declaratory Judgment and Plaintiffs' Reply, ¶28.)

After completing its inspection, Dial valued the computer loss at $4,600.00. This valuation was received by Defendant on June 25, 2008. (N.T. 2/24/14 (Jennifer Tunitis Deposition), pp. 51-52.) On July 8, 2008, Defendant issued a check to Plaintiffs in this amount, together with a copy of Dial's estimate. (Motion and Answer, ¶11.) Included with Defendant's check was a letter advising Plaintiffs that if they disagreed with the amount of the loss, they were entitled under the Policy to seek an appraisal. **See** Policy (Section I—Conditions, ¶6).[1] This letter also included a copy of the Policy's appraisal provision. (Motion and Answer, ¶12; Defendant's Counterclaim for Declaratory Judgment and Plaintiffs' Reply, ¶31; Defendant's Counterclaim and Plaintiffs' Reply, ¶25.)

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[1] This provision of the Policy stated the following:

6. **Appraisal.** If you and we fail to agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will choose a competent appraiser within 20 days after receiving a written request from the other. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a court of record in the state where the 'residence premises' is located. The appraisers will separately set the amount of loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of loss.

Each party will:

a. Pay its own appraiser; and

b. Bear the other expenses of the appraisal and umpire equally.

Plaintiffs erroneously interpreted the foregoing letter from Defendant as requesting an appraisal. For the next six months, counsel for both parties exchanged several letters disputing whether Defendant had requested an appraisal. This impasse was finally "resolved" on December 31, 2008, when Defendant advised Plaintiffs in writing that it was construing Plaintiffs' consent to the appraisal process, acknowledged in Plaintiffs' previous letter of December 18, 2008, as an invocation of the Policy's appraisal provision. (**See** Defendant's Motion for Leave to File Counterclaim and Plaintiffs' Answer, ¶9.) By letter dated January 9, 2009, Defendant identified Michael Economou of Dial as its appraiser; by letter dated March 26, 2009, Plaintiffs confirmed that they had appointed KeyTech as their appraiser, but did not specifically identify the individual from this firm who would be serving on their behalf. (Defendant's Counterclaim for Declaratory Judgment and Plaintiffs' Reply, ¶¶47, 48.)

The parties next disagreed on who was to act as an umpire for the appraisal. Additionally, Plaintiffs refused to provide the name and contact information of the individual employed at KeyTech who would be serving as their appraiser. (Motion and Answer, ¶14.) To resolve this dispute, Defendant filed an Answer to the Complaint and Counterclaim for Declaratory Judgment on December 18, 2009, (Defendant's Counterclaim and Plaintiffs' Reply, ¶48) and later a motion on March 29, 2010, requesting this court to appoint an umpire and to direct Plaintiffs to identify their individual appraiser. By order dated July 1, 2010, we appointed PenTeleData, Incorporated as umpire and directed Plaintiffs, within ten days, to provide the contact information and name of the individual at KeyTech who would be serving as their appraiser, if they had not previously done so.

After examining the Computers and reviewing the estimates of KeyTech and Dial, on October 26, 2011, PenTeleData valued the Computers at $11,449.00. On November 10, 2011, Defendant issued a second check to Plaintiffs in the amount of $6,849.00, the difference between the umpire's estimate of $11,449.00 and Dial's earlier estimate of $4,600.00. Upon learning that Plaintiffs had not cashed its July 8, 2008, check in the amount of $4,600.00, on November 28, 2011, Defendant reissued a check in this same amount to Plaintiffs. (Motion and Answer, ¶20.)

The present suit began on June 2, 2008, when Plaintiffs filed a Writ of Summons in the Lackawanna County Court of Common Pleas.[2] In its complaint filed on August 20, 2009, Plaintiffs brought one count for breach of contract and one count for bad faith under 42 Pa. C.S.A. §8371.[3] In response to Defendant's challenge to venue, Plaintiffs' suit was transferred to this court by order dated November 5, 2009.

With the completion of the appraisal process under the Policy, both parties agreed that Plaintiffs' breach of contract claim was resolved. (Motion and Answer, ¶21.) Notwithstanding this resolution, Plaintiffs decided to pursue their claim for bad faith. In light of this decision, Defendant requested leave of court to file counterclaims for breach of contract, malicious use of legal process, and abuse of process. By order dated November 6, 2012, Defendant's request was granted.

Before discovery was complete, Defendant moved for summary judgment. Based on both parties' agreement that Plaintiffs' claim for breach of contract claim had been resolved through the Policy's appraisal process, summary judgment was granted on this count. Since discovery was not complete, the remainder of Defendant's motion was denied, without prejudice to Defendant moving for summary motion after discovery was concluded.

Upon the completion of discovery, Defendant filed its Motion for Summary Judgment ("Motion") now before us for disposition. Therein, Defendant requests summary judgment on Plaintiffs' bad faith claim, as well as on its three counterclaims. After receiving briefs, hearing argument, and reviewing the record, we are ready to rule on Defendant's Motion.

DISCUSSION

1. Plaintiffs' Complaint: Statutory Bad Faith—42 Pa. C.S.A. §8371

We begin with whether Defendant is entitled to summary judgment on Plaintiffs' claim for bad faith pursuant to 42 Pa. C.S.A.

[2] This was two days after Dial first inspected the Computers and while Defendant was waiting to receive Dial's estimate. (Motion and Answer, ¶10; Defendant's Counterclaim and Plaintiffs' Reply, ¶15.)

[3] Plaintiffs' complaint was filed after the appraisal process in the Policy had been invoked and both parties had selected their respective appraisers. (Motion and Answer, ¶13; Defendant's Counterclaim and Plaintiffs' Reply, ¶43.)

§8371.[4] Historically, in Pennsylvania no cause of action existed at common law in tort for an insurer's bad faith handling of an insured's claim. **See D'Ambrosio v. Pennsylvania National Mutual Casualty Insurance Company,** 494 Pa. 501, 505-11, 431 A.2d 966, 969-72 (1981). This void was addressed by the Pennsylvania legislature in 1990 with the enactment of Section 8371 of the Judicial Code which states:

> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
>
> (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.

[4] We note the standard for summary judgment. When deciding a motion for summary judgment, we "examine the record, which consists of all pleadings, as well as any depositions, answers to interrogatories, admissions, affidavits, and expert reports, in a light most favorable to the non-moving party, and we resolve all doubts as to the existence of a genuine issue of material fact against the moving party." **LJL Transportation, Inc. v. Pilot Air Freight Corporation,** 599 Pa. 546, 559, 962 A.2d 639, 647 (2009). We are to enter summary judgment under only two circumstances. First, "whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense." Pa. R.C.P. No. 1035.2(1). Second, "if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense." Pa. R.C.P. No. 1035.2(2). Summary judgment is appropriate only if the issues to be decided are legal.

The initial burden of demonstrating there are no genuine issues of material fact falls on the moving party. **Kafando v. Erie Ceramic Arts Company,** 764 A.2d 59, 61 (Pa. Super. 2000). Once the moving party has met its burden, the non-moving party must counter with specific facts showing that there is a genuine issue for trial, or challenge the credibility of witnesses testifying in support of the motion. **Phaff v. Gerner,** 451 Pa. 146, 149, 303 A.2d 826, 829 (1973); Pa. R.C.P. 1035.3. In determining whether the dispute is genuine, the court's function is not to weigh the evidence or to determine the truth of the matter, but only to determine whether the evidence of record is such that a reasonable jury could return a verdict for the non-moving party. Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. **Kvaerner Metals Division of Kvaerner U.S., Inc. v. Commercial Union Insurance Company,** 589 Pa. 317, 329-30, 908 A.2d 888, 896 (2006).

> (2) Award punitive damages against the insurer.
>
> (3) Assess court costs and attorney fees against the insurer.

42 Pa. C.S.A. §8371. **See Adamski v. Allstate Insurance Company,** 738 A.2d 1033, 1036 (Pa. Super. 1999), **appeal denied,** 563 Pa. 655, 759 A.2d 381 (2000).[5]

Section 8371 does not define the term "bad faith," which has been left to the courts to fathom. Relying on **Black's Law Dictionary,** bad faith has been held to consist of

> any frivolous or unfounded refusal to pay proceeds of a policy; it is not necessary that such refusal be fraudulent. For purposes of an action against an insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known duty (**i.e.,** good faith and fair dealing), through some motive of self-interest or ill will; mere negligence or bad judgment is not bad faith.

