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COMMONWEALTH of PENNSYLVANIA
vs. MICHAEL T. DEGILIO, Defendant

Criminal Law—Involuntary Deviate Sexual Intercourse/Indecent Assault—Element of Forcible Compulsion—Lack of Consent Alone Insufficient—Sufficiency of the Evidence—Weight of the Evidence—Competency to Stand Trial—Inability to Recall Key Events—Propriety of Post-Sentence Hearing to Determine Defendant's Competency

1. "Forcible compulsion" as an element of the offenses of involuntary deviate sexual intercourse and indecent assault is not limited to physical force. It describes not the type of force used—which can be physical, intellectual or psychological—but the effect of the force used on a complainant's will to resist, such that the complainant's participation is non-volitional. This standard is not met where there is a lack of consent alone; something more is required, that something being the use of force upon the will of the complainant to resist.

2. In contrast to the element of forcible compulsion, which looks to the conduct of the defendant, the element of consent focuses on the conduct of the complainant. Nevertheless the terms are not exclusive of one another: while the failure of a complainant to consent, by itself, does not satisfy the element of forcible compulsion, forcible compulsion encompasses within its meaning a lack of consent as interpreted by our case law.

3. The degree of force necessary to render a complainant's submission non-volitional is relative and rests on the totality of the circumstances of a given case. Factors to be considered are the respective ages of the victim and the accused, the respective mental and physical conditions of the victim and the accused, the atmosphere and physical setting in which the incident is alleged to have taken place, the extent to which the accused may have been in a position of authority, domination or custodial control over the victim, and whether the victim was under duress. Ultimately, the degree of force required is that which overcomes the victim's freedom of choice and compels a victim to engage in conduct against the victim's will.

4. The test for forcible compulsion is met where the relationship between the victim and Defendant is that of patient and treating psychologist; where the victim was only recently discharged from a mental health facility where she had been diagnosed with a major depressive disorder and was referred to the Defendant for outpatient therapy, where the victim was heavily medicated with sedative narcotics which caused her to be fatigued, lethargic and confused, and where the victim was vulnerable to being taken advantage of, all of which the Defendant was aware of at the time he sexually assaulted the victim; and where the Defendant assured the victim that the sexual relations between them was part of her treatment and for her benefit, which the victim believed and which in turn undermined her will to resist.

5. A criminal defendant is incompetent to stand trial if he is either substantially unable to understand the nature and object of the proceedings against him or to responsibly assist and participate in his own defense. Competency is measured according to whether the defendant has sufficient ability at the pertinent time to consult with counsel with a reasonable degree of rational understanding, and to have a rational as well as a factual understanding of the proceedings.

6. A defendant's inability or failure to recall key events surrounding the criminal offenses with which he has been charged, even to the extent of total amnesia, does not **per se** render him incompetent to stand trial.

7. On direct appeal from a conviction, the issue of the defendant's competency to stand trial is not waived, even though not previously raised before or during the defendant's trial.

8. Whether the Defendant was competent to stand trial was properly raised for the first time in Defendant's post-sentence motion, after the Defendant had been convicted and sentenced. Under these circumstances, the issue of the Defendant's competency was appropriately and timely decided upon evidence heard in a retrospective hearing.

NO. 232 CR 2010

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MEMORANDUM OPINION

NANOVIC, P.J.—April 24, 2015

On May 15, 2014, Michael T. Degilio ("Defendant") was convicted by a jury of involuntary deviate sexual intercourse,[1] indecent assault,[2] and indecent exposure.[3] In his Post-Sentence Motion filed on December 1, 2014, Defendant challenges principally the sufficiency of the evidence to establish forcible compulsion, a necessary element for conviction under the subsections of involuntary deviate sexual intercourse and indecent assault with which he was charged. Additionally, Defendant questions the weight of the evidence to support the verdict and asserts, for the first time, his competency to be tried. For the reasons which follow, we deny Defendant's Motion.

FACTUAL AND PROCEDURAL BACKGROUND

On February 24, 2009, Jane Doe[4] was alone with Defendant in his office in Mahoning Township, Carbon County, Pennsylvania.

[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).

[4] Out of respect for the victim's privacy, her true name has not been used in this published opinion. **Cf.** 42 Pa. C.S.A. §5988(a) (prohibiting disclosure of names of child victims of sexual or physical abuse by officers or employees of the court to the public and excluding any records revealing this information from public inspection).

Defendant was a practicing licensed psychologist with a doctoral degree in clinical psychology, and Mrs. Doe was his patient. This was their second time together and, because of what happened on that day, their last. The first time was February 20, 2009, when Mrs. Doe met Defendant for the first time as a new patient.

Mrs. Doe had been referred to Defendant by the Behavioral Health Unit of the Gnaden Huetten Memorial Hospital for outpatient therapy. (N.T., 5/12/14, p. 42; N.T., 5/14/14, pp. 5, 22-23, 69, 71, 73-76.) She was voluntarily admitted to that facility on February 14, 2009, following a domestic dispute with her husband which precipitated a nervous breakdown and culminated in her curling into a fetal position for eight hours. (N.T., 5/12/14, pp. 33-34, 36-37, 110; N.T., 5/13/14, pp. 37-38; N.T., 5/14/14, pp. 129-30, 207.) Mrs. Doe had a history of depression and anxiety and, while at the Behavioral Health Unit, was given Cymbalta for her depression and Klonopin for anxiety.[5] This was the first time she was prescribed Klonopin, and it caused her to be tired, confused and dazed. (N.T., 5/12/14, pp. 38-39.) Upon her discharge from the Behavioral Health Unit on February 18, 2009, copies of her medical records were forwarded to Defendant to whom she had been referred for further treatment. (N.T., 5/13/14, p. 106; N.T., 5/14/14, pp. 78-80, 102-103.) These records contained a discharge diagnosis of major depressive disorder. (Commonwealth Exhibit No. 6.)

At Mrs. Doe's initial meeting with Defendant on February 20, 2009, Defendant obtained some additional background information from her; told her she was "too beautiful" to be a patient at the Behavioral Health Unit; asked if she ever strayed in her marriage; stated that he enjoyed being with women; and remarked that if anything happened between them it would have to be kept quiet because his license was on the line. (N.T., 5/12/14, pp. 53-58.) During this meeting, Mrs. Doe also informed Defendant of the new medication she was on, Klonopin, and the dosage. (N.T., 5/12/14,

[5] Klonopin belongs to a class of medications known as benzodiazepines, also known as sedative hypnotics, which are used to calm people down, to control their anxiety. (N.T., 5/13/14, p. 27.) Benzodiazepines are known to cause fatigue, lethargy and confusion. (N.T., 5/13/14, pp. 27-28.) At high dosages, cognitive functions are impaired, including the capacity to concentrate, to process information, and to exercise judgment. (N.T., 5/13/14, pp. 30-31.)

pp. 38, 54.)[6] Defendant and Mrs. Doe were the only two people present at this meeting which lasted a little over an hour. (N.T., 5/12/14, pp. 51, 59, 115.) At the time of this meeting, Mrs. Doe was thirty-nine years of age and Defendant was forty years old.

When Mrs. Doe and Defendant met on February 24, 2009, Defendant had Mrs. Doe sit on a small sofa/love seat in his office, and Defendant sat down beside her. (N.T., 5/12/14, pp. 65, 67, 122.) Defendant again commented that if anything happened between them, he could lose his license. (N.T., 5/12/14, p. 66.) When Mrs. Doe asked if he could help her, Defendant assured her he would. (N.T., 5/12/14, p. 67.)

At this second meeting, Mrs. Doe told Defendant she was depressed and suicidal, also that the new medication she was taking was affecting her coordination and she was stumbling into walls. (N.T., 5/12/14, pp. 61, 66.) Defendant then began kissing Mrs. Doe on the lips, pulled the front of her shirt and bra down, and kissed her right breast. Next, Defendant, who had been sitting beside Mrs. Doe, stood up and faced her, pressing his knees against hers. Mrs. Doe remained seated on the love seat, the right side of her body boxed in by the armrest. Defendant then dropped his pants, exposed his genitals, placed Mrs. Doe's right hand on his penis,

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[6] Upon her discharge from the Behavioral Health Unit on February 18, 2009, Mrs. Doe was prescribed and began taking eight milligrams of Klonopin a day, two milligrams four times a day. (N.T., 5/12/14, pp. 38, 40, 43, 113; N.T., 5/13/14, pp. 37-38.) Dr. Ilan Levinson, a board-certified psychiatrist called by the Commonwealth, testified that this dosage was extremely high—in his opinion excessive—and would interfere with a person's judgment, verging on delirium, especially if the person was not accustomed to the medication. (N.T., 5/13/14, pp. 28-32.) As already stated, this was the first time Mrs. Doe was given Klonopin. (N.T., 5/12/14, pp. 37-38, 103; N.T., 5/13/14, pp. 25-26; N.T., 5/14/14, p. 212.)

Dr. Levinson testified that as a sedative hypnotic and at a dose of eight milligrams per day, the effects of Klonopin are almost like functioning under the influence of alcohol or sleeping medications, with symptoms of extreme confusion, fatigue and gait impairment. (N.T., 5/13/14, pp. 30, 52.) Mrs. Doe's friend, Tracy Sherwood, noticed these effects in Mrs. Doe within a few days after her discharge from the Behavioral Health Unit on February 18, 2009. (N.T., 5/13/14, p. 77.) Mrs. Doe described the effect of Klonopin on her as being "zoned out." (N.T., 5/12/14, p. 39.) Dr. Levinson further testified that when a person who suffers from depression takes a high dosage of Klonopin they are extremely vulnerable and susceptible to manipulation by a dominant person. (N.T., 5/13/14, pp. 31-32.)

and with one of his hands drew Mrs. Doe's head toward his erect penis where he had her perform oral sex on him. (N.T., 5/12/14, pp. 67-68, 73-78.) While this was occurring, Mrs. Doe repeatedly asked Defendant if he would help her and he said he was.[7] (N.T., 5/12/14, pp. 66, 75, 78.)

When questioned on direct examination, Mrs. Doe repeatedly stated she did not want what happened to happen. (N.T., 5/12/14, pp. 68, 73-74, 77-78.) She testified that Defendant's sexual contact with her was non-consensual, that she was confused, and that she did not resist because she thought Defendant was helping her. (N.T., 5/12/14, pp. 73-75, 77-80, 147, 155-56.) She also testified that after Defendant ejaculated he asked if she felt better and she said no. (N.T., 5/12/14, p. 81.) This second meeting, according to Mrs. Doe, also lasted a little over an hour.

DISCUSSION

Sufficiency of the Evidence

On these facts, as further discussed below, Defendant was convicted of involuntary deviate sexual intercourse and indecent assault. Both have "forcible compulsion" as an element of the offense. The offense of involuntary deviate sexual intercourse occurs, **inter alia,** when a person engages in deviate sexual intercourse with a complainant by forcible compulsion. 18 Pa. C.S.A. §3123(a)(1). Indecent assault occurs, **inter alia,** when a person has indecent contact with the complainant by forcible compulsion. 18 Pa. C.S.A. §3126(a)(2). The element of forcible compulsion describes not the type of force used—which can be physical, intellectual, or psychological—but the effect of the force used on the complainant's will

[7] At trial Defendant denied not only having sexual relations with Mrs. Doe, but also that he was even present in his office at the time. This alibi was corroborated by Bernadette Beckett, who testified that she and Defendant were together on the date and at the time Mrs. Doe claimed she was assaulted. Defendant's and Ms. Beckett's testimony was clearly not accepted by the jury, in part we suspect, because Mrs. Doe was able to identify a birthmark in the lower left quadrant of Defendant's abdomen, below his belt line and approximately three inches below his naval, which she testified she observed at the time of the assault. (N.T., 5/12/14, pp. 80-81, 214-15.) The existence of this birthmark was confirmed by the police upon a body examination of Defendant on July 7, 2009. (N.T., 5/12/14, pp. 171, 210, 213-14.)

to resist, such that the complainant's participation is non-volitional. **Commonwealth v. Rhodes,** 510 Pa. 537, 555, 510 A.2d 1217, 1226 (1986.) Forcible compulsion requires that the defendant by his conduct overcome the complainant's freedom of choice. **Id.**

In **Commonwealth v. Rhodes,** the Pennsylvania Supreme Court stated that forcible compulsion includes "not only physical force or violence, but also moral, psychological or intellectual force used to compel a person to engage in sexual intercourse against that person's will." **Id.** Lack of consent, by itself, is insufficient to prove forcible compulsion. Something more is required, that something being the use of force upon the will of the complainant to resist. Forcible compulsion requires that force be used—whether physical, intellectual, moral, emotional, or psychological (**see** 18 Pa. C.S.A. §3101 (Definitions))—and that such force renders the complainant's submission non-volitional. **Id.; Commonwealth v. Buffington,** 574 Pa. 29, 42, 828 A.2d 1024, 1031 (2003).

The degree of force required to meet this standard is relative and rests on the totality of the circumstances of a given case. Factors to be considered are

> the respective ages of the victim and the accused, the respective mental and physical conditions of the victim and the accused, the atmosphere and physical setting in which the incident was alleged to have taken place, the extent to which the accused may have been in a position of authority, domination or custodial control over the victim, and whether the victim was under duress.

Rhodes, supra at 556, 510 A.2d at 1226. That the victim resisted is not a prerequisite to proving forcible compulsion. **Id.;** 18 Pa. C.S.A. §3107.

The degree of physical force exercised by Defendant when he guided Mrs. Doe's head to his genitals, while minimal and not sufficient by itself to meet the standard of forcible compulsion, is nevertheless a factor to be considered given the circumstances of this particular victim and the facts and circumstances of the case. As noted in **Rhodes,** and applicable by analogy to the instant facts

where Mrs. Doe's ability to make clearheaded decisions and to fend for herself was compromised and not equal to that of Defendant,

> There is an element of forcible compulsion, or the threat of forcible compulsion that would prevent resistance by a person of reasonable resolution, inherent in the situation in which an adult who is with a child who is younger, smaller, less psychologically and emotionally mature, and less sophisticated than the adult, instructs the child to submit to the performance of sexual acts. This is especially so where the child knows and trusts the adult. In such cases, forcible compulsion or the threat of forcible compulsion derives from the respective capacities of the child and the adult sufficient to induce the child to submit to the wishes of the adult ('prevent resistance'), without the use of physical force or violence or the explicit threat of physical force or violence.

Id. at 557, 510 A.2d at 1227. **See also, Commonwealth v. Frank,** 395 Pa. Super. 412, 432, 577 A.2d 609, 619 (1990), **appeal denied,** 526 Pa. 629, 584 A.2d 312 (1990) (finding therapist-patient relationship, plus therapist's threat to sabotage eleven- or twelve-year-old patient's chances of adoption if he did not engage in sexual acts during therapy sessions, sufficient to establish psychological forcible compulsion).

The **sine qua non** of forcible compulsion is the use of superior force—physical, moral, psychological or intellectual—to compel another to do a thing against that person's will. **Commonwealth v. Ables,** 404 Pa. Super. 169, 176, 590 A.2d 334, 337 (1991), **appeal denied,** 528 Pa. 620, 597 A.2d 1150 (1991); **Rhodes, supra** at 552-53, 510 A.2d at 1225. Here, Defendant was clearly in a dominant position **vis-à-vis** Mrs. Doe. (N.T., 5/14/14, p. 135.) Defendant was a licensed psychologist, trained and experienced in his field. (N.T., 5/14/14, pp. 20-22.) Mrs. Doe had been referred to Defendant for outpatient treatment and she was in Defendant's office, alone with him, for these purposes. Defendant was the doctor in charge and Mrs. Doe the patient. Mrs. Doe had only recently been discharged from a mental health facility where she had been diagnosed with major depressive disorder, was heavily medicated for this condi-

tion, and was vulnerable to being taken advantage of, all of which Defendant was aware of at the time of the assault.[8]

Before Defendant met with Mrs. Doe, Mrs. Doe's record of medical treatment at the Behavioral Health Unit was forwarded to him, together with her diagnosis of severe mental depression. Mrs. Doe told Defendant that she was depressed and suicidal, that she was on new medication—Klonopin—and its dosage, and that this medication was affecting her coordination and balance. As a trained psychologist, Defendant knew that Mrs. Doe was susceptible to manipulation, that her mental functioning was diminished, and that she was desperate for help. Knowing this, Defendant not only flattered and flirted with Mrs. Doe, he virtually told her flat out that he wanted to have sexual relations with her and that this would make her feel better. Defendant had to know that a rational person in her right mind, seeking treatment for mental illness, would not believe such treatment included having sexual relations with her doctor, yet, this is exactly what Mrs. Doe conveyed when she submitted to Defendant's advances, without resistance, asking at the same time, "will this help me?"

Mrs. Doe was confused and insecure. She was assured by the Defendant that he cared for her, and she trusted and believed the Defendant when he told her he would help her. She viewed the Defendant as a professional person who knew what he was doing, and she submitted to his demands, behind closed doors, at a time when she was clearly vulnerable to being taken advantage of and was physically restricted in her ability to walk away, accept-

[8] Dr. Levinson testified that the combined effects of Mrs. Doe's severe depression and high dosage of Klonopin made her extremely vulnerable and susceptible to manipulation. On this point, which clearly implicates her will to resist, Dr. Levinson testified:

> One of the core symptoms of severe depressive state is that your self-esteem is very low. You look at yourself, at the world, at the future through dark glasses. You are not sure any more about your decisions. You're not sure about what you should do, what steps you should take. So anybody that comes across as strong and confident and knows what he's doing can easily manipulate you. If you add to this the fact that you're drugged by a medication, being overdosed by a medication and completely delirious, then obviously, you're more vulnerable, more susceptible to being taken advantage of by others.

(N.T., 5/13/14, pp. 31-32.)

ing, beyond rational comprehension, Defendant's assurances that gratifying Defendant sexually would help in her treatment.

We agree with Defendant's position that proof of "forcible compulsion" requires proof of "something more" than mere lack of consent, but disagree that this something more was not proven. **See Buffington, supra** at 42, 828 A.2d at 1031-32; **Commonwealth v. Berkowitz,** 537 Pa. 143, 149-50, 641 A.2d 1161, 1164-65 (1994); **see also, Commonwealth v. Smolko,** 446 Pa. Super. 156, 164, 666 A.2d 672, 676 (1995) ("Where there is a lack of consent, but no showing of either physical force, a threat of physical force, or psychological coercion, the 'forcible compulsion' requirement ... is not met."). [9]

In arguing that Mrs. Doe consented to his advances, that she allowed them to occur, and that she voluntarily participated, Defendant asks us to ignore why Mrs. Doe was in his office, the nature of the relationship between them, and that her ability to exercise normal judgment was severely impaired by her mental illness and the medication she was taking. Though not as palpable as physical force, or the threat of physical force, the vulnerability of an individual in deep depression is something Defendant was acutely aware of given his profession. And, as already noted, the test for forcible compulsion takes into account the particular circumstances and vulnerability of the victim. **See Rhodes, supra** (finding forcible compulsion based upon the child's physical and emotional helplessness in the face of her neighbor's commands, especially when the child knew and trusted the adult neighbor); **Commonwealth v. Smolko, supra** (finding forcible compulsion where the defendant performed oral sex on a victim who suffered from Pelizaeus-Merzbacher Syndrome and was confined to a wheelchair, and who was unable to physically defend himself or otherwise stop the assaults which the victim did not want to occur; the victim was vulnerable, the defendant in a position of authority,

[9] In its opinion in **Buffington,** the Pennsylvania Superior Court explained that whereas the element of forcible compulsion looks to the conduct of the defendant, the element of lack of consent implicates the conduct of the complainant. **Commonwealth v. Buffington,** 786 A.2d 271, 274 (Pa. Super. 2001), **aff'd,** 574 Pa. 29, 828 A.2d 1024 (2003). We agree with this assessment, noting, however, that while the absence of consent alone will not satisfy the element of forcible compulsion, forcible compulsion encompasses within its meaning a lack of consent as interpreted by our case law. **See Commonwealth v. Buffington,** 574 Pa. 29, 42, 828 A.2d 1024, 1031 (2003).

and the victim so physically deficient as to be unable to exert his will to resist the sexual demands of the defendant).

In testing the waters during his first appointment with Mrs. Doe and then crossing the line in the second appointment, Defendant took advantage of Mrs. Doe's weakened condition and emotionally and psychologically compelled her to engage in acts against her will. **Cf. Commonwealth v. Gonzalez,** 109 A.3d 711 (Pa. Super. 2015) (finding that notwithstanding the existence of a dating relationship and the initial consensual nature of the parties' physical contact with one another—kissing and touching each other's genitals over their clothing—and even though the physical force used was minimal, the element of forcible compulsion was met given the victim's vulnerability as one suffering from cerebral palsy and her verbal request that defendant stop).[10]

A challenge to the sufficiency of the evidence is measured by viewing the evidence admitted at trial in a light most favorable to the Commonwealth as the verdict winner and accepting as true all evidence and reasonable inferences drawn therefrom which, if believed, the jury could have relied upon in reaching its verdict. It is from this perspective that the court must determine whether the evidence is sufficient to support the verdict. **Id.** at 716. When viewed in this light, as set forth above, we find the evidence sufficient to support the verdict.[11]

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[10] We reject Defendant's suggestion that because Defendant was not charged with either sexual assault (18 Pa. C.S.A. §3124.1) or indecent contact without consent (18 Pa. C.S.A. §3126(a)(1)), both of which require only that the victim did not consent, but with violating Sections 3123(a)(1) and 3126(a)(2) of the Crimes Code which go one step further and require proof of forcible compulsion, Defendant's convictions are not sustainable. While we note that inherent in a finding of forcible compulsion is an absence of consent, the fact that Defendant may also have been charged with these other offenses and been convicted does not preclude a conviction under Sections 3123(a)(1) and 3126(a)(2) where the elements of such offenses have been proven beyond a reasonable doubt. **Cf. Commonwealth v. Rhodes,** 510 Pa. 537, 561, 510 A.2d 1217, 1229 (1986).

[11] In paragraph 29 of Defendant's Post-Sentence Motion, Defendant contends the evidence was insufficient to support his conviction of indecent exposure under 18 Pa. C.S.A. §3127(a). This Section provides that "a person commits indecent exposure if that person exposes his ... genitals ... in any place where there are present other persons under circumstances in which he ... knows or should know that this conduct is likely to offend, affront or alarm." Because we believe it evident that a doctor exposing his genitals to a patient during treatment is conduct likely to offend, affront or alarm that patient, no further discussion of this issue is necessary.

Weight of the Evidence

In contrast, a challenge to the weight of the evidence requires a review of all of the evidence admitted at trial and a determination whether the verdict is so contrary to the evidence as a whole so as to shock the court's sense of justice. **Commonwealth v. Boyd,** 73 A.3d 1269, 1274-75 (Pa. Super. 2013) **(en banc).** The role of the trial judge in this review is to determine whether certain facts are so clearly of greater weight than others that for the jury to have ignored them or to give them equal weight with other facts is to deny justice. **Gonzalez, supra** at 723. Because an appellate court's review of a trial court's order denying a weight of the evidence claim is a review of the trial court's exercise of discretion in reaching its decision, rather than a direct review of the evidence and a determination on its own as to whether the jury abused its discretion in evaluating and weighing the evidence, the denial of a motion for new trial on this basis is one of the most unassailable on appeal. **Id.; Commonwealth v. Diggs,** 597 Pa. 28, 39, 949 A.2d 873, 879-80 (2008).

We have no doubt that the evidence presented in this case was more than sufficient to justify an acquittal had the jury so decided. The jury could have found that the police investigation was inadequate and incomplete and that, as a result, it was in doubt as to what actually happened. (N.T., 5/12/14, pp. 89, 138-39, 237-42, 252-55; N.T., 5/13/14, pp. 89-90, 99-100.) The jury could have accepted Defendant's testimony that Mrs. Doe never appeared for her appointment on February 24, 2009, that he never saw her that day, and that he never assaulted her. The jury could have believed Rebecca Kadingo, the mother of a patient Defendant was treating, who testified that she was present in Defendant's office on February 20, 2009, when Mrs. Doe arrived for her appointment; that Defendant handed Mrs. Doe some paperwork to fill out which she worked on for five to ten minutes; that as Mrs. Doe was completing this paperwork, Defendant told Mrs. Kadingo about a skin tag near his belt line he was having checked out; that she sat in the waiting room outside Defendant's office whose door was opened by several inches while he met inside, in private, with Mrs. Doe; that she overheard some of what occurred between them; that at one point she entered Defendant's office to get bandages for

a bleeding finger; that she heard no suggestive or inappropriate solicitations made by Defendant; and that at the end of her session with Defendant, Mrs. Doe was upset and stomped out of the office like a little two-year-old. (N.T., 5/13/14, pp. 211-17, 237-38.) The jury could also have been persuaded by Ms. Beckett who, without skirting detail, testified of a sexual rendezvous between her and Defendant on February 24, 2009, at the very time when Mrs. Doe testified Defendant was with her. (N.T., 5/13/14, pp. 150, 152-54.) The jury could also have legitimately questioned the veracity of Mrs. Doe, finding that given her state of mind and the effect Klonopin can have on a person's ability to think clearly, she either imagined having been attacked or misinterpreted what actually happened. (N.T., 5/13/14, p. 118; N.T., 5/14/14, pp. 202-204, 220.)

But, this is not the standard by which to evaluate a challenge to the weight of the evidence. "A verdict is not contrary to the weight of the evidence because of a conflict in testimony or because the reviewing court on the same facts might have arrived at a different conclusion than the factfinder [sic]." **Commonwealth v. Morales,** 625 Pa. 146, 164, 91 A.3d 80, 91 (2014) (citation omitted). The jury had every right to make its own assessment of credibility and to disbelieve any or all of Defendant's evidence and reject the inferences therefrom.

Without question, the police investigation could have been more thorough, but that does not mean something more would have been found or that Mrs. Doe's version of what occurred would have been contradicted. The jury had a right to judge Defendant's testimony taking into consideration that his professional license was on the line if convicted and that a conviction would likely result in imprisonment. The jury may well have found that the timing of Defendant in providing Mrs. Kadingo's name to the police, within five hours of when he was interviewed by the police on July 7, 2009, and after speaking with Mrs. Kadingo who reminded him that she was in the office on February 20, 2009, was suspicious (N.T., 5/12/14, pp. 218-20; N.T., 5/13/14, pp. 234-35, 241-42; N.T., 5/14/14, pp. 41, 151)[12] and that her testimony was too convenient: did it really make

[12] For instance, Mrs. Kadingo testified that she contacted the Defendant to let him know she was in the office that day only after she learned of his arrest. (N.T., 5/13/14, pp. 231, 241-42.) Defendant was not arrested until January 28, 2010.

sense that an experienced psychologist would leave the door to his office open two to three inches while meeting with a patient—here, Mrs. Doe—thereby allowing Mrs. Kadingo to eavesdrop on what was being said, or that Mrs. Kadingo would knowingly interrupt Defendant while he was meeting with a patient inside his office, or that Defendant would mention his skin tag to Mrs. Kadingo in the presence of Mrs. Doe whom he had never met before and was in his office for the first time. (N.T., 5/13/14, pp. 213-17, 223-24, 238-39; N.T., 5/14/14, pp. 58-59, 63-65, 151-54, 156-57, 159.)[13] Similarly with respect to Ms. Beckett: did it really make sense that a spur-of-the-moment liaison would be documented in her office calendar, rather than a more likely explanation, that as a former paramour for two years, Ms. Beckett still had strong feelings for Defendant and was willing to help him at all costs. (N.T., 5/13/14, pp. 147-49, 160-61, 167-68, 176-82, 195.)

As to Mrs. Doe, her sincerity was apparent. She readily admitted that she was depressed, suicidal, confused and heavily medicated at the time of the assault.[14] Further, that after she was readmitted to the Behavioral Health Unit on February 26, 2009, and none of the staff believed her story, she had self-doubts and commented, "But it seemed so real." (N.T., 5/12/14, pp. 138-40; N.T., 5/13/14, pp. 67, 118.) More importantly, Mrs. Doe also testified that as she got better and her dosage of Klonopin was reduced, her mind cleared, and not only could she recall in greater detail what had happened, she was certain it did happen. (N.T., 5/12/14, pp. 91, 97, 143-45, 204, 206; N.T., 5/13/14, pp. 64, 88-89.) The

[13] At any rate, it was clear that Mrs. Kadingo wanted to help Defendant. (N.T., 5/14/14, p. 170.)

[14] Dr. Levinson, who was Mrs. Doe's treating psychiatrist after the assault by Defendant, testified that for a person who is not accustomed to Klonopin, as was the case with Mrs. Doe, he "can become extremely confused, delirious, tired, sleeping a lot, can have gait impairments." (N.T., 5/13/14, p. 30.) In further explanation, Dr. Levinson testified:

> Eight milligrams of Kloponin is extremely high dosage, way above the recommended dose. It can cause confusion, sedation, cognitive impairments and even gait impairments. Ms. Doe reported to me that she had all of these symptoms. She said that she occasionally bumped into objects. She said that she was tired all the time. She said that it was hard for her to stay alert. I believe that this combination of symptoms affected her capacity to function in multiple levels, including taking care of her children.

(N.T., 5/13/14, p. 52.)

sincerity of this belief was evident in her resulting diagnosis of post-traumatic stress disorder specifically related to the assault by Defendant and her readmission to the Behavioral Health Unit on February 26, 2009. (N.T., 5/13/14, pp. 23-24, 26; N.T., 5/14/14, pp. 205-206.)

Giving further credence to Mrs. Doe was her immediate reporting of what happened to her close friend, Tracy Sherwood, within an hour of when she left Defendant's office on February 24, 2009. (N.T., 5/12/14, pp. 83-84, 133; N.T., 5/13/14, pp. 71, 93-94.) Mrs. Sherwood testified of meeting with Mrs. Doe on that date, of Mrs. Doe telling her what had happened, of Mrs. Doe feeling betrayed and guilty at the same time, and of her own observations of Mrs. Doe whom she described as a mess: shaking, confused, and distraught, with heavy breathing and slurred speech. (N.T., 5/13/14, pp. 83-86.)

While perhaps this by itself may not have been enough to convince the jury of the validity of what Mrs. Doe claimed, hard evidence existed to support her accusations. Mrs. Doe recalled Defendant's birthmark which was below his belt line, near his genitals. She knew where it was, its shape and its color. (N.T., 5/12/14, pp. 213-14.) This was solid evidence to back Mrs. Doe's account of what occurred and the existence of this birthmark was confirmed by the police on their examination of Defendant.

That the jury believed Mrs. Doe over Defendant and accepted her version of what occurred on February 24, 2009, does not shock our sense of justice. That the jury found that Defendant's sexual assault of Mrs. Doe was the result of forcible compulsion, that Mrs. Doe was severely compromised at the time, that she believed Defendant when he told her the sexual relationship was therapeutic, and that Defendant exercised moral, psychological and intellectual force in taking advantage of Mrs. Doe is supported by the evidence.

Competency to Stand Trial

Finally, Defendant contends that he should never have gone to trial in May 2014, that he was unable to effectively assist his counsel in his defense, and that, when he testified, he was cognitively impaired. As a consequence, Defendant asserts he had difficulty remembering facts, concentrating on what was being asked

and articulating his responses, at times contradicting testimony of other witnesses favorable to his defense. The cause of these problems, according to Defendant, was hypothyroidism, which was not diagnosed until after trial. Legally, Defendant claims he was incompetent to stand trial.[15]

A criminal defendant is incompetent to stand trial if he is either unable to understand the nature of the proceedings against him or to participate in his own defense. **Commonwealth v. Brown,** 582 Pa. 461, 490-91, 872 A.2d 1139, 1156 (2005). The defendant is presumed competent and the burden of showing otherwise, by a preponderance of the evidence, is upon the defendant. **Id.** Here, Defendant only challenges his ability to assist and participate in his own defense, not his understanding of the nature or object of the proceedings against him. This challenge fails for the reasons which follow.

Dr. Megan Leary, a board-certified neurologist, first saw Defendant on November 7, 2013, when she was assisting Defendant in his recovery from the effects of a stroke he suffered in May 2013. Dr. Leary testified that on May 21, 2014, one week after the jury's verdict, Defendant contacted her office complaining of problems he was having when communicating with others: specifically, Defendant reported having trouble processing and understanding what was being said to him and in articulating what he wanted to say in response. This problem, as described by Defendant, first began shortly after he last met with Dr. Leary on April 4, 2014, and gradually worsened thereafter.

At first, Dr. Leary's staff thought Defendant's cognitive difficulty was a side effect of anti-seizure medication he was taking, however, after the results of blood tests ordered by Defendant's primary care physician which were taken on June 28, 2014, and July 15, 2014, reported TSH ("Thyroid Stimulating Hormone") levels of 18.22 and 23.26, respectively, Defendant was diagnosed

[15]Although raised for the first time in Defendant's Post-Sentence Motion, this issue has not been waived. The Pennsylvania Supreme Court has consistently held that "the issue of whether a defendant was competent to stand trial is an exception to the waiver rule in cases on direct appeal." **Commonwealth v. Brown,** 582 Pa. 461, 490-91, 872 A.2d 1139, 1153 (2005) (citations omitted).

with hypothyroidism.[16] Dr. Leary testified that confusion and poor concentration are known symptoms associated with hypothyroidism and that within one to two weeks of being given medication for this condition, Defendant reported improved concentration and ability to communicate. Ultimately, Dr. Leary opined that Defendant's difficulty in concentrating and focusing at trial had a medical basis (**i.e.,** hypothyroidism), and that this affected his ability to participate and assist with his defense.[17]

On cross-examination, Dr. Leary acknowledged that persons with hypothyroidism do not necessarily experience confusion and poor concentration, and that because the symptoms are subjective, their existence depends on reliable self-reporting.[18] She also testified that when confusion and poor concentration is due to hypothyroidism, the effect is widespread, not discrete, and generally does not fluctuate from day to day. Consequently, the testimony of Defendant's trial counsel, John Waldron, Esquire, who testified that Defendant exhibited no difficulty in responding to questions or recalling facts when he reviewed Defendant's testimony with him the evening before Defendant testified, as well as Defendant's ability while testifying at trial to recall in detail many and varied facts, and to regain his train of thought after some initial confusion, dictates against hypothyroidism as a cause of any shortcomings in Defendant's testimony. Moreover, Attorney Waldron testified that Defendant was medically cleared for trial by Dr. Leary.[19]

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[16] Dr. Leary testified that the normal range for TSH is 0.56 to 4.0. According to Dr. Leary, because Defendant's levels were more than four times normal, this was suggestive of hypothyroidism.

[17] Significantly, Dr. Leary made a distinction between encephalopathy, a confused state caused by metabolic problems, which can wax and wane over time, and memory loss which is constant. Dr. Leary attributed Defendant's presumed inability to focus and pay attention to encephalopathy. Yet, a close reading of Defendant's testimony shows Defendant was not confused by the questions he was asked. When he exhibited difficulty, it was in recalling what had happened or remembering what he had already said.

[18] In this regard, it is not insignificant that Defendant is a practicing psychologist, and that his field of practice is clinical and forensic psychology. (N.T., 5/14/14, pp. 20-22.) As such, Defendant was familiar with the legal standard for competency.

[19] Defendant advised Attorney Waldron in writing of this medical clearance by e-mail dated January 21, 2014. (**See** Commonwealth Exhibit No. 2 introduced at the hearing on Defendant's Post-Sentence Motion held on February 4, 2015.) In Defendant's Post-Sentence Motion, Defendant also acknowledged that he was medically cleared for trial. (Post-Sentence Motion, paragraph 41.) However, Dr. Leary denied that she ever medically cleared Defendant for trial or that she was even asked to do so.

Attorney Waldron is an experienced, respected criminal defense attorney. He testified that he met and discussed Defendant's case with Defendant multiple times prior to trial, that Defendant was active and instrumental in trial preparation, that he noticed no limitations in Defendant's ability to assist or participate in his defense, that Defendant was active in the jury selection which occurred on May 5, 2014, and that during the two days of trial testimony which preceded Defendant taking the stand, and even after Defendant had testified, Defendant never mentioned that he was having difficulty concentrating or following what was occurring.[20] Instead, Attorney Waldron noted what is common knowledge among experienced trial counsel, that sometimes, regardless of the defendant's knowledge of the facts, and regardless of preparation, the defendant freezes on the witness stand, is unable to recall what occurred when asked, or even to remember what he has previously said in response to the same question, and says things that are better left unsaid.[21]

In reviewing Defendant's testimony, it is true that Defendant did not know the answers to certain questions asked and that in certain instances his testimony did not support and at times contradicted the testimony of other defense witnesses which was favorable to him. (N.T., 5/13/14, pp. 175, 187-91, 213, 240; N.T., 5/14/14, pp. 27, 139-40, 151, 154, 157-59, 175-76.) It is also true that more than five years had passed from the events on which Defendant's prosecution was based and that a natural lapse in memory could be expected, and that where contradictions occurred, Defendant may well have been more accurate than the witness whose testimony was contradicted. (N.T., 5/14/14, pp. 135, 140, 163, 168.)[22] As to being confused, this certainly was not the case throughout

[20] The first time Attorney Waldron learned that Defendant claimed he was having difficulty at trial was after the verdict was returned and Attorney Waldron was advising Defendant of his right to appeal.

[21] Defendant's wife, also a forensic psychologist, was present when Defendant testified at trial. She too was disappointed in Defendant's demeanor and the manner in which he testified. At the hearing held on Defendant's Post-Sentence Motion, Mrs. Degilio testified that she did not question Defendant's competency at the time, knowing that he had been medically cleared for trial, but attributed his poor performance to the stress of trial.

[22] A defendant's inability or failure to recall key events surrounding the criminal offenses with which he has been charged, even to the extent of total

Defendant's entire testimony, and on several occasions when it did occur, Defendant demonstrated the ability to catch himself and get back on track. (N.T., 5/14/14, pp. 42-44.) Even beyond this, at times Defendant sought to clarify statements he had given five years earlier which may have been confusing when made. (N.T., 5/14/14, pp. 136-37.) In addition, as a general statement, Defendant had more difficulty answering questions on cross-examination than he did on direct, which is natural and to be expected of any witness. (N.T., 5/14/14, pp. 26, 154.)

The Commonwealth called Dr. Frank Dattilio as its expert to evaluate Defendant's competence to be tried. Dr. Dattilio is a licensed and board-certified psychologist; Dr. Dattilio's practice is in clinical and forensic psychology.[23] After reviewing Defendant's trial testimony, as well as Dr. Leary's medical records, and interviewing defense counsel, Dr. Dattilio concluded that while Defendant experienced difficulty, at times, in answering questions and recalling events, a review of when this occurred and the circumstances did not support a finding that Defendant was "substantially unable to understand the nature or object of the proceedings against him or to participate and assist in his defense." 50 P.S. §7402(a) (Definition of Incompetency). Finding Dr. Dattilio to be credible and his reasoning persuasive, we likewise conclude that because Defendant was able to prepare and participate effectively with his counsel in

amnesia, does not **per se** render him incompetent to stand trial. **Commonwealth v. Stevenson,** 64 A.3d 715, 720-21 (Pa. Super. 2013), **appeal denied,** 622 Pa. 759, 80 A.3d 777 (2013).

> Absent evidence of a mental disability interfering with the defendant's faculties for rational understanding, it is settled that mere vacuity of memory is not tantamount to legal incompetence to stand trial. It is only where the loss of memory [affects] or is accompanied by a mental disorder impairing the amnesiac's ability to intelligently comprehend his position or to responsibly cooperate with counsel that the accused's guaranties to a fair trial and effective assistance of counsel are threatened and therefore incapacity to stand trial may be demonstrated.

Id. at 720 (**quoting Commonwealth v. Epps,** 270 Pa. Super. 295, 411 A.2d 534, 536 (1979)).

[23] Dr. Dattilo testified he has evaluated the legal competence of numerous criminal defendants and been qualified in multiple jurisdictions to provide expert opinion evidence with respect to such evaluations. In contrast, Dr. Leary readily admitted that she was not familiar with the legal standards for determining a criminal defendant's competency to stand trial.

his defense and possessed a rational and factual understanding of the proceedings, he was competent. **Dusky v. United States,** 362 U.S. 402 (1960). **See also, Commonwealth v. Hughes,** 521 Pa. 423, 555 A.2d 1264 (1989).

CONCLUSION

The quality and quantity of force necessary to constitute "forcible compulsion" under Chapter 31 of the Crimes Code is relative and depends upon the facts and particular circumstances of each case. Such force is not limited to physical force, but encompasses, as well, moral, emotional, psychological and intellectual force if used to compel a person to engage in conduct against that person's will. The evidence, when viewed most favorably to the Commonwealth, was sufficient for the jury to conclude not only that Defendant was peculiarly aware of Mrs. Doe's vulnerability to emotional and psychological pressure, but that he used that knowledge to prey upon her, taking advantage of his position of authority and betraying the trust and confidence she rightly reposed in him, so as to compel and coerce her to engage in oral sex against her will. Nor, when viewed in its entirety, did the jury abuse its discretion in reaching this conclusion.

Separate from Defendant's challenge to the sufficiency and weight of the evidence to support his convictions, whether Defendant was competent to stand trial, an issue Defendant raised for the first time after the jury reached its verdict, was not waived and could be decided in a retrospective hearing. **Commonwealth v. Santiago,** 579 Pa. 46, 64, 855 A.2d 682, 692-93 (2004). Here, the relatively short time period between trial and the hearing held on this issue, the nature of the cause of the incompetency claimed, the content of statements made by Defendant at trial, the availability of Defendant's medical records shortly before and shortly after trial, and the availability of witnesses, both expert and non-expert, offering testimony regarding Defendant's mental status at the time of trial, all favor this review. As such, the hearing held on Defendant's Post-Sentence Motion challenging his competency to stand trial was both appropriate and timely.

Having heard the evidence presented on this issue, and having thoroughly reviewed Defendant's trial testimony and been pres-

ent when this testimony was presented, we are not convinced that Defendant was legally incompetent to be tried or to be called as a witness on his own behalf. Defendant's impairment, such as it was, did not affect to any significant degree his understanding of the proceedings or his ability to participate and assist in his defense.

REBECCA A. URBAN DIETER, Plaintiff vs.
GARY G. DIETER, Defendant

Civil Law—Domestic Relations—Divorce Complaint—Count for APL—Dismissal of APL Claim After Transfer to Domestic Relations Office—Dismissal Erroneously Based Upon Determination That the Parties Were Not Married—Effect on Divorce Action—Application of Collateral Estoppel

1. The failure to file a certificate of marriage after the parties were legally married in Texas under the authority of a valid marriage license did not void the marriage under Texas law or transform the ceremonial marriage which was held into an informal marriage.

2. Wife's claim for alimony **pendente lite** contained in her divorce complaint was erroneously dismissed after hearing before the domestic relations hearing officer on the basis that the parties were not married. The hearing officer incorrectly found that under Texas law the failure to file a certificate of marriage following a valid marriage ceremony required the marriage to be treated as an informal marriage, one whose occurrence is in question, and that because no legal proceeding to prove such a marriage was commenced within two years of the parties' separation, as is required under Texas law for an informal marriage, the parties were rebuttably presumed not to have married. In consequence of this determination, the wife's claim for alimony **pendente lite** was dismissed without prejudice.

3. The doctrine of collateral estoppel operates to prevent a question of law or issue of fact which has previously been litigated and fully determined in a court of competent jurisdiction from being relitigated in a subsequent suit.

4. For collateral estoppel to apply, five elements must be established: (1) the issue decided in the prior case was identical to the issue now presented; (2) a final judgment on the merits was entered; (3) the party against whom the prior decision is raised as a binding determination in the current proceedings was a party or in privity with a party in the prior case; (4) the party against whom the issue was decided had a full and fair opportunity to litigate the issue in the prior case; and (5) the determination of the issue in the prior case was essential to the judgment reached.

5. A claim for interim relief under Section 3702 of the Divorce Code, which encompasses a claim for alimony **pendente lite,** is interlocutory and thus not reviewable until final disposition of the case.

6. Because the dismissal of wife's claim for alimony **pendente lite** was interlocutory and the order confirming this dismissal expressly stated it was without prejudice, the critical finding which underlaid this dismissal—that no valid mar-

riage existed between the parties—was not part of a final judgment on the merits and could not form the basis for dismissing wife's complaint in divorce under the doctrine of collateral estoppel.

NO. 13-0436

JOSEPH G. GRECO, JR., Esquire—Counsel for Plaintiff.

ARLEY L. KEMMERER, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—May 22, 2015

In these divorce proceedings, the Plaintiff, Rebecca A. Urban Dieter, seeks to end a marriage which the Defendant, Gary G. Dieter, contends never began. A hearing to address this fundamental question—whether the parties were married—was held on November 24, 2014. At this hearing two issues were raised which we address below: (1) did the parties celebrate a legally binding marriage in Texas on July 13, 2002, and (2) is the Plaintiff estopped from relitigating this first issue by a previous order dismissing Plaintiff's claim for alimony **pendente lite** on the basis that the parties were not married.

PROCEDURAL AND FACTUAL BACKGROUND

On July 13, 2002, the parties exchanged wedding vows at a marriage ceremony performed by a minister from Woodlands, Texas. (N.T. pp. 5, 28-29, 36, 40, 51, 71-72.) Although a marriage license was obtained from the Harris County Clerk's office in Houston, Texas for this marriage, no marriage certificate was subsequently filed with the State to confirm that the marriage had been performed. Plaintiff testified that the minister who performed the ceremony was to file a marriage certificate but failed to do so, telling the Plaintiff shortly after the wedding that he had lost the paperwork. (N.T., pp. 73-74.)

Both before and after the marriage ceremony, the parties cohabited with one another in Texas. The parties began living together in 2000 and separated in 2008. (N.T., pp. 4, 8, 27.) During this time, Plaintiff gave birth to the parties' son on October 24, 2007.

Although the parties have at times held themselves out as husband and wife since the marriage ceremony, they have not been consistent in this regard. The parties filed joint state and federal income tax returns for the years 2002 through 2006, but as single

persons since then. (N.T., pp. 12, 35, 50, 52-54, 87-88.) In addition, Defendant listed Plaintiff as his wife on employer-provided health insurance for the years 2000 through 2008, and in 2013, the Plaintiff named herself as beneficiary on pension benefits Defendant was to receive from his union. (N.T., pp. 32-34, 46, 75.) However, in February 2011 Plaintiff applied for welfare benefits in Pennsylvania listing her marital status as single and also told a neighbor in 2002 that she was not married to Defendant. Further, since 2002, Plaintiff has at various times used Urban, Dieter, and Urban-Dieter as her surname. (N.T., pp. 5-6, 85-87, 96, 99.)

Soon after the parties' separation in 2008, Defendant moved to Pennsylvania with the parties' son, and Plaintiff remained in Texas. (N.T., p. 10.) In December 2010, Plaintiff also moved to Pennsylvania where she at first lived with Defendant, but moved into separate housing after approximately two months. (N.T., pp. 9-10, 47-48, 80.)

On March 8, 2013, Plaintiff filed a complaint for divorce against Defendant wherein she included a claim, **inter alia,** for alimony **pendente lite.** This claim for alimony was referred to a hearing officer, who, following a hearing, filed a report on December 16, 2013, in the Domestic Relations Office. In this report, the Hearing Officer determined that because there existed no record of the parties' marriage in Texas, a determination first had to be made whether the parties were legally married. In making this determination, the Hearing Officer relied upon Section 2.401(a)(2) of the Texas Family Code which concerns proof of informal marriages.[1] As

[1] As affects these proceedings, Section 2.401 of the Texas Family Code entitled "Proof of Informal Marriage" provides, in relevant part, as follows:

> (a) In a judicial, administrative, or other proceeding, the marriage of a man and woman may be proved by evidence that:
>
> (1) a declaration of their marriage has been signed as provided by this subchapter; or
>
> (2) the man and woman agreed to be married and after the agreement they lived together in this state as husband and wife and there represented to others that they were married.
>
> (b) If a proceeding in which a marriage is to be proved as provided by Subsection (a)(2) is not commenced before the second anniversary of the date on which the parties separated and ceased living together, it is rebuttably presumed that the parties did not enter into an agreement to be married.

Tex. Fam. Code Ann. §2.401(a), (b).

relevant to these proceedings, this section requires that an informal marriage be proven in a judicial, administrative, or other proceeding, by evidence that "the man and woman agreed to be married and after the agreement they lived together in [Texas] as husband and wife and there represented to others that they were married."

