Carbon County Law Journal

Containing Decisions of the Courts
of the 56th Judicial District of
Pennsylvania

Richard W. Webb — President Judge
Roger N. Nanovic — Judge
John P. Lavelle — Senior Judge

Volume XVI

2002 - 2004

Published by the Carbon County Bar Association

Carbon County Law Journal
Carbon County Courthouse
P.O. Box 6
Jim Thorpe, PA 18229

CLARE PRINTING
206 S. Keystone Avenue
Sayre, PA 18840

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Civil Action—Determination of Habitual Offender Status—Juvenile Disposition Not the Equivalent of a Conviction—Constitutional Challenges to the Ignition Interlock Law—Rational Basis—Overbreadth—Procedural Due Process—Authority of PennDOT To Require Installation of Ignition Interlock Device Absent a Court Order

1. A juvenile adjudication, consent decree or other disposition is not the equivalent of a conviction for determining an individual's status as an habitual offender under Section 1542 of the Vehicle Code.

2. A statute is presumed constitutional and will not be declared unconstitutional unless it clearly, plainly and palpably violates the constitution.

3. Appellant's challenge to the constitutionality of the Ignition Interlock Law on the bases of substantive and procedural due process, and facial overbreadth, are without merit. The Ignition Interlock Law promotes the legitimate state interest of ensuring the sobriety of motorists driving on public highways and reasonably acts to achieve that interest.

4. It is the sole province of the trial court to order the installation of an ignition interlock device. 42 Pa. C.S. §7002(b). Failure of the Court of Common Pleas to order the installation of the ignition interlock device does not give PennDOT the unilateral authority to override the trial court's order and impose the ignition interlock device requirements.

NO. 02-0403

NO. 02-0404

PAUL JOHN LEVY, Esquire—Counsel for Appellant.

JOHN V. ROVINSKY, Esquire—Counsel for Appellee.

MEMORANDUM OPINION

NANOVIC, J.—December 23, 2002

Joshua H. Egan (Appellant) appeals the suspension and revocation of his operating privileges and the requirement that he equip his vehicles with ignition interlock devices. In response to Appellant's issues, a motorist's juvenile consent decree cannot be used to compute habitual offender status, the ignition interlock law survives the rational basis test and does not violate the constitutional guarantee of due process, and the Commonwealth's failure to appeal the order of sentence from the Court of Common Pleas of Lehigh County relieves Appel-

lant of any ignition interlock requirement associated with that conviction.

FACTS

Appellant has violated Section 3731, "Driving Under the Influence of Alcohol or Controlled Substances," of Pennsylvania's Motor Vehicle Code, 75 Pa. C.S.A. §§101 **et seq.,** (Vehicle Code) three times. The first offense occurred on April 15, 1999, while Appellant was a juvenile. Appellant entered into a juvenile consent decree on June 1, 1999, for which Appellant's operating privileges were suspended for a period of six months.

Appellant's subsequent driving under the influence offenses occurred as an adult. Appellant pled guilty on November 29, 2001, to a DUI offense that occurred on May 10, 2001, in Carbon County, for which the Department of Transportation, Bureau of Driver Licensing (Department) imposed a one-year suspension of Appellant's operating privileges and required the placement of ignition interlock devices on Appellant's vehicles (Department of Transportation, Official Notice of Suspension, dated January 17, 2002).

Appellant was also arrested in Lehigh County on March 29, 2001, for Driving Under the Influence and pled guilty on December 18, 2001. The Department imposed a five-year revocation of Appellant's operating privileges as an habitual offender pursuant to the statutory mandate of Section 1542 of the Vehicle Code and required Appellant to place ignition interlock devices on his vehicles (Department of Transportation, Official Notice of Revocation, dated January 25, 2002).

Appellant filed separate appeals on February 15, 2002, to the Department's Official Notices of Suspension and Revocation. This Court consolidated the cases and conducted a hearing on May 14, 2002, to determine whether the "action of the Department of Transportation is suspending the [Appellant's] operating privileges to drive a motor vehicle … should be set aside." (Order of Court, dated February 19, 2002)

At the de novo hearing, the Department presented a packet of evidence, which was entered into evidence without objection. The packet included the conviction notices sent to the Department by the Clerk of Courts for Carbon and Lehigh Counties respectively, the suspension and revocation notices sent by the Department to Appellant and Appellant's driving

record. Appellant presented a copy of the juvenile consent decree dated June 1, 1999.

Appellant places three issues before this Court: whether his juvenile consent decree should be used to compute his habitual offender status, the constitutionality of Pennsylvania's Ignition Interlock Law, and whether it was proper for the Department to attach the ignition interlock restriction to Appellant's Lehigh County conviction where the court did not impose such limitation within its order of sentence.

DISCUSSION

Use of Juvenile Consent Decree To Compute the Habitual Offender Status

First, Appellant contends that the Department should not consider the juvenile consent decree as a prior act to compute Appellant's status as an habitual offender under Section 1542 of the Vehicle Code, 75 Pa. C.S.A. §1542. Section 1542, "Revocation of Habitual Offender's License," provides that a person who has three convictions under Subchapter B of Chapter 37, which relates to serious traffic offenses, within any period of five years, shall be considered an habitual offender. 75 Pa. C.S.A. §1542(a)(b)(1). Appellant's multiple violations are all with respect to Section 3731, "Driving Under the Influence of Alcohol or a Controlled Substance" of Chapter 37.

The issue is whether a juvenile consent decree is the equal of a conviction under the Vehicle Code. We believe not.

In this case, the interrelationship between criminal conduct as defined in the Vehicle Code and the Juvenile Act, 42 Pa. C.S.A. §§6301 **et seq.,** must be examined. The Vehicle Code defines a conviction as including

> a plea of guilty, a plea of nolo contendere, a finding of guilty by a court or an unvacated forfeiture of bail or collateral deposited to secure a defendant's appearance in court.

75 Pa. C.S.A. §6501(a). No mention is made of a juvenile consent decree, adjudication or other juvenile disposition. The Juvenile Act states that

> [a]n order of disposition or other adjudication in a proceeding under this [Act] is not a conviction of crime and does not impose any civil disability ordinarily resulting from

> a conviction or operate to disqualify the child in any civil service application or appointment.

42 Pa. C.S. §6354(a).

Historically, the distinction between criminal and juvenile proceedings is well marked.

> 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); **see, e.g., In the Interest of K.B.,** 432 Pa. Super. 586, 639 A.2d 798, 805 (1994), **appeal denied,** 540 Pa. 613, 656 A.2d 118 (1995), **overruled on other grounds by In the Interest of M.M.,** 547 Pa. 237, 690 A.2d 175 (1997) ('By its very terms, upon a finding of delinquency, the juvenile is not "branded" with the stigma of a criminal conviction, but is simply "adjudged delinquent" ').

In re J.H., 737 A.2d 275, 278 (Pa. Super. 1999), **appeal denied,** 562 Pa. 664, 753 A.2d 819 (2000) (holding that statute generally prohibiting examination of criminal defendant about prior offenses did not apply to juvenile delinquency hearings).

The Department's argument that because Section 3731(e)(2) of the Vehicle Code, 75 Pa. C.S.A. §3731(e)(2), treats a prior consent decree as a conviction for purposes of computing the order of subsequent Section 3731 convictions and that Appellant's convictions on November 29 and December 18, 2001, were therefore the second and third convictions on the Department's records thereby implicating the mandate of Section 1542 of the Vehicle Code is illusory. That Section 3731(e)(2) considers a prior consent decree the equivalent of a conviction for purposes of enhancing the penalty for subsequent convictions does not have the effect of converting the prior consent decree to a conviction. Were such the case and later conduct retroactively converted a juvenile disposition to a conviction, constitutional issues, including a violation of the ex post facto clause, would be implicated. **Frederick v. Commonwealth, Department of Transportation, Bureau of Driver**

Licensing, 802 A.2d 701, 704 (Pa. Commw. 2002) ("In order for a law to transgress the ex post facto prohibition, the law must retrospectively alter the definition of criminal conduct or retrospectively increase the penalty by which a crime is punishable.") Were such the case, a prior accelerated rehabilitative disposition would logically also be converted to a conviction pursuant to Section 3731(e)(2) and Section 1542(c)'s provision that acceptance of accelerated rehabilitative disposition should be counted as an offense in determining whether the requirements of the habitual offenders statute were met would be meaningless. The latter is contrary to our case law. **Lihota v. Department of Transportation, Bureau of Driver Licensing,** 2002 WL 31696930 (Pa. Commw.).

In **Commonwealth v. Rudd,** 366 Pa. Super. 473, 531 A.2d 515 (1987), the court held that a prior juvenile adjudication for driving under the influence of alcohol could not be considered a conviction for the purpose of mandatory minimum sentence enhancement under Section 3731(e)(1) of the Vehicle Code and that, if the Legislature sought to include juveniles within the recidivist ambit of Section 3731(e)(1), the Legislature should do so explicitly. Subsequently, Section 3731(e)(2) was amended to include juvenile dispositions among those which should be counted in determining the penalty for subsequent convictions. Likewise, if the Legislature intends to include juvenile dispositions among those to be counted in determining whether a driver should be declared an habitual offender, it is the responsibility of the Legislature to expand Section 1542(c) to so provide.

We conclude, therefore, that Appellant's previous consent decree should not be counted in determining Appellant's status as an habitual offender. This conclusion is consonant with "the purpose of the Juvenile Act in removing from children committing delinquent acts the consequences of criminal behavior" and "the absence of an express inclusion of juvenile [dispositions] as convictions by the Vehicle Code." **Commonwealth v. Rudd, supra** at 477-78, 531 A.2d at 518 (internal quotations and citations omitted). In holding that Appellant is not an habitual offender and, therefore, not subject to a five-year revocation of his driving privileges, Appellant nevertheless is subject to a one-year suspension of his driving privileges pursuant to Section

1532(b)(3) of the Vehicle Code for his December 18, 2001 conviction of violating Section 3731 of the Vehicle Code.[1]

Constitutional Challenges

Rational Basis

Appellant challenges the constitutionality of Pennsylvania's Ignition Interlock Law. 42 Pa. C.S. §§7001-7003.[2] In doing so, Appellant must first hurdle the high bar of the presumption of constitutionality. A statute is presumed to be constitutional and will not be declared unconstitutional unless it clearly, palpably and plainly violates the constitution. **Commonwealth v. Etheredge,** 794 A.2d 391, 396 (Pa. Super. 2002), **citing Commonwealth, Department of Transportation v. McCafferty,** 563 Pa. 146, 758 A.2d 1155 (2000).

In the face of a due process or equal protection constitutional challenge, the standard for measuring constitutionality must first be set. Legislation must be examined under one of three tests—strict scrutiny, intermediate scrutiny, or the rational basis test. **Commonwealth v. Albert,** 563 Pa. 133, 758 A.2d 1149 (2000). Because the operation of a motor vehicle does not involve a fundamental right or a suspect class, or what has been termed an "important" though not fundamental right or suspect class, the standards of strict and intermediate scrutiny are inapplicable. Instead, the most difficult standard for Appellant to overcome, the rational basis test, must be applied. **Commonwealth v. Etheredge, supra** at 397; **Commonwealth v. McMullen,** 756 A.2d 58 (Pa. Super. 2000), **appeal denied,** 565 Pa. 661, 775 A.2d 804 (2001).[3]

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[1] In those situations where our findings of fact or conclusions of law are different than those made by the Department, we are vested with the authority to modify the penalty imposed by the Department. **Guidas v. Commonwealth, Department of Transportation, Bureau of Driver Licensing,** 655 A.2d 228, 232 (Pa. Commw. 1995).

[2] The Ignition Interlock Law became effective September 30, 2000, except for Section 7002(a), which became effective September 30, 2001.

[3] An "operating privilege" is defined by the Vehicle Code to be a "privilege" and not a "property right or civil right." 75 Pa. C.S. §102. In **Plowman v. Commonwealth, Department of Transportation, Bureau of Driver Licensing,** 535 Pa. 314, 318, 635 A.2d 124, 126 (1993), the Supreme Court specifically stated that "[s]ince a driver's license is a privilege and not a fundamental right, legislation affecting it must be evaluated under a 'rational basis' analysis."

The rational basis test requires a dual step analysis: Pennsylvania's Ignition Interlock Law must promote a legitimate state interest and must be tailored to meet that interest. **Paz v. Pennsylvania Housing Finance Agency,** 722 A.2d 762, 766 (Pa. Commw. 1999). The Ignition Interlock Law clearly promotes a legitimate state interest—to ensure the sobriety of motorists driving on public highways,[4] and reasonably acts to achieve that interest—the Law applies to those who are known to have previously been convicted of driving under the influence and are recidivist offenders.

Overbreadth of Statute

Appellant asserts that the Ignition Interlock Law is overbroad inasmuch as the law requires all motor vehicles owned by Appellant to be equipped with an ignition interlock system. Appellant suggests this would include motor vehicles such as "go carts, riding lawn mowers, junk cars or collectible vehicles not in use" without even alleging that Appellant owns such types of vehicles (Memorandum of Appellant, pp. 3-4).

If the statute under review does not affect a fundamental right, the litigant may present an overbreadth challenge only where his or her own rights have been impacted directly by the alleged overbreadth. **Commonwealth v. Stock,** 346 Pa. Super. 60, 499 A.2d 308 (1985).

> A traditional principle of constitutional adjudication is that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may be applied unconstitutionally to others in situations not before the court. **Broadrick v. Oklahoma,** 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed. 2d 830 (1973). However, where First Amendment rights are involved, a litigant may attack the facial overbreadth of a statute in regulating free expression even where his own rights are not directly affected by the asserted overbreadth, based on the judicial assumption that the statute's very existence might have a

[4] An "interlock system" is a system approved by the Department that prevents a vehicle from being started or operated unless the operator first provides a breath sample indicating that the operator has an alcohol level of less than .025%. **See** 42 Pa. C.S.A. §7001.

> 'chilling effect' on the exercise of First Amendment freedoms by persons not before the court.

Id. at 66, 499 A.2d at 311. Abstract positions are not the proper measure by which to assert that a statute is unconstitutionally broad or vague.

Appellant has not established his standing to make this challenge.[5] **See also,** discussion of ripeness **infra.**

Procedural Due Process

Appellant argues that the Ignition Interlock Law violates his constitutional rights to due process by not providing a method to challenge the court's certification that each vehicle of an habitual offender has been equipped with an ignition interlock system (Memorandum of Appellant, p. 3).[6] Due process requires notice and an opportunity to be heard when entitlements—whether termed "rights" or "privileges"—are affected. **Commonwealth, Department of Transportation, Bureau of Driver Licensing v. Clayton,** 546 Pa. 342, 351, 684 A.2d 1060, 1064-65 (1996).

The notices of suspension and revocation received by Appellant advised Appellant that he would receive further information regarding the requirement for installation of an ignition interlock system approximately thirty days prior to the eligibility date for restoration of his driving privileges. At this time, Appellant's challenge to the certification procedure is premature and not ripe for review.

An issue is ripe for review when it is sufficiently concrete and crystallized for the court to identify and accurately define the dispute.

> The rationale behind the ripeness doctrine is 'to prevent the courts, through avoidance of premature adjudica-

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[5] To the extent Appellant may be arguing that the Ignition Interlock Law violates the constitutional guarantee of equal protection and irrationally discriminates between persons who own motor vehicles and those who do not, the Commonwealth Court has already addressed this issue and upheld the statute's constitutionality. **Commonwealth v. Etheredge,** 794 A.2d 391 (Pa. Super. 2002).

[6] In **Turner v. Commonwealth, Department of Transportation, Bureau of Driver Licensing,** 805 A.2d 671, 675 (Pa. Commw. 2002), the Commonwealth Court found that the "trial court's action of certifying an offender's compliance with a mandatory condition of restoration of his operating privilege is connected with the functions of the trial court" and does not violate the separation of powers doctrine.

> tions, from entangling themselves in abstract disagreements over administrative policies … .' **Abbott Laboratories v. Gardner,** 387 U.S. 136, 148, 87 S.Ct. 1507, 1515, 18 L.Ed. 2d 681 (1967). The criteria which the Court will consider are (1) whether the issues are adequately developed for judicial review, and (2) what hardship the parties will suffer if review is delayed.

Braksator v. Zoning Hearing Board of Northampton Township, 163 Pa. Commw. 332, 334, 641 A.2d 44, 45 (1994). "The ripeness doctrine is a concept of standing premised on the notion that judicial machinery should be conserved for problems which are real and present or imminent, not squandered on problems which are abstract or hypothetical or remote." **Van Doren v. Mazurkiewicz,** 695 A.2d 967, 971 (Pa. Commw. 1997) (internal quotations and citations omitted).

That an issue involving Appellant's certification will arise is not inevitable[7] and, if it does arise, the extent and nature of the issue, and the reasons for challenge, are unknown. Accordingly, Appellant's challenge at this stage is purely hypothetical and Appellant has not requested, much less been denied, certification of the installation of an ignition interlock device. **Cf. City of Hermitage v. Zoning Hearing Board,** 149 Pa. Commw. 488, 613 A.2d 612 (1992), **appeal denied,** 533 Pa. 637, 621 A.2d 582 (1993) (challenge to a rezoning ordinance premature until landowner first applies for a building permit or otherwise attempts to develop the affected tract of land).[8]

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[7] Appellant may elect, by inaction, not to apply for an ignition interlock restricted license and thereby be subject effectively to an additional one-year suspension of his driving privileges. 42 Pa. C.S. §7003(5).

[8] Appellant's challenge to the enactment process of the Ignition Interlock Law, contending that the law was not enacted in accordance with Article III, Section 4, of the Pennsylvania Constitution, has not been supported by record evidence and has not been developed and supported by legal authority to permit meaningful review by this court. Appellant alleges generally that "[t]he Act was not properly enacted according to Article III of the Pennsylvania Constitution, as the substantial changes made to include the interlock device were not considered for three different days in each house." (Memorandum of Appellant, p. 4) Nonetheless, it should be noted that it is not the amendments, be they substantial changes or otherwise, to a bill that must receive a separate three days of consideration in each house. As long as the bill was initially considered on three different days in the House and three different days in the Senate, the bill passes the consideration requirement of Article III, of Pennsylvania's constitution. **Fumo v. Pennsylvania Public Utility Commission,** 719 A.2d 10, 15 (Pa. Commw. 1998).

Imposition of Interlock Devices in the Absence of a Court Order

Appellant's final contention asserts that the Department improperly attached the ignition interlock requirement to the DUI offense that occurred in Lehigh County where the Court of Common Pleas of Lehigh County did not direct the installation of the interlock device within its order of sentence.

This issue is controlled by the Commonwealth Court's decision in **Schneider v. Commonwealth, Department of Transportation, Bureau of Driver Licensing,** 790 A.2d 363 (Pa. Commw. 2002). In that case, the court held:

> Section 7002 provides that only '**the court** shall order the installation of an approved ignition interlock device … .' 42 Pa. C.S. §7002(b). (Emphasis added). Because this provision gives a court the sole authority, PennDOT has no unilateral authority to impose ignition interlock device requirements if the trial court fails to do so. If the trial court fails to impose this requirement in a criminal proceeding, the district attorney can appeal the trial court's failure to do so as it would if the trial court failed to impose any other mandatory sentence.

Id. at 366-67. "The failure of the trial court to order the installation of the ignition interlock device does not give the Department the authority to override the trial court's order and require installation." **Turner v. Commonwealth, Department of Transportation, Bureau of Driver Licensing,** 805 A.2d 671, 676 (Pa. Commw. 2002).[9]

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[9] The Department's position that the imposition of an ignition interlock requirement is not a continuation of a suspension of driving privileges, but rather a condition for restoration thereof, and is therefore not a final order subject to review by this Court has been repeatedly rejected by the Commonwealth Court. **Schneider v. Commonwealth, Department of Transportation, Bureau of Driver Licensing,** 790 A.2d 363, 366 n.7 (Pa. Commw. 2002); **Turner, supra** at 674; **Frederick v. Commonwealth, Department of Transportation, Bureau of Driver Licensing,** 802 A.2d 701, 704 (Pa. Commw. 2002). The reasoning of the Court is that "[b]ecause failure to comply can effectively result in an additional one-year suspension, … the ignition interlock requirement is a continuation of the suspension of driving privileges." **Id.** at 704. Pursuant to 75 Pa. C.S. §1550, the Courts of Common Pleas have jurisdiction over appeals for license suspensions and revocations. However, the only issues to be reviewed on such appeals are "whether the licensee was, in fact, convicted and whether DOT acted in accordance with applicable law." **Ladd v. Commonwealth, Department of Transportation, Bureau**

For the foregoing reasons we enter the following:

ORDER

AND NOW this 23rd day of December 2002, it is hereby ORDERED that the License Revocation Appeal docketed to No. 02-0404, is GRANTED, insofar as Appellant is relieved of the interlock ignition restriction, and the five year period of revocation is modified to a one year period of suspension pursuant to 75 Pa. C.S. §1532(b) for Appellant's conviction on December 18, 2001, of violating 75 Pa. C.S. §3731; however, Appellant must fulfill the remaining obligations of the Notice of Revocation dated January 25, 2002, issued by the Department of Transportation.

It is further ORDERED that the License Suspension Appeal docketed to No. 02-0403 is DENIED, and Appellant must fully comply with the Notice of Suspension dated January 17, 2002, issued by the Department of Transportation.

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of Driver Licensing, 753 A.2d 318, 321 (Pa. Commw. 2000). Examples of issues not appropriate for review by the Court of Common Pleas on an appeal from a license suspension or revocation are provided in footnote 6 in the **Ladd** decision. **Id.** at 321 n.6. In this case, both the notice of suspension and notice of revocation sent by the Department to the Appellant advised Appellant of his right to appeal the Department's action to the trial court within thirty days of the mailing date of the notice.

ALBERT MIKULA, LORETTA MIKULA, MICHELE MIKULA, ALBERT LEONZI, JOSEPH LEONZI and GEORGE KRAJNAK, Appellants vs. LANSFORD BOROUGH ZONING HEARING BOARD, Appellee and BENNETT VERTA, JR., President of EVERBRITE INDUSTRIES, INC., individually in its own right, Intervenors

Civil Action—Res Judicata—*Collateral Estoppel—Special Exception Use—Standard of Review—Sunshine Act*

1. The traditional elements to establish **res judicata** and collateral estoppel apply equally to zoning proceedings with the further qualification that, because of the dynamic nature of zoning, preclusion as a matter of law is disfavored and the proponent of these bars to relitigation has the further burden of establishing that no substantial condition or circumstances relating to the land itself have occurred since the prior proceeding.

2. A request for a special exception use is not barred by the previous denial of a request for a variance on a different theory and under a different section of the zoning ordinance.

3. The determination of whether one nonconforming use is equally appropriate or more appropriate than another nonconforming use so as to justify the granting of a special exception for the proposed nonconforming use is within the sound discretion of the Zoning Hearing Board.

4. In those cases where the Court of Common Pleas acts as a reviewing court and takes no additional testimony or evidence, the Court must accept the findings and judgment of the Zoning Hearing Board when supported by the evidence. The Court is without authority to make findings on factual disputes not addressed by the Zoning Hearing Board.

5. The Zoning Hearing Board's decision that the Applicants' proposed use of the property and building for the business of soap manufacturing and commercial washing of vehicles was equally appropriate or more appropriate than the property's prior commercial/industrial use is supported by the evidence.

6. The Sunshine Act requires that the decision-making process and vote of governmental agencies be performed at public meetings. The Appellants' claim that the Zoning Hearing Board deliberated in private and voted in public in violation of the Sunshine Act is not supported by the evidence. Whether quasi-judicial deliberations of a zoning hearing board may properly be held in private in an executive session is unclear under the present language of Sections 708(a)(5) and 716 of the Sunshine Act.

NO. 02-0096

CHARLES R. PEDRI, Esquire—Counsel for Appellants.

MICHAEL GARFIELD, Esquire—Counsel for Appellee.

WILLIAM H. BAYER, Esquire—Counsel for Intervenors.

MEMORANDUM OPINION

NANOVIC, J.—December 24, 2002

The Borough of Lansford's Zoning Hearing Board (Zoning Hearing Board) did not run afoul of the doctrine of **res judicata,** violate the principles of the Sunshine Act, or err in granting a special exception use of the property located at 401 West Bertsch Street, Lansford, Carbon County, Pennsylvania (the Property).

FACTS

The protracted procedural history of this case is as follows. In May of 1999, Bennett Verta, Jr. purchased the Property for use in the operation of his trucking and soap manufacturing business. The Property's varied history includes service as a commercial/industrial site for an automobile dealership, storage of equipment and supplies for mining operations, as a carpet cleaning and storage facility, and most recently, as the site for a trucking and excavation business.

Bennett Verta, Jr. filed a zoning application with the Borough of Lansford (Borough), which was denied on December 10, 1999. On March 1, 2000, Mr. Verta filed a zoning application with the Zoning Hearing Board requesting a use variance for the Property to continue the current uses as a storage and warehouse facility, to manufacture and sell soap and cleaning products, and with an incidental use as an indoor truck washing facility. The Zoning Hearing Board conducted a hearing on March 21, 2000, and issued its decision approving the variance application on April 25, 2000.

The Mikulas, Leonzis, and George Krajnak (Appellants) appealed to this Court to reverse the decision of the Zoning Hearing Board, and deny the use variance. Mr. Verta was not named in the appeal; Mr. Verta did not seek permission to intervene, or otherwise participate, in that action. By Order of Court dated September 11, 2000, and docketed to case No. 00-0972, this Court, without explanation, reversed the decision of the Zoning Hearing Board and denied the use variance. No further appeal was taken.

On October 16, 2000, Mr. Verta and Everbrite Industries, Inc. (Intervenors) filed an occupancy permit application for the Property, which the zoning officer denied on December 5, 2000. On December 18, 2000, Intervenors filed a zoning/building permit application to continue the current use of the Property, to manufacture soaps and cleaning products, and as a "professional truck washing and product testing facility." This application was denied by the Borough's zoning officer on December 27, 2000. The zoning officer determined that the Property was located within the "public parks" zoning district, that the requested uses were not permitted within this district, and that the application had been previously denied by Order of Court.

On January 4, 2001, the Intervenors timely filed, with the Zoning Hearing Board, a zoning application requesting a special exception or variance use of the Property and appealed the denials of their occupancy and zoning/building permit applications. The special use application identified the proposed use of the Property as a continuation of all current uses, as a full-line manufacturing and testing facility for soaps and cleaning products, and as a professional truck washing facility. The Zoning Hearing Board conducted hearings on the special exception/

variance use application and the denials of the permit applications over the course of three sessions—October 11, November 29, and December 14 of 2001. During the final session, December 14, 2001, the Intervenors withdrew the request for a use variance. Upon the conclusion of the hearings, the Zoning Hearing Board publicly voted on several of the issues presented, granted a special exception use of the Property, and formally supported its vote in a subsequently issued written decision. Appellants filed an appeal to this Court on January 11, 2002, and amended their appeal on February 27, 2002.

Appellants ask the Court to reverse the Zoning Hearing Board and deny the special exception use of the Property. Appellants contend, **inter alia,** that this Court's Order, dated September 11, 2000 is **res judicata** on the Intervenors' request for a special exception use of the Property; that the criteria for a special exception were not met; and that the Zoning Hearing Board acted in contravention of the Sunshine Act.

DISCUSSION

Res Judicata and Collateral Estoppel

Zoning limits a person's right to the unrestricted use of his property and permits a municipality to protect the public welfare by confining certain activities to specific areas within the municipality so that the community may develop in an orderly manner in accordance with a comprehensive plan. **Marino v. Zoning Hearing Board of Harrison Township,** 1 Pa. Commw. 116, 120, 274 A.2d 221, 223 (1971). A balance in these, at times, competing interests requires flexibility in the application of zoning regulations. "The doctrine of res judicata is applied sparingly in zoning matters because the need for flexibility outweighs the risk of repetitive litigations." **Stoneback v. Zoning Hearing Board of Upper Saucon Township,** 699 A.2d 824, 827 (Pa. Commw. 1997), **appeal denied,** 552 Pa. 693, 716 A.2d 1250 (1998). The nature of zoning in and of itself is dynamic, things change.

A claim or issue preclusion analysis necessitates an inquiry into two related, yet discrete principles: strict **res judicata** and collateral estoppel. **Henion v. W.C.A.B. (Firpo & Sons, Inc.),** 776 A.2d 362 (Pa. Commw. 2001). Strict **res judicata,** or claim preclusion, bars a subsequent suit on the same cause of action as a prior suit on which a final judgment on the merits issued.

Balent v. City of Wilkes-Barre, 542 Pa. 555, 563, 669 A.2d 309, 313 (1995). "**Res Judicata** applies not only to claims actually litigated, but also to claims which could have been litigated during the first proceeding if they were part of the same cause of action." **Id.** Collateral estoppel, or issue preclusion, prevents a question of law or fact, that was previously litigated and necessary to a final judgment, from being relitigated in a subsequent action on a different cause of action. **Id.** at 564, 669 A.2d at 313; **City of Pittsburgh v. Zoning Board of Adjustment of City of Pittsburgh,** 522 Pa. 44, 55, 559 A.2d 896, 901 (1989).

Res judicata bars re-litigation when there exists: (1) identity of the thing sued for, (2) identity of the cause of action, (3) identity of the persons and parties to the action, and (4) identity of the parties' capacity between the present and prior action. **Harrington v. Zoning Hearing Board of East Vincent Township,** 117 Pa. Commw. 197, 201, 543 A.2d 226, 228 (1988). With respect to zoning litigation, **res judicata** also requires a determination that there "has been no substantial change in condition or circumstances relating to the land itself since the denial of the applicant's first application." **Stoneback, supra** at 827. Collateral estoppel bars re-litigation if the following elements exist: (1) identity of issues, (2) a valid, final judgment on the merits, (3) the party against whom the doctrine is asserted was a party or in privity with a party to the prior adjudication, (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 question in the prior proceeding, and (5) the determination in the prior proceeding was essential to the judgment. **Chada v. Chada,** 756 A.2d 39, 42-43 (Pa. Super. 2000).

Appellants seek to assert the defense of **res judicata** against the Intervenors and, on this issue, Appellants bear the burden of proof. **Callery v. Blythe Township Municipal Authority,** 432 Pa. 307, 311-12, 243 A.2d 385, 387 (1968). Appellants have not met their burden.

As to **res judicata,** there exists lack of identity between the theories of recovery and the relief sought. In the prior action docketed to No. 00-0972, Intervenors sought to prevent a variance use of the Property; Intervenors presently seek to prevent a special exception/claim of right use of the Property. "[T]he

doctrine of res judicata is inapplicable in zoning matters, where the second application is based on a different theory under different provisions of the ordinance." **Stoneback, supra** at 828. Nor has collateral estoppel been proven where the Court Order, docketed to No. 00-0972, unsupported by an opinion, solely directs reversal of the Zoning Hearing Board's decision, but does not reveal whether a question of law or issue of fact necessary to determine the Intervenors' special exception/claim of right use had been litigated and adjudicated finally.

The Zoning Hearing Board properly conducted a hearing to determine whether to grant a special exception/claim of right use of the Property.

Special Exception Claim

A zoning applicant who files for a special exception does not seek to use his property in a manner that is proscribed by a zoning ordinance; rather the special exception applicant seeks a use that is envisioned by the ordinance. "Special exceptions are conditionally permitted uses which are legislatively determined to be consistent with the public interest if certain standards are met." **Upper Moreland Township Appeal,** 76 Pa. Commw. 1, 6, 462 A.2d 962, 965 (1983).

Conceptually, special exception uses are permitted uses statutorily defined within a municipality's zoning ordinance to be granted, or denied, by a zoning hearing board pursuant to express standards and criteria. 53 P.S. §10912.1. The Lansford Zoning Ordinance is no exception. The Lansford Borough Council created a statutory scheme to divide the Borough into four zoning districts pursuant to a comprehensive plan "providing for coordinated and practical residential, commercial and industrial areas." (Lansford Borough Zoning Ordinance, §103(2)) Part Three of the Borough's zoning ordinance enumerates a total of four zoning districts—Residential, Mixed Commercial, Commercial, and Industrial—within the Borough and Part Four of the ordinance provides for permitted uses, special exceptions, and conditional uses within the various zoning districts (Lansford Borough Zoning Ordinance, §§301, 403-406).

Itemizing zoning districts and categorizing the uses therein is the common and expected language of a zoning ordinance. However, and significant to this case, the Borough's ordinance contains a proviso permitting, by special exception, the conver-

sion of one nonconforming use to another nonconforming use anywhere within the Borough (Lansford Borough Zoning Ordinance, §506(3)).

Section 506(3) of the Zoning Ordinance provides:

> If lawful use involving principal use or major structures or of structure and premises in combination exists at the effective date of adoption or amendment of this [ordinance] that would not be allowed in the district under the terms of this [ordinance], the lawful use may be continued so long as it remains otherwise lawful, subject to the following provisions:
>
> 3. If no structural alterations are made, any non-conforming use of a structure or structure and premises may, as a special exception, be changed to another non-conforming use provided that the Zoning Hearing Board, either by general rule or by making findings in the specific case, shall find that the proposed use is equally appropriate or more appropriate to the district than the existing nonconforming use. In permitting such change, the Zoning Hearing Board may require appropriate conditions and safeguards in accordance with the provisions of this [ordinance].

Special exceptions granted pursuant to this section may be granted regardless of how the district within which the property is located is zoned. Special exceptions granted pursuant to Part Five of the ordinance, of which Section 506 is a part, are further unique from other special exceptions recognized in the ordinance in that such special exceptions are understood to be not generally permitted in the district and continue being nonconforming uses even though "permitted as a special exception." (Lansford Borough Zoning Ordinance, §508)

At this point, it is important to note the applicable standard of review in this case where we have not taken any additional evidence or testimony and rely upon the record established before the Zoning Hearing Board.

> [O]ur standard of review in a zoning case, where the Court of Common Pleas has taken no additional evidence, is limited to determining whether the zoning hearing board abused its discretion or committed an error of law. … An abuse of discretion will be found only if the zoning board's findings are not supported by substantial evidence, that is,

> such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. … Upon reviewing a decision of a zoning hearing board, a court may not substitute its judgment for that of the board; and, assuming the record demonstrates substantial evidence, the court is bound by the board's findings which result from resolutions of credibility and the weighing of evidence rather than a capricious disregard for the evidence.

Zoning Hearing Board of Sadsbury Township v. Board of Supervisors of Sadsbury Township, 804 A.2d 1274, 1278 (Pa. Commw. 2002) (citations omitted).

The Borough's Zoning Hearing Board, in granting the special exception, specifically addressed the applicability of Section 506(3) of the Zoning Ordinance to this case. The Board found that the Property had a history of being used for commercial and industrial uses which predated the ordinance, continued to the present time and had not been abandoned (Findings of Fact Nos. 11 through 18). Similarly, the Board determined that the Intervenors' proposed use of the Property would not endanger the public's health, welfare or safety (Findings of Fact Nos. 20 and 21; Zoning Hearing Board Decision, pp. 5-6). The Board concluded that the Intervenors met the criteria set forth in Section 506(3) of the ordinance, specifically that no major structural alterations are being made, and that the proposed use "is as appropriate as the existing nonconforming use and/or more appropriate" and, in fact, that the proposed use is "more suitable to the character of the neighborhood than some of the previous uses." (Conclusions of Law, Nos. 8 and 11) The Board also concluded that the Intervenors' proposals would "not negatively affect the health and well-being of the neighborhood" and that the proposals are "an allowable special exception under the Borough's zoning ordinance." (Conclusions of Law, Nos. 12 and 13)

After thoroughly reviewing the record in this matter, we are persuaded that findings of the Board necessary to the grant of a special exception are supported by the record and that the Board has not abused the exercise of its discretion. We are also cognizant of the deference with which we are to treat the Board's decision and of the importance of this Court not intruding upon legitimate, sustainable decisions of municipal officials. "In pass-

ing upon the propriety of the actions of municipal officials, judicial restraint rather than judicial intervention should guide the courts." **Marino, supra** at 125, 274 A.2d at 225, quoting with approval the opinion of the trial judge.

The Zoning Hearing Board's decision is supported by the record and should be upheld.[1]

Sunshine Act

Appellants assert that the Zoning Hearing Board violated Pennsylvania's Sunshine Act. 65 Pa. C.S. §701 **et seq.** This contention is not supported by the record before us.

The Sunshine Act has as its objective better government by ensuring "the public's ability to witness and evaluate the actions of public officials to determine if, in fact, the public is being adequately represented." **Babac v. Pennsylvania Milk Marketing Board,** 136 Pa. Commw. 621, 626, 584 A.2d 399, 401 (1990), **appeal granted in part,** 528 Pa. 638, 598 A.2d 994 (1991), **rev'd on other grounds,** 531 Pa. 391, 613 A.2d 551 (1992). To achieve this goal of public accountability, the Act

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[1] The Intervenors' claim of right, as we understand it, is premised on one of two bases: first, that the Property is located within a commercial zone designated on the zoning map and that, to the extent the Intervenors request commercial as well as industrial uses of the Property, the commercial uses are permitted uses within this district; and, alternatively, that if the Property is located within the "public parks" area depicted on the zoning map, that such a zoning district is not one provided for or defined within the text of the zoning ordinance, thereby causing this area to be unzoned and the Intervenors' use to be one permitted as of right.

Because critical findings on this issue have not been made by the Board, namely, is there an official zoning map and, if so, which map is it and in what zoned district is the Property located on that map, we are not willing to assume facts which have not been found by the Board and, in the absence of such findings, we cannot render a meaningful review of the Intervenors' claim on this basis. **See e.g., Piecknick v. South Strabane Township Zoning Hearing Board,** 147 Pa. Commw. 308, 316-17, 607 A.2d 829, 835-36 (1992). Nor do we have the authority to make additional factual findings on matters in dispute where none have been made by the Board. **Id.** at 317-18 n.9, 607 A.2d at 833 n.9.

That the Board determined prior uses of the Property were nonconforming does not necessarily mean the Board implicitly found the Property to be located within the "public parks" area labeled on several of the zoning maps submitted since, even within a commercial district, various of the prior industrial uses of the Property would be nonconforming. Because of our decision on the special exception claim, we have not remanded this case to the Zoning Hearing Board for further findings, but would do so if the Intervenors' right to use the Property as requested depended on this issue.

directs that "official action and deliberations by … an agency shall take place at a meeting open to the public unless closed under section 707 (relating to exceptions to open meetings), 708 (relating to executive sessions) or 712 (relating to General Assembly Meetings covered)." 65 Pa. C.S. §704. The Act defines "deliberation" to be "the discussion of agency business held for the purpose of making a decision"; "official action" includes both the decision made and the vote taken by an agency or agency business. 65 Pa. C.S. §703.

A zoning hearing board when acting on an application for a zoning permit is acting as a quasi-judicial body. **Urbano v. Meneses,** 288 Pa. Super. 103, 109, 431 A.2d 308, 311 (1981). In this capacity, the zoning hearing board is required to adhere to the provisions of the Sunshine Act. **Kennedy v. Upper Milford Township Zoning Hearing Board,** 779 A.2d 1257 (Pa. Commw. 2001).

Appellants argue that the Board's written decision in support of granting the Intervenors' application for a special exception relies upon the conclusion that a nonconforming use existed and that this use was not discussed publicly at the time the Board rendered its decision in favor of the application. In making this argument, Appellants confuse the difference between agency deliberations which may precede a decision and the statement of reasons required in the written decision of a zoning hearing board.

By statute, zoning hearing boards are required to render written decisions containing findings of fact, conclusions and the reasons therefore. Section 908(9) of the Pennsylvania Municipalities Planning Code, as applicable to this case, provides that a zoning hearing board

> shall render a written decision or, when no decision is called for, make written findings on the application within 45 days after the last hearing before the board or hearing officer. Where the application is contested or denied, each decision shall be accompanied by findings of fact and conclusions based thereon together with the reasons therefore. Conclusions based on any provisions of [the Municipalities Planning Code] or of any ordinance, rule or regulation shall contain a reference to the provision relied on and the rea-

> sons why the conclusion is deemed appropriate in the light of the facts found.

53 P.S. §10908(9).

The preparation and rendering of this written decision has repeatedly been held by our appellate courts not to constitute "official action" or to be subject to the provisions of the Sunshine Act. **Bruno v. Zoning Board of Adjustment of City of Philadelphia,** 664 A.2d 1077, 1079 (Pa. Commw. 1995). In meeting its obligation to render a written decision with reasons explaining that decision, the Zoning Hearing Board properly found and discussed the prior usage of the Property as being a nonconforming use.

In applying the Sunshine Act to the conduct of a zoning hearing board, it is important to distinguish and determine whether the zoning hearing board is acting in its legislative or quasi-judicial capacity. **Urbano, supra** at 109, 431 A.2d at 311. When acting in a quasi-judicial capacity, the Sunshine Act affords a measure of confidentiality towards the deliberations of the zoning hearing board. Section 708(a)(5) of the Act provides:

> An agency may hold an executive session …
>
> (5) To review and discuss agency business which, if conducted in public, would violate a lawful privilege or lead to the disclosure of information or confidentiality protected by law, including matters related to the initiation and conduct of investigations of possible or certain violations of the law and **quasi-judicial deliberations.**

65 Pa. C.S. §708. Section 716 of the Act re-emphasizes the importance of this confidentiality using the same language which, as pertinent, provides:

> Those deliberations or official actions which, if conducted in public, would violate a lawful privilege or lead to the disclosure of information or confidentiality protected by law, **including … quasi-judicial deliberations,** shall not fall within the scope of this [Act].

65 Pa. C.S. §716 (emphasis added).

While disagreement may exist whether quasi-judicial deliberations under these sections are, by themselves, lawful privileges or confidential communications exempt from the requirements of the Sunshine Act or, to be exempt, must be of a "sort

that, if conducted in public, would violate a lawful privilege or lead to the disclosure of information or confidentiality protected by law" (**see Kennedy v. Upper Milford Township Zoning Hearing Board, supra** at 1260), is academic in this case.[2] The record before us reveals that the Zoning Hearing Board was assiduously advised by their counsel not to deliberate in executive session and that no discussions or deliberations held for the purpose of making a decision were made in private (N.T. 12/14/01, pp. 44-45).

In affirming the Zoning Hearing Board's decision granting the special exception, we note, as did the Zoning Hearing Board, that this approval does not mean the Intervenors need not com-

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[2] In **Kennedy,** relied upon by Appellants, a two-judge panel of the Commonwealth Court appears to have found that quasi-judicial deliberations of a zoning hearing board are not per se exempt from the provisions of the Sunshine Act and, to be exempt, must further be qualified as being deliberations involving another matter which "would violate a lawful privilege or lead to the disclosure of information or confidentiality protected by law." (**Id.** at 1260, quoting from 65 Pa. C.S. §708.) The decision in this respect is unclear particularly given the egregiousness of the violation in **Kennedy** where the board clearly made a decision in executive session which the court properly determined was in and of itself a violation of the Sunshine Act. To the extent the decision goes further and states that quasi-judicial deliberations to be exempt from the Sunshine Act must be ones involving some other privilege or information protected by law, the language is dicta and, we believe, contrary to the grammar and punctuation of the statute. **See** 1 Pa. C.S. §1923(b) (grammar and punctuation of statutes). The free and open discussion and communication between zoning hearing board members involving their thoughts on a matter heard before the board and to be decided by them is inherently quasi-judicial in nature and should be protected by the law.

The deliberative process privilege has been accepted in Pennsylvania. **Commonwealth ex rel. Unified Judicial System v. Vartan,** 557 Pa. 390, 733 A.2d 1258 (1999) (plurality opinion). The privilege protects confidential deliberations of law, or policymaking that reflect opinions, recommendations or advice. **Id.** at 1265. The privilege recognizes that "if governmental agencies 'were forced to operate in a fishbowl, the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer.' " **Id.** at 1264. In this respect, the privilege "benefits the public, and not the officials who assert the privilege." **Id.**

When exercised by a quasi-judicial body in their capacity as judges making decisions, the language of the Sunshine Act, as we read it, wisely excludes deliberations of a judicial nature from public view. Such exclusion, combined with the requirement that the decision made by a zoning hearing board be openly voted upon at a public meeting and the Municipalities Planning Code's requirement of a written decision setting forth the reasons for the decision, draws the proper balance between the board's responsibility to the public and maintaining the integrity, confidentiality and quality of quasi-judicial deliberations.

ply with any other applicable statutes, ordinances or regulations with respect to the use and development of the Property, including but not limited to statutes, ordinances and regulations governing building procedures, occupational safety, and the storage and use of hazardous materials.