Terletsky v. Prudential Property and Casualty Insurance Company, 437 Pa. Super. 108, 125, 649 A.2d 680, 688 (1994), **appeal denied,** 540 Pa. 641, 659 A.2d 560 (1995). As applied by our courts, this definition forms a two-part conjunctive test; to establish bad faith, an insured must establish by clear and convincing evidence that the insurer (1) did not have a reasonable basis for its actions and (2) knew of or recklessly disregarded its lack of a reasonable basis. **Greene v. United Services Automobile As-**

"Where the non-moving party bears the burden of proof on an issue, he may not merely rely on his pleadings or answers in order to survive summary judgment." **Babb v. Centre Community Hospital,** 47 A.3d 1214, 1223 (Pa. Super. 2012) (citations omitted), **appeal denied,** 619 Pa. 718, 65 A.3d 412 (2013). Further, "[f]ailure of a non-moving party to adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof establishes the entitlement of the moving party to judgment as a matter of law." **Id.**

[5] "The purpose of Section 8371 was to provide a statutory remedy to an insured when the insurer denied benefits in bad faith." **General Account Insurance Company v. Federal Kemper Insurance Company,** 452 Pa. Super. 581, 587, 682 A.2d 819, 822 (1996). However, "[c]ourts have extended the concept of 'bad faith' beyond an insured's denial of a claim in several limited areas." **Northwestern Mut. Life Ins. Co. v. Babayan,** 430 F.3d 121, 137 (3d Cir. 2005); **see also, Rowe v. Nationwide Insurance Company,** 6 F. Supp. 3d 621, 630 (W.D. Pa. 2014) (listing types of conduct where an insurer has been found to have committed bad faith). One of these limited areas is the conduct at issue here: if the insurer acts in bad faith while investigating or processing a claim. **See O'Donnell v. Allstate Insurance Company,** 734 A.2d 901, 906 (Pa. Super. 1999).

sociation, 936 A.2d 1178, 1189 (Pa. Super. 2007) (citation omitted), **appeal denied,** 598 Pa. 750, 954 A.2d 577 (2008).

The first prong of this test requires an objective analysis of the insurer's conduct. **Williams v. Hartford Cas. Ins. Co.,** 83 F. Supp. 2d 567, 574 (E.D. Pa. 2000), **aff'd,** 261 F.3d 495 (3d Cir. 2001) (Table); **see also, Bodnar v. Amco Ins. Co.,** 2014 WL 3428877, *3 (M.D. Pa. 2014); and **Lites v. Trumbull Ins. Co.,** 2013 WL 5777156, *5 (E.D. Pa. 2013). To determine if this prong has been met, we do not analyze the insurer's actual motive for its conduct but instead determine whether there is an objectively reasonable basis for its conduct. **Livornese v. Medical Protective Co.,** 219 F. Supp. 2d 645, 648 (E.D. Pa. 2002), **rev'd on other grounds,** 136 Fed. Appx. 473 (3d Cir. 2005). "As a matter of law, if some reasonable basis did exist, [the] insurer cannot have acted in bad faith under Section 8371." **Id.**

The second prong is subjective and considers the level of culpability that needs to be associated with a finding of bad faith. **Employers Mutual Casualty Company v. Loos,** 476 F. Supp. 2d 478, 491 (W.D. Pa. 2007). "To support a finding of bad faith, the insurer's conduct must be such as to 'import[] a dishonest purpose.'" **Brown v. Progressive Insurance Company,** 860 A.2d 493, 501 (Pa. Super. 2004), **appeal denied,** 582 Pa. 714, 872 A.2d 1197 (2005). Whether the insurer was motivated by self-interest or ill will is probative of this second element. **Greene, supra** at 1190-91.[6]

Both elements of bad faith must be established by clear and convincing evidence. **Brown, supra.** This standard requires "evidence so clear, direct, weighty and convincing as to enable a clear conviction, without hesitation, about whether or not the defendant[] acted in bad faith." **Amica Mut. Ins. Co. v. Fogel,** 656 F.3d 167, 179 (3d Cir. 2011) (citation and quotation marks omitted). "At the summary judgment stage, the insured's burden in opposing a summary judgment motion brought by the insurer is commensurately high because the court must view the evidence presented in light of the substantive evidentiary burden at trial." **Northwestern**

[6] An insurer's actions in defending itself in litigation alleging its bad faith handling of a claim is not **per se** actionable under Section 8371 "since the statute was designed to provide 'a remedy for bad-faith conduct by an insurer in its capacity as an insurer and not as a legal adversary in a lawsuit filed against it by an insured.'" **O'Donnell, supra** at 909.

Mut. Life Ins. Co. v. Babayan, 430 F.3d 121, 137 (3d Cir. 2005) (citation and quotation marks omitted). "In sum, in order to defeat a motion for summary judgment, a plaintiff must show that a jury could find by the stringent level of clear and convincing evidence that the insurer lacked a reasonable basis for its handling of the claim and that it recklessly disregarded its unreasonableness." **Williams, supra** at 571 (citation and quotation marks omitted).

With this burden in mind, we review Defendant's conduct. Plaintiffs rely on four specific acts which they claim establish bad faith: (1) the investigation into the value of the Computers, (2) the one-year delay before any payment was tendered, (3) the low settlement offer, and (4) conduct which Plaintiffs contend evidences Defendant's improper motive. We examine each of these claims in the order stated.

a. Investigation

Section 8371 was passed by the Pennsylvania Legislature with the intent of dissuading insurance providers from "using [their] economic power to coerce and mislead insureds." **Jung v. Nationwide Mut. Fire. Ins. Co.,** 949 F. Supp. 353, 361 (E.D. Pa. 1997). It was not the Legislature's intent to subject an insurer to a finding of bad faith merely because it investigated and litigated legitimate claims. **Id.** As our courts have repeatedly stated, "an aggressive defense of the insurer's interest is not bad faith." **Id.** at 360; **O'Donnell v. Allstate Insurance Company,** 734 A.2d 901, 910 (Pa. Super. 1999) (in the absence of evidence of a dishonest purpose or ill-will, it is not bad faith to take a stand with a reasonable basis or to "aggressively investigate and protect its interests" in the normal course of litigation).

In the context of an insurer investigating a claim, our courts have held that an insurer does not act in bad faith if it investigates a claim when there are certain "red flags" that provide a reason to investigate. **See id.** at 905. These deviations from what is normal by their very nature provide a reasonable basis for the insurer to investigate. **Id.** One such signal is when the facts of a case make a determination of the value of the claim difficult to assess. **Lublin v. American Financial Group, Inc.,** 960 F. Supp. 2d 534, 541 (E.D. Pa. 2013); **Williams, supra** at 575.

The "red flag" which provided the Defendant here with a reasonable basis to investigate the value of Plaintiffs' Computers was their uniqueness. Plaintiffs built these Computers themselves using parts and components from various manufacturers so they could be used for creating and playing video games. Because the Computers were built by hand using different parts, they were unique, making it reasonable for Defendant to want to examine and investigate to determine their value. It was likewise reasonable for Defendant to hire an independent qualified expert to examine and appraise the Computers in order to intelligently evaluate the amount of Plaintiffs' loss.

The difficulty in valuing this loss was evident from the information provided by Plaintiffs themselves. Initially, Plaintiffs, who were familiar with computers having built the Computers at issue, valued the Computers at around $50,000.00. They then presented Defendant with an expert estimate that valued the Computers for $30,000.00 less, at $20,537.58. The discrepancy between these two estimates, together with the patchwork nature of the Computers, easily explains the reasonableness of Defendant's decision to investigate.

b. One-Year Delay

"Delay is a relevant factor in determining whether bad faith has occurred, but a long period of time between demand and settlement does not, on its own, necessarily constitute bad faith." **Rowe v. Nationwide Ins. Co.,** 6 F. Supp. 3d 621, 634 (W.D. Pa. 2014) (citation and quotation marks omitted). "In order for an insured to recover for bad faith stemming from delay, an insured must demonstrate that the delay is attributable to the defendant, that the defendant had no reasonable basis for the actions it undertook which resulted in the delay, and that the defendant knew or recklessly disregarded the fact that it had no reasonable basis to deny payment." **Thomer v. Allstate Ins. Co.,** 790 F. Supp. 2d 360, 370 (E.D. Pa. 2011) (citation and quotation marks omitted).

A delay does not constitute bad faith "if [the] delay is attributable to the need to investigate further or even to simple negligence." **Rowe, supra** at 634. Moreover, a delay attributable to the insured or outside of the control of either party will not establish bad faith. **See Seto v. State Farms Ins. Co.,** 855 F. Supp. 2d 424, 430 (E.D. Pa. 2012); **see also, Kosierowski v. Allstate Ins. Co.,** 51 F. Supp. 2d 583, 590 (E.D. Pa. 1999) (finding that the "legitimate, if frustrating delays that are an ordinary part of legal and insurance work" do not constitute bad faith), **aff'd,** 234 F.3d 1265 (3d Cir. 2000) (Table).