Finding that there was ample evidence that the requirements of Section 2.401(a)(2) were met but that because a proceeding to prove the existence of this marriage had not been commenced within two years of the date on which the parties separated, the Hearing Officer concluded he was constrained by the statutory presumption set forth in Section 2.401(b) of the Texas Family Code to find that the parties were not married. Section 2.401(b) states:

> If a proceeding in which a marriage is to be proved as provided by Subsection (a)(2) is not commenced before the second anniversary of the date on which the parties separated and ceased living together, it is rebuttably presumed that the parties did not enter into an agreement to be married.

Under this reasoning, the Hearing Officer found that no valid marriage existed between the parties and recommended that because the Defendant had no marital duty to support the Plaintiff, the claim for alimony **pendente lite** should be dismissed.

By Interim Order dated December 16, 2013, the Honorable Judge Joseph J. Matika of this court ordered, **inter alia,** that

> Since it is found that there was no valid marriage between the parties, and the Defendant has no duty to support another individual who is not the Defendant's spouse, the matter is dismissed.

(Defendant's Exhibit No. 3, Order dated 12/16/13.) By Order dated January 8, 2014, and filed of record in the divorce proceedings, Judge Matika ordered that

> the complaint for support filed [ ] in the above-captioned matter is dismissed without prejudice due to: Since it is found that there was no valid marriage between the parties, and the Defendant has no duty to support another individual who is not the Defendant's spouse, the marriage is dismissed.
>
> This case is to close.

(Order dated 1/8/14.)

DISCUSSION

Existence and Enforceability of Marriage

Contrary to the Hearing Officer's findings and recommendation, we find the parties were married on July 13, 2002.[2] Not only was this ceremony performed by a religious minister and vows exchanged with family and friends of both parties in attendance, the marriage was performed under the authority of a valid license issued on June 26, 2002, by the State of Texas. (Defendant's Exhibit No. 1; N.T., p. 73.)[3] Pictures of the married couple on their wedding day and while on their honeymoon in Cancun, Mexico were also admitted into evidence. (Plaintiff's Exhibit Nos. 2, 4, 5; N.T., pp. 43-46, 77-80.) Under these circumstances, we find it inappropriate to characterize the parties' marriage as an informal one, and conclude Section 2.401 of the Texas Family Code is inapplicable.[4]

Although the minister, who presided over the parties' wedding was required under Texas law to record the relevant information on the marriage license and file it with the county clerk within thirty days of the ceremony—the failure to do so is a misdemeanor punishable by fine (Tex. Fam. Code Ann. §2.206 (1997))—that this did not occur does not void the marriage. To the contrary, any marriage performed in Texas is presumed "to be valid unless expressly made void ... or unless expressly made voidable by [statute] and annulled. ... " Tex. Fam. Code Ann. §1.101 (1997). Thus, the "failure to comply with [marriage license] formalities does not render the marriage invalid unless a statute declares it so." **In re Estate of Loveless,** 64 S.W.3d 564, 576 (Tex. App. 2011). No such statute has been brought to our attention. **See also, Jenkins-Dyer v. Dray-**

[2] Defendant does not dispute that a marriage ceremony occurred, but challenges the validity of the marriage on the basis that no record of the marriage taking place was filed with the State of Texas. (Defendant's Answer and New Matter, paragraph 4.)

[3] Under Texas law, a marriage license expires if a marriage ceremony has not been conducted within ninety days of its issuance. Tex. Fam. Code Ann. §§2.201 (1997, amended 2013).

[4] Section 2.401 addresses the question of whether a legally cognizable marriage occurred. It does not address the question presented here, the effect of failing to file a certificate of marriage after a ceremonial marriage has taken place. Because we do not know what evidence was presented to the Hearing Officer, this is not intended in any way to be critical of the Hearing Officer's application of Section 2.401 to the evidence heard by him.

ton, No. 2:13-CV-02489, 2014 WL 5307851 at *10 (D. Kan. Oct. 16, 2014) (holding that under Texas law a late filing of a marriage license (**i.e.,** more than thirty days after the marriage ceremony) was not grounds to declare the marriage void).

Having been formally married, notwithstanding any subsequent inconsistent conduct or statements to the contrary, absent a divorce decree or a judicial declaration negating the validity of this marriage, the marriage continues to the present time. There is no such thing as a common-law divorce under Texas law or under the law of this Commonwealth. **Phillips v. The Dow Chemical Co.,** 186 S.W.3d 121, 127 (Tex. App. 2005) (**citing Villegas v. Griffin Indus.,** 975 S.W.2d 745, 750 (Tex. 1998) and **Claveria's Estate v. Claveria,** 615 S.W.2d 164, 167 (Tex. App. 1981)); **Starr v. Starr,** 78 Pa. Super. 579, 584 (1921).[5]

COLLATERAL ESTOPPEL

Whether the Plaintiff is barred from now litigating the question of the parties' marriage because her claim for alimony **pendente lite** was dismissed on the basis that no marriage occurred is a more difficult question. Collateral estoppel, or issue preclusion, "operates to prevent a question of law or issue of fact which has once been litigated and fully determined in a court of competent jurisdiction from being relitigated in a subsequent suit." **Catroppa v. Carlton,** 998 A.2d 643, 646 (Pa. Super. 2010), **appeal denied,** 611 Pa. 659, 26 A.3d 1100 (2011). For collateral estoppel to apply, the following five elements must be established:

> (1) the issue decided in the prior case is identical to [the] one presented in the later case; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding and (5) the determination in the prior proceeding was essential to the judgment.

Catroppa, supra.

[5] Defendant acknowledges in his Answer and New Matter to the divorce complaint that no prior actions for divorce or annulment of the parties' marriage have taken place. (Answer and New Matter, paragraph 5.)

In comparing the reasoning behind the dismissal of Plaintiff's claim for alimony **pendente lite** with the issue now being litigated—the existence of the parties' marriage—it is clear the issues are identical, the parties are identical, Plaintiff was provided a full and fair opportunity to litigate the issue,[6] and the determination that no marriage occurred was essential to dismissal of the claim for alimony **pendente lite.** Therefore, the decisive factor to applying collateral estoppel to Plaintiff's divorce action hinges on whether Judge Matika's Order of January 8, 2014, which accepted the Hearing Officer's recommendation to dismiss the claim for alimony **pendente lite,** was a final judgment on the merits.

In approaching this question, we first note that the claim for alimony **pendente lite** was a constituent part of Plaintiff's divorce complaint filed on March 8, 2013. In **Fried v. Fried,** 509 Pa. 89, 501 A.2d 211 (1985), the Pennsylvania Supreme Court held that a claim for interim relief under Section 502 of the Divorce Code, now 23 Pa. C.S.A. §3702, "is interlocutory and thus not reviewable until final disposition of the case." **Id.** at 97, 501 A.2d at 215. Section 3702 encompasses a claim for alimony **pendente lite.**

In support of his position that the ruling on Plaintiff's claim for alimony **pendente lite** was a final order, Defendant cites the Superior Court's decision in **Vignola v. Vignola,** 39 A.3d 390 (Pa. Super. 2012), **appeal denied,** 616 Pa. 660, 50 A.3d 126 (2012). In that case wife filed a complaint for child and spousal support against her husband. At the time, no complaint for divorce was pending, however, before her claim for spousal support was decided, wife filed a divorce complaint in a proceeding separate from her claim for spousal support.

Wife's claim for spousal support was premised on her assertion that the parties were married at common law. The existence of this marriage was disputed by husband and the hearing officer, to whom the support complaint was referred, determined that because the parties never had a ceremony where vows were exchanged, no common-law marriage existed, therefore, no legal basis existed to support wife's claim for spousal support. Accordingly, the hearing officer recommended that this claim be dismissed.

[6] However, this statement is subject to the caveat noted in Footnote 8 below questioning whether Plaintiff was advised of her right to challenge the Interim Order of December 16, 2013.

This recommendation was implicitly adopted by the trial court which issued an interim order requiring husband to pay child support only. Because wife failed to request a hearing **de novo** or file exceptions to this interim order, the Superior Court, relying on Pa. R.C.P. No. 1910.12(g), reasoned that the interim order disposing of wife's spousal support claim became final twenty days after its entry. Consequently, the Superior Court held that when she failed to appeal from this final order, the doctrine of collateral estoppel barred her claim in the divorce proceedings that the parties were married under common law.[7]

[7] To be procedurally precise, the divorce action which wife first commenced after filing for support in **Vignola** was administratively purged for failure to proceed. Approximately six months after this divorce complaint was dismissed, wife filed a second divorce complaint. This second divorce action was commenced after the interim order on wife's claim for spousal support became final. In response to this second complaint, husband filed a petition for declaratory judgment which was granted on the basis that wife was collaterally estopped from asserting that the parties were married.

Husband's petition for declaratory judgment in **Vignola** was filed pursuant to 23 Pa. C.S.A. §3306 (Proceedings to determine marital status). In the case **sub judice,** the issue was raised in Defendant's Answer and New Matter to the divorce complaint and subsequently discussed with the parties at a management conference held on August 18, 2014, whereupon the question was scheduled for hearing.

As to the procedure followed with respect to wife's claim for spousal support the Superior Court stated:

> With respect to actions for support, Pennsylvania Rule of Civil Procedure 1910.12 states that a hearing officer 'shall receive evidence, hear argument and file with the court a report containing a recommendation with respect to the entry of an order of support.' Pa. R.C.P. No. 1910.12(d). 'The court, without hearing the parties, shall enter an interim order consistent with the proposed order of the hearing officer.' Pa. R.C.P. No. 1910.12(e). Following the entry of an interim order, Rule 1910.12 provides:
>
> (f) Within twenty days after the date of receipt or the date of mailing of the report by the hearing officer, whichever occurs first, any party may file exceptions to the report or any part thereof, to rulings on objections to evidence, to statements or findings of facts, to conclusions of law, or to any other matters occurring during the hearing. Each exception shall set forth a separate objection precisely and without discussion. Matters not covered by exceptions are deemed waived unless, prior to entry of the final order, leave is granted to file exceptions raising those matters. If exceptions are filed, any other party may file exceptions within twenty days of the date of service of the original exceptions.
>
> (g) **If no exceptions are filed within the twenty-day period, the interim order shall constitute a final order.**

Vignola v. Vignola, 39 A.3d 390, 394 (Pa. Super. 2012) (emphasis in original).

Vignola is distinguishable in at least two material respects from the instant proceedings. First, in **Vignola,** wife's claim for spousal support was filed as a separate action, whereas Plaintiff's claim for alimony **pendente lite** was joined in her divorce complaint but heard by the Hearing Officer in accordance with the procedure set forth in Pa. R.C.P. No. 1920.31(a)(3). At no time was this claim severed from the divorce proceedings. Under **Fried,** the piecemeal appeal of interim orders in divorce proceedings and consequent protraction of litigation is not to be countenanced. Second, and perhaps more importantly, Judge Matika's Order of January 8, 2014, expressly stated it was without prejudice, thus signaling that no final decision on the merits was being made. **See Robinson v. Trenton Dressed Poultry Company,** 344 Pa. Super. 545, 549, 496 A.2d 1240, 1243 (1985) ("[A] dismissal without prejudice is not intended to be **res judicata** of the merits of the controversy."). When these two differences from **Vignola** are taken into account, we do not find the January 8, 2014 Order to be a final, appealable order, nor do we find the issue to have been waived.[8]

CONCLUSION

In accordance with the foregoing, because we have found that the parties were married in a formal marriage ceremony held on July 13, 2002, and also found that the Plaintiff is not estopped from maintaining her action in divorce by reason of the Order dated January 8, 2014, dismissing her claim for alimony **pendente lite,** Defendant's request that we dismiss the divorce proceedings will be denied.

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[8] We believe it also worth noting that in **Vignola,** the interim order which adopted the hearing officer's recommendations contained a notice of the parties' right to request a hearing **de novo. Id.** Likewise, Pa. R.C.P. No. 1910.12(e) requires that the interim order provided to the parties in a claim for spousal support be accompanied by written notice of the parties' right, "within twenty days after the date of receipt or the date of mailing of the order, whichever occurs first, [to] file with the domestic relations section written exceptions to the report of the hearing officer and interim order." There is no indication in the record before us that Plaintiff was advised of her right to challenge the December 16, 2013, Interim Order, and Plaintiff contends in her brief opposing dismissal that she never received this notice.

IN RE: ESTATE OF EARL L. MILLER, DECEASED

Civil Law—Prenuptial Agreement—Enforcement—Breach of Contract—Damages—Award of Attorney Fees—Fraudulent Conveyance to Avoid Payment—Uniform Fraudulent Transfer Act ("UFTA")—Uniform Interpretation—Actual and Constructive Fraud

1. Under the American Rule, each party bears responsibility for the payment of their own attorney fees unless provided otherwise by agreement, statute, or court rule. Here, the prenuptial agreement between the decedent and his surviving spouse provided that if either breached or sought to set aside any provision of the agreement, the other would be entitled to the payment of their reasonable counsel fees and costs incurred in the successful enforcement of the agreement.

2. In determining the reasonableness of the amount of attorney fees owed by one party to the other under an agreement providing for the payment of attorney fees by the party who has breached the agreement, the following factors are to be considered: 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; and the ability of the client to pay a reasonable fee for the services rendered.

3. After consideration of the relevant factors in setting the reasonableness and amount of attorney fees claimed by decedent's estate in its successful defense of the parties' prenuptial agreement, the court determined the estate was entitled to recover $35,000.00 of the $105,000.00 amount sought.

4. Pursuant to Section 1939 of the Statutory Construction Act (use of comments and reports), the detailed Committee Comment that follows each section of the Uniform Fraudulent Transfer Act ("UFTA") is not only informative, it bears directly on the interpretation of the statute. Further, because the UFTA is a uniform law, its interpretation by one state should be consistent with that of other states which have adopted the statute, thereby enhancing the significance of case law from other states in interpreting the provisions of the UFTA in Pennsylvania.

5. The paramount purpose of the UFTA is to protect unsecured creditors against transfers and obligations injurious to their rights.

6. In keeping with the intended purpose of the UFTA, the UFTA is concerned primarily with the transfer of assets by a debtor which would otherwise be available to satisfy an unsecured debt. For this reason, the term assets as defined in the UFTA specifically excludes property to the extent it is encumbered by a valid lien, property to the extent it is generally exempt under non-bankruptcy law, and an interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.

7. In evaluating whether fair value is received by a debtor in exchange for assets transferred by the debtor, the exchange is viewed from the perspective of an unsecured creditor, not from that of the debtor. Therefore, where property received by a debtor in exchange for property which has been transferred is exempt from execution or solely benefits an entireties' estate in which the debtor is a joint tenant, "reasonably equivalent value" has not been received by the debtor.

8. Section 5104 of the UFTA entitled "Transfers fraudulent as to present and future creditors" contains two tests for determining whether a transfer is

fraudulent: actual fraud under Section 5104(a)(1) and constructive fraud under Section 5104(a)(2). Section 5105 of the UFTA entitled "Transfers fraudulent as to present creditors" also deals with constructive fraud.

9. Actual fraud under Section 5104(a)(1) of the UFTA requires proof that the debtor made the transfer "with actual intent to hinder, delay or to defraud any creditor of the debtor." Section 5104(b) of the UFTA sets forth eleven non-exclusive circumstantial factors which are relevant in determining whether "actual fraud" was involved in the transfer of an asset by the debtor.

10. The term insolvency as defined in the UFTA means "balance sheet insolvency," that is, a debtor is insolvent if, at fair valuations, the sum of the debtor's debts is greater than the sum of the debtor's assets. Insolvency under Sections 5104(b)(9) and 5105 of the UFTA equates to "balance sheet insolvency" or its presumptive equivalent—the inability to pay existing debts at the time of transfer—whereas insolvency under Section 5104(a)(2)(ii) concerns the debtor's ability to pay existing and future debts.

11. Wife's transfer of her home, titled in her name alone, to her new husband and her children from a former marriage, as joint tenants with right of survivorship, in exchange for property wife's new husband transferred to wife and himself as tenants by the entireties, after which the remaining assets owned by wife were insufficient to satisfy these debts in her name alone, was a fraudulent conveyance such that the conveyance of wife's home was voidable by wife's deceased husband's estate under the UFTA in order for the estate to collect payment of those attorney fees incurred by it in successfully defending against wife's challenge to the prenuptial agreement between wife and her deceased husband.

NO. 06-9200

EDMUND J. HEALY, Esquire and JOHN M. ASHCRAFT, III, Esquire—Counsel for Executor.

VANCE E. MEIXSELL, Esquire—Counsel for Objector.

MEMORANDUM OPINION

NANOVIC, P.J.—June 16, 2015

When Earl L. Miller ("Decedent") and Doris E. Snyder ("Wife") married on November 12, 1994, they were, respectively, 60 and 51 years of age. Both had been previously married; both had adult children from their first marriages; both had their own homes; and both were self sufficient. As is not uncommon in these circumstances, they executed a prenuptial agreement (hereinafter referred to as both the "Prenuptial Agreement" and "Agreement"). This Agreement is dated September 16, 1994. Unfortunately, since Decedent's death on May 12, 2006, litigation over the enforceability and meaning of this Agreement has had the opposite effect of what a prenuptial agreement is intended to accomplish: to simplify and define the rights and obligations of spouses in marital and premari-

tal property without the need for extensive and expensive litigation over the distribution and disposition of these assets.[1]

In previous decisions we have upheld the facial validity of the Prenuptial Agreement,[2] determined the meaning of a disputed provision,[3] and found Decedent fulfilled his obligations under the Agreement.[4] Two issues remain which we address below: (1) Decedent's Estate's (the "Estate") claim for an award of attorney fees against Wife for breaching the Prenuptial Agreement and (2) the Estate's claim to void Wife's recent conveyance of her home to herself, her new husband, and her three children from her first marriage as a fraudulent conveyance intended to avoid payment of the Estate's attorney fees.

FACTUAL AND PROCEDURAL BACKGROUND

This case has a protracted and complicated history which we summarize briefly, focusing on those facts relevant to the two remaining issues to be decided.

When Decedent died on May 12, 2006, he left behind two documents that have been key in this litigation to date: the Prenuptial Agreement and his Will dated February 20, 2002. In addition to Paragraph 5 of the Prenuptial Agreement which provides that each party's premarital property would remain their separate property, free and clear of any claim by the other, including any rights as surviving spouse to elect to take against the other's will,[5] Paragraph 9 of the Agreement provided:

[1] Decedent's Will was probated on June 8, 2006, at which time, Decedent's two sons and primary beneficiaries, Kirby Miller and Kevin Miller, were appointed as executors. On November 4, 2009, Decedent's son Kirby Miller died, leaving Kevin Miller as the sole executor.

[2] **See** order dated June 26, 2009.

[3] **See** orders dated July 20, 2010 and September 12, 2011.

[4] **See** order dated June 28, 2013.

[5] Paragraph 5 of the Prenuptial Agreement states in relevant part:

> Each of the parties hereto does hereby waive, release and relinquish any and all rights whatsoever which he or she may now have or hereinafter acquire ... to share in the property or the estate of the other as surviving spouse, heir-at-law or otherwise, including without limitation ... any rights as surviving spouse to elect to take against the other's Will (whether heretofore or hereafter made) ... and any other similar rights granted to him or her by the laws of the Commonwealth of Pennsylvania ... .

(Prenuptial Agreement, Paragraph 5.)

> [Decedent] agrees to make provisions in his Will or though [sic] jointly-owned property to provide [Wife] with the sum of Twenty Thousand Dollars ($20,000.00) upon his death. Said sum shall be payment in full for any and all claims [Wife] may make under the Probate Code regarding her elective share or her intestate rights.

(Prenuptial Agreement, Paragraph 9.) Complementing this provision, Paragraph 5 of Decedent's Will stated:

> I direct that my executor(s) distribute the sum of Twenty Thousand Dollars ($20,000.00) to Doris E. Snyder Miller who is my wife. Said sum may come from jointly-owned property and/or from the assets of my Estate so long as the total amount of property she receives upon my death is worth Twenty Thousand Dollars ($20,000.00).

(Decedent's Last Will and Testament, Fifth Clause.)

After having found against Wife's challenge to the facial validity of the Prenuptial Agreement on June 26, 2009, by order dated July 20, 2010, we described what had to be proven to determine whether Decedent had complied with Paragraph 9 of the Agreement during his lifetime. Our subsequent order of June 28, 2013, determined that Decedent had complied with this provision by funding with his own monies after the parties' marriage sufficient jointly owned assets which passed to Wife upon his death.

At this time, the Estate seeks to recover the attorney fees it has incurred in defense of Wife's claims against the Estate for the period between May 20, 2007 and February 29, 2012, in the amount of $105,393.40. The Estate relies on two provisions of the Prenuptial Agreement to support this request. (**See** Estate's New Matter in the Nature of Counterclaims to Wife's Objections to the Estate's First and Final Formal Account, Paragraph 87.) In this respect, Paragraph 21 of the Prenuptial Agreement provides:

> In the event that either party breaches any provision of this Agreement and the other party retains counsel to enforce any provision hereof, the breaching party shall pay the enforcing party's reasonable counsel fees and costs incurred in the enforcement hereof.

(Prenuptial Agreement, Paragraph 21.) Paragraph 22 provides:

> In the event that either party seeks to set aside any provision of this Agreement and the other party retains counsel to enforce any provision so sought to be set aside, the party defending the Agreement, if successful in such defense, shall receive all of his or her reasonable counsel fees and costs incurred in such defense from the other party.

(Prenuptial Agreement, Paragraph 22.)

Wife filed an election to take against Decedent's Will on August 11, 2006, and further filed objections to the First and Final Formal Account filed by the Estate on February 4, 2008 (the "Account"). In these objections, Wife contended, **inter alia,** that the Prenuptial Agreement was invalid for various reasons and should be set aside.[6] Whether by being withdrawn, not pursued, or denied by us, Wife's various objections to the Estate's Account challenging the validity of the Prenuptial Agreement have all been resolved in the Estate's favor.[7] Accordingly, as Wife is bound by the Agreement, she is subject to the payment of attorney fees for her unsuccessful attempt to set aside any of its provisions and for her breach of the Agreement by filing an election to take against Decedent's Will. The reasonableness and amount of these attorney fees are in dispute.

In addition, on January 10, 2012, Wife conveyed title to the home which she owned prior to her marriage to Decedent and which was in her name alone to herself, her new husband (Karl A. Sheckler), and her three children, "as tenants by the entirety between husband and wife and as joint tenants with the right of survivorship between the parties." The Estate contends this transfer was a fraudulent conveyance under Pennsylvania's Uniform Fraudulent Transfer Act ("UFTA"), 12 Pa. C.S.A. §§5101-5110, to avoid payment of the Estate's claim for attorney fees.

Wife and Mr. Sheckler were married on July 2, 2011. On the same date as Wife's transfer of the title to her home, Mr. Sheckler

[6] In her objections, Wife alleged the Prenuptial Agreement was facially invalid for failing to provide a detailed disclosure of the parties' assets, and also that the Agreement was invalid and unenforceable due to mutual mistake, legal duress, undue influence, fraudulent inducement and failure of consideration.

[7] Several objections raised by Wife to the Estate's Account requested reimbursement for miscellaneous expenses Wife paid on behalf of the Estate which totaled $415.05 and opposed the Estate's claim for the return of several items of property which Wife kept after Decedent's death. These objections were ultimately resolved in Wife's favor by agreement of the parties. **See** order dated July 20, 2010.

also transferred title to his home and another property owned by him into his and Wife's names as tenants by the entireties. These two properties were worth $199,000.00 and $121,626.00, respectively, at the time of transfer.

DISCUSSION

Attorney Fees

Pursuant to Paragraphs 21 and 22 of the Prenuptial Agreement, Wife is responsible for paying the reasonable attorney fees incurred by the Estate in defending and enforcing the Agreement. This phase of the litigation, however, ended on January 25, 2010.[8] There-

[8] At some point after we decided the facial validity of the Agreement, Wife abandoned her remaining challenges to the Agreement and her request to assert her elective share. The question is at what point this occurred. While Wife appears to acknowledge in her post-hearing submissions filed on December 5, 2014, that this concession occurred immediately after we denied Wife's facial challenge to the Prenuptial Agreement by our order dated June 26, 2009 (**see** Wife's Findings of Fact, Argument and Conclusions of Law, p. 32), after reviewing the record, we believe this is incorrect.

The June 26, 2009 order only addressed Wife's challenge to the facial validity of the Prenuptial Agreement. If we had accepted Wife's argument that the Agreement was invalid on its face as a matter of law, there would have been no need for further hearings on this issue. Therefore, Wife's facial challenge was considered first. When this challenge failed, a hearing to address Wife's factual averments in support of invalidating the Agreement was scheduled for January 25, 2010. For purposes of this hearing, the scrivener of the Agreement, Edward Vermillion, Esquire, was subpoenaed by Wife's counsel and was present in court.

Although we are uncertain at this time why the hearing was continued (the Estate's counsel's billing records refer to an unexpected settlement proposal, **see** Estate Exhibit 3A, 1/25/10 entry; **see also,** continuance application filed on 1/25/10), we did meet with counsel in conference on January 25, 2010. As best as we can ascertain at this time, it was during this meeting that Wife's counsel advised that because Wife would not be able to overcome the evidentiary bar of the Dead Man's Statute, Wife would not be presenting any evidence on this issue. Unfortunately, no record was made of what occurred at this meeting.

That the hearing on January 25, 2010 was scheduled to take testimony on Wife's challenge to the Prenuptial Agreement is evidenced further by the Estate's counsel's billing records in preparation for this hearing, their reference to the Agreement's scrivener being present in court on January 25, and Attorney Healy's testimony that he recalled discussing the case with Attorney Vermillion at that time. (N.T., 11/21/13, p. 72; Estate Exhibit 3A (Estate invoices), 1/25/10 entry.) Further, the Estate's invoices evidence no further preparation for this issue after January 25, 2010. It is also clear that after January 25, 2010, Wife never attempted to present evidence on this issue prior to the filing of our September 12, 2011 opinion in which the only issue addressed was the meaning of Paragraph 9 of the Prenuptial Agreement, an issue which would not have been reached had Wife's

after, the litigation centered on whether Decedent's obligation to pay Wife $20,000.00 was satisfied by way of jointly owned property titled in Decedent and Wife's names at the time of Decedent's death, or whether Wife was entitled to receive $20,000.00 from Decedent's Estate by virtue of Paragraph 5 of his Will. Because these latter aspects of the dispute are not encompassed within the subject matter of Paragraphs 21 and 22, they are not a basis for an award of attorney fees. Absent any additional legal basis to hold Wife accountable for payment of the Estate's attorney fees incurred after January 25, 2010, having been presented by the Estate, we find no such liability exists.[9]

For the period between May 20, 2007 and January 25, 2010, the Estate's claim for attorney fees and costs is $50,938.30. (**See** Estate Exhibit 3A, Steckel and Stopp invoices dated June 30, 2007 through February 25, 2010.) Of this amount $50,326.15 is for attorney fees: 225.57 hours billed by Attorney Healy at a starting rate in 2007 of $180.00 an hour and an ending rate in 2010 of $200.00 an hour for $43,501.65; 2 hours, or $360.00, for work by associates in Attorney Healy's office; and $6,464.50 for 35.15 hours of work by Attorney John Ashcraft, whom Attorney Healy employed as outside counsel to assist him in the case.[10] The balance—$612.15—is for paralegal work ($485.10) and costs ($127.05). In contrast, the

challenge to the validity of the entire Agreement still been outstanding. **See also,** the transcript for the first hearing date scheduled after January 25, 2010, that on May 7, 2010, where no mention is made of Wife's challenge to the Prenuptial Agreement.

[9] Under the American Rule, each party bears responsibility for the payment of their own attorney fees unless provided otherwise by agreement, statute, or court rule. **Trizechahn Gateway LLC v. Titus,** 601 Pa. 637, 652, 976 A.2d 474, 482-83 (2009). Here, the Prenuptial Agreement places the burden of paying the Estate's attorney fees on Wife only with respect to those attorney fees incurred by it in enforcing a breach of the Agreement or its defense of Wife's attempt to set aside the Agreement, not disputes over whether Decedent has complied with Paragraph 9 by funding jointly owned assets during his lifetime or through the dispository provision in Paragraph 5 of his Will. Moreover, since Decedent's attorney drafted this Agreement and Wife was unrepresented, any ambiguity in the meaning of the Agreement should be interpreted against Decedent. **Shovel Transfer & Storage, Inc. v. Pennsylvania Liquor Control Board,** 559 Pa. 56, 67, 739 A.2d 133, 139 (1999).

[10] According to the invoices submitted to the Estate, Attorney Ashcraft first began doing work for which the Estate was charged on September 24, 2008, at which time Attorney Ashcraft's hourly billing rate was $170.00. By 2010, Attorney Ashcraft's hourly rate had increased to $200.00.

Estate's expert, Ronold Karasek, Esquire, estimated a reasonable attorney fee for the type of work performed by the Estate's counsel, taking into account the amount in controversy, to be between $20,000.00 and $25,000.00.

In determining the reasonableness of an attorney's fee claim, the following must be considered:

> [T]he 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.

In re LaRocca's Trust Estate, 431 Pa. 542, 546, 246 A.2d 337, 339 (1968). It is also appropriate in valuing the reasonableness of attorney fees for the court to take into account whether the attorney fees sought are those of a claimant seeking to recover a principle amount or those of a defendant defending against a claim brought by another party, as is the case here, and to consider the nature, number and merits of the claims being made or defended against. **See e.g., Mountain View Condominium Association v. Bomersbach,** 734 A.2d 468, 470-71 (Pa. Commw. 1999). Furthermore, the court may rely upon "its knowledge of the rate of professional compensation usual at [this] time and place" in determining the amount of counsel fees to award. **In re Thompson's Estate,** 426 Pa. 270, 282, 232 A.2d 625, 631 (1967); **see also, Wachovia Bank, N.A. v. Gemini Equipment Co.,** 1 D. & C.5th 235 (Dauphin Co. 2006) (trial court relied on the evidence presented, the court's own experience, its oversight of the litigation, and the prevailing hourly rates in the community during the relevant time to set an award of attorney fees).

In this case, Attorney Healy, who has over twenty years' experience as a general civil practitioner and has handled approximately twenty-six orphans' court cases in his career, testified to what work was done and why; the need to research and respond to numerous and sometimes irrelevant issues raised by Wife; various evidentiary

issues, including the Dead Man's Statute, which were in play; the number of hours he, associates in his office, and Attorney Ashcraft spent in defending against Wife's claims; and the hourly rates charged the Estate and how these rates compared to the prevailing rates in the community during the relevant time. Made part of the record was a detailed billing statement by Attorney Healy's office which included a description of each service rendered, by whom and the date, and the amount of the charge. Attorney Healy also testified that the amount of the services and costs charged in these billings were all reasonable and necessary, that favorable results were obtained, and that the Estate paid all invoices submitted by his firm.

Still, the hourly rate and the total number of hours charged to the Estate concern us. For instance, the Estate was charged $3,762.00 to prepare an answer to Wife's objections to the Estate's account (Estate Exhibit 3A, entries dated 7/9/08 through 8/29/08); $7,961.00 for a motion **in limine** and supporting brief (Estate Exhibit 3A, entries dated 9/30/08 through 10/15/08); almost $10,000.00 to prepare a memorandum of law (Estate Exhibit 3A, entries dated 3/16/09 through 3/30/09); and $5,577.00 for Attorney Healy to prepare and rehearse for oral argument on the memorandum (Estate Exhibit 3A, entries dated 6/18/09 through 6/26/09). Further, the average hourly attorney rate charged the Estate for the period in question is $191.56. No distinction is made between time in the office or time in court, or even between travel time. Considering the relevant factors outlined in **LaRocca** and the posture of the Estate as a defendant, as well as a thorough review of the amount charged the Estate for the work done during this period, we believe a reasonable attorney fee for the services and costs for which recovery is allowed under the Prenuptial Agreement is $35,000.00, plus costs.[11]

[11] The gross value of the Decedent's Estate as set forth in the Estate's First and Final Formal Account is $371,235.08. The net amount stated for distribution in this account is $337,950.00. Had Wife been successful in setting aside the Prenuptial Agreement and asserting her one-third elective share pursuant to 20 Pa. C.S.A. §2203(a)(1), the value of the elective share, and therefore the amount at stake, is in excess of $110,000.00. In contrast, after the Prenuptial Agreement was upheld the amount at stake, at most, was $20,000.00, for which the Estate expended in excess of $55,000.00 in attorney fees and litigation costs.

Fraudulent Conveyance

The paramount purpose of the UFTA is "to protect unsecured creditors against transfers and obligations injurious to their rights." 12 Pa. C.S.A. §5101, cmt. 3.[12] In keeping with this objective, the UFTA is concerned primarily with the transfer of assets by a debtor which would otherwise be available to satisfy an unsecured debt. 12 Pa. C.S.A. §5101, cmt. 2. For this reason, the term assets as defined in the UFTA specifically excludes property to the extent it is encumbered by a valid lien, property to the extent it is generally exempt under non-bankruptcy law, and an interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant. 12 Pa. C.S.A. §5101(b) (definitions). Further, when a transfer occurs, whether fair value is received in exchange is viewed from the unsecured creditor's perspective, not from that of the debtor. **United States v. Rocky Mountain Holdings, Inc.,** 782 F. Supp. 2d 106, 123 n.12 (W.D. Pa. 2011) (**quoting In re R.M.L., Inc.,** 92 F.3d 139, 150 (3d Cir. 1996)). Accordingly, where the property received by the debtor in exchange for property transferred by the debtor is exempt from execution or solely benefits an entireties' estate in which the debtor is a joint tenant, "reasonably equivalent value" has not been received by the debtor. **See Klein v. Weidner,** 729 F.3d 280, 285 (3d Cir. 2013).

The value of Wife's home at the time of transfer, as determined from the records maintained by the Carbon County Assessment Office, was $74,793.00. At this time, Wife also had income of approximately $1,400.00 a month (N.T., 5/21/12, pp. 195-96) and a checking account in her name alone with a balance of $1,000.00. She was also the joint owner with her husband, Karl A. Sheckler, of four investment accounts with American Funds having a total value as of January 1, 2012, of $21,062.35; the sole owner of an

[12] Pursuant to 1 Pa. C.S.A. §1939 (use of comments and reports), the detailed Committee Comment that follows each section of the UFTA is not only informative, it bears directly on the interpretation of the statute; **see also, Fid. Bond & Mortg. v. Brand,** 371 B.R. 708, 718 (E.D. Pa. 2007) ("Because the Committee Comments were written by the drafters of the UFTA in connection with the enactment of the statute and the Legislature had access to them prior to passing the legislation, the comments inform the meaning and operation of the UFTA's provisions.").

IRS Tax Qualified Individual Retirement Account with American Funds with a balance as of January 1, 2012, of $8,857.16; and the sole owner of a fixed annuity with Liberty Bankers with a value as of January 26, 2012, of $11,686.47.

The Estate claims that the transfer of Wife's home was fraudulent under Sections 5104 and 5105 of the UFTA. Section 5104 provides as follows:

> **§ 5104 Transfers fraudulent as to present and future creditors**
>
> **(a) General rule.**—A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) with actual intent to hinder, delay or defraud any creditor of the debtor; or
>
> (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> (i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (ii) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.
>
> **(b) Certain factors.**—In determining actual intent under subsection (a)(1), consideration may be given, among other factors, to whether:
>
> (1) the transfer or obligation was to an insider;
>
> (2) the debtor retained possession or control of the property transferred after the transfer;
>
> (3) the transfer or obligation was disclosed or concealed;
>
> (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
>
> (5) the transfer was of substantially all the debtor's assets;
>
> (6) the debtor absconded;

(7) the debtor removed or concealed assets;

(8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

12 Pa. C.S.A. §5104.

Section 5105 provides:

§ 5105 Transfers fraudulent as to present creditors

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

12 Pa. C.S.A. §5105. Insolvency under this Section and Section 5104(b)(9) has the same meaning as defined in 12 Pa. C.S.A. §5102, "balance sheet insolvency" or its presumptive equivalent—the inability to pay existing debts at the time of the transfer—whereas insolvency under Section 5104(a)(2)(ii) concerns the debtor's ability to pay existing and future debts.

Section 5104 contains two tests for determining whether a transfer is fraudulent: Actual fraud under Section 5104(a)(1) and constructive fraud under Section 5104(a)(2). Section 5105 also deals with constructive fraud. **In re Int'l Auction & Appraisal Servs. LLC (Carr v. Loeser),** 493 B.R. 460, 468 (Bankr. M.D. Pa. 2013) ("Actual fraud is addressed in § 5104 (a) (1), and constructive fraud is addressed in §§ 5104 (a) (2) and 5105.").

Whether a transfer was made "with actual intent to hinder, delay or to defraud any creditor of the debtor" under Section 5104(a)(1) is a question of fact. Section 5104(b) sets forth eleven, non-exclusive circumstantial factors that are relevant to a determi-

nation of this question. In reviewing these subsections, we find that Subsections (1), (2), (4), (5), (8), and (9) support the conclusion that Wife's transfer of her home constituted a fraudulent conveyance. The transfer was to an insider, Wife's husband and her children;[13] Wife retained an interest in the property after the transfer and therefore a right of use, possession and enjoyment;[14] the transfer was made after the Estate had asserted its claim for attorney fees in the Estate's First and Final Account and while this claim was still pending before the court; the transfer was of substantially all of Wife's assets since, with the exception of the $1,000.00 checking account, the remaining property held by Wife was all exempt from execution and does not meet the UFTA's definition of an asset;[15] no reasonably equivalent value was received by Wife in exchange for the transfer since no consideration was received from Wife's children and the conveyance by Mr. Sheckler of his two properties were titled in his and Wife's names as tenants by the entireties, thereby exempting them as a source of recovery on execution of the debt owed by Wife to the Estate;[16] and Wife was rendered insolvent by the transfer in that she clearly no longer held suf-

[13] A spouse is an insider, **Kraisinger v. Kraisinger,** 34 A.3d 168, 174 (Pa. Super. 2011), as are children. **Mid Penn Bank v. Farhat,** 74 A.3d 149, 154 (Pa. Super. 2013).

[14] As a joint tenant, Wife retained the right to use, possess and enjoy the property. **Estate of Quick,** 588 Pa. 485, 490, 905 A.2d 471, 474 (2006); **Madden v. Gosztonyi Savings & Trust Co.,** 331 Pa. 476, 481, 200 A. 624, 627 (1938).

[15] Section 5101(b) of the UFTA excepts from the definition of "asset" property to the extent it is generally exempt from execution and attachment under non-bankruptcy law, or is an interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant. 12 Pa. C.S.A. §5101(b). As previously noted, the four investments Wife holds in American Funds were jointly titled in her and her husband's names thereby rendering them immune from execution proceedings by the Estate. **ISN Bank v. Rajaratnam,** 83 A.3d 170, 173-74 (Pa. Super. 2013) (to execute upon property held as a tenancy by the entireties, a creditor must obtain a judgment against both the husband and the wife as joint debtors). The same applies to the two properties deeded by Mr. Sheckler into his and Wife's names as tenants by the entireties. Further, Wife's IRA account and tax-deferred fixed annuity are exempt from execution under Pennsylvania law. 42 Pa. C.S.A. §8124(b)(1)(ix) (cross-referencing to 26 U.S.C. §§408 and 408A); 42 Pa. C.S.A. §8124(c) 3)-(4), (6); Pa. R.C.P. 3252 and 3123.1.

[16] Consideration which is unreachable by creditors, such as property titled in the name of tenants by the entireties, is not "reasonably equivalent value." **Klein v. Weidner,** 729 F.3d 280, 285 (3d Cir. 2013).

ficient assets from which the Estate could collect on payment of the amount owed to it.[17]

Finally, the date when Wife first met with an attorney to have title to her home transferred is extremely suspect, as is her selection of an attorney who had no knowledge of and was provided no information about the instant proceedings. In addition to having previously ruled against Wife on various issues prior to September 12, 2011, by order dated that same date we determined it was Wife's burden to prove the jointly owned assets which existed in her and Decedent's names at the time of Decedent's death were not acquired with Decedent's assets if she was to have any success in having the Estate pay her claim of $20,000.00. Approximately one month later, on October 17, 2011, Wife went to counsel to have the title to her home transferred. **Cf. Iscovitz v. Filderman,** 334 Pa. 585, 6 A.2d 270 (1939) (finding that a guardian's transfer of significant portions of his ward's estate soon after he was cited by the court to file his account as guardian was relevant in determining whether the transfers were intentional acts of fraudulent conveyance).

The factors for determining actual fraud under Section 5104(a)(1) are to be considered under a totality of the circumstances standard. 12 Pa. C.S.A. §5104, cmt. 6. Here, because six of the eleven factors enumerated in Section 5104(b) for determining fraudulent intent have been met, we find actual intent to defraud has been

[17] Insolvency as defined in UFTA is "balance sheet insolvency," that is a debtor is insolvent if, "**at fair valuations,** the sum of the debtor's debts is greater than all of the debtor's assets." 12 Pa. C.S.A. §5102(a) (emphasis added). Since property which is exempt from execution is not considered an asset, as is property owned by the entireties where only one of the joint owners is a debtor, the only remaining asset which Wife owned following the conveyance of her home was her checking account with a $1,000.00 balance which Wife clearly knew would be insufficient to pay the amount of attorney fees claimed by the Estate. Although Wife appears not to have known the full extent of the Estate's claim for attorney fees at the time she transferred her home, in the First and Final Account filed by the Estate on February 4, 2008, to which Wife filed her objections on April 2, 2008 and supplemental objections on April 4, 2008, the Estate estimated the amount of its claim against Wife for attorney fees at that time to be $7,500.00. This was almost four years before Wife transferred the title to her home. Further, Wife knew that her own attorney fees as charged by her counsel totaled $18,729.42. Consequently, while Wife may not have known the exact amount of the Estate's claim at the time of transfer, she certainly had reason to believe it was far in excess of $1,000.00, and likely at least $20,000.00 to $25,000.00.

established. **Cf. In re Computer Personalities Systems, Inc. (Lichtenstein v. Aspect Computer Corp.),** 362 B.R. 669, 674 (Bankr. E.D. Pa. 2006) (recognizing that while the presence of just one factor may cause suspicion of debtor's intent, several may be sufficient to establish actual intent to defraud); **see also, In re Model Imperial, Inc. (Development Specialists, Inc. v. Hamilton Bank, N.A.),** 250 B.R. 776, 792 (Bankr. S.D. Fl. 2000) (while one specific badge of fraud will be insufficient, the "confluence of several can provide conclusive evidence of an actual intent to defraud").[18] Under the same analysis used in evaluating Subsections (8) and (9) of Section 5104(b) with respect to actual fraud, we find that constructive fraud has been proven under Section 5104(a)(2)(ii) in that Wife did not receive a reasonably equivalent value in exchange for the transfer and she believed or reasonably should have believed that her remaining assets would be insufficient to pay her debts as they became due. Similarly, the Estate is entitled to relief under 12 Pa. C.S.A. §5105, which applies specifically to creditors whose claims arise before a transfer has been made.

CONCLUSION

For the reasons stated, we find the Estate is entitled to recover $35,000.00 in attorney fees plus costs from Wife under the terms of the Prenuptial Agreement for her breach of the Agreement and her attempt to set aside its provisions. Having determined that the conveyance by Wife of her home to her husband and three children was fraudulent, pursuant to 12 Pa. C.S.A. §5107(a) an order will be entered voiding the January 10, 2012 transfer of Wife's home at 136 Mauch Chunk Street, Lehighton, Carbon County, Pennsylvania, and enjoining all grantees of that conveyance from transferring, leasing or encumbering, or damaging, wasting and/or otherwise converting the said property or any interest therein, or attempting to do the same, until further order of court.

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[18] Because the UFTA is a uniform law, its interpretation should be consistent with that of other states which have adopted the statute. 1 Pa. C.S.A. §1927 (construction of uniform laws).

JEREMY D. WITNER and RACHEL A. WITNER, His Wife, ROBERT BRIAN SELERT and MICHELLE A. SELERT, His Wife, Plaintiffs vs. KYLE G. TITUS and ALLYSON M. TITUS, His Wife, ROBERT G. PUGH and DEBORAH PUGH, His Wife, ROBERT JOSEPH PUGH, BRANDON PUGH and KAREN PUGH, His Wife, Defendants

Civil Law—Real Estate—Easements—How Created—By Express Grant—By Adverse Use—By Implication—By Necessity—By Estoppel

1. A prescriptive easement is created by adverse, open, notorious, continuous, and uninterrupted use of land for a period of twenty-one years.

2. A use is adverse or hostile if it implies an assertion of rights adverse to that of the true owner. Where one uses an easement whenever he sees fit, without asking leave, and without objection, it is adverse.

3. A use which has been open and continuous into the indefinite past such that how, when, and why the use began predates living human memory and is incapable of present proof, is presumed to be adverse and the burden of showing otherwise is upon the party denying this presumption.

4. Where the owners of the dominant and servient estate are related to one another, what might otherwise be considered to be an adverse use during the prescriptive period is presumed to be permissive, which presumption requires direct, clear evidence to the contrary to be rebutted. For this presumption to arise from a familial relationship, the relationship need not be with an immediate family member.

5. To establish an easement by implication, the following three factors must be proven: (1) first, a separation of title; (2) that, before the separation takes place, the use which gives rise to the easement, has been so long continued, and so obvious or manifest, as to evidence that it was meant to be permanent; and (3) that the easement must be reasonably necessary to the beneficial enjoyment of the land granted or retained.

6. An easement by necessity may be implied upon the division of property if: (1) title to the properties has been held by one person, (2) this unity of title has been severed by the conveyance of one of the tracts, and (3) the easement in question is necessary for the use of the severed tract.

7. To establish an easement by necessity, the measure of necessity is that of actual necessity, not mere convenience. That access to a part or portion of a severed tract is more difficult or burdensome after the separation than it was before severance occurred, does not establish necessity if access to some part of the severed tract exists, since the requisite necessity for a disadvantaged part or portion of a severed tract never exists when an owner can get to his own property through his own land.

8. An easement by estoppel—traditionally termed an irrevocable license in Pennsylvania—will arise when a landowner permits a use of property under circumstances suggesting that the permission will not be revoked, and the user changes his or her position in reasonable reliance on that permission.

9. Plaintiffs' and their predecessors' use of a road crossing Defendants' and their predecessors' land since the late 1930s as a means of access to a public road,

although continuous, open, visible and uninterrupted, was not shown to be adverse where the property owners of the properties involved were at all times during the relevant period of usage covered by Plaintiffs' evidence related to one another by blood or marriage. Nor were any of Plaintiffs' alternative bases for finding an easement across Defendants' properties—by express grant, by implication, by necessity or by estoppel—supported by the evidence.

NO. 13-0597

CYNTHIA S. YURCHAK, Esquire—Counsel for Plaintiffs.

KIM ROBERTI, Esquire—Counsel for Defendants.

MEMORANDUM OPINION

NANOVIC, P.J.—June 26, 2015

The ultimate issue in this case is Plaintiffs' right, if any, to use a private road located on the northern edge of Defendants' adjoining properties as a means of ingress to and egress from Plaintiffs' property. Plaintiffs premise their claim to an easement as arising from adverse use, and by implication, necessity, express grant, and estoppel. Each is addressed below.

PROCEDURAL AND FACTUAL BACKGROUND

All of the parties' properties are located in Packer Township, Carbon County, Pennsylvania, in an area between Wetzel Run Drive on the north and Quakake Road on the south. Both Wetzel Run Drive and Quakake Road run roughly in an east-west direction. Both are public roads which intersect with Pennsylvania State Route 93 to the east.

In 1850, all of the parties' properties were encompassed within a 412-acre tract of property owned by Dennis Bauman. (Plaintiff Exhibit No. 6.) By deed dated April 1, 1853, Dennis Bauman conveyed 68 acres of this property to John Steiner. (Plaintiff Exhibit No. 7.) All of Defendants' properties are contained within this 68-acre tract. By deed dated August 10, 1855, Mr. Bauman conveyed 40 acres of his property to Charles Brandenberg. All of Plaintiffs' properties are contained within this tract. The 68- and 40-acre tracts are adjacent to one another, with the 68-acre tract lying on the western side of the 40-acre tract.