In accordance with the foregoing, we make the following

ORDER

AND NOW, this 24th day of December 2002, upon consideration of the Appellants' Land Use Appeal, having heard arguments and upon briefs thereon, it is hereby

ORDERED and DECREED that the decision of the Borough of Lansford's Zoning Hearing Board granting a special exception use of the property located at 401 West Bertsch Street, Lansford, Pennsylvania, for the business of soap manufacturing and commercial washing of vehicles, is AFFIRMED.

NICHOLAS J. PETROLE vs. MAUREEN S. PETROLE

Civil Action—Child Support—Arrearages—Enforcement Against Award of Equitable Distribution—Existence of Equitable Jurisdiction—Mootness

1. When joined in a divorce proceeding, the Divorce Code vests in the Court of Common Pleas broad equitable powers under Section 3323(f) to enforce child support orders. The exercise of such powers frequently depends upon facts demonstrating a past history of failing to pay court-imposed monetary obligations, existing unpaid and overdue support, anticipated future willful noncompliance, and proof that the traditional means of enforcing a child support order would prove meaningless and unenforceable.

2. Husband's petition for special relief to modify the terms of an agreed-upon equitable distribution order and to require monies which were to be paid under that order from Husband to Wife to be paid to the Domestic Relations Office in order to collect arrearages on Wife's child support obligations, which support proceedings were not joined in the divorce proceedings, and which petition was filed after Husband was held in contempt for failure to make payment of such monies to Wife, will not be countenanced.

3. Once Husband made payment of the monies required by the equitable distribution order, in full satisfaction of the obligations imposed by that order, Husband's petition for special relief requesting payment of such monies to the Domestic Relations Office became moot.

NO. 98-2036

CYNTHIA DYRDA-HATTON, Esquire—Counsel for Plaintiff/Petitioner.

THOMAS J. CARLYON, Esquire—Counsel for Defendant/Respondent.

MEMORANDUM OPINION

NANOVIC, J.—December 30, 2002

Nicholas J. Petrole (Husband) has petitioned for special relief to have an agreed-upon lump sum payment of equitable distribution owed by him to Maureen S. Petrole (Wife) paid directly to the Domestic Relations Office to offset Wife's child support arrearages. Husband has failed to plead or prove sufficient facts warranting the granting of special relief.

FACTS

The parties to this proceeding have developed an extensive relationship with the Court from the inception of the divorce complaint. Following several conferences, the parties reached agreement on the entry of a consensual no-fault divorce and the division of marital assets. Pursuant to this agreement as reflected in the Master's report and recommendation, the Court entered a decree of divorce and an order of equitable distribution which directed Husband to pay Wife, within sixty days, the sum of $10,500.00 (Divorce Decree dated August 28, 2001). Payment of these monies, as agreed upon by the parties, was to be made as follows: Wife was to receive a lump sum cash payment of $7,500.00 and a credit in the sum of $3,000.00 against Wife's accrued child support arrearages as maintained by the Domestic Relations Office of Carbon County.

After Husband failed to make the payment of $7,500.00 within sixty days, Wife filed a petition for contempt on November 16, 2001. A contempt hearing was held on January 3, 2002, following which Husband was found to be in contempt of the equitable distribution order dated on August 28, 2001. As a condition of avoiding sanctions, Husband was directed to pay the sum of $7,500.00, together with interest and Wife's counsel fees, within 120 days (Order of Court dated January 4, 2002).

On April 12, 2002, ninety-eight (98) days following the entry of this Court's order dated January 4, 2002, Husband filed the petition for special relief now before us. In this petition, Husband asks the Court to permit him to pay the amount of $7,500.00 owed to Wife directly to the Carbon County Domestic Relations Office to be credited towards child support

arrearages due and owing Husband. A hearing on Husband's petition for special relief was held on May 5, 2002. At this hearing, Husband advised the Court that the payments to Wife required by the January 4, 2002 order were made by him on May 3, 2002.

DISCUSSION

While precedent exists for the type of relief requested by Husband,[1] Husband has not convinced the Court that he is entitled to such relief.

The support order is for the parties' five minor children. At the time the support order was first entered on January 15, 2002, arrearages were set at $14,922.59 as of December 20, 2001. Wife is directed by the order to make monthly payments of $2,184.98, consisting of $2,069.83 for current support and $115.15 for arrears, and additional payments of $51.00 per month and $100.00 per month for arrears for her share of orthodontia expenses. The support order attaches Wife's wages.

Husband has not established that Wife previously attempted to defeat her child support obligations or is in default of the support order since its entry. Nor has Husband himself acted in good faith in complying with the equitable distribution order of August 28, 2001, which he, in effect, seeks to modify. Husband, represented by competent counsel, freely agreed upon the terms as expressed in that order. Yet, Husband's compliance with the order occurred only after several months of noncompliance and a court order holding him in contempt. Husband delayed as long as possible in giving effect to the equitable distribution order. Husband's own conduct militates against the equitable relief he seeks.

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[1] **Petto v. Petto,** 372 Pa. Super. 558, 539 A.2d 1337 (1988) (reversing trial court's refusal to impose a trust or some other security arrangement on funds wife owed husband in equitable distribution of the parties' marital estate to ensure future child support payments by husband where current arrearages existed and husband had in the past failed to pay child support, absconded with funds in the marital bank accounts and the children's bonds, and currently had no reported income and expressed an intent not to become gainfully employed); **Nika v. Nika,** 382 Pa. Super. 551, 555 A.2d 1337 (1989) (affirming order of equitable distribution directing that monies equitably distributed to husband be used to pay arrearages and the balance paid to the Domestic Relations Office to be used as a credit against future payments of alimony due former wife, thereby ensuring payment where husband had in the past failed to pay arrearages and current obligations and been held in contempt).

In denying Husband's request, we recognize the broad equitable powers with which we are vested under Section 3323(f) of the Divorce Code to attach pensions, monies held by third parties, and other funds for the enforcement of child support orders, but question whether such powers exist when the basis of Husband's petition is not derivative from the underlying divorce proceedings, but arises to enforce unpaid arrearages in a separate child support proceeding.[2] **Cf. Nika v. Nika,** 382 Pa. Super. 551, 557, 555 A.2d 1337, 1340-41 (1989) (full equity power determined to exist where validity of order challenged was a comprehensive order in equitable distribution, part of which included payment of alimony, not an order entered solely to enforce arrearages); **Petto v. Petto,** 372 Pa. Super. 558, 539 A.2d 1337 (1988) (equitable jurisdiction existed where payment of child support was part of a comprehensive order in divorce proceedings resolving the economic issues between the parties and wife's petition for special relief requested the court to secure the funds she owed husband in equitable distribution in order to ensure future child support payments).

Assuming, nevertheless, that full equity power and jurisdiction to consider Husband's petition does exist, the facts justify-

[2] We believe it significant that Husband's divorce complaint does not contain a claim for child support. Consequently, Pa. R.C.P. 1920.31(b)(1), which permits claims for child support, when joined in a divorce complaint, to be "enforced as provided by the rules governing actions for support and divorce, and in the Divorce Code" is not applicable and does not provide the authorization for invoking the full equity power granted by Section 3323(f) of the Divorce Code, 23 Pa. C.S. §3323(f). **Cf. Petto v. Petto, supra** at 562-63, 539 A.2d at 1339. To the extent authorization for the relief Husband requests is claimed to exist pursuant to 23 Pa. C.S. §4305(b)(10) and Pa. R.C.P. 1910.20(b), we note that

> these remedies are restricted to cases involving overdue support, **i.e.,** the delinquent support arrearages which accumulate as the result of nonpayment of a support order. They may not be used to collect past due support more quickly so long as the obligor remains current on all provisions of the support order, including repayment of past due support. If, however, the obligor subsequently defaults on the support order, subdivision (c) of this rule and the definitions in Rule 1910.1 make it clear that any past due support still owing under the order immediately converts to overdue support and remains overdue support subject to these remedies until collected in full.

Pa. R.C.P. 1910.20 (explanatory comment—2000). We also note that although Husband's petition bears the caption and docket number of the custody proceedings, the parties have treated the Petition for Special Relief in their legal memoranda as being filed pursuant to Rule 1920.43(a) and ancillary to the divorce proceedings.

ing the exercise of this power and the need to grant special relief are often compelling. **See Nika, supra** and **Petto, supra.** Frequently the facts evidence a past history of failing to pay court-imposed monetary obligations, substantial unpaid and overdue support or alimony, anticipated future willful noncompliance or an inability to do so once the funds/assets requested to be attached have been released, and the conclusion that "the traditional means of enforcing a child support order, **i.e.** contempt, wage attachment, and execution upon a judgment for arrearages, would prove meaningless and unenforceable … ." **Petto, supra** at 562, 539 A.2d at 1339. In such circumstances, not to impose a trust, or sequester or otherwise attach the funds in order to ensure future child support payments, would "frustrate the objectives of justice." **Petto, supra** at 564, 539 A.2d at 1340. Such findings and conclusions are not supported by the record in this case.

The Court also has serious concerns whether the relief requested by Husband is now moot. The payment required by the equitable distribution order has been paid by Husband thereby resolving and according full satisfaction to the outstanding litigation formerly pending with respect to compliance with the equitable distribution order. The case at which Husband's petition for special relief has been considered—the divorce proceedings—is concluded and ended.[3]

Notwithstanding termination of the divorce proceedings, should Wife become delinquent in the payment of support

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[3] The relevant legal standard for determining when a case is moot was recently set forth by the Superior Court in **First Union National Bank v. F.A. Realty Investors Corp.,** 2002 WL 31528615 (Pa. Super.):

> As a general rule, an actual case or controversy must exist at all stages of the judicial process, or a case will be dismissed as moot. **In re Duran,** 769 A.2d 497 (Pa. Super. 2001). 'An issue can become moot during the pendency of an appeal due to an intervening change in the facts of the case or due to an intervening change in the applicable law.' **In re Cain,** 527 Pa. 260, 263, 590 A.2d 291, 292 (1991). In that case, an opinion of this Court is rendered advisory in nature. **Jefferson Bank v. Newton Associates,** 454 Pa. Super. 654, 686 A.2d 834 (1996).

In re D.A., 801 A.2d 614, 616 (Pa. Super. 2002) **(en banc)** 'It is impermissible for courts to render purely advisory opinions.' **Erie Ins. Exchange v. Claypoole,** 449 Pa. Super. 142, 673 A.2d 348, 352 (Pa. Super. 1996). 'In other words, judgments or decrees to which no effect can be given will not, in most cases, be entered by this Court.' **Id.**

arrearages and Husband find it necessary to enforce expedited payment, remedies for these purposes exist, including contempt proceedings, attaching and seizing assets that the Wife holds in financial institutions, reducing and executing upon a judgment for arrearages, and suspension of driving privileges. **See generally,** Pa. R.C.P. 1910.20-1910.25. Under these remedies, attachment of the pension and Thrift Plan awarded to Wife as her sole and separate property in the divorce proceedings may be justified for overdue support. 23 Pa. C.S. §4305(b)(10)(iv); **see also, Young v. Young,** 507 Pa. 40, 488 A.2d 264 (1985) (authorizing attachment of a police pension to enforce payment of a judgment for arrearages as well as an order requiring future payments when substantial arrearages already exist with respect to an obligation of support; holding not dependent upon equitable powers authorized under Section 3323(f) of the Divorce Code).

In consideration of the foregoing, we enter the following:

ORDER

AND NOW this 30th day of December 2002, upon consideration of Plaintiff's Petition for Special Relief and after hearing and the submission of briefs thereon, it is hereby

ORDERED and DECREED that the Petition is DENIED.

Even so,

> [T]his Court will decide questions that otherwise have been rendered moot when one or more of the following exceptions to the mootness doctrine apply: 1) the case involves a question of great importance, 2) the question presented is capable of repetition and apt to elude appellate review, or 3) a party to the controversy will suffer some detriment due to the decision of the trial court.

In Re D.A., supra, 801 A.2d at 616.

Id. at paras. 15, 16.

COMMONWEALTH OF PENNSYLVANIA vs. CHRIS JAMES NEFF, Defendant

Criminal Law—Appeal From Judgment of Sentence—Preservation of Issues for Appellate Review—Sufficiency of the Evidence—Weight of the Evidence

1. Issues not raised in a 1925(b) statement are waived. A concise statement of matters complained of on appeal that is too broad or vague and fails to identify the issues raised on appeal is the equivalent of having submitted no concise statement at all.

2. A claim that the verdict is contrary to the weight of the evidence does not identify a specific claim of error.

3. A claim that the Commonwealth failed to present evidence that Defendant was incapable of safe driving due to alcohol consumption attacks the sufficiency of the evidence. A sufficiency of the evidence challenge requires a court to review the evidence in the light most favorable to the verdict winner and to draw all reasonable inferences favorable to that verdict.

4. Pennsylvania's driving under the influence statute, 75 Pa. C.S. §3731(a), requires the Commonwealth to prove beyond a reasonable doubt that (1) Defendant was operating a motor vehicle (2) while under the influence of alcohol to a degree which rendered him incapable of safe driving.

5. The phrase "under the influence" includes a mental or physical condition which substantially impairs the normal faculties essential to the safe operation of a motor vehicle.

Evidence that Defendant accelerated through a red light, drove at a speed forty miles an hour in excess of the posted speed limit, passed another motor vehicle while traveling in a no-passing zone, and failed to stop in response to the siren and flashing lights of a police vehicle, supports the jury's conclusion that Defendant's normal faculties, necessary to the safe operation of a motor vehicle, were substantially impaired.

Evidence of a blood alcohol content of 0.15 percent within half an hour of driving, a strong odor of alcohol on Defendant's breath, the presence of a partially consumed bottle of beer in Defendant's vehicle, and the opinion of intoxication by an experienced police officer supports the jury's conclusion that the impairment was alcohol related.

6. The Rules of Criminal Procedure remain unclear as to whether a weight of the evidence challenge may be made for the first time on direct appeal. By the very nature of the claim itself, a challenge that the weight of the evidence is against the verdict can only be made after trial. Despite the absence of clarity within the Rules, where the trial court addresses a weight of the evidence challenge in its Rule 1925 opinion and explains its reasons for denying the claim, a challenge to the weight of the evidence is subject to review by the appellate courts.

7. A claim that the verdict is contrary to the weight of the evidence, in that the Commonwealth failed to present competent substantiated evidence that Defendant was incapable of safe driving, requires that all of the evidence be weighed by the Court, not necessarily in the light most favorable to the verdict winner, to determine whether a serious miscarriage of justice occurred which "shocks one's sense of justice."

8. Defendant's conviction was not so contrary to the weight of the evidence to warrant a new trial where Defendant's claim is premised upon the credibility of Defendant's testimony, which version of the incident was rejected by the jury.

NO. 181 CR 02

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

MICHAEL P. GOUGH, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, J.—January 31, 2003

On October 10, 2002, following a jury trial, Chris James Neff, Defendant, was convicted of one count of driving under the influence of alcohol[1] and acquitted of one count of fleeing or attempting to elude police officers.[2] The driving under the influence conviction was Defendant's third within a period of seven years and was graded as a misdemeanor of the first degree. Consequently, in accordance with the recidivist provisions of the driving under the influence statute, Defendant, on November 21, 2002, was sentenced to a mandatory minimum term of imprisonment of not less than ninety days nor more than one year. 75 Pa. C.S. §3731(e)(1)(iii).

On December 18, 2002, Defendant filed a timely notice of appeal from the judgment of sentence. The Court requested a Statement of the Matters Complained of on Appeal pursuant to Pa. R.A.P. 1925(b), which statement was filed by Defendant on January 6, 2003. In Defendant's Statement of Matters Complained of on Appeal, Defendant asserts three broad claims of error: (1) that the verdict was contrary to the weight of the evidence because no competent, substantiated evidence was presented to establish that Defendant was incapable of safe driving; (2) that the Commonwealth failed to present any evidence to establish that Defendant was under the influence of alcohol to an extent which made him incapable of safe driving; and (3) that the verdict was contrary to the weight of the evidence. No error is claimed with respect to pretrial or trial motions, the admission of evidence, the Court's charge to the jury or sentencing.

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[1] 75 Pa. C.S. §3731(a)(1).

[2] 75 Pa. C.S. §3733(a).

PRESERVATION OF ISSUES FOR REVIEW

Preliminarily, we must determine whether Defendant has sufficiently identified the errors of which he complains. "Any issues not raised in a 1925(b) statement will be deemed waived." **Commonwealth v. Lord,** 553 Pa. 415, 719 A.2d 306, 309 (1998). Similarly, "a Concise Statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no Concise Statement at all." **Commonwealth v. Dowling,** 778 A.2d 683, 686-87 (Pa. Super. 2001). Waiver under Rule 1925 is automatic. **Commonwealth v. Butler,** 812 A.2d 631, 633 (Pa. 2002).

Claims which are generic, boilerplate and all encompassing, as well as claims which are unduly vague and imprecise, are insufficient to preserve any error for review. **Commonwealth v. Dowling, supra,** at 686. The purpose behind this rule is "to aid trial judges in identifying and focusing upon those issues which the parties plan to raise on appeal" thereby enabling the trial court to efficiently, accurately and meaningfully discuss the claim of error raised, an indispensable criteria for effective and meaningful appellate review. **Commonwealth v. Alsop,** 799 A.2d 129, 134 (Pa. Super. 2002). To require the trial court to search and frame issues the parties may have intended to raise, but of which the court is uncertain, disserves the parties and the adversarial process which is dependent on the parties framing and arguing the nuances of multifaceted issues. **Commonwealth v. Lemon,** 804 A.2d 34, 38 (Pa. Super. 2002); **Commonwealth v. Shaw,** 564 Pa. 617, 770 A.2d 295, 304 (2001) ("Our system of jurisprudence, of course, proceeds upon the time-proven assumption that adversarial presentation in actual cases and controversies, rather than visceral reactions to academic questions discovered by the Court itself, produces the best and wisest decision-making.") (Castille, J., dissenting).

Claims which allege simply that "the evidence was insufficient to support the verdict" without specifying in what respect the evidence was insufficient, or which assert that "the verdict was against the weight of the evidence" without stating why the verdict was against the weight of the evidence, are deficient. **Commonwealth v. Holmes,** 315 Pa. Super. 256, 262, 461 A.2d 1268, 1270 (1983) (discussing the inadequacy of "boilerplate" post-verdict motions); **see also, Commonwealth v. Lemon,**

supra at 37 (Rule 1925(b) statement claiming that "[t]he verdict of the jury was against the evidence," "[t]he verdict of the jury was against the weight of the evidence," and "[t]he verdict was against the law" held to be too vague to preserve sufficiency of the evidence claim) and **Commonwealth v. Seibert,** 799 A.2d 54, 62 (Pa. Super. 2002) (Rule 1925(b) statement claiming that "[t]he verdict of the jury was against the weight of the credible evidence as to all of the charges" held to be too vague to preserve weight of the evidence claim). In both instances, the court is forced to speculate about the precise error claimed and in so doing is unable to analyze and focus precisely on a specific claim of error. It is in this context that we believe the third assignment of error contained in Defendant's Statement of Matters Complained of on Appeal—that the verdict is contrary to the weight of the evidence—is deficient and identifies no specific error we can intelligently discuss. Defendant's first and second assignments of error are more specific and will be considered.

SUFFICIENCY OF THE EVIDENCE

We examine first Defendant's second assignment of error—that the Commonwealth failed to present any evidence to establish that Defendant was incapable of safe driving due to alcohol consumption. This claim is a challenge to the sufficiency of the evidence.[3] In reviewing a challenge to the sufficiency of the evidence, we must determine:

> [w]hether, viewing [all] the evidence in the light most favorable to the Commonwealth, and drawing all reasonable inferences favorable to the Commonwealth, there is sufficient evidence to find every element of the crime beyond a rea-

[3] A sufficiency claim reviews in the light most favorable to the verdict winner the presence or absence of the quantum of evidence necessary to sustain a conviction. A challenge to the weight of the evidence, in contrast, concedes the sufficiency of the evidence but reviews the overall evidence, not necessarily in the light most favorable to the verdict winner, and weighs such evidence and examines the credibility of witnesses to determine whether a manifest injustice has occurred demanding that the verdict be set aside and a new trial granted. The remedy for a sufficiency claim, if founded, results in a discharge of the conviction and a protection from retrial under the double jeopardy provisions of the Fifth Amendment to the United States Constitution, and Article I, §10 of the Pennsylvania Constitution. **See Commonwealth v. Widmer,** 560 Pa. 308, 744 A.2d 745, 751-52 (2000) (discussing the differences between sufficiency and weight of the evidence claims and the tests and relief to be applied for each).

> sonable doubt. … The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence … Moreover, in applying the above test, the entire trial record must be evaluated and all evidence actually received must be considered … Finally, the trier of fact, while passing upon the credibility of witnesses and the weight to be afforded the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Griscavage, 512 Pa. 540, 543, 517 A.2d 1256, 1257 (1986), **quoting Commonwealth v. Harper,** 485 Pa. 572, 576-77, 403 A.2d 536, 538-39 (1979).

Under this standard, the evidence established that at approximately 11:00 P.M. on May 20, 2001, as Defendant approached a traffic light while driving on Delaware Avenue in Palmerton, Carbon County, Pennsylvania, he accelerated and drove through a red light, attracting the attention of Patrolman Randolph Smith of the Palmerton Borough Police Department. Patrolman Smith immediately activated his siren and overhead red/blue lights and pursued Defendant's vehicle. Rather than stop, Defendant continued to accelerate his vehicle reaching speeds of 75 to 80 miles per hour in a 35 mile per hour speed zone.[4] At one point, Defendant's vehicle crossed the double yellow lines in the center of the road designating a no-passing area and passed the car ahead of it. Defendant traveled a distance of approximately one mile before coming to a stop at a local tavern, at which point Defendant left his car and fled on foot toward the tavern doors.

Patrolman Smith was able to apprehend the Defendant before he entered the tavern. At this point, Patrolman Smith detected a strong odor of alcohol on Defendant's breath. Patrolman Smith further observed a six-pack container of 12 ounce Budweiser beer in Defendant's car containing three full bottles and one partially consumed bottle. A blood alcohol test to which Defendant consented revealed a blood alcohol level of 0.15 percent. Defendant's blood for the test was drawn within half an hour of the stop.

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[4] At the light and for the first two blocks after the light in the direction Defendant was heading, the speed limit was twenty-five miles per hour. Thereafter, the speed limit was thirty-five miles per hour (N.T. 10/10/02, p. 29).

Defendant admitted drinking beer, at least two cans, and equivocated on the actual amount consumed (N.T. 10/10/02, pp. 108, 118-21). At trial, Patrolman Smith offered his opinion that Defendant was under the influence of alcohol and, due to this, unable to drive safely (N.T. 10/10/02, pp. 33, 66-64).

Viewing this evidence in the light most favorable to the Commonwealth and allowing all reasonable inferences therefrom, the evidence is sufficient to convict Defendant of operating a motor vehicle upon a public highway in this Commonwealth at a time when he was under the influence of alcohol to a degree which rendered him incapable of safe driving. 75 Pa. C.S. §3731(a)(1). That Defendant was operating a motor vehicle is not in dispute. With respect to whether Defendant was under the influence of alcohol to a degree which rendered him incapable of safe driving, our Supreme Court has stated:

> The statute does not require that a person be drunk, or intoxicated, or unable to drive his automobile safely in traffic, but merely that the Commonwealth prove beyond a reasonable doubt that the defendant was operating his automobile under the influence of intoxicating liquor …
>
> The statutory expression 'under the influence of intoxicating liquor' includes not only all the well known and easily recognized conditions and degrees of intoxication, but also any mental or physical condition which is the result of drinking alcoholic beverages and (a) which makes one unfit to drive an automobile, or (b) **which substantially impairs his judgment, or clearness of intellect, or any of the normal faculties essential to the safe operation of an automobile.**

Commonwealth v. Griscavage, supra at 544-45, 517 A.2d at 1258, **quoting Commonwealth v. Horn,** 395 Pa. 585, 590-91, 150 A.2d 872, 875 (1959). "[S]ubstantial impairment, in this context, means a diminution or enfeeblement in the ability to exercise judgment, to deliberate or to react prudently to changing circumstances and conditions. Its meaning is not limited to some extreme condition of disability." **Griscavage, supra** at 545, 517 A.2d at 1258.

Here, the evidence supported the jury's conclusion that Defendant's faculties essential to the safe operation of a motor vehicle were in fact substantially impaired: accelerating through

a red light on a main thoroughfare late in the evening; speeding more than forty miles per hour over the speed limit; passing another vehicle in a no-passing zone; and failing to stop when being chased by a police officer with his siren sounding and emergency lights reflecting from Defendant's vehicle. That this impairment was due to alcohol, was equally clear: a blood alcohol level of 0.15 percent from a sample of Defendant's blood drawn within half an hour of Defendant's driving;[5] a strong odor of alcohol on Defendant's breath; the presence of beer in Defendant's car, including a partially consumed bottle; and the opinion of intoxication by an experienced police officer.[6]

WEIGHT OF THE EVIDENCE

With respect to Defendant's first claim of error, that the verdict was contrary to the weight of the evidence in that the Commonwealth failed to present competent, substantiated evidence that the Defendant was incapable of safe driving, the jury did not err.[7] To grant a new trial when the weight of the evidence is challenged, we must be convinced that a serious miscarriage of justice has occurred requiring the award of a new trial so that right may be given another opportunity to pre-

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[5] Seeing 75 Pa. C.S. §§1547(c)(d)(3) and 3731(a.1)(1)-(2) (providing for admissibility of test results); **Commonwealth v. Zugay,** 745 A.2d 639, 646-47 (Pa. Super. 2000), **appeal denied,** 568 Pa. 653, 795 A.2d 976 (2000) (acknowledging the admissibility and relevance of BAC evidence to prove charges under 75 Pa. C.S. §3731(a)(1)).

[6] **See Commonwealth v. Bowser,** 425 Pa. Super. 24, 624 A.2d 125 (1993), **appeal denied,** 537 Pa. 638, 644 A.2d 161 (1994), **cert. denied,** 513 U.S. 867, 115 S.Ct. 186, 130 L.Ed. 2d 120 (1994) (experience and personal observation of a police officer permit him to render an opinion as to whether a person is intoxicated).

[7] It is the discretion of the trial court, not that of the jury, which is being reviewed by the appellate court in a weight of the evidence challenge. See footnote 9 **infra.** Therefore, a challenge to the weight of the evidence must be addressed by the trial court prior to being addressed by an appellate court.

Because a challenge to the weight of the evidence can only be made **after** trial, whether such a challenge may be made for the first time on direct appeal, without previously being raised before the trial court in a post-sentence motion, is unclear under Pa. R.Crim.P. 720(B)(1)(c) (providing that issues raised before or during trial shall be deemed preserved for appeal whether or not the defendant elects to file a post-sentence motion on those issues). **See also,** Pa. R.Crim.P. 607(A) (identifying the stages at which a claim that the verdict was against the weight of the evidence may be presented to the trial judge, presentation in a Rule 1925(b) statement not mentioned).

vail. **Commonwealth v. Weis,** 416 Pa. Super. 623, 631 n.6, 611 A.2d 1218, 1223 n.6 (1992). A verdict will not be deemed as against the weight of the evidence unless so contrary to the

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In **Commonwealth v. Widmer,** 547 Pa. 137, 689 A.2d 211 (1997), where the challenge to the weight of the evidence was first raised on appeal in defendant's statement pursuant to Pa. R.A.P. 1925(b), because the trial court in its Rule 1925 opinion stated it would have granted the motion, but apparently did not analyze and explain its reasons for doing so, the Supreme Court remanded the case to the trial court and permitted the defendant to file a motion for a new trial **nunc pro tunc** challenging the weight of the evidence. In **Commonwealth v. Goodwine,** 692 A.2d 233 (Pa. Super. 1997), **appeal denied,** 549 Pa. 695, 700 A.2d 438 (1997), defendant's challenge to the verdict based on the weight of the evidence was, like in **Widmer,** first raised in defendant's direct appeal and identified in his 1925(b) statement. In **Goodwine,** in contrast to **Widmer,** the trial court addressed the claim in its Rule 1925 opinion, denied the claim, and apparently explained its reasons for doing so. Based on this critical distinction from **Widmer,** the Superior Court held that it was not necessary to remand the matter for the filing of a motion for new trial **nunc pro tunc** and that it would review the weight of the evidence claim. (In so concluding, the Superior Court strongly recommended that the Rules of Criminal Procedure be amended to "definitively address the issue of whether a weight of the evidence claim is preserved by an appellant who fails to file post-sentence motions." **Goodwine, supra** at 236 n.1.) Accordingly, we will address the claim in this opinion.

While **Goodwine,** acknowledged that our discretion in reviewing a challenge to the weight of the evidence may be exercised in a Rule 1925 opinion, we would be lax in our review if we did not also question whether Defendant's claim is, in fact, one addressed to the weight of the evidence. Though using the talismanic phrase that the verdict was "contrary to the weight of the evidence," the grounds Defendant sets forth in support of this claim are more appropriately addressed to the sufficiency of the evidence (**i.e.** that there was insufficient "competent, substantiated evidence that the Defendant was incapable of safe driving"), a claim which we have already discussed. To the extent the claim is that evidence was erroneously admitted and considered by the jury, this claim of error has not been properly and precisely identified, and is waived. **See** discussion **supra** on requirements of Concise Statement of Matters Complained of on Appeal (**i.e.,** specific error will not be preserved by a general claim of error).

To the extent the claim is truly a challenge to the weight of the evidence, we seriously question whether the Defendant has adequately stated the issue raised and the grounds relied upon. Because a motion for a new trial on the grounds that the verdict is contrary to the weight of the evidence concedes the sufficiency of the evidence to sustain the verdict, such a motion requests the court to weigh the evidence and determine that "notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice." **Commonwealth v. Widmer, supra,** 744 A.2d at 752. In this context, Defendant's motion does not explain or identify what compelling evidence was capriciously disregarded in relation to the evidence supportive of the verdict. Nevertheless, with the intent of being complete in our review, we will also address the issue as one involving the weight of the evidence.

evidence as to "shock one's sense of justice." **Commonwealth v. Rogers,** 419 Pa. Super. 122, 141, 615 A.2d 55, 64 (1992).

In contrast to the evidence in support of the verdict discussed above, Defendant's testimony did not persuasively contradict or undermine that presented by the Commonwealth. Defendant admitted that he had been drinking beer at a friend's home for approximately an hour to an hour and a half prior to driving that evening; while Defendant minimized the number of beers he had consumed, Defendant's testimony in this respect was contradictory and inconsistent; Defendant admitted accelerating to beat the red light; Defendant denied being aware of the flashing police lights and siren; Defendant denied traveling at 75 to 80 miles an hour contending that his vehicle could not reach this speed; and Defendant denied passing another car in a no-passing zone. Such evidence was, without question, self-serving, was not required to be accepted by the jury, and did not convincingly undermine or overwhelm the evidence presented by the Commonwealth.[8] Defendant's conviction for driving under the influence was not so contrary to the evidence as to shock our sense of justice.[9]

In accordance with the foregoing, we believe Defendant's contentions to be without merit and we respectfully request that Defendant's appeal be denied.

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[8] "The fact that the jury rejected [Defendant's] version of the incident does not render the verdict so shocking or contradictory as to mandate the award of a new trial." **Commonwealth v. Weis, supra** at 631 n.6, 611 A.2d at 1223 n.6. "[W]here evidence is conflicting, the credibility of the witnesses is solely for the jury." **Commonwealth v. Russell,** 445 Pa. Super. 510, 526, 665 A.2d 1239, 1247 (1995), **appeal denied,** 544 Pa. 628, 675 A.2d 1246 (1996), and 544 Pa. 681, 679 A.2d 227 (1996).

[9] We note that appellate review of a weight of the evidence claim is a review of the trial court's exercise of discretion in ruling upon a challenge that the verdict was contrary to the weight of the evidence, whether made prior to appeal or in a Rule 1925(b) statement. **Commonwealth v. Widmer, supra,** 744 A.2d at 753; **Commonwealth v. Goodwine, supra** at 236 n.2.

COMMONWEALTH OF PENNSYLVANIA vs. JEFFREY P. MORGAN, Defendant

Criminal Law—PCRA—Timeliness and "Currently Serving" As Requirements for Jurisdiction—Waiver

1. Absent a timely filing of a PCRA petition, the court is without jurisdiction to entertain a PCRA petition. To be timely, the petition, whether a first or subsequent petition, must be filed within one year of the date the judgment of sentence becomes final, or within sixty days of the date one of the factual circumstances enumerated as an exception to the general filing deadline becomes known and could have been presented.

2. Absent an averment and proof that Defendant at the time of filing a PCRA petition is "currently serving" or waiting to serve a sentence for the conviction challenged in the petition, the court is without jurisdiction to rule on the merits of the petition. The only relief available under the PCRA is relief from noncollateral consequences of the conviction, that is, incarceration. "Collateral consequences" are insufficient to vest jurisdiction in the court under the PCRA.

3. An issue raised—or which could have been raised, but was not raised—in a prior PCRA proceeding, and which has not been litigated, is waived when the proceeding is voluntarily withdrawn. Absent a separate claim of ineffectiveness of counsel being responsible for the waiver, claims which have been waived are noncognizable and nonreviewable under the PCRA.

NO. 495 CR 97

DAVID W. ADDY, Esquire, Assistant District Attorney—Counsel for Commonwealth.

STEPHEN P. VLOSSAK, SR., Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, J.—February 12, 2003

I. FACTS AND PROCEDURAL HISTORY

Before us is Defendant Jeffrey P. Morgan's second petition for collateral relief pursuant to the Post Conviction Relief Act (hereinafter the "PCRA" or the "Act"), 42 Pa. C.S. §9541 **et seq.** For the reasons that follow, we are without jurisdiction to consider this Petition. Additionally, the issues Defendant raises have been waived and are no longer subject to PCRA review.

On May 12, 1998, Defendant pled nolo contendere to one count of statutory sexual assault, a felony of the second degree.[1] Defendant was sentenced the same date to a term of imprisonment of not less than 127 days nor more than 12 months,

[1] 18 Pa. C.S. §3122.1.

given credit for time served of 127 days, and placed on immediate parole. The sentencing guidelines at the time provided for a standard range sentence of not less than 6 to 14 months. No appeal or post-sentence motion was filed.

On or about January 8, 2001, Defendant filed a **pro se** "Motion for Withdrawal of Plea of Nolo Contendere" alleging ineffective assistance of his trial counsel and that his plea was unlawfully induced.[2] The motion was treated by the Court as a petition for post-conviction relief, his first, and counsel was appointed to represent Defendant. Subsequently, on April 3, 2001, an Amended Petition for Post-Conviction Collateral Relief was filed. In this petition, Defendant repeated the allegations of ineffective assistance of counsel and the unlawful inducement of his plea contained in the original motion. Also included in the amended petition, as an additional basis for relief, was an averment that recently-discovered exculpatory evidence, not available at the time of trial, was obtained, namely a letter from the victim denying that the offense for which Defendant was sentenced ever occurred. This letter, according to Defendant, was received by him in October, 2000, when he was in prison. Defendant acknowledged that the amended petition was untimely but claimed that the after-discovered evidence exception to a timely filed petition, coupled with interference by government officials, excused the delay. 42 Pa. C.S. §9545(b)(1)(i),(ii).

A hearing on the amended petition was scheduled for June 22, 2001. Two days prior to this date, Defendant filed a Motion to Withdraw his PCRA petition. In this motion, signed and verified by the Defendant, Defendant acknowledged that his counsel had been in contact with the victim and that the victim denied writing the letter upon which Defendant relied as the basis

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[2] "Allegations of ineffectiveness in connection with the entry of a guilty plea will serve as a basis for relief only if the ineffectiveness caused [the defendant] to enter an involuntary or unknowing plea." **Commonwealth v. Allen,** 557 Pa. 135, 732 A.2d 582, 587 (1999). When claiming unlawful inducement of a guilty plea, a defendant must further demonstrate that he is innocent in order to withdraw the plea. **Id.** at 586 n.11.

"A plea of nolo contendere is treated in the same manner as a guilty plea in terms of its effect upon a particular case." **Commonwealth v. Williams,** 442 Pa. Super. 590, 600 n.1, 660 A.2d 614, 619 n.1 (1995), **appeal denied,** 544 Pa. 608, 674 A.2d 1071 (1996).

for excusing the untimeliness of his petition; that Defendant was aware of his right to appear in person at the hearing and did not wish to be present; and that Defendant was advised by counsel that if he withdrew the petition the effect "could have an irreparable adverse impact upon any attempts to reinitiate similar litigation on the matter in the future." (Motion to Withdraw PCRA Petition, Paragraphs 19, 21, 23, 24, and 25) Nevertheless, Defendant wanted the petition withdrawn (Motion to Withdraw PCRA Petition, Paragraph 26). The Motion to Withdraw was approved by court order dated June 21, 2001, thereby terminating the proceedings. **See** Pa. R.Crim.P. 905(A) (providing for leave of court to withdraw a petition for post-conviction collateral relief).

On December 17, 2001, Defendant filed a **pro se** "Notice of Intent to File a Petition for PCRA" and a "Motion for the Court Appointment of Counsel." These two filings, taken together, have been treated as Defendant's second PCRA petition (the "Petition"). **See Commonwealth v. Kutnyak,** 781 A.2d 1259, 1261 (Pa. Super. 2001) (court required to treat and evaluate such filing as a PCRA petition regardless of the manner in which the petition is titled).[3] The Motion for the Appointment of Counsel specifically incorporates all other papers or pleadings which are on file in this matter and effectively restates the same allegations contained in Defendant's previous Amended Petition for Post-Conviction Relief filed on April 3, 2001.

Counsel was appointed for Defendant on January 16, 2002, and was provided an opportunity to file an amended PCRA petition. No amendment has been filed. After further review of

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[3] This is Defendant's second PCRA petition. Although Defendant's first petition was voluntarily withdrawn and, therefore, not decided on the merits, Defendant's claim in the first petition was not denied due to counsel's ineffectiveness or circumstances for which Defendant bore no responsibility. **See Commonwealth v. Kubis,** 808 A.2d 196 (Pa. Super. 2002), **appeal denied,** 813 A.2d 839 (Pa. 2002). Accordingly, we do not believe it appropriate to characterize the Petition now before us as "merely an extension of [Defendant's] first PCRA petition" for purposes of calculating timeliness. **See Commonwealth v. Hall,** 565 Pa. 92, 771 A.2d 1232, 1233-34 (2001) (finding second PCRA petition time-barred where petitioner failed to file timely first petition and did not establish his reliance on counsel to file an appeal); **see also, Commonwealth v. Williams, supra,** (prior PCHA petition voluntarily withdrawn treated as first post-conviction proceeding for purposes of determining whether later filed PCRA petition was a first or second post-conviction proceeding).

the Petition and all papers and filings in this matter which, as previously indicated, were incorporated by reference in the Petition, and the Court being satisfied that no issues of material fact existed necessary to a disposition of the Petition, the matter was scheduled for argument.[4] Prior to argument, and on the same date, Defendant's court-appointed counsel filed a No Merit Memo advising the Court that Defendant's Petition was time-barred and that the issues raised in the Petition have been waived by Defendant's voluntary withdrawal of his previous PCRA proceeding.

Thereafter, in accordance with Pa. R.Crim.P. 907, the Court issued a notice of its intent to dismiss the Petition, including the reasons for dismissal.[5] No response has been made to this notice.

II. **DISCUSSION**

To be eligible for relief under the PCRA, a defendant must plead and prove by a preponderance of the evidence not only that his conviction or sentence arose from one or more of the substantive bases set forth in Section 9543(a)(2) of the Act, but also (1) that he is in prison or otherwise subject to custody for the offenses of which he was convicted; (2) that he has not waived or previously litigated the issues he raises; and (3) that the failure to litigate the issues prior to or during trial, or on direct appeal, could not have been the result of any rational, strategic, or tactical decision by counsel. 42 Pa. C.S. §9543(a)(1), (2), (3), (4).

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[4] The right to an evidentiary hearing on a post-conviction petition is not absolute. Where there are no genuine issues of material fact, or where the facts alleged, if proven, would not entitle a petitioner to relief, an evidentiary hearing would serve no purpose and none is required. Pa. R.Crim.P. 907(1); **Commonwealth v. Williams,** 566 Pa. 553, 782 A.2d 517, 529 (2001) (Zappala, J., concurring). When the court is able to determine from the face of the record that defendant's claims have been previously litigated or are waived or meritless, it is not an abuse of discretion to deny the petition without first holding a hearing. **Commonwealth v. Lambert,** 568 Pa. 346, 797 A.2d 232, 248 (2001).

[5] Although authority exists excusing such notice when the petition is untimely, and defendant fails to invoke the jurisdiction of the court by pleading the applicability of any time of filing exception, the procedural requirements set forth in Rule 907 are mandatory. **Commonwealth v. Kutnyak,** 781 A.2d 1259, 1262-63 (Pa. Super. 2001); **Commonwealth v. Feighery,** 443 Pa. Super. 327, 329, 661 A.2d 437, 439 (1995).

Before entertaining the merits of a petition, the PCRA court must further satisfy itself that the petition has been timely filed and, if the petition is a second or subsequent post-conviction proceeding, that a "strong **prima facie** showing is offered to demonstrate that a miscarriage of justice may have occurred." **Commonwealth v. Lawson,** 519 Pa. 504, 513, 549 A.2d 107, 112 (1988) (emphasis in original). "A miscarriage of justice, like prejudice, can only occur where it is demonstrated that a particular omission or commission was so serious that it undermined the reliability of the outcome of the proceeding." **Id.** at 514, 549 A.2d at 112 (Papadakos, J., concurring). This standard is met if the petitioner can demonstrate either that the proceedings resulting in his conviction were so unfair that a miscarriage of justice occurred which no civilized society can tolerate or that he is innocent of the crimes charged. **Commonwealth v. Palmer,** 2002 WL 31859547 (Pa. Super.). "A Lawson determination is not a merits determination." **Id.** at ¶28 n.18.

A. **Timeliness**

What stands out when reviewing the procedural history of this case is the time lapse between Defendant's plea and sentencing, and the filing of the Petition now before us. This period of more than three years requires that we first decide, as a threshold issue, the timeliness of the Petition.

The PCRA contains specific time constraints on filing a petition for post-conviction relief. 42 Pa. C.S. §9545(b). These time limitations are mandatory and limit the jurisdiction of the court to decide the petition. **Commonwealth v. Hutchins,** 760 A.2d 50, 53 (Pa. Super. 2000) (the PCRA court has no jurisdiction to hear an untimely petition). These time limitations, unlike a statute of limitations, may not be tolled or equitably estopped. **Commonwealth v. Fahy,** 558 Pa. 313, 737 A.2d 214, 222 (1999).[6] Nor do the time limitations vary depending upon

[6] In **Commonwealth v. Fahy,** the court stated:

> Jurisdictional time limits go to a court's right or competency to adjudicate a controversy. These limitations are mandatory and interpreted literally; thus, a court has no authority to extend filing periods except as the statute permits. … As it has been established that the PCRA's time restrictions are jurisdictional, we hold that the period for filing a PCRA petition is not subject to the doctrine of equitable tolling, save to the extent the doctrine is embraced by §9545(b)(1)(i)-(iii).

Id., 737 A.2d at 222.

the nature of the individual claims raised. **Commonwealth v. Murray,** 562 Pa. 1, 753 A.2d 201, 202-203 (2000). Once time-barred, the court is without jurisdiction to consider the merits of the petition. **Commonwealth v. Murray, supra** at 203.