Dial's investigation into the value of the Computers lasted close to nine months, contributing to the ten-month lapse between Defendant's receipt of KeyTech's estimate in September 2007 and its tender of a check to Plaintiffs in July 2008. Although this delay is unfortunate, it does not establish bad faith. The delay began with Defendant wanting additional information relevant to valuing the Computers. As explained earlier, this request was reasonable, likewise allowing for a normal period of delay to investigate to be reasonable.

However, a delay which typically would have lasted only a few weeks or months was extended because of Plaintiffs. Initially Plaintiffs refused to allow Dial to examine the Computers. Plaintiffs then refused to permit the Computers to be removed from their home for inspection. Once this hurdle was overcome, Plaintiffs' work schedule delayed Dial's inspection of the Computers further. (N.T. 2/25/2014 (Deposition of Michael Johnson), p. 80:14-25.) These circumstances—a delay attributable to a reasonable investigation and protracted by Plaintiffs' conduct—preclude a finding of bad faith.

c. Low Offer

A low offer evidences bad faith when the offer bears no reasonable relationship to the insured's losses. **Brown, supra.** Conversely, a low offer does not show bad faith when "the insurer makes a low but reasonable estimate of the insured's losses." **Id.** When Dial completed its investigation, it valued the Computers at $4,600.00. This amount was promptly tendered to Plaintiffs.

Although Defendant's offer was less than half what the umpire valued the loss at—$11,449.00, KeyTech's estimate was almost twice the amount determined by the umpire. These variances evidence the difficulty in valuing Plaintiffs' loss on which reasonable minds disagreed. Significantly, Defendant had a reasonable basis for its offer which relied on an estimate prepared by an independent expert in computers. As with the time delay, the cir-

cumstances here—a low offer based on an estimate by a neutral, qualified expert, accompanied by notice to the insureds of their right under the Policy to demand an appraisal if they disagreed with the amount—do not rise to the level of bad faith.

d. Evidence of Improper Motive

Plaintiffs next contend that Jennifer Tunitis, Defendant's inside adjuster, acted with an improper motive, thus establishing that Defendant acted in bad faith. Specifically, Plaintiffs claim Ms. Tunitis did not read, personally respond to, or contact KeyTech about its estimate, did not forward a copy of this estimate to Dial for its review, and her employment of Dial was motivated by a desire to pay as little as possible on Plaintiffs' claim, rather than a fair and reasonable amount. Plaintiffs also claim that Ms. Tunitis misrepresented the facts about Plaintiffs' claim to the Department of Insurance. This conduct, Plaintiffs contend, undermines any pretense that Defendant's conduct was objectively reasonable.

Assuming, **arguendo,** that Ms. Tunitis' conduct implies an improper motive,[7] by itself this does not establish bad faith. As previously discussed, the first prong of the test for bad faith, that the insurer have no reasonable basis for its conduct, is an objective test. **Williams, supra** at 574. As an objective test, "[i]f there is a reasonable basis for [the insurer's actions], even if it is clear that the insurer did not rely on that reason, there cannot, as a matter of law, be bad faith." **Serino v. Prudential Ins. Co. of America,** 706 F. Supp. 2d 584, 592 (M.D. Pa. 2009) (citation and quotation marks omitted).

[7] We disagree with Plaintiffs' claim that the evidence to which they point establishes Defendant acted with dishonesty or with an improper motive. When read in the context of the entire record, we do not believe a reasonable jury would find by clear and convincing evidence that Defendant acted with a motive of either self-interest or ill will.

For instance, to the extent Ms. Tunitis did not read KeyTech's estimate, this was because of the small print on the image she received for viewing, which she could not read. (N.T. 2/25/14 (Jennifer Tunitis Deposition), p.33.) As to not forwarding a copy to Dial for its review, there is nothing inherently suspect in seeking an objective, independent loss estimate from a qualified expert without first presenting that expert with the results of an earlier estimate from another expert. Moreover, these differences were later reconciled in the appraisal process in which all experts participated.

At most, the evidence establishes that Defendant acted imperfectly in its investigation. Even so, an insurer does not act in bad faith by acting negligently or performing an imperfect investigation. **See Seto v. State Farms Ins. Co.,** 855 F. Supp. 2d 424, 431 (E.D. Pa. 2012).

For the reasons stated, Defendant had an objectively reasonable basis to conduct an investigation into the value of Plaintiffs' Computers and to make an offer based on that investigation. Under the facts in this case, the delay in completing that investigation was not inordinate, nor was the delay attributable primarily to Defendant. Therefore, even if we were to accept that Defendant had an improper motive and acted based on that motive, because the first prong of the test for statutory bad faith requires the absence of an objectively reasonable basis for Defendant's conduct—which prong has not been met—as a matter of law, Defendant cannot be found to have acted in bad faith.

2. Defendant's Counterclaim: Contractual Bad Faith

We consider next Defendant's Motion for Summary Judgment on its counterclaim for what it describes as "reverse bad faith." Unlike Plaintiffs' bad faith claim pursuant to 42 Pa. C.S.A. §8371, Defendant's reverse bad faith claim is not based on statute or tort, but on breach of contract.[8] Defendant claims Plaintiffs breached the terms of the Policy when they acted in bad faith during the pendency of their claim.

[8] Plaintiffs argue that Pennsylvania does not recognize a common-law bad faith claim for breach of contract. This is simply not true. While such a claim does not exist at common law in tort, **see D'Ambrosio v. Pennsylvania National Mutual Casualty Insurance Company,** 494 Pa. 501, 505-13, 431 A.2d 966, 969-72 (1981), which the Legislature remedied, in part, by its enactment of 42 Pa. C.S.A. §8371, the implied duty of good faith that is imposed on the parties pursuant to the law of contracts existed at common law prior to the enactment of Section 8371 and was not supplanted by it. **Ash v. Continental Insurance Company,** 593 Pa. 523, 533-34, 932 A.2d 877, 884 (2007). Not only do these two causes of action for bad faith arise from difference sources—"one is imposed by virtue of a contract, and the other is imposed by statute." **Id.** at 533, 932 A.2d at 883—compensatory damages are awarded for breach of the contractual duty, whereas breach of the statutory duty created by Section 8371 allows for the award of specified statutory damages generally not available for breach of contract. **Id.** at 534-35, 932 A.2d at 884.

The contractual duty to act in good faith is distinct from the common-law duties which form the basis for a tort. **Creeger Brick and Building Supply, Inc. v. Mid-State Bank and Trust Company,** 385 Pa. Super. 30, 35, 560 A.2d 151, 153 (1989) ("Where a duty of good faith arises, it arises under the law of contracts, not under the law of torts."). Further, "[t]his duty arises not so much under the terms of the contract but is said to arise because of the contract and to flow from it." **See Gray v. Nationwide Mutual Insurance Company,** 422 Pa. 500, 509, 223 A.2d 8, 12 (1966) (citations and quotation marks omitted).

No express provision exists in Defendant's Policy which required either party to act in good faith. Consequently, for Defendant to succeed on this counterclaim, a duty of good faith must be implied. The Restatement (Second) of Contracts §205 states that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."

In several cases, our Superior Court has stated that Pennsylvania has adopted this section of the Restatement. **See e.g., Herzog v. Herzog,** 887 A.2d 313, 317 (Pa. Super. 2005); **Kaplan v. Cablevision of PA, Inc.,** 448 Pa. Super. 306, 318, 671 A.2d 716, 722 (1996), **appeal denied,** 546 Pa. 645, 683 A.2d 883 (1996); **Baker v. Lafayette College,** 350 Pa. Super. 68, 84, 504 A.2d 247, 255 (1986), **aff'd,** 516 Pa. 291, 532 A.2d 399 (1987). In other cases, the Superior Court, as well as the Commonwealth Court and the Third Circuit, have stated that the covenant of good faith and fair dealing is recognized only in limited situations. **See West Run Student Hous. Assocs., LLC v. Huntington Nat. Bank,** 712 F.3d 165, 170 (3d Cir. 2013); **Agrecycle, Inc. v. City of Pittsburgh,** 783 A.2d 863, 867 (Pa. Commw. 2001), **appeal denied,** 568 Pa. 687, 796 A.2d 319 (2002); **Creeger Brick and Building Supply, Inc. v. Mid-State Bank and Trust Company,** 385 Pa. Super. 30, 35, 560 A.2d 151, 153-54 (1989). In a recent decision, the Pennsylvania Supreme Court noted the "considerable disagreement over the applicability of the implied duty of good faith," but, because the issue was not before it, declined to address it. **Ash v. Continental Insurance Company,** 593 Pa. 523, 533 n.2, 932 A.2d 877, 883 n.2 (2007).