The relative location of Plaintiffs' and Defendants' properties to one another (not to scale) are depicted on Appendix A of this opinion. Also shown is the location of the disputed right-of-way,

now named Meyers Drive,[1] in relation to the parties' properties and Wetzel Run Drive, as well as where Quakake Road and a right-of-way granted by Hattie Gerhard to J. Homer Gerhard in 1941 are located. Finally, Appendix A shows the location of some other properties and features or characteristics of the immediate area referred to in the text of this opinion.

We do not know when farming began in the area, but clearly by 1940 most, if not all, of the 68- and 40-acre tracts were being farmed, as well as many of the surrounding properties. In 1941, John Homer Gerhard ("Homer") owned and was farming the 68-acre tract, and Hattie Gerhard ("Hattie") owned and was farming the 40-acre tract. Hattie's husband, Samuel O. Gerhard, who had acquired the 40-acre tract in 1913, died on March 2, 1938. On February 28, 1941, Hattie granted Homer a 15-foot wide right-of-way along the western edge of her property, 850 feet in length, beginning on Quakake Road and running north to the southern end of Homer's property. (Plaintiff Exhibit No. 26.)

At the time of this conveyance, two farming roads existed on either side of Hattie's property—one along the entire length of the boundary between the 68-acre and 40-acre tracts, and the other along the entire length of the boundary between the 40-acre tract and the adjacent property to the east, also farmed. Meyers Drive, which runs in a west/east direction from Wetzel Run Drive, intersected with the north/south road on the western side of Hattie's property at its northern terminus and connected at this intersection with another dirt road (now known as Pine Tree Lane) which ran across the northern end of Hattie's property, also in a west/east direction. At the easternmost end of this other road, it intersected with the north/south road running along the eastern side of Hattie's property. All of these roads existed at least as early as February 28, 1941.

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[1] What is now known as Meyers Drive was previously part of Pine Tree Lane. In late 2012, early 2013, the Defendants requested the supervisors in Packer Township to rename that portion of Pine Tree Lane crossing the northern end of their properties as Meyers Drive in honor of Joseph Meyers who had once owned their properties, was a relative of many of them, and was a respected citizen in the Township. Before this name change, Defendants' home mailing addresses were for Pine Tree Lane. Even today, Grover Gerhard's home mailing address is 220 Pine Tree Lane. Grover Gerhard's property was part of the 40-acre tract.

These roads were all dirt paths running along the edge of farmers' fields. They were wide enough to accommodate farming equipment and motor vehicles—approximately ten feet in width—and for the most part, they were unimproved, some consisting of only two tire tracks. Some were better defined and more permanent than others, remaining in the same location year after year due to the frequency with which they were used and their destination. This included Meyers Drive which provided direct access to Wetzel Run Drive, a public road. Others, such as the road on the northern end of Hattie's property, were plowed under yearly to take full advantage of the length of the field for planting.

These roads were used by the owners of the 68- and 40-acre tracts, who farmed these and surrounding fields, and their families—including Hattie, her husband, and her children—for farming and for traveling between properties and gaining access to surrounding public roads, such as Wetzel Run Drive and Quakake Road. Meyers Drive for instance was used by Hattie, her husband, and her children, not only as a means of access to Wetzel Run Drive while moving farming equipment between fields, but also for visiting family and friends, for moving construction equipment and materials, and for miscellaneous reasons. On occasion, Samuel O. Gerhard used this road to gather peonies. The roads were shortcuts between public roads.

The use of Meyers Drive in particular by Hattie and the owners of her property over the years, including Robert Selert at the present time, has been far in excess of twenty-one years, and it has been continuous, open, visible, and uninterrupted since the late 1930s. What is unclear and unproven is when it started and how. At the outset, was it permissive, or hostile and adverse? And when did it first become open and continuous? In all likelihood, the antiquity of the beginning use of Meyers Drive makes this unknowable.

Important also is knowing who the users of these roads were and their relationships with one another. Samuel O. Gerhard and Homer's father, Charles Gerhard, were brothers. Samuel was Homer's uncle. Homer owned the 68-acre tract between November 10, 1941, and August 19, 1961. At that time the property was conveyed to his daughter, Mary E. Meyers, and her husband, Joseph Meyers. When the four lots located on the northern edge of the 68-acre

tract were conveyed to the Defendants, Kyle and Allyson Titus, Robert and Deborah Pugh, Robert Joseph Pugh, and Brandon and Karen Pugh, in each instance a twenty-foot wide earthen pathway along the northern edge of the property conveyed was reserved by the grantor as a means of access to remaining lands of the 68-acre tract situate on the east. Joseph Meyers died on April 26, 2002. After his death, the balance of the 68-acre tract was conveyed by Mary Meyers to her daughter, Deborah Pugh, and her son-in-law, Robert G. Pugh, on November 7, 2002. Defendants Robert Joseph Pugh and Brandon Pugh are Defendants Robert G. and Deborah Pugh's children.

As to the 40-acre tract, title to this property was transferred by Hattie to her son, Raymond S. Gerhard, and his wife, Verna E. Gerhard, by deed dated September 23, 1953. Eugene Gerhard, who at different times purchased various properties from Homer for farming, is Raymond's brother. The three lots at the northern end of the 40-acre tract were transferred by Raymond and Verna Gerhard to their three children, Grover Gerhard, Donald Gerhard and Mildred Selert, and their respective spouses, in 1975 and 1976. In each case, the deeds of conveyance reserved and excepted to the grantor a twenty-foot right-of-way across the northern end of the properties conveyed. In addition, the deed to Grover Gerhard excepted and reserved a 20-foot right-of-way along the western side of the property conveyed. The deed to Mildred Selert also excepted and reserved a twenty-foot right-of-way along the eastern side of the property, which is depicted on a map attached to the deed as connecting with an existing earth road located along the eastern edge of the 40-acre tract.

On August 8, 1977, Raymond Gerhard conveyed a 1.3-acre lot to Nancy C. Hinkle; this lot is to the immediate south of the properties previously conveyed to Donald Gerhard and Mildred Selert and their spouses.[2] This lot is now owned by Robert Selert. By deed dated January 19, 1978, Raymond and Verna Gerhard

[2] The deed for this conveyance was not placed in evidence, and we do not know what, if any, rights-of-way were granted or reserved for access to this property.

conveyed the balance of the 40-acre tract to Arnold and Mildred Selert, who in turn conveyed this property to their son, Robert Selert, one of the Plaintiffs, on January 19, 1978. Appendix B to this opinion charts the family relationship between the former and current owners of the 68- and 46-acre tracts.

Rachel A. Witner, another Plaintiff, is Robert Selert's daughter. The property now owned by Rachel A. Witner and her husband, Jeremy D. Witner, previously consisted of two separate lots: the western half of this property is the same lot which Raymond and Verna Gerhard originally conveyed to Donald and Patricia Gerhard, and the eastern half is the same property which Raymond and Verna Gerhard originally conveyed to Arnold and Mildred Selert. Arnold and Mildred Selert conveyed this property to their son, Edward J. Selert, and his wife, Rebecca A. Selert, on June 25, 1990. Edward and Rebecca Selert built a home on this property in 1989, which burned down in 1996, and was not rebuilt. While residing in this home, Edward and Rebecca Selert used Meyers Drive to gain access back and forth to their home. The Witners became the owners of the western half of their property on January 29, 2010, and of the eastern half on March 8, 2011.

In October 2009, Defendants erected a gate on Meyers Drive near its intersection with Wetzel Run Drive. Almost two years later, on June 21, 2011, the Witners commenced this suit by filing a claim for access to their property pursuant to the Private Road Act, 36 P.S. §§2731-2891, in the Carbon County Clerk of Courts office.[3] This action was subsequently amended to include additional counts and to join Rachel Witner's parents, Robert B. Selert and Michelle A. Selert, as claimants. On the basis of **Opening a Private Road for Benefit of O'Reilly Over Lands of (A) Hickory on Green Homeowners Association, and (B) Mary Lou Sorbara,** 22 A.3d 291 (Pa. Commw. 2011), Plaintiffs' claim under the Private Road Act was stricken and the case was then transferred to the law side of the court and assigned the present docket number.

[3] This suit was commenced less than two weeks before Defendants had Robert B. Selert, Michelle A. Selert, and Rachel A. Witner arrested for trespassing on Meyers Drive on July 4, 2011. (Plaintiff Exhibit Nos. 42-44.) These charges were dismissed by the magistrate.

A bench trial was held before the court on August 28, 2014, October 6, 2014, December 3, 2014, and December 4, 2014.

DISCUSSION

Prescriptive Easement

A prescriptive easement is created by adverse, open, notorious, continuous, and uninterrupted use of land for a period of twenty-one years. **Newell Rod and Gun Club, Inc. v. Bauer,** 409 Pa. Super. 75, 79-80, 597 A.2d 667, 669-70 (1991) (noting that the chief distinction between the doctrines of "adverse possession" and "prescription" is that "in adverse possession the claimant occupies or 'possesses' the land of the fee owner, whereas in prescription the claimant makes some easement-like use of it").

The use is open and notorious if it is sufficiently visible and manifest to place a landowner exercising reasonable vigilance on notice of the claimed usage. **Boyd v. Teeple,** 460 Pa. 91, 94, 331 A.2d 433, 434 (1975) (continuous use of a roadway over a servient estate establishes open and notorious use); **see also, Watkins v. Watkins,** 775 A.2d 841, 846 (Pa. Super. 2001). Continuous use is use which evidences "a settled course of conduct indicating an attitude of mind on the part of the user or users that the use is the exercise of a property right." **Keefer v. Jones,** 467 Pa. 544, 548, 359 A.2d 735, 737 (1976). A use is "uninterrupted" if "those against whom the use is adverse do not initiate and bring to successful conclusion legal proceedings or otherwise cause a cessation of the use." **RKO-Stanley Warner Theaters, Inc. v. Mellon Nat'l Bank & Trust Co.,** 436 F.2d 1297, 1301 n.14 (3d Cir. 1970). Here, the Plaintiffs have met their burden of proof as to these three elements beginning in the late 1930s with Hattie and Samuel O. Gerhard's use of the 40-acre tract and Meyers Drive to access Wetzel Run Drive.

Prescriptive rights must be established by a user with hostile intent, and not through indulgence, permission or mutual accommodation. The word "hostile" as an element of adverse use does not mean "ill will" or "hostility," but implies an assertion of rights adverse to that of the true owner. **Cf. Watkins, supra** (discussing elements for adverse possession). "Where one uses an easement

whenever he sees fit, without asking leave, and without objection, it is adverse, and an uninterrupted adverse enjoyment for twenty-one years cannot be afterwards disputed." **Adshead v. Sprung,** 248 Pa. Super. 253, 257-58, 375 A.2d 83, 85 (1977) (citation omitted). Where a use has been open and continuous into the indefinite past such that how, when and why the use began predates living human memory and is incapable of present proof, the use is "presumed to have been in pursuance of an unqualified grant [**i.e.,** a prescriptive easement], and the burden of showing the contrary is upon the party denying the presumption." **Wedge v. Schrock,** 146 Pa. Super. 425, 434, 22 A.2d 305, 309-10 (1941); **see also, Predwitch v. Chrobak,** 186 Pa. Super. 601, 603, 142 A.2d 388, 389 (1958). However, where a familial relationship exists, "permissive use will be presumed, thereby negating the element of hostility." **Watkins, supra.** Not only is "[t]he use of the disputed land deemed permissive when a familial relationship exists," the familial relationship need not be with "an **immediate** family member." **Id.** at 847 (emphasis in original). Further, if a use commences permissively, it will be deemed to continue as permissive "in the absence of a clear showing that the user brought home his intention to make an adverse use without recognizing the rights of the owner." **Gehres v. Falls Township,** 948 A.2d 249, 252 n.2 (Pa. Commw. 2008) (**quoting Wanczycki v. Svoboda,** 36 Lehigh L.J. 59, 64 (1974)).

Samuel O. Gerhard, who died on March 2, 1938, acquired the 40-acre tract on May 1, 1913. Upon his death, this property passed to his widow, Hattie Gerhard, who conveyed title to her son, Raymond S. Gerhard, and his wife, Verna E. Gerhard, on September 23, 1953. Raymond and Verna then transferred title to their daughter, Mildred L. Selert, and her husband, Arnold R. Selert, on January 16, 1978.

The 68-acre tract was acquired by Samuel Gerhard's father and mother, John and Mary Gerhard, on March 1, 1940, who later transferred this property to their grandson, John Homer Gerhard ("Homer"), on November 10, 1941. Homer and Raymond were cousins. The property was next conveyed by Homer to his daughter, Mary E. Meyers, and her husband, Joseph Meyers, on August 19, 1961.

As is evident from this recital, during the twenty-one year span from March 1, 1940 to August 19, 1961, the relationship between the owners of the 68-acre and 40-acre tracts varied from that of father- and mother-in-law (John and Mary Gerhard) and daughter-in-law (Hattie Gerhard); to nephew (Homer) and aunt (Hattie); to first cousins (Homer and Raymond Gerhard); to second cousins (Mary Meyers and Mildred Selert). These familial relationships are all close and raise a presumption that the use of Meyers Drive by the owners of the 40-acre tract was permissive. Plaintiffs have presented no evidence to rebut this presumption. Rather, consistent with this presumption, Eugene Gerhard, Samuel Gerhard's son and Raymond Gerhard's brother, testified clearly that Meyers Drive existed during this time period and was used freely by his immediate family. Because of this familial relationship, Plaintiffs' predecessors' use of Meyers Drive was not hostile. **See also, Sterner v. Freed,** 391 Pa. Super. 254, 261, 570 A.2d 1079, 1082 (1990) ("where a familial or fiduciary relationship exists, permissive use will be presumed") (citation omitted).

The presumption of a permissive use by virtue of the familial relationship between the owners of the 68- and 40-acre tracts continued at least until the erection of the gate by the Defendants in October 2009. At that time, Deborah Pugh and Robert Selert, the principal owners of these two tracts, were third cousins. The erection of this gate is the first time that the owners of the 68-acre tract made clear that the prior permissive use was over.

Nor did the owners of the 40-acre tract at any time prior to this date assert that their use by a predecessor in title of Meyers Drive was other than permissive. **Margoline v. Holefelder,** 420 Pa. 544, 547, 218 A.2d 227, 229 (1966) (holding that "a prior permissive use by a predecessor in title will be deemed to continue until the contrary is shown") (citation omitted); **Orth v. Werkheiser,** 305 Pa. Super. 576, 580, 451 A.2d 1026, 1028 (1982) (holding that permissive use by a predecessor in title is personal to that predecessor, is non-assignable, and that adverse use by a successor owner if continued for over twenty-one years will ripen into a prescriptive easement). Though disputed, we accept as true and corroborative of a permissive use that Robert Selert sought permission from both

Robert G. Pugh and Kyle G. Titus to allow his daughter, Rachel Witner, to use Meyers Drive as a means of access to her property.[4]

Easement by Implication

To establish an easement by implication, the following three factors must be proven: (1) first, a separation of title; (2) that, before the separation takes place, the use which gives rise to the easement, shall have been so long continued, and so obvious or manifest, as to show that it was meant to be permanent; and (3) that the easement must be reasonably necessary to the beneficial enjoyment of the land granted or retained. **Bucciarelli v. DeLisa,** 547 Pa. 431, 438-39, 691 A.2d 446, 449 (1997); **Possessky v. Diem,** 440 Pa. Super. 387, 395, 655 A.2d 1004, 1008 (1995). When these factors exist, the grant or reservation of an easement is implied from the conveyance, and the owner of the property subject to the easement is charged with notice of it and knowledge of the facts that could have been acquired by the exercise of reasonable diligence. **Anania v. Serenta,** 275 Pa. 474, 478, 119 A. 554, 556 (1923).

The existence of the first factor is not in dispute. The 68- and 40-acre tracts were once held in common ownership: by Dennis

[4] A use which is permissive to one property owner becomes adverse for purposes of calculating the prescriptive period when continued hostilely by the purchasers of that property. **Orth v. Werkheiser,** 305 Pa. Super. 576, 581, 451 A.2d 1026, 1029 (1982). Consequently, in relation to the Witner property which was severed from the 40-acre tract in 1975 and 1976, adverse use of Meyers Drive by the new owners for a period in excess of twenty-one years will support a prescriptive easement. However, in this regard, the evidence is insufficient. No evidence was presented as to what use Donald Gerhard made of Meyers Drive following the conveyance to him of the western half of what is now the Witner property in 1975 by Raymond and Verna Gerhard. With respect to the eastern half of the Witner property, even if it were established that Edward and Rebecca Selert's use of Meyers Lane between 1989 and 1996 when their home burned down was adverse, this usage is far short of the twenty-one years required to obtain a prescriptive easement.

Nor are the Witners able to track any adverse usage claimed by Robert Selert to the benefit of their property. Mr. Selert did not acquire title to his property until 1978, after title to the Witner property was severed from the 40-acre tract. Therefore, even if Robert Selert was able to establish that his use of Meyers Drive after 1978 was adverse and continuous for a period of twenty-one years or more, such right, at best, would attach to the property owned by him and for whose benefit the prescriptive easement would be appurtenant. **See Lindemuth v. Safe Harbor Water Power Corporation,** 309 Pa. 58, 64, 163 A. 159, 161 (1932) (an appurtenant easement is attached to a specific property and may not be separated from it; it is not independently alienable).

Bauman in 1850. However, as to the second factor, Plaintiffs have failed to clearly prove that Meyers Drive existed when ownership of the 68- and 40-acre tracts was severed. The burden of proving the existence of Meyers Drive at this time was upon Plaintiffs. **Stein v. Bell Telephone Co. of Pennsylvania,** 301 Pa. 107, 112, 151 A. 690, 692 (1930).

The 68-acre tract was conveyed by Dennis Bauman in 1853, and the 40-acre tract in 1855. At that time, it is unclear whether the right-of-way for the public road between Weatherly and Tamaqua, which at some point crossed through the 68-acre tract and would have provided a clear means of access to this property from a public road, then existed. **See** Plaintiff Exhibit Nos. 20 (Mary Ulshafer Tract—Parcel #2) and 38 (1885 Beers Atlas). More importantly, what is clear is that the 1855 deed for the 40-acre tract has as its southern boundary the public road leading from the L&S Turnpike to Tamaqua, now known as Quakake Road, thus establishing open access to this property. (Plaintiff Exhibit Nos. 10 and 38.)

Neither deed from Dennis Bauman references Meyers Drive. In fact, the furthest back Plaintiffs' evidence goes to show the existence of Meyers Drive is either 1937 or 1938, near the time of Samuel Gerhard's death. Eugene Gerhard, who testified he was nine years old when his father died, provided this testimony. However, at this time, Meyers Drive was at best a narrow dirt farmer's path running along the edge of a field. Further, 1937 is eighty-four years after title to the 68- and 40-acre tracts was severed. This evidence does not prove that at the time title was severed, the critical point of our analysis, there existed an open, visible, continuous and permanent use of Meyers Drive, or that such use was necessary to the beneficial enjoyment of the 40-acre tract. To the contrary, no evidence or testimony was presented as to how the 68- and 40-acre tracts were used in relation to one another—or even what use was made of these properties—by Dennis Bauman before the 1853 conveyance to John Steiner. Moreover, Plaintiffs' contention that Meyers Drive proceeded in an easterly direction to intersect with what is now State Route 93 is not supported by the credible evidence. **See** Plaintiff Exhibit No. 38 (1885 Beers Atlas) which, while depicting Wetzel Run Drive, contains no reference to

Meyers Drive or any other public road at this location extending to State Route 93.

Easement by Necessity

An easement by necessity may be implied upon the division of property if: (1) title to the properties has been held by one person, (2) this unity of title has been severed by the conveyance of one of the tracts, and (3) the easement in question is necessary for the use of the severed tract. **Graff v. Scanlan,** 673 A.2d 1028, 1032 (Pa. Commw. 1996). "It is a well-settled principle of law that, in the event property is conveyed and is so situated that access to it from the highway cannot be had except by passing over the remaining land of the grantor, then the grantee is entitled to a way of necessity over the lands of the grantor." **Possessky, supra** at 399, 655 A.2d at 1010 (citation and quotation marks omitted). Further, the measure of necessity is that of actual necessity, not mere convenience. **Graff, supra.** As with an easement by implication, Defendants do not dispute that the first two prongs of this test have been met.

As previously stated, at the time Dennis Bauman conveyed the 68-acre tract in 1853, he retained ownership of the 40-acre tract. However, because the legal description of this 40-acre tract bounds on a public road, it is clear this property is not landlocked. **See Phillippi v. Knotter,** 748 A.2d 757, 760-61 (Pa. Super. 2000) (determining that plaintiff failed to establish the existence of an easement by necessity over an adjoining parcel because a portion of plaintiff's property was accessible from a public road), **appeal denied,** 563 Pa. 689, 760 A.2d 855 (2000).

Nor was the northeast corner of the 40-acre tract, what is now the Witners' property, landlocked by this conveyance. The doctrine of an easement by necessity is not meant to "ensure that each portion of [a] singular property has access to a public road," rather only that the property has some access. **Id.** at 761. "The right of way from necessity over the land of another ... is always of strict necessity, and the necessity must not be created by the party claiming the right of way. It never exists, when a man can get to his own property through his own land." **Ogdon v. Grove,** 38 Pa. 487, 491 (1861) (**quoting M'Donald v. Lindall,** 3 Rawle 492, 493 (1827)).

Plaintiffs nevertheless argue that due to distance, slope and wet areas, access to the Witners' property along the eastern boundary of Robert Selert's property from Quakake Road is extremely difficult and burdensome, such that use of Meyers Drive is not simply a matter of convenience, but a question of actual necessity within the meaning of this term. **See Application of Little,** 180 Pa. Super. 555, 559, 119 A.2d 587, 589 (1956). This notwithstanding, to the extent a necessity exists to justify the grant of an implied easement to the Witners' property, it was not created when title to the 68- and 40-acre tracts was severed in 1850, but by the conveyances in 1975 and 1976 of what is now the Witners' property to Donald Gerhard and Mildred Selert, respectively. These conveyances by Raymond and Verna Gerhard to their children severed these two properties from the 40-acre tract. To the extent the conveyances in 1975 and 1976 meet the criteria for granting an easement by necessity, the Witners' recourse is against the owner of the 40-acre tract from which their property was severed, not against the owners of adjacent land who were strangers to the severance.

Easement by Express Grant

Plaintiffs at the time of filing their amended complaint apparently were under the mistaken belief that the 1941 deed of right-of-way from Hattie Gerhard to Homer Gerhard (Plaintiff Exhibit No. 26) was a grant of easement rights by Hattie to Homer in what is now known as Meyers Drive. It is clear Plaintiffs were wrong. The 1941 grant was for a south/north right-of-way from Quakake Road along the western side of the 40-acre tract. The easement Plaintiffs claim in Meyers Drive runs in a west/east direction from Wetzel Run Drive and is across the northern end of the 68-acre tract, not the western edge of the 40-acre tract. As significant, if not more, is that this grant gives Defendants, as the owners of the 68-acre tract, the right to cross the western edge of the 40-acre tract, not vice versa, and therefore is of no benefit to Plaintiffs who seek to cross Defendants' property.

Easement by Estoppel

This theory, apparently advanced by the Witners only, appears to proceed on the basis that Defendants are estopped from denying an easement in Meyers Drive because the Witners relied on the

existence of a right to use Meyers Drive when they purchased their property and thereafter expended money preparatory to building a home. The problem with this theory is that neither the facts nor the law support it.

"An easement by estoppel—traditionally considered an irrevocable license in Pennsylvania—will arise when a landowner permits a use of property under circumstances suggesting that the permission will not be revoked, and the user changes his or her position in reasonable reliance on that permission." **Kapp v. Norfork Southern Railway Co.,** 350 F. Supp. 2d 597, 611-12 (M.D. Pa. 2004). **See also, Bieber v. Zellner,** 421 Pa. 444, 447, 220 A.2d 17, 19 (1966) ("A license to use the promisor's land will become irrevocable for the duration of the license term when the promisee in justifiable reliance treats his land in a way he would not otherwise treat it, that is, by making expenditures of money for such changes as would prevent his being restored to his original position.").

As to Defendants' actions, no evidence was presented of any oral or written representations made by any of the Defendants to Plaintiffs which authorized the use of Meyers Drive. At most, as discussed with respect to Plaintiffs' claim for a prescriptive easement, given the familial relationship between the parties, the owners of the 40-acre tract were allowed to use Meyers Drive as a courtesy. No evidence was presented, such as the formal grant of easement from Hattie to Homer in 1941, that this was ever intended to be anything more. The Witners have pointed to no conduct attributable to the Defendants which suggests that this accommodation was or would become irrevocable.

Nor was there any evidence of any conduct by the Defendants which the Witners reasonably relied upon to their detriment so as to estop the Defendants from revoking the permissive use. The Witners purchased their property in 2010 and 2011. This was after Defendants erected the gate in October 2009, as were all the other expenditures the Witners claim to have made. (Plaintiff Exhibit Nos. 50 and 51.) Many of these expenditures were also incurred after Rachel Witner learned from her friend, Tiffany Titus, Defendant Kyle Titus' daughter, in May 2011 that Mr. Titus would not consent to the Witners using Meyers Drive to access their property and to

transport construction materials and equipment; after Plaintiffs filed suit on June 21, 2011; and after Plaintiffs had been arrested by Defendants for trespassing on Meyers Drive on July 4, 2011. These circumstances preclude a finding of detrimental reliance.

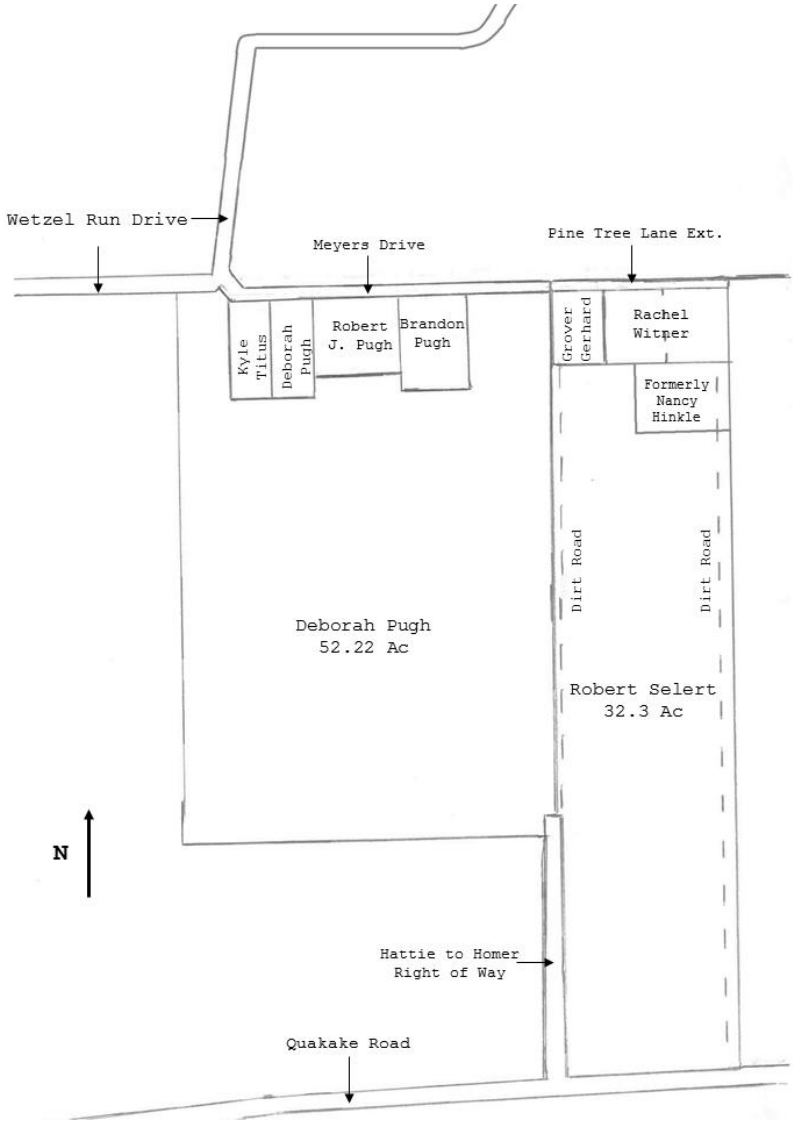
CONCLUSION

"When a right or title is of ancient origin or where the transaction under investigation is so remote as to be incapable of direct proof ... the law, of necessity, relaxes the rules of evidence and requires less evidence to substantiate the fact [in] controversy." **Tomlinson v. Jones,** 384 Pa. Super. 176, 179, 557 A.2d 1103, 1104 (1989) (citation and quotation marks omitted). This is of course true and has obvious bearing on this case where the transactions and conduct in question are more than seventy-five years old and, with respect to the severance of title, one hundred and sixty-two years old. But this relaxation of the rules does not mean we ignore the rules, or engage in supposition or speculation.

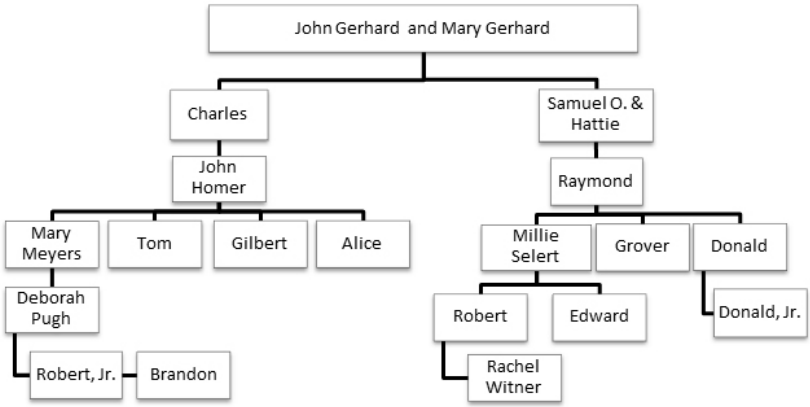
When dealing with questions of ancient and adverse use, the law wisely provides that "[i]f all of the elements of adverse [use] other than hostility are established, the element of hostility is implied." **Watkins, supra.** At the same time, the law also wisely accounts for human nature, here, that in the absence of contrary evidence, "[t]he use of the disputed land is deemed permissive when a familial relationship exists." **Id.** at 847.

As to proof that Meyers Drive existed when title to the subject properties was severed in 1853, there was no direct proof, and little indirect proof, and it defies common sense to believe that Meyers Drive at that time was part of a public road which extended several miles to the east and which was abandoned before the 1885 Beers Atlas was printed, which, it is argued, would explain why no reference to this road appears in the Atlas. If this were the case, not only is the abandonment of the road inexplicable, it makes no sense that none of the deeds for the 68- and 40-acre tracts, which Plaintiffs argue fronted on this road, include the road in their metes and bounds description or even make reference to the road. Yet, this is what Plaintiffs ask us to believe.

Finally, in denying Plaintiffs' relief against Defendants, we do not find that the Witners have no remedy, only that it is not against Defendants on the evidence presented.


Wetzel Run Drive
Meyers Drive
Pine Tree Lane Ext.
Kyle Titus
Deborah Pugh
Robert J. Pugh
Brandon Pugh
Grover Gerhard
Rachel Witmer
Formerly Nancy Hinkle
Dirt Road
Dirt Road
Deborah Pugh
52.22 Ac
Robert Selert
32.3 Ac
N
Hattie to Homer
Right of Way
Quakake Road

Appendix A


John Gerhard and Mary Gerhard
Charles
Samuel O. & Hattie
John Homer
Raymond
Mary Meyers
Tom
Gilbert
Alice
Millie Selert
Grover
Donald
Deborah Pugh
Robert
Edward
Donald, Jr.
Robert, Jr.
Brandon
Rachel Witner

Appendix B

JOSEPH L. VENTRESCA, Plaintiff vs. MICHAEL J. DONAHUE and KAREN P. DONAHUE, His Wife, Defendants

Civil Law—Personal Guaranty of Corporate Note—Secondary Liability of Guarantor—Discharge of Guarantor and Accompanying Collateral Upon Payment and Satisfaction of Debt Which Is the Subject of the Guaranty—Effect at Law of Assignment of Guarantor's Mortgage on Residential Property by Creditor After Discharge of Underlying Debt—Action in Mortgage Foreclosure by Assignee—Judgment in Favor of Defendant Guarantor in Mortgage Foreclosure Action—Entitlement of Defendant Guarantor to Attorney Fees As Prevailing Party—Act 91—Act 6—Payment of Principal's Debt by One of Several Co-Guarantors—Right of Contribution by and Between Co-Guarantors—Doctrine of Equitable Subrogation—Relation to Unjust Enrichment—Subrogation of Guarantor Paying Debt in Full to All Rights of Creditor Against Principal Debtor and Co-Guarantors—Subrogee's Right to Recovery Against Co-Guarantors and Collateral Pledged by Co-Guarantors—Pa. R.C.P. No. 1148—Nature of Counterclaims Permitted in a Mortgage Foreclosure Action—Fiduciary Duties Arising Between Parties Who Do Not Deal With Each Other on Equal Terms—Fiduciary Duties Owed by Majority Shareholder to Minority Shareholder—Fiduciary Duties Owed by Corporate Director to Corporation—Corporation As Indispensable Party in Shareholder Derivative Claim—Right to an Accounting, at Law and in Equity—Discovery As Remedy in Lieu of Accounting

1. A guarantor guarantees that another person will pay a debt or perform a duty and such person remains primarily liable. In case of default, the guarantor is secondarily liable.

2. Upon satisfaction of a guaranteed debt, both the personal guaranty of that debt and any mortgage provided as security for the guaranty is discharged at law. Consequently, once the underlying debt has been extinguished, no valid action in mortgage foreclosure exists for a mortgage given to secure performance of a guaranty of the underlying debt.

3. Unlike Act 6 (41 Pa. C.S.A. §101 **et seq.**), no private cause of action exists under Act 91 (35 Pa. C.S.A. §1680.401c **et seq.**) for a borrower or debtor who prevails in an action in mortgage foreclosure on a residential mortgage.

4. Section 503(a) of Act 6, 41 P.S. §503(a), requires payment of reasonable attorney fees incurred by a borrower or debtor who prevails in a mortgage foreclosure action on a residential mortgage.

5. The remedy of equitable subrogation is granted as a means of placing the ultimate burden of a debt upon the one who in good conscience ought to pay it, and is generally applicable when one pays out of his own funds a debt or obligation that is primarily payable from the funds of another. Equitable subrogation is premised upon equitable principles one of which is the avoidance of unjust enrichment.

6. For equitable subrogation to apply, four criteria must be met: (1) the claimant paid the creditor to protect its own interest; (2) the claimant did

not act as a volunteer; (3) the claimant was not primarily liable for the debt; and (4) allowing subrogation will not cause injustice to the rights of others.

7. Under the principles of equitable subrogation, the payment of a principal's debt by a guarantor of that debt acts as if the guarantor had purchased the creditor's claim; the payment operates as an assignment of the debt **pro tanto** and of all rights of the creditor with regard thereto, including the right to proceed in the name of the creditor against a co-guarantor liable for the same debt. No formal assignment either to create or evidence the right of contribution is required. The right arises out of the equities of two or more persons obligating themselves to pay the debt of another becoming mutually bound thereby to each other to divide and equalize any loss that may arise therefrom to either or any of them. The right of subrogation is not lost because the debt of the principal is satisfied or extinguished by the guarantor's payment; on the contrary, it is just because of such satisfaction or extinguishment that the right of subrogation arises.

8. The right of contribution is enforceable against a co-guarantor not only through the medium of an independent and direct claim, but by way of subrogation to the rights of the creditor whose claim it has paid.

9. A guarantor who is compelled to pay the debt of his principal is entitled to be subrogated to all the rights and remedies of the creditor as against his co-guarantors in precisely the same manner as against the principal debtor, and as substituted in the place of the creditor is entitled to enforce all of the creditor's liens, priorities and means of payment, including any securities pledged or mortgage granted to secure a guaranty of the debt.

10. Joint or co-guarantors are jointly and severally liable for the whole debt upon the default of their principal, and in relation to each other each is a principal for that proportionate amount for which he is primarily liable as between himself and his co-guarantors, and a guarantor of his co-guarantors with respect to the remaining balance of the principal's debt. In the event one of several co-guarantors pays more than his proportionate share of the common debt, he is entitled to contribution from the other co-guarantors for the amount paid in excess, the extent of the personal liability of each such co-guarantor to the overpaying guarantor being limited, however, to that amount which satisfies each co-guarantor's duty to contribute his proportionate share of the principal's default.

11. Pa. R.C.P. No. 1148 restricts counterclaims in a mortgage foreclosure action to those "which arise from the same transaction or occurrence or series of transactions or occurrences from which the plaintiff's cause of action arose." In accordance with case law, this rule only permits counterclaims which are "part of or incident to the creation of the mortgage relationship itself."

12. A fiduciary relationship exists when 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. Where neither has been proven, as here, a claim for breach of fiduciary duty on this basis will be denied.

13. A majority shareholder of a business corporation stands in a fiduciary relationship to a minority shareholder.

14. A majority shareholder of a business corporation owes a fiduciary duty to a minority shareholder not to waste, fraudulently dispose of, or divert corporate assets or opportunities for the majority shareholder's personal benefit or that of businesses controlled by him, or misrepresent or conceal corporate financial information from the minority shareholder. The fact that a business corporation fails financially or becomes insolvent, in and of itself does not establish that the majority shareholder breached any fiduciary obligation to the minority shareholder.

15. A corporate director owes a fiduciary duty to the corporation. When that duty is breached, only the corporation or a shareholder on behalf of the corporation may bring suit for breach of the director's standard of care owed to the corporation. A shareholder does not have standing to commence an action in his name alone for harm that is peculiar to the corporation and that is only indirectly or derivatively injurious to the shareholder. To have standing to sue individually, the shareholder must allege a direct, personal injury—that is one independent of any injury to the corporation—arising from a breach of duty owed to the shareholder such that the shareholder is entitled to receive the benefit of any recovery.

16. A claim against a corporate director for the director's alleged dominating control, self-dealing, diversion of corporate assets, failure to make payment of required taxes, and mismanagement of the corporation asserts an injury primarily to the corporation and, therefore, to the extent a viable cause of action exists for breach of a fiduciary duty, the action is one belonging to the corporation, not to an individual shareholder.

17. At law, because a claim for an accounting is incident to an underlying claim for which damages are recoverable, before an accounting will be granted, a viable claim for damages must exist.

18. In equity, a claim for an accounting is proper where a fiduciary relationship exists between the parties, where fraud or misrepresentation is alleged, or where the accounts are mutual or complicated, and plaintiff does not possess an adequate remedy at law.

19. A claim for an accounting will be denied where the information sought is equally obtainable through discovery or where an accounting would serve no useful purpose.

NO. 12-1455

JANE S. SEBELIN, Esquire—Counsel for Plaintiff.

MARIANNE J. GILMARTIN, Esquire—Counsel for Defendants.

MEMORANDUM OPINION

NANOVIC, P.J.—July 22, 2015

Assume:

A corporation borrows $815,000.00 from a bank. Four owners and officers of the corporation personally guarantee this debt. One of the guarantors pledges an investment account with $487,000.00 in assets as additional security. A second guarantor grants a mortgage against his home as collateral for his guaranty.

The corporation defaults on its loan. As part of a private foreclosure sale the bank takes possession of the corporation's assets and sells them for $300,000.00 to a third-party [sic] with the proceeds of this sale to be applied against the corporation's outstanding indebtedness to the bank, leaving $613,000.00 still unpaid.

The $487,000.00 investment account pledged by the one guarantor is applied by the bank to the corporation's indebtedness. This same guarantor, pursuant to his guaranty agreement, pays the remaining unpaid balance of $126,000.00 to the bank.

Two days after the corporate debt has been paid in full, the bank assigns the corporation's promissory note pursuant to which the corporation's initial borrowing was based, together with the written guaranty of the guarantor who pledged his home and the mortgage securing this guaranty, to the guarantor whose investment account and $126,000.00 payment was used to satisfy the corporate debt.

Does the recipient guarantor of this assignment have a valid and enforceable cause of action at law in mortgage foreclosure?

These are the basic, albeit simplified, facts of Plaintiff's case-in-chief. The law in this area is not unduly complicated but appears to be misunderstood by the parties. This is critical to Plaintiff's claim which in form and substance is an action in mortgage foreclosure.

PROCEDURAL AND FACTUAL BACKGROUND

Appreciated Vending Services, Inc. ("AVS"), is a New Jersey business corporation originally incorporated by the Defendant, Michael J. Donahue ("Donahue"), in 1996. In 2005, its principal business was servicing food and beverage vending machines in Pennsylvania and New Jersey. That same year, Plaintiff, Joseph L. Ventresca ("Ventresca"), and his partner, Jeffrey Snyder, acquired a controlling interest in AVS via a stock purchase agreement.[1]

[1] Ventresca and Snyder purchased a sixty-five percent ownership interest in AVS. A copy of the stock purchase agreement was not provided and it is unclear whether this sixty-five percent stock interest is held by a limited liability company owned by Ventresca and Snyder, or is owned by them in their individual names. (N.T., 6/27/14, pp. 51-52, 109-12; N.T., 10/14/14, pp. 83-84.) Either way, Ventresca testified that he either owned or controlled eighty percent of the sixty-five percent interest purchased, that is, fifty-two percent of AVS.

Both before and after this purchase, Donahue and his partner, Christopher Side, each owned a seventeen and one-half percent interest in AVS.

Between 2005 and 2009, Donahue continued as AVS' President. (N.T., 10/14/14, pp. 37, 160.) In this position, he managed its day-to-day affairs. (N.T., 6/27/14, p. 77.) Soon after the stock purchase, Ventresca became Chairman of the Board of Directors for AVS. In this position, he controlled policy and made major, non-routine business decisions.

AVS was heavily in debt and struggling financially when Ventresca first became involved. (N.T., 6/27/14, pp. 8-9.) Why, was never made clear. However, in 2006, in order to reduce its interest rate and monthly payments, AVS refinanced its existing debt with Sun Bank, with whom AVS had previously done business, and entered two new loans with The Bank, a subsidiary of Fulton Bank: one in the amount of $75,000.00 and one in the amount of $340,000.00. Each loan is evidenced by a promissory note dated August 28, 2006, in the face amount of the loan, is made payable to The Bank, and is executed by Donahue in his capacity as President of AVS. (Plaintiff Exhibit Nos. D and F.) Both notes on their face state they are secured by the following: (1) AVS' accounts receivable, inventory, equipment and other assets; (2) a mortgage on real estate owned by Donahue and his wife, Karen P. Donahue (the "Donahues"), located at 384 Kipling Lane, Penn Forest Township, Jim Thorpe, Carbon County, Pennsylvania;[2] (3) a mortgage on the Donahues' home located at 30 Gable Hill Road, Levittown, Bucks County, Pennsylvania; (4) an A.G. Edwards investment account pledged by Ventresca and his wife, Tinamarie G. Ventresca; and (5) the personal guaranties of Joseph L. Ventresca, Tinamarie G. Ventresca, Jeffrey Snyder, Christopher Side, Michael J. Donahue and Karen P. Donahue.

Separate mortgages with respect to the Donahues' property at 384 Kipling Lane, Penn Forest Township, Jim Thorpe, Carbon County, Pennsylvania, were recorded in the Carbon County Recorder of Deeds Office on October 16, 2006, for each note. Other

[2] This is a residential property on which the Donahues maintain a second home. It is not their primary residence. The Donahues' primary residence is at 30 Gable Hill Road, Levittown, Bucks County, Pennsylvania. (N.T., 6/27/14, p. 65.)

than the face amount of the mortgage which corresponds to the amount of the note guaranty for which it is collateral, the language of both mortgages are substantially the same.

Both mortgages state in bold print the following:

> THIS MORTGAGE, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERSONAL PROPERTY, IS GIVEN TO SECURE (A) PERFORMANCE OF A GUARANTY FROM GRANTOR TO LENDER, AND DOES NOT DIRECTLY SECURE THE OBLIGATIONS DUE LENDER UNDER THE NOTE AND (B) PERFORMANCE OF ANY AND ALL OBLIGATIONS UNDER THIS MORTGAGE.

Both mortgages also define the term "Indebtedness" to mean "all obligations of the Grantor under the Guaranty" and further provide that "[i]f the Grantor strictly performs all of the Grantor's obligations under the Guaranty and all of the Grantor's obligations imposed upon the Grantor under the Mortgage, the Lender will execute and deliver to Grantor a suitable satisfaction of the Mortgage."[3]

A third loan with The Bank in the amount of $400,000.00 was also taken on March 2, 2007. This loan is evidenced by a promissory note dated March 2, 2007, and executed by Donahue in his capacity as President of AVS on behalf of AVS as maker. According to the terms of this note, it is secured by the following: (1) AVS' accounts receivable, inventory, equipment and other assets; (2) assignment of the A.G. Edwards investment account pledged by Joseph L. Ventresca; and (3) the personal guaranties of Joseph L. Ventresca, Jeffrey L. Snyder, Christopher Side and Michael Donahue. (Plaintiff Exhibit No. G.) This third loan is not secured by any real estate owned by Donahue or his wife.

Unfortunately, AVS' financial condition continued to deteriorate. (N.T., 6/27/14, pp. 10-11, 105; N.T., 10/14/14, pp. 58, 209.) In September 2008, it entered a wholesale agreement with Stomel

[3] One difference which does appear between the $75,000.00 and $340,000.00 mortgages is that the $340,000.00 mortgage contains a paragraph entitled "Events of Default" which does not appear in the $75,000.00 mortgage. One of these events of default is if the borrower (**i.e.,** AVS) fails to make any payment when due under the indebtedness.

Vending, Inc. ("Stomel") for Stomel to operate and manage AVS' business. (Defendant Exhibit No. 6.) On August 31, 2009, AVS entered into an Asset Purchase Agreement with Stomel which, in conjunction with a collateral sale agreement between The Bank, as seller, and Stomel, as buyer, provided for the sale of virtually all of AVS' assets to Stomel, with the net proceeds of this sale to be applied against AVS' debt owed to The Bank.[4] The Asset Purchase Agreement was signed by Donahue as President of AVS and by Ventresca as guarantor of AVS' obligations thereunder.

Settlement of AVS' debts with The Bank and closing for Stomel's purchase of AVS' assets occurred on September 30, 2009, at two separate locations. (N.T., 6/27/14, pp. 142, 150-54, 161; N.T., 10/14/14, pp. 47, 183; Defendant Exhibit No. 2.) Ventresca and his counsel first met at The Bank's offices in New Jersey to finalize the settlement of AVS' indebtedness to The Bank in advance of the sale of AVS' assets to Stomel. Ventresca expected Donahue to be present at this settlement, however, he failed to show. (N.T., 6/27/14, p. 13.)

According to Ventresca, The Bank was to receive $300,000.00 from the sale to Stomel, leaving a deficiency of approximately $613,000.00 owed on AVS' debt to The Bank. To close this gap, The Bank seized the assets in Ventresca's investment account valued at $487,000.00. The remaining difference, $126,099.05, was covered

[4] Included in the background recitals of the Asset Purchase Agreement is the following:

> Lender has declared Seller to be in default under the Loan Obligations and has advised Seller that it intends to exercise its right to dispose of the Collateral in a private foreclosure sale pursuant to Section 6-910 of the New Jersey Uniform Commercial Code (the 'UCC'). In furtherance of such intention, and in order to maximize the amount realized from the sale of the Collateral, on or about the date hereof Lender and Buyer have entered into an Agreement for Sale of Collateral after Default (the 'Collateral Sale Agreement'), whereby Buyer has agreed to purchase the Collateral from Lender, and the proceeds of such sale will be applied to reduce Seller's outstanding indebtedness under the Loan Obligations. Seller and Guarantor concur that the proposed private foreclosure sale of the Collateral to Buyer is most likely to maximize the amount realized from the Collateral to reduce the Loan Obligations.

(Plaintiff Exhibit No. S (Asset Purchase Agreement, Background, Paragraph B).) The guarantor in the above-quoted language refers to Ventresca as the guarantor under the Asset Purchase Agreement.

by Ventresca's personal check for this amount written to The Bank on September 30, 2009. (Defendant Exhibit No. 21.) Absent this payment, the sale to Stomel would not have gone forward and what residual value AVS then possessed would have been lost. (N.T. 6/27/14, pp. 24-25.)