We begin our analysis of the timeliness of Defendant's Petition by reference to Section 9545(b). This Section provides:

> (b) Time for filing petition.—
>
> (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
>
> (i) the failure to claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.
>
> (2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.
>
> (3) For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.
>
> (4) For purposes of this subchapter, 'government officials' shall not include defense counsel, whether appointed or retained.

42 Pa. C.S. §9545(b). "[These] restrictions dictate that all petitions, including second and subsequent ones, be filed within one year of the date on which the judgment became final, unless one of the three enumerated exceptions … apply." **Com-**

monwealth v. Beasley, 559 Pa. 604, 741 A.2d 1258, 1260 (1999).

A judgment of sentence becomes final at the conclusion of direct review or at the expiration of the time for seeking such review. 42 Pa. C.S. §9545(b)(3). Here, Defendant's conviction became final on June 11, 1998, thirty days after sentencing. Pa. R.Crim.P. 720(A)(3); Pa. R.A.P. 903(a). Therefore, the one-year period within which to file a timely petition expired on June 11, 1999, making Defendant's Petition, filed on December 17, 2001, untimely under the general proscription that a petition be filed within one year of the date the judgment becomes final.

This general limitation, however, is not dispositive. Contained within Section 9545(b), are three exceptions describing three separate factual circumstances extending the deadline to file a petition beyond one year from the date the judgment of sentence becomes final: (1) interference by government officials in the presentation of the claim; (2) after-discovered facts or evidence; and (3) an after-recognized constitutional right that has been held to apply retroactively. 42 Pa. C.S. §9545(b)(1)(i)-(iii). For an exception to preserve an otherwise untimely filing, the petition must allege, and the petitioner must prove, one or more of the exceptions, and the petition invoking the exception must be filed within sixty days of the date the claim could have been presented. 42 Pa. C.S. §9545(b)(2). **Commonwealth v. Beasley, supra** at 1261. ("[I]t is the petitioner's burden to plead in the petition and prove that one of the exceptions applies."). This is a jurisdictional necessity. **Commonwealth v. Palmer, supra** at ¶11. ("[T]he courts lack jurisdiction to grant PCRA relief unless the petitioner can plead and prove that one of the exceptions to the time bar applies.").

Fatal to Defendant's Petition is any attempt to identify, much less prove, a viable exception. This failure is, apparently, insurmountable and explains, in part, the no-merit letter filed by Defendant's court-appointed counsel. The letter provides, **inter alia,** that the Petition is untimely and that the issues raised have been waived. An independent review of the record is consistent with this conclusion.

That the Petition was filed more than three years after the judgment of sentence became final is indisputable. The only exception Defendant alludes to in his Petition, Defendant's claim

of after-discovered evidence, the alleged recantation of the victim, is patently spurious.[7] This basis was raised in Defendant's first petition and, as part of a counseled decision, voluntarily abandoned. More than sixty days, in fact more than one year, has passed between October, 2000, when this basis first became known to Defendant and the filing of Defendant's current Petition. Defendant's Petition was filed neither within one year of the judgment of sentence becoming final nor within sixty days of Defendant's discovery of the evidence which he claims extends the filing deadline.

B. **Waivers**[8]

A defendant has waived an issue if the defendant could have raised the issue but failed to do so before trial, at trial, on appeal, or in a prior state post-conviction proceeding. 42 Pa. C.S. §9544(b). A defendant has previously litigated an issue if the highest appellate court in which the defendant could have had review as a matter of right has ruled on the merits of the issue, or the issue has been raised and decided in a proceeding collaterally attacking the conviction or sentence. 42 Pa. C.S. §9544 (a)(2), (3); **see also, Commonwealth v. Ragan,** 560 Pa. 106, 743 A.2d 390, 394-95 (1999).

Claims which have been previously litigated are not cognizable under the PCRA. 42 Pa. C.S. §9543(a)(3). "Generally, a PCRA petitioner cannot obtain post-conviction review of claims that were previously litigated by alleging ineffectiveness of prior counsel and presenting new theories to support the previously

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[7] Section 9543(a)(2)(vi) provides for post-conviction relief when a petitioner can prove a claim of newly discovered exculpatory evidence. In order to succeed on such a claim, the petitioner must establish by a preponderance of the evidence that:

(1) the evidence has been discovered after the trial and it could not have been obtained at or prior to trial through reasonable diligence;

(2) such evidence is not cumulative;

(3) it is not being used solely to impeach credibility; and

(4) such evidence would likely compel a different verdict.

Commonwealth v. Fiore, 780 A.2d 704, 711 (Pa. Super. 2001), **appeal granted,** 568 Pa. 713, 797 A.2d 910 (2002), **citing Commonwealth v. Abu-Jamal,** 553 Pa. 485, 517, 720 A.2d 79, 94 (1998).

[8] In accordance with our discussion of timeliness, **supra,** and expiration of Defendant's sentence, **infra,** we believe we are without jurisdiction to adjudicate the Petition. Accordingly, we address this issue with reservations, and in the alternative.

litigated versions of the claims." **Commonwealth v. Lambert,** 568 Pa. 346, 797 A.2d 232, 240 (2001); **Commonwealth v. Ragan, supra** at 395 ("[A] petitioner cannot obtain post-conviction relief by alleging ineffectiveness of prior counsel but presenting previously litigated claims shrouded under novel theories to support the claim of ineffectiveness.").

Claims which have been waived are also not cognizable under the PCRA. 42 Pa. C.S. §9543(a)(3); **Commonwealth v. Albrecht,** 554 Pa. 30, 720 A.2d 693, 700 (1998). Once waived, a direct challenge to the error claimed is no longer possible; nothing defendant can do can resurrect the claim itself. **Commonwealth v. Lambert, supra** at 242. Issues waived may, however, be challenged derivatively through allegations and proof of prior counsel's ineffectiveness, a claim which is cognizable under the PCRA. 42 Pa. C.S. §9543(a)(2)(ii); **Commonwealth v. Lambert, supra** at 242.

To establish a claim of ineffectiveness of counsel, a defendant must prove by a preponderance of the evidence that: (1) the underlying claim is of arguable merit; (2) counsel's performance had no reasonable basis; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the proceedings would have been different. **Commonwealth v. Lambert, supra** at 243.[9] Ineffectiveness claims are concerned with defense counsel's performance; the underlying issue is only indirectly implicated. **Commonwealth v. Williams,** 566 Pa. 553, 782 A.2d 517, 535 (2001) (Castille, J., concurring).

Ineffectiveness claims of trial counsel are waived if not raised at the earliest opportunity at which the claim can be raised on post-conviction collateral review. **Commonwealth v. Grant,** 813 A.2d 726 (Pa. 2002). "Although a claim of ineffectiveness must be raised at the earliest possible stage in which the allegedly ineffective counsel no longer represents the petitioner,... a claim of ineffectiveness will not be deemed waived where the petitioner has layered the claim by alleging the ineffectiveness of all prior counsel for failing to pursue the claim." **Common-**

[9] The United States Supreme Court has identified three categories of cases in which the third element of this test, the prejudice prong, is presumed rather than required to be proven by the defendant: "(1) an actual denial of counsel, (2) state interference with counsel's assistance, or (3) an actual conflict of interest burdening counsel." **Commonwealth v. Lambert, supra** at 245.

wealth v. Allen, 557 Pa. 135, 732 A.2d 582, 587 (1999) (citations omitted). While boilerplate assertions of ineffectiveness of all prior counsel may be sufficient at the pleading stage to preserve claims of ineffective assistance of counsel, defendant has the burden of developing and proving the substantive merits of ineffectiveness asserted against each separate prior counsel. **Commonwealth v. Williams, supra,** 782 A.2d at 525. ("PCRA counsel must, in pleadings and briefs, undertake to develop, to the extent possible, the nature of the claim asserted with respect to each individual facet of a layered ineffectiveness claim, including that which relates to appellate counsel.")

In the present case, Defendant voluntarily withdrew his first PCRA Petition filed on January 8, 2001. Consequently, the merits of that Petition were not decided and have not been previously litigated within the meaning of the PCRA. However, since all the issues Defendant now raises were raised, or could have been raised, in the 2001 proceedings, they have been waived under Section 9544(b). **Commonwealth v. Williams,** 442 Pa. Super. 590, 597, 660 A.2d 614, 617 (1995), **appeal denied,** 544 Pa. 608, 674 A.2d 1071 (1996) (finding waiver of issues not litigated in prior PCHA petition voluntarily withdrawn).

Defendant's present Petition does not raise a challenge to the adequacy of previous PCRA counsel's performance in discontinuing the first PCRA proceedings. **See Commonwealth v. Green,** 551 Pa. 88, 709 A.2d 382, 383 n.4 (1998) (analysis of abandoned claim "is undertaken solely for the purpose of resolving questions of ineffective representation"), **quoting Commonwealth v. Hubbard,** 472 Pa. 259, 278, 372 A.2d 687, 696 (1977). In failing to do so, the claim, if any existed, has been waived, and Defendant's Petition is subject to dismissal for failure to state a claim in relation to such issue. **Commonwealth v. Williams, supra,** 782 A.2d at 526.[10]

C. **Expiration of Sentence**

In order to be eligible for relief under the PCRA, a defendant must be currently serving a sentence of death, imprisonment, probation or parole for the conviction that he challenges,

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[10] Even if Defendant had averred the ineffectiveness of prior PCRA counsel, such a claim does not extend the filing deadlines under the Act and Defendant's Petition would still be time-barred. **Commonwealth v. McKinney,** 772 A.2d 1023, 1025 (Pa. Super. 2001).

or must be currently serving a prior sentence which must expire before he may commence serving the disputed sentence. 42 Pa. C.S. §9543(a)(1)(i)-(iii). If a PCRA petition is filed after the defendant's unconditional release from custody for the conviction or sentence challenged, the court is without jurisdiction to hear the petition. **Commonwealth v. Ahlborn,** 453 Pa. Super. 124, 142, 683 A.2d 632, 637 (1996), **aff'd,** 548 Pa. 544, 699 A.2d 718 (1997). If the defendant is released from custody after the PCRA petition is filed, but before its adjudication, the issue is no longer one of jurisdiction but of mootness. In the latter context, expiration of the defendant's sentence and his unconditional discharge from custody during the pendency of the petition, renders meaningless any relief available under the PCRA and requires the court, in the exercise of its jurisdiction, to dismiss the petition as moot. **Commonwealth v. Ahlborn, supra** at 142, 683 A.2d at 637-38.

In Defendant's Petition, Defendant acknowledges that his sentence has been served (Motion for the Court Appointment of Counsel, Paragraph 1, page 2; **see also,** Affidavit attached to the Motion, Paragraph 9). Further, the sentence imposed on May 12, 1998, expired, on its face, by January 5, 1999 (**i.e.,** 127 days prior to May 12, 1999). By the date Defendant filed his Petition, December 17, 2001, Defendant's sentence had been fully satisfied and Defendant was ineligible for post-conviction collateral relief.

To the extent Defendant argues that he is prejudiced by the record of his conviction and that his conviction will have future criminal consequences (**e.g.,** future sentencing and recidivist enhancements) and may have actual or potential civil consequences (**e.g.,** his ability to vote, engage in certain businesses, hold public office, or serve as a juror), the former doctrine of "collateral consequences" under the PCHA has been rejected under the PCRA. **Commonwealth v. Pierce (Nevius),** 397 Pa. Super. 126, 579 A.2d 963 (1990), **appeal denied,** 527 Pa. 609, 590 A.2d 296 (1991). Such indirect effects of his conviction are legally insufficient to present a claim for relief under the PCRA. **Commonwealth v. Ahlborn,** 548 Pa. 544, 699 A.2d 718, 720-21 (1997).

III. **CONCLUSION**

In these proceedings, Defendant is no longer protected by the presumption of innocence and has the burden of establish-

ing his eligibility for relief under the PCRA. It is clear from the face of the record that Defendant cannot, and has not, met this burden. The severity of that burden is further enhanced by the **Lawson** standard for second and subsequent petitions.

We hold first that the time restrictions for filing a PCRA petition are jurisdictional, that Defendant's Petition was untimely when filed, and that none of the exceptions to a timely filing apply. Therefore, we are without jurisdiction to entertain the merits of the Petition and none of the claims raised by Defendant are cognizable on collateral review.

We hold further that Defendant's Petition was filed after his sentence expired, that the forms of relief available under the PCRA do not include relief from the collateral consequences of a conviction, and that once Defendant was unconditionally released from custody on the conviction challenged, the Court was without jurisdiction under the PCRA to consider a petition subsequently filed.

Finally, and alternatively, we hold that the issues raised by Defendant have been waived.

In consideration of the forgoing, we enter the following:

ORDER OF COURT

AND NOW, this 12th day of February, 2003, for the reasons stated in our accompanying opinion, it is hereby

ORDERED and DECREED that Defendant Jeffrey P. Morgan's Petition for Post-Conviction Collateral Relief is DISMISSED.

Notice to Defendant

1. You have the right to appeal to the Pennsylvania Superior Court from this order dismissing your PCRA Petition and such appeal must be filed within 30 days from the entry of this order, Pa. R.A.P. 108 & 903.

2. You have the right to assistance of legal counsel in the preparation of the appeal.

3. You have the right to proceed **in forma pauperis** and to have an attorney appointed to assist you in the preparation of the appeal, if you are indigent. However, should your present counsel be granted permission to withdraw, you may "proceed pro se, or by privately retained counsel, or not at all." **Commonwealth v. Turner,** 518 Pa. 491, 495, 544 A.2d 927, 928-29 (1988).

COMMONWEALTH OF PENNSYLVANIA vs. JOSHUA YORGEY, Defendant

*Criminal Law—Suppression—**Miranda**—Meaning and Requirement of Custody—Legality of Arrest—Necessity of Probable Cause*

1. **Miranda** dictates, that a custodial interrogation by police be prefaced by certain prescribed warnings, does not apply to an investigatory stop supported by reasonable suspicion. Police questions to confirm or dispel a police officer's reasonable suspicions justifying the stop may occur absent **Miranda** warnings.

2. An officer's request to question a suspect outside his home, when reasonably related to the circumstances provoking his initial suspicion, does not automatically convert an investigative detention into a custodial confinement. The test for determining when an individual is in custody is the totality of the circumstances, the officer's request being only one of a myriad of factors to be considered.

3. Additional information discovered by the investigating officer following his detention of defendant for driving under the influence—the odor of alcohol on defendant's breath, and confirmation that defendant had consumed beer earlier—when combined with the officer's earlier observations of defendant's glassy and bloodshot eyes and unsteady balance following a one car accident, provided probable cause to arrest defendant for driving under the influence and to request a blood alcohol test.

NO. 243 CR 02

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

STEPHEN P. VLOSSAK, SR., Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, J.—February 28, 2003

Before us is Defendant, Joshua Yorgey's, request that we suppress certain statements made by him and the results of a blood alcohol test as they relate to the criminal charges filed against him.[1] Defendant contends that the statements were made in response to police questioning while he was in custody without the benefit of **Miranda** warnings and that probable cause did not exist for his arrest and the request for blood testing.

FINDINGS OF FACT

The relevant facts of this case are not in dispute. During the early morning hours of January 23, 2002, at approximately

[1] Defendant has been charged with two counts of driving under the influence (incapable of safe driving, and driving with a blood alcohol content in excess of 0.10%), careless driving and leaving the scene of an accident. 75 Pa. C.S. §§3731(a)(1), 3731(a)(4)(i), 3714 and 3745(a) respectively.

2:23 A.M., Corporal Neil Ebbert of the Borough of Lehighton Police Department was on patrol when he received a call from the Carbon County Communications Center to report to the scene of a hit and run accident which "just occurred" at 615 Mahoning Street in the Borough (N.T., p. 4). The accident had been reported by the residents of that location (N.T., p. 22).

Officer Ebbert immediately responded and arrived at the scene within minutes. While there, he observed where a motor vehicle had hit and sheared a utility pole near its base and also collided with and snapped a tree in the front yard (N.T., p. 4). Wreckage from the motor vehicle was strewn about and a trail of fluid led from the accident scene onto Mahoning Street westbound (N.T., pp. 4-5, 17).

Officer Ebbert followed the fluid trail to a home approximately one mile away where he found a motor vehicle parked in the driveway facing the home (N.T., pp. 5-6). The vehicle was heavily damaged in the front end and was clearly the vehicle involved in the accident being investigated: parts of the utility pole and the tree were embedded in the vehicle and pieces of the vehicle found at the accident scene matched the vehicle in the driveway (N.T. pp. 6, 19).

Lights inside the home were on (N.T., p. 20). At the front door, after knocking, Officer Ebbert was met within twenty to thirty seconds by a gentleman, later identified as Defendant's father (N.T., pp. 6-7, 20). When Officer Ebbert asked whose vehicle was in the driveway, Defendant's father immediately offered to get the driver of the car and invited Officer Ebbert inside (N.T., pp. 7, 20-21). Officer Ebbert then observed the Defendant coming up the steps from the basement. The time was approximately 2:45 A.M. (N.T., p. 13). Officer Ebbert noted that the Defendant's eyes were glassy and bloodshot, that the Defendant swayed while walking and that Defendant's balance was unsteady (N.T., p. 7).[2]

As the Defendant approached Officer Ebbert, Officer Ebbert asked the Defendant to accompany him outside to the Defendant's vehicle. The Defendant willingly complied but staggered when walking outside (N.T., pp. 8, 21).

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[2] In following the fluid trail to the home, Officer Ebbert had also noted that the trail was not straight but weaved within the lane of travel and that, when the turn onto the road leading to Defendant's home was made, the turn was wide and car parts were lying on the road (N.T., pp. 15-16).

While standing outside by the damaged vehicle, the Defendant volunteered that he must have hit something. When asked if he knew what he hit, Defendant stated that earlier he had consumed a six-pack of beer and was returning home from a local restaurant when the accident occurred (N.T., p. 8).

During their conversation, Officer Ebbert detected an odor of brewed beverage on Defendant's breath (N.T., p. 8).

Defendant was then arrested and a blood alcohol test requested and consented to (N.T., p. 9). Blood was drawn at a nearby hospital at 3:30 A.M. (N.T., p. 11). The results were 0.20% (N.T., p. 10). No field sobriety tests were requested or performed prior to Defendant's arrest.

On October 10, 2002, Defendant filed a petition to suppress the blood alcohol results as well as any statements made to Officer Ebbert. At no time prior to Officer Ebbert's questioning of Defendant, or Defendant's arrest, was Defendant given **Miranda** warnings (N.T., p. 20).

DISCUSSION

SUPPRESSION AND THE REQUIREMENTS OF MIRANDA

In **Miranda v. Arizona,** 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), the United States Supreme Court determined that interrogation[3] by police of an individual in custody, or who was otherwise deprived of his freedom of action in any significant way, must be preceded by the now famous **Miranda** warnings: (1) that he has the right to remain silent, (2) that any statements he makes may be used as evidence against him, (3) that he has the right to the presence of an attorney, either privately retained or, if he cannot afford one, appointed by the court, before questioning, and (4) that, if he is willing to give a statement, he may stop at any time. These warnings must be provided prior to any custodial interrogation by police. "Testimonial evidence which the police [obtain] after wrongfully failing to give **Miranda** warnings must be suppressed." **Commonwealth v. Toanone,** 381 Pa. Super. 336, 343, 553 A.2d 998, 1001 (1989).

[3] "Interrogation" is defined as "questioning initiated by law enforcement officials." **Commonwealth v. DeJesus,** 567 Pa. 415, 787 A.2d 394, 401 (2001), **cert. denied,** 123 S.Ct. 580, 154 L.Ed. 2d 441 (2002), **quoting Miranda, supra** at 444.

"In determining whether an individual [is] in custody, a court must examine all of the circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." **Stansbury v. California,** 511 U.S. 318, 322-323, 114 S.Ct. 1526, 1528-29, 128 L.Ed. 2d 293 (1994) (per curiam) (citations and quotations omitted). "[T]his jurisdiction's test of 'custodial interrogation' examines more than actual deprivation of freedom. Pennsylvania's test for custodial interrogation is whether the suspect is physically deprived of his freedom in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by said interrogation … ." **Commonwealth v. Gonzalez,** 519 Pa. 116, 124, 546 A.2d 26, 29 (1988) (citations omitted). This standard of reasonableness is to be measured from the viewpoint of a reasonable person innocent of any crime. **Commonwealth v. Jones,** 474 Pa. 364, 374, 378 A.2d 835, 840 (1977), **cert. denied,** 435 U.S. 947, 98 S.Ct. 1533, 55 L.Ed. 2d 546 (1978); **Florida v. Bostick,** 501 U.S. 429, 438, 111 S.Ct. 2382, 2388, 115 L.Ed. 2d 389 (1991) (the reasonable person test presupposes an innocent person).

The test is an objective one based upon the whole picture, the totality of the circumstances. The police officer's subjective intent does not govern the determination but rather the objective and reasonable impressions and belief of the person being questioned. **Commonwealth v. Edmiston,** 535 Pa. 210, 225, 634 A.2d 1078, 1085-86 (1993); **Commonwealth v. Duncan,** 514 Pa. 395, 400, 525 A.2d 1177, 1179 (1987) ("[A] police officer's subjective view that a defendant was not free to leave is of no moment absent an act indicating an intention to take the person into custody."). The question is not decided by whether the individual interrogated was a suspect in the case or the focus of the investigation at the time of the interrogation. **Commonwealth v. Busch,** 552 Pa. 43, 713 A.2d 97, 99 (1998). The standard is the same under the Pennsylvania and Federal Constitutions. **Id.** at 100-101 n.5.

Complicating the determination whether **Miranda** warnings are required prior to questioning by police is the concept of an investigative detention. Under **Terry v. Ohio,** 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968), the police may restrict

an individual's freedom of movement for a limited period of time in order to conduct an investigation when specific and articulable facts give rise to a reasonable suspicion of criminal activity. An investigative detention is one of the three categories of interaction between citizens and the police recognized by our Supreme Court:

> The first of these is a 'mere encounter' (or request for information) which need not be supported by any level of suspicion, but carries no official compulsion to stop or to respond. See **Florida v. Royer,** 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); **Florida v. Bostick,** 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991). The second, an 'investigative detention' must be supported by reasonable suspicion; it subjects a suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of an arrest. See **Berkemer v. McCarty,** 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984); **Terry v. Ohio,** 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Finally, an arrest or 'custodial detention' must be supported by probable cause. See **Dunaway v. New York,** 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); **Commonwealth v. Rodriques,** 532 Pa. 62, 614 A.2d 1378 (1992).

Commonwealth v. Mendenhall, 552 Pa. 484, 715 A.2d 1117, 1119 (1998), **quoting Commonwealth v. Ellis,** 541 Pa. 285, 293-94, 662 A.2d 1043, 1047-48 (1995).

The proper scope of an investigative detention is circumscribed by the reasons giving rise to the police officer's reasonable suspicion. **Commonwealth v. Strickler,** 563 Pa. 47, 757 A.2d 884, 896 (2000). "To maintain constitutional validity, an investigative detention must be supported by a reasonable and articulable suspicion that the person seized is engaged in criminal activity and may continue only so long as is necessary to confirm or dispel such suspicion; … whereas, a custodial detention is legal only if based on probable cause." **Id.** at 889. (citations omitted) "Said another way, police detentions become custodial when, under the totality of the circumstances, the conditions and/or duration of the detention becomes so coercive as to constitute the functional equivalent of arrest." **Commonwealth v. Mannion,** 725 A.2d 196, 200 (Pa. Super. 1999).

Miranda warnings are only required prior to a custodial interrogation, however, a person is not in custody for purposes of **Miranda** simply because his freedom of movement has been restricted by the police.

> It is important to note, however, that while a 'seizure' of a suspect by police triggers Fourth Amendment protections, it does not trigger **Miranda** rights under the Fifth Amendment. 'Seizures' and 'custody' are analytically distinct concepts in the modern criminal constitutional law lexicon. The mere fact that an individual is subjected to a stop and a period of detention during which the individual is subject to the control of the police and not free to leave (a seizure) does not render such detention 'custodial' so as to require **Miranda** warnings. 'While a suspect may certainly walk away from a mere encounter with a police officer, every traffic stop and every **Terry** stop involves a stop and period of time during which the suspect is not free to go but is subject to the control of the police officer detaining him.' (citations omitted).

Commonwealth v. Haupt, 389 Pa. Super. 614, 625, 567 A.2d 1074, 1080 (1989), **quoting Commonwealth v. Ellis, supra** at 354, 549 A.2d at 1331.[4] "When a person's inculpatory statement is not made in response to custodial interrogation, the statement is classified as gratuitous, and is not subject to suppression for lack of warnings." **Commonwealth v. Mannion, supra** at 200.

Underlying **Miranda,** and therefore to be considered in determining whether a detention is custodial or investigatory, is whether Defendant's will to assert his legal rights has been undermined by the circumstances surrounding his questioning by the police. It "was the compulsive aspect of custodial inter-

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[4] The right of silence protected by **Miranda** emanates from the Fifth Amendment and the privilege not to be compelled to provide testimonial or communicative evidence or to be a witness against oneself. **Commonwealth v. Ellis,** 379 Pa. Super. 337, 549 A.2d 1323, 1329 (1988). "Requiring a driver to perform physical tests or to take a breath analysis test does not violate the privilege against self incrimination because the evidence procured is of a physical nature rather than testimonial, and therefore, no **Miranda** warnings are required." **Commonwealth v. Benson,** 280 Pa. Super. 20, 29, 421 A.2d 383, 387 (1980) (footnote omitted). The protection from being compelled to produce real or physical evidence arises under the Fourth Amendment. **Id.**

rogation, and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the Court to impose the **Miranda** requirements with regard to custodial questioning." **Beckwith v. United States,** 425 U.S. 341, 346-47 96 S.Ct. 1612, 1616, 48 L.Ed. 2d 1 (1976). Therefore, "[f]idelity to the doctrine announced in **Miranda** requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated. Thus, we must determine whether [the totality of the circumstances exert] upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights." **Berkemer v. McCarty,** 468 U.S. 420, 436-37, 104 S.Ct. 3138, 3148-49, 82 L.Ed. 2d 317, 332-33 (1984).

"Among the factors generally considered in determining whether a detention is investigative or custodial are: the basis for the detention (the crime suspected and the grounds for suspicion); the duration of the detention; the location of the detention (public or private); whether the suspect was transported against his will (how far, why); the method of detention; the show, threat, or use of force; and, the investigative methods used to conform or dispel suspicions." **Commonwealth v. Douglass,** 372 Pa. Super. 227, 245, 539 A.2d 412, 421 (1988), **appeal denied,** 520 Pa. 595, 552 A.2d 250 (1988). Further, "[w]hen a defendant files a motion to suppress, the burden is on the Commonwealth to prove, by a preponderance of the evidence, that the challenged evidence is admissible." **Commonwealth v. Blasioli,** 454 Pa. Super. 207, 215, 685 A.2d 151, 155 (1996), **aff'd,** 552 Pa. 149, 713 A.2d 1117 (1998), **citing** Pa. R.Crim.P. 323 (now Rule 581(H)). With these principles in mind and recognizing that the ultimate decision is necessarily contextual and extremely fact specific, we consider whether Officer Ebbert's questioning of the Defendant was a mere encounter, an investigative detention, or a custodial interrogation.

In this case, by the time Officer Ebbert approached the door to Defendant's residence, he knew that Section 3745(a) of the Vehicle Code had been violated, hit and run, and that the vehicle involved was parked in Defendant's driveway. Once told by Defendant's father that the driver was present, Officer Ebbert was justified in wanting to ask the driver what had happened

and, from his observations of the Defendant, he obtained an objective basis to investigate whether Defendant might have been driving while under the influence. That Officer Ebbert had a reasonable suspicion, at this point, to believe that Defendant had committed a crime and grounds to temporarily detain the Defendant to obtain further information to confirm or dispel his suspicion is apparent.

From what we can determine, Defendant was asked a few questions over a brief period by one police officer.[5] The questions were logically related to the damage to Defendant's vehicle and were asked outside Defendant's home, a non-coercive location. No evidence was presented of any force, show of force, threats of force, or physical restraints exhibited or used. Nor did Defendant at any time testify that he felt threatened or intimidated or dominated by the surrounding circumstances.

That Officer Ebbert asked Defendant to step outside to be questioned and, to this extent, exercised some control over Defendant's movements, does not automatically transform a legitimate investigative detention into a custodial interrogation. The basis for the request was apparent and for non-custodial reasons: to discuss and, at the same time, examine the damage to Defendant's vehicle which was present and parked in front of Defendant's home. The request was for legitimate law enforcement purposes, the distance involved minor, and the investigation quickly and diligently pursued. Compare **Commonwealth v. Lovette,** 498 Pa. 665, 450 A.2d 975 (1982), **cert. denied,** 459 U.S. 1178, 103 S.Ct. 803, 74 L.Ed. 2d 1025 (1983) (placing defendant in police car and transporting him to the scene of an offense, held to be an arrest despite Commonwealth's contention that the seizure was intended to serve investigative purposes rather than to arrest and charge), with **Commonwealth v. Smith,** 732 A.2d 1226 (Pa. Super. 1999), **appeal granted,** 565 Pa. 633, 771 A.2d 1283 (2001) (asking defendant to exit a

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[5] Although the transcript reveals that the Mahoning Township Police met Officer Ebbert outside Defendant's home before Officer Ebbert entered the home, the record is silent as to whether any other officers were present when Officer Ebbert questioned Defendant (N.T., pp.18-19). No evidence has been presented to suggest that any other officer was an active participant in Officer Ebbert's questioning of the Defendant.

bus in order to speak with police in private, a request consented to by defendant, did not amount to a custodial detention).

We believe Officer Ebbert's conduct while investigating this incident was reasonable, responsible and properly focused on the events and on-the-spot observations giving rise to his suspicions. Defendant's conduct, in turn, was consistent with that of a willing and cooperative party. The record does not support a belief that Defendant was physically deprived of his freedom in any significant way or that he was placed in a situation in which he reasonably believed that his freedom of action or movement was restricted by Officer Ebbert's questions. Neither the conditions nor duration of Defendant's detention became so coercive as to constitute the functional equivalent of formal arrest. **Cf. United States v. Sharpe,** 470 U.S. 675, 686, 105 S.Ct. 1568, 1575-76, 84 L.Ed. 2d 605, 615-16 (1985) (the reasonableness of an investigative detention must be judged based upon the reasonableness of the steps taken to confirm or dispel suspicions; courts must consider the fact that events develop swiftly and should avoid unrealistic second-guessing).

In reaching this decision, we believe it important to note that **Miranda** is a non-constitutional prophylactic rule having as its rationale trustworthiness of the statements received and deterrence of abusive police practice. Our ruling today will compromise neither.

SUPPRESSION—LEGALITY OF ARREST

We next address whether Officer Ebbert's stop of Defendant provided sufficient information to support Defendant's arrest, that is, did probable cause exist to arrest Defendant for driving under the influence. We believe so.

"Probable cause" to arrest "exists where the facts and circumstances within the officer's knowledge are sufficient to warrant a person of reasonable caution in the belief that an offense has been or is being committed." **Commonwealth v. Acosta,** 2003 WL 122395, ¶6 (Pa. Super.) "It is only the probability and not a **prima facie** showing of criminal activity that is a standard of probable cause." **Commonwealth v. Monaghan,** 295 Pa. Super. 450, 453, 441 A.2d 1318, 1320 (1982), **quoting Commonwealth v. Vesselles,** 273 Pa. Super. 100, 416 A.2d 1108 (1979) (emphasis added). To arrest Defendant for driving under the influence, it was not necessary for Officer Ebbert to

witness Defendant driving. 75 Pa. C.S. §3731(c); **Commonwealth v. Monaghan, supra**.

While immediately prior to asking Defendant to step outside to talk, Officer Ebbert had reason to believe that Defendant was involved in a one-vehicle accident from which he fled, and exhibited bloodshot and glassy eyes, and an unsteady gait, after speaking with Defendant, Officer Ebbert's suspicions of driving under the influence were confirmed. It was then that Officer Ebbert first detected the odor of alcohol on Defendant's breath and learned that Defendant had been drinking beer prior to the accident. Officer Ebbert's prior observations of certain indicia of intoxication—Defendant's glassy and bloodshot eyes and unsteady gait—were also consistent with possible injury from the accident; the odor of alcohol on Defendant's breath and Defendant's admission to drinking earlier provided the necessary probable cause to believe that Defendant was driving under the influence of alcohol at the time of the accident. **Cf. Commonwealth v. Haynos,** 363 Pa. Super. 1, 525 A.2d 394 (1987), **appeal denied,** 517 Pa. 604, 536 A.2d 1329 (1987) (probable cause to arrest defendant for driving under the influence existed where defendant was involved in a one car accident and the officer detected an odor of alcohol on defendant's breath).

CONCLUSIONS OF LAW

1. At the time Officer Ebbert questioned Defendant, Officer Ebbert had reasonable suspicion, based on specific and articulable facts, that the Defendant had violated the Motor Vehicle Code, specifically, by leaving the scene of an accident and driving while under the influence.

2. Officer Ebbert's suspicions constituted reasonable grounds to detain the Defendant and question Defendant about the motor vehicle accident he was investigating and Defendant's involvement in that accident.

3. Officer Ebbert's request that the Defendant step outside to be questioned was for legitimate law-enforcement purposes, reasonable under the circumstances, and did not transform the detention into a custodial interrogation.

4. The statements made by Defendant to Officer Ebbert were gratuitous and voluntary on his part and not the product of a custodial interrogation.

5. Defendant was arrested based upon sufficient probable cause.

6. The blood test in question was administered with Defendant's consent, at the request of a police officer, having reasonable grounds to believe that Defendant had been driving while under the influence of alcohol.

In accordance with the forgoing, we enter the following order

ORDER OF COURT

AND NOW, this 28th day of February, 2003, it is hereby

ORDERED and DECREED that Defendant's Omnibus Pretrial Petition in the Nature of a Motion to Suppress Evidence is DENIED.

MAUREEN S. PETROLE, Plaintiff vs.
NICHOLAS J. PETROLE, Defendant

Civil Action—Child Custody—Preservation of Issues for Review—Judicial Notice of Other Proceedings—Trial Court's Standard of Review of Hearing Officer's Findings and Recommendation—Definition of Primary Physical Custody—Determination of Best Interests

1. When evidence sought to be presented is excluded, protection of the record requires an offer of proof.

2. Preservation of issues for review requires that issues be properly raised and developed in a brief together with citation to the record and legal authority.

3. Generally, the court is without authority to take judicial notice of the records of another case even though the contents of the records may be known to the court.

4. Primary physical custody is not determined by the number of nights spent with either parent.

5. In reviewing a hearing officer's findings and recommendations, the trial court makes an independent review of the record to determine whether the hearing officer's findings and recommendations are appropriate. The trial court should not set aside findings based upon credibility determinations made by the hearing officer.

6. The best interests of the children, not of the parents, is the issue in any child custody dispute.

7. A parent's status as primary physical custodian does not foreclose an extension of the periods of partial physical custody with the other parent when in the children's best interests. It is the quantity and quality of contacts with both parents which must be carefully examined in order to determine the best interests of the children.

8. Where the existing custody arrangement unnecessarily interferes with the children's extracurricular activities and homework by requiring the Mother to return the children to Father's home and into the care of his girlfriend on evenings when the Father is not at home and will not be returning home until after the children are in bed, the best interests of the children will be achieved by permitting the Mother to retain the children overnight.

NO. 01-2088

THOMAS CARLYON, Esquire—Counsel for Plaintiff.

CYNTHIA A. DYRDA-HATTON, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, J.—March 20, 2003

Nicholas J. Petrole, Sr. (Father) has appealed our dismissal of his exceptions to the Hearing Officer's Custody Report. The hearing officer recommended extending Maureen S. Petrole's (Mother) periods of partial physical custody to include overnight visits during the weeks Father works the swing shift, from 3:30 P.M. until Midnight (12:00 A.M.).

FACTS

On October 14, 1998, Father filed a complaint in divorce against Mother containing a claim for custody of the parties' minor children. The custody count was severed from the divorce proceedings. A decree of divorce was entered on August 8, 2001.

Mother and Father are the natural parents of five minor children: Nicholas J. Petrole, Jr. (D.O.B. 11/12/87), Jonathan Petrole, (D.O.B. 01/18/89), Albert Petrole, (D.O.B. 05/02/92), Michael Petrole, (D.O.B. 05/31/94), and Anthony Petrole, (D.O.B. 01/10/98). A custody order, docketed to No. 99-0451, was entered on October 20, 1999, granting Father primary physical custody and Mother partial physical custody on alternate weekends, holidays and special occasions.

On January 14, 2000, Mother filed a petition to modify the custody order. A hearing was held before the hearing officer, following which a custody order, docketed to No. 00-0096, was entered on May 5, 2000. This order, in combination with the October 20, 1999 order, granted Mother additional periods of physical custody during the week on an alternating weekly basis

corresponding with the Father's rotating weekly work schedule as follows:

> 1) During the first week when Father works the swing shift (**i.e.,** 3:30 P.M. until Midnight), Mother was granted partial physical custody on Monday and Friday from 3:00 P.M. until 8:00 P.M., and from Tuesday at 3:00 P.M. until Thursday morning with Mother responsible for arranging the school-age children's attendance at school and return of the younger children to Father's residence; and
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> 2) During the following week when Father works the day shift (**i.e.,** 7:00 A.M. until 3:30 P.M.), Mother was granted partial physical custody from Tuesday at 3:00 P.M. until Wednesday morning with Mother responsible for arranging the school-age children's attendance at school and return of the younger children to Father's residence, Wednesday from 3:30 P.M. to 8:00 P.M., and Friday from 6:00 P.M. until Sunday at 6:00 P.M.

On September 14, 2001, Mother filed a complaint to modify the custody order, wherein Mother requested primary physical custody of the parties' minor children. On October 22, 2001, during a conciliation conference before the hearing officer, Mother conceded that her request should be limited to a modification of her periods of partial physical custody and that she was not requesting a change of primary physical custody. Nevertheless, Father, by petition filed on January 9, 2002, requested that the hearing be held before the Court.

Following an opportunity for hearing on Father's petition and based upon Mother's assurances that she was not requesting a change of primary physical custody, the Court denied Father's petition for a hearing before the Court, remanded Mother's custody petition to the hearing officer to conduct a hearing, and ordered that any "relief requested [by Mother], and any relief granted, shall be limited and confined to a request for modification of Mother's periods of partial physical custody" and not a request for a change in primary physical custody. (Order of Court dated February 20, 2002). The only issue presented to the hearing officer was whether Mother's periods of partial physical custody should be enlarged during the week Father worked swing shift. The testimony presented to the hearing officer focused on this issue and was not a full-blown custody hearing.

Upon conclusion of the proceeding before the hearing officer, the officer submitted a report, recommendation, and proposed order to the Court which recommended that Mother's periods of physical custody include custody of the children from Monday at 3:00 P.M. until Friday at 5:00 P.M. during the week Father works swing shift. Father filed timely exceptions to the report, recommendation, and proposed order of the hearing officer.

After briefs and oral argument thereon, this Court denied and dismissed the Father's exceptions and entered a custody order, dated December 30, 2002, which adopted the recommendation of the hearing officer. The same order integrated the prior custody orders of October 20, 1999 and May 5, 2000.

On January 28, 2003, Father filed an appeal of our decision to the Superior Court. In response to our Rule 1925(b) Order requesting Father to file a concise statement of matters complained of on appeal, Mother filed a statement on February 11, 2003, listing twenty-five matters ostensibly complained of.[1]

DISCUSSION

We decline to address the merits of those issues numbered 16, 19 and 20 which merely present bare assertions and lack fully developed arguments.[2] **Commonwealth v. Drew,** 353 Pa. Super. 632, 634, 510 A.2d 1244, 1245 (1986) ("When issues are not properly raised and developed in briefs, when the briefs are wholly inadequate to present specific issues for review, a court will not consider the merits thereof.").

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[1] The first twenty-three matters listed correspond with the twenty-three exceptions Father filed to the hearing officer's report. An additional two issues numbered as 24 and 25 were added to the Father's list.

In requesting the Father to set forth in a concise statement the matters he intended to pursue on appeal, it was hoped that the Father would narrow and focus on those issues which the Father believes are most meritorious. In this respect, our Supreme Court has stated on a number of occasions that the hallmark of effective appellate advocacy is the winnowing of issues and the ability to select and focus on dispositive issues. **See Commonwealth v. Lambert,** 568 Pa. 346, 797 A.2d 232, 244 (2001) (plurality opinion).

[2] Additionally, issues 19 and 20 were addressed in the custody order. **See** Order of Court dated December 30, 2002, Paragraph 4(a). Issue 16 challenges the Court's decision to divide the costs of the proceedings between the parties on an equal basis.

The remaining issues present a modicum of legal argument and support.[3] Underneath these seemingly diverse claims lays one assertion, that the hearing officer, in various aspects, abused his discretion. Father's allegations of abuse fall into two broad categories: one, by failing to permit Father to elicit various testimony, the hearing officer failed to conduct a full hearing (issues 1, 7, 10, 14, 17 and 22); and, two, in recommending the Mother be awarded partial physical custody from 3:00 P.M. on Monday until 5:00 P.M. on Friday during the week Father works swing shift, the hearing officer acted contrary to the best interests of the children (issues 2-6, 8, 9, 11, 12, 13, 15, 18, 21 and 23-25).

Allegation That Custody Hearing Officer Failed To Conduct a Full Hearing

Father asserts that the hearing officer abused his discretion by limiting the testimony Father desired to present regarding: Mother's child support arrears (issue 1); Mother's credibility and motive for seeking the requested modification, and the appropriateness of Mother's chosen caregiver (issue 10); Mother's alleged refusal to cooperate with Father (issue 14); and Father's work schedule (issue 22). In consequence, Father claims he was prohibited from developing a complete record (issues 7 and 17).

Father asserts, repeatedly, that the fact-finder must consider all facts, circumstances, and relevant factors prior to rendering a decision that affects the child custody arrangement. **McAlister v. McAlister,** 747 A.2d 390, 391 (Pa. Super. 2000). Despite these repetitious assertions (**see** issues 1, 7, 10, 14, 17 and 22), Father fails to cite to the record or state explicitly which facts, circumstances and relevant factors he was denied the opportunity to present, and how, if given the chance to present the information, such testimony would alter the fact-finder's assessment that the best interests of the children will be promoted by permitting Mother to serve as partial physical custodian during the nights Father works swing shift.

In further reference to issues 1 and 14, when objections were sustained to the Father's questions directed to eliciting

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[3] Although waived, because not preserved by exception, issues 24 and 25 identified in Father's precise statements of matters complained of, overlap with issues 13 and 15, the prior subject of exceptions, and will be addressed.

evidence of the amount of support arrears owed by the Mother and a previous finding of contempt against the Mother, the hearing officer, without objection from either party, indicated that he would take judicial notice of those proceedings (N.T., pp. 38-39 and 54-55). Father has not suggested that this did not occur, nor did Father present any offer of proof as to what evidence he intended to present (N.T., 38-39, 54-55, 62-63, 94). **Romeo v. Manuel,** 703 A.2d 530, 533 (Pa. Super. 1997) ("In order to preserve an objection to the exclusion of testimony the party seeking to have the testimony admitted must make an offer as to what the testimony is going to establish.").[4]

Insofar as the maternal grandmother serving as Mother's surrogate caregiver (issue 10), no offer of proof was made with respect to excluded testimony (N.T., p. 95). The record demonstrates that the maternal grandmother has served as caregiver for the parties' minor children, as needed, from the commencement of the initial custody order (N.T., p. 95). Prior to Mother's present modification petition, Father did not object to the maternal grandmother functioning as a surrogate caregiver.

Moreover, the record demonstrates that the maternal grandmother's role as surrogate caregiver is minimal and occurs, primarily, during the brief lapse in time between Mother's departure for work and children's departure for school (N.T., pp. 23-24, 55). The eldest child was fourteen (14) years of age on the date of the hearing and is, presumably, able to assist the maternal grandmother during the minimal time period in which she is the caregiver.