The duty has been recognized in franchisors' dealings with franchisees, **Atlantic Richfield Company v. Razumic,** 480 Pa. 366, 390 A.2d 736 (1978); in insurers' dealings with insureds, **Gray v. Nationwide Mutual Insurance Company,** 422 Pa. 500, 508, 223 A.2d 8, 11 (1966); and in the employer-employee context where the employer does not fulfill some contractual obligation that the employer had assumed beyond the at-will relationship. **Donahue v. Federal Express Corporation,** 753 A.2d 238, 242 (Pa. Super. 2000) (interpreting **Somers v. Somers,** 418 Pa. Super. 131, 613 A.2d 1211 (1992), **appeal denied,** 533 Pa. 652, 624 A.2d 111 (1993)). In contrast, in **Southeastern Pennsylvania Transit Authority v. Holmes,** 835 A.2d 851 (Pa. Commw. 2003), **appeal denied,** 577 Pa. 738, 848 A.2d 930 (2004), the Commonwealth Court noted three circumstances in which no duty of good faith may be implied, where:

> (1) a plaintiff has an independent cause of action to vindicate the same rights with respect to which the plaintiff invokes the duty of good faith; (2) such implied duty would result in defeating a party's express contractual rights specifically covered in the written contract by imposing obligations that the party contracted to avoid; or (3) there is no confidential or fiduciary relationship between the parties. ...

Id. at 859 (citation omitted).

In explaining the rationale behind restricting an independent cause of action for breach of the duty of good faith and fair dealing to a limited number of circumstances, the Third Circuit stated:

> Such an approach limits the use of the bad faith cause of action to those instances where it is essential. The covenant of good faith necessarily is vague and amorphous. Without such judicial limitations in its application, every plaintiff would have an incentive to include bad faith allegations in every contract action. If construed too broadly, the doctrine could become an all-embracing statement of the parties' obligations under contract law, imposing unintended obligations upon parties and destroying the mutual benefits created by legally binding agreements.

Northview Motors, Inc. v. Chrysler Motors Corp., 227 F.3d 78, 92 (3d Cir. 2000). We find this analysis persuasive and apply it here.

As a preliminary matter, the duty of good faith is broadly defined "as honesty in fact in the conduct or transaction concerned." **Stamerro v. Stamerro,** 889 A.2d 1251, 1259 (Pa. Super. 2005) (citation omitted). "[G]ood faith generally entails 'faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.'" **Curley v. Allstate Ins. Co.,** 289 F. Supp. 2d 614, 617 (E.D. Pa. 2003) (**quoting** Restatement of Contracts (Second) §205 cmt. a). "[E]xamples of 'bad faith' conduct include: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." **Williams v. Nationwide Mutual**

Insurance Co., 750 A.2d 881, 887 (Pa. Super. 2000) (citation and quotation marks omitted). While these broad definitions of the duty of good faith are helpful, the extent of the duty and whether the duty was violated requires a case specific and fact intensive inquiry. **Haywood v. University of Pittsburgh,** 976 F. Supp. 2d 608, 627 (W.D. Pa. 2013).

Defendant argues Plaintiffs breached the implied covenant of good faith and fair dealing during the adjustment, appraisal, settlement, and post-settlement phases of Plaintiffs' claim. More precisely, Defendant claims Plaintiffs violated their duty of good faith by (1) delaying for eight months Dial's inspection of the Computers, (2) failing to notify Defendant of their chosen appraiser within twenty days, (3) refusing to provide Defendant with the name and contact information for the individual from KeyTech who was to serve as their appraiser, and (4) filing "vexatious and retributive" litigation against Defendant. (Motion and Answer, ¶51; Defendant's Counterclaim, ¶66.)

We begin with whether an independent cause of action exists to redress Plaintiffs' complaints since "a party is not entitled to maintain an implied duty of good faith claim where the allegations of bad faith are identical to a claim for relief under an established cause of action." **Northview Motors, supra** at 91-92 (citation and quotation marks omitted); **see also, Leder v. Shinfeld,** 609 F. Supp. 2d 386, 400-401 (E.D. Pa. 2009) (holding that duty of good faith does not apply when party had an adequate remedy based on a negligence claim).

As to Defendant's first three complaints, the express language of the Policy requires Plaintiffs to make the damaged property available for inspection (Policy (Section I—Conditions, ¶2(f)(1))) and to "choose a competent appraiser within 20 days after receiving a written request from the other." (Policy (Section I—Conditions, ¶6).) While not explicit, implicit in this language is the obligation of Plaintiffs to permit an inspection within a reasonable time of request and to provide Defendant with the name and contact information of the appraiser they selected.[9] As for Plaintiffs filing

[9] The doctrine of necessary implication provides that "[i]n the absence of an express provision, the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose of the contract and to refrain from doing anything that would destroy or injure the other party's right to receive the fruits of the contract." **Agrecycle, Inc. v. City of Pittsburgh,** 783 A.2d 863, 868 (Pa. Commw. 2001) (citation and quotation marks omitted). **Cf. Northview Motors, Inc. v. Chrysler Motors Corp.,** 227 F.3d 78, 91 (3d Cir. 2000) (noting that "[c]ourts have utilized the good faith duty as an interpretive tool to determine the parties' justifiable expectations in the context of a breach of contract action, but that duty is not divorced from the specific clauses of the contract and cannot be used to override an express contractual term"); **Agrecycle, supra** at 867 ("The good faith obligation may be implied to allow enforcement of the contract terms in a manner that is consistent with the parties' reasonable expectations.").

what Defendant has characterized as "vexatious and retributive" litigation, the common-law causes of action for malicious prosecution and abuse of process are available to vindicate Defendant's rights. **See also,** 42 Pa. C.S.A. §2503(7), (9) (Right of participants to receive counsel fees).

Though an independent cause of action does not exist to address Plaintiffs delaying the inspection or failing to earlier name the individual they chose to be an appraiser, Defendant has provided us with no law that Plaintiffs owed any fiduciary duty to Defendant. While an insurer owes a fiduciary duty to its insured, thereby being obligated to act in good faith and with due care in representing the interests of the insured, **Gray, supra,** we are unaware of any case holding the reverse to be true. This absence under **Holmes** precludes a contractual bad faith claim. **Supra.**

The uncertain nature of exactly what damages Defendant claims in this count of its counterclaim further precludes the grant of summary judgment. Defendant states only that it has suffered "significant costs due to extensive and unnecessary court intervention in defending against Plaintiffs' baseless claims and in bringing the instant Counterclaim." (Motion, ¶52; Defendant's Brief in Support of its Motion, p. 20; Defendant's Counterclaim, ¶71.) However, to the extent these costs refer to attorney fees, attorney fees are generally not recoverable in a common-law action for breach of contract. **See Trizechahn Gateway LLC v. Titus,** 601 Pa. 637, 652, 976 A.2d 474, 482-83 (2009) ("Under the American Rule, applicable in Pennsylvania, a litigant cannot recover counsel fees from an adverse party unless there is express statutory authorization, a clear agreement of the parties, or some other established exception.").

3. Defendant's Counterclaim: Malicious Use of Process

Penultimately, Defendant requests summary judgment in its favor on its claim for malicious use of process. "Malicious use of process is a tort which arises when a party institutes a lawsuit with a malicious motive and lacking probable cause." **Shaffer v. Stewart,** 326 Pa. Super. 135, 138, 473 A.2d 1017, 1019 (1984). These elements are now codified in the Wrongful Use of Civil Proceedings Act, also known as the Dragonetti Act, 42 Pa. C.S.A. §§8351-54, which provides:

> **(a) Elements of action.—**A person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings:
>
> (1) he acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and
>
> (2) the proceedings have terminated in favor of the person against whom they are brought.