Going into the settlement with The Bank on September 30, 2009, Ventresca knew the $300,000.00 payment by Stomel would not satisfy AVS' debt obligations and also that the value of the stocks and bonds in his AG Edwards investment account would be insufficient to make up the difference, although he did not know exactly what additional amount would need to be paid to The Bank. (N.T., 6/27/14, pp. 21-24.) Ventresca advised Donahue before settlement that there would be a shortfall and also that Donahue would be expected to contribute to this deficiency in proportion to his ownership interest in AVS. Ventresca initially estimated this number to be $157,000.00, but later honed this figure to $125,000.00. (N.T., 6/27/14, pp. 12-13, 126.)

Because Ventresca knew Donahue did not have this amount of money immediately available to him, in order for the Donahues to save their property at 384 Kipling Lane, rather than have it foreclosed upon by The Bank, in or about February 2009, at the time Ventresca estimated Donahue's contribution to be $157,000.00, he also suggested the Donahues obtain a mortgage from The Bank for $157,000.00 to finance this payment. Ventresca had a draft mortgage prepared for these purposes which he provided to Donahue who chose not to follow up on this suggestion. (N.T., 6/27/14, pp. 104, 106, 108; N.T., 10/14/14, pp. 62-63, 77-79; Defendant Exhibit No. 7.)[5]

Later, after Ventresca was able to determine more precisely what amount should be contributed by Donahue to pay his pro rata

[5] The draft mortgage Ventresca gave Donahue to review correctly stated the principal amount to be repaid, $157,000.00, but incorrectly made reference to a note dated October 28, 2005, in the original amount of $3,570,000.00. In reviewing the draft mortgage, Donahue noticed this reference to the October 28, 2005 note, did not know what it meant, and was unwilling to sign the document. (N.T., 10/14/14, pp. 62-63, 77-79; Defendant Exhibit No. 7.) Donahue, however, never told Ventresca why he was unwilling to sign the document and did not ask Ventresca why the October 28, 2005 note was referenced, which Ventresca believed to be a typographical error. (N.T., 6/27/14, pp. 104-106.)

share of the deficiency, he proposed advancing the Donahues the $125,000.00 necessary to satisfy AVS' outstanding debts at closing and taking back a mortgage on the Donahues' property for this amount. (N.T., 6/27/14, pp. 12-13, 32-34.) Ventresca testified he never received a definite answer to this proposal but that he fully expected Donahue to be present at the settlement with The Bank and that he believed they would be able to work out what amount Donahue should be contributing to the unpaid deficiency owed on AVS' debt to The Bank. (N.T., 6/27/14, pp. 32-33, 125-26; N.T. 10/14/14, pp. 182-83.)

Ventresca was upset and disappointed that Donahue did not show for the settlement with The Bank at which AVS' debts to that financial institution were to be settled; he felt betrayed, that it was wrong for him to be fully responsible for the full burden of the deficiency owed to The Bank; and he believed his only chance of receiving any contribution from the Donahues toward this debt was for him to purchase AVS' two promissory notes and the corresponding mortgages held by The Bank on the Donahues' property. (N.T., 6/27/14, pp. 13-14, 108.) Because of this last-minute development, Ventresca testified that closing on Stomel's purchase of AVS' assets was pushed back later in the day. (N.T., 6/27/14, p. 13.)

The closing on Stomel's purchase of AVS' assets was originally scheduled for either 10:00 or 11:00 A.M. on September 30, 2009, at Stomel's bank, First Colonial. (N.T., 6/27/14, p. 156; N.T. 10/14/14, pp. 60-61.) Donahue was present at the scheduled time and signed all of the documents required to transfer title to those vehicles owned or leased by AVS to Stomel. (N.T., 6/27/14, pp. 151-52, 158; N.T. 10/14/14, pp. 60-61, 85.) These vehicles had not been used as collateral for The Bank loans and, therefore, were not part of the collateral sale agreement between The Bank and Stomel.

When Ventresca did not appear by 11:30 A.M. for this closing, and there was some indication that he might not be appearing, the parties present decided to recess for lunch and to reconvene at approximately 1:30 P.M., when it was hoped more would be known on whether the closing could proceed. (N.T., 6/27/14, pp. 151-52, 156-57; N.T., 10/14/14, p. 61.) According to Donahue, he did not believe Ventresca was coming to closing; therefore,

once the group broke for lunch, he left and did not return. (N.T., 10/14/14, pp. 60-61.)[6]

When the parties reconvened, Ventresca was present and the closing with Stomel went forward. At this closing, as planned, Stomel paid $300,000.00 to The Bank for AVS' corporate assets, which amount was applied to AVS' indebtedness to The Bank. (N.T., 6/27/14, p. 151; Defendant Exhibit No. 21.) With this payment, The Bank's receipt of Ventresca's stocks and bonds in his investment account worth $487,000.00, and the $126,099.05 check Ventresca wrote to The Bank to cover the remaining balance, The Bank was paid in full on AVS' indebtedness. (N.T., 6/27/14, pp. 21, 25, 45.)[7]

Inexplicably, none of the parties has provided a copy of the settlement statements for either of the settlements held on September 30, 2009. Nor has any party provided an amortization schedule for any of the three loans taken by AVS from The Bank. Consequently, we do not know the amount of the unpaid principal balance on any of the three loans as of September 30, 2009, or in what amounts and to which loans The Bank applied the $300,000.00 payment from Stomel, the $487,000.00 in value of Ventresca's investment account,[8] or the $126,099.05 check written by Ventresca.

Several days after settlement, on October 2, 2009, The Bank assigned to Ventresca the Donahue mortgage encumbering their Penn Forest property with respect to the $340,000.00 loan. This assignment specifically states that:

> the said Assignor hereby constitutes and appoints the Assignee as the Assignor's true and lawful attorney, irrevocable in law or in equity, in the Assignor's name, place and stead but at the Assignee's cost and expense, to have, use and take all lawful

[6] This reason, we believe, is only partly true. After Ventresca told Donahue he expected Donahue to personally contribute to the deficiency owed on AVS' debt, there is no evidence that Donahue ever seriously discussed with Ventresca his personal obligation to pay this debt. Instead, for more than a week prior to settlement, Donahue did not communicate with Ventresca (N.T., 6/27/14, p. 13), and there is every indication that Donahue wanted to avoid facing Ventresca.

[7] In addition, Ventresca pledged collateral worth $300,000.00 to assist Stomel in securing the financing necessary to purchase AVS' assets. (N.T., 6/27/14, pp. 20, 26, 59-61, 141-42; Plaintiff Exhibit No. S, pp. 8-9.)

[8] At trial, Ventresca testified this investment account was used to satisfy the $400,000.00 loan. (N.T., 6/27/14, pp. 44-45.)

> ways and means for the recovery of all sums due Assignee by Michael J. Donahue and Karen P. Donahue by reason of mutual guarantees given to The Bank as security for the note referenced in the mortgage; and in case of payment, to discharge the same as fully as the Assignor might or could do if these presents were not made.

(Plaintiff Exhibit No. H.) By a second assignment dated July 31, 2014, The Bank assigned to Ventresca both mortgages on the Donahues' Penn Forest property "along with their corresponding Promissory Notes and the Guaranties of Michael J. Donahue and Karen P. Donahue." This Assignment of Note and Mortgage further states that:

> the said Assignor hereby constitutes and appoints the Assignee as the Assignor's true and lawful attorney, irrevocable in law or in equity, in the Assignor's name, place and stead but at the Assignee's cost and expense, to have, use and take all lawful ways and means for the recovery of all sums due assignee by Michael J. Donahue and Karen P. Donahue by reason of mutual guarantees given to Assignor as security for the note referenced in the mortgage; and in case of payment, to discharge the same as fully as the Assignor might or could do if these presents were not made.

(Plaintiff Exhibit No. W.) None of the guaranties referenced in either of these assignments was ever presented in evidence.

On or about October 21, 2009, The Bank sent a notice to AVS advising that the $75,000.00 loan was paid off on October 6, 2009. (Defendant Exhibit No. 12.) Further, the $75,000.00 promissory note was marked paid by The Bank on October 6, 2009, and the $340,000.00 promissory note marked paid by The Bank on October 2, 2009. (Defendant Exhibit Nos. 11, 12.)

On the strength of the first assignment—the second assignment had yet to occur—Ventresca commenced the instant mortgage foreclosure action against the Donahues on July 2, 2012. In response to this complaint, the Donahues averred, **inter alia,** that Ventresca failed to establish any breach of guaranty by the Donahues, failed to establish the amount of any loss to Ventresca for which the Donahues were responsible, failed to establish that any

loss to Ventresca was secured by the mortgage such that Ventresca was entitled to commence foreclosure proceedings, and failed to provide proper notice prior to commencing suit. In addition, the Donahues filed a three-count counterclaim against Ventresca for breach of fiduciary duty, unjust enrichment, and an accounting.

Trial in this matter was held on June 27, 2014, and October 14, 2014.

DISCUSSION

A. Ventresca's Claim for Mortgage Foreclosure

This case is procedurally and substantively a mess. To begin, Ventresca's complaint for foreclosure is premised upon the assignment of one mortgage by The Bank to Ventresca on October 2, 2009. The assignment purports to transfer the $340,000.00 mortgage only with no transfer made of the promissory note, or of the claimed guaranty of this note by the Donahues. This assignment on its face authorizes Ventresca in The Bank's name, not Ventresca's name, to use whatever legal means are available to recover all sums due Ventresca by the Donahues by reason of mutual guaranties given to The Bank as security for the $340,000.00 promissory note. Clearly, this suit was not commenced in The Bank's name, no mutual guaranties have been proven, and the terms and conditions of any personal guaranties given by the Donahues to The Bank are unknown because neither copies of these guaranties nor evidence as to their terms and conditions was presented. From this, it is evident that whether the Donahues have breached these guaranties cannot be determined and if breach has occurred, why Ventresca should be due any monies from the Donahues is unexplained.

The second assignment from The Bank to Ventresca dated July 31, 2014, purports to assign both mortgages on the Donahues' property, the corresponding promissory notes related to each mortgage, and the guaranties of Michael J. Donahue and Karen P. Donahue. While this assignment ostensibly corrects the perceived defects in the first assignment—noting, however, that at no time did Ventresca move to conform the pleadings to the evidence, either at the time it was presented on the second day of trial or later—it did not cure the procedural and evidentiary concerns mentioned in the previous paragraph. No mutual guaranties were proven and how and

in what respect the Donahues breached any guaranties given by them to The Bank has not been shown, nor has Ventresca proven how any such breach has caused damages to him or to what extent.

The three promissory notes from AVS to The Bank on their face total $815,000.00. Two of the notes are dated August 28, 2006, and the third is dated March 2, 2007. The first two notes were issued more than three years prior to the settlement held on September 30, 2009, and the third is more than two and a half years prior to that settlement date. The evidence is undisputed that payments on all three notes were made prior to September 30, 2009, although the amount of these payments may well be in dispute, yet no evidence was presented as to the unpaid principal amount due and owing on any of the three promissory notes as of September 30, 2009. (N.T., 6/27/14, pp. 93-97.)

We know, if we accept Ventresca's evidence, that at least $913,000.00 was paid to The Bank at the settlement held on September 30, 2009: $300,000.00 by Stomel, $487,000.00 by virtue of the value of Ventresca's investment account, and Ventresca's check for $126,099.05. This amount is almost $100,000.00 more than the face amount of the three notes combined.

We do not know how The Bank allocated the monies it was paid on September 30, 2009, and are unable to determine from the evidence presented whether any of the monies from the $126,099.05 check Ventresca wrote at the time of settlement was used to pay either of the promissory notes indirectly secured by the Donahues' property, or was used to satisfy payment of the $400,000.00 promissory note. If to the $400,000.00 note, the Donahues would have no obligation to The Bank—or to Ventresca for that matter—in this action for mortgage foreclosure since no mortgage was given by the Donahues on this note.[9] Nevertheless, we also know that The Bank was paid in full all indebtedness owed it by AVS and that The Bank on its records marked both promissory notes which were the subject of the Donahues' guaranties secured by their mortgages as paid.

[9]To the extent the monies in Ventresca's investment account were used to pay either or both of the $75,000.00 and $340,000.00 notes, the use of this collateral for payment of these two notes was separate and independent from the Donahues' guaranties and therefore would not trigger foreclosure of the mortgages.

Significantly, the mortgages Ventresca seeks to foreclose upon secure only the guaranties given by the Donahues in relation to the $75,000.00 and $340,000.00 promissory notes. They do not guarantee directly the payment of these notes. We do not have the benefit of being able to examine any of the Donahues' guaranties to determine what notices or other preconditions, if any, must be met before enforcement of the guaranties—and by extension, foreclosure of the mortgages by which they are secured—may occur, whether the guaranties are full or limited guaranties of the note amounts, or whether the Donahues have breached any of their terms or conditions, but can safely conclude from their mention in the notes that these guaranties were for the benefit of The Bank to ensure payment of the notes and that once the notes were paid in full and the primary liability thereunder of AVS was extinguished, the secondary liability of the guarantors also ended, as did the security of the mortgages. **Citicorp North America, Inc. v. Thornton,** 707 A.2d 536, 539 n.2 (Pa. Super. 1998) ("A guarantor undertakes that another person will pay a debt or perform a duty and such person remains primarily liable. ... In case of default the guarantor is secondarily liable ... .") (**quoting Homewood People's Bank v. Hastings,** 106 A. 308, 309 (Pa. 1919)); **In re Estate of Snyder,** 13 A.3d 509, 514 (Pa. Super. 2011) ("[I]t is well settled in this Commonwealth that, although each is a distinct security, [t]he payment of either a mortgage or [an underlying] bond discharges both, and a release or extinguishment of either, without actual payment, is a discharge of the other, unless otherwise intended by the parties") (quotation marks and citation omitted), **appeal denied,** 611 Pa. 652, 25 A.3d 329 (2011). Therefore, because Ventresca's mortgage foreclosure action is expressly dependent upon the assignment of the Donahue mortgages to him by The Bank, for this additional reason, Ventresca's claim must fail.[10, 11]

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[10] Most commonly, a mortgage provides the collateral security for a debt, usually in the form of a bond or promissory note. **See e.g., In re Estate of Evanovich,** 487 Pa. 55, 57, 408 A.2d 1092, 1093 (1979). In contrast, in the instant case the Donahues' mortgages secure the guaranties of separate notes, not the notes directly. Nevertheless, since each guaranty appears to be a promise to pay a specific debt of AVS if AVS fails to do so, once the notes were paid in full, the related mortgages were discharged since the obligations arising under the guaranties—and secured by the mortgages—were dissolved. Stated differently,

Before considering the Donahues' counterclaims, we believe it appropriate to briefly discuss the doctrine of equitable subroga-

once AVS' debt was paid in full at the settlement held on September 30, 2009, AVS' debt to The Bank was extinguished and The Bank no longer held any legally cognizable interests or rights in the Donahues' guaranties or mortgages to assign to Ventresca. **Zeller v. Henry,** 157 Pa. 1, 4, 27 A. 559, 560 (1893); **Meyer v. Industrial Valley Bank & Trust Company,** 44 Pa. D. & C.2d 295, 301 (1967); **cf., Kiski Area School District v. Mid-State Surety Corporation,** 600 Pa. 444, 450-51, 967 A.2d 368, 371-72 (2008) (holding that once the principal has fully performed, the obligee cannot look to the surety).

[11] In their proposed Findings of Fact and Conclusions of Law filed on December 9, 2014, the Donahues contend Ventresca failed to comply with the notice requirements of the Pennsylvania Loan Interest and Protection Law, 41 Pa. C.S.A. §101 **et seq.** ("Act 6"), and the Emergency Assistance Law, 35 Pa. C.S.A. §1680.401c **et seq.** ("Act 91"), and request an award of attorney fees. The Donahues claim under Act 91 is easily disposed of since that statute, unlike Act 6, does not provide for a private right of action. **Hammill v. Bank of America,** 2013 WL 4648317 *3 n.1 (W.D. Pa. 2013).

In contrast,

> Act 6 provides that '[a]ny person affected by a violation of [the Act] shall have the substantive right to bring an action ... for damages [incurred as a result] of such conduct or violation, together with costs including reasonable attorney's fees and other such relief to which such person may be entitled under law.' 41 Pa. Stat. Ann. § 504. Regarding attorney's fees and costs, the Act contains three separate fee-shifting provisions: (1) section 406, which permits a mortgage lender to receive attorney's fees '[u]pon commencement of foreclosure or other legal action with respect to a residential mortgage'; (2) section 407, which allows '[a]ny debtor who prevails in any action to remove, suspend or enforce a judgment entered by confession ... to recover reasonable attorney's fees and costs as determined by the court'; and (3) section 503, which provides that '[i]f a borrower or debtor, including but not limited to a residential mortgage debtor, prevails in an action arising under this act, he shall recover the aggregate amount of costs and expenses ... together with a reasonable amount for attorney's fee.' 41 Pa. Stat. Ann. §§ 406, 407(b), and 503(a). Sections 407 and 503, which permit borrowers as opposed to lenders to recover attorney's fees and costs, require that the borrower be the prevailing party in the mortgage foreclosure action.

Hammill, *3. As concerns debtor's rights, the Donahues have not commenced any action seeking damages for any violation of Act 6, nor do these proceedings involve a judgment entered by confession.

However, as a prevailing party the Donahues are entitled to recover their attorney fees and costs pursuant to 41 P.S. §503(a). **First National Bank of Allentown v. Koneski,** 392 Pa. Super. 533, 539, 573 A.2d 591, 594 (1990). A prevailing party is one who "succeeds in obtaining substantially the relief sought." **Id.** at 540, 573 A.2d at 594 (**quoting Gardner v. Clark,** 349 Pa. Super. 297, 302, 503 A.2d 8, 10 (1986)). "[O]nce it has been found that a debtor has prevailed, the award of reasonable counsel fees and costs is mandatory." **Id.** at 540, 573 A.2d at 595. The factors to be considered by the court in determining the amount of an attorney fee award are set forth in 41 P.S. §503(b).

tion. Subrogation is "the substitution of one [entity] in the place of another with reference to a lawful claim, demand, or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies or securities." **Public Service Mutual Insurance Company v. Kidder-Friedman,** 743 A.2d 485, 488 (Pa. Super. 1999) (quotation marks and citation omitted). "The right of subrogation is granted as a means of placing the ultimate burden of a debt upon the one who in good conscience ought to pay it, and is generally applicable when one pays out of his own funds a debt or obligation that is primarily payable from the funds of another." **Hi-Tech-Enterprises, Inc. v. General Accident Insurance Company,** 430 Pa. Super. 605, 609, 635 A.2d 639, 642 (1993), **abrogated on other grounds, Egger v. Gulf Insurance Company,** 588 Pa. 287, 903 A.2d 1219 (2006).

> The payor must have acted on compulsion, and it is only in cases where the person paying the debt of another will be liable in the event of a default or is compelled to pay in order to protect his own interests, or by virtue of legal process, that equity substitutes him in the place of the creditor without any agreement to that effect; in other cases the debt is absolutely extinguished.

Id. at 610, 635 A.2d at 642 (**quoting Dominski v. Garrett,** 419 A.2d 73, 77 (Pa. Super. 1980)); **see also, Home Owners' Loan Corporation v. Crouse,** 151 Pa. Super. 259, 262, 30 A.2d 330, 331 (1943).[12]

As applies instantly, a guarantor (**i.e.,** Ventresca) who pays the debt of his principal (**i.e.,** AVS) is entitled to be subrogated to the rights of the principal's creditor (**i.e.,** The Bank) not only against the principal, but also as against other guarantors of the principal for the same debt.[13] "[A] surety paying the debt of his principal

[12] More recently, in **1313466 Ontario, Inc. v. Carr,** 954 A.2d 1, 4 (Pa. Super. 2008) the Superior Court set forth four criteria which must be met for equitable subrogation to apply: (1) the claimant paid the creditor to protect its own interest; (2) the claimant did not act as a volunteer; (3) the claimant was not primarily liable for the debt; and (4) allowing subrogation will not cause injustice to the rights of others.

[13] At common law, a surety became liable immediately upon default by the principal obligor, whereas a guarantor did not become liable until efforts to collect

is entitled to be subrogated to all the rights and remedies of the creditors, as against his co[-]sureties in precisely the same manner as against the principal debtor, and as substituted in the place of the creditor and entitled to enforce all his liens, priorities and means of payment." **Commonwealth ex rel. Schnader v. National Surety Co.,** 349 Pa. 599, 608, 37 A.2d 753, 757 (1944) (**quoting Hess' Estate,** 69 Pa. 272, 275 (1871)).

"The right of subrogation is not lost because the debt of the principal is satisfied or extinguished by the surety's payment; on the contrary, it is just because of such satisfaction or extinguishment that the right of subrogation arises. When a surety pays the debt of a principal it is just as if the surety had purchased the claim; the payment operates as an assignment of the debt pro tanto and of all rights of the creditor with regard thereto, including, as the authorities thus indicate, the right to proceed in the name of the creditor against a co[-]surety liable for the same debt." **Id.** at 611, 37 A.2d at 759; **see also, Wright v. Grover & Baker S. M. Co. to use of Smith,** 82 Pa. 80, 82 (1876) ("Although actual payment discharges a bond, judgment or other encumbrance at law, it does not in equity, when justice requires that it be kept afoot for the safety of the paying surety.").

As a general rule, "if a surety has paid a debt, he is entitled to all the securities the creditor had against the principal debtor." **Id.** at 81.

> If a paying surety is entitled to all the securities of the creditor, it would reasonably follow that he should also have all the remedies. Hence, it was held, in **Himes v. Keller,** 3 W.& S. [401,] 404 [(Pa. 1842)], that he is entitled to a cession

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from the principal proved to be unavailing. **Keystone Bank v. Flooring Specialists, Inc.,** 513 Pa. 103, 112 n.6, 518 A.2d 1179, 1184 n.6 (1986); **First National Consumer Discount Company v. McCrossan,** 336 Pa. Super. 541, 547 n.2, 486 A.2d 396, 399 n.2 (1984). This distinction, however, has been largely abolished by statute in Pennsylvania. 8 P.S. §1. Under this statute, "a written agreement made by one person to answer for the default of another subjects such person to the liabilities of suretyship unless the agreement contains in substance the words 'this is not intended to be a suretyship.'" **Id.** (citation omitted). As previously discussed, copies of the Donahues' guaranties were not placed in evidence. Consequently, absent proof to the contrary, the Donahues are subjected to the liabilities of a surety.

> of the debt, and substitution or subrogation to all the rights and actions of the creditor against the debtor; and the security is treated as between the surety and debtor, as still subsisting and unextinguished.

Id. at 82. "Put more simply, equitable subrogation allows a person who pays off an encumbrance to assume the same priority position as the holder of a previous encumbrance." **1313466 Ontario, Inc. v. Carr,** 954 A.2d 1, 4 (Pa. Super. 2008) (citation and quotation marks omitted).

Joint or co-sureties are jointly and severally liable for the whole debt upon the default of their principal, and in relation to each other each is a principal for that proportionate amount for which he is primarily liable as between himself and his co-sureties, and a surety of his co-sureties with respect to the remaining balance of the principal's debt. In the event one of several co-sureties pays more than his proportionate share of the common debt, he is entitled to contribution from the other co-sureties for the amount paid in excess, the extent of the personal liability of each such co-surety to the overpaying surety being limited, however, to that amount which satisfies each co-surety's duty to contribute his proportionate share of the principal's default. **In re Bailey's Estate,** 156 Pa. 634, 642, 27 A. 560, 562 (1893); **Keystone Bank v. Flooring Specialists, Inc.,** 513 Pa. 103, 115, 518 A.2d 1179, 1185-86 (1986).[14] The fraction of the common debt for which each co-surety is proportionately liable as between themselves is in equal shares: "[c]ontribution rests on the ancient maxim, 'equality is equity.'" **Freeman v. Sundheim,** 348 Pa. 248, 251, 35 A.2d 295, 297 (1944); **Bailey's Estate, supra.**

Under the equitable principles at play in equitable subrogation, no formal assignment either to create or evidence the right of contribution is required. The right arises out of the equities of two or more persons obligating themselves to pay the debt of another becoming mutually bound thereby "to each other to divide and equalize any loss that may arise therefrom to either or any of them." **Id.** This right is enforceable against a co-surety "not only through the medium of an independent and direct claim, but by

[14] "[T]he right to have and the liability to make contribution inhere in the transaction by which the sureties [are] jointly and severally bound for the debt of the principal." **Bailey's Estate,** 156 Pa. 634, 642, 27 A. 560, 562 (1893).

way of sobrogation [sic] to the rights of the creditor whose claim it has paid." **Schnader, supra** at 611, 37 A.2d at 759; **see also, Bailey's Estate, supra** (acknowledging that the right of contribution may be enforced by an action of assumpsit or by subrogation to the rights of the creditor).

Had Ventresca raised a claim of equitable subrogation—which we hasten to add, he has not[15]—our analysis would be different, but perhaps not the results. The initial failure of The Bank to assign the notes and guaranties would be irrelevant, and the satisfaction of the notes would not be fatal to Ventresca's claims. **See Wright, supra** at 83. However, Ventresca's right of contribution would likely be limited to at best one-third, perhaps one-fourth, of the amount Ventresca paid pursuant to his guaranty—the Donahues being two of six guarantors, and having signed one of four guaranty agreements. Further, because the amount of AVS' indebtedness to The Bank after subtraction of the $300,000.00 payment by Stomel and credit given for the $487,000.00 value of Ventresca's investment account is in dispute, if AVS' total indebtedness to The Bank as of September 30, 2009, did not exceed $787,000.00, The Bank had no right to an additional payment from any of the guarantors. **Kramph's Executrix v. Hatz's Executors,** 52 Pa. 525 (1866) (holding joint guarantor of debt was entitled to assert in defense to claim for contribution by co-guarantor, those defenses that could have been asserted against creditor).[16]

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[15] At the risk of being repetitious, Ventresca's claim for mortgage foreclosure is an action at law premised upon an alleged breach of two specific written documents, the Donahues' mortgages, whereas equitable subrogation is premised upon equitable principles one of which is the avoidance of unjust enrichment. **United States Fidelity & Guaranty Company v. United Penn Bank,** 362 Pa. Super. 440, 451-52, 524 A.2d 958, 963-64 (1987) (**citing, inter alia, Comment, Equitable Subrogation—Too Hardy a Plant to be Uprooted by Article 9 of the UCC?,** 32 Pitt.L.Rev. 580, 583 (1971)). In this case, neither of the parties has alleged, argued, or even mentioned, that equitable subrogation is relevant to these proceedings.

[16] As of March 1, 2012, Ventresca claimed the Donahues owed $449,254.50 on the two loans indirectly secured by their mortgages computed as follows: $415,000.00 in unpaid principal; $17,637.48 in interest, with an additional $1,469.79 accruing monthly; $2,400.00 in late fees, with an additional $100.00 accruing each month; $217.00 in miscellaneous fees; an escrow deficit of $6,000.00; and $8,000.00 in attorney fees. (Complaint, paragraph 17.) The unpaid principal balance alleged is equal to the combined face value of both notes (**i.e.,** that for $75,000.00 and that for $340,000.00) and runs counter to Ventresca's testimony

B. Donahue Counterclaim[17]

(1) Breach of Fiduciary Duty

The Donahues' counterclaim against Ventresca fails for many of the same reasons Ventresca's claim fails, lack of proof. While

that to his recollection no payments were missed on either note (N.T., 6/27/14, pp. 93-97, 100-101), as well as the sum of $50,075.65 paid to The Bank between December 2008 and September 2009 during the period while Stomel operated and managed AVS' business pursuant to the wholesale agreement. (N.T., 6/27/14, pp. 101, 148-50; Plaintiff Exhibit No. S, Article 8.4.4, p. 8; Defendant Exhibit No. 5, p. 2.)

The unpaid principal balance alleged in the complaint also contradicts The Bank's records which document an outstanding balance on the $340,000.00 note as of September 28, 2009, of $222,984.57, with no reduction made to the outstanding balance for the $75,000.00 note. (N.T., 10/14/14, pp. 101-104; Defendant Exhibit No. 14, pp. 2, 4.) The total outstanding balance (**i.e.,** consisting of both principal and interest) of both notes just two days prior to the first assignment was $297,984.57. Accepting Ventresca's testimony that the $487,000.00 in his investment account paid the amount owed on the $400,000.00 note, the $300,000.00 payment from Stomel would have been sufficient to pay in full the outstanding balance owed on the two notes for which Ventresca now seeks contribution from the Donahues. Ventresca has not explained the $151,269.93 discrepancy between the amount he claims he is owed in the complaint (**i.e.,** $449,254.50) and the amount shown as unpaid on The Bank's records (**i.e.,** $297,984.57).

[17] Pa. R.C.P. No. 1148 restricts counterclaims in a mortgage foreclosure action to those "which arise[] from the same transaction or occurrence or series of transactions or occurrences from which the plaintiff's cause of action arose." This rule has been interpreted to permit only counterclaims which are "part of or incident to the creation of the mortgage relationship itself." **Cunningham v. McWilliams,** 714 A.2d 1054, 1057 (Pa. Super. 1998), **appeal denied,** 557 Pa. 653, 734 A.2d 861 (1999); **see also, Rearick v. Elderton State Bank,** 97 A.3d 374, 383 (Pa. Super. 2014) (holding that in Pennsylvania "the scope of a foreclosure action is limited to the subject of the foreclosure, **i.e.,** disposition of property subject to any affirmative defenses to foreclosure or counterclaims arising from the execution of the instrument(s) memorializing the debt and the security interest in the mortgaged property").

Because the Donahues' counterclaims all relate to alleged misconduct by Ventresca which occurred after the subject mortgages were entered, these counterclaims, which seek to impose personal liability on Ventresca, have not been properly pled in response to Ventresca's action in mortgage foreclosure, which is strictly an **in rem** proceeding. Nevertheless, because Ventresca has not objected to the counterclaims and Rule 1148's bar is a procedural limitation, not a jurisdictional one, we consider the merits of these claims. **See Beneficial Consumer Discount Company v. Vukman,** 621 Pa. 192, 202, 77 A.3d 547, 553 (2013) ("Jurisdiction relates solely to the competency of the particular court or administrative body to determine controversies of the general class to which the case then presented for its consideration belongs.") (citation and quotation marks omitted).

Further, given the nature of these claims, whether they should be analyzed under New Jersey law is a question not raised by the parties, and, because waived, one we do not address.

it is true, as argued by the Donahues, that a fiduciary relationship exists when "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 over-mastering dominance on one side, or weakness, dependence, or justifiable trust on the other," neither has been proven by the Donahues. **McDermott v. Party Citi Corp.,** 11 F. Supp. 2d 612, 626 (E.D. Pa. 1998) (**quoting Commonwealth Department of Transportation v. E-Z Parks, Inc.,** 153 Pa. Commw. 258, 268, 620 A.2d 712, 717 (1993)).

Here, Donahue was the President of AVS before Ventresca and his partner, Jeffrey Snyder, acquired a sixty-five percent interest, and he continued as President after that acquisition. Donahue knew the business before Ventresca became involved (in fact, he started the business in 1996), and he knew the business after Ventresca was involved. (N.T., 6/27/14, p. 108.) Donahue placed his personal property at stake in guarantying all three promissory notes and in granting mortgages on his real estate in Bucks and Carbon Counties. But so did Ventresca when he also personally guarantied the three notes, pledged the investments in his A.G. Edwards investment account as security for their payment, and personally wrote checks to AVS or on its behalf for $468,181.93 between September 29, 2005, and September 25, 2009. (N.T., 6/27/14, pp. 128-30; N.T., 10/14/14, p. 58; Plaintiff Exhibit No. Q.)

Donahue knew AVS' business was failing and that AVS was in default under its loan obligations to The Bank. Donahue knew that The Bank was exercising its right to dispose of substantially all of AVS' assets in a private foreclosure sale, and he knew that the only assets of AVS that were not collateralized with The Bank were being sold to Stomel. (N.T., 10/14/14, pp. 86-87.) In the Asset Purchase Agreement, which Donahue signed in his capacity as AVS' President, Donahue expressly acknowledged that the planned transfer of AVS' assets to The Bank and The Bank's sale of those assets to Stomel was most likely to maximize the amount realized from the collateral to reduce AVS' loan obligations.

Donahue attended part of the closing which was scheduled to begin either at 10:00 or 11:00 A.M. on September 30, 2009, and had the right to attend the settlement held earlier that morning at

The Bank. He chose not to do so. This was his decision and one he must live with. As the President of AVS, Donahue had the right to question The Bank at settlement as to the amount of any deficiencies claimed and how these would be accounted for, he had the right to question and to know how the monies paid by Stomel would be applied, and he had the right to assure himself and determine whether he retained any personal exposure or liability to The Bank following the sale to Stomel and in what amount. Donahue had an obligation to protect himself and if he failed to do so, this was not a breach of fiduciary duty by Ventresca.

Nor did Ventresca breach any fiduciary duty owed to Donahue when Vistar Corporation entered a personal judgment against him and AVS for $55,833.89 in January 2008 or when the State of New Jersey entered a judgment against him on June 14, 2012, in the amount of $116,225.76 as "a responsible person of [AVS]" for unpaid corporate income and sales and use taxes. (Defendant Exhibit Nos. 10A, 22.) On February 12, 2008, Donahue executed a promissory note to Vistar Corporation in the face amount of $79,405.67 and personally guaranteed this note. (N.T., 10/14/14, pp. 180-81; Plaintiff Exhibit No. K.) As President of AVS, the State of New Jersey identified Donahue as a responsible party for the payment of AVS' taxes. (N.T., 10/14/14, pp. 179-80.) Both judgments were a direct result of deliberate decisions made by Donahue to personally guaranty a corporate debt and to serve as AVS' president, respectively.[18]

[18] Alternatively, the Donahues claim that Ventresca, as a majority shareholder, stands in a fiduciary relationship to Donahue, a minority shareholder. **See Ferber v. American Lamp Corporation,** 503 Pa. 489, 496, 469 A.2d 1046, 1050 (1983) (holding that "majority shareholders have a duty to protect the interests of the minority."). First, whether Ventresca is a majority shareholder is by no means clear. **See supra** footnote 1; **see also,** N.T., 10/14/14, p. 116. If the limited liability company of which Ventresca is a member, or if Ventresca and his partner, Jeffrey Snyder, jointly own sixty-five percent of the outstanding stock of AVS, then either the limited liability company or Snyder would be indispensable parties to this counterclaim, thereby divesting this Court of jurisdiction to make a substantive decision. **Hart v. O'Malley,** 436 Pa. Super. 151, 166, 647 A.2d 542, 549 (1994).

Assuming for purposes of argument only, that Ventresca is in fact the individual owner of a majority interest in AVS, the Donahues have failed to prove any breach of a fiduciary obligation owed by Ventresca to Donahue arising from Ventresca's status as a majority shareholder. Though the Donahues argue generally that after Ventresca became a shareholder he assumed control over AVS'

operations and financing, and that within four years AVS was out of business, the Donahues have presented no evidence that Ventresca wasted, fraudulently disposed of, or diverted corporate assets or opportunities for his personal benefit or that of his other businesses, or that he misrepresented or concealed corporate financial information from Donahue, or that he in some manner violated or abused his fiduciary responsibilities to Donahue. To the contrary, Ventresca personally obligated himself to AVS' debts, pledged substantial assets of his own to secure these debts, and, through one of his other businesses, provided rent-free office space to AVS. (N.T., 6/27/14, pp. 47-48, 68-69.)

The Donahues have not established that Ventresca acted fraudulently, illegally, or oppressively toward Donahue. **See e.g.,** 15 Pa. C.S.A. §1767(a)(2); **Ford v. Ford,** 878 A.2d 894, 899-900 (Pa. Super. 2005). Further, Donahue was not frozen out of AVS' business operations by Ventresca: he continued as AVS' president and acted as such (**e.g.,** Donahue signed AVS' promissory notes to The Bank which are the subject of the Donahues' personal guaranties, the Asset Purchase Agreement with Stomel, and corporate tax returns of AVS in his capacity as president). (Plaintiff Exhibit Nos. D, F, G, S; Defendant Exhibit No. 10A.) Donahue was active in the business and he was kept advised of its financial status. (N.T., 6/27/14, pp. 77, 84, 102; N.T., 10/14/14, pp. 42-43.) **Cf. Viener v. Jacobs,** 834 A.2d 546 (Pa. Super. 2003) (finding a breach of fiduciary duty where a minority shareholder was removed from office by the majority shareholders and effectively frozen out of any meaningful role in the corporation's business, thereby allowing the majority shareholders to control the corporation for their own benefit), **appeal denied,** 579 Pa. 704, 857 A.2d 680 (2004), **cert. denied,** 543 U.S. 1146 (2005). The fact that AVS failed financially does not, by itself, prove that Ventresca breached his fiduciary obligations to Donahue. **Cf. Selheimer v. Manganese Corporation of America,** 423 Pa. 563, 580, 224 A.2d 634, 644 (1966) (setting forth several well-established principles in determining when a director has personal liability to a corporation).

Finally, although Ventresca was a director of AVS, it does not appear that the Donahues base their counterclaim against Ventresca on breach of Ventresca's fiduciary duty as a director to AVS. 15 Pa. C.S.A. §1712(a); **Anchel v. Shea,** 762 A.2d 346 (Pa. Super. 2000), **appeal denied,** 566 Pa. 656, 782 A.2d 541 (2001). Nor could they: "In Pennsylvania, only the corporation and 'a shareholder ... by an action in the right of the corporation' may bring a lawsuit and claim that a director breached the standard of care owed to the corporation." **Hill v. Ofalt,** 85 A.3d 540, 548 (Pa. Super. 2014) (**quoting** 15 Pa. C.S.A. §1717). "[A] shareholder does not have standing to institute a direct suit for a harm [that is] peculiar to the corporation and [that is] only [] indirectly injurious to [the] shareholder." **Id.** (citation and quotation marks omitted). "To have standing to sue individually, the shareholder must allege a direct, personal injury—that is independent of any injury to the corporation—and the shareholder must be entitled to receive the benefit of any recovery." **Id.** (quotation marks and citation omitted). For the shareholder's claim to be direct, rather than derivative, the duty breached must be one owed to the shareholder, not to the corporation. This would occur, for instance, where the shareholder's suit is "based on a contract to which the [individual] shareholder is a party, or on a right belonging severally to the shareholder, or on a fraud affecting [him or her] directly." **Id.** at 549 (**quoting** 12B Fletcher Cyclopedia of Law of Corporations §5911 (2013)).

(2) Unjust Enrichment

The Donahues' claim for unjust enrichment against Ventresca requires proof of the following three elements: (1) that they conferred benefits on Ventresca, (2) that Ventresca appreciated these benefits, and (3) that Ventresca accepted and retained these benefits under such circumstances that it would be inequitable for Ventresca to retain them without payment of value. **Ameripro Search, Inc. v. Fleming Steel Company,** 787 A.2d 988, 991 (Pa. Super. 2001). Specifically, the Donahues contend that at the closing transferring AVS' assets to The Bank, which was followed by the sale of AVS' assets to Stomel, Ventresca arranged to have the monies received from Stomel applied first to satisfy Ventresca's personal obligations to The Bank or those debts for which Ventresca's personal assets were at risk, in preference to those debts for which the Donahues were personally responsible or their property might be foreclosed upon.

To the same extent that Ventresca has failed to prove how The Bank allocated the proceeds at settlement, so too have the Donahues failed to prove this allocation. No evidence has been presented that Ventresca somehow benefited from the allocation. To the contrary, Ventresca was required to contribute $613,000.00 from his personal assets at the time of settlement in order for the sale to Stomel to proceed and to cut further losses on AVS' obligations to The Bank. These monies came solely from Ventresca—$487,000.00 from his investment account and $126,099.05 from a personal check—with nothing paid personally by the Don-

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Because the injuries claimed by the Donahues are dependent upon and derivative from injury to AVS—which the Donahues claim resulted from Ventresca's alleged dominating control, self-dealing, diversion of corporate assets, failure to make payment of required taxes, and mismanagement of AVS—if a cause of action exists for breach of Ventresca's fiduciary duty as a director, it belongs to AVS and not to the Donahues. **Id.** at 551-52 (holding the filing of a tax lien against shareholder/officer/director of corporation for corporation's failure to remit required withholding taxes to appropriate taxing authorities and commencement of litigation proceedings against the shareholder/officer/director based upon his personal guaranty of the corporation's debt, while causing personal financial harm to the individual shareholder/officer/director, is nevertheless an indirect injury in that it resulted from a breach of duty of the director owed to the corporation, not to the shareholder/officer/director, such that any injury to the shareholder/officer/director was dependent upon and derivative to the corporate injury).

ahues. Ironically, it is this disproportionate recovery by The Bank from one guarantor (**i.e.,** Ventresca) over another (**i.e.,** Donahue) that potentially could have formed the basis for a claim of equitable subrogation on Ventresca's behalf, itself founded on principles of unjust enrichment.

(3) Accounting

As to the Donahues' claim for an accounting, the information the Donahues seek—what payments were made by AVS, or on its behalf, on its indebtedness to The Bank; how the net proceeds of the sale of AVS' assets to Stomel were allocated to the payment of AVS' indebtedness to The Bank; and how the balance of that indebtedness was accounted for—was as accessible to Donahue as it was to Ventresca. As President of AVS, Donahue had as much right to attend the settlements held on September 30, 2009, as Ventresca. Donahue had the same opportunity as Ventresca to be present and obtain this information from The Bank. Yet Donahue never requested an accounting of AVS' outstanding debts to The Bank. (N.T., 10/14/14, pp. 201-202.)

Why, if Donahue wanted this information, he did not obtain a copy of the settlement statement for the closing he attended on September 30, 2009, or attend and obtain a copy of the settlement statement for the settlement held earlier in the morning, we cannot say. The information, however, appears to have been equally available to him, and Donahue has not proven otherwise. Moreover, as it affects the claims raised by Ventresca and the Donahues in these proceedings, the trial has been concluded, our decision made, and the Donahues present no case for the benefit of an accounting at this late date.[19]

[19] In requesting an accounting, a complaint "seeks to turn over to the party wrongfully deprived of possession all **benefits** accruing to defendant by reason of its wrongful possession." **Boyd & Mahoney v. Chevron U.S.A.,** 419 Pa. Super. 24, 36, 614 A.2d 1191, 1197 (1992) (emphasis in original), **appeal denied,** 535 Pa. 629, 631 A.2d 1003 (1993). Hence, a party is only entitled to an accounting when there are underlying claims that warrant a recovery of damages.

An accounting at law pursuant to Pa. R.C.P. 1021 is "merely an incident to a proper assumpsit claim." **Buczek v. First National Bank of Mifflintown,** 366 Pa. Super. 551, 555, 531 A.2d 1122, 1123 (1987). Here, the Donahues have not asserted any claim for breach of contract, or any other claim for assumpsit.

An equitable accounting is proper where a fiduciary relationship exists between the parties, where fraud or misrepresentation is alleged, or where the

CONCLUSION

This case has been unduly complicated for a variety of reasons, among them: (1) the failure to appreciate the doctrine of equitable subrogation and its applicability to the facts of this case; (2) the failure to provide critical evidence, such as the Donahues' written guaranties and those of Joseph L. Ventresca, Tinamarie G. Ventresca, Jeffrey Snyder and Christopher Side, the settlement statements for the closings held at The Bank on September 30, 2009, and the Stock Purchase Agreement for Ventresca's purchase of AVS stock; and (3) the failure to follow Pa. R.C.P. 1148, which precludes counterclaims in foreclosure that do not "arise[] from the same transaction or occurrence or series of transactions or occurrences from which the plaintiff's cause of action [**i.e.,** the execution of the note and mortgage] arose." Absent such unnecessary complications, the issues that appear are fairly resolvable under well-recognized equitable principles. Though not applied, because not presented, we believe that the resolution we have reached is legally sound and just based upon the causes of action asserted by the parties and the evidence presented to support them.

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accounts are mutual or complicated, and plaintiff does not possess an adequate remedy at law. **Rock v. Pyle,** 720 A.2d 137, 142 (Pa. Super. 1998) (citations omitted). While the Donahues allege a fiduciary relationship and self-dealing by Ventresca, the Donahues' claims in this regard have been denied by us.

In addition, the information the Donahues request from an accounting has previously been requested by them in discovery in this case. In response, Ventresca stated that a fire in January 2011 destroyed some of the records the Donahues were requesting, but that he had produced all documents in his possession responsive to the Donahues' request and responded fully to the Donahues' discovery. (N.T., 6/27/14, pp. 48-49; Ventresca Second Reply to Donahues' Motion for Sanctions, paragraphs 3-14; Ventresca Answer to Motion **in Limine,** paragraphs 6, 9.) Not only will an accounting be denied where the information sought is equally obtainable through discovery, **Buczek, supra** at 556, 531 A.2d at 1124, where, as here, discovery has been made and answered, ordering an accounting from Ventresca at this point would serve no useful purpose.

FREDERICK L. KREAMER, JR. and TERRI LEE KREAMER, His Wife, Plaintiffs vs. LOBAR, INC., Defendant LOBAR, INC., Third-Party Plaintiff vs. CHOWNS FABRICATION AND RIGGING, INC., Third-Party Defendant

Civil Law—Summary Judgment—Contract Interpretation—Questions of Law—Construction Agreement—Agreement of Subcontractor to Obtain and Maintain General Liability Insurance Coverage—

Requirement That the General Contractor Be Named As an Additional Insured on the Subcontractor's Liability Policy—Nature and Scope of Insurance Coverage to Be Provided Additional Insured Under the Subcontract—"Caused by" Versus "Arising out of" Coverage—Nature and Scope of Coverage Provided by Additional Insured Endorsement—Claim Against General Contractor—Insurer's Duty to Defend General Contractor As an Additional Insured—General Contractor's Claim Against Subcontractor for Breach of Contract

1. The primary objective in construing the terms of an agreement is to ascertain and give effect to the parties' intent as expressed by the words they have chosen to effectuate their agreement.

2. When the words of a contract are clear and unambiguous, the parties' intent is to be found only in the express language of the agreement. The determination of whether ambiguity exists in the contract is a question of law for the court to decide by looking at the contract as a whole in light of the circumstances present when the contract was entered.

3. A party is entitled to summary judgment as a matter of law in two situations: (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or (2) if, after the completion of discovery relevant to the motion, 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 which in a jury trial would require the issues to be submitted to a jury. Hence, 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.

4. Because the construction and interpretation of a contract is a question of law, it is one particularly appropriate for summary judgment provided the contract is clear and unambiguous.

5. Naming an indemnitee as an additional insured under the indemnitor's commercial general liability policy is a common means by which indemnitors back up their promise of indemnification. In those circumstances where the indemnity agreement proves unenforceable, the indemnitee may still be able to obtain coverage for its liability by making a claim directly as an additional insured under the indemnitor's general liability policy.

6. A construction contract which requires the subcontractor to name the general contractor as an additional insured in the subcontractor's commercial general liability policy for claims caused in whole or in part by the subcontractor's negligent acts or omissions while working on the construction project imposes a contractual obligation on the subcontractor to provide liability insurance coverage protecting the general contractor from vicarious liability created by the subcontractor's conduct, as distinguished from direct, primary liability of the general contractor for its own acts of negligence.

7. The focus of an "arising out of" clause, unlike a "caused by" clause in an additional insured endorsement, is not on who caused the injury, but on what caused the injury.

8. An additional insured endorsement insuring an additional insured against liability caused, in whole or in part, by the named insured's acts or omissions,

or the acts or omissions of those acting on the named insured's behalf, protects the additional insured against claims for injuries "proximately caused" by the named insured's negligent acts or omissions, but not against those claims which are otherwise related to or arise out of the work performed by the named insured.

9. An additional insured endorsement to a subcontractor's commercial general liability insurance policy insuring the general contractor against injury caused in whole or in part by the subcontractor's acts or omissions, or the acts or omissions of those acting on its behalf, satisfies the subcontractor's contractual obligation under its contract with the general contractor to obtain commercial liability insurance naming the general contractor as an additional insured for claims for which the general contractor might be found legally liable in consequence of the conduct of the subcontractor, or that of its employees, agents or representatives.

10. An insurer's duty to defend a suit is determined solely by comparing the averments of the underlying complaint against the insured with the policy terms and limitations to determine whether coverage exists for the claim made.