Father's challenge concerning the credibility and motive of Mother (issue 10), is dubious given the parties' mutual litigious history against one another and casts aspersions upon Father's own motive and credibility (**see** Custody Report, Findings 3 through 7 and Discussion, page 5 ["Father was disingenuous

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[4] In the context of this discussion, we note that the court does not have the authority to sua sponte take judicial notice of proceedings in cases other than those at bar and that the parties must be provided an opportunity to deny the existence and conclusive effect of the record of other proceedings. "[A] court may not ordinarily take judicial notice in one case of the records of another case, whether in another court or its own, even though the contents of those records may be known to the court." **220 Partnership v. Philadelphia Electric Co.,** 437 Pa. Super. 650, 656, 650 A.2d 1094, 1097 (1994) (citations and quotations omitted).

relative to his work schedule."]; **see also,** discussion below regarding credibility determinations by the hearing officer).

With respect to issue 22, governing Father's work schedule, the record contains documentation from Father's employer that Father works a rotating shift schedule and will continue to do so, despite Father's attempt to be placed, permanently, on the day schedule, that is from 7:00 A.M. until 3:30 P.M. (Exhibit P-1). Again, the record is devoid of any offer of proof on this matter.

"[A] parent's ability to care for a child must be determined as of the time of the custody hearing, not as of an earlier time." **Wiseman v. Wall,** 718 A.2d 844, 847 (Pa. Super. 1998). Accordingly, the hearing officer did not abuse his discretion or commit an error of law in centering the scope of the relevant inquiry upon the appropriateness, at the time of the hearing, of Mother maintaining physical custody during the week Father works swing shift.

The Hearing Officer Did Not Fail to Properly Consider Father's Status As Primary Physical Custodian or the Stability of the Existing Arrangement

Father's remaining issues aver that the hearing officer failed to properly consider Father's status as primary physical custodian and improperly recommended Mother be provided custodial privileges each weeknight on which Father works the swing shift (**see** issues 2-6, 8, 9, 11, 12, 13, 15, 18, 21 and 23-25).

Preliminarily, it should be noted that the hearing officer did not exceed his authority. The officer was directed, by order of court, to confine relief, if any, to a modification of Mother's periods of partial physical custody (Order of Court dated February 20, 2002).

Father's claim that despite nomenclature, the real effect of the hearing officer's recommendation is to transfer primary physical custody of the children to the Mother is mistaken (issue 13, 15, 24 and 25). Unfortunately, Father reaches this conclusion without any reference to the record or analysis of the facts.

To begin, Father claims that during a two-week period, Mother has the children overnight for eight days (issue 13). This is incorrect. During a two-week period, Mother has seven overnights with the children: four during Father's week on swing

shift, one during his day shift week, and two during Mother's weekend period of partial custody. It should also be noted that Father fails to provide any legal authority to support his apparent proposition that primary physical custody is determined by the number of overnight visits.[5]

Neither the Child Custody Act nor the Rules of Civil Procedure define primary physical custody. **See** 23 Pa. C.S. §5302; Pa. R.C.P. 1915.1(b). Assuming that the primary physical custodian is the person awarded physical custody of a child for more than fifty percent of the time, then, both in fact and in name, Father continues to be the primary physical custodian. During a fourteen-day schedule, according to our calculations, Mother's period of partial physical custody with the children will be less than fifty percent of the total time. The majority of this time, Father continues as the custodian of the children and is specifically identified in the custody order as being the primary physical custodian (Order of Court dated December 30, 2002, Paragraph 1).

Before addressing Father's remaining issues, we note that when a custody proceeding is heard before a hearing officer, with argument on exceptions before a judge, "[a]lthough advisory, the hearing officer's report and recommendations are given the fullest consideration particularly on the issue of credibility of witnesses, which the trial court is not empowered to second-guess." **T.B. v. L.R.M.,** 753 A.2d 873, 881 (Pa. Super. 2000) (en banc), **aff'd,** 567 Pa. 222, 786 A.2d 913 (2001). The function of the trial court is to make an independent review of the record to determine whether the hearing officer's findings and recommendations are appropriate. **Id.** at 881. In custody proceedings, as in trial proceedings generally, the officer before whom the record hearing is held is in the best position to observe the proceedings and the demeanor of the witnesses and, therefore, to determine the credibility and motive of each party. **Swope v. Swope,** 455 Pa. Super. 587, 590, 689 A.2d 264, 265 (1997).

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[5] On this issue, Father may be confusing the allocation of child support obligations with a custody proceeding. **See** Pa. R.C.P. 1910.164(c) (Substantial or Shared Physical Custody) ("For purposes of this provision, the time spent with the children shall be determined by the number of overnights they spend during the year with obligor.").

The issue the hearing officer was asked to address in this case was extremely narrow. The previous order provided that when Father worked the swing shift, from 3:30 P.M. until 12:00 A.M., Mother would return the children to his home by 8:00 P.M. on Monday. During this same week, Mother also had custody from Tuesday at 3:00 P.M., the end of the school day, until the start of school on Thursday, and then, again, after school on Friday until 8:00 P.M. Because this schedule interrupted the children's extracurricular activities and homework while they were in Mother's care, and required their return to the Father's home at a time when he was not present and would not be returning until after the children were in bed, Mother requested that the order be revised to permit the children to spend these evenings with her. Father argued that his position as primary caretaker and the development of a stable, continuous and strong relationship between him and the children dictated against providing the Mother with additional time during the week Father works the swing shift.

While both of these factors merit positive consideration from the fact-finder, the paramount concern in any custody proceeding is the best interests of the children. **Moore v. Moore,** 535 Pa. 18, 30, 634 A.2d 163, 169 (1993).[6] "[T]he concept of a child's best interests is a legal concept … ." **T.B. v. L.R.M., supra** at 889. Father does not contest the standard, he challenges that the best interests do not lie with Mother retaining physical custody in preference to returning the children to Father's residence and the care of his girlfriend (N.T., pp. 77-78, 82, 100-102, 115).

Both parents love and have a strong relationship with their children and exhibit, commendably, a desire to maximize the time that each is able to spend with their sons. The record also demonstrates that each parent, during their respective periods of custody, can sufficiently meet the "physical, intellectual, moral and spiritual well-being" of the children. **Tripathi v. Tripathi,** 787 A.2d 436, 442 (Pa. Super. 2001) (noting that a best inter-

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[6] "The paramount concern in a child custody case is the best interests of the child, based on a consideration of all factors that legitimately affect the child's physical, intellectual, moral and spiritual well-being." **Swope v. Swope,** 455 Pa. Super. 587, 591, 689 A.2d 264, 265 (1997). All other considerations are subordinate. **Clapper v. Clapper,** 396 Pa. Super. 49, 54, 578 A.2d 17, 20 (1990).

ests analysis includes a consideration of factors that affect a child's whole well-being).

The very narrow issue in this case was whether expanding the Mother's period of partial physical custody to provide overnight stays during the week Father worked the swing shift would be in the best interests of the children. On this issue, Mother presented credible evidence that returning the children to Father's residence by the time mandated in the custody order, and into the custody of a surrogate caregiver, often disrupted the children's participation in extracurricular activities and denied Mother the opportunity of engaging in evening nurturing with her sons, the younger children especially, such as preparation for bed—baths and story reading (N.T., pp. 15-20, 34).

Jonathan Petrole, the second eldest son, stated that difficulty arose when it was necessary to leave an activity to return timely into Father's custody (N.T., p. 122). The older children, Nicholas Jr. and Jonathan, ages fourteen (14) and thirteen (13) on the date of the hearing, did not oppose the suggestion that they spend the evenings with their Mother during the week Father works the swing shift (N.T., pp. 117, 122-24).

Under the former order of shared custody, both parents were active in the children's lives and this will continue under the new order (N.T., p. 26). The parties themselves live approximately two miles from one another (N.T., p. 68). Frequent and continuing physical contact with both parents is the hallmark of a shared custody order. Indeed, "it is the public policy of this Commonwealth, when in the best interest of the child, to assure a reasonable and continuing contact of the child with both parents … and the sharing of the rights and responsibilities of child rearing by both parents … ." Child Custody Act, Declaration of Policy, 23 Pa. C.S. §5301.

The continuity in the children's lives has been the sharing of the rights and responsibilities of parenthood between both parents. The revised order continues this history of parental participation and involvement established by the Order of October 20, 1999, as revised by the Order of May 5, 2000.

Significantly, the primary caretaker doctrine upon which the Father relies heavily is, most importantly, concerned with "the quality and quantity of care actually given to the child by the parent as opposed to the supervisory care by others while

in the parent's custody." **Wiseman v. Wall, supra** at 847. Both parents work. Although there is some amount of time during each parent's periods of physical custody when the children must be under the care of a surrogate provider, the time during Mother's periods of custody is minimal relative to the hours of surrogate care the children receive when Father works the swing shift. This factor, coupled with the testimony of the children and the present ability of Mother to provide parental nurturing and care during the nights Father works the swing shift, supports the report and recommendation of the hearing officer.

CONCLUSION

Absent a determination that one parent is unfit, it is generally within the best interests of the parties' children to assure reasonable and continuing contact between the children and both parents, and the sharing of the rights and responsibilities of child rearing by both parents. The strength and stability of the relationship between parents and their children is of the utmost importance. **Clapper v. Clapper,** 396 Pa. Super. 49, 54, 578 A.2d 17, 19 (1990). What custodial arrangement will best serve this goal is dynamic, depending in part on the growth and development of the children, as well as the circumstances of their parent's lives.

Here, the circumstances favor the Mother's request. For this reason, we accepted and adopted the recommendation of the hearing officer and permitted the Mother to have overnight visits with her children during the week Father works the swing shift. In doing so, our focus has been the best interests of the children and not the respective rights of the contesting parties. **T.B. v. L.R.M., supra** at 890.

SHERWOOD GREEN and MARTHA GREEN, h/w, Plaintiffs vs. FLORIEL P. DIAZ, M.D. and GNADEN HUETTEN MEMORIAL HOSPITAL, Defendants

Civil Action—Pleadings—Requirement That Material Facts in Support of Claim Be Pled—Pleading a Claim of Negligence—Pleading an Agency Relationship—Pleading a Cause of Action for Corporate Negligence

1. General, nonspecific allegations of negligence are objectionable. A claim of negligence must provide notice to the defendant of the claim made and summarize the material facts essential to the cause of action asserted.

2. When the liability of the defendant is dependent on an agency relationship, the pleadings must identify the agent by name or appropriate description and set forth the material facts of the conduct for which the defendant is claimed liable.

3. The pleadings in a cause of action for corporate liability must establish through the assertion of material facts a **prima facie** case for breach of an institutional duty. Merely reciting the standard of care for the cause of action is insufficient.

4. An individual act of negligence by an agent or an ostensible agent of a hospital will not support a cause of action for corporate negligence.

NO. 02-0538

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MEMORANDUM OPINION

NANOVIC, J.—May 1, 2003

Although no new law is involved, this case affords us the opportunity to examine a basic principle of pleading practice: a party must plead the material facts of his claim or defense. Material facts are not statements of the law or legal conclusions. Material facts are not the details or minutae of evidence. Material facts are the operative and necessary facts essential to support a claim. **Baker v. Rangos,** 229 Pa. Super. 333, 324 A.2d 498, 505-506 (1974).

In this case, the Plaintiff, Sherwood Green (hereinafter "Green"), and his wife, Martha Green, commenced an action for medical negligence, by writ, on March 7, 2002. Plaintiffs allege in their complaint that Defendants failed to properly and timely provide medical treatment to Mr. Green for abdominal pain, diagnosed as gall stones, and that, when surgery was per-

formed for removal of the gall stones, surgical and postoperative complications arose requiring additional medical treatment. Sued were Dr. Floriel P. Diaz (hereinafter "Dr. Diaz"), Green's treating and operating physician, and the Gnaden Huetten Memorial Hospital (hereinafter "the Hospital"), the medical facility where the operation occurred.

Plaintiffs' complaint, filed on June 5, 2002, is divided into three counts, each incorporating the averments of the previous count. Count I asserts a claim against Dr. Diaz for medical malpractice; Count II asserts a claim against the Hospital for vicarious liability premised on the acts or omissions of Dr. Diaz described in Count I and those of other unnamed agents, servants or employees of both Dr. Diaz and the Hospital; Count III asserts a claim against the Hospital for corporate negligence.

Both Defendants have filed preliminary objections. Defendants move to strike various averments in Plaintiffs' Complaint for failure to comply with Pa. R.C.P. 1019(a) and, alternatively, move for a more specific pleading. For the reasons which follow, Defendants' preliminary objections are granted, in part, and denied, in part.

Rule 1019(a) requires that "the material facts on which a cause of action or defense is based shall be stated in a concise and summary form." [1] This rule, while clear on its face, is oftentimes difficult in its application. "The determination of whether or not facts have been averred with sufficient specificity, is almost always a difficult task, involving the sound exercise of discretion, based upon the circumstances and pleading in each particular case." **Boyd v. Somerset Hospital,** 24 D. & C. 4th 564, 567 (Somerset Co. 1993); **Pike County Hotels Corp. v. Kiefer,** 262 Pa. Super. 126, 134, 396 A.2d 677, 681 (1978). "Under the Pennsylvania system of fact pleading, the pleader must define the issues; every act or performance essential to that end must be set forth in the complaint." **Miketic v. Baron,** 450 Pa. Super. 91, 104, 675 A.2d 324, 330 (1996) (citations omitted).

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[1] What constitutes a cause of action has never been fully explained or defined by our Supreme Court, an observation noted by the Superior Court in **Reynolds v. Thomas Jefferson University Hospital,** 450 Pa. Super. 327, 676 A.2d 1205 (1996), **appeal denied,** 549 Pa. 695, 700 A.2d 442 (1997). There, the court offered the following definition:

> 'A cause of action in negligence has been defined as the negligent act or acts which occasioned the injury for which relief is sought. **Cox v. Wilkes-Barre**

A complaint which recites merely the legal elements of a cause of action for medical malpractice—duty, breach, causation and damages—without any factual context, is legally incomplete and inadequate. **See Pennsylvania Public Utility Commission v. Zanella Transit, Inc.,** 53 Pa. Commw. 359, 417 A.2d 860 (1980) (general conclusions of law violate the requirement of Rule 1019(a) mandating the pleading of mate-

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Railway Corporation, 334 Pa. 568, 570, 6 A.2d 538, 539 (1939); **Martin v. Pittsburgh [sic] Railways Company,** 227 Pa. 18, 20, 75 A. 837, 837 (1910). A new cause of action does not exist if plaintiff's amendment merely adds to or amplifies the original complaint or if the original complaint states a cause of action showing that the plaintiff has a legal right to recover what is claimed in the subsequent complaint. **Wilson v. Howard Johnson Restaurant,** 421 Pa. 455, 460, 219 A.2d 676, 678-79 (1966); **Arner v. Sokol,** 373 Pa. 587, 591, 96 A.2d 854, 855-56 (1953); 3 **Standard Pennsylvania Practice** 682. A new cause of action does arise, however, if the amendment proposes a different theory or a different kind of negligence than the one previously raised **or if the operative facts supporting the claim are changed.** 2B Anderson **Pennsylvania Civil Practice,** §§1033.28 and 1033.31.'

Junk v. East End Fire Dept., 262 Pa. Super. 473, 490-91, 396 A.2d 1269, 1277 (1978) (emphasis added).

Support for this definition is found in **Saracina v. Cotoia,** 417 Pa. 80, 208 A.2d 764 (1965), in which our supreme court stated, '[a]n amendment of the complaint under Rule 1033 which adds or changes the theory of recovery upon which relief is sought through the introduction of new factual allegations generally constitutes a new cause of action … .' **Id.** at 85, 208 A.2d at 767, **citing Willinger v. Mercy Catholic Medical Center,** 482 Pa. 441, 444 n.2, 393 A.2d 1188, 1189 n.2 (1978) (refusing to allow hospital to amend its negligence complaint against anesthesiologist to include vicarious liability for the negligence of a nurse/anesthetist). Stated differently, an amendment proposes a different theory or a different kind of negligence if the operative facts supporting the claim are changed. **See also, Jaindl v. Mohr,** 432 Pa. Super. 220, 229-30, 637 A.2d 1353, 1358 (1994) (refusing to allow amendment where initial complaint in defamation was based solely upon the conduct of the defendant, while amended pleadings would include the conduct of others acting as defendant's agent), **affirmed,** 541 Pa. 163, 661 A.2d 1362 (1995); **Wilson v. Howard Johnson Restaurant,** 421 Pa. 455, 459-61, 219 A.2d 676, 678-79 (1966) (where plaintiff's original complaint was based upon defendant's negligence in permitting ice to form on its sidewalk, an amendment to charge defendant with maintaining a potentially dangerous picket fence next to the walkway introduces a new cause of action).

Id. at 338-39, 676 A.2d at 1210-11. This definition is, we believe, accurate and, importantly for our purposes, emphasizes the importance of the statement of material facts in identifying and circumscribing the cause of action upon which a claim is made. Separate causes of action must be pled in separate counts. Pa. R.C.P. 1020(a).

rial facts). Conversely, the rule does not require an all-inclusive narration of the events underlying the claim or that the complaint serve as a substitute for an expert report. A plaintiff is expected to set forth in his complaint the operative facts upon which he relies for the claim, and not the evidentiary facts upon which the claim will rest at trial. **See PennDOT v. Bethlehem Steel Corp.,** 33 Pa. Commw. 1, 11-12, 380 A.2d 1308, 1313 (1977). It is between these two extremes that ascertaining compliance with the rule becomes difficult.

The factual averments of a pleading need not be detailed, abundant or even coherent.[2] What is required is that fair notice of the claim be given and that the material facts, essential to the claim, be summarized and presented. **Rachlin v. Edmison,** 813 A.2d 862, 870 (Pa. Super. 2002); **Burnside v. Abbott Laboratories,** 351 Pa. Super. 264, 277, 505 A.2d 973, 980 (1985) ("A complaint must not only give notice to the defendant of the claim being asserted but it must summarize the facts essential to support the claim."). In addition, "[a]verments of time, place and items of special damage shall be specifically stated." Pa. R.C.P. 1019(f).

Where crucial facts are in the exclusive knowledge of the defendant, and the plaintiff so pleads, greater latitude is expected, and will be granted. **Line Lexington Lumber & Millwork Co., Inc. v. Pa. Publishing Corp.,** 451 Pa. 154, 162, 301 A.2d 684, 689 (1973); **see also,** Pa. R.C.P. 126 (liberal con-

[2] Nor is the plaintiff required to identify his legal theory or cause of action: this obligation is imposed upon the court. As stated in **DelConte v. Stefonick,** 268 Pa. Super. 572, 408 A.2d 1151 (1979):

> Under the Rules of Civil Procedure, a plaintiff is not obliged to state the legal theory or theories underlying his complaint. Pa. R.C.P. 1019(a) requires only allegations of the 'material facts on which a cause of action … is based.' Assertions of legal rights and obligations in a complaint may be construed as conclusions of law, which have no place in a pleading and need not be denied in preliminary objections. Goodrich-Amram 2d, Standard Pennsylvania Practice §1019(a):12 (collecting cases). This system of fact pleading may sometimes cause both the court and the defendant uncertainty as to the legal grounds of the complaint.

Id. at 577, 408 A.2d at 1153. **See also, Estate of Swift v. Northeastern Hospital of Philadelphia,** 456 Pa. Super. 330, 337, 690 A.2d 719, 723 (1997) ("While it is not necessary that the complaint identify the specific legal theory of the underlying claim, it must apprise the Defendant of the claim being asserted and summarize the essential facts to support that claim."), **appeal denied,** 549 Pa. 711, 701 A.2d 577 (1997).

struction and application of rules); **cf. McNeil v. Jordan,** 814 A.2d 234, 246 (Pa. Super. 2002) ("[P]recomplaint discovery is permissible if it is shown that, one, the plaintiff has set forth a **prima facie** case, and, two, the plaintiff cannot prepare and file a complaint otherwise."). Still, defendant must be provided notice of the material facts which, if he is to successfully defend the action, he will be required to refute. **Burnside v. Abbott Laboratories, supra** at 277, 505 A.2d at 980.

> The … question under Rule [1028(a)(3)] is 'whether the complaint is sufficiently clear to enable the defendant to prepare his defense,' or 'whether the plaintiff's complaint informs the defendant with accuracy and completeness of the specific basis on which recovery is sought so that he may know without question upon what grounds to make his defense.'

McNeil v. Jordan, supra at 237-38 (footnote omitted) (**quoting Ammlung v. City of Chester,** 224 Pa. Super. 47, 59 n.36, 302 A.2d 491, 498 n.36 (1973)).

The purpose of Rule 1019(a)—to define the issues and present a concise, but fair, statement of the operative facts—is intended to permit a plaintiff to pursue a legitimate claim unhindered by hyper-technical pleading pitfalls and to provide a defendant fair notice of the nature of a plaintiff's claim and the factual grounds upon which it rests. Implicit in these goals is that the defendant be put on notice as to what he did or failed to do in order that defendant's right and ability to answer and defend will not be unduly impaired and that the plaintiff's proof will be confined to the claim appearing from the statement of material facts set forth in his complaint. "A pleading must be sufficiently specific so as to advise a defendant as to what action on his part is deemed by the complainant to have been improper." **Maddux v. Commonwealth of Pennsylvania, Dept. of Agriculture,** 35 Pa. Commw. 386, 389, 386 A.2d 620, 622 (1978). Moreover, "[a]t trial, the plaintiff is not entitled to insist on a jury instruction on any claim which has not been properly pleaded." **Mattia v. Sears, Roebuck & Co.,** 366 Pa. Super. 504, 509, 531 A.2d 789, 792 (1987), **appeal denied,** 519 Pa. 660, 546 A.2d 622 (1988).

"[A] physician charged with negligence and unskillfulness in the practice of his profession is entitled to be advised of the specific acts of commission or omission which constitutes the

negligence and unskillfulness complained of, so that plaintiff's proof may be confined to such acts, and so that he may reasonably prepare for his defense." **Boyd v. Somerset Hospital, supra** at 568, **citing Gray v. Oech,** 49 D. & C. 2d 358 (1970). In determining whether this standard has been met, "the challenged averments cannot be viewed in isolation. The complaint must be read as a whole. Each individual averment at issue must be read in connection with all other parts and averments of the complaint." **Boyd v. Somerset Hospital, supra** at 567; **Rachlin v. Edmison, supra** at 870.

With these precepts in mind, we now examine Defendants' preliminary objections.

PRELIMINARY OBJECTIONS OF DR. DIAZ

Green alleges in his complaint that a physician-patient relationship existed between him and Dr. Diaz; that Dr. Diaz performed surgery on him at the Gnaden Huetten Memorial Hospital on April 12, 2000 for removal of gall stones; that during the course of this surgery Dr. Diaz failed to identify the common hepatic duct and the common bile duct, thereby causing injury to these bilary structures; that Dr. Diaz failed to recognize the injury he had caused; and that, postoperatively, Dr. Diaz failed to diagnose and provide the requisite treatment for this injury and Green's resulting medical condition. The Complaint sets forth the foregoing in a concise and summary fashion and alleges, **inter alia,** that Dr. Diaz was negligent and careless in the following respects:

a) Failing properly to treat Plaintiff's condition during surgery;

b) Failing properly and timely to diagnose Plaintiff's condition post operatively;

c) Misdiagnosing Plaintiff's condition;

d) Failing to employ and utilize current scientific tests and procedures to arrive at a diagnosis in Plaintiff's case, and properly to treat it;

e) Allowing Plaintiff's medical condition to deteriorate and worsen;

f) Preventing the utilization at an earlier date of care and treatment which would have improved Plaintiff's condition;

g) Delaying the use of proper and current scientific tests and procedures for the purpose of diagnosis and treatment;

h) Causing Plaintiff to lose the opportunity and chance to receive care and treatment for his condition;

i) Permitting the risk of harm to be increased;

j) Failing properly to supervise agents and employees, including personnel from Defendant Hospital;

k) Failing timely to obtain consultations with appropriate specialists;

l) Failing to render proper pre-operative, perioperative, and post-operative care.

(Complaint, Par. 26) Dr. Diaz contends that the averments of subparagraphs 26(a), (b), (c), (d), (h), (j) and (l) lack sufficient specificity, are vague and conclusory allegations of negligence and, as such, violate Pa. R.C.P. 1019 and should be stricken.

Our review of these averments, individually and in the context of the complaint as a whole, persuades us that subparagraphs 26 (c), (d), (j) and (l) are insufficiently specific to apprise Defendant of the nature of the complained of conduct. Subparagraph (c) fails to state whether the alleged misdiagnosis is with respect to Plaintiff's preoperative or postoperative condition, what diagnosis was made by Defendant and what was the correct diagnosis; subparagraph (d) fails to state whether the claimed inadequacy in testing is with respect to Plaintiff's preoperative or postoperative condition; subparagraph (j) fails to identify the agents or employees by name or appropriate description, to describe what tortious acts were committed by them, or to explain when or in what manner such employees were under Dr. Diaz' direction and control and how he failed to properly supervise them; subparagraph (l) fails to properly focus on any identifiable acts of misconduct by the Defendant and is analogous to the generalized averment reviewed by the Supreme Court in **Connor v. Allegheny General Hospital,** 501 Pa. 306, 461 A.2d 600 (1983). **See also, Reynolds v. Thomas Jefferson University Hospital,** 450 Pa. Super. 327, 676 A.2d 1205 (1996) (discussing the different causes of action which exist for conduct during an operation versus postoperative treatment, separate acts of alleged negligence separated by breaks in time assert separate causes of action), **appeal denied,** 549 Pa. 695, 700 A.2d 442 (1997).

Broad averments of negligence which permit proof of innumerable negligent acts and, therefore, different causes of action, are objectionable and must be objected to if the later amendment of the pleadings and the interjection of new causes of action, not specifically pled, but encompassed within the scope of broad and uncertain generalities, is to be avoided once the statute of limitations has run. While prior to **Connor,** "it was assumed that a general averment of negligence in a complaint would not support a later specific claim of negligence that was not initially factually supported, and defendants were routinely denying the general averment of fact and relying on the discovery process," **Connor** proved this to be an extremely dangerous and unacceptable practice. **Allen v. Lipson,** 8 D. & C. 4th 390, 392-93 (Lycoming Co. 1990).

In **Connor,** after plaintiff's medical expert was unable to state within a reasonable degree of medical certainty that his colon was negligently perforated during surgery, which permitted barium solution to seep into his abdominal cavity and cause peritonitis, the factual basis of negligence specifically pled in the original complaint, the plaintiff was permitted to amend the complaint, after the running of the statute of limitations, and prove a new cause of action—undue delay in discovering and diagnosing the perforation and failing to promptly perform surgery to correct the tear and cleanse the abdominal cavity of the barium solution. The Court determined that the catch-all averment in the complaint, that the hospital was negligent "[i]n otherwise failing to use due care and caution under the circumstances" encompassed the latter cause of action and, therefore, the requested amendment to the pleadings and proof of this different theory merely amplified that which had already been averred and did not change the original cause of action. **Connor, supra** at 310, 461 A.2d at 602.

The court noted that if defendant did not know how it " 'otherwise fail[ed] to use due care and caution under the circumstances,' it could have filed a preliminary objection in the nature of a request for a more specific pleading or it could have moved to strike that portion of [the] complaint." **Connor, supra** at 311 n.3, 461 A.2d at 603 n.3. By doing neither, the hospital was prevented from confining the claim to the separate and distinct cause of action for which the operative facts were specifically pled.

General, nonspecific allegations of negligence do not provide the defendant with clear, exact and definite information about the nature of the claim presented and, under **Connor,** will not confine a plaintiff to a specific theory or cause of action. The general allegations to which we have sustained Defendant's preliminary objections fail to aver the alleged acts of negligence with sufficient particularity and precision to advise Defendant fairly of the claims made and, because of their breadth and generality, if not sustained, will open the door to proof of various additional and different acts of negligence not clearly identified from the face of the pleadings or specifically pled in the complaint.

PRELIMINARY OBJECTIONS OF THE HOSPITAL—VICAROUS LIABILITY

The complaint asserts claims of vicarious liability and corporate negligence against the Hospital. The Hospital contends the averments of agency and the conduct for which vicarious liability is sought are too general.

a) **Objection to the Averments of Negligence**

In the complaint, Plaintiff asserts Dr. Diaz was an agent, servant or employee of the Hospital for whose misconduct the Hospital is legally responsible or, in the alternative, was a practitioner duly authorized to use the Hospital facilities at the Hospital. The acts of alleged misconduct by Dr. Diaz averred to be attributable to the Hospital are the same as those asserted against Dr. Diaz directly in Count I. Here, however, the Hospital objects to the generality of subparagraphs 26(a) through (l), inclusive, as well as paragraphs 30 and 31. Paragraph 30 states: "Defendant Diaz failed to possess the degree of professional learning, skill, and ability which others similarly situated ordinarily possess with respect to laproscopic surgery." Paragraph 31 states: "Defendant Diaz failed to exercise reasonable care and diligence in the application of knowledge and skill to the Plaintiff's case, to wit, appropriate surgery, properly performed surgery, reasonable follow-up and post-operative care."

For the reasons already discussed, we will grant Defendant's objections to subparagraphs (c), (d), (j), and (l). In addition, Defendant's objections to subparagraphs (f) and (g) are also granted: subparagraph (f) fails to identify the date or point in time relative to the operation when Dr. Diaz prevented the care

and treatment which Plaintiff contends should have been provided and in what manner Dr. Diaz prevented such care and treatment; likewise, subparagraph (g) fails to identify how and when Plaintiff contends Dr. Diaz delayed the use of tests and procedures which Plaintiff believes should have been made earlier and at what point in time Plaintiff is referring to relative to the operation. With respect to Defendants' objections to Paragraphs 30 and 31, we believe the content of these paragraphs when read in the context of the complaint as a whole is simply to summarize the more specific averments of paragraph 26. Paragraphs 30 and 31 shall be so construed and limited in these proceedings.

b) **Objection to the Averments of Agency**

For purposes of imposing liability on the Hospital for individual acts of negligence, Dr. Diaz is not the only person upon whom the Plaintiffs rely to attribute negligence to the Hospital. Plaintiffs claim all Defendants "acted jointly and severally, and through their agents, servants and employees, both actual and ostensible, and while engaged in their business and acting within the course and scope of their respective employments." (Complaint, paragraphs 4 and 6)[3] Under this averment, Plaintiffs seek to impose liability on the Hospital for unidentified acts or omissions committed by unnamed agents, servants and/or employees, actual or ostensible, in addition to liability for the conduct of Dr. Diaz. The Hospital argues that it is entitled to know the identity of those individuals for whose conduct the Plaintiffs seek to hold it accountable.

The need for a complaint to provide basic information with respect to an alleged agency relationship and the acts of the alleged agent for which vicarious liability is claimed against the defendant is inherent in the requirements of Rule 1019(a) and the concept of what constitutes a cause of action (**See** footnote 1 **supra**). Such information extends beyond the mere allegation of the existence of an agency relationship, the averment of which, for pleading purposes, is treated as an averment of material fact and not a conclusion of law. **Line Lexington Lumber &**

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[3] **See Mazzarino v. Kushner,** 36 D. & C. 4th 517, 528-32 (York Co. 1996) (discussing the differences between and the factors to be considered in evaluating whether a physician is a servant or ostensible agent, albeit an independent contractor, for whom vicarious liability may be imposed on a hospital).

Millwork Co., Inc. v. Pa. Publishing Corp., supra at 162, 301 A.2d at 689. "[A] complainant must allege, as a minimum, facts which: (1) identify the agent by name or appropriate description; and (2) set forth the agent's authority, and how the tortious acts of the agent either fall within the scope of that authority, or, if unauthorized, were ratified by the principal." **Alumni Association v. Sullivan,** 369 Pa. Super. 596, 605 n.2, 535 A.2d 1095, 1100 n.2 (1987) (**citing** P.L.E. Agency §174), **aff'd,** 524 Pa. 356, 572 A.2d 1209 (1990). While the evidentiary basis of the agency relationship and the agent's conduct need not be pled, the material facts in support of vicarious liability must be. Unless the identity of the alleged agent is in some manner disclosed in the pleading, as well as the circumstances and nature of the agent's conduct complained of for which liability is claimed, the opportunity and ability to file an intelligent and meaningful response is denied.

With the exception of identifying Dr. Diaz as an agent, it is unclear from the complaint who the alleged agents are and whether they were acting within the course and scope of their authority at the time of their conduct for which liability is asserted against the Hospital. By failing to identify by name or some other means those individuals Plaintiffs claim acted on behalf of the Hospital, when such conduct occurred—whether before the operation, during the operation or after the operation, and some description of the asserted liability imposing conduct, Plaintiffs fail to meet the pleading requirements of Rule 1019(a).

PRELIMINARY OBJECTIONS OF THE HOSPITAL—CORPORATE NEGLIGENCE

Finally, the Hospital claims that the complaint fails to set forth material facts sufficient to sustain a claim for corporate negligence or corporate liability. The basis and elements of the doctrine of corporate liability were set forth in **Thompson v. Nason Hospital,** 527 Pa. 330, 591 A.2d 703 (1991) as follows:

> The corporate hospital of today has assumed the role of a comprehensive health center with responsibility for arranging and coordinating the total health care of its patients. … Courts have recognized several bases on which hospitals may be subject to liability including respondeat superior, ostensible agency and corporate negligence. …

> Corporate negligence is a doctrine under which the hospital is liable if it fails to uphold the proper standard of care owed the patient, which is to ensure the patient's safety and well-being while at the hospital. This theory of liability creates a nondelegable duty which the hospital owes directly to a patient. …
>
> The hospital's duties have been classified into four general areas: (1) a duty to use reasonable care in the maintenance of safe and adequate facilities and equipment …; (2) a duty to select and retain only competent physicians …; (3) a duty to oversee all persons who practice medicine within its walls as to patient care …; and (4) a duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for the patients ... .

Id. at 338-40, 591 A.2d at 706-707 (citations and footnote omitted). Under this doctrine, "a plaintiff must show that the hospital itself was negligent, not merely that an individual for whom the hospital is responsible committed an individual act of negligence." **Mazzarino v. Kushner, supra** at 523, **citing Edwards v. Brandywine Hospital,** 438 Pa. Super. 673, 683, 652 A.2d 1382, 1386 (1995).

The duties recognized by the doctrine of corporate negligence are institutional duties, systemic in nature, and are in contrast to the discrete or isolated acts of negligence by an individual for which liability may be separately imposed on a hospital for an employee's negligence under respondeat superior and for the acts of a non-employee who is determined to be the hospital's ostensible agent. "Just as regular negligence is measured by a reasonable person standard, a hospital's corporate negligence will be measured against what a reasonable hospital under similar circumstances should have done." **Edwards v. Brandywine Hospital, supra** at 683, 652 A.2d at 1387. Under this doctrine, hospitals "can be found liable for a breach of these duties independently of the negligence of its employees or ostensible agents." **Id.** at 682, 652 A.2d at 1386. As stated in **Moser v. Heistand,** 545 Pa. 554, 681 A.2d 1322 (1996):

> The cause of action [for corporate negligence] arises from the policies, actions or inaction of the institution itself rather than the specific acts of individual hospital employees. For example, if a physician who is a hospital em-

> ployee negligently performs an operation, the patient can bring suit against the hospital for the doctor's act under respondeat superior. **Tonsic v. Wagner,** 458 Pa. 246, 329 A.2d 497 (1974). However, if a hospital fails to keep an incompetent doctor from practicing within its walls, and a patient suffers harm as a result, the patient may have a cause of action in corporate liability against the hospital. In that instance, the focus of the action is not the negligence of the doctor, but the negligence of the hospital.

Id. at 560-61, 681 A.2d at 1326. "[A] cause of action in corporate liability is based on the duties a hospital owes to its patients, and not on the status of specific individuals who work in the institution." **Id.** at 557 n.1, 681 A.2d at 1324 n.1.[4]

The complaint filed by Plaintiffs asserts the following with respect to this cause of action:

> Defendant Hospital owed to Plaintiff, Sherwood Green, the following duties, which were breached:
>
> (a) The duty to use reasonable care in the maintenance of safe and adequate facilities and equipment;
>
> (b) The duty to select and retain only competent physicians, surgeons, and other hospital personnel;

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[4] The elements of the cause of action for corporate negligence are similar to those in a medical malpractice action, namely, that the plaintiff must establish through the introduction of expert testimony the following: (1) that the defendant was under a standard of care; (2) that the defendant breached that standard; (3) that the defendant's breach was the proximate cause of, or a substantial factor in, bringing about the harm suffered by the patient; and (4) that the damages suffered by the patient were a direct result of that harm. **Rachlin v. Edmison, supra** at 868. Also, as in medical malpractice actions, "[o]nce a plaintiff has introduced evidence that a defendant's negligent act or omission **increased the risk of harm** to a person in the plaintiff's position, and that the harm was in fact sustained, it becomes a question for the jury as to whether or not that increased risk was a substantial factor in producing the harm." **Edwards v. Brandywine Hospital, supra** at 681, 652 A.2d at 1385-86 (emphasis in original), **quoting Hamil v. Bashline,** 481 Pa. 256, 269, 392 A.2d 1280, 1286 (1978).

The discussion in the text above addresses the nature of the duty or standard of care created by the doctrine of corporate negligence. Additionally, in order to prevail, the plaintiff must establish "that the hospital had actual or constructive knowledge of the defect or procedures which created the harm" (**i.e.,** that a reasonable hospital under similar circumstances would have intercepted and corrected the problem) and that the hospital's negligence was a substantial factor in bringing about the plaintiff's injuries. **Thompson v. Nason Hospital, supra** at 341, 591 A.2d at 708.

(c) The duty to oversee all persons who were practicing medicine and providing patient care services within its healthcare complex;

(d) The duty to formulate, adopt and enforce adequate rules and policies to insure patient safety and quality care for patients, including Plaintiff.

(Complaint, Par. 41) These averments do no more than recite the standard of care under the doctrine of corporate negligence. Here, as in **Boyd,** "there are no factual allegations to indicate which policies and procedures were ineffective; which personnel were inappropriately selected, trained, and supervised; which patients received inadequate treatment; which equipment was inadequate or not available for patient treatment, and how the Defendant Hospital failed in reviewing the performance of Defendant [Dr. Diaz]." **Id.** at 571. The averments contain no allegations of material fact setting forth a cause of action for breach of systemic duties owed by the Hospital to Plaintiffs. To the contrary, by incorporating the averments of Counts I and II, alleging liability under theories of respondeat superior and ostensible agency, the factual averments in Count III amount to little more than allegations of individual acts of negligence and not of a breach of institutional duties.

Because we believe the above described deficiencies in Plaintiffs' complaint can be corrected, we will provide Plaintiffs that opportunity. **Otto v. American Mutual Insurance Co.,** 482 Pa. 202, 205, 393 A.2d 450, 451 (1978).

For the forgoing reasons, we enter the following

ORDER

AND NOW this 1st day of May, 2003, upon consideration of Defendants' preliminary objections, Plaintiffs' opposition thereto, their respective memoranda, all of the matters of record, having heard oral argument and in accordance with the opinion being filed contemporaneously with this order, it is hereby

ORDERED and DECREED that Defendants' preliminary objections are granted, in part, and denied, in part.

Defendants' preliminary objections alleging a lack of specificity under subparagraphs 26(c), (d), (f), (g), (j) and (l) are granted. Further granted are the Hospital's preliminary objections to the generality of Plaintiffs' allegations of agency contained in Paragraphs 4 and 6 of the Complaint and the acts or

omissions of alleged agents for which Plaintiffs seek to hold the Hospital liable and the Hospital's preliminary objections to Count III of the complaint. Subparagraphs 26(c), (d), (f), (g), (j) and (l), Paragraphs 4 and 6, and Count III are stricken, without prejudice, and Plaintiffs are granted twenty (20) days to amend the above referenced Paragraphs in accordance with this opinion or alternatively to proceed without the stricken counts.

The parties are to proceed in a manner consistent with the attached Memorandum Opinion and this Order.

LISA MARIE DRAGONI, Plaintiff vs.
JAMES F. DRAGONI, Defendant

Civil Action—Divorce Proceedings—Equitable Distribution—Treatment of Federal Retirement Benefits Received in Lieu of Social Security—Responsibility of the Fact-Finder To Determine the Value of All Items of Marital Property—Transformation of a Premarital Asset to a Marital Asset by Gifting

1. Retirement benefits received pursuant to the Federal Civil Service Retirement System are not per se exempt from treatment as a marital asset by federal law. Such benefits may be excluded to the extent they are received in lieu of social security retirement benefits.

2. Equitable distribution requires reasonable and fair distribution of marital assets. Distribution by default (**i.e.,** an award of marital assets as possessed) for failure of the spouse out of possession to prove fair market value is neither reasonable nor fair.

3. Absent clear and convincing evidence that a donative intent did not exist, premarital assets transferred by the owner spouse into both spouses' names become a part of the marital estate subject to equitable distribution.

NO. 01-1952

WILLIAM B. QUINN, Esquire—Counsel for Plaintiff.

BARRY C. SHABBICK, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, J.—May 23, 2003

At issue in the above-referenced divorce proceedings are questions involving the identification, valuation and distribution of marital assets. Both the Plaintiff, Lisa Marie Dragoni (hereinafter "Wife"), and the Defendant, James F. Dragoni (hereinafter "Husband"), have filed exceptions to the Master's Report necessitating a complete and independent review of the evidence before the Master.

Husband and Wife were married on October 27, 1990 and separated on July 6, 2001. At the time of marriage, Wife was 25 years of age and Husband was 47 years old. The marriage was Wife's first and Husband's second, Husband's first wife having died on April 15, 1990. No children were born of the marriage.

A number of issues involving economic claims have been raised in the parties' exceptions, however, only three require extended discussion. These are reviewed in this Memorandum.

I. STATUS OF HUSBAND'S RETIREMENT BENEFITS WITH THE FEDERAL CIVIL SERVICE RETIREMENT SYSTEM

At the time of Husband's marriage to Wife, Husband was employed by the United States Postal Service. Husband began employment with the Postal Service in April 1965 and retired in October 1992. Husband's last position held was as Postmaster at the Kunkletown Office.

As an employee of the Postal Service, Husband did not contribute to and was not entitled to social security retirement benefits. Instead, Husband's retirement contributions and benefits are governed by the federal Civil Service Retirement Act under Chapter 83, 5 U.S.C. §§8301-8351.[1]

At the time of retirement, Husband received a retirement benefit of approximately One Thousand One Hundred Dollars ($1,100.00) per month. These benefits are adjusted annually for cost of living increases. On May 20, 2002, the day of the Master's hearing, Husband was receiving a monthly net retirement benefit of One Thousand Six Hundred Forty-Eight Dollars ($1,648.00). This amount was paid to Husband after a deduction of One Hundred Nine Dollars ($109.00) to provide for Husband's medical insurance coverage.

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[1] An employee who has completed twenty-five years of service or who has reached fifty years of age and has completed twenty years of service qualifies for immediate retirement and is entitled to an annuity. 5 U.S.C. 58336(j)(1)(A)(i). This annuity is financed primarily by contributions deducted from the employee's pay as permitted by 5 U.S.C. §8334 (N.T., p. 66).

Benefits under the Civil Service Retirement Act have different enabling legislation than military retirement benefits. **See** Uniformed Services Former Spouses' Act, 10 U.S.C. §§1408-1412. For this reason, the treatment of benefits under the Civil Service Retirement Act in divorce proceedings must be analyzed independently of the division of military benefits under the Uniformed Services Former Spouses' Act.