42 Pa. C.S.A. §8351.

"In order to recover under [this] statutory cause of action, three essential elements must be proved: (1) that the underlying proceedings terminated favorably to the plaintiff; (2) that the defendant caused those proceedings to be instituted without probable cause; and (3) malice[,]" that the proceedings were instituted primarily for an improper purpose, "as, for example, to put pressure upon the person proceeded against in order to compel payment of another claim of his own or solely to harass the person proceeded against by bringing a claim known to be invalid." **Shaffer, supra** at 140, 141, 473 A.2d at 1020 (citations and quotation marks omitted); **Hart v. O'Malley,** 436 Pa. Super. 151, 160, 647 A.2d 542, 547 (1994), **aff'd,** 544 Pa. 315, 676 A.2d 222 (1996). "As every man has a legal power to prosecute his claims in a court of law and justice, no matter by what motives of malice he may be actuated in doing so, it is necessary [for malicious prosecution] to aver and prove that he has acted not only maliciously, but without reasonable or probable cause." **Dumont Television and Radio Corporation v. Franklin Electric Co. of Phila.,** 397 Pa. 274, 280, 154 A.2d 585, 588 (1959) (citations and quotation marks omitted).[10]

A prerequisite of malicious prosecution is that the underlying civil proceedings have terminated in favor of the party bringing suit. **See Clausi v. Stuck,** 74 A.3d 242, 246 (Pa. Super. 2013). The underlying civil proceeding for purposes of this claim is Plaintiffs' current action for bad faith. Although judgment is being granted in Defendant's favor and against Plaintiffs on Plaintiffs' claim for bad faith, a decision favorable to Defendant, the

> entry of summary judgment does not constitute a 'favorable termination' as understood in the context of a wrongful use of civil proceedings suit until the summary judgment is final, meaning that it has been upheld by the highest appellate court having jurisdiction over the case or that the summary judgment has not been appealed.

D'Elia v. Folino, 933 A.2d 117, 122 (Pa. Super. 2007), **appeal denied,** 597 Pa. 706, 948 A.2d 804 (2008) (**citing Ludmer v. Nernberg,** 520 Pa. 218, 222, 553 A.2d 924, 926 (1989)). Because this condition precedent to recovery has not been met, Defendant's Motion for Summary Judgment on this count of its counterclaim will be denied.[11]

4. Defendant's Counterclaim: Abuse of Process

Finally, Defendant seeks judgment in its favor and against Plaintiffs for abuse of process for Plaintiffs' filing and pursuit of what Defendant contends is a frivolous lawsuit. "To establish a claim for abuse of process, it must be shown that the defendant (1) used a legal process against the plaintiff, (2) primarily to accomplish a purpose for which the process was not designed, and (3) harm has been caused to the plaintiff. ... The word 'process' as used in the tort of abuse of process has been interpreted broadly and encompasses the entire range of procedures incident to the

[10] "[T]he question of want of probable cause is exclusively for the court." **Dumont Television and Radio Corporation v. Franklin Electric Co. of Phila.,** 397 Pa. 274, 280, 154 A.2d 585, 588 (1959) (citation and quotation marks omitted).

[11] In addition, genuine issues of material fact exist on the other two elements of this cause of action: (1) whether Plaintiffs initiated their claim without probable cause and (2) whether Plaintiffs did so for malicious purposes.

litigation process." **Hart, supra** at 168-69, 647 A.2d at 551 (citations and quotation marks omitted).[12]

[12] At common law, abuse of process and malicious prosecution were two separate and distinct causes of action, part of the difference being the stage of the proceedings at which the abuse or misuse of process occurred. On this point, the Pennsylvania Supreme Court in **Dumont** stated:

> Decisions in this state and in other jurisdictions have drawn a distinction between actions for abuse of legal process and those for malicious prosecution, which, when founded on civil prosecutions, are usually described as malicious use of civil process. The gist of an action for abuse of process is the improper use of process after it has been issued, that is, a perversion of it. Malicious use of civil process has to do with the wrongful initiation of such process, while abuse of civil process is concerned with a perversion of a process after it is issued.

Supra at 278-79, 154 A.2d at 587 (citations and quotation marks omitted). In **Triester v. 191 Tenants Association,** 272 Pa. Super. 271, 415 A.2d 698 (1979), the Superior Court describes this difference as follows:

> An abuse of process arises when a party employs legal process for some unlawful purpose, not the purpose for which it was intended. The classic example is the initiation of a civil proceeding to coerce the payment of a claim completely unrelated to the cause of action sued upon. The gist of the action is the proper issuance of the original process, but an abuse of that process after it has been issued such that there is a perversion of the process. ... The action of malicious use of process, on the other hand, is concerned with the wrongful initiation of a meritless suit. It occurs when a party institutes suit with a malicious motive and without probable cause.

Id. at 279, 415 A.2d at 702-703 (citations omitted).

The elements of a cause of action for abuse of process appear to be subsumed within the statutory elements for a cause of action for the wrongful use of civil proceedings as defined by 42 Pa. C.S.A. §8351. **See U.S. Express Lines, Ltd v. Higgins,** 281 F.3d 383, 394 (3d Cir. 2002). If so, as a legal matter, Defendant's Motion for Summary Judgment on this count of its counterclaim is premature for the same reasons we have denied Defendant's motion with respect to its claim for malicious prosecution.

However, the appellate courts of this Commonwealth repeatedly—including, since the effective date of the Wrongful Use of Civil Proceedings Act, 42 Pa. C.S.A. §§8351-54—contrast a claim for abuse of process with one for malicious prosecution, noting that the elements of abuse of process do not require a favorable termination of the underlying proceeding or an absence of probable cause preceding the commencement of the underlying suit. **See e.g., Clausi v. Stuck,** 74 A.3d 242, 248-49 (Pa. Super. 2013); **see also, Rosen v. American Bank of Rolla,** 426 Pa. Super. 376, 381, 627 A.2d 190, 192 (1993) (explaining that the tort of wrongful use of civil proceedings entails the initiation or continuation of an action, whereas abuse of process concerns use of process which is incident to the litigation). Consequently, we independently evaluate Defendant's motion on this count from that for malicious prosecution.

"Abuse of process is the employment of [process] for an unlawful object, a perversion of it,—**e.g.** to extort money, to compel the surrender of a deed or other thing of value, or the like; and misuse, simply a malicious use of [process] where no object[ive] is contemplated to be gained by it other than its proper effect and execution ... ." **Grohmann v. Kirschman,** 168 Pa. 189 (1895). Abuse of process "differs from that of wrongful use of civil proceedings in that, in the former, the existence of probable cause to employ the particular process for its intended use is immaterial." **Lerner v. Lerner,** 954 A.2d 1229, 1238 (Pa. Super. 2008) (citation and quotation marks omitted). The gravamen of abuse of process is the perversion of the particular legal process, that it was used primarily for a purpose for which it was not designed, to benefit the defendant in achieving a purpose which was not an authorized goal of the procedure in question. **Werner v. Plater-Zyberk,** 799 A.2d 776, 785 (Pa. Super. 2002), **appeal denied,** 569 Pa. 722, 806 A.2d 862 (2002).

"The significance of [the word 'primarily'] is that there is no action for abuse of process when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant ... ." **Rosen v. American Bank of Rolla,** 426 Pa. Super. 376, 382, 627 A.2d 190, 192 (1993) (**quoting** Restatement (Second) of Torts, §682, cmt. b).

> It is not enough that the process employed was used with a collateral purpose in mind.
>
> A cause of action for abuse of process requires [s]ome definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process ... [;] **there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.**

Hart, supra at 170-71, 647 A.2d at 552 (citations and quotation marks omitted) (emphasis in original). "In evaluating the primary purpose prong of the tort, there must be an act or threat not authorized by the process, or the process must be used for an illegitimate aim such as extortion, blackmail, or to coerce or compel the plaintiff to take some collateral action." **Clausi, supra** at 249 (quotation marks omitted).

Explaining further, the Superior Court in **Rosen** stated:

> The gravamen of the misconduct for which the liability stated ... is imposed is not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish. Therefore, it is immaterial that the process was properly issued, that it was obtained in the course of proceedings that were brought with probable cause and for a proper purpose, or even that the proceedings terminated in favor of the person instituting or initiating them. The subsequent misuse of the process, though properly obtained, constitutes the misconduct for which the liability is imposed ... .

Id. at 381, 627 A.2d at 192. In other words, abuse of process is, in essence, the "use of the legal process as a tactical weapon to coerce a desired result that is not the legitimate object of the process." **McGee v. Feege,** 517 Pa. 247, 259, 535 A.2d 1020, 1026 (1987).

On this claim, it is unclear what legal process Defendant claims was used improperly[13] and, consequently, just as unclear whether its use was a perversion of that process. While Defendant claims generally the primary purpose of Plaintiffs' suit and its continued pursuit was to harass and intimidate Defendant from investigating Plaintiffs' claim in order to extort a higher settlement payment on their loss, evidence also exists to support Plaintiffs' contention that their intent in bringing suit and taking discovery, for instance, were for legitimate purposes. Therefore, summary judgment on this count of Defendant's counterclaim is also being denied.

CONCLUSION

Defendant's Motion for Summary Judgment is granted in part and denied in part. Because there is no clear and convincing evidence by which a reasonable jury could find bad faith, Defendant's Motion as to Plaintiffs' claim for bad faith has been granted. Because genuine issues of material fact exist for each of Defendant's counterclaims, in addition to the legal limitations discussed in the body of this opinion, Defendant's Motion for Summary Judgment on its counterclaim is denied.