NO. 12-2274

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MEMORANDUM OPINION

NANOVIC, P.J.—September 2, 2015

On July 26, 2011, Frederick L. Kreamer, Jr., an employee of Chowns Fabrication and Rigging, Inc. ("Chowns"), sustained a work-related injury during the construction of an addition and renovations to the Carbon County Area Vocational Technical School (the "Project") located in Jim Thorpe, Carbon County, Pennsylvania. The general contractor for this Project was Lobar, Inc. ("Lobar"). Lobar subcontracted the structural steel work for the Project to Chowns pursuant to an agreement dated April 14, 2009 (the "Subcontract"). Kreamer was injured when he fell from a ladder while trying to remove a makeshift plywood cover erected by another subcontractor at the job site.

Kreamer and his wife, Terri Lee Kreamer, (collectively the "Plaintiffs"), thereafter brought suit against Lobar for personal injuries and loss of consortium. Lobar, who, pursuant to the Subcontract, was to be named as an additional insured under Chowns'

general liability policy, tendered the defense of Plaintiffs' claim to Pennsylvania National Mutual Casualty Insurance Company ("Penn National"), Chowns' general liability carrier. After Penn National denied coverage, Lobar filed a third-party joinder complaint against Chowns, alleging, **inter alia,** that Chowns had breached its contract with Lobar in failing to provide insurance coverage protecting Lobar against claims, such as Plaintiffs', arising out of Chowns' operations under the Subcontract.

At issue in this dispute is the scope of additional-insured coverage owed to Lobar under the Subcontract and whether it has been provided.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed their complaint against Lobar on October 22, 2012, after Kreamer's workers' compensation claim as an employee of Chowns had been fully and finally adjudicated. In this complaint, Plaintiffs sought damages solely as result of Lobar's alleged negligence. Specifically, the complaint alleges that Lobar was negligent, **inter alia,** in failing to (1) establish policies and standards regarding site safety and the erection of plywood structures in the area where employees of Chowns would be working; (2) implement a safety plan; (3) appoint sufficient supervisory personnel; (4) adequately train personnel on site safety; (5) require the workers who constructed the plywood structure during the School renovations to remove it; (6) adequately inspect the job site for safety hazards; (7) inform Kreamer of the dangers involved with removing the plywood structure; (8) provide assistance to Kreamer in removing the plywood structure; and (9) provide a safe means of accessing the plywood structure, such as a scissor lift. (Complaint, ¶16.)

Prior to the filing of Plaintiffs' complaint, Plaintiffs' counsel notified Lobar's commercial general liability insurance carrier, The Hartford, of Plaintiffs' intent to commence suit. After its review of this potential claim, The Hartford wrote to Chowns on August 10, 2012, and requested that Chowns' general liability insurer assume the defense of Plaintiffs' claim against Lobar as an additional insured under Chowns' general liability policy. In explaining its request, The Hartford relied upon the following language from Paragraph 3 of the Subcontract as creating a contractual obligation

on Chowns to obtain liability insurance protecting Lobar against Plaintiffs' claim:

> INSURANCE. [Chowns] shall purchase and maintain insurance that will protect [Chowns] from claims arising out of [Chowns'] operations under this Agreement, whether the operations are by [Chowns], or any of [Chowns'] consultants or anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable. Prior to starting any work under this Agreement, [Chowns] shall obtain insurance in accordance with the General Requirements of the Contract from a responsible insurance company or companies and shall provide two (2) certificates of insurance to [Lobar] naming [Lobar] and Owner as an additional insured and evidencing coverage in accordance with the above referenced requirements.

Subcontract, Paragraph 3.

By letter dated September 7, 2012, Penn National denied Lobar's request noting that since Plaintiffs had yet to file any litigation necessitating a defense, this request was premature. In response, Lobar's counsel wrote on October 31, 2012, that based upon the additional insured requirements of the Subcontract, Penn National, as Chowns' liability carrier, "owed a duty to Lobar in the same manner it would owe a duty to its insureds, even in the pre-litigation, claim investigation stage"; that if Chowns had failed to name Lobar as an additional insured under the Penn National policy, then Chowns would be in breach of the Subcontract and liable to Lobar for its damages; and that if Plaintiffs brought suit against Lobar, Lobar would join Chowns in the litigation as an additional defendant for breach of contract.

Plaintiffs' complaint was filed on October 22, 2012. After further communication between Lobar and Penn National, Penn National denied Lobar's request to defend against Plaintiffs' claim. In a letter dated February 7, 2013, Penn National stated that Lobar did not qualify as an additional insured under the policy it issued to Chowns and, therefore, no duty to defend existed.

Lobar filed its joinder complaint against Chowns on June 13, 2013. In this complaint, Lobar claimed Chowns breached the insur-

ance requirements of the Subcontract by failing to name Lobar as an additional insured in its general liability policy. The complaint quotes in full Paragraph 3 of the Subcontract recited above, alleges that the policy Chowns obtained from Penn National does not provide the insurance coverage safeguarding Lobar required by the Subcontract, and asserts under Count I, which is entitled "Breach of Contract" and is the only count in the complaint, that pursuant to the Subcontract Chowns was to have Lobar named as an additional insured under its commercial general liability policy with Penn National, that it appeared Lobar was not named as an additional insured in the policy, and that if this were true, then Chowns was in breach of the Subcontract. (Joinder Complaint, ¶¶9, 11, 17, 18 and 19.)

Chowns' answer to the joinder complaint was filed on September 18, 2013. With the exception of Chowns' response to the quoted language from Paragraph 3 of the Subcontract, which was admitted, Chowns denied each of the other above-identified averments as a conclusion of law to which no response was required. Notwithstanding these denials, by opinion letter dated September 16, 2014, addressed to Lobar's counsel, Penn National's independent counsel acknowledged that Lobar was in fact an additional insured under the policy issued by Penn National to Chowns by virtue of an endorsement to the policy entitled "Automatic Additional Insureds—Owners, Contractors and Subcontractors (Ongoing Operations)" ("Additional Insured Endorsement") which provides, in part, as follows:

> This endorsement modifies insurance provided under the following:
>
> COMMERCIAL GENERAL LIABILITY COVERAGE PART
>
> A. The following provision is added to SECTION II—WHO IS AN INSURED
>
> 1. Any person(s) or organizations(s) ... with whom you are required in a written contract or agreement to name as an additional insured, but only with respect to liability for 'bodily injury' ... caused, in whole or in part, by:
>
> (1) Your [Chowns'] acts or omissions; or

> (2) The acts or omissions of those acting on your behalf; in the performance of your ongoing operations for the additional insured(s) at the location or project described in the contract or agreement.

Additional Insured Endorsement, Part A, Section 1.[1] That Lobar was in fact an additional insured under the Penn National policy pursuant to this Endorsement is not in dispute at this time.

This notwithstanding, Penn National's independent counsel also opined in his letter of September 16, 2014, that Penn National nevertheless owed no duty to defend Lobar as an additional insured under the coverage provided by the Additional Insured Endorsement. Specifically, counsel noted that since this Endorsement only protects Lobar as an additional insured if Plaintiffs suffered bodily injury resulting from an act or omission by Chowns, or by someone acting on its behalf, Penn National's duty to defend Lobar as an additional insured arises only if Plaintiffs claim their injuries were caused in whole or in part by the acts or omissions of Chowns, or the acts or omissions of someone acting on its behalf, and that this determination is to be made solely from the "four corners" of Plaintiffs' complaint against Lobar. **Kvaerner Metals Division of Kvaerner U.S., Inc. v. Commercial Union Insurance Company,** 589 Pa. 317, 331, 908 A.2d 888, 896-97 (2006) (holding that an insurer's duty to defend a suit is determined solely by comparing the averments of the underlying complaint against the insured with the policy terms and limitations to determine whether coverage exists for the claim made); **see also, American and Foreign In-**

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[1] In **West Bend Mut. Ins. Co. v. MacDougall Pierce Const., Inc.,** 11 N.E.3d 531 (Ind. Ct. App. 2014), the Indiana Court of Appeals stated:

> CGL [**i.e.,** Commercial General Liability] insurance policies are designed to protect an insured against certain losses arising out of business operations. Most CGL policies are written on standardized forms developed by an association of domestic property insurers known as the Insurance Services Office ('ISO'). These policies begin with a broad grant of coverage, which is then limited in scope by exclusions. Exceptions to exclusions narrow the scope of the exclusion and, as a consequence, add back coverage. However, it is the initial broad grant of coverage, not the exception to the exclusion, that ultimately creates (or does not create) the coverage sought.

Id. at 538 (internal quotation marks and citations omitted). The Additional Insured Endorsement in the Penn National policy is on a standard form prepared by the Insurance Services Office.

surance Company v. Jerry's Sport Center, Inc., 606 Pa. 584, 609, 2 A.3d 526, 541 (2010) ("The question of whether a claim against an insured is potentially covered is answered by comparing the four corners of the insurance contract to the four corners of the complaint."); **American States Insurance Company v. State Auto Insurance Company,** 721 A.2d 56, 59-60 (Pa. Super. 1998).[2]

In making this evaluation, Penn National's independent counsel observed that Plaintiffs' complaint alleges direct negligence against Lobar only; no negligence is claimed against Chowns;[3] and the complaint specifically disclaims any fault by either Plaintiff. (Plaintiffs' Complaint, ¶14.) **Citing Dale Corp. v. Cumberland Mut. Fire Ins. Co.,** 2010 WL 4909600 (E.D. Pa. Nov. 30, 2010), in which virtually the same additional insured policy language appeared as is present in the instant Endorsement, counsel opined that for coverage to exist under this language, the Plaintiffs' injuries must be shown to have been "proximately caused" as a result of Chowns' negligent acts or omissions, and that a "but for" showing—that the injury arose or resulted because of Chowns' work under the Subcontract—was not sufficient. In sum, Penn National's counsel argued that for Plaintiffs' claim against Lobar to be covered under Penn National's policy, Kreamer's accident must have been caused in whole or in part by Chowns' acts or omissions—not simply that the accident was related to or arose out of Chowns' operations (**i.e.,** that the policy Endorsement provides "caused by" not "arising out of" coverage).

Because nothing in Plaintiffs' complaint suggests that Plaintiffs' injuries were caused by any acts or omissions of Chowns, or anyone on its behalf, counsel concluded that no coverage exists under the policy with respect to Plaintiffs' claim against Lobar. As a corollary

[2] In this case, the Superior Court described the following two-step analysis for determining whether a complaint triggers an insurer's duty to defend:

> The first step in a declaratory judgment action concerning insurance coverage is to determine the scope of the policy's coverage. After determining the scope of coverage, the court must examine the complaint in the underlying action to ascertain if it triggers coverage.

American States Insurance Company v. State Auto Insurance Company, 721 A.2d 56, 59-60 (Pa. Super. 1998) (citations and quotation marks omitted).

[3] This is likely because Chowns was Kreamer's employer and could not be held liable under Pennsylvania's workers' compensation laws.

conclusion, no coverage is provided by the policy for injuries or damages caused solely by the negligence of Lobar. In this regard, as also noted by counsel, obtaining additional insured status for Lobar does not create blanket insurance coverage under the Penn National policy for every claim made against Lobar. **See also, Graziano Construction and Development Company v. Pennsylvania National Mutual Casualty Insurance Company,** 2011 WL 2409883 *5, *6 (Pa. Super. 2011), also cited in independent counsel's coverage opinion. In **Graziano,** the identical additional insured endorsement language as is at issue here, issued by the same insurer—Penn National—was examined. Under this language, the Court found that "any organization that [Chowns] was required by contract to name as an additional insured becomes an insured if a person suffers bodily injury resulting from an act or omission by [Chowns] or by someone acting on [Chowns'] behalf." **Id.** at *5.[4]

Lobar does not dispute Penn National's independent counsel's interpretation of the Additional Insured Endorsement as applied to the averments of Plaintiffs' complaint against Lobar. Lobar argues, however, that the insurance protection Chowns was obligated to provide for Lobar's benefit under Paragraph 3 of the Subcontract was broader than that actually provided under the Additional Insured Endorsement. As argued by Lobar, Chowns' contractual obligation under the Subcontract was to procure insurance naming Lobar as an additional insured for claims "arising out of [Chowns'] operations" such that Lobar would be insured against all liability arising in connection with Chowns' work, including Lobar's own negligence.[5] In contrast, Chowns argues that its obligation under Paragraph 3 of the Subcontract is limited to providing insurance coverage protecting Lobar from liability actually "caused by"

[4] Although **Graziano** is an unpublished memorandum opinion and, therefore, not binding on us, **Commonwealth v. Phinn,** 761 A.2d 176, 179 (Pa. Super. 2000), we find its analysis of this same endorsement persuasive.

[5] As argued by Lobar, based on an "arising out of"/"but for" analysis, it is undisputed that Kreamer's injuries arise from Chowns' work on the Project since the focus of an "arising out of" clause is not on who caused the accident but on what caused the accident, that is, the general nature of the operation or work in the course of which the injury was sustained. Here, Kreamer was engaged in Chowns' work when he was injured.

Chowns' acts or omissions, and that it has met this obligation. This difference is the focus of the respective Motions for Summary Judgment filed by Lobar and Chowns with respect to Lobar's joinder complaint against Chowns for breach of contract and which we now address.[6]

DISCUSSION

The issue presented is whether Paragraph 3 of the Subcontract required Chowns to obtain liability insurance, with Lobar named as an additional insured, insuring Lobar against all liability for claims arising out of Chowns' operations, such that Lobar would be protected not only against claims made for injury caused by Chowns, but also for claims alleging injury caused by Lobar relative to Chowns' work, even if based on negligence attributable to Lobar alone, and regardless of whether Chowns' conduct was a

[6] Summary judgment in Pennsylvania is appropriate when, after the relevant pleadings are closed, there is no genuine issue of any material fact as to a necessary element to establish a cause of action. **See** Pa. R.C.P. 1035.2. Specifically, the court shall, upon motion of any party, render summary judgment as a matter of law in two situations: (1) whenever there is no genuine issue of any material fact, as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or (2) if, after the completion of discovery relevant to the motion, 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 which in a jury trial would require the issues to be submitted to a jury. **Id.** "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)).

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, 267, 870 A.2d 850, 857 (2005). Hence, even disputed evidence may allow for the grant of summary judgment if the evidence is 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). Specific to this case, because the construction and interpretation of a contract is a question of law, it is one particularly appropriate for summary judgment provided the contract is clear and unambiguous.

The fact that cross motions for summary judgment have been filed, does not affect our standard or scope of review. Rather, each motion must be separately evaluated to determine if the moving party is entitled to judgment as a matter of law.

contributing factor to the injury.[7] **Cf. Township of Springfield v. Ersek,** 660 A.2d 672, 676-77 (Pa. Commw. 1995) (holding liability

[7] Preliminarily, Chowns requests that its Motion for Summary Judgment be granted on procedural grounds, that the basis of Lobar's claim for breach of contract identified in its joinder complaint against Chowns is fundamentally different from the breach it now claims and which has not been pled. Specifically, Chowns argues that while the joinder complaint may have averred broadly a breach of contract because Chowns did not procure insurance protection for Lobar as mandated by the Subcontract, the exact nature of the breach claimed was Chowns' failure to have Lobar named as an additional insured on Chowns' insurance policy with Penn National. (Joinder Complaint, ¶¶17-20.) However, at this time, Lobar no longer argues it was not named as an additional insured on Chowns' general liability policy, Chowns having proven otherwise, but now claims Chowns breached the Subcontract by procuring insurance which only protects Lobar from liability for damages caused by Chowns or for which it is vicariously liable, whereas the Subcontract required Chowns to procure insurance coverage protecting Lobar as an additional insured for claims arising out of Chowns' operations.

Whether the variance between what Lobar has pled and what it now argues precludes this reconstituted claim depends largely on whether Chowns has been surprised or prejudiced by Chowns' shift in the focus of its claim. While the joinder complaint specifically identified Chowns' alleged failure to have Lobar named as an additional insured on its policy with Penn National, the complaint also alleged generally that Chowns breached Paragraph 3 of the Subcontract by not obtaining insurance coverage for Lobar in accordance with this provision. Further, the joinder complaint quoted Paragraph 3 verbatim in the body of the complaint and attached copies of the Subcontract and Penn National's policy as exhibits to the pleading. Moreover, the theory of liability upon which relief may be granted need not be explicitly stated in the pleadings if it can be gleaned from the facts averred and the applicable law. **See e.g., Ecksel v. Orleans Construction Company,** 360 Pa. Super. 119, 129, 519 A.2d 1021, 1026 (1987) (finding trial court properly held defendant had breached the implied warranty of habitability, even though plaintiffs had only pled a breach of the written terms of a home construction contract).

In finding Chowns has been neither prejudiced nor surprised by the shift in focus of the nature of the breach claimed, we note first that prior to the filing of the joinder complaint on June 13, 2013, both Chowns and its insurer, Penn National, balked at providing Lobar with a copy of the Penn National Policy despite being asked to do so, and that approximately four months before the joinder complaint was filed Penn National denied Lobar's requested defense of Plaintiffs' claim, writing that Lobar did not qualify as an additional insured under the policy issued to Chowns. Not until September 16, 2014, less than a month before Lobar filed its Motion for Summary Judgment on October 14, 2014, did Penn National, through its independent counsel, acknowledge that Lobar was named as an additional insured in the policy but claimed the scope of the insurance coverage available to Lobar as an additional insured under this policy did not protect Lobar against Plaintiffs' claim. Moreover, at the time Lobar filed its

insurance policy naming Springfield Township as an additional insured "with respect to liability arising out of operations performed by the named insured" required insurer to defend and indemnify Springfield Township for injuries connected or related to the named insured's activities, regardless of whether the negligence which gave rise to the claim was that of the named insured or the Township). In effect, Lobar argues the language of the Subcontract required Chowns to provide Lobar with general liability coverage equal to that provided to Chowns as the named insured.

In examining the Subcontract, we construe this agreement as we would any other contract. Our primary objective in doing so is to ascertain and give effect to the parties' intent as expressed by the words they have chosen to effectuate their agreement. **Shovel Transfer and Storage, Inc. v. Pennsylvania Liquor Control Board,** 559 Pa. 56, 65, 739 A.2d 133, 137-38 (1999) ("When the words of a contract are clear and unambiguous, the intent is to be found only in the express language of the agreement."). To that end, we give the words in the Subcontract their natural, plain, and generally accepted meaning unless the contract indicates that the parties intended the language to impart a technical or different meaning. **J.K. Willison, Jr. v. Consolidation Coal Company,** 536 Pa. 49, 54, 637 A.2d 979, 982 (1994).

We consider the Subcontract as a whole, seeking to reconcile all provisions and render none meaningless. **See International Organization Master, Mates and Pilots of America, Local No. 2 v. International Organization Masters, Mates and Pilots of America, Inc.,** 497 Pa. 102, 439 A.2d 621 (1981) (noting that, in construing a contract, each and every part of it must be taken into consideration and given effect, if reasonably possible). If the

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Motion for Summary Judgment, Lobar was under a court-ordered deadline of October 13, 2014, by which to file dispositive motions.

It is also clear in reviewing Chowns' Motion for Summary Judgment and its supporting brief that Chowns understood the nature of the breach of contract claimed by Lobar and briefed this issue. Both parties have treated the question as one of law and neither has claimed that any extrinsic evidence needs to be introduced to clarify or interpret the meaning of the Subcontract's provisions regarding its requirements for the type or scope of the insurance coverage to be obtained by Chowns. Accordingly, we find Lobar's claim to be allowed under the pleadings and circumstances as they exist and will address its merits.

Subcontract uses unambiguous language, we will construe it as a matter of law and enforce it as written. **Currid v. Meeting House Restaurant, Inc.,** 869 A.2d 516, 519 (Pa. Super. 2005), **appeal denied,** 584 Pa. 694, 882 A.2d 478 (2005). Further,

> [w]hen interpreting contract language, specific provisions ordinarily will be regarded as qualifying the meaning of broad general terms in relation to a particular subject. ... Thus, where specific or exact terms seem to conflict with broader or more general terms, the former is more likely to express the meaning of the parties with respect to the situation than the general language. ...

A.G. Cullen Construction, Inc. v. State System of Higher Education, 898 A.2d 1145, 1168 (Pa. Commw. 2006) (internal quotation marks and citations omitted).

Contractual terms are ambiguous "if they are subject to more than one reasonable interpretation when applied to a particular set of facts." **Madison Construction Company v. Harleysville Mutual Insurance Company,** 557 Pa. 595, 606, 735 A.2d 100, 106 (1999). In determining whether the terms are ambiguous, the court cannot distort the plain meaning of the words found in the agreement. **Id.** Whether a contract is ambiguous is a question of law for the court to decide by looking at the contract as a whole in light of the circumstances present when the contract was entered.[8] In addition, "[w]hen a contract is ambiguous, it is undisputed that the rule of **contra proforentem** [sic] requires the language to be construed against the drafter." **Commonwealth, Department of Transportation v. Semanderes,** 109 Pa. Commw. 505, 511, 531 A.2d 815, 818 (1987).[9]

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[8] If, and only if, the language in the written contract is "ambiguous may extrinsic or parol evidence be considered to determine the intent of the parties." **Commonwealth, Department of Transportation v. Brozzetti,** 684 A.2d 658, 663 (Pa. Commw. 1996).

[9] By agreement, the doctrine of **contra proferentem** does not apply to the Subcontract. Paragraph 14 of this contract states:

> JOINT DRAFTING. The parties expressly agree that this Agreement was jointly drafted, and that they both had opportunity to negotiate terms and to obtain assistance of counsel in reviewing terms prior to execution. This Agreement should be construed neither against nor in favor of either party, but should be construed in a neutral manner.

Subcontract, Paragraph 14.

Paragraph 3 of the Subcontract, the provision upon which both parties rely for their respective interpretations, consists of two sentences. The first describes the scope of coverage Chowns must obtain to protect itself and its employees/agents:

> Subcontractor shall purchase and maintain insurance that will protect Subcontractor from claims arising out of Subcontractor operations under this Agreement, whether the operations are by Subcontractor, or any of Subcontractor's consultants or anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable.

This sentence, which requires Chowns to obtain insurance which fully protects it "from claims arising out of [its] operations under [the Subcontract]," says nothing about the nature or scope of insurance Chowns is required to obtain on Lobar's behalf.

It is the second sentence of Paragraph 3 which is at issue in this case and which governs the requirement that Lobar be named as an additional insured:

> Prior to starting any work under this Agreement, Subcontractor shall obtain insurance in accordance with the General Requirements of the Contract from a responsible insurance company or companies and shall provide two (2) certificates of insurance to Contractor naming the Contractor and Owner as an additional insured and evidencing coverage in accordance with the above-referenced requirements.

This sentence literally requires Chowns to obtain "insurance in accordance with the General Requirements of the Contract" and to provide two certificates of insurance naming Lobar and the Project owner, here the Carbon County Area Vocational Technical School Authority, as additional insureds with respect to this insurance.

Both parties agree that the General Requirements of the Contract are those found in the General Conditions of the Contract for Construction (AIA Document No. A201-2007) (hereinafter referred to as the "General Conditions") which were expressly incorporated by reference and made part of the prime contract between the Carbon County Area Vocational Technical School

Authority, as owner, and Lobar, as the general contractor.[10] Section 5.3 of the General Conditions provides that:

> the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities, including the responsibility for safety of the Subcontractor's Work, which the Contractor, by these Documents, assumes toward the Owner and Architect.

The Subcontract itself also incorporates the General Conditions of the prime contract. In accordance with Section 5.3 of the General Conditions, the Subcontract requires that to the extent the terms of the prime contract between the owner and contractor apply to the work of the subcontractor, the subcontractor assumes toward the contractor all obligations, rights, duties, and redress that the contractor assumes toward the owner and also, that the contractor assumes toward the subcontractor all obligations, rights, duties, and redress that the owner assumes toward the contractor. (Subcontract, Paragraph 1, p. 1.) The Subcontract also provides that "[i]n the event of conflicts or inconsistencies between provisions to this Agreement and the prime agreement, this Agreement shall govern." (Subcontract, Paragraph 1, p. 1.)

Article 11 of the General Conditions is entitled "Insurance and Bonds." It sets the standard for insurance required under the Subcontract. Substituting the term "Contractor" for "Owner" and the term "Subcontractor" for "Contractor" to reflect the application of these General Conditions to the Subcontract and the roles of the parties in the instant dispute, Section 11.1.1 of the General Conditions provides:

> The [Subcontractor] shall purchase from and maintain in a company or companies lawfully authorized to do business in

[10] The agreement between the Authority and Lobar utilizes the Standard Form of Agreement Between Owner and Contractor (AIA Document No. A101-2007) prepared by the American Institute of Architects. Similarly, the General Conditions of the Contract for Construction (AIA Document No. A201-2007) incorporated by reference in the prime contract were prepared by the American Institute of Architects. The Subcontract, by contrast, utilizes a form developed by the Associated General Contractors of America (AGC Document No. 604).

> the Commonwealth of Pennsylvania ... such insurance as will protect the [Subcontractor] from claims **set forth below** which may arise out of or result from the [Subcontractor's] operations and completed operations under the [Subcontract] and for which the [Subcontractor] may be legally liable, whether such operations be by the [Subcontractor] or by a [Sub-Subcontractor] or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable.

(Emphasis added.) This requirement corresponds closely with the first sentence of Paragraph 3 of the Subcontract. However, rather than listing the nine categories of claims which are "set forth below" in the General Conditions, the Subcontract simply states that the subcontractor will purchase and maintain insurance to protect itself against claims arising out of its operations. To the extent this is different than the General Conditions, the Subcontract's terms replace and supersede those in the General Conditions.

When similarly edited to reflect the roles of the parties in this litigation, Section 11.1.2.1 of the General Conditions provides:

> The insurance required by [Section] 11.1.1 shall name the [Contractor] [and] the [Contractor's] consultants ... as additional insured. If coverage is written on a 'claims made' basis, [Subcontractor] warrants the purchase of an extended reporting period of not less than two (2) years.

With respect to naming the general contractor as an additional insured, this language corresponds roughly with the second sentence in Paragraph 3 of the Subcontract and appears to some degree to support Lobar's position. Significantly, this language does not describe the scope of the protection the contractor is to have as an additional insured, and whether such coverage is to be on a "primary" or "derivative" basis, the latter entitling the additional insured only to coverage for that conduct of the named insured for which it is vicariously liable, as distinguished from direct, primary liability for its own acts of negligence. As written, the language in this section of the General Conditions does not address one way or another whether the protection to be provided is to include insurance coverage for the contractor's independent acts of negligence.

This question, however, is answered, at least with respect to commercial liability coverage, by a more specific section of the General Conditions, Section 11.1.4, which states:

> The [Subcontractor] shall cause the commercial liability coverage required by the Contract Documents to include (1) [the Contractor] as [an] additional insured[ ] for claims caused in whole or in part by the [Subcontractor's] negligent acts or omissions during the [Subcontractor's] operations; and (2) the [Contractor] as an additional insured for claims caused in whole or in part by the [Subcontractor's] negligent acts or omissions during the [Subcontractor's] completed operations.

When read in context, the insurance provisions of the General Conditions require the subcontractor to obtain commercial liability insurance naming the contractor as an additional insured for claims "caused in whole or in part by" the subcontractor's negligent acts or omissions.[11]

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[11] To paraphrase the International Risk Management Institute's ("IMRI") insurance glossary, in liability insurance, additional insured status is commonly used in conjunction with an indemnity agreement between the named insured (the indemnitor) and the additional insured (the indemnitee). Having the rights of an insured under the indemnitor's commercial general liability policy is a common means by which indemnitors back up their promise of indemnification. If the indemnity agreement proves unenforceable for some reason, the indemnitee may still be able to obtain coverage for its liability by making a claim directly as an additional insured under the indemnitor's general liability policy. IMRI, Additional Insured—Insurance Glossary, http://www.irmi.com/online/insurance-glossary/terms/a/additional-insured.aspx (last visited Sept. 1, 2015).

Paragraph 11 of the Subcontract provides the following with respect to Chowns' obligation to indemnify and hold harmless Lobar:

> INDEMNITY. To the fullest extent permitted by law, Subcontractor shall defend, indemnify and hold harmless Contractor, Contractor's other subcontractors, Architect/Engineer, Owner and their agents, consultants, employees and others as required by this Agreement from all claims for bodily injury and property damage that may arise from performance of Subcontract Work to the extent of the negligence attributed to such acts or omissions by Subcontractor, Subcontractor's subcontractors or anyone employed directly or indirectly by any of them or by anyone for whose acts any of them may be liable.

Subcontract, Paragraph 11. This language reinforces our interpretation of the requirements of the General Conditions with respect to commercial liability coverage and that the coverage owed to the contractor need only include coverage against the contractor's vicarious liability for the acts or omissions of the subcontractor.

As so construed, the Subcontract requires Chowns to obtain commercial liability insurance protecting Lobar from liability for those claims "caused in whole or in part by" Chowns. It does not require Chowns to procure commercial liability insurance naming Lobar as an additional insured for any claim "arising out of" Chowns' operations, which insures Lobar to the same extent Chowns is insured under the policy, or which insures Lobar against all liability, including that for its own negligence. This carve out for commercial liability coverage in the General Conditions is critical to the parties' dispute since the provisions of Penn National's policy being examined are those for commercial general liability coverage. More particularly, Part A, Section 1 of the Additional Insured Endorsement insures Lobar as an additional insured for claims "caused by" Chowns' operations. It provides:

> A. The following provision is added to SECTION II—WHO IS AN INSURED
>
> 1. Any person(s) or organizations(s) (referred to below as additional insured) with whom you are required in a written contract or agreement to name as an additional insured, but only with respect to liability for 'bodily injury', 'property damage' or 'personal and advertising injury' caused, in whole or in part, by
>
> (1) Your acts or omissions; or
>
> (2) The acts or omissions of those acting on your behalf;
>
> in the performance of your ongoing operations for the additional insured(s) at the location or project described in the contract or agreement.

Additional Insured Endorsement, Part A, Section 1. As already discussed, this additional insured provision requires a showing that Chowns' acts or omissions were a proximate cause of Plaintiffs' injuries in order to trigger coverage for Lobar under the policy. **See Dale Corp. v. Cumberland Mut. Fire Ins. Co.,** 2010 WL 4909600 *7 (ED. Pa. Nov. 30, 2010).

CONCLUSION

For the foregoing reasons, we will deny Lobar's Motion for Summary Judgment requesting that we find Chowns in breach of the Subcontract and, for the same reasons, grant Chowns' Motion for Summary Judgment to dismiss Lobar's joinder complaint.

COMMONWEALTH of PENNSYLVANIA vs.
RONALD A. COHEN, Defendant

Criminal Law—Regulatory Checkpoints—
Constitutionality—Suppression

1. The stopping of a motor vehicle and the detention of its occupants is a seizure subject to constitutional restraints.

2. Checkpoint stops, even though not supported by reasonable suspicion or probable cause, are constitutionally allowed provided such stops are conducted pursuant to certain guidelines which guard against arbitrary, random traffic stops.

3. In balancing the public interest of the government in ensuring that dangerous drivers and unsafe vehicles are kept off the road against the right to privacy of individual members of the public, checkpoint stops must be conducted within certain prescribed parameters in order to protect individuals from arbitrary invasions at the unfettered discretion of officers in the field.

4. To protect against unreasonable searches and seizures, the Pennsylvania Supreme Court has developed guidelines (the "**Tarbert/Blouse** guidelines") to minimize the intrusiveness of a roadblock seizure to a constitutionally acceptable level. These guidelines, in the context of a DUI checkpoint, require that: (1) vehicle stops must be brief and must not entail a physical search; (2) there must be sufficient warning of the existence of the checkpoint; (3) the decision to conduct a checkpoint, as well as the decisions as to time and place for the checkpoint, must be subject to prior administrative approval; (4) the choice of time and place for the checkpoint must be based on local experience as to where and when intoxicated drivers are likely to be traveling; and (5) the decision as to which vehicles to stop at the checkpoint must be established by administratively prefixed, objective standards, and must not be left to the unfettered discretion of the officers at the scene.

5. With respect to driving under the influence checkpoints, the fourth guideline requires that the route selected for the roadblock be one which, based on local experience, is likely to be traveled by intoxicated drivers. To meet this requirement, the Commonwealth must introduce detailed evidence concerning the number of DUI-related arrests and/or accidents to support the checkpoint's location; generalized conclusions summarizing specific data reviewed is insufficient to establish compliance with the **Tarbert/Blouse** guidelines.

6. Where a regulatory safety checkpoint is at issue, the fourth of the **Tarbert/Blouse** guidelines is tailored to require that the location of the checkpoint be one where license, equipment and inspection violations are likely to occur. To meet this requirement and satisfy constitutional safeguards, the Commonwealth must present evidence regarding the number of prior safety violations and/or accidents at the checkpoint location within a relevant time period.

7. Where police do not comply with the **Tarbert/Blouse** guidelines in selecting and conducting a motor vehicle checkpoint, the evidence derived from a checkpoint stop, including the results of field sobriety testing, must be suppressed.

NO. 636 CR 2014

JOSEPH D. PERILLI, Esquire, Assistant District Attorney—Counsel for Commonwealth.

MATTHEW J. RAPA, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—September 17, 2015

Before the Court is Defendant Ronald A. Cohen's Omnibus Pretrial Motion. Defendant has been charged with Driving Under the Influence of a Controlled Substance ("DUI")[1] and Careless Driving.[2] In his motion, Defendant argues the evidence against him was obtained pursuant to an unconstitutional regulatory checkpoint and should be suppressed.[3] A hearing was held on Defendant's motion on June 19, 2015. For the reasons which follow, Defendant's motion is granted.

FINDINGS OF FACT

At the conclusion of the June 19, 2015 hearing, we made the following findings of fact:

1. On September 22, 2013, the Pennsylvania State Police set up a regulatory checkpoint at the intersection of Maury Road and Long Run Road, Franklin Township, Carbon County.

2. The purpose of this checkpoint, in contrast to a DUI checkpoint, was for administrative purposes: to check whether drivers possessed valid driver's licenses, whether vehicles displayed current inspection and registration stickers, and whether required seatbelts/child seats were being used, as well as whether any equipment violations existed.

3. As planned, all vehicles were to be stopped and checked, however, if traffic backed up, vehicles would be allowed to pass through in order to alleviate the backup.

4. On September 22, 2013, Defendant was stopped by Trooper Ryan Kempinski as he approached the checkpoint heading north on the Maury Road.

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[1] 75 Pa. C.S.A. §3802(d)(2).

[2] 75 Pa. C.S.A. §3714(a).

[3] This evidence consists of the arresting trooper's observations of Defendant at the checkpoint and the State Police Barracks, statements Defendant made at the checkpoint and the State Police Barracks, and the results of field sobriety tests administered to Defendant.

5. During this stop, Trooper Kempinski observed that Defendant had bloodshot eyes. Trooper Kempinski asked Defendant to produce his driver's license, registration and proof of insurance. While speaking with Defendant, Trooper Kempinski noticed Defendant's speech was slurred and he was unable to produce his license.

6. Based upon these observations, Trooper Kempinski asked Defendant to exit his vehicle in order that he could better determine if Defendant was capable of safe driving.

7. Once outside the vehicle, Trooper Kempinski observed Defendant was sluggish. Trooper Kempinski asked Defendant whether he had consumed any alcohol or was taking any medication. Defendant denied having ingested alcohol and stated that while he did have a prescription, he had not taken any medication that day.

8. Trooper Kempinski then administered several field sobriety tests to Defendant. The first test was the horizontal gaze nystagmus (HGN) test. The Trooper observed signs of failure, **i.e.,** Defendant's eyes did not move smoothly. Next was the walk and turn test which Trooper Kempinski first demonstrated for Defendant. Defendant performed this test but again exhibited signs of intoxication, **i.e.,** his gait was wobbly and he needed to raise his arms to maintain his balance. The third test Trooper Kempinski attempted to administer was the one leg stand test; Defendant was unable to perform this test. As a result of Defendant's failure of the two field sobriety tests, he was taken into custody and transported to the Pennsylvania State Police barracks in Lehighton.

9. At the Lehighton barracks, a drug recognition expert (DRE) evaluated Defendant, the results of which were not placed in evidence. Defendant was then read his **Miranda** rights and asked to give a blood sample for alcohol and drug testing. Defendant refused to supply a blood sample.

10. The patrol unit supervisor of the regulatory checkpoint on September 22, 2013, was Corporal Michael Borosh.

11. Prior to setting up and implementing this checkpoint, Corporal Borosh conducted a pre-deployment briefing at the

Lehighton barracks at which he informed the troopers participating in the checkpoint of the standards to be applied in its administration, including that every vehicle would be subject to the checkpoint and that if traffic backed up, vehicles would be permitted to pass.

12. Corporal Borosh was present at the checkpoint during the entire time it was in operation. As implemented, vehicles were only permitted to pass when a backup occurred; otherwise, all vehicles were checked without exception.

13. Corporal Borosh testified the location of the checkpoint at the intersection of Maury Road and Long Run Road was selected by him based on numerous accidents in the area within the one year period preceding September 22, 2013, numerous DUI crashes within the one year period prior to September 22, 2013, the results of three previous regulatory checkpoints at the same location, and complaints of speeding, stop sign violations, and other Vehicle Code violations in the area. Another consideration was the clear line of sight at this intersection, making it a safe location to conduct a checkpoint.

14. During the time the checkpoint was in operation, signs announcing the checkpoint were posted approximately 400 feet on either side of the checkpoint in each direction.

15. The date when the checkpoint was in place, September 22, 2013, was during a weekend.

DISCUSSION

Defendant argues the Commonwealth's reasons for choosing the site at which the regulatory checkpoint was set up do not meet the requirements set down by the appellate courts of this Commonwealth, and therefore, the stop of his vehicle was unconstitutional. In consequence, Defendant requests the suppression of all evidence obtained against him as a result of this stop.

At a suppression hearing, the Commonwealth has the burden "of going forward with the evidence and of establishing that the challenged evidence was not obtained in violation of the defendant's rights." Pa. R.Crim.P. 581(h); **see also, Commonwealth v. Galendez,** 27 A.3d 1042, 1046 (Pa. Super. 2011) **(en banc), appeal denied,** 615 Pa. 753, 40 A.3d 120 (2012). The Fourth Amendment to the United States Constitution and Article I, Section 8 of the

Pennsylvania Constitution protect the people from unreasonable searches and seizures. **See Commonwealth v. Chase,** 599 Pa. 80, 89, 94-95, 960 A.2d 108, 112-13, 116 (2008). Moreover, "[i]t is undisputed that the stopping of an automobile and the detention of its occupants is a seizure subject to constitutional restraints." **Commonwealth v. Blouse,** 531 Pa. 167, 169, 611 A.2d 1177, 1178 (1992) (**citing, inter alia, Michigan Dept. of State Police v. Sitz,** 496 U.S. 444 (1990); **Commonwealth v. Swanger,** 453 Pa. 107, 307 A.2d 875 (1973)). **See also, Commonwealth v. Tarbert,** 517 Pa. 277, 535 A.2d 1035 (1987) (plurality).

The Vehicle Code in Pennsylvania authorizes police to stop vehicles and conduct systematic DUI or traffic safety checkpoints, even though such stops are not based on reasonable suspicion or probable cause standards. **See** 75 Pa. C.S.A. §6308(b). However, the public interest of the government in ensuring that dangerous drivers and unsafe vehicles are kept off the road must be balanced against the individual right to privacy; therefore, in order to protect individuals "from arbitrary invasions at the unfettered discretion of the officers in the field," systematic checkpoint stops must be conducted within certain prescribed parameters to guard against "the discretion that is problematic in random traffic stops." **Blouse, supra** at 170-71, 611 A.2d at 1178-79 (upholding the state constitutionality of systematic, non-discriminatory, non-arbitrary roadblocks instituted to detect registration, licensing and equipment violations) (**citing, inter alia, Brown v. Texas,** 443 U.S. 47 (1979)). To meet this standard, when conducting DUI checkpoint stops in Pennsylvania, law enforcement must comply with the guidelines established by our Supreme Court in **Tarbert** and **Blouse,** namely:

> (1) vehicle stops must be brief and must not entail a physical search; (2) there must be sufficient warning of the existence of the checkpoint; (3) the decision to conduct a checkpoint, as well as the decisions as to time and place for the checkpoint, must be subject to prior administrative approval; (4) the choice of time and place for the checkpoint must be based on local experience as to where and when intoxicated drivers are likely to be traveling; and (5) the decision as to which vehicles to stop at the checkpoint must be established by administratively prefixed, objective standards, and must not be left to the unfettered discretion of the officers at the scene.

Commonwealth v. Worthy, 598 Pa. 470, 479, 957 A.2d 720, 725 (2008) (**citing Blouse, supra** and **Tarbert, supra**) (hereinafter the "**Tarbert/Blouse** guidelines").[4] As to the fourth guideline, "it is **essential** that the route selected for the roadblock be one which, based on local experience, is likely to be travelled by intoxicated drivers." **Blouse, supra** at 172, 611 A.2d at 1180 (citation omitted) (emphasis added). "These guidelines, ... are designed to protect individuals from **unreasonable** searches and seizures, pursuant to the United States and Pennsylvania Constitutions." **Commonwealth v. Garibay,** 106 A.3d 136, 143 (Pa. Super. 2014) (Ott, J., dissenting).[5]

Like DUI checkpoints, checkpoints established to detect license, registration and equipment violations are lawful, provided the checkpoint complies with the procedural requirements delineated by the **Tarbert/Blouse** guidelines. **Id.** at 140 **(en banc)** (**citing In re J.A.K.,** 908 A.2d 322, 325-26 (Pa. Super. 2006)). However, where a regulatory safety checkpoint is at issue, as here, the fourth guideline is adjusted accordingly to identify likely areas where license, equipment and inspection violations occur. "Substantial compliance with the **Tarbert/Blouse** guidelines is all that is necessary to minimize the intrusiveness of a roadblock seizure to a constitutionally acceptable level." **Id.** (**quoting Commonwealth v. Yastrop,** 564 Pa. 338, 768 A.2d 318, 323 (2001) (plurality)). Where police do not comply with these guidelines in establishing a checkpoint, the evidence derived from a checkpoint stop, including the results of field sobriety testing, should be suppressed. **Id.** (**citing Commonwealth v. Blee,** 695 A.2d 802 (Pa. Super. 1997)).

At the conclusion of the hearing held on June 19, 2015, we concluded that the Commonwealth established that the state police

[4] In **Worthy,** the Pennsylvania Supreme Court held that the exercise of discretion by on-site police officers to suspend temporarily the operation of a sobriety checkpoint because of traffic backup that has created unreasonable delay or safety concerns complies with the dictates of the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution. **Commonwealth v. Worthy,** 598 Pa. 470, 483, 957 A.2d 720, 727 (2008).

[5] On this point, the court in **Blouse** stated: "We now adopt the guidelines set forth in **Tarbert,** because they achieve the goal of assuring that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." **Commonwealth v. Blouse,** 531 Pa. 167, 173, 611 A.2d 1177, 1180 (1992).

complied with the first, second, third, and fifth **Tarbert/Blouse** guidelines. Defendant claimed that the Commonwealth had failed to comply with the fourth guideline, **i.e.,** "that the route selected for the roadblock be one which, based on local experience, is likely to be traveled by [unsafe drivers or vehicles]." Specifically, Defendant argued that the Commonwealth's evidence as to the basis for its selection of the checkpoint site was too generalized and did not meet the specificity of data required by the case law to support the selection of a specific checkpoint location. Consequently, we requested counsel to brief this issue.

In **Garibay,** the Pennsylvania Superior Court, sitting **en banc,** stated that the Commonwealth must introduce evidence concerning the number of DUI-related arrests and/or accidents in explaining the choice of a DUI checkpoint's location to comply with the **Tarbert/Blouse** guidelines, otherwise the checkpoint will be deemed unconstitutional. **Id.** at 140-41 (**citing, inter alia, Blee, supra** at 806).[6] The court also stated that the procedural requirements for non-DUI checkpoints are identical to those for DUI checkpoints. **Id.** at 140 (**citing In re J.A.K., supra,** a seat-belt safety checkpoint case). In the case of a regulatory checkpoint

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[6] Quoting extensively from **Commonwealth v. Blee,** 695 A.2d 802 (Pa. Super. 1997), the court stated:

> '[T]o ensure that the intrusion upon the travelling public remains minimal, we cannot accept [] general testimony elicited at [a suppression] hearing as proof of "substantial compliance" with the [**Tarbert/Blouse** guidelines].' **Blee,** 695 A.2d at 806. Rather, '[a]t the very least, the Commonwealth [must] present information sufficient to specify the number of DUI-related arrests and/or accidents [at] ... the specific location of the sobriety checkpoint.' **Id.** If the Commonwealth fails to introduce evidence concerning the number of DUI-related arrests and/or accidents in explaining the choice of a checkpoint's location, ... then the checkpoint will be deemed unconstitutional.

Commonwealth v. Garibay, 106 A.3d 136, 140-41 (Pa. Super. 2014) (footnote omitted). However, unlike **Garibay**'s focus on the sufficiency of the evidence to prove the requirement that "the route selected for the roadblock be one which, based on local experience, is likely to be traveled by intoxicated drivers," the focus in **Blee** was the need to prove the requirement itself. In **Blee,** because the PennDOT studies relied upon by the police official in charge of choosing the checkpoint's location were not specific to DUI-related accidents and arrests at the particular location of the sobriety checkpoint, the court held that the fourth of the **Tarbert/Blouse** guidelines had not been proven. The **Blee** court did not distinguish between the type or quality of the evidence needed to prove this requirement. To the contrary, in addition to the above-quoted language in **Garibay, Blee** cited approvingly to three previous cases of the court where the

intended to check for safety violations, the Commonwealth must present evidence regarding the number of prior safety violations and/or accidents at the specific checkpoint location to satisfy constitutional safeguards. **Id.**

The checkpoint at issue in **Garibay** was one set up in conjunction with the Pennsylvania Department of Transportation's Click

location of the checkpoint chosen was based on an evaluation or review of DUI-related accidents and arrests for the particular district, road or area where the checkpoint was located.

As we read the **Garibay** decision, the Commonwealth's reliance on research or a review of statistical data to identify checkpoint locations likely to be traveled by intoxicated drivers, without specifically introducing into evidence the actual number of DUI-related arrests and/or accidents evaluated, will not satisfy the procedural requirements of the **Tarbert/Blouse** guidelines. In particular, in **Garibay,** notwithstanding certain evidence presented as to how the specific checkpoint site was selected—information provided by PennDOT, culled from its database of traffic information, that the area of the road in question had a high volume of traffic and number of accidents; that the information received from PennDOT comported with the experience and familiarity with the specific road of the officer in charge of selecting the checkpoint site; and that the checkpoint site had previously been identified and used as a safety checkpoint because of its high traffic volume and high accident rate—because specific information as to the number of prior safety violations and/or accidents at the specific checkpoint location was not introduced, the evidence was held insufficient to establish substantial compliance with the **Tarbert/Blouse** guidelines. **Garibay, supra** at 141 n.7.

The majority opinion's reference in **Garibay** to the **Yastrop** decision of the Pennsylvania Supreme Court with an explanatory comment, "sobriety checkpoint constitutional where officer who set up checkpoint testified that he reviewed PennDOT records and information that led him to conclude the checkpoint location was a route likely to be traveled by intoxicated drivers," does not appear to qualify the majority's ultimate holding of the need for specific checkpoint information to meet the **Tarbert/Blouse** test. **Id.** at 141. In **Commonwealth v. Yastrop,** 564 Pa. 338, 768 A.2d 318 (2001), a plurality of the Pennsylvania Supreme Court found that a DUI checkpoint was constitutional when the supervising officer reviewed PennDOT records and DUI arrest records prior to selecting the location of the checkpoint. **Id.** at 323-24. The opinion does not state whether the officer testified as to the specific numbers of drunk driving-related accidents and DUI arrests that occurred in the vicinity of the checkpoint. However, even if the court in **Yastrop** had determined that testimony by the officer in charge of selecting the location of the checkpoint relied upon statistical information in making that decision (without the underlying data itself being presented to the suppression court) was sufficient to meet the Commonwealth's burden, **Yastrop** is a plurality decision that does not have precedential value. **See e.g., Commonwealth v. Brown,** 582 Pa. 461, 505, 872 A.2d 1139, 1165 (2005) ("Plurality opinions, by definition, establish no binding precedent for future cases."); and **Hoy v. Angelone,** 554 Pa. 134, 144, 720 A.2d 745, 750 (1998) (a plurality decision lacks precedential value).