Husband claims that the benefits he receives from the federal Civil Service Retirement System (CSRS) are in lieu of social security retirement benefits and since, under federal law, social security retirement benefits cannot be considered marital property, his CSRS benefits are neither marital property nor subject to equitable distribution.[2] Husband cites the Superior Court decision of **Cohenour v. Cohenour,** 696 A.2d 201 (Pa. Super. 1997), in support of his position. Wife challenges this conclusion and requests that the coverture fraction of Husband's federal retirement benefits be computed and deemed a marital asset forming part of the marital estate.[3] The Master accepted Husband's argument and excluded these benefits from the marital estate.

Prior to 1978, as a matter of federal law and preemption, benefits under the Civil Service Retirement Act were not assignable or subject to other legal process in a state court divorce proceeding. 5 U.S.C. §8346(a); **Cornbleth v. Cornbleth,** 397 Pa. Super. 421, 425 n.1, 580 A.2d 369, 371 n.1 (1990), **appeal denied,** 526 Pa. 648, 585 A.2d 468 (1991). However, in 1978 the Act was amended by adding subsection (j) to 5 U.S.C. §8345 and amending Section 8346(a) to provide for an exception to the anti-assignment provision created by the addition of subsection (j). 5 U.S.C. §8345(j)(1); **Cornbleth, supra**

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[2] The Civil Service Retirement System provides a comprehensive retirement plan that includes a required contribution in lieu of social security. Under federal law, social security benefits are not marital property subject to division and allocation in a state court proceeding. **Hisquierdo v. Hisquierdo,** 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed. 2d 1 (1979). This does not mean, however, that social security benefits may not be evaluated and considered in making an equitable distribution of marital assets. **LaBuda v. LaBuda,** 349 Pa. Super. 524, 539, 503 A.2d 971, 979 (1986), **appeal denied,** 514 Pa. 648, 524 A.2d 494 (1987); **Holland v. Holland,** 403 Pa. Super. 116, 119, 588 A.2d 58, 60 (1991), **appeal denied,** 528 Pa. 611, 596 A.2d 158 (1991).

[3] The coverture fraction is defined as:

> that portion of the value of the pension that is attributable to the marriage. The numerator of the fraction is the total period of time the employee spouse was a participant in the plan from the date of the marriage until date of separation, and the denominator is the total period of participation in the pension plan.

Meyer v. Meyer, 561 Pa. 225, 749 A.2d 917, 918 n.1 (2000).

at 425 n.1, 580 A.2d at 371 n.1.[4] The effect of the Amendment was to permit civil service pensions to be treated as marital property, and divided and distributed in divorce proceedings.[5]

While recognizing that federal law no longer prohibited a spouse's CSRS pension from being treated as a marital asset subject to equitable distribution, as a matter of state law, the Superior Court in **Cornbleth** determined that in order to equate CSRS participants with social security participants it is proper and equitable for the court to reduce the present value of the CSRS pension by the amount that the spouse would have received under social security benefits as if the spouse had participated and contributed to social security. Specifically, the Court stated:

> However, although, as aptly demonstrated by the trial court, there is no federal preemption obstacle in the way of considering appellant's pension a marital asset, this is only one part of the required analysis. There still remains a need to determine whether the pension should be considered a marital asset under the governing theories of our domestic relations law. In this respect, we have no difficulty in concluding that to the extent appellant's pension is similar to that of a conventional pension the portion of appellant's pension fairly characterized as the equivalent of a conventional pension should be included in the marital estate.

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[4] Section 8345(j)(1)(A) provides:

(j)(1)(A) Payments under this subchapter which would otherwise be made to an employee, Member, or annuitant based on service of that individual shall be paid (in whole or in part) by the Office to another person if and to the extent expressly provided for in the terms of any court decree of divorce, annulment, or legal separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation. Any payment under this paragraph to a person bars recovery by any other person.

[5] The marital portion of a federal pension is distributed by way of a Court Order Approved for Processing (COAP) which must be drafted in accordance with the Code of Federal Regulations. The significance of this is that the Office of Personnel Management will not accept court orders labeled as a "Qualified Domestic Relations Order" unless it specifically states that the provisions of the order pertaining to the CSRS benefits are governed by Part 838, Title 5 of the Code of Federal Regulations. **See** 5 C.F.R. §838.302(A). In contrast, Qualified Domestic Relations Orders (QDROs) are used in connection with private pension and retirement plans.

> However, to the extent part of the pension might figuratively be considered 'in lieu of' a Social Security benefit we believe that portion should be exempted from the marital estate.

Cornbleth, supra at 425, 580 A.2d at 371. This same reasoning was accepted and followed in **Cohenour.**

Consistent with **Cornbleth** and **Cohenour,** the present value of Husband's hypothetical social security benefits based on his federal earnings should have been deducted from the present value of his CSRS pension and the coverture fraction applied to this figure in determining the marital portion of Husband's CSRS pension. **Gordon v. Gordon,** 545 Pa. 391, 396, 681 A.2d 732, 735 (1996).[6] This value was not determined by the Master and could not be determined since neither party presented evidence as to the value of that portion of Husband's pension which was received in lieu of social security retirement benefits.

Given the presumption that all property acquired during the marriage is a marital asset, until proven otherwise, the burden of going forward with this evidence was upon the Husband. 23 Pa. C.S. §3501(b); **see also, Drake v. Drake,** 555 Pa. 481, 725 A.2d 717, 722 (1999). Having failed to do so, the Master should have applied the coverture fraction to the gross value of Husband's pension without reduction for a social security offset. However, because, as we explain below, further proceed-

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[6] This approach assumes use of the immediate offset method with respect to the division and distribution of retirement benefits, an approach appropriate to these proceedings given the existence of sufficient other marital assets to permit an immediate division of assets. If the present value of the marital portion of Husband's CSRS pension is not computed, because Husband's pension is already mature and in pay status, an award of a portion of the monthly benefits to wife is also possible. **Hayward v. Hayward,** 428 Pa. Super. 332, 630 A.2d 1275 (1993) (holding it is within the court's discretion whether to use the immediate offset method or award a portion of the benefit payments), **appeal denied,** 537 Pa. 621, 641 A.2d 586 (1994). A social security offset should not be made where neither spouse has accrued social security benefits during the marriage. **McClain v. McClain,** 693 A.2d 1355 (Pa. Super. 1997) (holding it is inequitable to credit husband with the value of hypothetical social security contributions when wife has no appreciable, or only miniscule, social security benefits attributable to employment during the marriage). Therefore, on remand, the Master will need to determine what, if any, social security retirement benefits Wife accrued during the marriage. **McClain, supra** at 1359 n.2.

ings before the Master are required, at such proceedings both the Husband and Wife will be permitted to supplement the record with competent evidence addressing the proper valuation of the marital portion of Husband's CSRS pension.

II. DIVISION OF JEWELRY

At the hearing before the Master, Husband testified to the cost of various jewelry he purchased and gifted to Wife during the marriage.[7] Wife did not dispute the occurrence of these gifts or the cost of the jewelry. Finding that the cost of an item is evidence of value, but not the same as value, and that Husband failed to present any evidence of the fair market value of the jewelry he purchased, the Master placed no value on the jewelry and awarded this property to Wife as possessed.

The effect of the Master's decision was to recognize the existence of marital property but effect a forfeiture of Husband's marital interest in favor of Wife. This was error. Allocation of a marital asset by default is not equity. **Oaks v. Cooper,** 536 Pa. 134, 142, 638 A.2d 208, 212 (1994).

Wife did not deny the existence of this jewelry, or that she remained in sole and exclusive possession and control of such property. Nor did Wife provide the Master with an alternative valuation. To have placed the burden of production of evidence of value on the Husband alone was wrong. At a minimum, the burden was shared between the parties. **Aletto v. Aletto,** 371 Pa. Super. 230, 237 n.5, 537 A.2d 1383, 1386 n.5 (1988) ("[I]t is an accepted principle of law that when evidence of a particular fact at issue is peculiarly within the control of a party, that party may be subjected to a burden of production.").

Moreover, in determining value, the Master may rely on estimates, inventories, records of purchase prices and appraisals submitted by the parties in valuing marital assets. **Smith v. Smith,** 439 Pa. Super. 283, 297, 653 A.2d 1259, 1265-66 (1995), **appeal denied,** 541 Pa. 641, 663 A.2d 693 (1995). "When one

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[7] Under the Divorce Code, the date of acquisition, rather than the method of acquisition, determines whether property is marital property. Gifts between spouses are not excluded from the definition of marital property. 23 Pa. C.S. §3501(a)(3). Of the jewelry Husband identified, the blue sapphire and the diamond solitary engagement ring were acquired by Wife prior to the marriage and are not marital assets (N.T., pp. 83-84). The remaining jewelry, purchased at a cost of $5,029.32, was acquired during the marriage and is a marital asset (Exhibit D-2).

party offers uncontradicted evidence of the value of a particular marital asset, this Court may adopt that value even if the resulting valuation would have been different if more accurate and complete evidence had been presented." **Id.** at 299, 653 A.2d at 1267. More importantly, with the possible exception of property whose value is inconsequential and would not affect the scheme of equitable distribution, the Master is required to value each item of marital property. **Aletto v. Aletto, supra** at 243 n.10, 537 A.2d at 1390 n.10.

To correct this error, the issue will be remanded to the Master. On further consideration, the Master may permit additional testimony from the parties with respect to fair market value. For these purposes, as an equitable owner of the property, Husband is competent to express his opinion of value. In distributing such property, the Master may also consider an in-kind distribution. Regardless what recommendation is made by the Master, at a minimum, fairness dictates that the value of marital assets be determined and a considered, equitable distribution be made, not one by default. **Aletto v. Aletto, supra** at 242-43, 537 A.2d at 1389-90.[8]

III. DIVISION OF HOME AND CERTIFICATES OF DEPOSIT

Husband disputes the Master's determination awarding Wife fifty percent of the value of the marital home valued at $115,428.94 and thirty percent of the value of four certificates of deposit totaling $101,332.27.

The home was previously owned by Husband and his first wife as tenants by the entireties and was unencumbered at the time of Husband's marriage to Wife. No evidence was presented by either party as to the value of the home at the time of the

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[8] On remand, the Master should also address and report on the Husband's claims for alimony, alimony pendente lite and costs, expenses and counsel fees. This claim is among those referred to the Master in the Court Order appointing the Master dated January 23, 2002, and is the subject of Husband's exception number 8. Notwithstanding the current order of alimony pendente lite in favor of Husband, if the Master determines that Husband has sufficient assets to pursue further litigation, including those assets recommended by the Master to be distributed to the Husband in the final decree of equitable distribution, the right to continue to receive alimony pendente lite may be terminated. **Brody v. Brody,** 758 A.2d 1274, 1281 (Pa. Super. 2000), **appeal denied,** 567 Pa. 719, 786 A.2d 984 (2001).

parties' marriage or at the time of separation. The property sold for $115,428.94 on March 27, 2002.

As property acquired prior to the marriage, and with no evidence being presented as to any increase in value during the marriage and prior to separation, ordinarily the entire value of this property would be presumed to be nonmarital. 23 Pa. C.S. §3501(a)(1) Here, however, Husband's conveyance and transfer of title of the home into his and Wife's name as tenants by the entireties by deed dated October 21, 1999, transformed the property into a marital asset. **Williams v. Williams,** 373 Pa. Super. 143, 147, 540 A.2d 563, 565 (1988) (property acquired prior to marriage which is subsequently transferred to the parties as tenants by the entireties becomes marital property absent clear and convincing evidence to the contrary).

The certificates of deposit at issue were previously owned by Husband's mother. Prior to her death on February 25, 2000, title to the certificates was placed in Husband's and his mother's name with right of survivorship. Although Husband became the sole owner of this property upon his mother's death, subsequently, on March 3, 2000, Husband made his Wife an equal owner of each certificate. Husband's argument that ownership of these certificates is controlled by the Multiple-Party Accounts Act, 20 Pa. C.S. §6301 **et seq.,** not by principles of equitable distribution, is belied by **Carney v. Carney,** 449 Pa. Super. 179, 673 A.2d 367 (1996) (the Multiple-Party Accounts Act is not applicable to the equitable distribution of funds held in joint accounts between husband and wife). Instead, Husband's naming of Wife as an equal owner of this property caused the certificates of deposit to become a marital asset. **Madden v. Madden,** 336 Pa. Super. 552, 558, 486 A.2d 401, 404-405 (1984) (absent clear and convincing evidence to the contrary, a spouse's transfer of monies from his name alone to an account in the names of husband and wife raises the presumption of a gift and the creation of an asset by the entireties); **Carney, supra** at 183, 673 A.2d at 369-70.

We find no error in the Master's determination that the home and the certificates of deposit are marital assets subject to equitable distribution. Husband failed to establish by clear and convincing evidence that an entireties estate was not created when title to the marital home was placed in both names and

Wife's name was added to the certificates of deposit. We also find no error in the Master's division of these assets.

At the time of hearing, Wife was employed as an Office Manager at the East Penn Veterinary Clinic with gross earnings of $38,000.00 annually. In addition to his pension benefits, Husband had obtained part-time employment as a cashier at a Sam's Club earning approximately $8,000.00 additional gross pay per year. Given Wife's age and good health, Wife can be expected to maintain good earnings and improve her financial status. Similar expectations for Husband are unlikely due to his age and retirement from the Postal Service.

Additionally, notwithstanding Husband's contention that substantial marital assets have as their origin Husband's premarital real estate or the monies he received from his mother, a factor which Husband argues should dominate the distribution of marital assets,[9] it is also clear that following Husband's retirement, Wife was a significant wage earner in the household. The record does not convince the Court, as Husband argues, that Wife's relationship with Husband was a premeditated scheme for her economic advantage. To the contrary, the parties continued together for more than ten years in marriage and, for reasons for which neither should be assigned fault, the parties agreed to end their marriage.

Although we find no fault with the Master's valuation and distribution of the proceeds of the home and certificates of deposit, because of the need for remand on the issues discussed

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[9] **Williams v. Williams, supra** (contribution of premarital property a factor, but not controlling, in making equitable distribution). The Divorce Code does not allow us to consider the Husband's motive in making a gift in the determination whether the property is marital or separate property. **Brody v. Brody, supra at 1278.** However, the motive and origin of the assets gifted are equitable considerations which may be examined in dividing marital property. **Cf. Drake v. Drake, supra,** 725 A.2d at 726. It is also important to note that in making equitable distribution, the Court must consider each asset and distribution individually. **Williams, supra** at 149, 540 A.2d at 566. An intelligent distribution of marital property does not require that all items of marital property be divided on the same percentage of division. **Drake, supra** at 727. "In this Commonwealth, marital property is not property that is thrown into the pot to be divided equally as in community property states, but property impressed with equitable consideration which must be evaluated before apportionment is considered." **Gioia v. Gioia,** 382 Pa. Super. 538, 548, 555 A.2d 1330, 1336 (1989) (citation and quotation marks omitted). The plan of distribution must be economically sound and just.

above and our rulings in the attached order with respect to the parties' remaining exceptions, on remand, the Master shall reexamine the effect of these calculations on the overall scheme of equitable distribution and the division of assets. At this time, without knowing the present value of the marital interest in Husband's pension benefits, if any, and any adjustments the Master may recommend to the division of marital assets after considering our rulings to the exceptions, it is premature to determine whether the Master abused his discretion in the plan of equitable distribution originally recommended.

CINDY L. SANTEE, Plaintiff vs.
KENNETH E. SANTEE, JR., Defendant

Civil Action—Divorce Proceedings—Equitable Distribution—Determination of Marital Debt—Division of Marital Debt

1. Marital debts subject to equitable distribution are those which arise between the date of marriage and the date of separation.

2. Absent a contrary intent, post-separation payments of marital debt made with post-separation earnings do not reduce the amount of marital debt subject to equitable distribution.

3. Debt which arises after separation, even though joint and mutual, is not marital debt subject to equitable distribution. Here the filing by the parties of joint tax returns for tax years after their separation, but before divorce, while creating a joint tax liability did not create a marital obligation.

4. While ordinarily not a factor in determining equitable distribution, conduct having a direct and substantial impact on the economic status of the parties, even though also constituting marital misconduct, may be considered.

5. The Master does not err in failing to divide marital assets whose existence and value is not supported by the evidence and properly documented.

NO. 99-2357

DAVID A. NICHOLLS, Esquire—Counsel for Plaintiff.

KENNETH E. SANTEE, JR.—Pro se.

MEMORANDUM OPINION

NANOVIC, J.—June 3, 2003

The Defendant, Kenneth E. Santee, Jr. (hereinafter referred to as "Husband"), has filed four exceptions to the Master's Report and Recommendation in these divorce proceedings. After review, three will be denied and one granted, in part.

The Husband and the Plaintiff, Cindy L. Santee (hereinafter referred to as "Wife"), were married on October 6, 1990,

and separated some time between October 1998 and February 1999.[1] The parties' separation was precipitated by domestic violence resulting in Husband's arrest for assaulting Wife (N.T., p. 9). Subsequently, between May and October, 1999, Husband was imprisoned for this offense (N.T., p. 44).

At the time of their separation, the parties' marital assets consisted primarily of their respective retirement benefits—both were employed; two vehicles—a 1995 Chevrolet Blazer and 1997 Dodge diesel pickup truck—both financed; and a newly built home under construction and for which bridge financing was in place during the period of construction.

Prior to Husband's imprisonment the parties struggled to make ends meet: between July 16, 1992 and January 12, 1999, early withdrawals were taken from Husband's annuity account at the International Union of Operating Engineers resulting in early withdrawal penalties. With Husband's imprisonment, what had been a two-income family was reduced to one income and earnings insufficient to service the parties' debt. In consequence, the 1997 Dodge diesel pickup truck was repossessed and the parties' home lost through foreclosure.[2]

By the time of the Master's hearing, the parties agreed to the entry of a consensual no-fault divorce and that each would retain their own retirement benefits (N.T., pp. 4, 66). Therefore, the only issues submitted to the Master were certain equitable distribution issues: primarily, the allocation between the parties of the debt outstanding on the 1995 Chevrolet Blazer at the time of separation; the division of the payment of outstanding taxes, penalties and interest owed on joint income tax returns filed by the parties for the years 1997, 1998 and 1999; and the division of household contents.

DEBT ON 1995 CHEVROLET BLAZER

Following the parties' separation, Wife retained possession of this vehicle and paid, with post-separation earnings,

[1] Wife testified to a date of separation of October 1, 1998 (N.T., p. 8). Husband testified to the separation being in February, 1999 (N.T., pp. 33, 55-56). The Master noted this conflict but did not resolve it, finding the conflict to be irrelevant with respect to the determination and distribution of marital assets (Master's Report, p. 2, ¶1).

[2] No evidence was presented of the request for or entry of a deficiency judgment by creditors.

$16,369.00, the entire outstanding debt owed. At the hearing before the Master, Wife testified that while the vehicle might be worth more, the most she was offered was $3,500.00 (N.T., pp. 14-15). The Master recommended that Husband pay Wife half the monies she paid on account of this debt less the anticipated sales proceeds, a total figure of $4,684.50 (**i.e.,** $8,184.50 (half of $16,369.00) less $3,500.00).[3] Husband excepted to this recommendation.

Husband's exception will be denied. The debt was one incurred during the marriage and is clearly marital in nature. **Litmans v. Litmans,** 449 Pa. Super. 209, 229, 673 A.2d 382, 391 (1996) (debts accruing during the marriage and prior to separation are marital debts). Wife used post-separation assets, her earnings, to pay this debt. By doing so, Wife did not intend to benefit Husband or otherwise reduce the amount of marital debt subject to equitable distribution. **Cf. Goldblum v. Goldblum,** 416 Pa. Super. 438, 611 A.2d 296 (1992) (increase in value of marital estate caused by post-separation payments on marital debt with post-separation earnings, considered by itself, not to be included in the value of the marital estate), **aff'd,** 539 Pa. 246, 652 A.2d 282 (1994); **Kohl v. Kohl,** 387 Pa. Super. 367, 564 A.2d 222 (1989) (repayment of a husband's loan by the father after separation did not cause increase in the marital estate by reduction of debt; there was no evidence that the father intended to also benefit the wife), **aff'd,** 526 Pa. 263, 585 A.2d 463 (1991).

Prior to separation, Wife earned $42,000.00 annually and Husband's annual income fluctuated between $20,000.00 to $50,000.00. The parties are close in age to one another and in good health. Husband's claim that after separation he spent $2,000.00 to make the vehicle road-worthy during a seven-month period when he took the vehicle from Wife's possession without her consent was neither documented nor proven at the time of hearing and, in any event, would be substantially offset by the 31,000 additional miles Husband placed on the vehicle during this same time. It is also not insignificant that while marital misconduct is not ordinarily a factor to be considered

[3] The Master used a figure of $3,000.00 for the present value of the Blazer. This has been corrected in our computations to $3,500.00 to conform to the evidence.

in equitable distribution, in this case, Husband's abuse of Wife was a direct and significant cause of the parties' economic hardship leading to the repossession and foreclosure of marital assets. **Cf. Semasek v. Semasek,** 331 Pa. Super. 1, 10 n.3, 479 A.2d 1047, 1052 n.3 (1984) (holding admissible evidence of marital misconduct when presented as an economic factor), **rev'd on other grounds,** 509 Pa. 282, 502 A.2d 109 (1985).

Under the circumstances, we believe an equal division of this debt, with Wife retaining the vehicle and Husband being credited for a residual value of $3,500.00, is fair and equitable.

LIABILITY ON JOINT TAX RETURNS

Husband next argues that the Master erred in recommending that Husband be solely responsible for payment of the 1997, 1998 and 1999 taxes, interest and penalties owed on the parties' joint federal income tax returns. The amount outstanding as of March 7, 2002 totaled $4,316.83 (Exhibit P-2). On this issue, we believe the Master erred.

Marital debts, like martial assets, are those which accrue between the date of marriage and the date of separation. **Grandovic v. Grandovic,** 387 Pa. Super. 619, 626, 564 A.2d 960, 963-64 (1989). Clearly, the principle amount of taxes owed on the 1997 and 1998 returns, due for the tax periods ending on December 31, 1997 and December 31, 1998, respectively, is a martial obligation. **Duff v. Duff,** 510 Pa. 251, 254, 507 A.2d 371, 373 (1986) (joint tax liability imposed after separation but arising prior to separation should be charged against marital estate). It is equally clear that the interest and penalties owed for these years was attributable to marital debt and while it appears that for the year 1997 most, and for the year 1998 all, of the interest and penalties accrued after separation, Wife's evidence does not persuade us that she did not know, or could not have known, of the outstanding claim by the Internal Revenue Service for interest and penalties on joint tax returns signed by her and for which she, by virtue of the returns, agreed to be equally responsible with Husband.

In contrast, the 1999 income tax return filed by the parties was for the calendar year 1999 and, therefore, for taxes, interest and penalties owed on the income earned primarily, if not entirely, after the parties separated. Consequently, the liability

assumed by filing this return, while joint and mutual, was not a marital obligation for which the Master had jurisdiction in an equitable distribution proceeding. **Grandovic, supra** at 626, 564 A.2d at 963-64.

In accordance with the foregoing, our Decree of Equitable Distribution will provide only for equitable distribution of the outstanding taxes, penalties and interest owed on the parties' 1997 and 1998 joint tax returns on a fifty/fifty basis.

DIVISION OF HOUSEHOLD CONTENTS

Husband's third exception challenges the Master's award of household contents between the parties as possessed. Husband argues that the Master fails to credit Wife with a larger value of personal property which he contends Wife removed from the marital home.

The evidence in support of the Master's recommendation, which we find credible,[4] is that the items of household furnishings retained by the Wife have only nominal value.[5] Husband was offered an opportunity to remove those items which he desired and failed to do so. Those items which neither party removed were left in the marital home and lost in the foreclosure proceedings.

Further, Husband failed to document or to present any evidence with respect to the fair market value of any household items, whether retained by him, by Wife or left in the marital home. "When one party offers uncontradicted evidence of the value of a particular marital asset, this Court may adopt that value even if the resulting valuation would have been different if more accurate and complete evidence had been presented." **Smith v. Smith,** 439 Pa. Super. 283, 299, 653 A.2d 1259, 1267

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[4] In reviewing a Master's report and recommendations, we have an obligation to make an independent study of the record. While the Master's findings of fact and recommendation are only advisory, where the issue is one of credibility and the Master is the one who heard and observed the witnesses, his findings should be given the fullest consideration. **Hunsinger v. Hunsinger,** 381 Pa. Super. 453, 457, 554 A.2d 89, 91 (1989).

[5] Wife testified that she received a living room suite with a value of $50, a bedroom suite consisting of a bed and chest of drawers with a value of $100, and an eighteen-year-old washer and dryer having little or no value (N.T., pp. 19-20).

(1995), **appeal denied,** 541 Pa. 641, 663 A.2d 693 (1995).[6] Absent any evidence presented by the Husband to support his contentions, we find no error in the Master's recommendation. See **Litmans v. Litmans, supra** at 236, 673 A.2d at 395.[7]

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[6] This situation is different from that where marital assets are identified but neither party presents competent and credible evidence for the Court to make a reasonable valuation. In the latter circumstance, equity requires that the matter be remanded to the fact-finder for further proceedings. **Semasek, supra** at 22, 479 A.2d at 1058 (Spaeth, P.J., dissenting). In order to achieve equitable distribution, it is incumbent upon the fact-finder to "assess the credibility of the parties and determine appropriate values for each item of marital property." **Aletto v. Aletto,** 371 Pa. Super. 230, 243 n.10, 537 A.2d 1383, 1390 n.10 (1988).

[7] Husband's fourth exception challenges the division of the costs of the divorce proceedings between the parties. Husband has not briefed this issue and it is waived. **See** Carbon County Local Rule 1920.55 which, in conjunction with Rules L210 and L211, requires exceptions to a master's report to be briefed. **Cf. Keller v. Keller,** 760 A.2d 22, 25 (Pa. Super. 2000) (absent reference to legal authority (**e.g.,** applicable local rules or case law) to support the proposition that a failure to file a brief at the trial court level in support of exceptions to a master's report constitutes waiver, issues found not waived on appeal).

EARL D. MARCUS and STEPHANIE MARCUS, Petitioners vs. CARBON COUNTY TAX CLAIM BUREAU, JASON KELLER, and COMMONWEALTH PROPERTIES, INC., Respondents

Civil Action—Real Estate Tax Sale Law—Judicial Sale—Petition To Set Aside Sale—Unclaimed Notice of Sale—Responsibility of Tax Claim Bureau To Exercise Reasonable Efforts To Locate Taxpayer and Provide Notice of the Sale

1. Before a property owner's interest in real estate may be divested for delinquent real estate taxes, strict compliance with the notice provisions of the Real Estate Tax Sale Law is required. The burden of establishing compliance is upon the Tax Claim Bureau.

2. When the notice of a pending tax sale is returned unclaimed or under other circumstances raising a significant doubt as to the actual receipt of the notice, the Tax Claim Bureau is obligated by statute and by principles of due process to exercise additional reasonable efforts to locate and notify the owner of the pending tax sale.

3. The burden of proof to establish that the required additional notification efforts were undertaken and documented in the files of the Tax Claim Bureau is upon the Tax Claim Bureau. If the required efforts are not made and the file is not notated, the sale is not valid.

NO. 02-0233

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MEMORANDUM OPINION

NANOVIC, J.—June 4, 2003

On December 10, 2001, the Petitioners' property located at 1935 Horace Way, Albrightsville, Penn Forest Township, Carbon County, Pennsylvania (the "Property") was sold at judicial sale for unpaid 1997 and 1998 real estate taxes. Respondents, Jason Keller and Commonwealth Properties, Inc., (the "Purchasers") were the successful bidders for the Property. By deed dated January 4, 2002, the Carbon County Tax Claim Bureau (the "Bureau") transferred title for the Property to the Purchasers.

On January 30, 2002, Petitioners filed a petition to set aside the judicial tax sale.[1] In this petition, Petitioners challenge the regularity and legality of the proceedings of the Bureau with respect to the sale. Specifically, Petitioners argue that (1) the Bureau failed to send notice of the impending sale to the Petitioners at "their last known post office address" as required by Section 611 of the Real Estate Tax Sale Law, 72 P.S. §5860.101 **et seq.** (the "Law") and (2) upon return of the Bureau's mailing of the petition and rule for judicial sale, unclaimed, the Bureau failed to exercise the reasonable efforts required by Section 607a of the Law to discover the Petitioners whereabouts and to notify them of the sale.[2]

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[1] An action or proceeding to set aside a judicial sale must be commenced within six months of the sale. 42 Pa.C.S. §5522(b)(5). In contrast to an upset tax sale, a judicial tax sale is a judicial sale within the meaning of this statute. **Murphy v. Monroe County Tax Claim Bureau,** 784 A.2d 878 (Pa. Commw. 2001). The period of limitations to challenge an upset tax sale is six years. 42 Pa.C.S. §5527; **Poffenberger v. Goldstein,** 776 A.2d 1037, 1042 n.5 (Pa. Commw. 2001). In the instant case, Petitioners' challenge to the judicial tax sale was timely commenced.

[2] These grounds are expressly stated and identified in the Petition. By doing so, the Petitioners have raised a prima facie challenge to the Bureau's compliance with the Law's requirements for mailing notice to a delinquent taxpayer. Since we believe the second issue to be dispositive, we find it necessary only to discuss this issue.

Section 611 requires that service of a rule to show cause why a judicial sale should not occur be made on an out of state resident owner of property "by the sheriff, by sending him, by registered mail, return receipt requested, postage prepaid, at least fifteen (15) days before the return date of the rule, a true and attested copy thereof addressed to such person's last known post office address." It is undisputed that at all relevant times the Petitioners were residents of the State of New York. Section 607a requires that when notice of a pending tax sale is returned unsigned by the owner, "then, before the tax sale can be conducted or confirmed, the bureau must exercise reasonable efforts to discover the whereabouts of such person or entity and notify him. The bureau's efforts shall include, but not necessarily be restricted to, a search of current telephone directories for the county and of the dockets and indices of the county tax assessment offices, the recorder of deeds office and prothonotary's office, as well as contacts made to any apparent alternate address or telephone number which may have been written on or in the file pertinent to such property."

FACTS AND PROCEDURAL BACKGROUND

Here, notice of the petition and rule for the judicial sale was mailed on June 29, 2001, by the Carbon County Sheriff by certified mail, return receipt requested, to the Petitioners at 798 Green Avenue, Brooklyn, New York 11221 (the "Green Avenue Address"). On or before July 17, 2001, the mail was returned to the Sheriff, undelivered, marked with the notation "moved." Since August 1993, the Petitioners have resided continuously at 297 East 92nd Street, Brooklyn, New York 11212 (the "92nd Street Address") (N.T., pp. 24, 30).[3] The Petitioners never received the notices sent by the Sheriff and had no actual knowledge of the sale prior to its occurrence. Nor were the Petitioners aware that a judicial sale had been requested (N.T., pp. 27-28, 46).

Notice of the return and claim with respect to the 1997 taxes was mailed by the Bureau in May 1998, also to the Green Avenue Address. This notice was returned, undelivered, on or

[3] The property at Green Avenue was formerly owned by Mr. Marcus' parents but sold by them in 1993 when they moved to the South. While Mr. Marcus resided there at one time, he has not lived at this address since the property was sold by his parents (N.T., pp. 25-26,45).

about July 22, 1998, marked "attempted-not known" and "vacant." However, both before and after this mailing, the Bureau had documented evidence in its files of the Petitioners' residence at 92nd Street.

On May 1, 1997, the Bureau sent notice of a return and claim with respect to unpaid 1996 taxes levied against the Property to the Petitioners at the 92nd Street Address. On August 4, 1998, the Bureau sent to the 92nd Street Address notice of an upset tax sale of the Property to collect the 1996 taxes scheduled for September 25, 1998. This sale was stayed when the Petitioners and the Bureau as of September 24, 1998, entered an agreement to stay the sale.[4]

A notice of the return and claim for unpaid 1998 taxes levied against the Property was mailed to the Petitioners at 4816 Avenue N., Brooklyn, New York 11234 on May 3, 1999. The source of this address is unknown; Petitioners testified that they never lived at this address or requested that mail be sent to them at this location. The return receipt for this notice was signed, however, the signature is not that of either of the Petitioners nor did the Petitioners recognize the name or authorize any person to sign on their behalf.

An agreement to stay the sale with respect to the 1997 taxes was also signed between the Petitioners and the Bureau as of September 20, 1999.[5] Petitioners made three of the four required payments for payment of the 1997 taxes but failed to pay the fourth and final payment. With this failure, Petitioners were in default under the agreement as of June 19, 2000. Both this agreement and the previous agreement to stay the sale of the Property for 1996 taxes listed the Petitioners' mailing address as the 92nd Street Address.

On April 25, 2000, the Bureau sent to the Petitioners at the 92nd Street Address notice of the return and claim for unpaid 1999 taxes levied against the Property. The Bureau also sent to the Petitioners at the 92nd Street Address on July 11, 2000, notice of an upset sale of the Property scheduled for September 22, 2000. The sale was scheduled for pre-1999 unpaid real

[4] The final payment owed pursuant to this agreement was made on September 20, 1999.

[5] No evidence was presented that this agreement was preceded by a notice of an upset tax sale to collect the 1997 taxes.

estate taxes: presumably the unpaid balance of the 1997 taxes, interests and penalties in default as of June 19, 2000, under the agreement to stay the sale of the Property for payment of the 1997 taxes, and the unpaid balance pursuant to the notice of return and claim for 1998 taxes. No bid equal or greater than the upset price was received at the sale scheduled for September 22, 2000. For this reason, the Property was not sold at that time.

All notices sent by the Bureau to the Petitioners referred to above were with respect to the Property. All of the notices sent by the Bureau to the Petitioners at the 92nd Street Address were signed either by the Petitioners or someone on their behalf, were received by them, and none were returned to the Bureau.

The Law requires that a petition for judicial sale be accompanied by searches "showing the state of the record and the ownership of the property and all tax and municipal claims, liens, mortgages, ground rents, charges and estates against the same. …" 72 P.S. §5860.610. This search was performed for the Bureau by Paramount Abstract, Inc. In its search, Paramount identified the Green Avenue Address as the address at which the Petitioners should be served. While no evidence of record supports the use of this address as Petitioners' then current mailing address, its reference in the search appears to be the cause of the Bureau's use of the Green Avenue Address for service of the petition and rule for the judicial sale (N.T., pp. 8, 11).

In any event, once the Sheriff's return of service for notice of the judicial sale disclosed that the notice was not received by the Petitioners, the Bureau was required to exercise reasonable efforts to locate and notify the Petitioners of the pending sale. These efforts must, by statute, include, **inter alia,** an examination by the Bureau of its own records for "contacts made to any apparent alternate address or telephone number which may have been written on or in the file pertinent to such property." 72 P.S. §5860.607a. The Law requires that these efforts and the results thereof be documented in the property file. 72 P.S. §5860.607a.

No evidence was presented of any additional efforts made by the Bureau to discover the whereabouts of the Petitioners

or to notify them of the judicial sale after the mailed notification was returned unclaimed. Nor does the Bureau's file contain any information or entries concerning additional notification or investigation efforts made by the Bureau to locate the Petitioners prior to the December 10, 2001 judicial tax sale (N.T., pp. 12-13, 21-22).

DISCUSSION

In **In re Sale No. 10,** 801 A.2d 1280 (Pa. Commw. 2002), the Commonwealth Court held that the reasonable efforts requirement of Section 607a of the Law applies equally to both upset tax sales and judicial tax sales. The notification efforts required by Subsection 607a(a) are in addition to any other notice requirements imposed by the Law. 72 P.S. §5860.607a(b).

The impetus behind the enactment of Section 607a was the Pennsylvania Supreme Court's decision in **Tracy v. County of Chester Tax Claim Bureau,** 507 Pa. 288, 489 A.2d 1334 (1985). **In re Sale No. 10, supra** at 1286. There, the Supreme Court held that "[t]he collection of taxes … may not be implemented without due process of law that is guaranteed in the Commonwealth and federal constitutions; and this due process, as we have stated here, requires at a minimum that an owner of land be actually notified by government, if reasonably possible, before his land is forfeited by the state." **Tracy, supra** at 297, 489 A.2d at 1339. "[U]nder the due process clause a **reasonable effort** must be made to provide **actual** notice of an event which may significantly affect a legally protected property interest." **Id.** at 295, 489 A.2d at 1338 (emphasis in original). "[W]here the name and address of the party affected are known or ascertainable after reasonable effort to determine them, a party with a legally protected property interest 'is entitled to notice reasonably calculated to apprise him of a pending tax sale.' " **Id.** at 295, 489 A.2d at 1338, **quoting Mennonite Board of Missions v. Adams,** 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed. 2d 180 (1983).

In **Gladstone v. Federal National Mortage Assoc.,** 819 A.2d 171 (Pa. Commw. 2003), the Commonwealth Court wrote:

> There must be strict compliance with the notice provisions of the Law to guard against the deprivation of property without due process of law. **Diefenderfer v. Carbon**

> **County Tax Claim Bureau,** 789 A.2d 366 (Pa.Cmwlth. 2001). To meet the due process requirements, the taxing authority is required to make a reasonable effort to discover the identity and address of a person whose interests are likely to be affected by the tax sale. **Mennonite Board of Missions v. Adams,** 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983).
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> * * * *
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> The Bureau has the burden of proving compliance with all applicable notice provisions. **McElvenny v. Bucks County Tax Claim Bureau,** 804 A.2d 719 (Pa.Cmwlth. 2002).

Id. at 173-74.[6] Challenges to a tax sale should also be reviewed in the context of the purposes of the Law: "The purpose of a tax sale is not to strip an owner of his property but rather to insure the tax on the property is collected." **Murphy v. Monroe Co. Tax Claim Bureau,** 784 A.2d 878, 883 (Pa. Commw. 2001).

In this case, the Tax Claim Bureau had at its disposal, in its files, the correct address at which the Petitioners had resided since August 1993. The address had been used successfully by the Bureau on numerous occasions to provide notice to the Petitioners of delinquent property taxes owed on the Property and the entry of claims and scheduled upset tax sales. Two agree-

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[6] The presumption of regularity that exists with respect to the acts of public officers applies to tax sales. With respect to this presumption, in **In re 1999 Upset Sale of Real Estate,** 811 A.2d 85 (Pa. Commw. 2002), the Commonwealth Court stated:

> Although a presumption of regularity attaches to tax sales, a property owner overcomes the presumption whenever he or she states a prima facie challenge to the sale based on the agency's compliance with statutory tax sale requirements. **Michener v. Montgomery County Tax Claim Bureau,** 671 A.2d 285 (Pa.Cmwlth. 1996). Because of the fundamental importance of the due process considerations that arise when the government subjects a citizen's property to forfeiture for nonpayment of taxes, the agency that has sold the property bears the burden of proving that it complied with statutory notice requirements when property owner mounts such a prima facie challenge.

Id. at 88. **Cf. 1999 Tax Claim Bureau of Consolidated Returns,** 820 A.2d 833, 835 (Pa. Commw. 2003) ("While in general, the notice provisions of the Tax Sale Law are strictly construed in favor of landowners, our case law also establishes a presumption that, where actual notice is established, the formal requirements of notice need not be strictly met."). "[A]ctual notice encompasses both **express** actual notice and **implied** actual notice ... ." **Sabbeth v. Tax Claim Bureau of Fulton County,** 714 A.2d 514, 517 (Pa. Commw. 1998) (emphasis in original).

ments to stay sales, one for 1996 taxes and one for 1997 taxes, explicitly identified the Petitioners' address as that at the 92nd Street Address. Section 603 of the Law, applicable to the agreement to stay the payment of 1997 taxes, expressly directs that if a default in an agreement with an owner to stay a tax sale occurs, written notice of the default is to be provided by the Bureau by United States mail, postage prepaid, to the owner at the address stated in the agreement. 72 P.S. §5860.603.

From our review of the evidence, we conclude that upon return of the unclaimed notice of the rule and petition for the judicial tax sale, the Bureau did not exercise reasonable efforts as required by Section 607a of the Law to notify the Petitioners of the judicial tax sale. "Because, in the case **sub judice,** the Bureau did not comply with the mandatory requirements set forth in Section 607.1(a) in that it did not make the required efforts and did not notate its files, the sale was not valid." **McElvenny v. Bucks County Tax Claim Bureau,** 804 A.2d 719, 723 (Pa. Commw. 2002), **appeal denied,** 819 A.2d 549 (Pa. 2003).[7] In reaching this conclusion, it is not our intent to impugn the general efforts or work of the Bureau. We understand fully the volume of work processed by the Bureau; that unintentional, unavoidable errors will occur; and that, in this case, the Bureau was provided an inaccurate address by the abstract company employed by the Bureau to search the title for the Property in anticipation of the judicial tax sale.

Nor is it our intent to impose upon the Bureau an impossible or impractical burden of investigation. "[A] government body is not required to make 'extraordinary efforts' to discover the identity and address of a person whose property interest are likely to be significantly affected by a tax sale, but only reasonable efforts." **Tracy, supra** at 296, 489 A.2d at 1338. Here, we find that standard was not met.

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[7] The record in this case contains no evidence that the Tax Claim Bureau pursued any of the required additional notification efforts. Because the Bureau failed to meet its burden of proving that it performed any of the notification efforts required by Section 607a, the burden never shifted to the Petitioners to produce contradictory evidence or to otherwise show cause why the tax sale should be overturned. **In re 1999 Upset Sale of Real Estate, supra** at 90.

MARIE T. MARK, Petitioner vs. CARBON COUNTY TAX CLAIM BUREAU AND MICHAEL R. FREY, Respondents

Civil Action—Real Estate Tax Sale Act—Upset Tax Sale—Exceptions—Allocation of Burdens and Presumptions—Necessity of Strict Compliance With the Posting Requirements

1. The presumption of the regularity of the acts of public officers attaches to tax sales. Once a prima facie challenge is made to the Tax Claim Bureau's compliance with the requirements of statutory notice, the burden shifts to the Bureau to prove affirmatively strict compliance with the Law. The presumption of regularity, a procedural expediency until rebutted, does not relieve the Bureau of this burden.

2. The Law requires that property subject to tax sale be posted at least ten days in advance of the sale. The Law contains no specific method of posting; however, case law requires that the posting be reasonable and likely to inform the taxpayer and the public of the intended real property sale.

3. The Bureau's burden to show strict compliance with the Law requires a showing that the posted notice was conspicuously posted and reasonably secured to the property which is the subject of the tax sale.

NO. 02-2560

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WILLIAM B. QUINN, Esquire—Counsel for Michael Frey.

MEMORANDUM OPINION

NANOVIC, J.—June 9, 2003

On September 20, 2002, the property at 303 East Abbott Avenue, Lansford, Carbon County, Pennsylvania, (the "Property") was sold by the Carbon County Tax Claim Bureau (the "Bureau") at an upset tax sale to Michael R. Frey (the "Purchaser"). Located on the Property is half a double home. The Property owner at the time was Marie T. Mark (the "Petitioner") who resided at 1804 Plaza Apartments, Lebanon, Pennsylvania 17042.

Notice that the sale had occurred was sent to the Petitioner on September 26, 2002, by certified mail addressed to her at 1804 Plaza Apt. C, Lebanon, PA 17042. This notice was returned unclaimed, however, on November 8, 2002. Petitioner filed timely exceptions to the tax sale which are now before us. In these exceptions, Petitioner alleges two bases for her challenge to the validity and legality of the sale: (1) that mailed

notice of the sale was sent to an incorrect address and (2) that the Property was not properly posted prior to its sale.

THE LAW

Section 602 of the Real Estate Tax Sale Law, 72 P.S. §§5860.101-5860.803 (the "Law"), imposes a series of notification requirements prior to an upset tax sale: by publication at least thirty days prior to the sale; by certified mail at least 30 days prior to the sale and, if the return receipt is not received, then, similar notice of the sale by first class mail at least ten days prior to the sale; and posting of the property at least ten days prior to the sale. 72 P.S. §5860.602(a), (e)(1)-(3). Additionally, before a sale can be conducted or confirmed, Section 607a of the Law requires additional notification efforts when the mailed notification is returned without the required personal receipt or under circumstances that raise doubt as to the actual receipt of notification by the named addressee. 72 P.S. §5860.607a(a).