[13] Paragraph 78 of Defendant's counterclaim for abuse of process asserts only that Plaintiffs "abused the litigation process by filing a frivolous lawsuit and by using legal process in a manner not intended by the law to effect."

COMMONWEALTH of PENNSYLVANIA vs. FRANK J. RUBINO, Defendant

*Criminal Law—Driving Under the Influence—Blood Alcohol Content—Margin of Error—Weight Versus Sufficiency of the Evidence—Sentencing a Defendant Convicted Under Two Subsections of the Same Statute for a Single Act—Merger—**Corpus Delicti** Rule—Two Levels of Application: (1) Admissibility of Defendant's Statements and (2) Consideration of Statement by Fact-Finder*

1. A challenge to a conviction of driving under the influence with a blood alcohol content ("BAC") of 0.10% or greater premised on the margin of error inherent in the chemical test used to measure a driver's BAC implicates the weight of the evidence, not its sufficiency. Consequently, a defendant's conviction for driving under the influence with a BAC of 0.10% or greater will be upheld against a challenge to the sufficiency of the evidence where the defendant's BAC is found to be 0.102% with a 10 percent margin of error, whereas a challenge to the weight of the evidence under these same circumstances would more likely be sustained.

2. For sentencing purposes, a defendant convicted of violating two separate subsections of the same driving under the influence statute for the same act of driving, should be sentenced for one conviction alone, the other conviction merging by operation of law into the first.

3. **Corpus delicti** is a rule of evidence which requires the Commonwealth to establish by a preponderance of the evidence that a crime has been committed before inculpatory statements of an accused connecting him to the crime can be admitted.

4. The purpose of the **corpus delicti** rule is to prevent a conviction based solely upon a confession or admission, where in fact no crime has been committed.

5. The **corpus delicti** rule is applied at two distinct levels: (1) admissibility of the statement into evidence and (2) consideration of the statement by the fact-finder.

6. As a rule of admissibility, before an accused's confession or admission will be allowed in evidence, the Commonwealth must prove the **corpus delicti** of the offense charged by a preponderance of evidence independent of such statement. In order for the confession or admission to be considered by the fact-finder in rendering a verdict, the Commonwealth must establish the **corpus delicti** beyond a reasonable doubt.

7. In this case, the **corpus delicti** for driving under the influence was established by the following evidence: the occurrence of a one-vehicle accident in the early morning hours with no adverse weather conditions to explain the driver's loss of control of his vehicle in a twenty-five-mile-per-hour speed zone; the Defendant standing next to the open driver's door of the vehicle shortly after the accident with an odor of alcohol emanating from his facial area and no other person in the vicinity being the apparent driver; the responding police officer's opinion that the Defendant was under the influence of alcohol to a degree which rendered him incapable of safe driving and a blood draw taken within two hours of the accident measuring the Defendant's BAC at 0.102%.

NO. 017 CR 2004

GARY F. DOBIAS, Esquire, Assistant District Attorney—Counsel for Commonwealth.

MATTHEW J. MOTTOLA, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—February 17, 2015

On September 9, 2014, Frank J. Rubino (the "Defendant") was found guilty by a jury of two counts of driving under the influence (hereinafter "DUI")[1] for which he was sentenced on November 17, 2014, to a period of imprisonment of no less than forty-eight (48) hours nor more than six (6) months.[2] In Defendant's Post-Sentence Motion filed on November 21, 2014, Defendant moved to arrest judgment or, in the alternative, for a new trial on two grounds: (1) the evidence was insufficient to convict Defendant of driving under the influence with a blood alcohol content (hereinafter "BAC") over 0.10%, and (2) this court's ruling admitting Defendant's admission to owning and driving the vehicle involved in a one-car accident violated the **corpus delicti** rule. Defendant's Post-Sentence Motion was denied the same date it was filed.

Upon Defendant's appeal from the judgment of sentence, we directed Defendant to file a Concise Statement of Matters Complained of on Appeal pursuant to Pa. R.A.P. 1925(b). Defendant has complied. In his Concise Statement, Defendant repeats the same two issues previously raised in his Post-Sentence Motion. For the reasons that follow, we believe the appeal is without merit.

[1] 75 Pa. C.S.A. §§3731(a)(1) (General Impairment—Incapable of Safe Driving) and 3731(a)(4)(i) (Blood Alcohol Content of 0.10% or Greater). Although repealed by the Act of September 30, 2003, P.L. 120, No. 24, §14, effective February 1, 2004, Section 3731 applies as the offense occurred on August 16, 2003. Trial was originally scheduled for March 7, 2005, however, Defendant failed to appear, prompting a bench warrant to be issued for his arrest. Defendant was subsequently apprehended, bail was set, and trial commenced on September 8, 2014.

[2] This sentence was imposed on Defendant's conviction of Count 1 of the information, which alleges a violation of 75 Pa. C.S.A. §3731(a)(1). No sentence was imposed on Defendant's conviction for violating 75 Pa. C.S.A. §3731(a)(4)(i), Count 2 of the information, which merged for sentencing purposes with his conviction under Count 1. **Commonwealth v. Dobbs,** 452 Pa. Super. 488, 494-95, 682 A.2d 388, 392 (1996) (holding that where a single act is charged, a defendant cannot be sentenced for violating two subsections of the same statute, despite the fact that the evidence supports both convictions); **Commonwealth v. Rhoads,** 431 Pa. Super. 437, 442, 636 A.2d 1166, 1168 (1994) (same).

FACTUAL AND PROCEDURAL BACKGROUND

On August 16, 2003, at approximately 1:19 A.M., Officer Michael Fedor of the Kidder Township Police Department was dispatched to the scene of a one-car motor vehicle accident along Moseywood Road—a two-lane road—in Kidder Township, Carbon County. (N.T., 9/9/14, pp. 59-61, 72.) Officer Fedor arrived at the scene at approximately 1:31 A.M., whereupon he noted the following: there were no adverse weather conditions, the posted speed limit was 25 miles per hour, the road curved towards the left, a single vehicle had gone off the right side of the road striking a tree. **Id.** at 60-61, 72. At the time Officer Fedor arrived, a second vehicle was parked parallel to the road behind where the first vehicle had missed the turn. This second vehicle belonged to a passing motorist who stopped to render assistance after the accident had occurred. **Id.** at 61.

Maryann Gile, who had been a passenger in the vehicle which struck the tree, was sitting in this other vehicle when Officer Fedor arrived and requesting medical assistance. (N.T., 9/9/14, p. 62.) Officer Fedor called for an ambulance and Ms. Gile was subsequently transported from the scene while Officer Fedor continued his investigation. **Id.** at 63-64, 73-74. Officer Fedor did not interview Ms. Gile about the accident before she was transported for treatment, nor was she interviewed afterwards. **Id.** at 74. Ms. Gile died in April of 2013[3] and, therefore, was unavailable to testify at trial. **Id.** at 63.

After calling for the ambulance, Officer Fedor approached the Defendant, whom Officer Fedor witnessed standing between the open driver's door and driver's side compartment of the crashed vehicle when he first arrived at the accident scene. (N.T., 9/9/14, p. 65.) Upon Officer Fedor's request, Defendant produced his driver's license, proof of insurance, and a registration evidencing the vehicle was registered in his name. **Id.** at 65-66, 100. Officer Fedor detected an odor of alcohol on Defendant's breath and asked if Defendant had consumed any alcohol. **Id.** at 66. In response to the officer's questions, Defendant admitted to drinking that evening and also that he was the driver of the car. **Id.** at 66, 68-69. At trial

[3] At trial the Commonwealth and Defendant stipulated Ms. Giles died from causes unrelated to the accident. (N.T. 9/9/2014, pp. 62-63.)

Officer Fedor opined that based upon his training and experience as a police officer, as well as his observations of Defendant, Defendant was under the influence of alcohol to a degree that rendered him incapable of safe driving. **Id.** at 70-71.

Defendant was transported to Geisinger Wyoming Valley Hospital where his blood was drawn at 3:11 A.M. to test for alcohol content. (N.T., 9/9/14, pp. 69-70.) Cathy Sweeney, a medical technologist at Hazleton General Hospital, tested Defendant's blood using an Abbott TDX machine. **Id.** at 85-87.[4] The results of this test revealed a BAC by weight of 102 milligrams per deciliter or 0.102%. **Id.** at 88; Commonwealth Exhibit No. 1. At trial Ms. Sweeney testified that she believed the testing equipment has a margin of error of ten percent based upon what her supervisor advised her, but that she had never seen any documentation independently corroborating that figure. **Id.** at 90-91. She also testified that given this margin of error, Defendant's actual BAC ranged between 0.092% and 0.112%. **Id.** at 90.