It or Ticket program and was designed to ensure compliance with seatbelt and motor vehicle equipment requirements. In addressing whether specific evidence regarding the data, reports or statistics relied upon in selecting the location of the checkpoint was required to meet the **Tarbert/Blouse** test, or whether general conclusory testimony regarding the number of DUI arrests and accidents at the location of the checkpoint was sufficient, the **Garibay** court held that

> generalized testimony [which] provided no specifics whatsoever regarding accidents, arrests, citations, violations, etc., regarding seatbelt usage or non-usage at the specific checkpoint location, [and which presented no] insight into the selection of the checkpoint time and duration ... did not satisfy the requirements of the **Tarbert/Blouse** guidelines.

Id. at 142.

Garibay overruled **sub silentio** existing Superior Court precedent which held that the standard for proving that the checkpoint area chosen was one "likely to be traveled by intoxicated drivers" was met when the Commonwealth proved that its choice of location for the DUI checkpoint was based on its review and reliance upon traffic data, accident records, or other information evidencing generally a higher than average incidence of driving under the influence offenses in the general area of the checkpoint, without necessarily introducing this statistical information. **Commonwealth v. Ziegelmeier,** 454 Pa. Super. 330, 338, 685 A.2d 559, 563 (1996). Prior to **Garibay,** the Commonwealth was not required to introduce detailed information as to the exact, or even approximate, number of DUI-related arrests and/or accidents at the specific location of the sobriety checkpoint, or to make part of the record the reports, data and statistics relied upon by the police in determining the location of the DUI checkpoint. **Id.**

Here, Corporal Borosh testified that his decision to establish a checkpoint at the intersection of Maury Road and Long Run Road was based on his research of the number of traffic accidents and DUI crashes at this location for the one-year period preceding the date of the checkpoint, the number of citations for Vehicle Code violations issued during previous checkpoints at the same location, and complaints about speeding and stop sign violations

in the vicinity. However, Corporal Borosh did not testify as to the specific number of accidents, citations, or complaints, or present any documentary evidence—including any statistics, data or reports—upon which his generalized conclusions that the number of accidents, citations and complaints was "numerous" was based. Nor did Corporal Borosh identify the author or source of the reports, data or statistics he relied upon in selecting the location and time of the checkpoint or maintain that he had conducted a statistical analysis comparing the number of reported license, equipment and inspection violations at the site of the checkpoint with other areas in Franklin Township. Without this empirical information the record is inadequate to intelligently determine whether the selection of this particular checkpoint imposes a minimal intrusion upon the privacy interests of the traveling public when balanced against the Commonwealth's interest in ensuring roadway safety. **See also, Worthy, supra** at 487, 957 A.2d at 730 ("[T]he elements of the **Tarbert-Blouse** standard ... are designed to minimize interference with individual liberty by 'eliminating the discretion that is problematic in random traffic stops.'") (Saylor, J., dissenting).[7]

CONCLUSION

The Superior Court's decision in **Garibay** is binding on us.[8] The sole issue in **Garibay,** as here, was the sufficiency of the evidence regarding the location and time of the checkpoint, and the evidence there, as here, was general, conclusory testimony rather than detailed, numerical information. In accordance with that decision, we conclude that the Commonwealth's evidence did not set forth with sufficient specificity the basis for its selection of the location, date, and time of the regulatory checkpoint so as to substantially comply with the fourth **Tarbert/Blouse** guideline. Having so concluded, the evidence derived from Defendant's stop at that checkpoint must be suppressed.

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[7] Parenthetically, we note that while Corporal Borosh testified he had available to him in the courtroom some of the material he had reviewed in selecting the location of the checkpoint, he did not identify what specific information he had brought nor did the Commonwealth attempt to move any of this information into evidence.

[8] As an **en banc** decision of the Superior Court, **Garibay** is also controlling authority relative to any contradictory or inconsistent panel decisions of that court. **See Commonwealth v. Rabold,** 597 Pa. 344, 356, 951 A.2d 329, 336 (2008).

COMMONWEALTH of PENNSYLVANIA vs. GABRIEL E. ROLDAN

Criminal Law—Sexual Assault—Prompt Complaint—Basis of Admissibility—Prior Consistent Statement—Preliminary Hearing Testimony of Critical Witness—Unavailability of Witness at Trial—Rule Against Hearsay—Former Testimony Exception—Right of Confrontation in a Criminal Case—Requirement That a Full and Fair Opportunity to Cross-Examine Exists—Requirement the Defense Be Provided With Vital Impeachment Evidence in the Possession of the Commonwealth—Prior Consistent Statements Used to Impeach the Testimony of an Unavailable Witness

1. In prosecutions for sexual assault, a prompt complaint made by the victim of the assault is admissible not for the truth of the matter asserted, but as a prior consistent statement offered to bolster the credibility of the complainant, whose testimony is inherently vulnerable to attack as recent fabrication in the absence of evidence of hue and cry on her part.

2. As a general rule, hearsay—an out-of-court statement offered for the truth of the matter asserted—is not admissible as evidence against a criminal defendant at trial.

3. The right afforded an accused under Article I, Section 9 of the Pennsylvania Constitution to be confronted with the witnesses against him and the right of an accused under the Confrontation Clause of the Sixth Amendment of the United States Constitution share a common objective and are therefore treated the same in determining whether the protections afforded a criminal defendant under these provisions have been violated.

4. Although the common-law rule against the admissibility of hearsay and the protection afforded a criminal defendant by the constitutional right of confrontation are generally designed to protect similar values, they are not identical. The right of confrontation, for instance, bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule.

5. In **Crawford v. Washington,** the United States Supreme Court held that in a criminal prosecution where hearsay is testimonial in nature—**i.e.,** where the declarant should reasonably expect that the statement will be used for prosecution purposes—its admissibility at trial requires that the witness be unavailable and that the defendant had a prior opportunity to cross-examine the witness. Where the hearsay is non-testimonial, the statement must be within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness" to be admissible.

6. Prior testimony at a preliminary hearing, before a grand jury, or at a formal trial is **per se** testimonial in nature.

7. For a witness' preliminary hearing testimony to be admissible at trial as evidence against a criminal defendant (1) the witness must be unavailable; (2) the defendant must have been represented by counsel at the preliminary hearing; and (3) the defendant must have been provided a full and fair opportunity to cross-examine the witness at the preliminary hearing.

8. The test for determining whether the preliminary hearing testimony of a witness who is unavailable at trial is able to overcome a challenge premised on the Confrontation Clause and is, therefore, admissible, derives not from whether the witness was in fact cross-examined at the time of the preliminary hearing, or on the content or extent of such cross-examination, but on whether the opportunity for full and effective cross-examination existed at the time.

9. Where the prosecution in a criminal matter has not disclosed to the defendant vital impeachment evidence in its possession with respect to a witness called by the prosecution at the defendant's preliminary hearing, and the defendant is not otherwise aware of this evidence at or prior to the preliminary hearing, or the defendant is not permitted to use this evidence to question the credibility of the witness, a full and fair opportunity to cross-examine the witness is lacking.

10. If the Commonwealth knows of vital impeachment evidence of a witness of which the defense is unaware and does not disclose this evidence to the defense at or prior to the defendant's preliminary hearing, and the witness is subsequently unavailable to testify at trial, the Commonwealth must suffer the consequences of not having provided such information to the defense and thereby deprived the defendant of a full and fair opportunity to cross-examine the witness at the preliminary hearing.

11. A criminal defendant who claims he was denied a full and fair opportunity to cross-examine a Commonwealth witness at a preliminary hearing on the basis of "vital impeachment evidence" which was withheld by the Commonwealth and of which he was unaware must establish that such evidence was in fact vital to the impeachment of the witness.

12. For a prior inconsistent statement to be used for impeachment, the statement must be actually inconsistent with, and not just different from, trial testimony. Trial testimony which omits certain information contained in a prior statement does not, simply because of the omission, cause the prior statement to be inconsistent for impeachment purposes, unless the dissimilarities or omissions are substantial enough to cast doubt on the witness' testimony.

13. Absent those circumstances described in Pa. R.E. 803.1(1), prior inconsistent statements of a witness who is unavailable for cross-examination but whose preliminary hearing testimony has been admitted in evidence are admissible to impeach the testimony of the unavailable witness.

14. A written report which is merely a summary of what a witness said and not a verbatim account of the witness' statement cannot be used to impeach the witness on cross-examination, since it would be unfair to allow a witness to be impeached on a scrivener's interpretation of what was said.

NO. 999 CR 2014

CYNTHIA A. DYRDA-HATTON, Esquire, Assistant District Attorney—Counsel for Commonwealth.

ADAM R. WEAVER, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—November 13, 2015

Is inculpatory testimony given at a defendant's preliminary hearing by a key witness who later dies admissible against the defendant at trial? The question is a difficult one, made more difficult when the witness is the victim of the alleged sexual assault with which the defendant has been charged, the defendant is the victim's mother's boyfriend, and the victim was thirteen years of age at the time of the alleged assault. This, sadly, is the case before us.

FACTUAL AND PROCEDURAL BACKGROUND

The Defendant, Gabriel E. Roldan, has been charged with sexually assaulting C.M. in his apartment during the early morning hours of July 18, 2014, when C.M. was thirteen years old.[1] As testified to by C.M. at a preliminary hearing held on October 20, 2014, C.M. first met Defendant, who was a friend of her mother's, approximately two months before the incident. Between then and the incident, C.M. and Defendant frequently spent time together.

On July 17, 2014, Defendant and C.M. ate dinner at C.M.'s home and afterwards went to the Rusty Nail, a local bar where C.M.'s mother worked and where Defendant had been living in an upstairs room for the previous five weeks. The Rusty Nail is located approximately four blocks from C.M.'s home.[2]

Defendant and C.M. arrived at the Rusty Nail sometime between 9:00 and 10:00 P.M. (N.T., pp. 50-51.)[3] While there, C.M. was with Defendant and two friends of hers, and also spoke with her boyfriend by phone.[4] (N.T., pp. 22, 54.)

At the time, C.M. was expecting her boyfriend to come and meet her. (N.T., pp. 21-22.) C.M. was in the bar area with Defen-

[1] At the time, Defendant was twenty-nine years old. He was born on January 2, 1985.

[2] The Rusty Nail is located at 939 Mauch Chunk Road in Palmerton. C.M.'s address at the time was 588 Mauch Chunk Road, Palmerton, Pennsylvania.

[3] All references herein to the notes of testimony are to the transcript of the preliminary hearing held on October 20, 2014.

[4] At the preliminary hearing, C.M. testified that in addition to the Defendant, she sat with the bartender, whom it was clear she knew beforehand, and also with a good friend of hers who she testified was over twenty-one years of age. (N.T., pp. 22, 51-53.) C.M. denied being served or consuming any alcoholic beverages that evening. (N.T., p. 52.)

dant until closing time, approximately 11:00 P.M., and stayed there while the staff cleaned up. (N.T., pp. 22, 54.)

Around midnight, Defendant and C.M. went upstairs to Defendant's room. (N.T., pp. 22-23, 51, 64.) C.M.'s boyfriend had yet to arrive. While there, C.M. sat on a couch and Defendant laid in his bed. Both played games or watched movies on their separate cell phones. (N.T., pp. 22, 24, 65.)

Sometime after 1:00 A.M., C.M.'s boyfriend contacted her and said he would not be coming. (N.T., p. 63.) After that, C.M. fell asleep on the couch and did not awaken until she felt Defendant rubbing and digitally penetrating her vagina with the fingers of his right hand. (N.T., pp. 24-25, 27-28, 75.) C.M. had been asleep on her left side facing the back of the couch with her back towards the bed where Defendant was lying.

C.M. testified that she was surprised and shocked at what was happening and, at first, laid still pretending to be asleep. (N.T., pp. 27, 87.) Defendant continued to digitally penetrate C.M. for approximately five minutes, after which he took C.M.'s right hand and placed it on his erect penis. (N.T., pp. 27, 31-32.) Next, with his hand over C.M.'s hand, Defendant moved C.M.'s hand back and forth across his penis approximately ten times. (N.T., p. 32.) As this was happening, Defendant was whispering for C.M. to have sex with him and saying no one would know. (N.T., p. 32.)

Up until this point, C.M. pretended to still be asleep. (N.T., pp. 32, 88-89, 118.) With the intent of removing her hand from Defendant's penis, C.M. turned over onto her right side, put her hand behind her head, and opened her eyes for the first time. (N.T., p. 33.) She then stood up, left Defendant's room, and went to a bathroom which was down the hall from Defendant's room, where she washed her hands of Defendant's seminal fluid. (N.T., pp. 33-35.)

According to C.M. she was in the bathroom "a little bit." (N.T. p. 33.) When she returned to Defendant's room, Defendant asked if she was mad at him and C.M. feigned ignorance of what had happened. (N.T., pp. 34-35.) C.M. first reported the incident to her boyfriend approximately a week later. (N.T., pp. 35, 98-99.)

The Borough of Palmerton Police first learned of the incident on August 6, 2014, when they were dispatched to a fight in progress in the Borough Park between Defendant and C.M.'s sixteen-year-old brother at which C.M. was present. C.M. told the police the fight was over what had happened to her on July 18, 2014. When C.M. began to tell the police what Defendant had done, the police contacted C.M.'s mother and made immediate arrangements for C.M. to be audio/video interviewed that same day with C.M.'s mother present.

Based on this interview, which was summarized in a written narrative statement prepared by the arresting officer, and a handwritten statement also given by C.M. on the same date, a criminal complaint charging Defendant with Aggravated Indecent Assault,[5] Corruption of Minors,[6] Unlawful Contact With a Minor—Sexual Offenses,[7] and Indecent Assault Without Consent[8] was filed on August 6, 2014. All charges were bound over to court for trial following the preliminary hearing held on October 20, 2014, at which C.M. and the arresting officer were the only witnesses to testify. Tragically, C.M. was killed in a motor vehicle accident on December 19, 2014, in which three other teenagers were also killed, including C.M.'s sixteen-year-old brother.

On March 4, 2015, Defendant filed a Motion **in Limine** seeking to exclude, among other evidence, C.M.'s preliminary hearing testimony, as well as any verbal and written statements C.M. made to the police about the incident on August 6, 2014.[9, 10] In Defen-

[5] 18 Pa. C.S.A. §3125(A)(1), (8).

[6] 18 Pa. C.S.A. §6301(A)(1)(ii).

[7] 18 Pa. C.S.A. §6318(A)(1).

[8] 18 Pa. C.S.A. §3126(A)(1), (8).

[9] In the alternative, in the event we allow C.M.'s preliminary hearing testimony to be considered at trial, Defendant asks leave to use any prior inconsistent statements made by C.M. to impeach her credibility.

[10] Defendant concedes the statement C.M. made about the incident to her boyfriend on or about July 24, 2014, is admissible as a prompt complaint. (Defendant's Brief in Support of Motion, p. 4 n.1.) **See also, Commonwealth v. O'Drain,** 829 A.2d 316, 322 (Pa. Super. 2003) ("Evidence of a complaint of a sexual assault is competent evidence properly admitted when limited to establish that a complaint was made and also to identify the occurrence complained of with the offense charged.") (citations and quotation marks omitted); Pa. R.E. 613(c) (Witness' Prior Consistent Statement to Rehabilitate). In cases of alleged sexual

dant's brief in support of this Motion, Defendant contends that he was prevented from fully questioning C.M. at the preliminary hearing because the Commonwealth had not provided him with all information then in its possession which could have been used in challenging the credibility of C.M.'s testimony. Specifically, Defendant identifies three instances where Defendant claims C.M.'s preliminary hearing testimony was inconsistent with prior statements C.M. made to the police on August 6, 2014: (1) that C.M. previously told the police she was at Defendant's apartment waiting for her mother to finish work, but at the preliminary hearing she testified she was waiting for her boyfriend to pick her up; (2) that C.M. previously told the police she saw Defendant's penis the evening of the incident, yet at the preliminary hearing she denied seeing Defendant's penis; and (3) that while in earlier statements to the police C.M. stated she was in the bathroom for two hours, at the preliminary hearing she testified she was in the bathroom for only a short period of time. (Defendant's Brief in Support of Motion **in Limine,** pp. 7-8.) Each of these is discussed below.[11]

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assault, a prompt complaint of the victim is not considered inadmissible hearsay "because [the] alleged victim's testimony is automatically vulnerable to attack by the defendant as recent fabrication in the absence of evidence of hue and cry on her part." **O'Drain, supra** (citations and quotation marks omitted). Defendant also acknowledges that this statement to her boyfriend does not run afoul of the United States Supreme Court's decision in **Crawford v. Washington,** 541 U.S. 36, 124 S.Ct. 1354, 158 L. Ed. 2d 177 (2004), because it was not made to police with the purpose to prove past events in a criminal matter. (Defendant's Brief in Support of Motion, p. 11.) **See also, Horton v. Allen,** 370 F.3d 75, 84 (1st Cir. 2004) (holding that statements made in a private conversation are not testimonial), **cert. denied,** 543 U.S. 1093 (2005).

[11] A jury trial in this case was initially scheduled for April 6, 2015. Since then, the case has been continued for various reasons by defense counsel: (1) initially, for a decision on Defendant's pending Motion; (2) later, because of the request of Defendant's original trial counsel to withdraw and for new counsel to be appointed (**see** defense counsel's petition for the appointment of new counsel filed on May 8, 2015); and (3) most recently, as a result of Defendant's stipulation to enter a plea to the charge of corruption of minors filed on September 16, 2015, with a plea date set for October 1, 2015. Because the plea agreement called for a mitigated county sentence when aggravating circumstances existed, the plea was not accepted by the court. Defendant is currently scheduled for trial to commence on December 7, 2015. At the request of Defendant's new counsel, argument on Defendant's Motion was held on November 13, 2015.

DISCUSSION

Defendant claims C.M.'s preliminary hearing testimony may not be used against him at trial without violating the rule against the use of hearsay evidence and his right of confrontation under the Sixth Amendment of the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution.[12] These two grounds for excluding the admission of C.M.'s prior testimony, while related, are not the same.

> Although we have recognized that hearsay rules and the Confrontation Clause are generally designed to protect similar values, we have also been careful not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements. The Confrontation Clause, in other words, bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule.

Idaho v. Wright, 497 U.S. 805, 814, 110 S.Ct. 3139, 111 L. Ed. 2d 638 (1990) (citations omitted). Nevertheless, as applied to Defendant's Motion, both require that for a witness' preliminary hearing testimony to be admitted at trial against a criminal defendant (1) the witness must be unavailable; (2) the defendant must have been represented by counsel at the preliminary hearing; and (3) the defendant must have been provided a full and fair opportunity to cross-examine the witness at the preliminary hearing. **Commonwealth v. Rizzo,** 556 Pa. 10, 14 n.2, 726 A.2d 378, 380 n.2 (1999) (hearsay); **Commonwealth v. Johnson,** 758 A.2d 166, 169 (Pa. Super. 2000) (right to confrontation). **See also,** 42 Pa. C.S.A. §5917 (notes of evidence at former trial); Pa. R.E. 804 (b)(1) (former testimony).[13]

Instantly, Defendant was represented by counsel who extensively cross-examined C.M. at the preliminary hearing not only

[12] Because the Pennsylvania Constitution affords the same protection as the Confrontation Clause of the United States Constitution, **see Commonwealth v. Geiger,** 944 A.2d 85, 97 n.6 (Pa. Super. 2008), **appeal denied,** 600 Pa. 738, 964 A.2d 1 (2009), our examination of Defendant's claim under the Confrontation Clause applies equally to Defendant's claim under Article I, Section 9 of the Pennsylvania Constitution.

[13] Pennsylvania Rule of Evidence 804(b)(1) provides:

> Rule 804. Exceptions to the Rule Against Hearsay—When the Declarant is Unavailable as a Witness
>
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about the incident in question, but also about herself and her relationship with Defendant. Nor is C.M.'s unavailability in question. Defendant claims, however, that his cross-examination of C.M. was necessarily limited and constitutionally inadequate because he did not know of and was not provided copies of prior statements C.M. made to the police before the preliminary hearing. Consequently, whether C.M.'s preliminary hearing testimony is admissible at trial hinges on whether defense counsel had a full and fair opportunity to cross-examine C.M. at the preliminary hearing.

In **Commonwealth v. Johnson,** the Superior Court stated:

> Under both our federal and state constitutions, a criminal defendant has the right to confront and cross-examine witnesses against him at trial. **Commonwealth v. Bazemore,** 531 Pa. 582, 585, 614 A.2d 684, 685 (1992) (citations omitted). How-

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> **(b) The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:
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> (1) **Former Testimony.** Testimony that:
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> (A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and
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> (B) is now offered against a party who had—or, in a civil case, whose predecessor in interest had—an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

Pa. R.E. 804(b)(1). The circumstances under which former testimony is taken—in court under oath with the full opportunity for cross-examination—provides sufficient indicia of reliability for this hearsay exception.

Similarly, Section 5917 of the Judicial Code provides:

> § 5917 Notes of evidence at former trial
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> Whenever any person has been examined as a witness, either for the Commonwealth or for the defense, in any criminal proceeding conducted in or before a court of record, and the defendant has been present and has had an opportunity to examine or cross-examine, if such witness afterwards dies, or is out of the jurisdiction so that he cannot be effectively served with a subpoena, or if he cannot be found, or if he becomes incompetent to testify for any legally sufficient reason properly proven, notes of his examination shall be competent evidence upon a subsequent trial of the same criminal issue. For the purpose of contradicting a witness the testimony given by him in another or in a former proceeding may be orally proved.

42 Pa. C.S.A. §5917. Because this section applies only to prior testimony before a court of record, it does not apply to the testimony taken at a preliminary hearing. **Commonwealth v. Rodgers,** 472 Pa. 435, 452 n.7, 372 A.2d 771, 779 n.7 (1977), **abrogated on other grounds by Commonwealth v. Strickler,** 481 Pa. 579, 592, 393 A.2d 313, 319 (1978).

> ever, it is well-established that an unavailable witness' prior recorded testimony from a preliminary hearing is admissible at trial and will not offend the right of confrontation, provided the criminal defendant had counsel and **a full opportunity to cross-examine that witness at the prior proceeding. Id.** 614 A.2d at 687 (citation omitted) (emphasis added). The exception to the hearsay rule that permits the admissions of an unavailable witness' prior testimony at a preliminary hearing is 'predicated on the "indicia of reliability" normally afforded by adequate cross-examination. But where that "indicia of reliability" is lacking, the exception is no longer applicable.' **Id.** 614 A.2d at 687. (citations omitted). The Commonwealth may not be deprived of its ability to present inculpatory evidence at trial merely because the defendant, despite having the opportunity to do so, did not cross-examine the witness at the preliminary hearing stage as extensively as he might have done at trial. **Commonwealth v. Cruz-Centeno,** 447 Pa.Super. 98, 668 A.2d 536, 542 (1995) (citation omitted). However, where the defense, at the time of the preliminary hearing, was denied access to vital impeachment evidence, a full and fair opportunity to cross-examine the unavailable witness may be deemed to have been lacking at the preliminary hearing. **Id.,** 668 A.2d at 543 **(citing Bazemore, supra).** The opportunity to impeach a witness is particularly important where the Commonwealth[']s entire case hinges upon the testimony of the unavailable witness. **Commonwealth v. Smith,** 436 Pa.Super. 277, 647 A.2d 907, 913 (1994) **(citing Bazemore, supra).**

Supra at 169 (emphasis in original), **appeal denied,** 566 Pa. 637, 781 A.2d 140 (2001). A full and fair opportunity to cross-examine also requires that "the issues in the first proceeding and hence the purpose for which the testimony was there offered, must have been such that the present opponent ... had an adequate motive for testing on cross-examination the credibility of the testimony now offered." **Commonwealth v. Chmiel,** 558 Pa. 478, 499-500, 738 A.2d 406, 417 (1999) (citations and quotation marks omitted), **cert. denied sub nom., Pennsylvania v. Chmiel,** 528 U.S. 1131 (2000).

Where a defendant at a preliminary hearing has not been provided with vital impeachment evidence in the hands of the Commonwealth and is not otherwise aware of this evidence, or is not permitted to use this evidence to question the credibility of a witness, a full and fair opportunity to cross-examine the witness is lacking. **Commonwealth v. Bazemore,** 531 Pa. 582, 588-89, 614 A.2d 684, 687-88 (1992). "In order to have a full and fair opportunity for cross-examination, counsel must be apprised of all impeachment evidence at the time of the prior testimony." **Commonwealth v. Fink,** 791 A.2d 1235, 1245 (Pa. Super. 2002). **See also, Commonwealth v. Stays,** 70 A.3d 1256, 1265 (Pa. Super. 2013) ("[T]he admissibility of former testimony and its ability to withstand Confrontation Clause challenges derives not from the actual conduct or content of cross-examination, **but from its availability.**") (emphasis in original).

What suffices to establish whether a defendant has been previously afforded a full and fair opportunity to conduct a meaningful cross-examination of a witness who is not available for trial and whether "vital impeachment evidence" with which to challenge the witness' credibility has been withheld by the Commonwealth is subject to a case-by-case determination. In answering this question, the opportunity to cross-examine the witness at the preliminary hearing—whether or not exercised—is alone not sufficient to satisfy defendant's right of confrontation unless the defendant at the time of the preliminary hearing knew of or should have been aware of the impeaching evidence but chose not to use it. **Bazemore, supra** at 586, 614 A.2d at 686.

In considering whether a defendant was given a full and fair opportunity to cross-examine not only the accuracy of testimony, but also the credibility of the witness testifying, we must, at a minimum, with respect to the latter examine whether the impeaching information in question was known or available to the defendant at the time of the preliminary hearing and, if not, the significance of such information in evaluating whether the witness' testimony as a whole bears sufficient indicia of reliability (**i.e.,** does this information constitute "vital impeachment evidence"), considering factors such as the basis for impeachment, the degree to which it directly challenges whether or not the Defendant is guilty, and

whether multiple grounds to question the witness' credibility exist. **Compare Commonwealth v. Bazemore, supra** (witness' prior criminal record, prior statement giving a completely different version of the events in question, and status of being the target of a criminal investigation and the subject of possible criminal charges for conduct arising out of the same incident for which defendant was charged, not disclosed); **Commonwealth v. Smith,** 436 Pa. Super. 277, 647 A.2d 907 (1994) (witness' combined prior criminal record and pending robbery charge raising an inference that defendant either had received or had a reasonable basis to believe he would receive leniency in exchange for his favorable testimony (**i.e.,** potential bias or interest of witness), not disclosed); **and Commonwealth v. Johnson, supra** (witness' prior inconsistent statement, which in conjunction with other evidence, supported an inference that a third party, other than the defendant, might be responsible for the victim's death, not disclosed), **appeal denied,** 566 Pa. 637, 781 A.2d 140 (2001), where the Commonwealth's failure to disclose vital impeachment evidence was held to have deprived the defendant of a full and fair opportunity to cross-examine a witness who subsequently became unavailable to testify at trial, with **Commonwealth v. Elliott,** 549 Pa. 132, 700 A.2d 1243 (1997) (three previous statements, two of which were inconsistent with one another but none of which were inconsistent with witness' preliminary hearing testimony, where inconsistency found to contain only minor discrepancies not relevant to the defendant's guilt, not disclosed), **abrogated on other grounds by Commonwealth v. Freeman,** 573 Pa. 532, 827 A.2d 385 (2003); **Commonwealth v. Nelson,** 438 Pa. Super. 325, 652 A.2d 396 (1995) (police report summary implicating unavailable witness as the driver of the "get away" vehicle, not defendant, while providing information which would have been helpful to counsel in asking more pointed questions on cross-examination, was not a prior inconsistent statement with which the witness could be impeached, not disclosed); **and Commonwealth v. Cruz-Centeno,** 447 Pa. Super. 98, 668 A.2d 536 (1995) (witness' prior inconsistent statements, which were determined to be largely consistent with witness' preliminary hearing testimony, and juvenile record, which included open charges the existence of which was disclosed at trial, not disclosed),

appeal denied, 544 Pa. 653, 676 A.2d 1195 (1996), where the information not disclosed was not considered vital impeachment evidence and its absence held not to have deprived the defendant of a full and fair opportunity to cross-examine the witness at the prior proceeding. **See also, Commonwealth v. Douglas,** 558 Pa. 412, 737 A.2d 1188 (1999) (holding that defendant had a full and fair opportunity to cross-examine the now unavailable witness at the preliminary hearing when neither the court nor the Commonwealth precluded the cross-examination), **cert. denied sub nom, Douglas v. Pennsylvania,** 530 U.S. 1216 (2000) **and Commonwealth v. Stinson,** 427 Pa. Super. 289, 628 A.2d 1165 (1993) (admission of preliminary hearing testimony at trial held to be in error where defendant prevented from impeaching credibility of witness with **crimen falsi** conviction, however, error was considered harmless because the unavailable witness' testimony was cumulative of two other key witnesses), **appeal denied,** 537 Pa. 608, 641 A.2d 309 (1994).

Defendant argues that because he was not provided and did not know of prior inconsistent statements C.M. made to the police before the preliminary hearing, he was deprived of vital impeachment testimony with which to challenge the credibility of C.M.'s testimony and thus denied an opportunity for a full and fair hearing. **See Bazemore, supra** at 590, 614 A.2d at 688 (holding that a criminal defendant is denied a full and fair opportunity to cross-examine a witness where the defendant is denied access to vital impeachment evidence at or before the time of the preliminary hearing). Specifically, Defendant claims C.M. made three critical statements to the police prior to his preliminary hearing which were inconsistent with C.M.'s preliminary hearing testimony and were not disclosed to him. The three statements of which Defendant complains are that the reason C.M. went to Defendant's room with him on July 17, 2014, was to wait for her mother to finish working; that Defendant exposed his penis to C.M. and forced her to rub his penis in a back and forth motion; and that when C.M. went to the bathroom, she stayed there for approximately two hours and locked the door. These statements, according to Defendant, appear in the arresting officer's written summary of what C.M. told

him about the incident and C.M.'s written statement.[14] Because Defendant was not provided copies of these documents before the preliminary hearing, he argues he was deprived of a full and fair hearing.[15]

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[14] Copies of the arresting officer's summary and C.M.'s voluntary written statement which Defendant claims he was not provided copies of prior to the preliminary hearing are attached to Defendant's Brief in Support of his Motion. (**See** Defendant's Brief in Support of Motion **in Limine,** p. 7, and the attachments thereto.)

That this information was not yet discoverable at the time of the preliminary hearing and the Commonwealth was under no duty to disclose this information beforehand is not dispositive of this issue. Instead, the question of whether Defendant had a full and fair opportunity to question C.M. at the preliminary hearing turns on whether the information contained in these documents constituted vital impeachment evidence and, if so, whether Defendant was denied access to this information at or before the preliminary hearing. **Commonwealth v. Bazemore,** 531 Pa. 582, 590, 614 A.2d 684, 688 (1992). If the Commonwealth knows of vital impeachment evidence of a witness of which the defense is unaware and does not disclose this evidence to the defense at any time prior to the preliminary hearing, and the witness then becomes unavailable to testify at trial, "the Commonwealth must suffer the consequences in electing not to disclose that information which is necessary to afford defense counsel the opportunity for a full and fair cross-examination." **Id.**

[15] In Pennsylvania the principal purpose of a preliminary hearing is to determine whether sufficient evidence exists to establish that a crime has been committed and that the accused has committed it, **i.e.,** whether the defendant should be tried. **Commonwealth v. Smith,** 436 Pa. Super. 277, 290, 647 A.2d 907, 913 (1994). When making this determination, the magisterial district judge "is precluded from considering the credibility of a witness who is called upon to testify during the preliminary hearing." **Liciaga v. The Court of Common Pleas of Lehigh County,** 523 Pa. 258, 263, 566 A.2d 246, 248 (1998). In short, a preliminary hearing is concerned with probable cause, not credibility, which is a trial issue. **Smith, supra** (**citing Commonwealth v. Fox,** 422 Pa. Super. 224, 234, 619 A.2d 327, 332 (1993), **appeal denied,** 535 Pa. 659, 634 A.2d 222 (1993)).

Because of this limited function of a preliminary hearing and the constraints it places on cross-examination which seeks to impeach on the basis of credibility, whether a preliminary hearing is ever sufficient to satisfy confrontation rights and the opportunity for full and effective cross-examination is a legitimate question. The answer depends on how the preliminary hearing was actually conducted and whether the defendant was in fact substantially denied the opportunity to cross-examine the witness with vital impeachment evidence. If this opportunity was not denied, the opportunity for cross-examination envisioned by the United States Supreme Court's decision in **Crawford v. Washington,** 541 U.S. 36 (2004), has been met. **See Commonwealth v. Wholaver,** 605 Pa. 325, 360, 989 A.2d 883, 904 (2010) ("Where the defendant has had the opportunity to cross-examine a witness at a preliminary hearing, probing into areas such as bias and testing the veracity of the testimony, cross-examination, and thus confrontation, within

Preliminarily, before examining each of these statements in greater detail, Defendant's claim of being severely handicapped in his cross-examination of C.M. at the preliminary hearing because he was not provided copies of C.M.'s written statement and the arresting officer's narrative summary beforehand is seriously undermined by reference to the arresting officer's affidavit of probable cause attached to the criminal complaint filed on August 6, 2014. The substance of each statement which Defendant contends is inconsistent with C.M.'s preliminary hearing testimony is contained

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the meaning of the Sixth Amendment has been accomplished."), **cert. denied sub nom., Wholaver v. Pennsylvania,** 562 U.S. 933 (2010). **See also, State v. Mantz,** 222 P.3d 471, 477 (Idaho Ct. App. 2009) (advocating a case-by-case approach to the admissibility of preliminary hearing testimony at trial over a blanket prohibition where state law prohibits the hearing officer at a preliminary hearing from making credibility determinations). Here, Defendant was not significantly limited or restricted in the scope or nature of his cross-examination of C.M. at the preliminary hearing. **See California v. Green,** 399 U.S. 149, 166, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970).

In **Crawford,** the United States Supreme Court redefined the standard for admissibility of hearsay in a criminal proceeding. In sum, the court held that where the hearsay is testimonial in nature—**i.e.,** where the declarant should reasonably expect that the statement may be used for prosecution purposes—admissibility requires that the witness is unavailable and that defendant had a prior opportunity to cross-examine the witness. **Supra** at 51-54, 68. Where the hearsay is non-testimonial, the standard for admissibility set forth in **Ohio v. Roberts,** 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980)—that the evidence must either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness"—remains intact.

"Prior testimony at a preliminary hearing, before a grand jury, or at a former trial," and police interrogations are testimonial. **Crawford, supra** at 68. This encompasses C.M.'s audio/video recorded interview by the police and C.M.'s written statement immediately thereafter to the arresting officer. **Davis v. Washington,** 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (holding that a statement is testimonial when the primary purpose of police questioning is to establish or prove past events potentially relevant to a later criminal prosecution). Therefore, consistent with **Crawford,** since Defendant did not have an opportunity to cross-examine C.M. on these statements, the Commonwealth may not admit them as substantive evidence in its case-in-chief. This does not, however, bar their use by the Defendant for impeachment purposes. **Commonwealth v. Smith,** 380 Pa. Super. 619, 552 A.2d 1053 (1988) (holding that prior inconsistent statements of an unavailable witness were admissible for purposes of impeachment via the testimony of the person to whom such statements were made), **appeal denied,** 525 Pa. 581, 575 A.2d 112 (1990); **Commonwealth v. Davis,** 363 Pa. Super. 562, 526 A.2d 1205 (1987) (same), **appeal denied,** 518 Pa. 624, 541 A.2d 1135 (1988); **see also,** Pa. R.E. 806 (Attacking and Supporting the Declarant's Credibility).

in this affidavit. In describing the incident, the affidavit states, **inter alia,** that C.M. was in Defendant's apartment "waiting for her mother to finish working"; that after C.M. was awakened by Defendant digitally penetrating her and she rolled over, "Defendant exposed his penis to her and placed her hand on it moving it back and forth approximately ten times"; and that after C.M. refused to have sex with Defendant, C.M. "went and sat in the bathroom for approximately two hours with the door locked." Defendant has not explained why these statements in the affidavit of probable cause, each attributed to C.M., did not make him fully aware of the inconsistencies he now claims or what more would have been gained if he had been provided copies of the arresting officer's summary and C.M.'s written statement beforehand. **Commonwealth v. Leak,** 22 A.3d 1036, 1044 (Pa. Super. 2011) (explaining that a defendant asserting a lack of a full and fair opportunity for cross-examination must establish that he or she was deprived of "vital impeachment evidence"), **appeal denied,** 612 Pa. 707, 31 A.3d 291 (2011).

Additionally, as we discuss below, a serious question exists whether any of these statements is in fact inconsistent with what C.M. testified to at the preliminary hearing. As to two of these statements—why C.M. was in Defendant's room and how long she was in the bathroom—we further find that any inconsistency with C.M.'s preliminary hearing testimony is minor and non-prejudicial to the issue of whether Defendant is guilty of the offenses with which he has been charged. **Cf. Commonwealth v. Elliott, supra** (Commonwealth's failure to disclose minor discrepancies not relevant to the defendant's guilt non-prejudicial). The inconsistencies claimed with respect to these two statements do not compare in significance with the impeachment material withheld in **Johnson** and **Smith.** Moreover, Defendant fails to explain how either of these statements to the police constituted vital impeachment evidence. With respect to the third statement—whether C.M. visually saw Defendant's penis—while more problematic than the other two statements, not only is it unclear whether an inconsistency exists, Defendant's actual awareness of the possible inconsistency at the time of the preliminary hearing is evident from what Defendant asked the arresting officer, highlighting further that Defendant

knew of the inconsistency and had the opportunity to question C.M. on this issue.

A. **Questioning Why C.M. Was in Defendant's Room**

At the preliminary hearing, C.M. testified that she expected her boyfriend to meet her at the Rusty Nail sometime that evening. No specific time was ever given. In the arresting officer's written narrative summary of what C.M. told him on August 6, 2014, the officer wrote that C.M. was in Defendant's room waiting for her mother to finish work. Defendant argues that these two statements are inconsistent and deprived him of a full and fair opportunity to question C.M. at the preliminary hearing.

In addressing Defendant's argument, first, these two statements, by themselves, are not necessarily inconsistent. The arresting officer testified at the preliminary hearing that C.M.'s mother worked at the Rusty Nail and that she was working there the night of the incident. (N.T., pp. 137, 139-40.) Knowing this, it is certainly possible that during the time C.M. was at the Rusty Nail she expected her boyfriend to visit before her mother finished work, at which time she intended to go home.

However, this still leaves a number of questions unanswered. If, as C.M. testified, the bar closed by 11:00 P.M. and she remained downstairs until the staff cleaned up and left for the night, why didn't she go home with her mother at that time instead of going upstairs to Defendant's room. Since C.M. also testified it was not until sometime after 1:00 A.M. when her boyfriend informed her he would not be coming (N.T., p. 63), perhaps, after the bar closed, there was a change of plans and C.M.'s mother permitted C.M. to wait for her boyfriend in Defendant's room. Obviously, we do not know and do not have enough information to answer these questions, or others that are suggested by the circumstances.

Regardless, and without knowing these answers, there is no evidence presently on the record before us to dispute that C.M. was in Defendant's room at the time the alleged assault occurred and that she went there sometime after the bar closed on July 17, 2014. The reason she was in Defendant's room, whether because she was waiting to meet her boyfriend or for her mother to finish work, does not have a direct, immediate bearing on the accuracy

or veracity of C.M.'s testimony describing the claimed assault by Defendant.

To withstand constitutional challenge, the opportunity to cross-examine a witness at a prior proceeding who is now unavailable for trial "must be **fair** given the circumstances of the particular matter in order for such cross-examination to be deemed adequate." **Commonwealth v. Bazemore, supra** at 587, 614 A.2d at 686 (emphasis in original).

> When we review a constitutional objection to admission of evidence pursuant to an exception of the hearsay rule, we must remember that, although the right of confrontation is a fundamental right, it 'must occasionally give way to considerations of public policy and the necessities of the case.'

Commonwealth v. Kravontka, 384 Pa. Super. 346, 351, 558 A.2d 865, 868 (1989) (**quoting Mattox v. United States,** 156 U.S. 237, 243, 15 S. Ct. 337, 340, 39 L. Ed. 409 (1895)).

> The real basis for the admission of testimony given by a witness at a former trial is to prevent the miscarriage of justice where the circumstances of the case have made it unreasonable and unfair to exclude the testimony. It naturally follows that testimony from the former trial should not be admitted if to do so would result in a miscarriage of justice.

Bazemore, supra (**quoting** 29 Am.Jur.2d Evidence, §738, Evidence at Former Trial or Proceeding—Generally). Given this test, and given the nature of the possible inconsistency raised by Defendant on this point and its relation to the conduct with which Defendant has been charged, we do not believe admission of C.M.'s preliminary hearing testimony at trial would result in a miscarriage of justice, but rather that to exclude C.M.'s testimony on this basis would itself be a true miscarriage of justice.

B. **Questioning the Length of Time C.M. Spent in the Bathroom**

The second purported inconsistency argued by Defendant is the length of time C.M. testified she spent in the bathroom after the alleged assault. At the preliminary hearing, C.M. testified she was in the bathroom for "a little bit." (N.T., p. 33.) In C.M.'s written statement given to the arresting officer on August 6, 2014, C.M. wrote that she was in the bathroom "for about an hour or two." In

the arresting officer's summary of what C.M. told him on August 6, 2014, he wrote that C.M. "locked herself in the bathroom for approximately two hours." Defendant contends these statements are inconsistent and deprived him of a full and fair hearing on October 20, 2014. We disagree.[16]

In **Commonwealth v. Johnson,** the Superior Court stated:

> It is well-established that for a statement to be used for impeachment, a statement actually must be inconsistent with, and not just different from, trial testimony. Mere omissions from prior statements do not render prior statements inconsistent for impeachment purposes.

Supra at 170. Further, in **Commonwealth v. Cruz-Centeno,** the court stated:

> [M]ere dissimilarities or omissions in prior statements ... do not suffice as impeach[able] evidence; the dissimilarities or omissions must be substantial enough to cast doubt on a witness'[] testimony to be admissible as prior inconsistent statements.

Id. at 114, 668 A.2d at 544.

While stating someone was in the bathroom for one to two hours is more definite than saying they were there for "a little bit," the two statements are not necessarily irreconcilable and inconsistent. Further, as with Defendant's argument concerning

[16] As is illustrated by this sequence, what C.M. actually stated in her written statement is different from what the arresting officer wrote in his summary. This of course highlights the difficulty in knowing whether the statements which the arresting officer attributes to C.M. in his summary are accurate, in contrast to being his best recollection or interpretation of what C.M. told him. Because the officer's summary is just that, a summary and not a verbatim recording of what C.M. stated, this may explain, at least in part, some of the inconsistencies of which Defendant complains. **Cf. Commonwealth v. Simmons,** 541 Pa. 211, 245, 662 A.2d 621, 638 (1995) ("A written report which is only a summary of the words of the victim and not verbatim notes from the victim cannot be used to impeach the witness on cross-examination since it would be unfair to allow a witness to be impeached on a police officer's interpretation of what was said ... ."), **cert. denied sub nom., Simmons v. Pennsylvania,** 516 U.S. 1128 (1996); **Commonwealth v. Baez,** 494 Pa. 388, 394, 431 A.2d 909, 912 (1981) (holding that a police summary of the out-of-court statements of third-party witnesses is not admissible either for its substantive value or for impeachment purposes). In this regard we hasten to add that we have not seen a copy of C.M.'s audio/video recorded interview, nor is it part of the record before us.

possible inconsistencies between the reasons given by C.M. for being in Defendant's room at the time of the alleged assault, how long C.M. was in the bathroom after the alleged assault does not have an immediate bearing on the accuracy or veracity of C.M.'s description of the assault itself. Again, we find that to exclude C.M.'s preliminary hearing testimony on this basis, rather than to permit its admission at trial, would result in a miscarriage of justice.

C. **Questioning on C.M.'s Description of What She Saw**

The final inconsistency argued by Defendant is whether Defendant exposed his penis to C.M. during the time she claims she was assaulted. At the preliminary hearing, C.M. testified that she pretended to be asleep during the assault, kept her eyes closed, and did not see Defendant's penis. C.M.'s written statement to the arresting officer on August 6, 2014, does not address this issue, however, in the officer's narrative summary of what C.M. told him, the officer wrote that it was when C.M. rolled over still pretending to be asleep that "[Defendant] exposed his penis to her and took her hand and placed it on his penis and began moving it back and forth approximately ten times."

Again, Defendant claims this statement as reported by the arresting officer is inconsistent with C.M.'s preliminary hearing testimony, but this is not clear. The officer's summary does not state that C.M. told him she saw Defendant's penis, only that he exposed it to her, which may mean, and still be consistent with her preliminary hearing testimony, that when Defendant grabbed C.M.'s hand and placed it on his penis, his penis was exposed, even though she did not see it.

Regardless, whether this is a real or imagined inconsistency, "[t]he Commonwealth may not be deprived of its ability to present inculpatory evidence at trial merely because the defendant, despite having the opportunity to do so, did not cross-examine the witness at the preliminary hearing stage as extensively as he might have done at trial." **Commonwealth v. Johnson, supra** at 169. Here, as with the other inconsistencies argued by Defendant, the affidavit of probable cause which accompanied the criminal complaint expressly placed Defendant on notice of what the arresting officer swore C.M. reported to him which Defendant now claims was inconsistent with her preliminary hearing testimony.

Having been put on notice of these earlier statements through the affidavit of probable cause, Defendant's decision not to cross-examine C.M. at the preliminary hearing about these possible inconsistencies was a risk Defendant assumed. As to this specific claim, not only did Defendant not question C.M. about the possible inconsistency that Defendant was aware that an inconsistency might exist was clear in his examination of the arresting officer immediately after C.M. testified. In this examination, after drawing attention to C.M.'s testimony that she did not see Defendant's penis, the officer admitted that when he prepared the affidavit of probable cause, he used the word "exposed" because he believed at the time that C.M. had actually seen Defendant's penis. (N.T., p. 133.)

At the preliminary hearing, Defendant thoroughly cross-examined C.M. about what occurred when she was alone with Defendant in his room during the early morning hours of July 18, 2014. Defendant questioned C.M. in detail not only about what Defendant did and said and what she did and said when the two were together in Defendant's room, but also about when was the first time she met Defendant (N.T., pp. 17-18), what type of relationship the two had with one another (N.T., p. 18), and how much time they spent together (N.T., pp. 37-38), how many times she had been in Defendant's room before the incident (N.T., pp. 21, 65-66), and whether he had made advances to her before (N.T., p. 78), and what she thought of Defendant (N.T., pp. 99-100). Defendant asked C.M. where she had been before going to the Rusty Nail that night (N.T., pp. 22, 50) and who she was with while at the Rusty Nail before going upstairs to Defendant's room after the bar closed (N.T., pp. 22, 50-53); whether she had been drinking any alcoholic beverages or using drugs that evening (N.T., p. 52); what clothes she was wearing when the incident happened, where they were located at the time of the preliminary hearing, and whether she had tampered with them in anyway (N.T., pp. 26, 56-60); who her boyfriend was at the time of the incident and what his telephone number was (N.T., pp. 44-47); what phone she used to communicate with her boyfriend, what condition it was in, and whether she had saved any of the messages she and her boyfriend exchanged that evening (N.T., pp. 38-39, 43); and whether she

had spoken with anyone about what happened and what she said (N.T., pp. 98-99, 101, 120). Defendant also asked C.M. about why she went to the bathroom (N.T., pp. 95-96), where the bathroom was located in relation to Defendant's room (N.T., p. 69), and how much time she spent there (N.T., p. 100); what she saw while the incident was occurring, and how she knew it was Defendant if her eyes were closed (N.T., pp. 36, 85-88, 95-96); and about whether she was sitting in the bar waiting for her mother (N.T., p. 51), where she lived in relation to the bar (N.T., pp. 16, 60-62), why she didn't go home after the bar closed (N.T., pp. 22, 60-64), and why she didn't call her mother (N.T., pp. 63-64). In addition, Defendant asked C.M. if she screamed and yelled when Defendant assaulted her or when she was in the hallway on her way to the bathroom (N.T., pp. 96-98), both of which C.M. denied, and had C.M. admit that after she was in the bathroom she returned to Defendant's room and remained there with Defendant. (N.T., p. 100.)