The "[n]otice provisions of the Law are to be strictly construed, and there must be strict compliance with such provisions to guard against deprivation of property without due process of law." **Ali v. Montgomery County Tax Claim Bureau,** 124 Pa. Commw. 557, 562, 557 A.2d 35, 37 (1989).[1] If any of the three types of notice is defective, the tax sale is void. **Wells Fargo Bank v. Tax Claim Bureau of Monroe Co.,** 817 A.2d 1196, 1198 (Pa. Commw. 2003). "However, actual notice of a pending tax sale waives strict compliance with statutory notice requirements, and technical deficiencies in those notice requirements do not invalidate a tax sale." **Stanford-Gale v. Tax Claim Bureau of Susquehanna County,** 816 A.2d 1214, 1217 (Pa. Commw. 2003), **reargument denied,** (March 7, 2003). At issue in this case are the mailing and posting requirements, and the sufficiency of the notification efforts.

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[1] More than 50 years ago, in **Hess v. Westerwick,** 366 Pa. 90, 96, 76 A.2d 745, 748 (1950), our Supreme Court stated:

> It is a fundamental provision of both our state and federal constitutions that no person shall be deprived of property except by the law of the land or due process of law. Without due process of law the right of private property cannot be said to exist.

ALLOCATION OF BURDENS AND PRESUMPTIONS

A presumption of regularity of the acts of public officers exists generally and applies specifically to tax sales. **Dolphin Service Corp. v. Montgomery County Tax Claim Bureau,** 125 Pa. Commw. 220, 222, 557 A.2d 38, 39 (1989), **appeal denied,** 525 Pa. 588, 575 A.2d 117 (1990). The presumption is prima facie evidence of the Bureau's compliance with the statutory notice provisions of the Law until the contrary appears. **Id.** Absent any challenge, the presumption satisfies the Bureau's burden of proving compliance with the Law's notice requirements.

This presumption is overcome when a prima facie challenge to the Bureau's compliance with the statutory notice provisions is made. **In re 1999 Upset Sale of Real Estate,** 811 A.2d 85, 88 (Pa. Commw. 2002). It is in this sense and at this time that the Tax Claim Bureau bears the affirmative burden of proving by competent evidence compliance with the statutory notice provisions. **Dolphin Service Corp., supra** at 222, 557 A.2d at 39. By filing exceptions to a tax sale and averring with some specificity and particularity that certain identified statutory notice provisions have not been complied with, a prima facie challenge is raised. **Ali v. Montgomery Co. Tax Claim Bureau, supra** (averments that the property had not been properly posted and that the mail notice was inadequate and insufficient held to be sufficiently detailed to make out a prima facie challenge).

Once a prima facie challenge has been made, the Bureau has the burden of proving compliance with the challenged notice provisions. **In re 1999 Upset Sale of Real Estate, supra** at 88. When the Bureau fails to meet its burden of going forward, the burden never shifts to the taxpayer to produce contradictory evidence or to otherwise show cause why the tax sale should be overturned. **Id.** at 90.

In the case **sub judice,** Petitioner's exceptions claim that an incorrect address was used for the mailed notice and that the Property was never posted or, if posted, the posting provided improper or inadequate notice. These averments, we believe, are sufficient to raise a prima facie challenge to the adequacy of the Bureau's mailed notice and posting, and to shift to the Bureau the burden of proving compliance with the Law's requirements for mailing and posting.

POSTING REQUIREMENTS

"The collection of taxes … may not be implemented without due process of law that is guaranteed in the Commonwealth and federal constitutions; and this due process ... requires at a minimum that an owner of land be actually notified by government, if reasonably possible, before his land is forfeited by the state." **Tracy v. County of Chester, Tax Claim Bureau,** 507 Pa. 288, 297, 489 A.2d 1334, 1339 (1985). Integral to this process is conspicuous, prominent, secure posting of the property. Posting serves at least three purposes: (1) providing notice to the taxpayer either directly, or indirectly through neighbors, friends or others who observe the posting and contact the taxpayer; (2) providing notice to others whose interests may be affected by the sale such as mortgagees and other lien holders; and (3) providing notice to the public at large in order to attract the greatest number of bidders, create bidding conditions conducive to obtaining the highest bid possible, and secure monies not only sufficient to pay the taxes owed but, if possible, to pay the delinquent taxpayer monies in excess of the taxes owed, so as to minimize the taxpayer's loss of his property. **Ganzer v. Erie County Tax Claim Bureau,** 163 Pa. Commw. 522, 527, 641 A.2d 1261, 1263 (1994), **appeal denied,** 540 Pa. 587, 655 A.2d 517 (1994).

In language equally relevant to the significance of posting, the court in **Wells Fargo Bank v. Tax Claim Bureau of Monroe Co., supra** at 1198, quoting, **Hicks v. Och,** 17 Pa. Commw. 190, 193-94, 331 A.2d 219, 220 (1975) stated:

> [P]robably the posted notice and most certainly the advertisement notice are aimed at a far greater range of interested parties than merely the owner to whom the registered mail notice is directed.
>
> … [T]he purpose of the advertising was to notify the public in general. Not only does this tend to make the sale 'well-attended by bidders', but also it informs many people who may be concerned for the welfare of the owners. Such advertising, calling attention to the owners' plight might prompt these people to take such steps as they may consider appropriate to see to it that the owners' interests are protected. Therefore, since the advertising requirements of the law admittedly have not been met, the tax sale must fall.

At the hearing held in this matter, the Carbon County Tax Claim Director testified that the Property was posted on August 18, 2002, as evidenced by an affidavit of posting (Tax Claim Exhibit No. 6). This was the only information presented to respond to Petitioner's challenge to the Bureau's posting of the Property. This exhibit, however, raises more questions than it answers.

> In a tax sale case, the taxing authority has the burden of proving compliance with the statutory notice provisions. **Casanta v. Clearfield County Tax Claim Bureau,** 62 Pa.Cmwlth. 216, 435 A.2d 681, 683 (1981). With regard to posting, Section 602 merely states that '[e]ach property scheduled for sale shall be posted at least ten (10) days prior to the sale.' Section 602(e)(3) of the Law, 72 P.S. §5860.602 (e)(3). The Law does not prescribe a particular method of posting; however, the method chosen must be reasonable and likely to inform the taxpayer of an intended real property sale. **Lapp v. County of Chester,** 67 Pa.Cmwlth. 86, 445 A.2d 1356, 1358 (1982).

Consolidated Return by McKean Co. Tax Claim Bureau, 820 A.2d 900, 901 (Pa. Commw. 2003). "In deciding whether a property is properly posted for purposes of the Tax Sale Law, the Court must consider not only whether the posting is sufficient to notify the owner of the pending sale, but provides sufficient notice to the public at large so that any interested parties will have an opportunity to participate in the auction process." **Ban v. Tax Claim Bureau of Washington County,** 698 A.2d 1386, 1388 (Pa. Commw. 1997). Posting must be accomplished by "placing the notices somewhere on the premises for all to observe, rather than handing the notices to the owner, or in such a manner as to attract attention." **Id.** at 1389. (citations and quotation marks omitted).

Exhibit No. 6 provides no information from which we can determine whether the method of posting was reasonable or likely to inform persons entering the home, or the public or a passerby. Was the posting placed in a conspicuous location? The exhibit does not tell us. Where space is provided on the exhibit for the insertion of this information, giving as examples posting on a tree, pole, door, porch or in hand, the word "home" is inserted. The exhibit is silent as to whether this refers to the

front, side or rear of the home or where on the home posting was made.

Was the posting "reasonably secured"? We don't know. The exhibit is again silent as to how the posting was secured. We do know, however, that Theresa Springstead, who lives directly across the street from the Property, testified that she never noticed any posting on the Property (N.T., pp. 52-53).

In evaluating whether compliance with the Law has been met, it is the Bureau's, not the taxpayer's, conduct which must be examined.

> The [Law], however, impose[s] duties, not on owners, but on the agencies responsible for sales; and such of those duties as relate to the giving of notice to owners of impending sales of their properties must be strictly complied with. **Grace Building Co. v. Clouser,** 5 Pa.Cmwlth. 110, 289 A.2d 525 (1972). Hence, the inquiry is not to be focused on the neglect of the owner, which is often present in some degree but on whether the activities of the Bureau comply with the requirements of the statute.

Wells Fargo Bank, supra at 1200, **quoting Clawson Appeal,** 39 Pa. Commw. 492, 498-99, 395 A.2d 703, 706 (1979).

Here, we do not believe the Bureau has established strict compliance with the posting requirements of the Law. Exhibit No. 6 itself rebuts the prima facie presumption that the taxing officials acted with regularity in posting the Property. **Cf. Consolidated Return by McKean Co. Tax Claim Bureau, supra** (strict compliance with posting requirements not demonstrated by witness' inability to recall how notice was secured to telephone pole thereby preventing court from being able to conclude whether notice was reasonably secured). As such, the burden never shifted to the Petitioner to produce contradictory evidence or to otherwise show why the tax sale should be overturned.

Inasmuch as we conclude that the Bureau's posting did not comply with the Law, we need not address whether notification by mail was proper.

ORDER OF COURT

AND NOW this 9th day of June 2003, it is hereby ORDERED and DECREED that Petitioner's Exceptions to the

upset sale are SUSTAINED and the sale of the premises known as 303 East Abbott Avenue, Lansford, Carbon County, Pennsylvania is declared invalid and is hereby set aside.

It is further ORDERED that the Petitioner, Marie T. Mark, shall be permitted sixty (60) days from the date hereof to redeem the subject premises by payment to the Bureau of the amount of any outstanding tax claims and interest, expenses and costs thereon, in default of which the Bureau is ordered to expose said premises to tax sale in accordance with the provisions of the Real Estate Tax Sale Act.

It is further ordered that the Bureau shall refund in full to the purchaser, Michael R. Frey, all sums paid by him to the Bureau in connection with the purchase of the above mentioned property.

COMMONWEALTH OF PENNSYLVANIA vs. EDWIN DAVID MERTZ, Defendant

Criminal Law—Plea Agreement—Challenge to Validity of Guilty Plea—Preservation of Issue for Appellate Review—Requirements for a Valid Plea—Challenge to Discretionary Aspects of Sentencing—Necessity for Substantial Question As Basis for Finding of Abuse of Discretion by Sentencing Court—Challenge to Sentence As Being "Manifestly Excessive" and Unreasonable

1. To preserve for appellate review a challenge to the validity of a plea, a record of the issue must be created prior to appeal. Where the record is otherwise inadequate for appellate review, a post-sentence motion must be filed to avoid waiver of the issue.

2. In order for a plea to be valid, Defendant must be fully apprised of the nature and elements of the offenses to which he is pleading guilty, and the consequences of his plea.

3. Defendant may not challenge the discretionary aspects of a sentence which are the subject of a negotiated plea agreement accepted by the court.

4. A challenge to the discretionary aspects of a sentence requires a showing that, in some respect, the sentence imposed is either inconsistent with a particular provision of the Sentencing Code or is contrary to a fundamental norm underlying the sentencing process.

5. Such a showing must go beyond boilerplate allegations that the sentence is inappropriate. A substantial question explaining the manner in which the sentence violates either a specific provision of the sentencing scheme set forth in the Sentencing Code or a particular fundamental norm underlying the sentencing process must be articulated and proven.

6. Allegations that the sentencing court did not consider certain mitigating factors do not raise a substantial question.

7. A challenge which fails to identify any specific provision of the Sentencing Code which has been violated or any violation of the fundamental norms underlying the sentencing process and which simply asks the appellate court to substitute its judgment and discretion for that of the sentencing court does not raise a substantial question that the sentence is inappropriate.

8. Defendant's challenge to his sentence as being "manifestly excessive" and unreasonable, without further explanation, does not state a substantial question as to the appropriateness of his sentence, where the sentence is within the statutory limits **and** within the standard range of the sentencing guidelines.

NO. 572 CR 02

DAVID W. ADDY, Esquire, Assistant District Attorney—Counsel for Commonwealth.

CYNTHIA A. DYRDA-HATTON, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, J.—July 22, 2003

On May 2, 2003, the Defendant, Edwin David Mertz, ("Defendant"), pled guilty to one count of receiving stolen property[1] and, pursuant to a plea agreement, was sentenced the same date (N.T., p. 4). Previously, on two separate occasions, the Defendant announced his decision to plead guilty and then reconsidered: on January 9, 2003, the Defendant appeared in court to plead guilty to five separate offenses, three felonies and two misdemeanors, and then elected not to proceed (N.T., p. 20); on February 10, 2003, with jury selection scheduled to commence the same date, Defendant again appeared in court for a guilty plea, did in fact plead guilty to all five offenses, and then filed a petition to withdraw his plea which was granted (N.T., pp. 20-22).

When Defendant appeared before the court on Friday, May 2, 2003, to plead guilty, Defendant's case was scheduled for jury trial to begin on Monday, May 5, 2003 (N.T., pp. 5-6). At this time, it was made clear to the Defendant, both as a part of Defendant's plea agreement with the Commonwealth and by the Court, that if Defendant's plea was accepted, he would be sentenced immediately (N.T., p. 4; Post-Sentence Motion, ¶2). Defendant was further advised during the course of his guilty plea colloquy, and before his plea was accepted, that he should

[1] 18 Pa. C.S. §3925(a).

anticipate a period of confinement for one to two years, possibly in a state facility (N.T., p. 26).

In addition to the on-the-record colloquy with the Court, Defendant, with the assistance of counsel, read, completed and signed a written guilty plea colloquy which was made part of the record. Consistent with his plea agreement, Defendant acknowledged in his written colloquy, and in open court, his waiver of the preparation of a pre-sentence investigation. (Written Guilty Plea Colloquy, Question 40; N.T., p. 30).[2]

Consequently, after Defendant's plea was accepted, and before sentence was imposed, the Court inquired further into Defendant's personal history and background, his character, and the nature of the offense to which Defendant pled guilty, and permitted Defendant, his counsel and Defendant's witness, and

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[2] Although, "[i]t is firmly established that a plea of guilty generally amounts to a waiver of all defects and defenses except those concerning the jurisdiction of the court, the **legality** of sentence, and the validity of the guilty plea," a challenge to the discretionary aspects of sentencing will be permitted to the extent such aspects are not the subject of a negotiated plea agreement. **Commonwealth v. Dalberto,** 436 Pa. Super. 391, 395, 648 A.2d 16, 18 and 21 (1994) (emphasis in original), **appeal denied,** 540 Pa. 594, 655 A.2d 983 (1995), **cert. denied,** 516 U.S. 818, 116 S.Ct. 75, 133 L.Ed. 2d 34 (1995), and **rehearing denied,** 516 U.S. 1002, 116 S.Ct. 550, 133 L.Ed. 2d 452 (1995). However, "[w]here the plea agreement contains a **negotiated sentence** which is accepted and imposed by the sentencing court, there is no authority to permit a challenge to the discretionary aspects of the sentence." **Id.** at 399, 648 A.2d at 20, (**quoting Commonwealth v. Reichle,** 404 Pa. Super. 1, 4, 589 A.2d 1140, 1141 (1991)) (emphasis in original). **Cf. Commonwealth v. McClendon,** 403 Pa. Super. 467, 589 A.2d 706 (1991) (en banc) (plea bargain was limited to what sentence the prosecutor would recommend, not what sentence the court would actually impose, thus, when the prosecutor informed the trial court that the Commonwealth would have no objection to the imposition of concurrent sentences and the judge imposed consecutive sentences, appellant's motion to withdraw his guilty plea and motion to reduce sentence were denied), **appeal denied,** 528 Pa. 622, 597 A.2d 1151 (1991).

Here, given Defendant's record of announcing his intent to plead guilty on the verge of trial, and then reneging once the term of court for which Defendant was scheduled for trial had passed, the Commonwealth, as part of its plea agreement with Defendant, specifically requested that, in exchange for the dismissal of the most serious offenses, Defendant be immediately sentenced following his plea of guilty. In accordance with this agreement, the Defendant waived his right to a pre-sentence investigation and the Court dispensed with the preparation of a pre-sentence investigation report. Because the plea agreement did not address the duration of Defendant's sentence, Defendant is not precluded by the terms of the plea agreement from challenging the length of his sentence.

the Commonwealth, to speak relative to sentencing. Thereafter, Defendant was sentenced to a prison term of not less than one year nor more than two years in a state correctional institution. Defendant was given credit for time served of one day.

Defendant's Post-Sentence Motion was filed on May 9, 2003 and denied by Court Order dated May 13, 2003.[3] Defendant timely filed a Notice of Appeal to the Pennsylvania Superior Court on May 29, 2003. In compliance with the Court's Order for a Pa. R.A.P. 1925(b) concise statement of matters complained of on appeal, Defendant filed his Pa. R.A.P. 1925(b) statement on June 13, 2003. This opinion, pursuant to Pa. R.A.P. 1925(a), is in response to Defendant's appeal.

Defendant's Post-Sentence Motion was in the nature of a motion to modify his sentence and set forth four reasons for the request for modification: that the sentence would serve as a severe hardship on the Defendant's family; that the Court did not consider the fact that the sentence was unduly harsh under the circumstances; that the Court did not consider the particular social circumstances and conditions of environment which produced Defendant's behavior; and that the Court did not consider the nature of the crime in light of the Defendant's past criminal record (Post-Sentence Motion, ¶7). These bases, including the challenge to the duration of the sentence, but not its legality, are challenges to the discretionary aspects of sentencing. Defendant's statement of matters complained of on appeal repeats these same four contentions and further asserts that Defendant "was not in his right mind when he entered his guilty plea and was sentenced[,] and was not fully aware of what was going on[.] [T]herefore the plea he entered was not knowing and voluntary."

DISCUSSION

I. **Validity of Plea**

Initially, we question whether Defendant has preserved for review the issue of the validity of his plea. Defendant has failed to challenge the plea in an optional post-sentence motion. The comment to Pa. R.Crim.P. 720 states, in relevant part:

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[3] Where the petition for modification discloses no errors, the Court's decision to deny a request need not be preceded by a hearing on the petition. **Commonwealth v. Dalberto, supra** at 405, 648 A.2d at 23.

> A post-sentence challenge to a guilty plea under this rule is distinct from a motion to withdraw a guilty plea prior to sentence. **See** Rule 591. Cf. Standards Relating to Pleas of guilty §2.1(a)(ii), ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE (Approved Draft, 1968). Properly preserved issues related to guilty pleas need not be raised again in the post-sentence motion, but the defendant may choose to do so. A key consideration for the defendant is whether the record will be adequate for appellate review. If counsel is uncertain about the record, it is recommended that the guilty plea be challenged in the post-sentence motion.

Pa. R.Crim.P. 720(A)(1) and (B)(1)(a)(i) requires that a motion challenging the validity of a plea be filed within ten days of the imposition of sentence. Here, Defendant's challenge to the validity of his plea was first raised in his statement of matters complained of on appeal filed on June 13, 2003, forty-two days after the imposition of sentence. Because the issue was not raised prior to appeal, "by objecting at the sentence colloquy or otherwise raising the issue at the sentencing hearing or through a post-sentence motion," the issue has been waived for purposes of appeal. **Commonwealth v. D'Collanfield,** 805 A.2d 1244, 1246 (Pa. Super. 2002).

Regardless, we believe the issue to be without merit. A guilty plea, to be knowingly, intelligently and voluntarily made, must be preceded by a colloquy which demonstrates that the Defendant is fully cognizant of the nature and elements of the offenses to which he is pleading guilty, and the consequences of his plea. At a minimum, the Court must inquire into the following six areas:

> (1) Does the defendant understand the nature of the charges to which he is pleading guilty … ?
>
> (2) Is there a factual basis for the plea?
>
> (3) Does the defendant understand that he has [a] right to trial by jury?
>
> (4) Does the defendant understand that he ... is presumed innocent until [he is] found guilty?
>
> (5) Is the defendant aware of the permissible range of sentences and/or fines for the offenses charged?

(6) Is the defendant aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such agreement?

Commonwealth v. D'Collanfield, supra at 1247 n.1. "Determining whether a defendant understood the connotations of his plea and its consequences requires an examination of the totality of the circumstances surrounding the plea." **Commonwealth v. Yager,** 454 Pa. Super. 428, 438, 685 A.2d 1000, 1004 (1996), **appeal denied,** 549 Pa. 711, 701 A.2d 577 (1997).

In this case, the transcript of the guilty plea colloquy shows that (1) Defendant understood the nature of the charges to which he pled guilty (N.T., p. 17); (2) there was a factual basis for the plea (N.T., pp. 15-17); (3) Defendant understood that he had a right to trial by jury (N.T., pp. 5-6); (4) Defendant understood that he was presumed innocent until proven guilty (N.T., pp. 5-6); (5) Defendant was aware of the permissible range of sentences and/or fines for the offenses to which he was pleading guilty (N.T., pp. 19-20); and (6) Defendant was aware that the Court was not bound to the terms of any plea agreement unless accepted by the Court (Written Guilty Plea Colloquy, Question 26) and that, in fact, Defendant would likely be sentenced to period of confinement of between one to two years, possibly in a state prison (N.T., p. 26).

In this case, Defendant unequivocally admitted his guilt to the offense of receiving stolen property (N.T., pp. 22-25). Defendant further signed a written admission of guilt, witnessed by his counsel, to this offense (Commonwealth's Exhibit 1). It is also clear that Defendant's plea was motivated, at least in part, by a favorable plea agreement—four of the five charges being nolle prossed, including the most serious charges—and a desire to get this matter behind him.

This is not a case of an innocent defendant, overwhelmed and confused by the proceedings, erroneously pleading guilty to an offense he did not commit. Instead, this is a case of a defendant, who has negotiated a plea with significant concessions made by the Commonwealth, fully aware and advised of his rights, and the consequences of his plea, knowingly, voluntarily and intelligently pleading guilty to an offense committed by him.

II. **Propriety of Sentence**

The imposition of a proper sentence is a matter vested in the sound discretion of the court and will not be disturbed absent a manifest abuse of discretion. **Commonwealth v. Cunningham,** 805 A.2d 566, 575 (Pa. Super. 2002), **appeal denied,** 820 A.2d 703 (Pa. 2003). "Abuse of discretion consists of overlooking pertinent facts, disregarding the force of the evidence, committing an error of law or imposing a sentence which exceeds the statutory maximum." **Commonwealth v. McFarlin,** 402 Pa. Super. 502, 508, 587 A.2d 732, 735 (1991), **aff'd,** 530 Pa. 167, 607 A.2d 730 (1992). "An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will." **Commonwealth v. Cunningham, supra** at 575. An abuse of discretion may also occur when a trial court imposes a manifestly excessive sentence, one which is unreasonably severe, even though within the statutory limits. 42 Pa. C.S. §9781(c)(2), (3); **Commonwealth v. Mouzon,** 812 A.2d 617, 624 (Pa. 2002).

The right to appeal a discretionary aspect of a sentence is neither automatic nor absolute. To the contrary, a pre-condition to review of the merits of such a challenge is the articulation of a substantial question as to the appropriateness of the sentence. 42 Pa. C.S. §9781(b); **Commonwealth v. Mouzon, supra** at 627 n.14 ("This Court has made clear that there are two distinct levels of a challenge to the discretionary aspects of sentencing: (1) raising a substantial question and (2) arguing the merits of the challenge."). "The determination of whether a particular issue constitutes a substantial question as to the appropriateness of sentence must be evaluated on a case-by-case basis. … A substantial question exists where an aggrieved party can articulate clear reasons why the sentence imposed by the trial court compromises the sentencing scheme as a whole." **Commonwealth v. Cunningham, supra** at 574 (citations and quotation marks omitted). In order to raise a substantial question, Defendant must articulate and present a plausible argument that his sentence is either inconsistent with a particular provision of the Sentencing Code or is contrary to a fundamental norm underlying the sentencing process. **Commonwealth**

v. Goggins, 748 A.2d 721, 727 (Pa. Super. 2000), **appeal denied,** 563 Pa. 670, 759 A.2d 920 (2000).

A bald allegation of excessiveness, without explaining how or why the sentence violates "either a specific provision of the sentencing scheme set forth in the Sentencing Code or a particular fundamental norm underlying the sentencing process" is inadequate to raise a substantial question. **Commonwealth v. Mouzon, supra** at 627. **Cf. Commonwealth v. Mobley,** 399 Pa. Super. 108, 115-16, 581 A.2d 949, 952 (1990) (claim that sentence imposed for narcotics offense failed to take into consideration defendant's rehabilitative needs and was manifestly excessive did not raise a substantial question where sentence was within the statutory limits **and** within sentencing guidelines). Additionally, "allegation[s] that the sentencing court did not consider certain mitigating factors [do] not raise a substantial question." **Commonwealth v. McNabb,** 819 A.2d 54, 57 (Pa. Super. 2003).

At the time of sentencing, the Court considered Defendant's age, family history, educational background, work experience and lengthy criminal history over an eleven-year period. The Court further considered Defendant's back injury and need for medication and continued medical attention. The Court specifically focused upon Defendant's character and the nature of the offense.

The sentence imposed was neither too severe or manifestly excessive, was accompanied by reasons stated on the record, and was within the standard range of the sentencing guidelines (N.T., pp. 49-51).[4] Defendant has failed to identify any specific provision of the Sentencing Code which has been violated or any violation of the fundamental norms underlying the sentencing process as outlined in 42 Pa. C.S. §9721(b). Instead, the issues raised by Defendant, that the Court "failed to consider" or "did

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[4] The Pennsylvania Commission on Sentencing's Automated Guideline Sentence Form was made available to the Court at the time of sentencing, recommended, with Defendant's offense gravity score of three and his prior record score of four, a mitigated range sentence for the offense to which Defendant pleaded guilty of RS, a standard range sentence of three or fourteen months in prison, and an aggravated range sentence of seventeen months imprisonment. Attached to this form was a printout of Defendant's prior criminal history, also available to the Court at the time of sentencing.

not adequately consider" various factors, asks the Superior Court to substitute its judgment for that of the sentencing court. This type of claim "does not raise a substantial question that the sentence imposed was, in fact, inappropriate." **Commonwealth v. Griffin,** 804 A.2d 1, 9 (Pa. Super. 2002). Simply stated, Defendant has not presented a substantial question as to the appropriateness of his sentence.

In retrospect, Defendant may be dissatisfied with his decision to plead guilty, however, the law does not require that Defendant be pleased with the outcome of his decision. What is required is that the outcome, the sentence imposed, is reasonable, appropriate and in accordance with the Sentencing Code. These standards have been met.

Accordingly, we respectfully suggest that Defendant's sentence was neither manifestly excessive, unreasonable or outside the applicable guideline ranges, and that no substantial question exists in Defendant's challenge to the discretionary aspects of his sentence.

TRAVELERS INDEMNITY COMPANY, THE PHOENIX INSURANCE COMPANY and THE AUTOMOBILE INSURANCE COMPANY of HARTFORD, CONNECTICUT As Subrogees of KURT and JEANNETTE WEGELIUS, and JOHN BALAN, Plaintiffs vs. JACK FROST MOUNTAIN COMPANY, GEORGE WHITELEIGH, GEORGE & LISA LEMBO, WALTER & KATHERINE KOPOZYNSKIE, MR. & MRS. PETER SCALESCI, BERNARD & FRANCES FINKEL and BLUE RIDGE REAL ESTATE, Defendants

Civil Action—Pleadings—Deemed Admissions—Negligence—Motion for Summary Judgment—Burden of Establishing Causation Between Two or More Possible Causes—Applicability of Alternative Liability Theory—Failure of Equivocal Expert Opinion To Meet Burden of Proof for Causation—Alleged Improper Disposal of Fireplace Embers or Smoldering Cigarette Butts in Plastic Containers Supplied by Landlord—Liability of Landlord Out of Possession to Third Parties for Fire Damage Caused by Tenants' Negligence

1. To avoid becoming a deemed admission, an allegation of employment in a pleading must be specifically denied. A specific denial is one which must deny what is averred and then, if the correct facts are known, affirmatively aver what did occur in place of the facts which are denied.

2. With few exceptions, the burden of establishing causation in a negligence action is upon the plaintiff.

3. In those situations where the conduct of two or more individuals is negligent, simultaneous and identical, and the plaintiff is unable to identify the specific person causing his injury, the burden of proving the absence of liability is upon each individual defendant.

4. Where plaintiff's expert opines that either one or the other, or both, of two separate, discrete and independent acts is the cause of a fire, the expert opinion is little more than conjecture and speculation and fails to sustain plaintiff's burden of establishing causation.

5. With few exceptions, a landlord out of possession is not liable for injury to third persons off the leased premises caused by the tenant's negligence.

6. An exception to the general rule of a landlord's liability for the conduct of his tenants is where the landlord, prior to leasing the premises, knew or consented to the tenants' conducting certain activities on the leased premises which the landlord knew or had reason to know would unavoidably involve an unreasonable risk of injury to third parties or would be performed without taking special precautions necessary for safety.

7. A landlord who provides a plastic garbage container for the disposal of ordinary household waste is not liable to third parties for fire damage caused by a fire which results from the improper use of the container for the disposal of fireplace embers or smoldering cigarette butts by tenants or cleaning personnel.

NO. 02-0162

DANIEL BROWN, Esquire—Counsel for Plaintiffs.

HUGH M. EMORY, Esquire—Counsel for Jack Frost Mountain Co. and Blue Ridge Real Estate.

PAUL K. PATERSON, Esquire—Counsel for Peter Scalesci.

ENID W. HARRIS, Esquire—Counsel for Bernard and Frances Finkel.

GEORGE WHITELEIGH, Unrepresented.

GEORGE AND LISA LEMBO, Unrepresented.

WALTER AND KATHERINE KOPOZYNSKIE, Unrepresented.

MEMORANDUM OPINION

NANOVIC, J.—July 15, 2003

At issue in this case is the responsibility for a fire which destroyed Units 190 and 191 and damaged Unit 192 at Snow Ridge Village. Snow Ridge Village is a development of condominiums and townhouses located near the Jack Frost Mountain Ski Area in Kidder Township, Carbon County, Pennsylvania.

Plaintiffs, Travelers Indemnity Company, The Phoenix Insurance Company and The Automobile Insurance Company of Hartford, Connecticut ("Plaintiffs"), are the insurance companies for the owners of Units 190 and 192. Plaintiffs have commenced this action as a subrogation claim for repayment of the amounts paid by them for the fire damage: $150,726.57 for Unit 190 and $5,807.00 for Unit 192.[1]

The fire originated in a ski closet located outside and attached to the front right or southeast corner of Unit 191. Unit 191 is part of a two-story duplex attached to Unit 190 with Unit 190 on its western side. Unit 192 is approximately thirty feet to the east of Unit 191.

The Defendants are Bernard and Frances Finkel, the owners of Unit 191 ("Owners"); three couples who were tenants in Unit 191 the weekend of the fire ("Tenants")[2]; and Jack Frost Mountain Company and Blue Ridge Real Estate Company ("Housekeeping"), the alleged employers of the cleaning and housekeeping staff which cleaned Unit 191 following the Tenants' departure the day of the fire.[3]

All three groups of Defendants—Owners, Tenants and Housekeeping—have filed motions for summary judgment.

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[1] The owners of Unit 190 are Kurt and Jeannette Wegelius, and of Unit 192, John Balan.

[2] The Tenants have been identified in the documents submitted to the court as Peter Scalesci and his companion, Alicia, to whom he has since married; Katherine Kopozynskie and her companion, "Walter"; and Lisa Lembo and her companion George Whiteleigh (**See** Cusatis Report, pp. 4-5; Scalesci Deposition, pp. 9-10). Of the Tenants, only Peter Scalesci has filed an answer to the complaint and has filed a motion for summary judgment. Since service of the complaint was made on him by certified mail, Mr. Whiteleigh has passed away (Scalesci Deposition, p. 10).

[3] Defendants Jack Frost Mountain Company and Blue Ridge Real Estate Company are deemed to have admitted the averments of the complaint with respect to their employment of the housekeeping staff who cleaned Unit 191 after the Tenants' departure (Complaint, Paragraphs 14 and 15). In response to these averments of the complaint, the Defendants made general rather than specific denials.

In answer to the allegations contained in Paragraph 15 of the complaint that the employees, agents, servants and/or workmen of these Defendants cleaned Unit 191 following the Tenants' departure, the Defendants, in pertinent part, replied: "[These] allegations are specifically denied pursuant to Pa. R.C.P. 1029(e)(1)." This is not a specific denial.

Stated in the light most favorable to the Plaintiffs, the facts are as follows. The Tenants arrived at Unit 191 on Friday, February 11, 2000 and departed by noon on Sunday, February 13, 2000 (Cusatis Report, p. 3). All of the units at Snow Ridge Village have fireplaces (Wildrick Deposition, p. 37). The Tenants used the fireplace in Unit 191 on Friday and Saturday, but not on Sunday (Cusatis Report, p. 3). The ashes and any embers in the fireplace were not cleaned by the Tenants prior to their departure (Cusatis Report, p. 3).

Four of the six Tenants are smokers and smoked that weekend (Cusatis Report, p. 3). Prior to leaving, several of the Tenants cleaned the Unit and placed bags of trash in the ski closet outside Unit 191 (Cusatis Report, pp. 3-4). Firewood for the fireplace was also located in this closet (Cusatis Report, p. 4).

Unit 191 was cleaned by two cleaning women—Joan Schoch and Cindy Wildrick—sometime between 2:00 P.M. and 4:00 P.M. on Sunday, February 13, 2000 (Cusatis Report, p. 3; Schoch Deposition, pp. 23-24; Wildrick Deposition, pp. 35-36). Schoch

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Although no fixed rule can be stated for determining whether a denial is specific, **In re Estate of Roart,** 390 Pa. Super. 38, 568 A.2d 182 (1989), **appeal denied,** 527 Pa. 587, 588 A.2d 509 (1990) and **appeal denied,** 527 Pa. 588, 588 A.2d 510 (1990); **Bean v. Harleysville National Bank,** 160 Pa. Super. 396, 51 A.2d 394 (1947), generally, in order for a denial to be specific, it must deny what is averred and then must affirmatively aver what did occur in place of the facts which are denied. **Jones v. Dubuque Fire & Marine Insurance Co.,** 317 Pa. 144, 176 A. 208 (1934); **Parry v. First National Bank of Lansford,** 270 Pa. 556, 113 A. 847 (1921); **Lewis v. Spitler,** 69 D. & C. 2d 259, 260 (Lebanon Co. 1975); **Sincavage v. Howells,** 8 D. & C. 2d 515, 517 (Luzerne Co. 1957). **See also,** 5 Standard Pennsylvania Practice 2d, Section 26:40 (2001).

The facts upon which the defendant bases his or her denial should be stated. **Wedow v. Penn Products Co.,** 2 D. & C. 74, 75 (Lancaster Co. 1922). The word "denied" is an insufficient denial, **Swift v. Milner,** 371 Pa. Super. 302, 538 A.2d 28 (1988); **Lehner v. Montgomery,** 180 Pa. Super. 493, 119 A.2d 626 (1956), as is a denial which merely repeats the exact words of the corresponding paragraph in the complaint. **Lehner v. Montgomery, supra; Sincavage v. Howells, supra** at 517; **Martin v. Barfield,** 66 D. & C. 321, 323 (Northumberland Co. 1949). This is particularly true where the defendant, as here, knew the true facts at the time the answer was made. **Commonwealth by Preate v. Rainbow Associates, Inc.,** 138 Pa. Commw. 56, 587 A.2d 357 (1991). **See also,** 5 Standard Pennsylvania Practice 2d, Section 26:41 (2001).

If these Defendants intended to challenge the averments of Paragraphs 14 and 15 they were obligated by the rules to do so specifically. Pa.R.C.P. 1029(e)(1). Their failure to do so has resulted in a deemed admission. Pa. R.C.P. 1029(b).

and Wildrick are employed by the Defendants, Jack Frost Mountain Company and Blue Ridge Real Estate. **See supra** footnote 3.

When cleaning, the housekeeping staff at different times remove the ashes from the fireplaces in the various units (Young Report, p. 4). The cleaning women do not recall whether they emptied the fireplace ashes from Unit 191 on February 13, 2000, but may have done so (Cusatis Report, p. 3; Wildrick Deposition, pp. 70-71). When cleaning the units at Snow Ridge Village, the cleaning personnel empty garbage from each unit into the garbage container in the ski closet located outside of that unit (Wildrick Deposition, pp. 82-83). Garbage and trash are placed in these containers for eventual pickup and removal (Dietterick Deposition, pp. 40-41; Young Report, p. 2).

At 12:43 A.M. on February 14, 2000 a fire in Unit 191 was discovered by the occupants of a nearby unit, Unit 212 (Cusatis Report, p. 2). When first observed, the fire was concentrated near the front corner of the Unit (Cusatis Report, p. 2).

The fire was investigated by Deputy State Police Fire Marshal David P. Cusatis, Harry R. Young for Plaintiff Travelers Property Casualty, and Alex Profka for Brethren Mutual Insurance Company, the Owners' carrier. All three investigators agree that the origin of the fire was in the front right corner of Unit 191, either in the ski closet or nearby (Cusatis Report, p. 3; Deposition p. 99; Young Report, p. 3; Profka Report, p. 3).

The exact cause of the fire is, however, unknown. Trooper Cusatis eliminated electrical fault or failure as a cause (Cusatis Report, p. 3). Arson is also an unlikely cause. Snow Ridge Village has night security (Dietterick Deposition, p. 45). There is no history of recent vandalism or fires at the Village (Dietterick Deposition, pp. 39-40, 42) and Mr. Young, Plaintiffs' expert, stated in his report that the burn pattern was "consistent with a slow smoldering fire typically found in a fire related to a carelessly discarded cigarette or discarded fireplace ash into a trash receptacle" rather than the type of burning "consistent with a fire originating from an open flame or ignitable liquid vapor ignition typically employed to set an incendiary fire." (Young Report, p. 5) Mr. Young concluded his report with his opinion to "a reasonable degree of scientific certainty, that the fire was caused by the negligent discarding of either fireplace ash or

smoking materials by the previous tenants, the housecleaners, or both." (Young Report, p. 6).[4]

DISCUSSION

I. Motions for Summary Judgment by Housekeeping and the Defendants

Plaintiffs argue that the fire of February 13, 2000 was caused by either smoldering cigarette butts or fireplace embers placed in a plastic trash container located in the ski closet of Unit 191. Defendants challenge the sufficiency of the evidence to support either of these causes.

Defendants claim, in effect, that Plaintiffs' proof impermissibly asserts possibilities, not probabilities; that Plaintiffs proceed from a defensible proposition—that the fire originated in the outside ski closet—to an indefensible one—that the cause of the fire was either smoking materials or fireplace embers, with insufficient evidence to prove either. Consequently, Defendants contend, Plaintiffs jump from learning that four of the six Tenants were smokers and that several Tenants cleaned up the Unit before departing to the possibility that maybe smoldering cigarette butts were dumped, with other trash, in a bag placed in the ski closet. Equally indefensible, according to the Defendants, is Plaintiffs' jump from discovering that the Tenants were using the fireplace and that the Unit was cleaned by housekeeping the same day, to the possibility that maybe live embers were removed from the fireplace and discarded in the ski closet.

Proof of this nature, Defendants argue, is nothing more than speculation and conjecture. Nor, Defendants state, does this proof exhaust the possibilities when account is taken of the fact that the ski closet was only accessible from outside Unit 191 and was unlocked, thereby creating the possibility that the cause—whether intentional or inadvertent—was by some third party (Cusatis Deposition, pp. 34-36).

Defendants base their motions for summary judgment on Plaintiffs' failure to produce evidence of facts essential to their

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[4] The fire chief for the Lake Harmony Fire Company, the fire company that serves the area where the fire occurred, further observed, "We get this type of fire often in this area because renters will dump fireplace cinders into the trashcan before leaving the rental property." (Young Report, p. 4).

claim for negligence. "The requisite elements of a cause of action in negligence are 1) a duty on the part of the defendant to conform to a certain standard of conduct with respect to the plaintiff, 2) a failure by the defendant to so conform, and 3) a reasonably close causal connection between the defendant's conduct and some resulting injury to the plaintiff. This last element is commonly known as proximate cause." **Cummins v. Firestone Tire & Rubber Co.,** 344 Pa. Super. 9, 16-17, 495 A.2d 963, 967 (1985).

Proof of a causal connection between Defendants' alleged negligence and the cause of the fire is essential to Plaintiffs' burden.

> [I]t remains a principle so fundamental as to require no authority that the mere existence of negligence and the occurrence of injury are insufficient to impose liability upon anyone. There remains to be proved the vitally important link of causation: **Flagiello v. Crilly,** 409 Pa. 389, 187 A.2d 289 (1963); **Harrison v. Pittsburgh,** 353 Pa. 22, 44 A.2d 273 (1945); **Philadelphia & R. R. Co. v. Spearen,** 47 Pa. 300 (1864); **Drill v. Genetti,** 200 Pa. Superior Ct. 471, 190 A.2d 185 (1963); and, **Hillelson v. Renner,** 183 Pa. Superior Ct. 148, 130 A.2d 212 (1957). And plaintiff has the burden of proving this link, that the defendant's negligence was the proximate cause of her injury: **Cushey v. Plunkard,** 413 Pa. 116, 196 A.2d 295 (1964); **Loeb v. Allegheny County,** 394 Pa. 433, 147 A.2d 336 (1959); or of proving evidence from which a reasonable inference arises that the defendant's negligence was the proximate cause of the injury: **Zilka v. Sanctis Construction, Inc.,** 409 Pa. 396, 186 A.2d 897 (1962). On the other hand, it is not necessary that plaintiff prove with mathematical exactness that the accident could only have been caused in one manner to the exclusion of all other possibilities (**Finney v. G. C. Murphy Co.,** 406 Pa. 555, 178 A.2d 719 (1962)), but he must eliminate those other causes, if any, as were fairly suggested by the evidence: **Lescznski v. Pittsburgh Rys. Co.,** 409 Pa. 102, 185 A.2d 538 (1962); **Foley v. Pittsburgh-Des Moines Co.,** 363 Pa. 1, 68 A.2d 517 (1949); **Stauffer v. Railway Express Agency, Inc.,** 355 Pa. 24, 47 A.2d 817 (1946); **Cohen v. Penn Fruit Co.,** 192 Pa. Superior Ct. 244, 159 A.2d 558 (1960). And it is the duty of the trial court to

> determine whether or not this requirement has been met in the first instance before the issue can be submitted to the jury: **Idlette v. Tracey, supra.**

Cuthbert v. Philadelphia, 417 Pa. 610, 614-15, 209 A.2d 261, 263-64 (1965). Therefore, Plaintiffs are required to prove the cause of the fire. To the extent Defendants argue that Plaintiffs have failed, or are unable, to prove this cause, we agree.

Plaintiffs have identified neither a specific person nor a specific cause, which they claim is responsible for their loss. Instead, Plaintiffs point to one group of six tenants and a separate group of two cleaning women one or more of whom Plaintiffs assert may have engaged in tortious misconduct. And Plaintiffs' expert refers to one of two separate and successive causes: either the careless disposal of fireplace embers or of smoking materials.

In **Cummins, supra,** the court found that plaintiff's inability in his negligence claim to identify the manufacturer or seller of the particular tire and multi-piece rim assembly which exploded and caused injury precluded plaintiff from making allegations of duty, breach of duty or legal causation against any specific defendant thereby prohibited any finding of liability. **Id.** at 18, 495 A.2d at 967-68. In **Pennfield Corp. v. Meadow Valley Electric, Inc.,** 413 Pa. Super. 187, 604 A.2d 1082 (1992), the court held that the inability of plaintiff to identify which of two different defendants sold the allegedly defective electrical cable causing harm precluded plaintiff from sustaining a cause of action in strict liability, negligence, or breach of warranties against either defendant.

Pennfield confirmed the general rule that a plaintiff must show causation and there are few exceptions. **Hamil v. Bashline,** 481 Pa. 256, 265-66, 392 A.2d 1280, 1284 (1978); Restatement (Second) of Torts §433B(1) (1965). One such exception has become known as the "alternate liability" theory, first adopted in Pennsylvania in **Snoparsky v. Baer,** 439 Pa. 140, 266 A.2d 707 (1970), and set forth in the Restatement (Second) of Torts §433B, as follows:

> Burden of Proof
>
> (1) Except as stated in Subsections (2) and (3), the burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is upon the plaintiff.