Defendant testified that he was the owner of the vehicle but was not the driver that night. (N.T., 9/9/14, p. 95.) Defendant testified that he normally does not drive on the advice of his doctor and that Ms. Gile would often drive him around. **Id.** at 100-101, 104. According to Defendant, that evening a man named John (the Defendant did not know John's surname) was driving Defendant's vehicle. **Id.** at 98. Defendant claimed that he and Ms. Gile had met John at a nightclub earlier in the evening and invited him to go fishing. **Id.** at 95-98. Defendant further testified that he was asleep in the back seat of his vehicle and was awakened by the crash. **Id.** at 98.

Defendant testified that approximately five minutes after the accident a passing motorist stopped to render assistance. (N.T., 9/9/14, p. 106.) According to Defendant, he was sitting in this vehicle when the ambulance arrived, not Ms. Gile, because Ms. Gile was trapped in the crashed vehicle. Defendant also testified that the ambulance personnel extricated Ms. Gile from the crashed

[4] At trial the parties stipulated that Hazleton General Hospital was an approved testing facility whose accreditation was verified by reference to the **Pennsylvania Bulletin,** Volume 33, No. 28, dated July 12, 2003. (N.T., 9/9/14, pp. 84-85.) At the Commonwealth's request, this fact was judicially noticed. **Id.**

vehicle before Officer Fedor's arrival. **Id.** at 99-100, 104. Defendant denied standing near the crashed car at the time the officer arrived and further denied ever stating that he was the driver. **Id.** at 100-101, 104-105. Lastly, Defendant testified that John left the scene of the crash before the officer arrived and he never saw John again. **Id.** at 101-103.

Prior to opening statements at his trial, Defendant moved to preclude his statements to the police that he was the owner and driver of the car in question on the basis of the **corpus delicti** rule. (N.T., 9/9/14, p. 3.) The court discussed the matter with counsel in chambers, and the court reserved ruling on the motion until the officer testified. **Id.** at 16. During the officer's testimony, Defendant objected to the officer being questioned about Defendant's admission that he was the driver of the vehicle which struck the tree. **Id.** at 66-67. A discussion at sidebar ensued and the court overruled the objection and allowed the question to be asked. **Id.** at 66-68.

DISCUSSION

1. Whether the Evidence Was Sufficient to Convict Defendant of Driving Under the Influence—BAC Greater Than 0.10%

Defendant first argues that the evidence was insufficient to support his conviction of driving under the influence with a BAC greater than 0.10%, 75 Pa. C.S.A. §3731(a)(4)(i), because the margin of error for the BAC test administered was ten percent, thus rendering the jury's conclusion that he operated the vehicle with a BAC of 0.10% or greater wholly speculative.

In evaluating a claim that the evidence was insufficient, the court "must determine whether, viewing the evidence in the light most favorable to the Commonwealth as verdict winner, together with all reasonable inferences therefrom, the trier of fact could have found that each and every element of the crimes charged was established beyond a reasonable doubt." **Commonwealth v. Sloan,** 67 A.3d 808, 814 (Pa. Super. 2013) (citation omitted). Section 3731 of the Motor Vehicle Code, as it existed at the time of the offense, provides in relevant part:

> (a) Offense defined.—A person shall not drive, operate or be in actual physical control of the movement of a vehicle in any of the following circumstances:

* * *

(4) While the amount of alcohol by weight in the blood of:

(i) an adult is 0.10% or greater ... .

75 Pa. C.S.A. §3731(a)(4)(i). As stated above, Defendant claims only that the evidence was insufficient to establish that the amount of alcohol by weight in his blood was 0.10% or greater at the time he was driving.

The fact that Defendant's blood was drawn for testing of its alcohol content more than two hours after Defendant had been driving does not invalidate the result of the BAC test or otherwise render it inadmissible. Pursuant to 75 Pa. C.S.A. §3731(a.1)(2) then in effect, chemical testing of a driver's blood drawn within **three** hours of when the vehicle was driven is **prima facie** evidence of the BAC at the time the vehicle was driven.[5] Additionally, expert testimony relating back a defendant's BAC from the time of testing to the time defendant was driving was not required under 75 Pa. C.S.A. §3731(a.1)(2). **See Commonwealth v. Yarger,** 538 Pa. 329, 335, 648 A.2d 529, 531-32 (1994).

As construed by the Pennsylvania Supreme Court, Section 3731(a.1)(1)(i) created "a permissible inference" that the BAC of a blood sample drawn within three hours of driving is also a measure of the BAC at the time of driving. **Commonwealth v. MacPherson,** 561 Pa. 571, 587, 752 A.2d 384, 392 (2000). According to the Supreme Court, this inference did not shift the burden of proof or the burden of production from the Commonwealth to the defendant. **Id.** Furthermore, the jury, as the finder of fact, was free to ignore this inference. **Id.**

Turning next to Defendant's claim regarding the margin of error, a challenge premised on the margin of error (also known as the variance) present in a chemical test used to determine BAC implicates the weight of the evidence, not its sufficiency. **See Commonwealth v. Sloan,** 414 Pa. Super. 400, 416, 607 A.2d 285, 293

[5] Defendant has not argued that the sample was not drawn within three hours of when the accident occurred. Nor would the evidence support such an argument. Defendant left the Galleria where he had been drinking at approximately 1:00 A.M. (N.T., 9/9/14, p. 97.) Further, Officer Fedor arrived on scene at 1:31 A.M., **id.** at 72, and Defendant testified the accident occurred approximately twenty minutes before Officer Fedor arrived. **Id.** at 106. Defendant's blood was drawn at 3:11 A.M. **Id.** at 70.

(1992); **Commonwealth v. Mongiovi,** 360 Pa. Super. 590, 594, 521 A.2d 429, 431 (1987). Challenges to the weight of the evidence are distinct from sufficiency challenges and must be separately raised. **See** Pa. R.Crim.P. 606, 607.[6]

As to whether the evidence was sufficient to convict given the ten percent margin of error, the Superior Court has held the Commonwealth "need not preclude every possibility of innocence" or establish the defendant's guilt to a mathematical certainty. **Commonwealth v. Johnson,** 833 A.2d 260, 264 (Pa. Super. 2003) (citations omitted). In the instant case, the jury was presented with the BAC test results and testimony regarding the test's margin of error for it to weigh. Under the standard for judging the sufficiency of the evidence, this was sufficient for the jury to find that Defendant drove, operated, or was in actual control of a vehicle while the amount of alcohol in his blood by weight was 0.10% or greater. **See Commonwealth v. Sibley,** 972 A.2d 1218, 1219-20 (Pa. Super. 2009) (holding that the variance in the BAC test did not render the test result so infirm that it could not reasonably support the verdict); **cf. Commonwealth v. Landis,** 89 A.3d 694 (Pa. Super. 2014) (upholding a defendant's weight of the evidence challenge to a jury's verdict convicting defendant, **inter alia,** of DUI—highest rate of alcohol, where defendant's BAC was .164 with a ten percent margin of error, reflecting a range between .147 and .180).[7]

2. Whether the Court Erred in Admitting Inculpatory Statements by Defendant in Violation of the Corpus Delicti **Rule**

Defendant argues the court erred in admitting Defendant's statements that he owned and operated the vehicle because the

[6] Failure to properly preserve [a weight of the evidence] claim will result in waiver. **Commonwealth v. Sherwood,** 603 Pa. 92, 110, 982 A.2d 483, 494 (2009). Here, Defendant did not raise a separate weight of the evidence challenge prior to sentencing or in his Post-Sentence Motion, which challenge must be raised before the trial court to be preserved. **Commonwealth v. Lewis,** 45 A.3d 405, 410 (Pa. Super. 2012).

[7] Even had Defendant raised a challenge to the weight of the evidence and been successful, this would be a pyrrhic victory in that such challenge would not affect Defendant's conviction under 75 Pa. C.S.A. §3731(a)(1) (General Impairment). Further, as noted in footnote 2, **supra,** Defendant's conviction for violating 75 Pa. C.S.A. §3731(a)(4)(i) merged with his conviction under 75 Pa. C.S.A. §3731(a)(1). Consequently, Defendant was not sentenced for violating 75 Pa. C.S.A. §3731(a)(4)(i).

Commonwealth did not first establish the **corpus delicti** of driving under the influence.

Corpus delicti is a rule of evidence that places the burden upon the Commonwealth to establish by a preponderance of the evidence that a crime has been committed before inculpatory statements of an accused connecting him to the crime can be admitted. **Commonwealth v. Verticelli,** 550 Pa. 435, 444, 706 A.2d 820, 824 (1998), **abrogated on other grounds by Commonwealth v. Taylor,** 574 Pa. 390, 831 A.2d 587 (2003).