As the foregoing demonstrates, Defendant had a full and ample opportunity at the preliminary hearing to develop what C.M. knew and her version of what occurred. Defendant was allowed to question and did question C.M. extensively about her perception and recollection of what occurred, and her ability to communicate what had happened. In inquiring about C.M.'s relationship with Defendant, how she felt toward Defendant, and her reaction to the assault—her failure to immediately pull back and tell Defendant to stop, her silence rather than rage, and her return to Defendant's room—Defendant was clearly questioning C.M.'s veracity, possible bias or prejudice on her part, and establishing conduct arguably inconsistent with her accusations.

That Defendant did not ask C.M. directly whether her mother was at the bar when it closed, why she didn't go home with her mother at that time, and whether she told the police she was waiting in Defendant's room for her mother to finish work and, if she did, why, are questions only Defendant can answer. Similarly, why Defendant didn't ask C.M. point blank if she saw Defendant's penis and whether she had told the police she had, and what C.M. meant when she testified she was in the bathroom "a little bit," are questions for Defendant. As not only a key witness against him, but the only witness to the alleged sexual assault, Defendant

clearly had the motive to ask such questions and an opportunity to do so: the substance of the statements Defendant has identified and claimed were made by C.M. to the police at an earlier time, and which Defendant now questions, is apparent from a cursory review of the affidavit of probable cause. Moreover, nothing in the record we have reviewed suggests that Defendant was in any manner limited at the preliminary hearing in asking C.M. about any prior statements she made to the police on August 6, 2014.

CONCLUSION

For the reasons discussed, we do not find that any of the prior statements which the arresting officer attributed in his affidavit of probable cause as having been made by C.M. to the police on August 6, 2014, and which Defendant claims are inconsistent with C.M.'s preliminary hearing testimony, are necessarily inconsistent or were not reasonably known to Defendant prior to the preliminary hearing so as to compel the conclusion that Defendant was denied the use of vital impeachment evidence at this hearing. Further, as to two of the statements, a serious question exists whether the inconsistencies, if any exist, concern a core, critical evidentiary fact material to Defendant's guilt or innocence.

More importantly, the extensive cross-examination of C.M. and the leeway Defendant was granted in his questioning of C.M., combined with the statements disclosed in the affidavit of probable cause as having been made by C.M., convince us that Defendant had a full and fair opportunity at the preliminary hearing to test the strength and sincerity of C.M.'s testimony to ensure its reliability. Nor is there anything in the record before us to suggest that C.M. had any ulterior motive to fabricate her testimony of which Defendant was unaware and, therefore, unable to question C.M. about. Accordingly, we find that the admission of C.M.'s preliminary hearing testimony at the time of trial meets Pa. R.E. 804(b)(1)'s hearsay exception and will not result in a constitutional violation of Defendant's right to a fair trial.

COMMONWEALTH of PENNSYLVANIA vs. FRANK DUANE SWARTZ, Defendant

Criminal Law—PCRA—Ineffectiveness of Counsel—Three-Part Test—Distinguishing Between an Underlying Legal Claim Reviewed and Decided on Direct Appeal and a Claim of Ineffectiveness of Counsel Under the PCRA—Right to Effective Assistance of Counsel During the Plea Bargaining Process—Rejection of Plea Offer Premised Upon Constitutionally Inadequate Advice—Remedy

1. Under the PCRA, a defendant is eligible for relief if he establishes by a preponderance of the evidence that his conviction resulted from "[i]neffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa. C.S.A. §9543(a)(2)(ii).

2. To determine if counsel was ineffective, a three-part test is applied pursuant to which the defendant must establish: (1) that the underlying legal claim has arguable merit, (2) that no reasonable basis existed for counsel's conduct, and (3) that defendant was prejudiced by counsel's acts or omissions.

3. A claim has arguable merit where the facts upon which it is based, if determined to be accurate, give rise to a **prima facie** basis for questioning whether counsel's representation fell below an objective standard of reasonableness.

4. In examining whether counsel's actions or omissions lacked a reasonable basis, at issue is 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. Counsel's conduct is to be evaluated from counsel's perspective at the time counsel acted, based upon what counsel then knew or should have known, making all reasonable efforts made to avoid both the distorting effects of hindsight and post hoc rationalization of counsel's conduct.

5. 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.

6. A defendant's right to effective assistance of counsel extends to the plea bargaining process; if a plea bargain has been offered, a defendant has the right to effective assistance of counsel in evaluating whether to accept or reject the offer.

7. A defendant who relies upon constitutionally inadequate legal advice in rejecting a plea offer, after which the defendant is convicted and receives a substantially harsher sentence than that offered in the rejected plea bargain, has a viable claim under the PCRA. To establish prejudice under these circumstances, defendant must prove that but for the ineffective advice of counsel there is a reasonable probability that defendant would have accepted the plea offer, that the court would have accepted its terms, and that the conviction or sentence, or both, called for under the offer's terms would have been less severe than that which, in fact, occurred.

8. When met with a plea offer, defense counsel is not ineffective for not explicitly recommending that defendant accept or reject the plea offer, provided counsel provides defendant with that information, including sound legal guidance, necessary for defendant to intelligently evaluate the offer,

weigh the risks of going to trial, and make an informed decision of his own on whether to accept or reject the offer.

9. In contrast to a court ruling or other issue of error which has been previously raised and decided on the merits on direct appeal and which may not be relitigated under the guise of the PCRA, a claim of ineffective assistance of counsel is a separate claim cognizable on PCRA review, even if the underlying legal claim concerning which counsel is claimed to have been ineffective was previously raised on direct appeal.

NO. CR 104-2009

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

ROBERT S. FRYCKLUND, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—November 30, 2015

Before the court is Defendant Frank Duane Swartz' petition pursuant to the Post-Conviction Relief Act (PCRA)[1] wherein he claims his trial counsel was ineffective for: (1) not objecting to a witness' allegedly prejudicial comments at trial, (2) not presenting evidence to corroborate his testimony that he was interrogated by the police before being advised of his **Miranda** rights, and (3) not advising him to accept a proffered plea agreement rather than proceed to trial. For the reasons which follow, we hold these claims are without merit.

PROCEDURAL AND FACTUAL BACKGROUND

The evidence presented at trial established the following. Over a span of one month—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 (31) 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. 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

[1] 42 Pa. C.S.A. §§9541-46.

for Defendant's residence in Summit Hill, his vehicle, and to obtain a DNA sample. Trooper Klitsch and other officers executed the warrant for Defendant's residence 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 of Defendant's home, police seized two clear plastic bags of colored rubber bands and two white in color 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 having set sixteen of the nineteen fires for which he was questioned.[2] 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 pled guilty to all charges filed against him pursuant to a stipulated plea agreement. This agreement also called for a sentence of four to eight years' incarceration. At the time Defendant was represented by Paul J. Levy, Esq. However, on February 25, 2010, Defendant filed a **pro se** motion to withdraw his guilty plea. In consequence, Attorney Levy filed a motion to withdraw as counsel on the basis of irreconcilable differences with his client. This motion was granted on March 23, 2010.

On March 26, 2010, Michael P. Gough, Esq. ("Trial Counsel") was appointed as Defendant's new counsel. Following a May 27, 2010 hearing on Defendant's motion to withdraw his plea, the motion was granted the same day and Defendant allowed to proceed to

[2] 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.

trial. Trial counsel subsequently filed a motion to suppress the oral and written statements Defendant gave to the police on November 24, 2008. After hearing, this motion was denied on June 21, 2011.

A jury trial began on December 5, 2011, and ended on December 13, 2011, when the jury returned a verdict of guilty on fourteen counts of arson endangering persons,[3] one count of arson endangering property,[4] fifteen counts of possession of incendiary materials or devices,[5] fifteen counts of risking a catastrophe,[6] and fifteen counts of maliciously setting or causing a fire.[7] On January 30, 2012, following a presentence investigation report, Defendant was sentenced to an aggregate sentence of not less than two hundred sixteen (216) months nor more than four hundred thirty-two (432) months of incarceration in a state correctional facility. Defendant filed a timely post-sentence motion, which we denied on June 6, 2012.

On direct appeal to the Superior Court, Defendant, through trial counsel, raised six claims: (1) whether incriminating statements Defendant made to Trooper Klitsch should have been suppressed as the product of improper promises made by Trooper Klitsch designed to induce the Defendant to waive his **Miranda** rights; (2) whether the reading of Defendant's written confession to the jury after deliberations had begun was a violation of Pa. R.Crim.P. 646(c); (3) whether we erred in not declaring a mistrial as a result of allegedly prejudicial remarks made during the course of the trial and the representation by the jury at one point that it was unable to reach a unanimous decision; (4) whether the verdict was against the weight of the evidence; (5) whether the evidence was insufficient to sustain Defendant's convictions; and (6) whether the Commonwealth failed to timely bring the matter to trial.

On May 24, 2013, the Superior Court denied all of Defendant's claims on the merits and affirmed Defendant's judgment of sentence. **Commonwealth v. Swartz,** No. 1708 EDA 2012 (Pa. Super. May 24, 2013) (unpublished memorandum). Defendant did not petition the Pennsylvania Supreme Court for allowance of appeal.

[3] 18 Pa. C.S.A. §3301(a)(1)(i).

[4] 18 Pa. C.S.A. §3301(c)(2).

[5] 18 Pa. C.S.A. §3301(f).

[6] 18 Pa. C.S.A. §3302(b).

[7] 32 Pa. C.S.A. §344(b).

On May 22, 2014, Defendant mailed a timely **pro se** PCRA petition from prison, which was docketed on May 27, 2014. We subsequently appointed Robert S. Frycklund, Esq. as counsel for Defendant. Attorney Frycklund filed an amended PCRA petition on September 18, 2014. It is this petition which is now before us. A hearing on this petition was held on November 7, 2014.

DISCUSSION

1. **Standard of Review**

Under the PCRA, a defendant is eligible for relief if he establishes by a preponderance of the evidence that his conviction resulted from "[i]neffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa. C.S.A. §9543(a)(2)(ii). Generally, to determine if counsel was ineffective, we apply a three-part test based upon the Pennsylvania Supreme Court's interpretation of **Strickland v. Washington,** 466 U.S. 668 (1984), as articulated in **Commonwealth v. Pierce,** 515 Pa. 153, 527 A.2d 973 (1987).

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. **Strickland, supra** 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 no reasonable basis existed for counsel's action or omission, and (3) that defendant 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, 612, 36 A.3d 1, 7 (2011).

It is the defendant's burden to establish all three prongs of the **Pierce** standard. **Commonwealth v. Abu-Jamal,** 553 Pa. 485, 505, 720 A.2d 79, 88 (1998) (**citing Commonwealth v. Travaglia,** 541 Pa. 108, 118-20, 661 A.2d 352, 357 (1995)). Further, it is presumed that counsel acted effectively. **Id.** (**citing Commonwealth v. Miller,** 494 Pa. 229, 431 A.2d 233 (1981)).

A claim has arguable merit where the facts upon which it is based, if determined to be accurate, give rise to a **prima facie** basis for questioning whether counsel's representation fell below an objective standard of reasonableness. **Commonwealth v. Jones,** 583 Pa. 130, 138, 876 A.2d 380, 385 (2005). In examining whether counsel's actions lacked a 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." **Commonwealth v. Stewart,** 84 A.3d 701, 707 (Pa. Super. 2013) **(en banc)** (citations omitted), **appeal denied,** 625 Pa. 664, 93 A.3d 463 (2014). In determining whether a reasonable basis for counsel's actions existed, 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, 273-74 (2006), and 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). "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, 415-16, 57 A.3d 607, 613 (2012) (**quoting Strickland v. Washington,** 466 U.S. 668, 694 (1984)) (quotation marks omitted). **See also, Hill v. Lockhart,** 474 U.S. 52, 59 (1985) ("The ... 'prejudice' requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process."). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding." **King, supra** at 416, 57 A.3d at 613 (citation omitted).

2. **Trial Counsel's Failure to Object to Trooper John Corrigan's Allegedly Prejudicial Remarks**

Defendant's first claim concerns trial counsel's failure to timely and specifically object to Trooper John Corrigan's testimony about the quality of the latent fingerprint found on the matchbook of one of the incendiary devices recovered from one of the crime scenes. Of eight latent fingerprints developed as part of the police investigation into the identity of the arsonist, only one was of AFIS quality. In explaining what this meant, Trooper Corrigan testified

that AFIS (**i.e.,** the Automated Fingerprint Identification System) was a criminal record fingerprint database against which unknown fingerprints of sufficient quality and quantity of detail could be submitted for comparison to assist in identifying the owner of the unknown fingerprint. (N.T. 12/08/11, p. 68.) Defendant argues that he was prejudiced by this reference to criminal records as the jury could reasonably infer that Defendant had previously been involved with criminal activity unrelated to the charges for which he was on trial. Defendant refers to our memorandum opinion of July 25, 2012,[8] in which we held that this claim had not been preserved as a result of trial counsel's failure to object and denied Defendant's Post-Sentence Motion.[9] The Commonwealth contends that this claim has been previously litigated.

Claims that have been previously litigated may not be re-litigated in a PCRA petition. 42 Pa. C.S.A. §9543(a)(3). For the purposes of PCRA review, a claim has been previously litigated if "the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue ... ." 42 Pa. C.S.A. §9544(a)(2). However, a claim of ineffective assistance of counsel is a separate claim cognizable on PCRA review even if the underlying issue was previously raised on direct appeal. **See Commonwealth v. Collins,** 585 Pa. 45, 57-61, 888 A.2d 564, 571-73 (2005). For this reason, we find Defendant's instant claim of ineffective assistance of counsel has not been previously litigated.

In addressing the merits of this claim, the operative question is whether the jury could have reasonably inferred from the facts presented that the Defendant had engaged in prior criminal activity. Trooper Corrigan's characterization of the fingerprint as being of "AFIS quality" described only the quality of the fingerprint against a known standard: it did not claim that Defendant's fingerprint was found on the AFIS system or imply that Defendant engaged in

[8] The opinion denying Defendant's Post-Sentence Motion was filed on June 6, 2012.

[9] Although we found that trial counsel failed to preserve this claim by not making a timely and specific objection, we also denied this claim on the merits. At the hearing on Defendant's PCRA petition, trial counsel also observed that as a tactical matter, to have objected and requested a cautionary instruction may have done more harm than good by focusing the jury's attention on this aspect of Trooper Corrigan's testimony. (N.T. 11/7/14, pp. 51-52.)

other unrelated criminal conduct. Specifically, Trooper Corrigan testified:

> 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.)

At no point during Trooper Corrigan's testimony, or the testimony of any other witness, was it represented that the AFIS search yielded a match to Defendant's fingerprints. (N.T. 12/09/11, pp. 9, 71-72); **cf. Commonwealth v. Claffey,** 264 Pa. Super. 453, 455-56, 400 A.2d 173, 174 (1979) **(en banc)** (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.[10] With this information, Trooper Klitsch contacted Trooper David Andreuzzi, a fingerprint comparison and identification expert with the Pennsylvania State Police, and asked that he run a comparison between the AFIS-quality print and the known fingerprints of Defendant. Once finished with this 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

[10] This matching occurred by comparing the DNA from the cigarette filter with CODIS (Combined DNA Index System), a database of known DNA profiles. (N.T. 12/8/11, pp. 207-209; N.T. 12/9/11, pp. 30-31, 37-39.)

quality print. (N.T. 12/9/11, p. 62.) 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) **(en banc)** (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).

Further, Defendant has not shown that Defendant was prejudiced by trial counsel's failure to object. Not all improper references to past criminal activities warrant a new trial. A mere passing reference to prior criminal conduct does not warrant a new trial unless the record shows that prejudice resulted from the testimony. **Commonwealth v. Padilla,** 923 A.2d 1189, 1194-95 (Pa. Super. 2007), **appeal denied,** 594 Pa. 696, 934 A.2d 1277 (2007).

In addition to Defendant's fingerprint found on one of the incendiary devices, the Commonwealth's evidence implicating Defendant as the arsonist consisted of DNA matching that of Defendant's found on three of the incendiary devices recovered, colored rubber bands and matchbooks similar to those used to make the incendiary devices found in Defendant's home, and Defendant's confession to lighting the sixteen fires. Given this evidence, we do not believe Trooper Corrigan's reference to one of eight fingerprints found at the crime scene as being of "AFIS quality" would have affected the outcome of Defendant's trial. Accordingly, this claim is denied.

3. **Trial Counsel's Decision Not to Present Evidence of Travel Times at the Suppression Hearing**

Defendant's second claim centers on trial counsel's alleged failure to present corroborating evidence to contradict the time noted on Defendant's **Miranda** waiver form documenting when Defendant signed the form. More specifically, Defendant argues that trial counsel should have used a free online mapping service, such as MapQuest™, to calculate the actual time it would have taken for Defendant to drive from the location where he was hunting to his home in Summit Hill, Pennsylvania, and from there to

the Summit Hill police station. Defendant argues that this evidence would have supported his claim that the time written on the form, 5:40 P.M., was incorrect, which in turn would back his assertion that he was not **Mirandized** before he was questioned by police while in custody. Defendant contends trial counsel's decision to rely solely on Defendant's testimony to challenge the accuracy of this notation was not reasonable, and as a result, his incriminating statements were not suppressed.

First, although Defendant was unable to pinpoint the time precisely,[11] as testified to by trial counsel at the hearing on Defendant's petition, trial counsel believed that Defendant's own testimony as to what routes he took in driving home on November 24, 2008, and what he did once he arrived home, was strategically a better approach to challenging the Commonwealth's timeline than the use of MapQuest™. (N.T. 11/7/14, pp. 59-60.) As a matter of trial tactics, we concur that Defendant's description of what routes he actually drove on returning home and how long it took would be more persuasive than using a MapQuest™ estimate which would be unable to account for the actual route the Defendant took, Defendant's speed, weather conditions, lighting, and how much time Defendant spent at his home before proceeding to the police station.

Further, Defendant's claim that a computation based on MapQuest™ or a similar source would contradict the time on the **Miranda** waiver form is speculative at best, even if Defendant could overcome the evidentiary hurdle of admissibility. **See Commonwealth v. Brown,** 839 A.2d 433, 435-37 (Pa. Super. 2003) (holding that under Pa. R.E. 201(b)(2) a calculation of distance between two points obtained from the website MapQuest™, is not so reliable that the court may take judicial notice of that informa-

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[11] In its memorandum opinion of May 24, 2013 disposing of Defendant's direct appeal, the Superior Court noted:

> [Defendant] was not wearing a watch and did not otherwise note the time. N.T., 11/12/2010 at 156. Moreover, [Defendant] presented testimony from his fiancée and her two sons, who were present when [Defendant] returned home from hunting and accompanied him to the police station. None of these witnesses could specify the precise timing of events.

Commonwealth v. Swartz, No. 1708 EDA 2012 (Pa. Super. May 24, 2013) (unpublished memorandum, p. 12).

tion). **Cf. Commonwealth v. Suarez-Irizzary,** 15 D. & C.5th 106 (Lebanon Co. 2010) (applying Pa. R.E. 901(b)(9) and holding that the testimony of a detective who verified a distance computed using the program Google Earth™ by personally measuring the distance was a sufficient basis to find that the program produced an accurate result and to admit a second distance calculated using Google Earth™).

In this case, Defendant argues that MapQuest™ or a similar mapping service should have been used to produce a travel time calculation, not a distance calculation. Defendant has set forth no basis to verify the accuracy of such a computation; therefore, its admissibility is in question. Moreover, even if Defendant could somehow authenticate the process of calculating travel time, Defendant cannot establish when he began his return trip home nor when he left his home to go to the police station. Without knowing these times, any calculation of Defendant's travel time before reaching the police station does not eliminate the speculation inherent in his position. Lacking arguable merit, this claim is denied.

4. **Trial Counsel's Failure to Advise Defendant to Accept a Plea Agreement Rather Than Proceed to Trial**

Lastly, Defendant argues that trial counsel was ineffective in failing to advise him to accept the Commonwealth's offer to a plea which included a sentencing recommendation of four to eight years. In this respect, Defendant asserts that he had already been incarcerated for almost three years when his trial began on December 5, 2011, which was a majority of what his minimum sentence would have been under the proffered plea agreement. In contrast, after Defendant was convicted he received a sentence that was four-and-a-half (4 1/2) times greater than that provided for in the previous plea offer. Defendant argues that trial counsel's failure to advise him to reconsider the Commonwealth's offer before following through on his **pro se** motion to withdraw his plea was tantamount to ineffective assistance of counsel under **Lafler v. Cooper,** 566 U.S. __, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012). Defendant also contends that trial counsel was ineffective for not recommending Defendant enter into a new plea agreement after he withdrew his prior plea.

In **Lafler,** the United States Supreme Court reaffirmed a defendant's right to effective assistance of counsel during the plea bargaining process. **Id.** at 1384 (**citing, inter alia, Padilla v. Kentucky,** 559 U.S. 356, 373 (2010); **McMann v. Richardson,** 397 U.S. 759, 771 (1970)). The court held, for the first time, that a defendant who relies upon counsel's constitutionally inadequate advice in rejecting a plea offer, after which the defendant is convicted and receives a substantially harsher sentence than that offered in the rejected plea bargain, has a viable claim under **Strickland. Supra** at 1385-86, 1390-91.[12] In order to demonstrate prejudice, Defendant must show

> that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (**i.e.,** that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Id. at 1385.

This state's courts likewise recognize that a defendant has "the right to effective counsel during a plea process as well as during a trial." **Commonwealth v. Hickman,** 799 A.2d 136, 141 (Pa. Super. 2002) (**citing Hill v. Lockhart,** 474 U.S. 52 (1985)). Previous decisions held that a defendant was entitled to relief on the basis of ineffective assistance of counsel in relation to a guilty plea "if the ineffectiveness caused appellant to enter an involuntary or unknowing plea." **Commonwealth v. Allen,** 557 Pa. 135, 144, 732 A.2d 582, 587 (1999) (**citing Commonwealth v. Frometa,** 520 Pa. 552, 554, 555 A.2d 92, 93 (1989)). The Pennsylvania Supreme Court has not explicitly adopted the holding of **Lafler,** and the Superior Court has only discussed **Lafler** in the context of whether it created a new constitutional right that would serve as an exception to the

[12] Specifically, the defendant in **Lafler** was offered a sentence of 51 to 85 months as part of the plea bargain. Following his conviction at trial, he received a mandatory minimum sentence of 185 to 360 months' imprisonment. **Lafler v. Cooper,** 566 U.S. __, 132 S.Ct. 1376, 1383, 182 L. Ed. 2d 398 (2012). This sentence was three-and-a-half (3 1/2) times greater than that which he would likely have received had he pled guilty. **Id.** at 1386, 1391.

PCRA's one-year time bar.[13] **See Commonwealth v. Hernandez,** 79 A.3d 649 (Pa. Super. 2013); **Commonwealth v. Feliciano,** 69 A.3d 1270 (Pa. Super. 2013); **Commonwealth v. Lewis,** 63 A.3d 1274 (Pa. Super. 2013). In **Feliciano,** the Superior Court held that **Lafler** did not create a new constitutional right but rather applied the **Strickland** test to a claim of ineffective assistance of counsel arising out of the plea negotiation process. **Feliciano, supra** at 1277. Similarly, we find that the **Pierce** test as a restated form of the **Strickland** test applies to Defendant's third claim.

At the evidentiary hearing on Defendant's PCRA petition, Defendant testified that trial counsel never counseled him against withdrawing his plea. (N.T. 11/07/2014, pp. 14-16.) Defendant claimed that facing a potential life sentence if convicted at trial, he would have taken the plea deal for a four- to eight-year sentence but for his counsel's advice. **Id.** at 16-17. Defendant further testified that trial counsel informed him about the possible range of sentences but assured him that even if convicted at trial, he would not receive such a stringent sentence. **Id.** at 16, 36-37. Defendant testified that if trial counsel had advised him that it was in his best interest not to withdraw his guilty plea, he would have followed that advice. **Id.** at 25-26, 33-35.

In addition, Defendant testified that he never discussed a guilty plea with trial counsel after he withdrew his plea on May 27, 2010, and that trial counsel never communicated a subsequent plea offer with a sentencing recommendation of five to ten years' incarceration. (N.T., 11/07/2014, pp. 36-37, 40.) This, notwithstanding that earlier in his testimony Defendant acknowledged having received a plea offer with a sentencing recommendation of five to ten years of imprisonment after the start of trial. **Id.** at 24. Defendant testified that he rejected that offer on the grounds that he had already rejected a plea with a sentence of four to eight years. **Id.** Defendant conceded that it was ultimately his decision to plead guilty or proceed to trial. **Id.** at 18, 33-34.

Trial counsel testified as well at this evidentiary hearing. In contrast to Defendant, trial counsel testified that he discussed Defendant's decision to withdraw his guilty plea with him. (N.T. 11/07/2014, pp. 52-53; Commonwealth's Exhibit 2.) Defendant told trial counsel that he was dissatisfied with Attorney Levy's

[13] 42 Pa. C.S.A. §9545(b)(1)(iii).

representation and that he was innocent of the charges. **Id.** at 53; Commonwealth's Exhibit 2. Trial counsel noted that Defendant was informed at the hearing on his motion to withdraw his plea that the maximum possible sentence for the sixteen counts of arson was 320 years. **Id.** at 53; Commonwealth's Exhibit 3. Trial counsel recalled that shortly before trial, Defendant asked what sentence he might receive if convicted, and trial counsel responded that he believed that Defendant would receive a sentence of at least ten years. **Id.** at 56-57. Trial counsel testified that it was not his practice to affirmatively recommend to a client whether to accept a plea offer or go to trial. **Id.** at 57. Instead trial counsel utilized a "devil's advocate" approach, advising Defendant of the relative strengths and weaknesses of both the Commonwealth's case and that of the defense and letting Defendant make the final decision. **Id.** at 57-58, 61-62, 68.

Providing a client with the information necessary to make an intelligent decision and letting him make that decision is critically different than what happened in **Lafler:** counsel unduly influencing a criminal defendant to reject a plea offer based upon counsel's fundamental misunderstanding of the applicable law which the defendant relied upon to his detriment. **Lafler** requires only that "[i]f a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it." **Supra** at 1387.

Trial counsel testified that he corresponded with the Commonwealth's attorney, James M. Lavelle, Esquire, regarding a guilty plea prior to trial. (N.T., 11/07/2014, pp. 54-55, 65; Commonwealth's Exhibits 5 and 6.) Trial counsel stated that at some point between the date of his last correspondence with Assistant District Attorney Lavelle and the beginning of trial, A.D.A. Lavelle made a plea offer with a sentencing recommendation of five to ten years' incarceration in exchange for a guilty plea. **Id.** at 56. Trial counsel testified that he recorded this offer in his trial notes. **Id.** at 56, 66. Trial counsel explained that he communicated this offer to Defendant on the first day of trial, but that Defendant rejected the offer because it involved a longer term of incarceration than the previous plea offer. **Id.** at 56. Trial counsel was satisfied that Defendant was fully aware of the risks of going to trial. **Id.** at 58.

Lastly, trial counsel stated his belief that Defendant desired to go to trial. **Id.** at 55, 58, 63; Commonwealth's Exhibit 5.

Defendant's testimony is not credible to the extent that it is inconsistent with the testimony of trial counsel and the exhibits submitted into evidence. Defendant claimed that after he withdrew his plea, he did not discuss the possibility of entering another plea with trial counsel. This is at variance with trial counsel's two letters sent to the Commonwealth's attorney asking if the Commonwealth would enter into another plea agreement and trial counsel's notes of his meeting with Defendant on December 2, 2011. (N.T. 11/07/2014, pp. 54-56; Commonwealth's Exhibits 5, 6 and 7.) Additionally Defendant contradicted himself: initially Defendant admitted to receiving a plea offer after trial began, but later denied that he ever received such an offer. **Id.** at 24, 40. Trial counsel's testimony corroborates the existence of this latter offer. **Id.** at 24, 56.

We further find that trial counsel's advice to Defendant was not unreasonable. Trial counsel explained to Defendant the strengths and weaknesses of both the prosecution and defense cases, and informed him of a likely minimum sentence and the statutory maximum sentence. Defendant was provided the information necessary for him to make an informed decision of how he wanted to proceed. Defendant was clearly advised of the benefits of the plea offer, Defendant knew the decision was his to make, and Defendant knew the risks he was taking in going to trial. The fact that trial counsel did not explicitly recommend Defendant accept the offer does not mean there was no reasonable basis for trial counsel's approach or that no competent counsel would have so advised his client.

Furthermore, Defendant has failed to establish how he was prejudiced. Defendant testified that he would have pled guilty if trial counsel had advised him that doing so was in his best interests. (N.T. 11/07/2014, pp. 15, 25-26, 33-35.) However, trial counsel's testimony demonstrated that he adequately counseled Defendant about the risks of taking the case to trial and discussed the possibility of entering into a new plea after Defendant withdrew his earlier plea. **Id.** at 54-57. Under **Lafler,** in order to establish prejudice, a defendant must show that "but for the ineffective advice of counsel

there is a reasonable probability that the plea offer would have been presented to the court."

The evidence does not support Defendant's self-serving statement that but for trial counsel's advice he would have accepted the earlier plea offer. Instead, even before trial counsel had entered his appearance, Defendant sought to withdraw his plea entered on January 8, 2010, claiming that his previous counsel was ineffective in recommending this plea (**see** Defendant's Motion to Withdraw Guilty Plea filed on February 25, 2010) and Defendant expressly told trial counsel he was unwilling to accept the later offer calling for a sentence of five to ten years' imprisonment.[14] To the contrary, Defendant proclaimed his innocence and insisted upon his day in court. Because Defendant was not deprived of the effective assistance of counsel during plea negotiations,[15] this claim is denied.

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 U.S. 668, 686 (1984). This goal of a just result encompasses not only the fairness and reliability of the trial, but also "the fairness and regularity of the processes that preceded it, which caused the defendant to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance." **Lafler, supra** at 1388. Against this standard, we find that no act or omission of counsel rendered Defendant's decision to have his case tried an uninformed decision or that the verdict which followed was unreliable. Therefore, Defendant's Amended PCRA Petition will be denied.

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[14] At the hearing on Defendant's petition to withdraw his guilty plea, the maximum penalties that could be imposed for each offense with which Defendant was charged and the fact that the terms of imprisonment for each offense could run consecutive to one another were clearly explained to Defendant. Being fully aware of this information, Defendant was adamant that he was innocent and insisted on his right to trial. Defendant's decision to withdraw his plea was one which he was given every opportunity to reconsider.

[15] It is appropriate to note here as well that defendants have "no right to be offered a plea ... nor a federal right that the judge accept it." **Lafler v. Cooper, supra** (citation omitted).

KENNETH MITCHELL BECKER, Appellant vs. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, BUREAU OF DRIVER LICENSING, Appellee

Civil Law—License Suspension Appeal—Police Response to Motor Vehicle Accident on Private Development Road—Refusal to Submit to Requested Chemical Testing—75 Pa. C.S.A. §1547—Suspension of Operating Privileges—Elements of Driving Under the Influence—Requirement That the Offense Occur on a Highway or Trafficway—Issues on Appeal—Requirement of Concise Statement—Waiver

1. The driver of a motor vehicle whom the police have reasonable grounds to believe has been driving in violation of the driving under the influence laws of this Commonwealth is deemed to have consented to one or more chemical tests of breath, blood or urine for the purpose of determining the alcoholic content of blood or the presence of a controlled substance.

2. The driver of a motor vehicle who has been arrested for violating the driving under the influence laws of this Commonwealth is required, upon request, to submit to chemical testing of breath, blood or urine for the purpose of determining the alcoholic content of blood or the presence of a controlled substance. If this request is refused, the testing shall not be conducted, but upon notice by the arresting police officer, the Pennsylvania Department of Transportation shall suspend the operating privileges of the driver for a period of twelve months.

3. A suspension of a driver's operating privileges for refusing to submit to chemical testing after being arrested for driving under the influence is a civil proceeding in which the actual lawfulness of the driver's underlying DUI arrest is irrelevant, provided the officer had reasonable grounds to believe the driver was driving on a highway or trafficway while under the influence of alcohol.

4. To support a one-year suspension of operating privileges imposed as a consequence of a driver's refusal to submit to chemical testing after being arrested for driving under the influence, the Bureau of Driver Licensing must prove that the licensee (1) was arrested for driving under the influence by a police officer who had reasonable grounds to believe that the licensee was operating the vehicle under the influence of alcohol or a controlled substance; (2) was asked to submit to a chemical test; (3) refused to do so; and (4) was warned that a refusal would result in the suspension of his driver's license.

5. To be convicted of driving under the influence in violation of 75 Pa. C.S.A. §3802(a)(1) (driving under the influence—incapable of safe driving), the driver of the motor vehicle must have driven, operated or been in actual physical control of the movement of the motor vehicle upon a highway or trafficway within this Commonwealth after having consumed a sufficient amount of alcohol such that the individual is rendered incapable of safely driving, operating, or being in actual physical control of the movement of the vehicle.

6. The terms "highway" and "trafficway" as defined in the Motor Vehicle Code, while different in meaning, have in common the requirement that the road in question be open to the public for vehicular travel.

7. Because an essential element of the offense of driving under the influence is that the operation of the motor vehicle have occurred on a highway or trafficway, the driver of a motor vehicle on a private development road which is not open to public use for vehicular travel cannot be convicted of driving under the influence, even if the driver, due to alcohol consumption, is incapable of safely driving.

8. Notwithstanding that the driver of a motor vehicle cannot be criminally convicted of driving under the influence while driving on a private road which is not open to the general public, his driving privileges can nevertheless be administratively suspended for refusing to submit to chemical testing, provided the arresting police officer had reasonable grounds to believe the driver had recently been driving the vehicle on a highway or trafficway while under the influence of alcohol.

9. After responding to a motor vehicle accident in a private residential development not open to the general public, a police officer who, upon investigation, has reasonable grounds to believe that the driver of the motor vehicle had been earlier driving the vehicle while on a highway or trafficway, is permitted, after arrest, to request that a chemical test of the driver's breath, blood or urine be conducted, and if the request is refused, the operating privileges of the driver shall be suspended for a period of one year.

10. A concise statement filed by an appellant pursuant to Pa. R.A.P. 1925(b) which is too vague to allow the trial court to identify the issues raised on appeal is the functional equivalent of no concise statement being filed, even if the court correctly guesses the issues appellant intends to raise. Because of this, a concise statement which claims only that the court erred in ultimately denying the appellant's license suspension appeal fails to preserve any issue on appeal.

11. Except in circumstances relating to the law of the case, **res judicata,** or collateral estoppel, the Pennsylvania Superior Court expressly prohibits a court or a party to cite or rely upon an unpublished memorandum decision of the Superior Court in any other action or proceeding. Consequently, a court's decision not to cite or rely upon a memorandum decision of the Superior Court is not error.

NO. 15-1049

CHRISTOPHER OPIEL, Esquire—Counsel for Plaintiff.

TRICIA J. WATTERS, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—February 11, 2016

Appellant, Kenneth Mitchell Becker (hereinafter "Appellant"), has appealed to the Commonwealth Court from our order dated December 7, 2015, denying his license suspension appeal. In this appeal, Appellant questions whether an intoxicated driver's operating privileges can be suspended under Section 1547(b) of the Vehicle Code, 75 Pa. C.S.A. §1547(b), for refusing to submit

to chemical testing requested by an arresting police officer where the underlying driving offense occurred on a private development road not open to the general public.

PROCEDURAL AND FACTUAL BACKGROUND

On April 7, 2015, Trooper Carrie A. Gula of the Pennsylvania State Police was dispatched to the scene of a motor vehicle accident at the intersection of North Shore Drive and Wintergreen Drive in the Indian Mountain Lakes Development (hereinafter the "Development"). Indian Mountain Lakes is a private residential community located partly in Carbon County and partly in Monroe County, Pennsylvania. It is a gated community, although it is unclear whether every entrance to Indian Mountain Lakes is actually secured by a gate, security guard or both. (N.T., 6/24/15, pp. 10-11.) In any event, on this occasion, Trooper Gula was dispatched at the request of security from Indian Mountain Lakes who reported that an intoxicated driver had driven his vehicle into a ditch. (N.T., 6/24/15, p. 4.) Upon arrival at the Development, Trooper Gula was waved into the Development by a member of the Development's security detail.

At the intersection of North Shore Drive and Wintergreen Drive, within the Development, Trooper Gula observed Appellant inside a motor vehicle which had been driven into a ditch. Appellant was seated in the driver's seat and was unable to open the driver's door to exit the vehicle. Prior to Trooper Gula's arrival, security, who was on the scene at the time Trooper Gula arrived, had asked Appellant to turn the vehicle off and had taken his keys for security reasons.

Trooper Gula assisted Appellant in exiting the vehicle through the passenger side. Once outside the vehicle, Trooper Gula observed clear signs of intoxication: Appellant's speech was slurred, his eyes were bloodshot, his gait was unsteady and a strong odor of alcohol emanated from his breath. Trooper Gula attempted to have Appellant perform field sobriety tests, however, this never occurred. Instead, Appellant walked away from the Trooper, stated he was stoned, and admitted to drinking Seven and Sevens. Consequently, Trooper Gula placed Appellant under arrest for suspected driving under the influence and transported Appellant to the Pennsylva-

nia State Police Fern Ridge barracks for chemical testing of his breath. At the barracks, Trooper Gula read the warnings on the implied consent form, Form DL-26, to Appellant verbatim, which form advised Appellant that his operating privileges would be suspended upon refusal to submit to chemical testing, and if convicted of violating Section 3802(a)(1) of the Vehicle Code, he would be subject to the penalties provided in Section 3804(c) of the Code. (Commonwealth Exhibit No. 1.) Appellant refused chemical testing and refused to sign the form.

When Trooper Gula was asked whether she knew where Appellant was coming from at the time of the accident, Trooper Gula testified that at one point Appellant told her he was coming out of his driveway and backed into a ditch, and at another time stated that he was at a bar. (N.T., 6/24/15, p. 14.) Trooper Gula also explained that the first response did not make sense since Appellant did not live across the street from where the accident occurred, but rather lived approximately a block away. (N.T., 6/24/15, pp. 16-17.)

The evidence presented at the time of the license suspension hearing held on June 24, 2015, also developed that the Pennsylvania State Police respond to incidents within the Development when called by security or by a resident (N.T., 6/24/15, p. 11), and that on this occasion, Trooper Gula had been dispatched to the scene of the accident at approximately 5:07 P. M. and arrived at the scene within approximately twenty minutes of dispatch. (N.T., 6/24/15, pp. 4-5.) Trooper Gula further testified that Appellant's vehicle was still warm when she arrived at the scene of the accident. (N.T., 6/24/15, p. 17.) Trooper Gula was the only witness to testify in this matter.

DISCUSSION

In **Walkden v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing,** 103 A.3d 432 (Pa. Commw. 2014), the court held that to support a one-year suspension of operating privileges imposed as a consequence of a driver's refusal to submit to chemical testing after being arrested for driving under the influence, the Bureau of Driver Licensing must prove that the licensee (1) was arrested for driving under the influence by a police officer who had reasonable grounds to believe that the licensee was operating the vehicle under the influ-

ence of alcohol or a controlled substance; (2) was asked to submit to a chemical test; (3) refused to do so; and (4) was warned that a refusal would result in the suspension of his driver's license. **Id.** at 436. In this appeal, Appellant contests only the first element of this test, contending that because a driver cannot be convicted of driving under the influence while driving on a private road which is not open to the general public, his license cannot be suspended for refusing to submit to chemical testing for an offense of which he cannot be convicted. [1]

[1] By order dated January 14, 2016, we directed Appellant to provide us with a concise statement of the matters complained of on appeal pursuant to Pa. R.A.P. 1925(b). In his Concise Statement filed on February 3, 2016, Appellant appears to raise two issues. The first—"whether [we] erred in ultimately denying [his] license suspension appeal"—is so generic it fails to identify any precise error claimed and has likely waived any error. **Commonwealth v. Heggins,** 809 A.2d 908, 911 (Pa. Super. 2002) (holding that "a Concise Statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent to no Concise Statement at all," even if the trial court correctly guesses the issue) (citation omitted).

At the conclusion of the hearing held on June 24, 2015, we made specific findings of record none of which Appellant has challenged. (N.T., 6/24/15, pp. 31-33.) Further, in our order dated December 7, 2015, denying Appellant's appeal, we included an extensive footnote, supported by legal authority, explaining our decision. Given these findings made of record and the legal reasoning behind our decision, Appellant has had ample opportunity to identify with specificity what error was committed, but has failed to do so. In addressing the one issue which we have set forth in the text of this opinion, we do so because it was an issue identified at the time of hearing and is the only issue of which we are aware which may have plausible merit.

The second issue Appellant raises in his Concise Statement is that we failed to consider an unpublished memorandum opinion of the Pennsylvania Superior Court because a copy of this opinion was not provided to the court as required by Local Rule 210(5). Appellant is correct that Local Rule 210(5) requires, **inter alia,** that copies of unpublished opinions referred to in a brief be attached as an exhibit to that brief and that Appellant failed to do so. It is also true that at the time of the hearing held on June 24, 2015, Appellant's counsel referred to this unpublished memorandum opinion, that the Court asked to be provided a copy of the opinion for its review, and that Appellant failed to do so. More importantly, as explained in the footnote to our December 7, 2015 order, the Pennsylvania Superior Court expressly prohibits, except in circumstances relating to the law of the case, **res judicata,** and collateral estoppel, "an unpublished memorandum decision [from being] relied upon or cited by a Court or a party in any other action or proceeding." **See** Section 65.37(A), Superior Court Internal Operating Procedure, 210 Pa. Code §65.37(A); **Hunter v. Shirer US, Inc.,** 992 A.2d 891, 896 (Pa. Super. 2010). This is in contrast to the Commonwealth Court which allows citation to its unreported panel decisions for their persuasive value, but not as binding precedent. **See** Section 414, Commonwealth Court Internal Operating Procedure, 210 Pa. Code §69.414.

Chapter 38 of the Vehicle Code, 75 Pa. C.S.A. §§3801-3817, which deals with the topic of driving after imbibing alcohol or utilizing drugs, provides, in relevant part, that

> [a]n individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the individual is rendered incapable of safely driving, operating, or being in actual physical control of the movement of the vehicle.

75 Pa. C.S.A. §3802(a)(1) (Driving Under the Influence—Incapable of Safe Driving). Section 3101(b) of the Vehicle Code states, in relevant part, that the provisions of Chapter 38 "shall apply upon highways and trafficways throughout this Commonwealth." 75 Pa. C.S.A. §3101(b). The Vehicle Code defines the term "highway" as

> [t]he entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel. The term includes a roadway open to the use of the public for vehicular travel on grounds of a college or university or public or private school or public or historical park[,]

and the term "trafficway" as

> [t]he entire width between property lines or other boundary lines of every way or place of which any part is open to the public for purposes of vehicular travel as a matter of right or custom.

75 Pa. C.S.A. §102 (Definitions).

Under the foregoing, an essential element of the offense of driving under the influence is that the operation of the motor vehicle have occurred on a highway or trafficway. The factor common to the meaning of both a highway and a trafficway as defined in Section 102 of the Vehicle Code is that the road in question be open to the public for vehicular travel.

No evidence was presented by the Commonwealth that the Development roads were open for public use by vehicular travel as a matter of right or custom; instead, access to the Development appears to be restricted by gates and security personnel. **See Commonwealth v. Karenbauer,** 393 Pa. Super. 491, 494, 574 A.2d 716, 718 (1990) (noting that the burden of proving the defendant

was driving upon a highway or trafficway for purposes of a criminal prosecution for driving under the influence is upon the Commonwealth). It also appears that the roads within the Development are on private property and privately maintained, thereby foreclosing their designation as a highway. Accordingly, were this a case where Appellant was being prosecuted for driving under the influence on the Development roads, Appellant might well be correct that such a prosecution would fail. **See Commonwealth v. Wyland,** 987 A.2d 802 (Pa. Super. 2010) (holding that a prosecution for driving under the influence on the roads of a military base which was secured by a fence topped with barbed wire and to which public access was strictly limited to individuals who had received security clearance and who entered the base through a main checkpoint could not be sustained, the court concluding that the roads within the base did not meet the Vehicle Code's definition of a trafficway, even though many civilians were allowed to enter the base on a daily basis), **appeal denied,** 608 Pa. 623, 8 A.3d 346 (2010); **but see, Commonwealth v. Cameron,** 447 Pa. Super. 233, 234-35, 668 A.2d 1163, 1164 (1995) (affirming a driving under the influence conviction where defendant drove through a private parking lot which was "posted as restricted for tenants only" of an eleven-story apartment building, holding that "the public use component of Section 102 can be satisfied even where access to a parking lot is restricted, but where there are a sufficient number of users," and observing that "tenants, employees, and others who have the advantage of a restricted parking facility still deserve and expect to be protected from incidents involving serious traffic offenses").

Significantly, and critical to the instant proceedings, Appellant is not being criminally prosecuted for driving under the influence. Instead, Appellant is appealing his license suspension under Section 1547 of the Vehicle Code for his refusal to submit to chemical testing after he was arrested for driving under the influence by a state trooper. Section 1547(a) states in relevant part:

> **(a) General rule.**—Any person who drives, operates or is in actual physical control of the movement of a vehicle in this Commonwealth shall be deemed to have given consent to one or more chemical tests of breath, blood or urine for the purpose of determining the alcoholic content of blood or the presence

> of a controlled substance if a police officer has reasonable grounds to believe the person to have been driving, operating or in actual physical control of the movement of a vehicle:
>
> (1) in violation of section ... 3802 (relating to driving under influence of alcohol or controlled substance)... .

75 Pa. C.S.A. §1547(a)(1). Section 1547(b) provides in relevant part:

> If any person placed under arrest for a violation of section 3802 is requested to submit to chemical testing and refuses to do so, the testing shall not be conducted but upon notice by the police officer, the department shall suspend the operating privilege of the person ... for a period of 12 months.

75 Pa. C.S.A. §1547(b)(1)(i).

The implied consent law is not a criminal statute, but a condition precedent to obtaining driving privileges in this Commonwealth, **Commonwealth, Department of Transportation, Bureau of Driver Licensing v. Bird,** 134 Pa. Commw. 305, 311, 578 A.2d 1345, 1348 (1990) **(en banc)**, and "a license suspension stemming from a refusal to submit to chemical testing is a separate administrative proceeding." **Bashore v. Commonwealth, Department of Transportation, Bureau of Driver Licensing,** 27 A.3d 272, 275 (Pa. Commw. 2011). In such a proceeding, "the lawfulness of a driver's underlying DUI arrest is irrelevant for purposes of determining whether a licensee's operating privileges were properly suspended as a consequence of the driver's refusal to submit to chemical testing under the implied consent statute." **Id.** (citations and quotation marks omitted).

Further, while we agree that Section 1547(a) is limited to those instances where the police officer has reasonable grounds to believe that the driver had been driving, operating, or in actual physical control of the vehicle while on a highway or trafficway, that requirement has been met here.[2] Specifically, Trooper Gula

[2] In **Commonwealth, Department of Transportation, Bureau of Driver Licensing v. Bird,** 134 Pa. Commw. 305, 578 A.2d 1345 (1990) **(en banc)**, the Commonwealth Court held that Sections 1547(a)(1) and 3101(b) of the Vehicle Code did not need to be read together such that the police officer have reasonable grounds to believe a motorist was operating a motor vehicle on a highway before a request for chemical testing could be made. Reaffirming and quoting from its

testified that when Appellant was questioned about where he had been coming from at the time of the accident, he stated, among other things, that he was coming from a bar. **Cf. Bashore, id.** (upholding the suspension of a driver's license pursuant to Section 1547 where the driver was involved in a motor vehicle accident on

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opinion in **Lewis v. Commonwealth of Pennsylvania,** 114 Pa. Commw. 326, 330, 538 A.2d 655, 657-58 (1988), the court stated:

> [Section 1547(a)(1) **only**] requires that the officer have reasonable grounds to believe the motorist was driving, operating or in actual physical control of a vehicle while under the influence of alcohol. It does **not** require the officer to have reasonable grounds to believe the motorist was driving, operating or in actual physical control of a vehicle **on a highway or trafficway** while under the influence of alcohol. If the legislature had intended for police officers to make such a determination, it would have specifically provided for this in the statute.