> (2) Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.
>
> (3) Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each actor to prove that he has not caused the harm.[5]

A finding of group negligence, that each of the possible tortfeasors is a perpetrator of negligent conduct, is an essential precondition to applying subsection (3). **Pennfield, supra** at 194, 604 A.2d at 1085.[6] As explained in **Pennfield:**

> Subsection (3) is based on the rationale that 'injustice [lies in] permitting proved wrongdoers, who among them have inflicted an injury upon the entirely innocent plaintiff, to escape liability merely because the nature of their conduct and the resulting harm has made it difficult or impossible to prove which of them has caused the harm.' Restatement (Second) of Torts, §433B(3), Comment f.

Pennfield, supra at 194, 604 A.2d at 1085. Further, the tortious conduct of the Defendants must be simultaneous and iden-

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[5] In **Snoparsky,** the minor plaintiff was unable to identify which of seven or eight boys, who were throwing stones, was responsible for throwing the stone that struck him in the eye.

In **Sommers v. Hessler,** 227 Pa. Super. 41, 323 A.2d 17 (1974), the minor plaintiff was unable to identify which of several students in a bus engaged in a "spit ball" fight, threw the spit ball with which he was hit and blinded.

[6] We note that Comment g to §433B(3) states:

> The rule stated in Subsection (3) applies only where it is proved that each of the two actors has acted tortiously, and that the harm has resulted from the conduct of some one of them. On these issues the plaintiff still has the burden of proof. **The rule stated has no application to cases of alternative liability, where there is no proof that the conduct of more than one actor has been tortious at all. In such a case the plaintiff has the burden of proof as to the tortious conduct and as to the causal relationship.**

Comment quoted with approval in **Pennfield, supra** at 194-95, 604 A.2d at 1086 (emphasis in original).

tical. **Skipworth v. Lead Industries Association, Inc.,** 547 Pa. 224, 236, 690 A.2d 169, 174 (1997).[7]

The alternative liability theory is inapplicable in this case. First, the Defendants did not act simultaneously, but successively. Second, their conduct was not identical, or similarly tortious, but separate and discrete both in time and in kind. Third, it is by no means clear from Plaintiffs' evidence that all, or even any, of the Defendants was necessarily negligent, a critical and necessary element for the law to justify the risk of imposing liability on an innocent party.[8] Therefore, Subsection (3), **supra,** does not apply and the burden of proof remains with the Plaintiff to prove that tortious conduct attributable to one or more of the Defendants caused the fire.

In **Marrazzo v. Scranton Nehi Bottling Co.,** 422 Pa. 518, 223 A.2d 17 (1966), the Pennsylvania Supreme Court stated:

> The distinction (between an inference and a conjecture) is as broad as philosophy itself. It is that an inference rests upon premises of fact and a conjecture does not. An opinion of an expert based upon an adequate factual foundation is neither speculative nor conjectural, but a legitimate inference and as such has evidentiary value in determining disputed questions of fact.

Id. at 530, 223 A.2d at 23-24 (citations and internal quotation marks omitted). Here, however, Plaintiffs' expert's opinion that either one of two separate and successive acts of misconduct,

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[7] "The cases thus far decided in which the rule stated in Subsection (3) has been applied all have been cases in which all of the actors involved have been joined as defendants. All of these cases have involved conduct simultaneous in time, or substantially so, and all of them have involved conduct of substantially the same character, creating substantially the same risk of harm, on the part of each actor." Restatement (Second) of Torts §433B(3), cmt. h (1965).

[8] When the exception applies, the burden of identifying the responsible person is " 'upon each such actor to prove that he has not caused the harm.' **Snoparsky v. Baer,** 439 Pa. 140, 144, 266 A.2d 707, [709] (1970). If the defendants are unable to identify the one causing the harm, they are all liable as joint tort-feasors. Restatement of Torts (2d) §433B." **Sommers v. Hessler, supra** at 46, 323 A.2d at 19.

Under this rule it is important to understand that not only is the burden to show causation shifted to the defendants, but also that liability is assigned to all the possible tort-feasors when they cannot show one of their number caused the injury. **Pennfield, supra** at 199, 604 A.2d at 1088. It is therefore inherent in this theory that liability may be imposed on an innocent party.

or both, caused the fire simply means that the witness is "unable to testify to a reasonable degree of scientific certainty what he believed to be the cause of the fire." **Lanza v. Poretti,** 537 F. Supp. 777, 785 (E.D. Pa. 1982). To submit this opinion to a jury would require the jury to speculate about the existence of negligence and causation.[9]

In this context, where the alternative liability theory does not apply, even though the plaintiff has purportedly reduced the number of possible tort-feasors to a limited number of parties, "[a] mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." Restatement (Second) of Torts §433B(1), cmt. a; **Pennfield, supra** at 202, n.15, 604 A.2d at 1089 n.15. On these claims, Plaintiffs' failure "to adduce sufficient evidence on an issue essential to [their] case and on which [they] bear[] the burden of proof … establishes the entitlement of the moving party to judgment as a matter of law." **Murphy v. Duquesne University,** 565 Pa. 571, 777 A.2d 418, 429 (2001) (citation and quotation marks omitted).[10]

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[9] "[A]n expert witness must state his or her opinion with 'reasonable certainty.' " **Detterline v. D'Ambrosio's Dodge, Inc.,** 763 A.2d 935, 940 (Pa.Super. 2000).

> We acknowledge that an expert need not testify with absolute certainty or rule out all possible causes of a condition. **Mitzelfelt,** 526 Pa. at 62, 584 A.2d at 892. Nor do we require an expert to testify in precisely the language used to enunciate the legal standard. **Hoffman,** 443 Pa.Super. at 255, 661 A.2d at 402; **In re Jones,** 432 Pa. 44, 246 A.2d 356 (1968) (medical testimony need not conform to precise statutory definitions). Rather, we review expert testimony in its entirety to assess whether it expresses the requisite degree of medical certainty. **McCann v. Amy Joy Donut Shops,** 325 Pa.Super. 340, 343-44, 472 A.2d 1149, 1151 (1984) (en banc). 'An expert fails this standard of certainty if he testifies "that the alleged cause 'possibly', or 'could have' led to the result, that it 'could very properly account' for the result, or even that it was 'very highly probable' that it caused the result." ' **Kravinsky v. Glover,** 263 Pa.Super. 8, 21, 396 A.2d 1349, 1356 (1979) (citations omitted).

Eaddy v. Hamaty, 694 A.2d 639, 642 (Pa.Super. 1997).

[10] Not only have Plaintiffs failed to distinguish between the alleged causes of the fire, as between the individual Tenants, Plaintiffs have failed to establish that all were negligent or, that if any were negligent, the Defendant, Peter Scalesci, was among these.

II. **Motion for Summary Judgment by the Owners**

We now address the Owners' motion for summary judgment. Plaintiffs claim the Owners were negligent for allegedly creating or allowing the establishment and maintenance of a dangerous condition on their property. Although not identified explicitly, presumably the dangerous condition referred to is the use of a plastic garbage container for household waste.[11]

In this claim, Plaintiffs do not argue that the Owners are vicariously liable for the conduct of the Tenants or Housekeeping, but that the Owners' own conduct establishes negligence and responsibility to the Plaintiffs. As part of their burden of proof, Plaintiffs must present evidence both that the acts of the Owners deviated from what was reasonable and that such deviation was the proximate cause of the fire.

Because we do not believe the Owners have identified a duty which has been breached and for which the Owners may

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[11] Plaintiffs argue in their brief opposing Defendants' motions for summary judgment that they are "also asserting theories [of liability] that the trash can provided in the ski closet violated the applicable codes and was a hazardous and/or dangerous condition due to the discarding of fireplace ash or smoking materials into this container." (Plaintiffs' Brief opposing the Motion for Summary Judgment of the Defendants Jack Frost Mountain Company and Blue Ridge Real Estate Company, p. 4) Plaintiffs, however, have not supported this claim with any evidence of record. We have not been provided with citations or copies of the codes to which Plaintiffs refer, or with evidence that such codes have been enacted by or otherwise apply to Kidder Township and the circumstances before us. We have been presented with no direct evidence as to who, in fact, supplied the trash receptacle referred to in some documents as being located in the ski closet, who was responsible for providing trash receptacles generally at Snow Ridge Village, and even whether the trash receptacle, if present in the ski closet for Unit 191, was actually used. Plaintiffs have not produced a copy of the rental contract, which they allege in the complaint, the parties failed to comply with (Complaint, Paragraphs 20(d) and 21(d)).

We do not know from the information we've been provided whether the receptacles in the ski closets complied with the "applicable codes" to which Plaintiffs allude, and, if not, in what respects and even whether the receptacles actually present and which may have been used, or the type of receptacles Plaintiffs contend should have been used, would have prevented or lessened the likelihood of fire. The answer may itself depend on whether cigarette ashes or burning fireplace embers were placed in the receptacle, a fact which we do not know. For purposes of Defendants' motions, viewing the evidence and the inferences therefrom in the light most favorable to the Plaintiffs, we have assumed that the trash receptacle was supplied by Defendants, was made of plastic, was located in the ski closet for Unit 191, and was used by the Tenants or Housekeeping or both.

be held accountable for Plaintiffs' losses, we first consider the nature of the Owners' duty owed to Plaintiffs. In determining when a duty exists and what it consists of, our Supreme Court stated:

> In determining the existence of a duty of care, it must be remembered that the concept of duty amounts to no more than 'the sum total of those considerations of policy which led the law to say that the particular plaintiff is entitled to protection' from the harm suffered. **Leong v. Takasaki,** 55 Haw. 398, 520 P.2d 758, 764 (1974). To give it any greater mystique would unduly hamper our system of jurisprudence in adjusting to the changing times. The late Dean Prosser expressed this view as follows:
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> These are shifting sands, and no fit foundation. There is a duty if the court says there is a duty; the law, like the Constitution, is what we make it. Duty is only a word with which we state our conclusion that there is or is not to be liability; it necessarily begs the essential question. When we find a duty, breach and damage, everything has been said. The word serves a useful purpose in directing attention to the obligation to be imposed upon the defendant, rather than the causal sequence of events; beyond that it serves none. In the decision whether or not there is a duty, many factors interplay: The hand of history, our ideas of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall. In the end the court will decide whether there is a duty on the basis of the mores of the community, 'always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind.'

Gardner v. Consolidated Rail Corp., 524 Pa. 445, 454-55, 573 A.2d 1016, 1020 (1990) (**quoting, Sinn v. Burd,** 486 Pa. 146, 164, 404 A.2d 672, 681 (1979)).

Under general principles of common-law negligence, the Owners have a duty to exercise ordinary care to protect the property interests of neighboring property owners. Restatement (Second) of Torts §283 (1965). The degree of care owed is not one of extraordinary care and the question we must ask here is whether, as a matter of law, Plaintiffs have presented sufficient

evidence to place before a jury the question whether the Owners' duty of ordinary care was breached.

The definition of "ordinary care" appears in the Pennsylvania Suggested Standard Civil Jury Instructions as follows:

> Ordinary care is the care a reasonably careful person would use under the circumstances presented in this case. It is the duty of every person to use ordinary care not only for his or her own safety and the protection of his or her property, but also to avoid injury to others. What constitutes ordinary care varies according to the particular circumstances and conditions existing then and there. The amount of care required by the law must be in keeping with the degree of danger involved.

Pa.SSJI (Civ.) 3.02. Further, there is but one standard of care.

> The care required is always reasonable care. The standard never varies, but the care which it is reasonable to require of the actor varies with the danger involved in his act and is proportionate to it. The greater the danger, the greater the care which must be exercised.

Stewart v. Motts, 539 Pa. 596, 601, 654 A.2d 535, 537 (1995), quoting Restatement (Second) of Torts §298 cmt. b (1965).

In this case, Plaintiffs argue, in effect, that a residential landlord who permits his tenants to use a fireplace or to smoke cigarettes in the leased premises, is negligent if he provides a plastic garbage receptacle for the disposal of ordinary household waste and his tenants negligently use this receptacle for the disposal of glowing embers or smoldering cigarettes. We do not believe that under these circumstances the landlord's provision of a plastic garbage container is a breach of the standard of care owed to neighboring property owners.

To the extent Plaintiffs' theory of the cause of the fire is correct, it was the manner in which the fireplace ashes or smoking materials were disposed of more so than the availability of the container which caused the fire. As such, Plaintiffs' claim is more appropriately analyzed in the context of Section 379A of the Restatement (Second) of Torts (1965). This section provides:

> 379A. Activities After Lessor Transfers Possession.
>
> A lessor of land is subject to liability for physical harm to persons outside of the land caused by activities of the

lessee or others on the land after the lessor transfers possession if, but only if,

(a) the lessor at the time of the lease consented to such activity or knew that it would be carried on, and

(b) the lessor knew or had reason to know that it would unavoidably involve such an unreasonable risk, or that special precautions necessary to safety would not be taken.

Comment c to this Section provides, in pertinent part, that "if the unreasonable risk is not a necessary consequence of the contemplated activities of the lessee, and such activities could normally be conducted without creating the unreasonable danger to those outside of the land by taking precautions, the lessor is not liable unless he knows or has reason to know that the lessee intends to carry on the activity without taking precautions." [12]

Section 379A is expressly limited to cases involving an unreasonable risk of harm to others **outside of the land.** To hold a lessor liable for injuries which occur "off the land," "the plaintiff must show that the injury resulted from the ordinary and expected use of the premises or from the purpose for which the premises was leased, not for activities which are dangerous only because negligently conducted by a lessee." **Clauson v. Kempffer,** 477 N.W.2d 257, 260 n.5 (S.D. 1991). Further, the proper disposal of fireplace ashes or smoking materials into a garbage receptacle is not an inherently dangerous activity which, if conducted reasonably and non-negligently, inevitably and unavoidably involves an abnormally dangerous risk. **Cf. Bowers v. Wurzburg,** 207 W.Va. 28, 528 S.E.2d 475 (1999). In this case, Plaintiffs have not proven, nor can it be reasonably inferred, that the Owners knew or had reason to know that the disposal of fireplace ashes or smoking materials into the plastic container "would **unavoidably** involve such an unreasonable risk, or that **special precautions necessary to safety** would not be taken." Restatement (Second) of Torts §379A, **supra** (emphasis added).

To impose liability upon the Owners for supplying a plastic garbage can, rather than a metal one, we believe would impose

[12] This section of the Restatement was recognized and discussed by the Commonwealth Court in **Rodriguez v. City of Philadelphia,** 657 A.2d 105 (Pa. Commw. 1995), **appeal denied,** 542 Pa. 653, 666 A.2d 1060 (1995).

a heightened level of duty on the Owners which neither was contemplated by the parties nor is justified by the circumstances of this case. Because we conclude that the Owners breached no duty owed to the Plaintiffs as a lessor, or as a landowner or under the lease agreement, it would be improper to conclude that the Owners' actions were a legal cause of the Plaintiffs' loss.

ORDER OF COURT

AND NOW this 15th day of July, 2003, Motions for Summary Judgment having been made by the Defendants, Jack Frost Mountain Company, Blue Ridge Real Estate Company, Bernard and Frances Finkel and Peter Scalesci, and on consideration of the pleadings, expert reports, depositions and arguments of counsel, it is hereby ORDERED that the Motions are GRANTED, and judgment is entered in favor of the Defendants, Jack Frost Mountain Company, Blue Ridge Real Estate Company, Bernard and Frances Finkel and Peter Scalesci, and against the Plaintiffs, Travelers Indemnity Company, The Phoenix Insurance Company and The Automobile Insurance Company of Hartford, Connecticut, as Subrogees of Kurt and Jeannette Wegelius, and John Balan, with costs to be paid by the Plaintiffs.

PALMERTON AREA SCHOOL DISTRICT, Petitioner vs. PENNSYLVANIA LABOR RELATIONS BOARD, Respondent and PALMERTON AREA EDUCATION SUPPORT PERSONNEL, Intervenor

Civil Action—Jurisdiction—Pennsylvania Labor Relations Board—Determination of Whether Time Periods of a Collective Bargaining Agreement Have Been Complied With As a Prerequisite to Determining Whether the Terms of a Collective Bargaining Agreement Have Been Repudiated—Unfair Labor Practice—Repudiation of Collective Bargaining Agreement

1. Ordinarily, the filing of a grievance and the appointment of an arbitrator are necessary when a determination must be made whether the terms of a collective bargaining agreement have been violated, or when the dispute involves the terms and interpretation of a collective bargaining agreement.

2. In contrast to the use of arbitration proceedings to resolve contractual disputes governed by the terms of a collective bargaining agreement, the jurisdiction of the Pennsylvania Labor Relations Board ("Board") is to remedy violations of statute, **i.e.,** unfair labor practices, and not violations of contract.

3. In those circumstances where the same act may give rise to both a violation of the collective bargaining agreement and an unfair labor practice, or that determination of whether an unfair labor practice has accrued may depend on interpretation of the collective bargaining agreement, the Board has jurisdiction to act.

4. The Board will not find an unfair labor practice if there is a sound arguable basis in the collective bargaining agreement for the employer's claim that the parties bargained over the subject in dispute, and the employer is acting consistent with the parties' agreement on that subject. However, a public employer's clear repudiation of a bargained-for agreement constitutes an unfair labor practice as well as a grievance.

5. Where the determination of whether the employer repudiated the collective bargaining agreement depends on a disputed evidentiary fact, not involving an interpretation of the collective bargaining agreement, the Board has jurisdiction to resolve such dispute to reach the ultimate question of whether an unfair labor practice has been committed.

6. In this case, the Board was within its jurisdiction in determining the disputed fact of whether the union granted the employer an extension of time to respond to the grievance, in which event the employer's response was timely, or whether no extension was granted, in which event the employer's response was untimely and the employer's subsequent refusal to accept the resolution of the grievance in favor of the union as provided for by the terms of the collective bargaining agreement constituted an unfair labor practice.

NO. 02-2322

ELLIS H. KATZ, Esquire—Counsel for Petitioner.

JAMES L. CRAWFORD, Esquire—Counsel for Respondent.

MARTIN A. HERRING, Esquire—Counsel for Intervenor.

MEMORANDUM OPINION

NANOVIC, J.—June 26, 2003

On September 17, 2002, the Pennsylvania Labor Relations Board ("Board") issued a final order affirming the Decision and Order of the Hearing Examiner and finding that the Palmerton Area School District ("District") violated Section 1201(a)(1) and 1201(a)(5) of the Pennsylvania Public Employe Relations Act ("Act"), 43 P.S. §§1101.101-1101.2301.[1] This matter is

[1] The Hearing Examiner issued a Proposed Decision and Order on May 8, 2002 which contained findings of fact, a detailed discussion, conclusions, and an order directing remedial action. The Board issued its final order, with additional findings of fact, on September 17, 2002. This order made the Hearing Examiner's Proposed Decision and Order, as modified therein, "absolute and final."

before us on the District's Petition for Review of the Board's Final Order.[2]

The facts as found by the Hearing Examiner and as supplemented by the Board are summarized as follows.[3] On May 22, 2000, the Palmerton Area Educational Support Personnel Association ("Union") filed two grievances.[4] Pursuant to the grievance procedure set forth in the Collective Bargaining Agreement ("CBA") between the District and the Union, the District was to make a written response within no more than ten days.[5]

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[2] Jurisdiction of this petition is properly before us pursuant to 42 Pa.C.S. §933(a)(1)(vii). Our scope of review of decisions of the Board is set forth in Section 5105(d)(1) of the Judicial Code which states, in pertinent part, that "an appeal under this section shall extend to the whole record with like effect as upon an appeal from a judgment entered upon the verdict of a jury in an action at law." 42 Pa.C.S. §5105(d)(1). Our standard of review for such appeals is limited and is governed by Section 5105(d)(2) of the Judicial Code, 42 Pa.C.S. §5105(d)(2). Under that Section, as interpreted by our appellate courts, review is limited to determining whether the Board's findings are supported by substantial evidence and whether conclusions drawn from those findings are reasonable and not illegal, arbitrary or capricious. **Uniontown Area School District v. PLRB,** 747 A.2d 1271, 1273-74 (Pa. Commw. 2000) (**citing St. Joseph's Hospital v. PLRB,** 473 Pa. 101, 373 A.2d 1069 (1977)). Additionally, it is appropriate to defer to the Board's expertise and not to lightly substitute our judgment for that of the Board. **Millcreek Township School District v. PLRB,** 158 Pa. Commw. 156, 159 n.4, 631 A.2d 734, 735 n.4 (1993), **appeal denied,** 537 Pa. 626, 641 A.2d 590 (1994).

[3] The District has not challenged any specific findings of fact as being unsupported by substantial evidence. Accordingly, the Examiner's findings are the facts for purposes of reviewing the District's exceptions. 34 Pa. Code §95.98(a)(3); **Fraternal Order of Police, Lodge No. 5 v. PLRB,** 727 A.2d 1187, 1190 (Pa. Commw. 1999).

[4] Grievance No. PAESP-2000-1 sought to recover money that the District withheld from secretaries' paychecks to recapture alleged overpayments to those secretaries for summer hours worked. Grievance No. PAESP 2000-2 disputed the school board's decision to create two classifications of secretaries with no bumping rights, allegedly in violation of the Collective Bargaining Agreement, and the furlough of a secretary, Geraldine Dorshimer, who was not given bumping rights into the District's central office.

[5] The mutually agreed upon grievance procedure is contained in Appendix D of the CBA. The grievance procedure contains four steps, the fourth step being arbitration. Step I of the grievance procedure requires a grievance to be filed with the first level supervisor within 10 working days of the occurrence and answered within 10 working days of the presentation of the grievance. Step II requires that, if the grievance is denied at Step I, the grievance shall be referred to the Superintendent within 5 days of the denial and that the Superintendent shall reply within 5 work days from the presentation of the grievance to him.

Although the parties disagree as to why this did not happen, a dispute which forms the basis of the District's appeal and which we will discuss below, it is undisputed that this did not occur. Instead, the District's response denying the two grievances was not made until June 8, 2002. This response, according to the Union, was untimely thereby triggering the default provision of the grievance procedure which provides with respect to the District: "If the [District] at any step fails to render its decision within the time periods established, the grievant shall be granted the action requested, without prejudice to the [District's] future position." (CBA, Appendix D, Section III) Under this language, the District's response, if untimely, resolved the grievance in favor of the Union.

On August 11, 2000, the Union filed with the Board a charge of unfair practices claiming that the District had acted contrary to the provisions of Section 1201(a)(1)-(5) of the Act. The Hearing Examiner's decision referred to earlier concluded that the District engaged in unfair practices within the meaning of Section 1201(a)(1) and (5) of the Act by refusing to grant the requested relief in the two grievances when the District failed to respond to those grievances within the response time specified in the CBA.[6]

In this appeal, and before the Hearing Examiner and the Board, the District challenges the authority of the Board to

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It is unclear whether the timeline provisions of Step I or Step II govern the two grievances. Although the grievances were presented to and accepted by the Superintendent, thereby seemingly governed by the terms of Step II, the record indicates that the filing of those grievances with the Superintendent was the first presentation to the employer suggesting that the grievances could be governed by the terms of Step I and the more liberal time frames therein. However, such a determination is unnecessary to the resolution of the issues presented because the District's response was untimely under either time frame.

[6] Section 1201 of the Act, 43 P.S. §1101.1201, provides, in relevant part, the following:

> (a) Public employers, their agents or representatives are prohibited from:
>
> (1) Interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this act.
>
> ****
>
> (5) Refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.

hear the dispute. Specifically, the District contends the matter was not properly before the Board because the issue in dispute involves the terms and interpretation of a contract which must be heard and decided by an arbitrator under the grievance procedure set forth in the CBA. Further, by statute, arbitration is the mandatory method of resolving disputes arising from the collective bargaining process. 43 P.S. §1101.903. This issue, according to the District, is separate and distinct from an unfair labor practice over which the Board has jurisdiction by statute and which involves a violation of statute, namely, the Act. 43 P.S. §1101.1301.

In raising this issue, the contract referred to by the District is not the CBA, or an interpretation of its provisions, but whether or not the Union agreed to an extension of time for the District to respond to the grievances (District Brief, p. 3). The District claims that upon receipt of the grievances, its Superintendent contacted first the union president to verify whether the union representative who signed the grievances was authorized to do so, and, after being advised that the grievances should proceed, he discussed the grievances directly with the union representative involved. In that conversation, the District's Superintendent testified that he requested and was provided an extension of time within which to file an answer to the grievances (N.T. 9/5/02, Hearing before the Hearing Examiner, pp. 15-16).

The Hearing Examiner, however, found to the contrary. On this issue, the Hearing Examiner stated:

> The [Union] put on two witnesses: the [Union representative], and the [Union's] president. Both denied ever giving the Superintendent an extension of time to file the District's answers to the [Union's] grievances, which were filed on May 22, 2000. The Superintendent, when questioned about his request for an extension of time to answer the [Union's] grievances, stated 'Perhaps I wasn't as clear in my request.' (N.T. 15). The testimony of the [Union's] witnesses is more persuasive than is that of the Superintendent. That conclusion is based on the demeanor, clearness of statements and certainty of the witnesses.

(Proposed Decision and Order of the Hearing Examiner, pp. 2-3; **see also,** Hearing Examiner's Findings of Fact, No. 10) Absent a legal determination that the Hearing Examiner was with-

out jurisdiction to hear this controversy, the Examiner's findings, supported by substantial evidence, must be upheld.

In arguing that the Hearing Officer was without jurisdiction, he District states that the Board's jurisdiction is circumscribed to violations of statute (**i.e.,** unfair labor practices) while violations of contract are for an arbitrator to decide.[7] (District Brief, p. 3) While this may be generally true, the distinction raised by the District fails to recognize the fundamental difference between assuming jurisdiction to decide controversies over the merits of a grievance and assigning jurisdiction to preserve the collective bargaining relationship by enforcing statutory bargaining obligations that require an employer to honor the terms of its collective bargaining agreement. **Moshannon Valley School District v. PLRB,** 142 Pa. Commw. 270, 597 A.2d 229 (1991), **appeal denied,** 530 Pa. 662, 609 A.2d 170 (1992) (employer failed to proceed to the second level of the grievance procedure in accordance with the parties' collective bargaining agreement; employer's further failure to honor the resolution of the grievance at the first level constituted an unfair labor practice).

That the Board is not the forum to decide the merits of a grievance (**i.e.,** whether the substantive provisions of the CBA have been violated), does not mean the Board is without juris-

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[7] In **Pa. State Troopers Ass'n v. PLRB,** 761 A.2d 645 (Pa. Commw. 2000), the Pennsylvania Commonwealth Court stated:

> This case concerns the proper role for the PLRB in a case dealing with unfair labor practice charges under the PLRA and Act 111. As indicated, the PLRB exists to remedy violations of statute, **i.e.,** unfair labor practices, and not violations of contract. **Parents Union for Public Schools in Philadelphia v. Board of Education of the School District of Philadelphia,** 480 Pa. 194, 389 A.2d 577 (1978). Where breach of contract is alleged, interpretation of collective bargaining agreements typically is for the arbitrator under the grievance procedure set forth in the parties' collective bargaining agreement. **Ellwood City Police Wage and Policy Unit v. Ellwood City Borough,** 29 PPER 29213 (Final Order 1998), **aff'd,** 736 A.2d 707 (Pa. Commw. 1999). However, the PLRB will review an agreement to determine whether the employer clearly has repudiated its provisions because such a repudiation may constitute both an unfair labor practice and a grievance. **Millcreek Township; Port Authority of Allegheny County v. Amalgamated Transit Union Local #85,** 27 PPER 27184 (Final Order 1996).

Id. at 649. If a clear repudiation of a previously bargained-for provision is not found, the issue is limited to a question of contractual, not statutory, violation.

diction when the procedural provisions of the CBA providing the method to resolve grievances are violated or ignored. To the contrary, violations of this nature because they undermine the collective bargaining process are per se bargaining violations under the Act over which the Board has jurisdiction. 43 P.S. §1201(a)(5). Consequently, it is critical in this case to distinguish between the underlying merits of the Union's grievances—which were not before the Board—and the District's statutory collective bargaining obligation, which includes the timely resolution of grievances, which was properly before the Board. The question of whether or not the Union granted the District an extension of time to respond to the grievances was an evidentiary factual question implicating directly the District's statutory obligation to bargain in good faith and is not, at least primarily, an issue of whether the CBA was violated.[8]

Nor are the facts which will support an unfair labor practice necessarily mutually exclusive from those facts which will support a grievance proceeding. In language relevant to this

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[8] The Board will not find an unfair labor practice in violation of Section 1201 (a)(1) and 1201 (a)(5) of the Act if there is a sound arguable basis in the collective bargaining agreement for the employer's claim that the parties bargained over the subject in dispute, and the employer is acting consistent with the parties' agreement on that subject. **See Amalgamated Transit Union Local #801 v. Altoona Metro Transit,** 26 PPER ¶26085 (F.O. 1995) and **Ambridge Area Education Association v. Ambridge Area School District,** 28 PPER ¶28020 (H.Ex., 1996), **aff'd,** 28 PPER ¶28092 (F.O. 1997). The Board's theory in such a case is that the employer met its statutory obligation to bargain in good faith when it negotiated the provision and does not act unilaterally by staking out its own interpretation of the provision so long as there is a legitimate basis for doing so. **See Ambridge, supra.** In such cases, where the collective bargaining agreement covers the item of dispute and the District and Association disagree regarding the proper interpretation of their agreement, the PLRB will not enter the dispute to determine which interpretation is correct. **See Amalgamated Transit Union Local #801, supra** at p. 3. Rather, the PLRB leaves the parties' dispute over exactly what they agreed to for an arbitrator to decide. **See Amalgamated Transit Union Local #801** and **Ambridge, supra.** This is consistent with the concept that arbitration represents an extension of the collective bargaining process. **Dunmore Police Ass'n v. Borough of Dunmore,** 107 Pa. Commw. 306, 528 A.2d 299 (1987), **appeal denied,** 518 Pa. 651, 544 A.2d 963 (1988). Application of the "contractual privilege/sound arguable basis" defense by the Board to a charge of unfair labor practices alleging a failure to bargain in good faith "allows the [Board] to determine whether the employer fulfilled its collective bargaining obligation under [the Act], without taking on the role of an arbitrator." **Pennsylvania State Trooper's Ass'n v. PLRB, supra** n.7, 761 A.2d at 650 n.11.

discussion, the Commonwealth Court in **Millcreek Township School District. v. PLRB,** 158 Pa. Commw. 156, 631 A.2d 734 (1993), **appeal denied,** 537 Pa. 626, 641 A.2d 590 (1994), stated:

> The District also argues that the Board lacks jurisdiction over this matter because its conclusion rests on an interpretation of the collective bargaining agreement. This argument misconstrues the function of the PLRB which has exclusive jurisdiction to prevent unfair labor practices. Section 1301 of the Act, 43 P.S. §1101.1301. The fact that the same act may give rise to both a violation of the collective bargaining agreement and an unfair labor practice, or that determination of whether an unfair labor practice has occurred may depend on interpretation of the collective bargaining agreement, does not oust the Board of jurisdiction. **Pennsylvania Labor Relations Board v. General Braddock Area School District,** 33 Pa. Commonwealth Ct. 55, 380 A.2d 946 (1977); **Commonwealth v. Pennsylvania Labor Relations Board.**

Id. at 162-63, 631 A.2d at 737. "[A] public employer's clear repudiation of a bargained-for agreement constitutes an unfair labor practice as well as a grievance." **Pa. State Trooper's Ass'n v. PLRB,** 761 A.2d 645, 649 (Pa. Commw. 2000) (**citing Millcreek Education Association v. Millcreek Township School District,** 22 PPER 22185 (Final Order 1991), **aff'd,** 158 Pa. Commw. 156, 631 A.2d 734 (1993).

In this case, the issue was principally one of evidence and credibility on the factual question: Did the Union agree to an extension of time for the District to respond to the grievances? The meaning and interpretation of the CBA is not in dispute. If the Union agreed to the extension, compliance within the time periods provided for in the grievance procedure was waived and the District's reply timely. If, however, there was no agreement to extend the period to respond, as found by the Board and supported by substantial evidence, the terms of the CBA resolved the grievance in favor of the Union and the District has failed to abide by that resolution thereby committing an unfair labor practice. In essence, the issue before the Board was not a question of arbitrability, to be first submitted to an arbitrator, but rather whether an unfair labor practice had been committed by a refusal to honor the terms of the CBA.

In affirming the Board's decision, we are cognizant of our standard of review and the deference which we must show to the Board's expertise in determining unfair labor practices.

ORDER OF COURT

AND NOW this 26th day of June, 2003, the Order of the Pennsylvania Labor Relations Board, dated September 17, 2002, is hereby AFFIRMED.

DAVID A. VAN HORN and BETTY LOU VAN HORN, Plaintiffs vs. REINHART FLYNN, INC. d/b/a REINHART FORD, PENNSYLVANIA DEPARTMENT of TRANSPORTATION of the COMMONWEALTH OF PENNSYLVANIA, Defendants vs. GENERAL MOTORS CORPORATION, Additional Defendant

Civil Action—Motion for Summary Judgment—Sovereign Immunity—Real Estate Exception—Requirement That Danger or Defect Arise Out of the Real Estate—Strict Liability—Proof of Defect—Malfunction Theory—Negligence—Proof of Specific Defect—Necessity for Expert Testimony—Spoliation—Three-Pronged Analysis—Application of Equitable Principles

1. The real estate exception to sovereign immunity requires proof that the dangerous condition complained of derived, originated, or had as its source the Commonwealth realty itself. It is insufficient to plead and prove that the Commonwealth could have taken steps to improve its property so as to avoid or minimize injuries from dangers outside of the traveled portion of the road. The Commonwealth has no duty to guard against dangerous conditions **off** of Commonwealth real estate.

2. While the juxtaposition of a highway under the jurisdiction of PennDOT and an adjacent embankment, drainage ditch and metal pipe into which Plaintiffs' car traveled causing serious injuries may create a dangerous condition, against which no guardrail or other protective barrier was erected by PennDOT, where the cause of the vehicle leaving the road is not related in any manner to the pavement surface or the condition of the traveled portion of the road, the defense of sovereign immunity protects PennDOT from liability.

3. In a strict product liability case, the malfunction theory permits evidence of a malfunction—in the absence of abnormal use or reasonable, secondary causes for the malfunction—as circumstantial evidence of the existence of a defect. Proof of a specific defect is not required.

4. Because liability in a negligence action is dependent upon whether the accident could have been avoided by the exercise of reasonable cause, a negligence claim, in contrast to a claim for strict liability, requires proof of a specific defect as the cause of the malfunction or proof of a specific defect in the design of the product. Mere proof of a malfunction is insufficient.

5. Where the jury must determine issues requiring scientific or specialized knowledge or experience, expert testimony is required. In the absence of such

evidence, Plaintiffs have failed to produce evidence of facts essential to its cause of action.

6. Plaintiffs' failure to present an expert report to identify a specific defect which Plaintiffs claim was responsible for the malfunction of Plaintiffs' motor vehicle justifies the grant of Defendant's Motion for Summary Judgment on Plaintiffs' negligence claim.

7. In determining the proper sanctions, if any, for loss of evidence by a party, a three-pronged analysis is required: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) the availability of a lesser sanction that will protect the opposing party's rights and deter future similar conduct. Additionally, principles of equity govern the application of these prongs.

8. When the loss of evidence by a party is innocent and without fault, and where no tactical advantage has been gained and such party's position may in fact be weakened by the loss, evidentiary sanctions will not be imposed. Instead, the burden of proof applicable to the party's claim will serve to protect the opposing party against an unfounded claim.

NO. 01-1794

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MEMORANDUM OPINION

NANOVIC, J.—July 23, 2003

Plaintiffs are David A. Van Horn and Betty Lou Van Horn, his wife ("Plaintiffs" or "Van Horns"). On August 29, 1999, Mr. Van Horn sustained serious physical injuries in a one-vehicle motor vehicle accident. At the time, Mr. Van Horn was test-driving a 1996 Chevrolet Tahoe owned by the Defendant, Reinhart Flynn, Inc., d/b/a Reinhart Ford ("Reinhart"), in a northbound direction on S.R. 2001 (locally known as Forest Inn Road). Forest Inn Road is a state highway maintained by the Defendant, Commonwealth of Pennsylvania, Department of Transportation ("PennDOT").

The Van Horns claim that the cruise control on the vehicle failed to disengage when Mr. Van Horn braked while rounding a left-hand curve in the road. In consequence, Mr. Van Horn was unable to complete the left turn in the road, lost control, and

traveled across the east berm of the road down an embankment and into an open drainage ditch where the vehicle eventually struck the end of a metal storm drainage pipe. This pipe, and most of the drainage ditch leading away from it, are located outside of PennDOT's right-of-way.

Suit was commenced, by complaint, on August 1, 2001 against Reinhart and PennDOT. Plaintiffs' claim against Reinhart is premised on principles of strict liability and negligence. Plaintiffs claim the vehicle was defective and unreasonably dangerous due to the alleged malfunction of the cruise control and the failure of the cruise control to disengage when Mr. Van Horn applied the brakes (Count I—Strict Liability). Plaintiffs further claim that Reinhart supplied the vehicle to Mr. Van Horn at a time when it knew or should have known of the vehicle's unreasonably dangerous condition, and in failing to warn of or correct this dangerous condition (Count II—Negligence). Reinhart is a merchant engaged in the business of selling and supplying new and used motor vehicles for use by the public. Mr. Van Horn was test-driving the vehicle as a prospective purchaser.

Liability against PennDOT is asserted on the theory that Forest Inn Road, at the location of the accident, was unreasonably dangerous as a result of "the curve to the left, adjacent to a steep-sided drainage ditch leading to an unyielding open metal culvert which terminated in a metal storm drain." (Amended Complaint, ¶22)

Reinhart joined General Motors Corporation ("GMC"), the manufacturer of the vehicle, as an Additional Defendant.

Both Defendants and the Additional Defendant have moved for summary judgment. Summary judgment is appropriate when, after examining the record in the light most favorable to the non-moving party, there is no genuine issue of material fact, and the moving party clearly establishes that he is entitled to judgment as a matter of law. Pa. R.C.P. No. 1035.2(1). Summary judgment is also appropriate where the party who bears the burden of proof has failed to produce facts essential to establish a prima facie case prior to trial. Pa. R.C.P. 1035.2(2). **See also, Troup v. Tri-County Confinement Systems, Inc.,** 708 A.2d 825, 826 (Pa. Super. 1998).

I. **MOTION FOR SUMMARY JUDGMENT BY PennDOT (SOVEREIGN IMMUNITY)**

PennDOT claims that the Sovereign Immunity Act ("Act"), 42 Pa. C.S. §§8521-8528, protects it from Plaintiffs' claim.

> The Act provides that sovereign immunity is only waived for damages arising out of a negligent act where the common law or a statute would permit recovery if the injury were caused by a person not protected by sovereign immunity. 42 Pa. C.S. §8522(a). In order for the Commonwealth to be found liable, a plaintiff must also establish that the cause of action falls under one of the specifically enumerated exceptions to immunity. 42 Pa. C.S. §8522(b). Because of the clear intent to insulate government from exposure to tort liability, the exceptions to immunity are to be strictly construed. **Kiley v. City of Philadelphia,** 537 Pa. 502, 645 A.2d 184, 185-186 (1994).

Dean v. Commonwealth, Department of Transportation, 561 Pa. 503, 751 A.2d 1130, 1132 (2000).[1]

In this case, we must determine whether Plaintiffs' claim is actionable under the real estate exception to sovereign immu-

[1] The Act, Section 8522, provides in pertinent part:

> (a) Liability imposed—The General Assembly, pursuant to section 11 of Article I of the Constitution of Pennsylvania, does hereby waive, in the instances set forth in subsection (b) only and only to the extent set forth in this subchapter and within the limits set forth in section 8528 (relating to limitations on damages), sovereign immunity as a bar to an action against Commonwealth parties, for damages arising out of a negligent act where the damages would be recoverable under the common law or a statute creating a cause of action if the injury were caused by a person not having available the defense of sovereign immunity.
>
> (b) Acts which may impose liability.—The following acts by a Commonwealth party may result in the imposition of liability on the Commonwealth and the defense of sovereign immunity shall not be raised to claims for damages caused by:
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> ******
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> (4) Commonwealth real estate, highways and sidewalks.—A dangerous condition of Commonwealth agency real estate and sidewalks, including Commonwealth-owned real property, leaseholds in the possession of a Commonwealth agency and Commonwealth-owned real property leased by a Commonwealth agency to private persons, and highways under the jurisdiction of a Commonwealth agency, except conditions described in paragraph (5) [dealing with potholes and sinkholes].

42 Pa. C.S. §8522(a), (b)(4).

nity, the only potentially relevant exception to this claim. The real estate exception states that liability may be imposed on the Commonwealth for damages caused by "[a] dangerous condition of Commonwealth agency real estate … including … highways under the jurisdiction of a Commonwealth agency." 42 Pa. C.S. §8522(b)(4). In order for the real estate exception to apply, "a claim … must allege that the dangerous condition 'derive[d], originiate[d], or ha[d] as its source the Commonwealth realty' itself." **Jones v. Southeastern Pennsylvania Transportation Authority,** 565 Pa. 211, 772 A.2d 435, 443 (2001) **(quoting Snyder v. Harmon,** 522 Pa. 424, 433, 562 A.2d 307, 311 (1989)). Further, the Commonwealth may not raise sovereign immunity as a defense "when a plaintiff alleges, for example, that a substance or an object on Commonwealth realty was the result of a defect in the property or in its construction, maintenance, repair, or design." **Id.** at 443-44 (footnote omitted).

The real estate exception is inapplicable to Plaintiffs' claim. PennDOT has no duty to guard against dangerous conditions **off** the highway. Yet, this is the essence of Plaintiffs' claim: an alleged dangerous condition arising out of the location and configuration of the road in relation to the adjacent embankment, drainage ditch and metal pipe.[2]

In **Dean,** our Supreme Court held that "the absence of a guardrail cannot be said to be a dangerous condition of the real estate that resulted in a reasonably foreseeable injury to [Plaintiff]. Stated differently, the lack of a guardrail does not render the highway unsafe for the purposes for which it was intended, i.e., travel on the roadway." **Dean, supra,** 751 A.2d at 1134 (footnote omitted). "The Commonwealth … is not a guarantor of the safety of the highway, but is only exposed to liability for dangerous conditions thereof." **Id.** at 1134 n.8.

In **Dean,** the plaintiff "was injured while a passenger in a car that fishtailed on a snow covered roadway and traveled over

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[2] No claim has been made of a dangerous condition arising from the geometry of the curve, the speed limit or signage, stopping site distances, or that Plaintiffs' injuries were in any manner caused by the pavement surface or the traveled portion of Forest Inn Road. Here, for reasons not related to the road, Mr. Van Horn's vehicle completely left the traveled portion of the road, encountered a drainage ditch and struck a metal pipe.

a steep embankment, where it overturned. The plaintiff alleged the Department was negligent in failing to shield the steep embankment with a guardrail and in failing to properly design, construct and maintain a safe highway." **Piazza v. Commonwealth, Department of Transportation,** 786 A.2d 328, 330 (Pa. Commw. 2001), **appeal denied,** 568 Pa. 732, 798 A.2d 1294 (2002).