> The **corpus delicti** is literally the body of the crime; it consists of proof that a loss or injury has occurred as a result of the criminal conduct of someone. ... The criminal responsibility of the accused for the loss or injury is not a component of the rule. ... The historical purpose of the rule is to prevent a conviction based solely upon a confession or admission, where in fact no crime has been committed. ... The **corpus delicti** may be established by circumstantial evidence.

Verticelli, supra at 441, 706 A.2d at 822-23 (citations omitted).[8]

"The purpose of the **corpus delicti** rule is to guard against the hasty and unguarded character which is often attached to confessions and admissions and the consequent danger of a conviction where no crime has in fact been committed." **Commonwealth v. Reyes,** 545 Pa. 374, 381, 681 A.2d 724, 727 (1996) (citation and quotation marks omitted). "Concerning the admission of an accused's statement before the establishment of **corpus delicti,** the Pennsylvania Supreme Court has held that the order of proof is a matter within the realm of the trial judge's judicial discretion which will not be interfered with in the absence of an abuse of that discretion." **Commonwealth v. Zelosko,** 454 Pa. Super. 635, 638, 686 A.2d 825, 826 (1996) (**citing Commonwealth v. Smallwood,** 497 Pa. 476, 442 A.2d 222 (1982)).

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[8] On this point, the Superior Court in **Commonwealth v. Friend,** stated:

> The **corpus delicti** rule is not one of constitutional dimension, dealing with the quantity of evidence known at the time of the statement, nor is it a question of custody or investigative permissibility. The rule is one of trial evidence. It is not designed to circumscribe the gathering of evidence. Its applicability turns on the quantity of evidence, not the order of its gathering.

717 A.2d 568, 572 (Pa. Super. 1998).

The **corpus delicti** rule is applied at two distinct levels: first, **admissibility** of defendant's statement and second, **consideration** of the statement by the fact-finder.

> The first step concerns the trial judge's **admission** of the accused's statements and the second step concerns the fact finder's [sic] **consideration** of those statements. In order for the statement to be admitted, the Commonwealth must prove the **corpus delicti** by a preponderance of the evidence. In order for the statement to be considered by the fact finder, [sic] the Commonwealth must establish the **corpus delicti** beyond a reasonable doubt.

Commonwealth v. Young, 904 A.2d 947, 956 (Pa. Super. 2006), **appeal denied,** 591 Pa. 664, 916 A.2d 633 (2006) (**quoting Commonwealth v. Rivera,** 828 A.2d 1094, 1103-1104 n.10 (Pa. Super. 2003), **appeal denied,** 577 Pa. 672, 842 A.2d 406 (2004)) (emphasis in original). Hence, a clear distinction exists between the burden of proof that the Commonwealth is required to meet before an inculpatory statement is **admitted** versus the burden of proof which must be met before the fact-finder may **consider** the statement in assessing the defendant's guilt or innocence. **Commonwealth v. Reyes, supra** at 380-85, 681 A.2d at 727-29. Defendant's statement of errors complained of on appeal only questions application of the first phase of this rule.

With respect to the **admissibility** of extra-judicial inculpatory statements, the evidence used to establish the **corpus delicti** must be consistent with a crime, even though also consistent with an accident, so long as the evidence is more consistent with a crime than with an accident. **Id.** at 381, 681 A.2d at 727 (**citing, inter alia, Commonwealth v. Byrd,** 490 Pa. 544, 556, 417 A.2d 173, 179 (1980)). If the evidence proffered to support admission of an inculpatory statement is as consistent with an accident as it is with a crime, the quantum of proof required to admit the statement—by a preponderance of the evidence—has not been met. **See also, Commonwealth v. McMullen,** 545 Pa. 361, 370, 681 A.2d 717, 722 (1996). Stated differently, "[a]lthough independent corroborative evidence is insufficient if it is merely equally as consistent with accident as with crime, ... the prosecution has no duty to exclude the possibility of accident in order to establish the corpus delicti." **Commonwealth v. Byrd, supra** (citations omitted).

"In order to establish the **corpus delicti** of the crime of driving while intoxicated, the Commonwealth need only show that someone operated a motor vehicle while under the influence of alcohol." **Commonwealth v. Zelosko, supra** at 638, 686 A.2d at 826. This standard was met in **Zelosko** where the defendant was found lying on the road next to his running vehicle with an odor of alcohol and no other apparent operator nearby; also in **Commonwealth v. DeLeon** where following a one-car accident, with evidence of the vehicle having been driven in excess of the speed limit, the defendant was observed lying outside the vehicle with an odor of alcohol on his breath. 276 Pa. Super. 36, 40, 419 A.2d 82, 84 (1980). In **Commonwealth v. Young,** the following evidence was sufficient to establish the **corpus delicti** for DUI: defendant was seen standing on the driver's side of a vehicle registered in his name moments after the vehicle struck a utility pole, after which the defendant fled the scene on foot and was apprehended within an hour with the keys to the vehicle in his pocket, at which time defendant exhibited signs of intoxication, and was later found to have a BAC of .170%. **Commonwealth v. Young, supra** at 956-57, **appeal denied,** 591 Pa. 664, 916 A.2d 633 (2006). **See also, Commonwealth v. Johnson,** 833 A.2d 260 (Pa. Super. 2003) where the court determined that where two vehicles were involved in an accident, one of which was registered in defendant's name, and defendant was observed leaning against the driver's side door of this vehicle when the police arrived on scene shortly after the accident, a reasonable inference could be drawn that defendant drove his vehicle to where the accident occurred.

Compliance with the first step of the **corpus delicti** rule requires that the occurrence of a crime be independently evidenced before an inculpatory extra-judicial statement by the defendant will be admitted. Here, Defendant's vehicle was involved in a one-vehicle accident at approximately one o'clock in the morning with no adverse weather conditions present to explain why the driver would lose control of the vehicle in a 25-mile-per-hour speed zone. Officer Fedor testified that upon his arrival, shortly after the accident, Defendant was standing beside this vehicle on the driver's side and that the vehicle was registered in Defendant's name.

Officer Fedor also testified that he detected an odor of alcohol emanating from Defendant's facial area, and that, based upon his observations of Defendant, Defendant was under the influence of alcohol to a degree which rendered him incapable of operating a vehicle safely. Defendant's BAC, as determined from a blood draw taken approximately two hours after the accident, was 0.102%. Finally, Officer Fedor testified that Maryann Gile, the only other person present at the scene of the accident upon his arrival who was an occupant of the vehicle involved in the accident, was seated in another vehicle and was determined through his investigation to have been a passenger, not the driver, of Defendant's vehicle.

The lack of adverse weather conditions that could have contributed to the accident, the lateness of the hour, the nature of the vehicle crash, Defendant standing at the open driver's side door of his vehicle shortly after the accident, the vehicle being registered in Defendant's name, the clear inference that Defendant was the driver—no other person present at the accident scene fitting this description—and the odor of alcohol emanating from Defendant's breath are more consistent with a DUI than an accident.[9] As such, the **corpus delicti** for the charge of DUI was established by a preponderance of the evidence, thereby making Defendant's admission to Officer Fedor that he was the driver of the vehicle involved in the accident and had been drinking earlier that evening admissible in evidence.[10]

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[9] Defendant's claim that a third person, John, was driving the vehicle was clearly rejected by the jury, which it was free to do in passing upon Defendant's credibility.

[10] To the extent Defendant claims on appeal that evidence of his admission to owning the vehicle involved in the accident violated the **corpus delicti** rule, Defendant appears to be objecting to Officer Fedor's testimony that the registration for the vehicle, which Defendant provided at the officer's request, showed Defendant was the registered owner. First, Defendant never objected to the admissibility of this evidence when presented, rendering the issue waived. (N.T., 9/9/14, pp. 65-66); **Commonwealth v. Chambliss,** 847 A.2d 115, 120 (Pa. Super. 2004). Had the issue not been waived, whether a vehicle owner exhibiting the vehicle's registration card to an investigating officer upon request as required by statute (**see** 75 Pa. C.S.A. §6308(a) (duty of operator or pedestrian)) qualifies as a statement under the **corpus delicti** rule and, if so, whether such statement is inculpatory, would need to be decided. **See Commonwealth v. Verticelli,** 550 Pa. 435, 444, 706 A.2d 820, 824 (1998) (limiting the scope of the **corpus delicti** rule to inculpatory statements).

CONCLUSION

In accordance with the foregoing, we conclude Defendant's contentions are without merit. Accordingly, we respectfully request the court affirm the jury's verdict and deny Defendant's appeal.

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