Bird, supra at 309, 578 A.2d at 1347. (Emphasis in original.) Critical to this decision was the language of Section 1547(a)(1) as it then existed which provided:

> **(a) General rule.**—Any person who drives, operates or is in actual physical control of the movement of a motor vehicle in this Commonwealth shall be deemed to have given consent to one or more chemical tests of breath, blood or urine for the purpose of determining the alcoholic content of blood or the presence of a controlled substance if a police officer has reasonable grounds to believe the person to have been driving, operating or in actual physical control of the movement of a motor vehicle:
>
> [(1) while under the influence of alcohol or a controlled substance or both. ...]

75 Pa. C.S.A. §1547(a)(1).

Significantly, this language was amended in 2003. Whereas previously the language of Section 1547(a)(1) did not contain any limitation on where the driving or control of the vehicle must occur, as the statute is currently worded, the officer must have a reasonable belief that the driver was in violation of Section 3802, which implicitly incorporates the qualifications imposed by Section 3101(b)(1).

Having said this, in **Bashore v. Commonwealth, Department of Transportation, Bureau of Driver Licensing,** 27 A.3d 272 (Pa. Commw. 2011), a case decided after the 2003 amendment, the court did not interpret Section 1547(a) as requiring a reasonable belief by the police that the vehicle had been operated on a highway or trafficway. Rather, on this issue, the court stated that it was "clear from a strict reading of the Implied Consent Law that it does not require [the police to] have reasonable grounds to believe that [the driver] was operating [the] vehicle on a highway or trafficway, but that [the officer] have 'reasonable grounds to believe [the person] to have been driving, operating or in actual physical control of the movement of a vehicle' while under the influence of alcohol." **Id.** at 275 (**quoting** 75 Pa. C.S.A. §1547(a)). Obviously, under this interpretation, the strength of the case in support of suspending Appellant's operating privileges is even greater. Nevertheless, under either interpretation, it is not an element of Section 3802 that the driver be seen by the officer driving upon a highway or trafficway for the officer's belief that this had occurred to be reasonable.

a private gravel road marked as a "private drive" which provided access to the driveways of several residences, where the police investigation revealed that the driver was returning home from her sister's when the accident occurred). Moreover, the quantum of evidence required to support a reasonable belief is clearly not that required for proof beyond a reasonable doubt. **See Bird, supra** at 312, 578 A.2d at 1348 (noting that "[t]he test for determining whether reasonable grounds exists is not very demanding, nor does it require the officer to be correct in his belief"); **Commonwealth, Department of Transportation, Bureau of Traffic Safety v. Dreisbach,** 27 Pa. Commw. 201, 205, 363 A.2d 870, 872 (1976) (in determining whether "reasonable grounds" exist, the only valid inquiry is whether "viewing the facts and circumstances as they appeared at the time, a reasonable person in the position of the police officer could have concluded that the motorist was operating the vehicle and under the influence of intoxicating liquor").

CONCLUSION

Accordingly, because we conclude that Trooper Gula had reasonable grounds to believe Appellant had been driving, operating or in actual physical control over the movement of his vehicle while under the influence on a highway or trafficway, Appellant's refusal to submit to Trooper Gula's request for chemical testing after his arrest justifies and mandates the suspension of his driving privileges under Section 1547 of the Vehicle Code.

IN THE INTEREST OF J.J.H., A MINOR
IN THE INTEREST OF C.R.S., A MINOR

Criminal Law—Juvenile Act—Delinquency Proceedings—Statute of Limitations—Separate and Distinct Limitation Periods Applicable to Juvenile and Adult Criminal Proceedings—Constitutionality—Substantive Due Process—Equal Protection

1. Juvenile adjudications and criminal proceedings serve different functions and have different goals: whereas the policies underlying the juvenile system emphasize the supervision, care and rehabilitation of juvenile offenders, criminal proceedings, whose subject is adult offenders, have as their goal to forbid and prevent conduct that unjustifiably inflicts or threatens substantial harm to the public or its citizens, and to punish.

2. Because, in general, juvenile offenders are less mature, more vulnerable to negative influences, and more amenable to rehabilitation than adult offenders, the purposes and procedures of the juvenile system are different from those in criminal prosecutions, with these differences manifested in

the need to treat juveniles as juveniles and to accomplish this, the absence of a statute of limitations applicable to juvenile delinquency proceedings.

3. Juvenile proceedings are intended to be and are in fact different from criminal proceedings: in contrast to the treatment of adults in criminal proceedings, juveniles are not charged with crimes, they are charged with committing delinquent acts; they do not have a trial, they have an adjudicatory hearing; and if charges are substantiated, they are not convicted, they are adjudicated delinquent. In keeping with these differences, the statute of limitations applicable to prosecutions for criminal conduct under the Crimes Code does not apply to juvenile delinquency proceedings.

4. The separate and different treatment of juveniles in juvenile proceedings from adults in criminal prosecutions, including the lack of a statute of limitations in juvenile proceedings, does not violate the constitutional rights of due process and equal protection to which juveniles are entitled under the United States and Pennsylvania Constitutions.

5. The fundamental liberty interests protected by the due process provisions of Article I, Section 9 of the Pennsylvania Constitution and the Fourteenth Amendment of the United States Constitution are the same. Further, Article I, Section 1 of the Pennsylvania Constitution, like the due process clause in the Fourteenth Amendment of the United States Constitution, guarantees persons in this Commonwealth certain inalienable rights.

6. In assessing whether a law will withstand constitutional analysis, substantive due process and equal protection require the court to identify a legitimate governmental interest or purpose to be served by the law and to examine the means employed by the law to achieve that interest or purpose against the private rights and interests of individual members of the public which will be burdened thereby. This assessment is conducted pursuant to one of three standards of review: strict, intermediate and rational basis.

7. Strict scrutiny analysis requires the government to demonstrate that the law is narrowly tailored to further compelling state interests.

8. Intermediate or heightened scrutiny requires that the object to be attained by the law be substantially related to important governmental objective.

9. Rational basis analysis requires that the law be rationally related to a legitimate state interest.

10. Federal substantive due process refers to those substantive rights and guarantees encompassed within and memorialized by the language of the Fourteenth Amendment's Due Process Clause which have been recognized as substantive limitations on governmental actions by the United States Supreme Court. Only those fundamental rights and liberty interests which are "deeply rooted in our history and traditions, or fundamental to our concept of constitutionally ordered liberty" meet this standard.

11. Laws which burden or restrict freedom of action of all persons in the same way and to the same extent are examined under principles of substantive due process. Those which classify or distinguish between persons so as to create non-uniform benefits or burdens are examined under equal protection.

12. For substantive due process rights to attach there must first be the deprivation of a property right or other interest that is constitutionally protected.

Substantive due process seeks to ensure that all non-discriminatory laws are fundamentally fair and effect substantial justice.

13. Substantive due process analysis requires the court to weigh the rights infringed upon by the law against the interest sought to be achieved by it, and to scrutinize the relationship between the law (the means) and that interest (the end).

14. Under substantive due process strict scrutiny analysis, fundamental rights and liberty interests may not be infringed upon unless the infringement is narrowly tailored to serve a compelling state interest. Laws which do not affect fundamental rights or liberty interests must be rationally related to a legitimate state interest to satisfy substantive due process.

15. Under the Fourteenth Amendment's Due Process Clause, a state statute must bear a rational relationship to the protection of the public health, morals or safety in order to constitute a valid exercise of the state's police power.

16. Under the Pennsylvania Constitution, the rational basis test requires that "a law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the object sought to be attained."

17. Laws which do not substantially impair a fundamental constitutional right enjoy a presumption of constitutionality under state substantive due process review and may only be found to be unconstitutional if the party challenging the law can prove that it "clearly, palpably, and plainly" violates the Constitution.

18. The absence of a statute of limitations in the Juvenile Act does not infringe upon a fundamental right or liberty interest. No substantive due process right exists to require the state to impose a statute of limitations beyond which no action can be taken by the government for violation of its criminal laws.

19. The absence of a statute of limitations in the Juvenile Act is rationally related to its purposes—the treatment, supervision and rehabilitation of minors who have committed delinquent acts—because of the relatively short timeframe within which a delinquent act subject to the juvenile court's jurisdiction can occur and because of the need to address the unique concerns of children within the juvenile justice system before the child reaches twenty-one years of age.

20. The Equal Protection Clause of the Fourteenth Amendment and the equal protection guarantee of Article I, Section 26 of the Pennsylvania Constitution protect the same interests and are analyzed under the same standards.

21. Equal protection requires the like treatment of similarly situated persons; it does not require the same treatment of all persons under all circumstances.

22. Laws which affect fundamental constitutional rights or which create distinctions premised on some suspect basis or trait must promote a compelling governmental interest for the law to be upheld. Under the rational basis standard of review, legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.

23. There is nothing inherently suspect or unreasonable in classifying and treating minors separate from adults because of their age.

24. Because age is not a constitutionally suspect trait, such as race, national origin, or alienage, or one deemed "quasi-suspect," such as gender and illegitimacy, the legality of such statutes on equal protection grounds rests on whether the statutory classification is rationally related to any legitimate governmental interest.

25. Under the rational basis standard of review, legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. Such a law will not be overturned unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that the law makes no rational sense.

26. Juvenile offenders are legitimately singled out in the Juvenile Act for special treatment precisely because of their age, and the different needs, concerns and goals this entails, which are rationally addressed in the Juvenile Act.

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MEMORANDUM OPINION

NANOVIC, P. J.—January 15, 2016

Almost forty years ago, the Franklin County Court of Common Pleas determined that the statutory periods within which criminal prosecutions must be commenced against adult offenders do not apply to juvenile proceedings. To our knowledge, no appellate court of this Commonwealth has addressed the issue, nor has the question been ruled upon by any other court of common pleas. Until now.

FACTUAL AND PROCEDURAL BACKGROUND

On March 2, 2013, two flare guns were fired from a motor vehicle driven by C.R.S., in which J.J.H. and two others were passengers, at a home in Penn Forest Township, Carbon County, Pennsylvania, setting the home on fire and causing substantial, irreparable fire damage. The Commonwealth claims that the two minors involved in these proceedings, C.R.S. and J.J.H. (collectively "the Minors"), in one form or another, collaborated or participated in the shooting of the flare guns. On May 6, 2015, a petition alleging delinquency was filed against C.R.S. and, on May 28, 2015, a petition alleging delinquency was filed against J.J.H. In each petition it is alleged that the delinquent act committed was that defined

by 18 Pa. C.S.A. §3303 (Failure to Prevent a Catastrophe) of the Crimes Code.[1]

At the time of the conduct charged, C.R.S. (DOB 11/23/95) was seventeen years old; she is now twenty. J.J.H. (DOB 10/26/95) was also seventeen years old when the fire began and is now twenty. Because the statute of limitations for commencing a criminal prosecution under the Crimes Code for a misdemeanor of the second degree—the assigned grade of the offense for failure to prevent a catastrophe—is two years,[2] and the juvenile proceedings filed against C.R.S. and J.J.H. were commenced more than two years after the delinquent conduct allegedy occurred, each of the minors have filed motions to dismiss on the basis that the applicable statute of limitations bars these delinquency proceedings.

Because fundamental differences exist between juvenile adjudications and criminal proceedings—they impact different age groups and serve different goals—the time limits on commencing criminal prosecutions are not binding on juvenile proceedings. Accordingly, the motions to dismiss filed on behalf of C.R.S. and J.J.H. will be denied for the reasons discussed below.

DISCUSSION

Incorporationg the Crimes Code's Statute of Limitations into the Juvenile Act

A juvenile cannot be adjudicated delinquent under the Juvenile Act ("Juvenile Act"), 42 Pa. C.S.A. §§6301-6375, unless it is first determined that the juvenile has committed a delinquent act and

[1] Section 3303 of the Crimes Code reads as follows:

> A person who knowingly or recklessly fails to take reasonable measures to prevent or mitigate a catastrophe, when he can do so without substantial risk to himself, commits a misdemeanor of the second degree if:
>
> (1) he knows that he is under an official, contractual or other legal duty to take such measures; or
>
> (2) he did or assented to the act causing or threatening the catastrophe.

18 Pa. C.S.A. §3303.

[2] Excluding offenses against an unborn child, Section 108(a) of the Crimes Code requires prosecutions for any offense under Title 18 to be "commenced within the period, **if any,** limited by Chapter 55 of Title 42 (relating to limitation of time)." 18 Pa. C.S.A. §108 (a) (emphasis added). As applies to failure to prevent a catastrophe, a prosecution for this offense must be commenced within two years after it is committed. 42 Pa. C.S.A. §5552(a). The Juvenile Act, 42 Pa. C.S.A. §§6301-6375, contains no limitations period within which a juvenile proceeding is required to be commenced in relation to the date of the alleged offense.

is in need of treatment, supervision or rehabilitation. 42 Pa. C.S.A. §6341(b); **see also, Commonwealth v. M.W.,** 614 Pa. 633, 39 A.3d 958, 966 (2012). Because the Juvenile Act defines a delinquent act, **inter alia,** as an act designated a crime under the laws of this Commonwealth,[3] the minors argue, in effect, that by incorporating the elements of the crime of failing to prevent a catastrophe set forth in the Crimes Code, also incorporated are the Crimes Code's time limitations on when such conduct can be prosecuted. At first glance, this approach appears both fair and logical. After all, why should a minor be subject to juvenile proceedings under the Juvenile Act for what would otherwise be a crime if committed by an adult, but for which an adult similarly situated could not be prosecuted because of the running of the statute of limitations?

The answer is simple, but perhaps not apparent: the Legislature has singled out juvenile offenders for special treatment precisely because of their age, and the different needs, concerns and goals this entails as compared to an adult criminal offender. As explained by the Pennsylvania Superior Court:

> Our esteemed colleague would hold that juvenile courts have jurisdiction over criminal matters because delinquent acts are those which are designated a crime under the laws of the Commonwealth. Concurring Statement at 1227, **citing,** 42 Pa. C.S. § 6302. While we see the logic and appeal of this position, we are constrained to disagree. It is true that juvenile courts concern themselves with acts which would be considered

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[3] At the time of the delinquent conduct at issue, the Juvenile Act defined the term "Delinquent act" as follows:

> ... The term means an act designated a crime under the law of this Commonwealth, or of another state if the act occurred in that state, or under Federal law, or under local ordinances or an act which constitutes indirect criminal contempt under ... 23 Pa.C.S. Ch. 61 (relating to protection from abuse).

42 Pa. C.S.A. §6302 (Definitions). Effective July 1, 2015, the term is defined as follows:

> ... The term means an act designated a crime under the law of this Commonwealth, or of another state if the act occurred in that state, or under Federal law, or under local ordinances or an act which constitutes indirect criminal contempt under Chapter 62A (relating to protection of victims of sexual violence or intimidation) with respect to sexual violence or 23 Pa.C.S. Ch. 61 (relating to protection from abuse).

42 Pa. C.S.A. §6302 (Definitions).

> criminal if they were committed by adults. Our Legislature, however, has seen fit through the Juvenile Act to authorize separate non-criminal proceedings to adjudicate these matters, precisely because the perpetrators are not adults. ... [T]hese proceedings are materially different from criminal proceedings in many respects.

In the Interest of R.A., 761 A.2d 1220, 1225 (Pa. Super. 2000).

The Juvenile Act draws deeply from the doctrine of **parens patriae.** Its purpose is holistic—to simultaneously salvage the life of a child in need of guidance while preserving the unity of the family, 42 Pa. C.S.A. §6301(b)[4]—not primarily "[t]o forbid and prevent conduct that unjustifiably inflicts or threatens substantial harm to individual or public interest[,]" or to punish, as in the Crimes Code. 18 Pa. C.S.A. §104(1). **See also, In the Interest of**

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[4] The Juvenile Act sets forth its purposes as follows:

> **(b) Purposes.**—This chapter shall be interpreted and construed as to effectuate the following purposes:
>
> (1) To preserve the unity of the family whenever possible or to provide another alternative permanent family when the unity of the family cannot be maintained.
>
> (1.1) To provide for the care, protection, safety and wholesome mental and physical development of children coming within the provisions of this chapter.
>
> (2) Consistent with the protection of the public interest, to provide for children committing delinquent acts programs of supervision, care and rehabilitation which provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the development of competencies to enable children to become responsible and productive members of the community.
>
> (3) To achieve the foregoing purposes in a family environment whenever possible, separating the child from parents only when necessary for his welfare, safety or health or in the interests of public safety, by doing all of the following:
>
> (i) employing evidence-based practices whenever possible and, in the case of a delinquent child, by using the least restrictive intervention that is consistent with the protection of the community, the imposition of accountability for offenses committed and the rehabilitation, supervision and treatment needs of the child; and
>
> (ii) imposing confinement only if necessary and for the minimum amount of time that is consistent with the purposes under paragraphs (1), (1.1) and (2).
>
> (4) To provide means through which the provisions of this chapter are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced.

42 Pa. C.S.A. §6301(b).

J.F., 714 A.2d 467, 473 (Pa. Super. 1998) ("[W]e must never forget that in creating a separate juvenile system, the [legislature] did not seek to punish an offender but to salvage a boy [sic] who may be in danger of becoming one.") (citation and quotation marks omitted), **appeal denied,** 557 Pa. 647, 734 A.2d 395 (1998), **cert. denied,** 528 U.S. 814, 120 S. Ct. 49, 145 L. Ed. 2d 44 (1999).

> To this end, the Juvenile Act sets forth
>
> a comprehensive scheme for the treatment of juveniles who commit offenses which would constitute crimes if committed by adults. The purposes and procedures of the juvenile system differ significantly from those of the adult criminal system. ... [T]he purpose of juvenile proceedings is to seek treatment, reformation and rehabilitation of the youthful offender, not to punish.

In the Interest of R.D.R., 876 A.2d 1009, 1016 (Pa. Super. 2005) (citation and quotation marks omitted). Clearly, "the juvenile court system was designed to provide [a] distinctive procedure and setting to deal with the problems of youth." **In the Interest of A.B.,** 987 A.2d 769, 776 (Pa. Super. 2009) **(en banc)** (citation and quotation marks omitted), **appeal denied,** 608 Pa. 644, 12 A.3d 369 (2010).

By design juvenile proceedings are distinct from criminal prosecutions under the Juvenile Act.

> Under the Juvenile Act, juveniles are not charged with crimes; they are charged with committing delinquent acts. They do not have a trial; they have an adjudicatory hearing. If the charges are substantiated, they are not convicted; they are adjudicated delinquent. **See** 42 Pa.C.S. §§ 6302, 6303, 6341, 6352. Indeed, the Juvenile Act expressly provides an adjudication under its provisions 'is not a conviction of crime.' 42 Pa. C.S. § 6354(a).

In the Interest of J.H., 737 A.2d 275, 278 (Pa. Super. 1999), **appeal denied,** 562 Pa. 671, 753 A.2d 819 (2000). In contrast to adult prosecutions, juvenile proceedings are intended to be intimate, informal and protective in nature, **In the Interest of J.F., supra** at 471, with the policies underlying the juvenile system emphasizing the supervision, care and rehabilitation of juvenile offenders. **Id.** at 473. In addition, the Pennsylvania Rules of Criminal Procedure

do not apply to juvenile proceedings, which have their own set of rules. **In the Interest of Bradford,** 705 A.2d 443, 444 (Pa. Super. 1997), **appeal denied,** 555 Pa. 715, 724 A.2d 932 (1998); **see also,** Rules of Juvenile Court Procedure adopted by the Pennsylvania Supreme Court. Because juvenile offenses are not crimes and are not prosecuted under the Crimes Code, they are not subject to the time periods for prosecutions applicable to the Crimes Code. **See** 18 Pa. C.S.A. §108(a).

Excepting the Minors' argument that the time limits on commencing prosecutions for offenses under Title 18 apply to juvenile proceedings, which we have rejected, the Minors next argue that the absence of a statute of limitations in the Juvenile Act violates their constitutional rights to due process and equal protection of the laws. To the extent both of these principles review the substance of the law, its fundamental fairness, and whether the law is constitutionally permissible, the two complement one another, but they are different.

In assessing whether a law will withstand constitutional analysis, substantive due process[5] and equal protection require the court to

[5] Substantive due process refers to the substantive rights and guarantees encompassed within and memorialized by the language of the Fourteenth Amendment's Due Process Clause as interpreted by the courts. Under this interpretation, the words "liberty" and "due process of law" impose more than merely procedural limitations on governmental actions which deprive or impair a person's "life, liberty or property," but also substantive limitations on the content and subject of governmental actions, including legislation, which adversely affect those fundamental rights and liberty interests embedded within the meaning of due process.

In identifying what fundamental rights and liberty interests are encompassed within due process, the court is prohibited from subjectively imposing its values on the law, for to do so would result in the subservience of the will of the people to the individual views of the court. To avoid such judicial activism, the fundamental rights and liberty interests protected by the Due Process Clause of the Fourteenth Amendment must be "deeply rooted in our history and traditions, or [ ] fundamental to our concept of constitutionally ordered liberty." **Washington v. Glucksberg,** 521 U.S. 702, 727, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997). This standard is admittedly an inexact one. As recognized by Justice Harlan in his dissent in **Poe v. Ullman,** 367 U.S. 497, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961):

> Due Process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the

identify a legitimate governmental interest or purpose to be served by the law and to examine the means employed by the law to achieve that interest or purpose against the private rights and interests of individual members of the public which will be burdened thereby. This assessment is conducted pursuant to one of three standards of review discussed in greater detail below: strict, intermediate, and rational basis. A law which burdens or restricts freedom of action of all persons in the same way and to the same extent will be examined under substantive due process. A law which classifies or distinguishes between persons so as to create non-uniform benefits or burdens will be examined under equal protection, since "[t]he Equal Protection Clause of the Fourteenth Amendment is essentially a direction that all persons similarly situated should be treated alike." **Lawrence v. Texas,** 539 U.S. 558, 579, 123 S. Ct.

> supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

Id. at 542 (Harlan, J., dissenting).

In construing the text of the Due Process Clause in the light of our Nation's history, legal traditions and practices, the United States Supreme Court has defined and delineated some of the unenumerated fundamental liberty interests specially protected by constitutional due process by including and incorporating into the Due Process Clause of the Fourteenth Amendment certain guarantees of the Bill of Rights, then applying them to the States. In addition to the specific freedoms protected by the Bill of Rights, the Supreme Court has also recognized the following fundamental constitutional rights and liberty interests protected by due process: the right to freedom of association, the right to vote and to participate in the electoral process, the right to interstate travel, and the right to privacy. At the same time, it is important to understand and recognize that not all liberty interests protected by the Constitution are fundamental liberty interests entitled to independent judicial review under strict scrutiny. **See Chicago v. Morales,** 527 U.S. 41, 73-98, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999) (Scalia, J., dissenting) (distinguishing between a fundamental constitutional right and a constitutionally protected liberty interest); **Nixon v. Commonwealth,** 576 Pa. 385, 401, 839 A.2d 277, 288 (2003) (recognizing that while the right to pursue a lawful occupation is one of the rights guaranteed under Article I, Section 1 of the Pennsylvania Constitution, it is not a fundamental right).

2472, 156 L. Ed. 2d 508 (2003) (O'Connor, J., concurring) (citation and quotation marks omitted).

Substantive Due Process

Granting that the commencement of a juvenile delinquency proceeding is not limited by a statute of limitations, we disagree that this violates principles of substantive due process. "Substantive due process is the esoteric concept interwoven within our judicial framework to guarantee fundamental fairness and substantial justice, ... and its precepts protect fundamental liberty interests against infringement by the government." **Khan v. State Board of Auctioneer Examiners,** 577 Pa. 166, 183, 842 A.2d 936, 946 (2004) (citation and quotation marks omitted). The fundamental liberty interests protected by the due process provisions of Article I, Section 9 of the Pennsylvania Constitution and the Fourteenth Amendment of the United States Constitution are the same. **Commonwealth v. Louden,** 569 Pa. 245, 250, 803 A.2d 1181, 1184 (2002).[6]

"Preliminarily, for substantive due process rights to attach there must first be the deprivation of a property right or other interest that is constitutionally protected." **Khan, supra** (citation omitted). Laws which restrict or limit the exercise of fundamental constitutional rights encompassed within the meaning of due process—those which are explicitly and specifically guaranteed in either the Federal or State Constitutions or their amendments, or implied therein, and which have been deemed to be incorporated

[6] Article I, Sections 1 and 9 of the Pennsylvania Constitution, provide the legal underpinnings for substantive due process under the Pennsylvania Constitution. Article I, Section 9 states, **inter alia,** that an accused cannot "be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land." In **Commonwealth v. Brown,** 8 Pa. Super. 339, 350-51 (1898), the Superior Court explained that this language prevents the legislature not only from making laws that deprive a person of life, liberty or property without procedural due process, but also places substantive limits on what laws the legislature can enact. "The phrase 'law of the land' is equivalent to the due process language in the federal Constitution, and has been referred to as 'the due process clause of our state constitution.'" **Commonwealth v. Davis,** 526 Pa. 428, 431, 586 A.2d 914, 916 (1991) (opinion in support of affirmance) (extending this protection to juvenile probation revocation hearings to prohibit inadmissible hearsay testimony from being the sole basis for revocation) (citation omitted). This provision, while ostensibly applicable only to criminal cases, has also been applied in civil matters. **See e.g., Palairet's Appeal,** 67 Pa. 479, 486 (1871).

into the due process provisions of the respective Constitutions, as well as those natural law rights which the courts have determined from a review of our Nation's or, as applicable, State's history are so deeply rooted in the traditions and conscience of our people as to constitute a fundamental aspect of liberty encompassed within and specially protected by the Fourteenth Amendment of the United States Constitution or the Declaration of Rights of the Pennsylvania Constitution, and without which neither liberty or justice would exist if they were sacrificed—are subject to substantive due process analysis. **Washington v. Glucksberg,** 521 U.S. 702, 720-21, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997) (citations and quotation marks omitted); **Nixon v. Commonwealth,** 576 Pa. 385, 399-400, 839 A.2d 277, 286-87 (2003). In arguing the need of a statute of limitations to protect a fundamental right or liberty interest, absent which such right or interest will be denied, the Minors rely on those cases which recognize a substantive component of due process which prevents the government from infringing certain "fundamental" liberty interests unless the infringement is narrowly tailored to serve a compelling state interest.

The Due Process Clause of the Fourteenth Amendment provides that:

> No state shall ... deprive any person of life, liberty, or property, **without due process of law.**

U.S. Const. amend. XIV, §1 (emphasis added). This Clause guarantees that all citizens have certain "fundamental rights comprised within the term liberty [that] are protected by the Federal Constitution from invasion by the States." **Planned Parenthood v. Casey,** 505 U.S. 833, 847, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) (**quoting Whitney v. California,** 274 U.S. 357, 373, 47 S. Ct. 641, 71 L. Ed. 1095 (1927)); **see also, Lawrence, supra** at 565 (recognizing that "the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person"). The Due Process Clause "protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition ... and implicit in the concept of ordered liberty." **Glucksberg, supra** at 720-21 (internal citations and quotation marks omitted). Nevertheless, "[h]istory and

tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." **Lawrence, supra** at 572 (citation and internal quotation marks omitted).

Similarly,

> Article I, section 1 of the Pennsylvania Constitution provides: 'All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.' Pa. Const. art. I, § 1. This section, like the due process clause in the Fourteenth Amendment of the United States Constitution, guarantees persons in this Commonwealth certain inalienable rights.
>
> * * *
>
> The constitutional analysis applied to the laws that impede upon these inalienable rights is a means-end review, legally referred to as a substantive due process analysis. **See Adler v. Montefiore Hosp. Ass'n of Western Pennsylvania,** 453 Pa. 60, 311 A.2d 634, 640-41 (1973); **see also Moore v. City of East Cleveland, Ohio,** 431 U.S. 494, 500-05, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). Under that analysis, courts must weigh the rights infringed upon by the law against the interest sought to be achieved by it, and also scrutinize the relationship between the law (the means) and that interest (the end). ... The touchstone of due process is protection of the individual against arbitrary action of the government.

Nixon, supra (additional citations and quotation marks omitted).

Under the judicially created doctrine of "substantive due process," "the Due Process Clause prohibits States from infringing **fundamental** liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest." **Lawrence, supra** at 593 (Scalia, J., dissenting). Only fundamental constitutional rights qualify for this heightened standard of review. "All other liberty interests may be abridged or abrogated pursuant to a validly enacted state law if that law is rationally related to a legitimate state interest." **Id.** (Scalia, J., dissenting); **see also, Nixon, supra** at 400, 839 A.2d at 287 (acknowledging the same standard of review

applicable to substantive due process claims under Pennsylvania's constitution).[7]

[7] Under the Equal Protection Clause, an intermediate level of review also exists. In discussing these three standards of review, the District Court for the Middle District of Pennsylvania recently stated:

> Laws reviewed under the Equal Protection Clause are subject to various levels of scrutiny depending upon the classification imposed. **See generally City of Cleburne, Tex. v. Cleburne Living Ctr.,** 473 U.S. 432, 439-41, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Strict scrutiny is reserved for statutes engendering suspect classifications, such as those based on race, alienage, or national origin, and requires the government to demonstrate that the law is narrowly tailored to further compelling state interests. **See id.** at 440, 105 S.Ct. 3249; **Johnson v. California,** 543 U.S. 499, 505, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005). Intermediate or heightened scrutiny has been applied to classifications deemed 'quasi-suspect,' such as those based on sex or illegitimacy. **See Mills v. Habluetzel,** 456 U.S. 91, 99, 102 S.Ct. 1549, 71 L.Ed.2d 770 (1982); **Miss. Univ. for Women v. Hogan,** 458 U.S. 718, 724, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982). To survive intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective. **See Clark v. Jeter,** 486 U.S. 456, 461, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988). Lastly, for classifications that do not target suspect or quasi-suspect groups, courts apply rational-basis review, which is satisfied if a statutory classification is rationally related to a legitimate governmental purpose. **See Heller v. Doe,** 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). Review for rationality is highly deferential to the legislature, and the burden rests with the challenger to negate every possible basis for the law. **See id.**

Whitewood v. Wolf, 992 F. Supp. 2d 410, 424-25 (M.D. Pa. 2014) (footnotes omitted), **appeal dismissed,** 621 Fed. Appx. 141 (3d Cir. 2015) **(per curiam)**.

The court in **Whitewood** further discussed the criteria for determining whether a class qualifies as suspect or quasi-suspect stating:

> The Supreme Court has established certain criteria for evaluating whether a class qualifies as suspect or quasi-suspect, which query whether the group: (1) has been subjected to 'a history of purposeful unequal treatment,' **Mass. Bd. of Ret. v. Murgia,** 427 U.S. 307, 313, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976) **(per curiam)**; (2) possesses a characteristic that 'frequently bears no relation to ability to perform or contribute to society,' **Cleburne,** 473 U.S. at 440–41, 105 S.Ct. 3249; (3) exhibits 'obvious, immutable, or distinguishing characteristics that define them as a discrete group[,]' **Bowen v. Gilliard,** 483 U.S. 587, 602, 107 S.Ct. 3008, 97 L.Ed.2d 485 (1987) (citation and internal quotation marks omitted); and (4) is 'a minority or politically powerless.' **Id.**

Id. at 426-27.

It is unclear whether the intermediate standard of review applicable in equal protection cases also applies to substantive due process analysis. **See Boddie v. Connecticut,** 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971) (holding that a state's refusal to permit the filing of a divorce action based partially on the plaintiff's

In a state's exercise of the police power to preserve the public health, safety, morals, and general welfare of its residents, the state legislature may limit the enjoyment of personal liberty and property within constitutional limitations and subject to judicial review. **Munn v. Illinois,** 94 U.S. (4 Otto) 113, 24 L. Ed. 77 (1877); **Nixon, supra** at 399, 839 A.2d at 286. These limits, as previously noted, include not only those imposed by specific constitutional guarantees—**i.e.,** those having a specific textual basis in the Constitution or its amendments—which are deemed to be fundamental liberty interests inseparable from due process, but also those implied from or inherent in the language and history of the Due Process Clause or State Declaration of Rights as affecting fundamental constitutional rights. Absent these limitations, a state statute must bear a rational relationship to the protection of the public health, morals or safety in order to constitute a valid exercise of the state's police power.

"Substantive due process analysis must begin with a careful description of the asserted right, for the doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." **Reno v. Flores,** 507 U.S. 292, 302, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993) (citation and quotation marks omitted). This is especially true here since the Minors are not claiming a right to be free from bodily restraint or restraints on their freedom of movement which unquestionably is a fundamental liberty interest and which the Juvenile Act authorizes when a delinquent act has been committed and the juvenile is in need of treatment, supervision or rehabilitation. **Foucha v. Louisiana,** 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary

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inability to pay a $60.00 court fee was unconstitutional on substantive due process grounds without stating precisely whether the "necessary to a compelling interest" test or the "substantially related to an important interest" test was the standard of review); **M.L.B. v. S.L.J.,** 519 U.S. 102, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996) (holding that a state's denial of a mother's right to appeal from a trial court's decision terminating her parental rights because she could not afford record preparation fees violated both due process and equal protection, the court having reached this conclusion after engaging in an independent review of the individual and governmental interests at stake without identifying the standard of review being applied).

governmental action."); **DeShaney v. Winnebago County Dept. of Social Services,** 489 U.S. 189, 200, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989) ("In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause. ..."). Instead, the right claimed is the alleged right to require the State to impose a statute of limitations beyond which no action can be taken by the government for violation of its criminal laws.

Such a right, however, does not exist. In **Commonwealth v. Wilcox,** the Pennsylvania Superior Court stated the following with respect to criminal statutes of limitations:

> It is one of the inherent rights of a state to apprehend and bring to trial those accused of a violation of its public criminal law. This right may be exercised without limitation of time, save in so far as the state by its own statute has seen fit to waive or limit its otherwise undeniable right. In construing statutes of limitation in criminal cases, it is to be remembered, as declared by Dr. Wharton, that in such cases 'The state is the grantor, surrendering by act of grace its right to prosecute and declaring the offense to be no longer the subject of prosecution.'

56 Pa. Super. 244, 250 (1913).

This is not to say that a person charged with a criminal act may not seek dismissal of the charges when it can be established that the length of delay between the commission of the offense and the commencement of prosecution results in a denial of due process. The right to a speedy trial, implied in due process, has long been recognized by our courts. In **Barker v. Wingo,** 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), the United States Supreme Court identified the factors to be balanced in determining whether a defendant's right to a speedy trial has been violated: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of rights; and (4) the prejudice to defendant. **Id.** at 530. **See also, Commonwealth v. Dallenbach,** 729 A.2d 1218, 1222 (Pa. Super. 1999) (making the Sixth Amendment right to a speedy trial applicable to juvenile delinquency proceedings by virtue of the Due Process Clause of the Fourteenth Amendment).

The Minors confuse the constitutional right to a speedy trial in criminal proceedings (which, as previously discussed, and which we emphasize here, are separate and distinct from juvenile proceedings) with the Legislature's prerogative to enact a statute of limitations. They are not the same. One emanates from the Constitution, the other from the Legislature. One is part of the core bundle of rights essential to the exercise of personal liberty and the pursuit of justice, the other sets down a line drawn by elected officials for limiting prosecutions. And while the existence of a statute of limitations may well serve as the first line of defense against overly stale criminal charges, **United States v. Marion,** 404 U.S. 307, 322, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971), the absence of a statute of limitations does not infringe upon the right to a speedy trial. Thus, the absence of a statute of limitations in the Juvenile Act does not infringe upon a fundamental liberty interest under the Due Process Clause.

A compelling state interest and narrow tailoring is required only when fundamental rights are involved. The test for substantive due process in the area of economic and social welfare legislation is whether the challenged statute is rationally related to a legitimate interest of government. **West Coast Hotel v. Parrish,** 300 U.S. 379, 392, 57 S. Ct. 578, 81 L. Ed. 703 (1937) (approving a minimum-wage law on the principle that "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process"); **Nixon, supra** at 400, 839 A.2d at 287. With reference to the Pennsylvania Constitution, the rational basis test requires that "a law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained." **Gambone v. Commonwealth,** 375 Pa. 547, 551, 101 A.2d 634, 637 (1954); **see also, Pennsylvania State Board of Pharmacy v. Pastor,** 441 Pa. 186, 191-92, 272 A.2d 487, 490-91 (1971). This standard of review as applied to our State's Constitution may require a slightly closer (**i.e.,** less deferential) level of scrutiny than under federal substantive due process jurisprudence. **Id.** at 191, 272 A.2d at 490; **see also, Ferguson v. Skrupa,** 372 U.S. 726, 730, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963)

(declining to follow **Commonwealth v. Stone,** 191 Pa. Super. 117, 155 A.2d 453 (1959); stating that "courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws," and the "[United States Supreme] Court does not sit to subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.") (quotation marks omitted)). "Furthermore, in determining the constitutionality of a law, [the Pennsylvania Supreme Court will] not question the propriety of the public policies adopted by the General Assembly for the law [so long as the end sought is not clearly unconstitutional], but rather is limited to examining the connection between those policies and the law." **Nixon, supra** at 398-99, 839 A.2d at 286. Consequently, laws which do not substantially impair a fundamental constitutional right enjoy a presumption of constitutionality under state substantive due process review and "may only be found to be unconstitutional if the party challenging the law can prove that it 'clearly, palpably, and plainly' violates the Constitution." **Id.** at 398, 839 A.2d at 286 (citation omitted).

The question before us, from the perspective of substantive due process, is whether the legislative decision in the Juvenile Act not to include a statute of limitations for commencing delinquency proceedings has a real and substantial relation to the objects sought to be attained. Those objects, as previously noted, are the social welfare of children, particularly those in need of treatment, supervision or rehabilitation. The Act defines a child for these purposes as "[a]n individual who: (1) is under the age of 18 years; [or] (2) is under the age of 21 years who committed an act of delinquency before reaching the age of 18 years." 42 Pa. C.S.A. §6302 (definition of the term "child"). A "delinquent child" is one who is "ten years of age or over whom the court has found to have committed a delinquent act and is in need of treatment, supervision or rehabilitation." 42 Pa. C.S.A. §6302 (definition of the term "delinquent child"). Consequently, as a practical matter, in dealing with delinquent acts the Juvenile Act is concerned with an eight-year span in a child's life, from the age of ten until 18 years of age.

It is unquestioned in the legal literature that in contrast to adults, "juveniles have diminished culpability and greater prospects

for reform." **Miller v. Alabama,** 132 S. Ct. 2455, 2464, 183 L. Ed. 2d 407 (U.S. 2012). In **Miller,** the court described three significant gaps between juveniles and adults:

> First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable ... to negative influences and outside pressures, including from their family and peers; they have limited contro[l] over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievabl[e] deprav[ity].

Id. at 2464 (citations and quotation marks omitted). Such characteristics—"transient rashness, proclivity for risk, and inability to assess consequences—both lessen[] a child's moral culpability and enhance[] the prospect that, as the years go by and neurological development occurs, his deficiencies will be reformed." **Id.** at 2465 (citations and quotation marks omitted).[8]

In the same context, in **In re J.B.,** 107 A.3d 1 (Pa. 2014), the Pennsylvania Supreme Court stated:

> Pennsylvania has long noted the distinctions between juveniles and adults and juveniles' amenability to rehabilitation. Pennsylvania utilizes courts which are specifically trained to address the distinct issues involving youth, and are guided by the concepts of balanced and restorative justice. Indeed, these goals are evident in the introductory section of the Juvenile Act, which instructs that the Act must be construed as follows:
>
> to provide for children committing delinquent acts programs of supervision, care and rehabilitation which provide balanced

[8] For similar reasons, the law does not hold children to the same standard of care as adults when negligence is claimed against a minor: "minors under the age of seven years are conclusively presumed incapable of negligence;[] minors over the age of fourteen years are presumptively capable of negligence, the burden being placed on such minors to prove their incapacity;[] minors between the ages of seven and fourteen years are presumed incapable of negligence, but such presumption is rebuttable and grows weaker with each year until the fourteenth year is reached.[]" **Kuhns v. Brugger,** 390 Pa. 331, 340,135 A.2d 395, 401 (1957) (footnotes omitted).

> attention to the protection of the community, the imposition of accountability for offenses committed and the development of competencies to enable children to become responsible and productive members of the community.
>
> 42 Pa. C.S. §6301(b)(2).

Id. at 18.

Thus, the absence of a statute of limitations is explained in part because of the relatively short timeframe within which a delinquent act subject to the juvenile court's jurisdiction occurs and, in part, because of the need to address the unique concerns of children within the juvenile justice system before the child reaches 21 years of age, regardless of when the offense occurred. **See also, Commonwealth v. Monaco,** 869 A.2d 1026, 1029 (Pa. Super. 2005) (holding that a defendant who was 22 years of age when criminal charges were filed against him was ineligible to be tried in juvenile court, notwithstanding that he was 15 years old at the time the offense occurred), **appeal denied,** 584 Pa. 675, 880 A.2d 1238 (2005).

From this, it is clear that youth matters in addressing criminal acts and, therefore, as further set forth in the Juvenile Act's statement of purposes (42 Pa. C.S.A. §6301(b)), that the Act has a legitimate purpose. That the Act is rationally drawn to accomplish these purposes is equally clear and, with the exception of not having a statute of limitations, has not been questioned by the Minors. **See** 42 Pa. C.S.A. §6352 (disposition of delinquent child); **see also, In re J.B., supra** at 9 (**quoting** with approval from the trial court opinion that juvenile courts are structured "to provide [measures of] guidance and rehabilitation for the child and protection for society, not to [fix] criminal responsibility, guilt, and punishment.") (citations omitted); **Commonwealth v. Fisher,** 213 Pa. 48, 62 A. 198 (1905) (holding constitutional the intent and goal of the juvenile system to provide treatment and rehabilitation to a child, rather than punishment, and to insulate the child from the harshness of criminal law).[9]

[9] Procedural due process, unlike substantive due process, ensures that a person has been accorded fair procedure (**i.e.,** "due process") with respect to governmental actions affecting the individual's life, liberty or property. Because the setting of a statute of limitations, or, as in this case, the failure to set a statute

Equal Protection

In creating different systems for dealing with juvenile "crime" and adult crime, constitutional due process requires only that an arbitrary or discriminatory classification scheme be avoided. **Commonwealth v. Cotto,** 708 A.2d 806, 809 (Pa. Super. 1998), **affirmed,** 562 Pa. 32, 753 A.2d 217 (2000). Equal protection requires the like treatment of similarly situated persons; it does not require the same treatment of all persons under all circumstances. Stated differently, "[t]he right to equal protection under the law does not absolutely prohibit the Commonwealth from classifying individuals for the purpose of receiving different treatment, ... and does not require equal treatment of people having different needs." **Commonwealth v. Albert,** 563 Pa. 133, 138, 758 A.2d 1149, 1151 (2000) (citations omitted).

There is nothing inherently suspect or unreasonable in classifying and treating minors separate from adults because of their age. The statutes making an age-based distinction of this type are legion. **See e.g.,** 75 Pa. C.S.A. §1503 (setting minimum age of 18 for issuance of a regular driver's license); 18 Pa. C.S.A. §6308 (making it illegal for a person less than 21 years of age to purchase, consume, possess, or transport alcoholic beverages); **and** 43 P.S. §40.3 (setting age and hour limitations on the employment of minors). **See also,** 42 Pa. C.S.A. §5533(b)(1) (tolling an unemancipated minor's

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of limitations, concerns the content of the statute, rather than a challenge to the process the Minors have been afforded to defend against the charges, we have analyzed this aspect of the Minors' claim as raising a question of substantive due process, not procedural due process.

We further note that while procedural due process requires that in juvenile delinquency proceedings, the elements of the offense charged must be proven beyond a reasonable doubt, **In re Winship,** 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), and that the juvenile is entitled to adequate notice of the charges, to counsel, to invoke the privilege against self-incrimination, and to the right of confrontation and cross-examination, **In re Gault,** 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), it does not require that juvenile adjudicatory proceedings in all particulars must be the same as adult criminal proceedings. **See e.g., In the Interest of J.F.,** 714 A.2d 467, 473 (Pa. Super. 1998) (holding that due process does not guaranty the right to a jury trial in a juvenile adjudication proceeding); **see also, McKeiver v. Pennsylvania,** 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971). To do so would transform a juvenile delinquency proceeding to the legal equivalent of an adult criminal proceeding, which it is not. **In the Interest of R.A.,** 761 A.2d 1220, 1223 (Pa. Super. 2000) ("[J]uvenile proceedings are not criminal proceedings.").

cause of action until the minor turns eighteen, regardless of when the injury occurred).

Classifications which affect fundamental constitutional rights or which create distinctions premised on some suspect basis or trait must promote a compelling governmental interest for the law to be upheld. However, when the law does not involve a fundamental constitutional right and does not classify persons on the basis of "suspect" or "quasi-suspect" traits, tremendous latitude is allowed to the wisdom and judgment of the legislature, unless the law is patently arbitrary or irrational. Because age is not a constitutionally suspect trait, such as race, national origin or alienage, or one deemed "quasi-suspect," such as gender and illegitimacy, **see Massachusetts Bd. of Ret. v. Murgia,** 427 U.S. 307, 312, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976) **(per curiam); Albert, supra** at 139, 758 A.2d at 1152, the legality of such statutes on equal protection grounds rests on whether the statutory classification is rationally related to any legitimate governmental purpose.[10] **See Heller v. Doe,** 509 U.S. 312, 320, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993); **Albert, supra** at 138, 758 A.2d at 1151.

Under the rational basis standard of review, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." **Lawrence, supra** at 579 (O'Connor, J., concurring). Review for rationality is highly deferential to the legislature, and the burden rests with the challenger to negate every possible basis for the law. **Heller, supra** at 320; **Albert, supra** at 138-39, 758 A.2d at 1151-52. "In undertaking its analysis, the reviewing court is free to hypothesize reasons the legislature might have had for the classification." **Id.** at 139, 758 A.2d at 1152; **cf., United States v. Carolene Products Co.,** 304 U.S. 144, 154, 58 S. Ct. 778, 82 L. Ed. 1234

[10] The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1. Likewise, Article I, Section 26 of the Pennsylvania Constitution provides that "[n]either the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right." Pa. Const. art. I, §26. This equal protection guarantee in the Pennsylvania Constitution is analyzed under the same standards used by the United States Supreme Court when reviewing similar claims under the Fourteenth Amendment. **See Commonwealth v. Albert,** 563 Pa. 133, 137-38, 758 A.2d 1149, 1151 (2000).

(1938) ("[W]here the legislative judgment is draw [sic] in question, [the inquiry] must be restricted to the issue whether any state of facts either known or which could reasonably be assumed, affords support for [the legislation].") (applying the implied equal protection guarantee of the Fifth Amendment's due process provision to federal legislation). **See also, City of New Orleans v. Dukes,** 427 U.S. 297, 303, 96 S. Ct. 2513, 49 L. Ed. 2d 511 (1976) ("[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.").

Moreover, under rational-basis scrutiny, legislatures are presumed to have acted constitutionally. **See e.g., McGowan v. Maryland,** 366 U.S. 420, 425-26, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961); **Lawrence, supra** at 579-80 (O'Connor, J., concurring) ("Laws ... that are scrutinized under rational basis review normally pass constitutional muster, since the Constitution presumes that even improvident decisions will eventually be rectified by the democratic process.") (citation and quotation marks omitted); **cf.,** 1 Pa. C.S.A. §1922(3) (Presumption of Constitutionality). Such a law will not be overturned "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the people's actions were irrational." **Gregory v. Ashcroft,** 501 U.S. 452, 471, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991) (citation and quotation marks omitted).

In this case, the reasons why the Juvenile Act satisfies substantive due process review are equally relevant to why the separate and distinct treatment of juveniles who have committed delinquent acts from adult criminal offenders does not violate equal protection. Because children are not similarly situated to adults with respect to criminal acts, different treatment is warranted, and because the manner in which the Juvenile Act treats juveniles is rationally related to that objective, the purpose and classification scheme of the Juvenile Act are rationally related to one another.

CONCLUSION

In **In re X,** 9 D. & C.3d 65 (1976), the Franklin County Court of Common Pleas found that the question of limitation of actions is

within the prerogative of the Legislature and that the Legislature's silence on this issue would be interpreted as an indication that such a limitation is inapplicable in juvenile proceedings due to the differences inherent in juvenile matters and criminal proceedings. These reasons, which are just as valid today as when **In re X** was decided, explain why the absence of a statute of limitations in the Juvenile Act does not violate principles of either substantive due process or equal protection.

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