Plaintiffs' argument before us is simply the converse of that made in **Dean** and is controlled by the reasoning of that decision. The injuries there, as here, occurred because the motor vehicle left the portion of the highway intended for travel. Where the claimed danger or defect does not arise out of the Commonwealth's real estate, liability will not be imposed simply because the Commonwealth could have taken steps to improve its property so as to avoid or minimize injuries from dangers outside of the traveled portion of the road—in this case, on property owned by third parties. **Dean, supra,** 751 A.2d at 1134; **see also, Snyder v. Harmon, supra** at 435, 562 A.2d at 312 ("[T]he appellees next assert that the close proximity between L.R. 33060 and the deep chasm, and the unlit and deceptive appearance of the shoulder of the road presented an inherently dangerous condition. Thus, liability is not predicated on a defective condition on Commonwealth land, but rather the knowledge of an inherently dangerous condition contiguous with Commonwealth property which the Commonwealth knows or should reasonably know and takes no action to prevent any harm from occurring. While this theory appears attractive, it is not supported by any exception to our immunity statute.").

Here, as in **Dean,** failure to erect a guardrail or to take other measures to reduce the likelihood of injury from a motor vehicle traveling off the portion of Forest Inn Road intended for travel did not create a dangerous condition of real estate for purposes of immunity. Plaintiffs' allegations that PennDOT could have erected barriers or designed the road in such a way as to mitigate the effects of driving off the road does not alter the fact that the drainage ditch, open culvert and metal pipe cannot be considered to have "derived, originated, or had as [their] source" the highway itself.

In this case, as in **Dean,** the issue is not whether a dangerous condition exists—a question of fact for a jury, but whether

PennDOT would be liable for it under the real estate exception to sovereign immunity. On this issue, a question of law, we conclude PennDOT is immune from Plaintiffs' claim and will grant the Motion.[3]

II. **MOTION FOR SUMMARY JUDGMENT BY REINHART**

Plaintiffs have neither secured an expert nor presented an expert's report with respect to their products liability claims against Reinhart. In the absence of expert opinion testimony, Reinhart contends Plaintiffs are unable and have failed to present a prima facie case of liability. In ruling on Reinhart's motion for summary judgment on this basis, we must distinguish between the nature of Plaintiffs' claims for strict liability and negligence.

The cause of action in a negligence claim has been defined as "the negligent act or acts which occasioned the injury." **Saracina v. Cotoia,** 417 Pa. 80, 85, 208 A.2d 764, 767 (1965). **But, see Kuisis v. Baldwin-Lima-Hamilton Corp.,** 457 Pa. 321, 325 n.7, 319 A.2d 914, 918 n.7 (1974) (because the meaning varies with the circumstances, the Supreme Court has never adopted a comprehensive definition of what constitutes a "cause of action").[4] Inherent in this meaning is the standard of reasonableness by which a defendant's conduct is to be measured.

In contrast, the cause of action under Section 402A is the defect itself. **Id.** at 325, 319 A.2d at 918. "The 'reasonable man' standard in any form has no place in a strict liability case." **Berkebile v. Brantly Helicopter Corp.,** 462 Pa. 83, 96, 337

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[3] To the extent PennDOT claims 53 P.S. §4104 also provides immunity from Plaintiffs' claims, we disagree. Section 4104(b) protects PennDOT from liability in damages "for any injury to persons or property arising out of the issuance or denial of a driveway permit, or for failure to regulate any driveway . . . ." 53 P.S. §4104(b). As Plaintiffs concede "Plaintiff is not claiming damages against PennDOT arising out of the issuance or denial of a driveway permit or for failure to regulate any driveway" (Plaintiffs' Brief in Opposition to PennDOT's Motion, p. 4), Section 4104 is irrelevant to the claims raised in Plaintiffs' Complaint.

[4] In **Young v. Commonwealth, Department of Transportation,** 560 Pa. 373, 744 A.2d 1276, 1277 (2000), the Pennsylvania Supreme Court quoted with approval the following language from **Gift v. Palmer,** 392 Pa. 628, 630, 141 A.2d 408, 409 (1958):

> Negligence is the want of due care which a reasonable man would exercise under the circumstances. Conduct is negligent only if the harmful consequences thereof could reasonably have been foreseen and prevented by the exercise of reasonable care.

A.2d 893, 900 (1975). While the theory of liability as to how the accident occurred may be the same in both negligence and strict liability claims, the principle of strict liability simplifies plaintiff's proof by eliminating the issue of negligence from the case. **Kuisis, supra** at 325, 319 A.2d at 918.

(a) **Strict Liability**

Malfunction Theory of Products Liability

The plaintiff in a strict product liability case has the burden of proving (1) that the product was defective; (2) that the defect was the proximate cause of his or her injuries; and (3) that the defect existed at the time the product leaves the manufacturer/seller. **Ducko v. Chrysler Motors Corp.,** 433 Pa. Super. 47, 50, 639 A.2d 1204, 1205 (1994). "The questions when and where a defect originated should be left to the finder of fact so long as reasonable and well balanced minds [could] be satisfied from the evidence adduced that the defective condition existed when the machine was delivered." **Kuisis, supra** at 334, 319 A.2d at 922 (citations and quotations marks omitted).

As to proof of a defect, the malfunction theory of products liability permits evidence of a malfunction—in the absence of abnormal use or reasonable, secondary causes for the malfunction—to be used as circumstantial evidence of a defective condition.

> Generally, a plaintiff will produce direct evidence of a product's defective condition. In those cases where the plaintiff is unable to prove the precise nature of the product's defect, however, he may, in some cases, rely on the 'malfunction theory' of product liability. **Rogers v. Johnson & Johnson Products, Inc.,** 523 Pa. 176, 182, 565 A.2d 751, 754 (1989).
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> The malfunction theory allows the plaintiff to use circumstantial evidence to establish a defective product. In **Rogers v. Johnson & Johnson Products, Inc., supra,** the court stated:
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> [The malfunction theory] permits a plaintiff to prove a defect in a product with evidence of the occurrence of a malfunction and with evidence eliminating abnormal use or reasonable, secondary causes for the malfunction. [The plaintiff is relieved] from demonstrating precisely the defect yet it per-

> mits the trier-of-fact to infer one existed from evidence of the malfunction, of the absence of abnormal use and of the absence of reasonable, secondary causes.
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> **Id.** (citations omitted). Although proof of a specific defect is not essential to establish liability under this theory, the plaintiff cannot depend upon conjecture or guesswork. 'The mere fact that an accident happens, even in this enlightened age, does not take the injured plaintiff to the jury.' **Stein v. General Motors Corp.,** 58 D. & C. 2d 193, 203 (Bucks 1972), **aff'd,** 222 Pa.Super. 751, 295 A.2d 111 (1972).
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> **Id.,** 427 Pa.Super. at 492, 629 A.2d at 975-976. The malfunction theory, thus, does not relieve the burden of establishing a defect. **Harkins v. Calumet Realty Co.,** 418 Pa.Super. 405, 418, 614 A.2d 699, 706 (1992). See also: **Sochanski v. Sears, Roebuck & Co.,** 689 F.2d 45, 50 (3d Cir.1982). However, '[t]he malfunction itself is circumstantial evidence of a defective condition, …' **D'Antona v. Hampton Grinding Wheel Co., Inc.,** 225 Pa.Super. 120, 124, 310 A.2d 307, 309 (1973). When a party relies on the malfunction of a product to prove that it was defective, testimony identifying the exact nature of the alleged defect is not essential. 'Although it is helpful for a plaintiff to have direct evidence of the defective condition which caused the injury or expert testimony to point to that specific defect, such evidence is **not** essential in a strict liability case based on §402A [of the Restatements (Second) of Torts].' **Cornell Drilling Co. v. Ford Motor Co.,** 241 Pa. Super. 129, 136, 359 A.2d 822, 825 (1976) (emphasis in original).

Ducko v. Chrysler Motors Corp., supra at 50-51, 639 A.2d at 1205-1206. **See also, MacDougall v. Ford Motor Co.,** 214 Pa. Super. 384, 391, 257 A.2d 676, 680 (1969) ("[T]he occurrence of a malfunction of machinery in the absence of abnormal use and reasonable secondary causes is evidence of a 'defective condition' within the meaning of §402A ... ."), **implicitly overruled on other grounds** by **REM Coal Co., Inc. v. Clark Equipment Co.,** 386 Pa. Super. 401, 413 n.5, 563 A.2d 128, 134 n.5 (1989). **Cf. Surowiec v. General Motors Corp.,** 448 Pa. Super. 510, 672 A.2d 333 (1996) (trial court's improper exclusion of defendant's evidence of plaintiff's intoxication as

cause of motor vehicle accident justified grant of new trial but not judgment n.o.v.).

The requirement that plaintiff negate reasonable, secondary causes applies to the evidence presented in plaintiff's case in chief.

> [I]n plaintiff's case-in-chief, plaintiff [need not] negate every theoretically conceivable secondary cause for the malfunction. Rather … the plaintiff fails to establish a prima facie case only if the plaintiff does not negate evidence of other reasonable, secondary causes or abnormal use that is actually introduced during plaintiff's case-in-chief. In other words … if, **based upon his own proof,** more than one cause could account for the accident.

Dansak v. Cameron Coca-Cola Bottling Co., Inc., 703 A.2d 489, 497 (Pa. Super. 1997), **appeal denied,** 556 Pa. 669, 727 A.2d 131 (1998) (emphasis in original), (**quoting Schlier v. Milwaukee Electrical Tool Corp.,** 835 F. Supp. 839, 841 (E.D. Pa. 1993). Further, in **Thompson v. Anthony Crane Rental, Inc.,** 325 Pa. Super. 386, 473 A.2d 120 (1984), the Court stated:

> We do not hold that a plaintiff must refute all possible explanations offered by a defendant … . 'It is not necessary that plaintiff prove with mathematical exactness that the accident could only have been caused in one manner to the exclusion of all other possibilities … but he must eliminate those other causes, if any, as were fairly suggested by the evidence … . And it is the duty of the trial court to determine whether or not this requirement has been met in the first instance before the issue can be submitted to the jury … .' [**Citing Cuthbert v. Philadelphia,** 417 Pa. 610, 614-15, 209 A.2d 261, 263-64 (1965).] 242 Pa.Super. at 92, 363 A.2d at 1175.

Id. at 395, 473 A.2d at 124.

Finally, a plaintiff who has presented a malfunction case is not necessarily precluded from proceeding upon an alternate theory of negligence. "It is altogether possible that a plaintiff's injuries could be caused jointly by a defective product and also by third party negligence so long as the negligence does not constitute a supervening cause of the malfunction." **Rogers v. Johnson & Johnson Products, Inc.,** 523 Pa. 176, 184-85, 565 A.2d 751, 755 (1989). With respect to abnormal use, "[w]hen a

malfunction occurs, a concurrent abnormal use of the machine forecloses an inference of a defective condition only if the abnormal use itself contributed to the malfunction." **Kuisis, supra** at 330, 319 A.2d at 920.

The evidence in this case indicates that Mr. Van Horn obtained the vehicle from Reinhart on August 28, 1999, the day before the accident. The vehicle was received by Reinhart on a trade-in on March 15, 1999 at which time it had 57,777 miles on the odometer. The vehicle was last serviced and inspected on March 19, 1999 and then driven an additional 1,502 miles before being turned over to Mr. Van Horn. There is no evidence that suggests Mr. Van Horn was using the vehicle abnormally at the time of the accident. Defendant's argument that Plaintiffs claim that Forest Inn Road was defective and unreasonably dangerous and thereby presented a reasonable, secondary cause of the accident is foreclosed by the reasoning of **Rogers, supra** (use of the malfunction theory to prove a defect does not relieve the supplier from liability simply because another concurring cause is also responsible for producing injury).

Under the circumstances, at this stage of the proceedings we believe Plaintiffs' evidence of a claim for strict products liability is sufficient to withstand Defendant's Motion for Summary Judgment. Defendant's Motion will be denied.

(b) **Negligence**

The elements, defenses, and measures of proof for negligence are different from those in a strict liability claim. In order to establish a prima facie cause of action in negligence, the plaintiff must prove (1) the existence of a duty on the part of the defendant to conform to a certain standard of conduct with respect to the plaintiff; (2) a breach of that duty; (3) a reasonably close causal connection between the defendant's conduct and some resulting injury to the plaintiff, and (4) actual loss or damages sustained by the plaintiff as a direct result of that harm. **See e.g., Atcovitz v. Gulph Mills Tennis Club, Inc.,** 812 A.2d 1218, 1222 (Pa. 2002).

Except as the doctrines of **res ipsa loquitur** or exclusive control may apply, "a plaintiff asserting liability on grounds of negligence must connect injury with a specific defect in the manufacture or design of a product." **MacDougall v. Ford Mo-**

tor Co., supra at 387, 257 A.2d at 678. Mere proof of a malfunction is insufficient. Liability under Section 402A is dependent "on a lack of fitness in the defendant's product, [the same] as in the case of an action for breach of warranty, rather than on the breach of a particular duty of care, ... as in the case of an action for negligence." **Kuisis v. Baldwin-Lima-Hamilton Corp., supra** at 329, 319 A.2d at 918.

In **MacDougall v. Ford Motor Co., supra,** the court found:

> The evidentiary requirements of negligence law demand proof that injury is proximately caused by a specific defect in design or construction because liability hinges upon whether the accident could have been avoided by the exercise of reasonable care. In contrast, the concern of both §402A and warranty law is with the fitness of the product, not the conduct of the producer as measured by due care. While proof of a mechanical malfunction does not support an inference of the absence of due care in the construction or design of equipment, it is circumstantial evidence of the unfitness of the equipment. Accordingly, we hold that the occurrence of a malfunction of machinery in the absence of abnormal use and reasonable secondary causes is evidence of a 'defective condition' within the meaning of §402A, as it is evidence of lack of fitness for warranty liability.

Id. at 391, 257 A.2d at 680. A claim for strict liability, as already stated, does not require that plaintiff prove a specific defect to prevail, although doing so will likely strengthen the claim.

It is because of the need for Plaintiffs in their negligence claim to identify the specific defect which caused the cruise control to allegedly malfunction and, then, to prove how Defendant's conduct deviated from the requisite standard of care and that the deviation was a substantial factor in causing the accident such that Defendant can be held responsible for Plaintiffs' injuries, that Plaintiffs' claim is vulnerable to attack. This burden, in this case, we believe requires expert testimony.

"Expert testimony [is] necessary when the subject matter of the inquiry is one involving special skills and training not common to the ordinary lay person." **Storm v. Golden,** 371 Pa. Super. 368, 376, 538 A.2d 61, 64 (1988), **appeal denied,** 524 Pa. 630, 574 A.2d 71 (1989).

> Frequently, the jury, or the court trying a case without a jury, is confronted with issues which require scientific or specialized knowledge or experience in order to be properly understood. Certain questions cannot be determined intelligently merely from the deductions made and inferences drawn from practical experience and common sense. On such issues, the testimony of one possessing special knowledge or skill is required in order to arrive at an intelligent conclusion. … In these matters, where laymen have no knowledge or training, the court and jury are dependent on the explanations and opinions of experts.
>
> In a logical and fundamental sense, a verdict is worth only as much as the evidence upon which it is based. In a complex case, a jury, in order to reach an intelligent conclusion, is dependent on expert testimony. If the jury is enlightened, it will reach the right verdict. Unaided by the explanations and opinions of those with specialized knowledge or skill, the ultimate conclusion might just as well be based on evidence presented in a language unfamiliar to the jury. Unless the jury is comprised of experts in the field, the verdict is based on mere conjecture. Such a verdict is worthless.

Dion v. Graduate Hospital of University of Pennsylvania, 360 Pa. Super. 416, 425, 520 A.2d 876, 881 (1987) (citation omitted).

Conversely,

> [I]f all the primary facts can be accurately described to a jury, and if the jury is as capable of comprehending and understanding such facts and drawing correct conclusions from them as are witnesses possessed of special training, experience or observation, then there is no need for the testimony of an expert.

Young v. Commonwealth, Department of Transportation, 560 Pa. 373, 744 A.2d 1276, 1278 (2000) (**quoting Reardon v. Meehan,** 424 Pa. 460, 227 A.2d 667, 670 (1967)).

In this case, other than Plaintiffs' claim that the cruise control failed to disengage when Mr. Van Horn stepped on the brake pedal, we do not know what the specific cause of this failure was. We do not know whether the claimed defect is a design defect or a manufacturing defect. We do not know what inspec-

tions or tests are required to discover the specific defect involved, whether such inspections or tests are extraordinary or routine, or even whether the defect was discoverable in advance of the accident. Was the defect a latent or hidden defect and one not able to be discovered upon reasonable inspection of the Defendants. Again, we don't know. The answers are not "so simple, and the lack of skill or want of care so obvious, as to be within the range of ordinary experience and comprehension of even non professional persons." **Brannan v. Lankenau Hospital,** 490 Pa. 588, 598, 417 A.2d 196, 201 (1980). Nor are the answers within the ability of the average person of ordinary intelligence to determine on their own.

The answers to these questions, however, are critical to proving Plaintiffs' claim. It is for this reason and because the answers require technical knowledge, acquired by study and experience, that an expert is necessary and required to prove Plaintiffs' case in chief on negligence. Absent the assistance and explanation of a qualified expert, the jury's verdict on this claim can be nothing more than speculation or conjecture. **See Schmoyer v. Mexico Forge, Inc.,** 437 Pa. Super. 159, 163, 649 A.2d 705, 707 (1994) ("the trial court has a duty to prevent questions from going to the jury which would require it to reach a verdict based on conjecture, surmise, guess or speculation."). **Cf. Masgai v. Franklin,** 787 A.2d 982, 985 (Pa. Super. 2001) ("[B]ecause 'the complexities of the human body place questions as to the cause of pain or injury beyond the knowledge of the average layperson,' a medical malpractice plaintiff generally must produce the opinion of a medical expert to demonstrate the elements of his cause of action."); **Storm v. Golden, supra** (expert testimony ordinarily necessary to establish legal malpractice).

Summary judgment is proper when 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, which, in a jury trial, would require the issues to be submitted to a jury. **Young v. Commonwealth, Dep't of Transp., supra,** 744 A.2d at 1277. "Where a plaintiff fails to produce an expert in a situation requiring one, the court should grant a defendant's motion for summary judgment." **Masgai v. Franklin, supra** at 985. Accordingly, we will grant Defendant's Motion on this claim.

III. **MOTION FOR SUMMARY JUDGMENT BY GMC**

Reinhart's joinder complaint is in standard form, incorporates the allegations of Plaintiffs' complaint, and asserts the same claims of negligence and strict liability against GMC as Plaintiffs have made against Reinhart. GMC raises the same issues in its motion for summary judgment against Reinhart as Reinhart raised against Plaintiffs, and our decision will be the same for the same reasons.

Additionally, GMC claims Reinhart's sale of the vehicle for salvage prior to institution of Plaintiffs' suit has resulted in spoliation of evidence and prevented GMC from inspecting the vehicle and verifying system functionality for the braking, cruise control and electrical systems of the vehicle. Reinhart's response alleges that no request or notice to preserve the evidence was ever made by Plaintiffs and that, prior to the salvage of the vehicle, it had no knowledge or reason to believe the Van Horns were claiming the accident was caused by other than driver error.

"Spoliation is an exclusionary doctrine grounded in principles of equity." **Cohen v. Chateau at Camelback,** 37 D. & C. 4th 317, 319 (Monroe Cty. 1997). There is no per se rule that a party has an inflexible duty in a products liability action to preserve the product for future inspection or forfeits its claim. Instead, a three-pronged analysis is required in determining the proper sanctions, if any, for spoliation of evidence: "(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) the availability of a lesser sanction that will protect the opposing party's rights and deter future similar conduct." **Schroeder v. Commonwealth, Department of Transportation,** 551 Pa. 243, 710 A.2d 23, 27 (1998).

Neither party has extensively developed the record or analyzed the relevant factors in determining whether GMC's request for dismissal is warranted on grounds of spoliation. Reinhart's response to the motion that it was unaware prior to the salvage of the vehicle that the Plaintiffs claimed the accident was caused by a defect in the vehicle, and that Reinhart received no prior request or notice to preserve the evidence, is

certainly relevant to the "degree of fault" consideration.[5] There is no evidence that salvaging of the vehicle was undertaken in bad faith or for ulterior motives.

On the other hand, GMC's claim of prejudice is a real one. The unavailability of the vehicle for inspection has undeniably deprived GMC of an opportunity "to have an expert examine the [vehicle] and to testify, if appropriate, that a defect did not cause the [vehicle] to malfunction." **Martin and Greenspan v. Volkswagon of America,** 1989 WL 81296 (E.D. Pa. July 13, 1989) (No. Civ. A. 88-8261). Indeed, GMC's expert has opined that Reinart's failure to preserve the vehicle has prevented GMC's ability to verify system functionality.[6]

In **Long v. Yingling,** 700 A.2d 508 (Pa. Super. 1997), **appeal denied,** 555 Pa. 725, 725 A.2d 182 (1998), the court recognized the public policies underlying the theory of spoliation as being "(1) to prevent fraudulent claims; and (2) to remove plaintiffs from the position of deciding whether the availability of the allegedly defective product would help or hurt their case." **Id.** at 513. Here, as previously stated, there is no reason to suspect that Reinhart's claim is fraudulent. Nor has Reinhart benefited from the unavailability of the vehicle. To the contrary, in this case, where Plaintiffs do not have a direct cause of action against GMC because of the running of the applicable statute of limitations (**Dickson v. Lewandowski,** 228 Pa. Super. 57, 323 A.2d 169 (1974)), Reinhart must shoulder entirely the burden of proving liability against GMC. **Wnek v. Boyle,**

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[5] There is no evidence of the circumstances surrounding the determination that the vehicle was a total loss and should be salvaged, and when this occurred. We do note, however, that Plaintiffs' action was not commenced until August 1, 2001, almost two years after the accident.

[6] Because the identity of the manufacturer of the vehicle is not in dispute, this is not a case warranting dismissal for failure to preserve evidence critical to identifying a responsible party. **Cf. Roselli v. General Electric Co.,** 410 Pa. Super. 223, 599 A.2d 685 (1991) (plaintiff failed to preserve shattered glass carafe thereby precluding defendant from verifying the product manufacturer of the carafe for indemnity purposes). Further, to the extent Reinhart may intend to argue a design defect, the prejudice claimed by GMC is lessened. **Schroeder, supra** (design defects common to all trucks of the same make and model; therefore the need to examine the actual truck to prepare a defense is not as great as when a manufacturing defect is claimed because all trucks of the same make and model would contain the same derfect); **see also, O'Donnell v. Big Yank, Inc.,** 696 A.2d 846 (Pa. Super. 1997).

374 Pa. 27, 96 A.2d 857 (1953). Without itself having examined or inspected the vehicle after the accident and being able to identify a specific defect, Reinhart's reliance on the malfunction theory to prove a defect, while at the same time defending Plaintiffs' claim on the basis of driver error, will weaken, if not defeat, Reinhart's ability to satisfy its burden of proof with respect to GMC. **Thompson v. Anthony Crane Rental, Inc., supra** at 394, 473 A.2d at 125.

Under the circumstances presented, we do not believe it would be appropriate to dismiss Reinhart's claim on the basis of spoliation of evidence. Reinhart's conduct has not resulted in a tactical advantage justifying this extreme sanction. Additionally, the burden of proof applicable to Reinhart's claim against GMC will serve to protect GMC against an unfounded claim.

LEHIGHTON AREA SCHOOL DISTRICT, Plaintiff vs. WALLACE & WATSON ASSOCIATES, P.C. and CANJALYN CONSTRUCTORS, INC., Defendants and KERN MASONRY, INC., THE MORGAN COMPANY, INC., KRAUS ADAMS ROOFING and PECORA CORPORATION, Additional Defendants

Civil Action—Construction Contract—Arbitration Provision—Determining the Subject and Scope of Mandatory Arbitration—Identification and Construction of Ambiguous Language in a Release Agreement—Requirement of Evidentiary Hearing Before Resort to Rules of Construction—Factual Disputes Precluding Summary Judgment

1. Where a party to a civil action seeks to compel arbitration of that action, a two-part test is employed to determine if arbitration is required. First, the trial court must determine whether a valid agreement to arbitrate exists between the parties. Second, if the trial court determines that such an agreement does exist, it must then determine if the dispute involved is within the scope of the arbitration provision.

2. In determining whether a dispute is within the scope of an arbitration provision, the intention of the parties must be ascertained in accordance with the rules of contractual construction.

3. An arbitration provision which is broadly worded, and is neither ambiguous nor unclear, will be construed liberally in favor of the law's policy favoring resolution of disputes by arbitration.

4. An arbitration provision which reads: "Claims, disputes, or other matters in question between the parties to this agreement arising out of or relating to this agreement or breach thereof shall be subject to and decided by arbitration as agreed to by the parties" will be construed to include claims in tort, as well as those in contract.

5. When the terms of a document—here a release agreement—are ambiguous, before resort may be made to rules of contractual construction, the courts—via a hearing—are required to inquire into the circumstances surrounding the execution of the contract. It is only when such an inquiry fails to clarify the ambiguity that the rules of contractual construction shall be used to conclude the matter against that party responsible for the ambiguity, the drafter of the document.

6. Whether defects in construction of a building are latent—that is whether the defects cannot be discovered by reasonable and customary observation or inspection as defined by the language of a release agreement, is a question of fact to be resolved by the jury, not by the court in a motion for summary judgment.

NO. 99-1760

NO. 99-2610

MEMORANDUM OPINION

NANOVIC, J.—September 18, 2003

In this opinion we address the motions for summary judgment of the Defendants, Wallace & Watson Associates, P.C. (the "Architect") and Canjalyn Constructors, Inc. (the "General Contractor"), the architect and general construction contractor respectively for the Plaintiff's, Lehighton Area School District's (the "School District"), new senior high school. The Architect designed and the General Contractor built this masonry structure. This litigation arises out of the construction of that project.

On October 3, 1989, the School District contracted with the Architect for the District's high school construction project (the "Architectural Agreement"). Pursuant to the terms of the Architectural Agreement, the Architect was responsible, **inter alia,** for the design of the new high school, preparation of the relevant drawings and specifications, and general supervision to guard the School District against defects and deficiencies in the work and against the Contractor's failure to complete the work in accordance with the construction drawings and specifications. The Architectural Agreement further provided that the Architect would perform its work within the requisite standard of professional care (Architectural Agreement, Section 1.1.4).[1]

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[1] Article 1, Section 1.1.4 of the Architectural Agreement provides:

The Architect represents that he will follow the standards of his profession in performing all services under this Agreement.

The Architectural Agreement contains the following arbitration provision:

> 7.1 Claims, disputes, or other matters in question between the parties to this Agreement arising out of or relating to this Agreement or breach thereof shall be subject to and decided by arbitration as agreed to by the parties.

(Architectural Agreement, Section 7.1). The Architectural Agreement further provides that all terms in the Architectural Agreement are to be interpreted in accordance with A.I.A. Document A201, General Conditions of the Contract for Construction, 1987 Edition (Architectural Agreement, Section 9.2).[2]

The Architect's motion which, in part, resurrects and repeats a previous motion to compel arbitration, asserts that the School District's claims against it are encompassed within the scope of the arbitration clause and must be submitted to arbitration once that provision is invoked by a participating party. The motion is made pursuant to Section 501(a) of the Uniform Arbitration Act, 42 Pa. C.S. §7304.[3]

The General Contractor's motion relies on the provisions of a Settlement and Mutual Release Agreement (the "Release Agreement") dated May 12, 1995, entered into between the School District and the General Contractor. After use of language common in a general release,[4] the Release Agreement contains the following qualifications:

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[2] Similar to Section 7.1 of the Architectural Agreement, the language of Section 4.5.1 of the General Conditions provides, in relevant part, as follows:

> Controversies and Claims Subject to Arbitration. Any controversy or Claim arising out of or related to the Contract, or the breach thereof, shall be settled by Arbitration in accordance with the Construction Industry Arbitration Rules of American Arbitration Association. ...

[3] While an agreement to arbitrate is binding upon the parties to the agreement, it is waivable and does not divest the court of subject matter jurisdiction. **Chester City School Authority v. Aberthaw Construction Co.,** 460 Pa. 343, 348-49, 333 A.2d 758, 761 (1975).

[4] The pertinent language as to the General Contractor is as follows:

> LASD [the School District] does release CANJALYN [the General Contractor], its officers, directors, employees, affiliates and bonding company, of, from and against any and all claims, demands, causes of action, obligations, liability or any other actual, threatened or potential obligations of CANJALYN to LASD for any matter occurring or arising prior to [the] date hereof or in any manner pertaining to or relating to the Project or otherwise relating to the Lehighton Area High School.

(Release Agreement, Section 3).

The foregoing releases[5] include release of the named entities and their successors and assigns, and also include release of indirect liability by way of subrogation, assignment from third parties or otherwise; however, NOTWITHSTANDING THE GENERALITY OF THE FOREGOING AND OF SECTIONS 3 AND 4 OF THIS SETTLEMENT AND MUTUAL RELEASE AGREEMENT, THE RELEASES SET FORTH IN SECTIONS 3 AND 4 OF THIS SETTLEMENT AND MUTUAL RELEASE AGREEMENT ARE LIMITED AS FOLLOWS:

5.1 ...

5.2 The Releases shall not bar claim for latent defect as a result of improper materials used and not known or disclosed or for defective materials used and not now known or disclosed, and shall allow claim only in the event of casualty causing liability to be asserted against LASD or CANJALYN or their insurers.

5.2.1 A latent defect shall be considered a hidden or concealed defect, which could not be discovered by reasonable and customary observation or inspection with ordinary care as a result of materials or workmanship performed by CANJALYN, its subcontractors or materialmen. Further, said defect shall be such that LASD shall have had no knowledge.

5.3 ...

(Release Agreement, Section 5). The General Contractor asserts that the School District's present claims against it were known or reasonably should have been known by the School District prior to May 12, 1995, and, therefore, are barred by the Release Agreement.

The respective motions of the Architect and General Contractor will be addressed separately once we have provided further factual background.

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[5] Referring to Section 3 of the Release Agreement, see footnote 4, **supra,** and Section 4, a general release by the Contractor in favor of the School District and its Board of Directors and Administrators.

FACTUAL BACKGROUND

Construction of the high school began in 1992 and was substantially completed by September 7, 1993. Water problems began to emerge from the beginning. These included interior condensation in areas where the metal roof was exposed and insulation was improperly installed; leaking where the first floor flat roofs meet the upper story walls; and leaking caused by roof gutter, drain and vent problems, and missing duct sleeves.

In August of 1996, the School District reported that moisture was entering into the new high school through the exterior masonry walls. This problem, the subject of the present suit, is claimed by the School District to be separate and distinct from the previously reported problems of leaking and condensation. To correct this problem, the General Contractor recommended applying a silicon-based water repellant sealant to the walls.

The Architect was informed of the Contractor's recommendation and did not object or otherwise advise the School District against this recommendation. In the fall of 1996, the Morgan Company, Inc. ("Morgan Company") applied a silicon sealant, produced by the Pecora Corporation ("Pecora"), to the exterior masonry walls.[6] Water penetration of the masonry walls improved for a period, then worsened and, according to the

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[6] The construction agreement (the "Construction Agreement") between the School District and the General Contractor is dated February 24, 1992, and incorporates by reference the General Conditions of the Contract for Construction, AIA document A201, 1987 Edition (Construction Agreement, Section 9.1.2). The Construction Agreement provides that the General Contractor is to "execute the entire Work described in the Contract Documents" unless otherwise provided (Construction Agreement, Article II). The General Conditions provide that "[t]he Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract" unless otherwise provided (General Conditions, Section 3.3.1). Subcontractors are to be directly contracted for by the Contractor (General Conditions, Section 5.1.1), and the Contractor is to be responsible for the work of these subcontractors (General Conditions, Section 3.3.2). Under the General Conditions, the General Contractor warrants all work for which it is responsible under the contract and is required to remediate construction defects (General Conditions, Section 3.5 (Warranty) and Section 12.2 (Correction of Work)). In accordance with these provisions, the School District seeks to hold the Contractor responsible for the water penetration problems at the District's high school, including the work performed and materials used when the sealant was applied, arrangements for which were made by the Contractor.

School District, now threatens the premature deterioration of the exterior masonry walls.[7]

In the spring and summer of 1999, the School District employed an independent expert to investigate and advise as to the cause of the water seeping through the exterior walls and what corrective action should be taken. Following a review of the Architect's plans and specifications, visual observations and wall probe openings, this expert concluded that various design and construction defects related to the exterior masonry walls were the cause of the water problems. This information was provided to the School District in a report dated September 7, 1999 (Report of Masonry Preservation Services, Inc. ("MPS")). [8]

The School District commenced suit against the Architect and the General Contractor by praecipe for issuance of a writ of summons on September 3, 1999. A complaint was filed on October 13, 1999, against both the Architect and General Contractor. The Complaint contains five counts, each count, the theory of liability and named defendant being as follows: Count I (Breach of Contract)—Defendant, General Contractor; Count II (Breach of Contract)—Defendant, Architect; Count III (Negligence)—Defendant, General Contractor; Count IV (Negligence)—Defendant, Architect; and Count V (Misrepresentation)—Defendant, General Contractor.

The General Contractor has filed a cross-claim against the Architect and, additionally, has joined as Additional Defendants the masonry subcontractor, Kern Masonry, Inc. ("Kern"), who constructed the exterior masonry walls; the Morgan Company; Pecora;[9] and Kraus Adams Roofing, Incorporated ("Kraus Adams"), the latter being a subcontractor employed by the General Contractor to construct a rubber roof upon the high school.

[7] The record does not provide the specific date in 1996 when the Morgan Company applied the silicon sealant produced by Pecora. The record also fails to identify the date when the School District concluded that the sealant did not prevent water penetration of the masonry walls.

[8] The defects identified by MPS and later by Wiss, Janney, Elstner Associates, Inc., a second independent expert employed by the School District, included mortar blockages within the inside cavities of the exterior masonry walls, improper installation of flashing, omission of proper horizontal joint reinforcement and the failure to install approximately 17,000 wall ties.

[9] By Order dated February 4, 2003, Pecora's Motion for Summary Judgment was granted and Pecora was dismissed as a party to this litigation. Separate Motions for Summary Judgment have also been filed by Kern, the Morgan Company and Kraus Adams and are being acted upon this same date.

At this time, the pleadings are closed and all discovery has been completed. The motions are ripe for decision on the merits.[10]

I. **Motion for Summary Judgment/Motion To Compel Arbitration by the Architect**

Arbitration is a matter of contractual agreement. Therefore, before a particular issue can be submitted to arbitration, an agreement between the parties to arbitrate that issue must exist. **Hazleton Area School District v. Bosak,** 671 A.2d 277, 282 (Pa. Commw. 1996). Further, because arbitration is a matter of contract, "in construing the language of an arbitration provision, courts must resort to the rules of contractual construction." **Id.** at 281.

When a party to a civil action seeks to compel arbitration of that action, two questions must be answered: first, whether a valid agreement to arbitrate exists between the parties; and second, whether the dispute involved is within the scope of the arbitration provision. **Id.** at 282. "The scope of arbitration is determined by the intention of the parties as ascertained in accordance with the rules governing contracts generally." **Pittsburgh Logistics Systems, Inc. v. Professional Transportation and Logistics, Inc.,** 803 A.2d 776, 779 (Pa. Super. 2002), **quoting Henning v. State Farm Mut. Automobile Ins. Co.,** 795 A.2d 994, 996 (Pa. Super. 2002), **appeal denied,** 570 Pa. 680, 808 A.2d 572 (2002). Whether a particular dispute falls within a contractual arbitration provision is a matter of law for the court to decide. **Shadduck v. Kaclik,** 713 A.2d 635, 637 (Pa. Super. 1998).

Pennsylvania law favors resolution of disputes by arbitration. **Huegel v. Mifflin Construction Co., Inc.,** 796 A.2d 350, 358 (Pa. Super. 2002). Consequently, a court should give liberal construction to the scope of an arbitration provision. **Hazleton Area School District, supra** at 285. "[W]hen parties agree to arbitration in a clear and unmistakable manner, the court will make every reasonable effort to favor such agree-

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[10] Prior motions for summary judgment of the Architect and General Contractor were denied, without addressing the merits, when the Court was advised that discovery was not complete. These denials, including that of the Architect to compel arbitration, were without prejudice of the Defendants to renew their motions upon completion of discovery. **See** order dated June 17, 2002.

ments." **Smith v. Cumberland Group, Ltd.,** 455 Pa. Super. 276, 283, 687 A.2d 1167, 1171 (1997). "If a valid arbitration agreement exists between the parties and appellants' claim is within the scope of the agreement, the controversy must be submitted to arbitration." **Id.** at 284, 687 A.2d at 1171. And while "a court must be careful not to extend an arbitration agreement by implication beyond the clear, express and unequivocal intent of the parties as manifested by the writing itself," **Hazleton Area School District, supra** at 282, "[f]undamental in our law of contracts is the axiom that parties may write their own contracts, and that it is the function of the courts to interpret those contracts and to enforce them as made." **Ambridge Borough Water Authority v. Columbia,** 458 Pa. 546, 548, 328 A.2d 498, 500 (1974).

The parties herein do not contest the existence or the validity of the arbitration provision in the Architectural Agreement. Nor do the parties dispute that certain matters between them are subject to mandatory arbitration pursuant to the arbitration provision. They do, however, disagree on its scope and applicability in this case.

The parties have focused their arguments on two divergent views of the arbitration provision. The School District argues that the provision is limited to disputes concerning only the language of the Architectural Agreement—its construction, interpretation and breach of its terms. The Architect argues that the proper subject matter of arbitration is not restricted to the language of the Agreement alone, but includes disputes involving the subject matter of the Agreement, in this case, the high school building project. Under the first view, claims for breach of contract are subject to arbitration but not those for professional negligence or those seeking non-contractual damages. Under the latter view, claims sounding in tort, if arising from conduct connected with the construction of the school, are within the scope of arbitration.

In determining the scope of the arbitration provision, we begin, as we must, with the actual language of the Architectural Agreement. Section 7.1 states:

> Claims, disputes, or other matters in question between the parties to this Agreement arising out of or relating to

> this Agreement or breach thereof shall be subject to and decided by arbitration as agreed to by the parties.

This provision is broadly worded. Its language encompasses not only any and all claims[11] and disputes between the parties but all matters in question between the parties arising out of and even relating to the Agreement, including, but not limited to, its breach.

The arbitration clause, on its face, does not exclude from arbitration claims for negligence or tort liability. All claims, regardless of their nature, are included, providing only that they arise out of or relate to the Agreement. Nor does the arbitration clause in any manner limit the School District's remedies or type of damages recoverable against the Architect. Damages are not confined to those for breach of contract.

The School District's Complaint contains claims against the Architect both for contract and in tort. Paragraphs 37 and 38 of Count II of the Complaint, directed against the Architect, allege that the Architect breached the terms of the Architectural Agreement in its design, supervision and control of the work required for the construction project, and in failing to properly investigate, analyze and recommend proper action necessary to correct deficiencies and defects reported by the School District. These claims directly relate to obligations created under the Architectural Agreement. The School District offers no explanation as to why Count II of the Complaint is not covered by the arbitration provision, and we are aware of none.

Count IV of the Complaint asserts that the Architect failed to perform its services under the Agreement with the requisite level of professional care. While conceptually structured as a claim in tort, this claim arises from the same conduct on which the claim for breach of contract is based.

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[11] As defined in Section 4.3.1 of the General Conditions of the Contract for Construction

> A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract.

In opposing arbitration, the School District relies principally on **Hazleton Area School District v. Bosak, supra.** There, unlike here, the only claim made against the architect was one in tort in his individual capacity. The architect, individually, was not a party to the agreement with the Hazleton Area School District.

In **Hazleton Area School District** the claim arose when, within four months of completion of the district's new high school, the roof of the building collapsed under the weight of snow. The school district commenced suit in the court of common pleas against the architect, and others. The architect filed preliminary objections and requested, **inter alia,** that the claim be decided by arbitration in accordance with the architectural agreement existing between the school district and the architect's firm. The architect's firm was the actual party to the agreement, was owned by the architect, and was organized as a sole proprietorship under a fictitious name. The agreement in **Hazleton Area School District** contained the following arbitration provision:

> Claims, disputes or other matters in question between the parties to this Agreement arising out of or relating to this Agreement or breach thereof shall be subject to and decided by arbitration … unless the parties mutually agree otherwise … .

Id. at 284.

In denying the architect's motion to compel arbitration, the court in **Hazleton Area School District** held, **inter alia,** that the architect individually was not a party to the agreement which contained the arbitration provision; that, therefore, the claim against the architect did not concern the terms of the agreement which contained the arbitration provision but was a direct and separate claim for professional negligence; and that, in effect, the architect could not individually invoke an arbitration provision contained in an agreement to which he was not a party.[12] The court further held, based upon witness testimony, that the claim for professional negligence by the architect in his

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[12] **See Peifer v. McCarthy,** 71 D. & C.2d 740, 741 (Lehigh Cty. 1974) ("As a general rule, persons who are neither party nor privy to an arbitration agreement may not invoke its provisions.").

individual capacity was not contemplated by the parties to the agreement as one subject to arbitration.[13]

In the present case, neither party has suggested or argued ambiguity in the arbitration provision of the Architectural Agreement. Nor has any witness testimony been presented to interpret this provision. The suit commenced by the School District has been filed against the Architect in the same capacity and under the identical name appearing in the Architectural Agreement and not against individual principals of the Architect. Finally, the Architectural Agreement, unlike that in **Hazleton Area School District,** contemplates in unmistakable language that the Architect "will follow the standards of his profession in performing all services under [the] Agreement." (Architectural Agreement, Section 1.1.4)

As noted, the case of **Hazleton Area School District** bears critical distinctions from the present case. More to the point is **Shadduck v. Kaclik, supra.** In **Shadduck,** the parties entered an agreement for the construction of a home. When the owner was dissatisfied with the construction, separate claims were filed in different forums: suit was commenced by the owner against the contractor in the court of common pleas for alleged false representations by the contractor regarding his ability, or willingness, to construct the owner's home in a workmanlike fashion and for violation of the Unfair Trade Practices and Consumer Protection Law. Additionally, the owner filed a demand for arbitration alleging that, due to faulty construction, the contractor breached the terms of the parties' contract and warranty obligations.

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[13] Claims in contract and tort have different theoretical underpinnings. While tort actions lie for the breach of duties imposed by law as a matter of social policy, contract actions lie only for the breach of duties imposed by mutual agreement of the parties. **Etoll, Inc. v. Elias/Savion Advertising, Inc.,** 811 A.2d 10, 14 (Pa. Super. 2002). Consequently, the policy considerations underlying contract law is the protection of expectations which have been bargained for by the parties to the agreement. **Hazleton Area School District v. Bosak, supra** at 282-83. In contract actions, "[i]t is necessary to determine whether losses incurred by a party were contemplated by the parties at the time that the contract was executed." **Id.** at 283. In contrast, the policy consideration underlying the recovery of damages in tort law is compensation for losses resulting from injury to persons or property, not the protection of disappointed expectations. **Id.**

The agreement in **Shadduck** provided:

> All claims or disputes between the Contractor and the Owner arising out of, or relating to, this Contract or the breach thereof shall be decided by arbitration in accordance with the construction Industry Arbitration Rules of the American Arbitration Association.

Id. at 637. On the basis of this provision, the contractor filed preliminary objections in the nature of a motion to compel arbitration of the owner's tort claim filed with the trial court. The trial court denied the objections. In reversing the trial court and granting the contractor's motion, the Pennsylvania Supreme Court, in language relevant to this litigation, stated:

> Our interpretation of the arbitration provision as a whole and, in particular, the highlighted portions above, convinces us that the parties intended to submit all of their grievances to arbitration, regardless of whether the claims sounded in tort or contract. There is no limiting language of the type that would lead one to believe that only contract claims fall within the purview of the agreement. Indeed, given the agreement's expansive terms, the only reasonable conclusion is that a claim's substance, not its styling, is to control whether the complaining party must proceed to arbitration or may file in the court of common pleas. That is, if the claim arises out of, or relates to, the building contract or the purported breach thereof, the moving party's sole forum is compulsory arbitration.

Shadduck v. Kaclik, supra at 637.

Also instructive is the Supreme Court's holding in **Ambridge Borough Water Authority v. Columbia, supra.** The arbitration clause before the court provided, **inter alia,** that "any controversy or claim arising out of or relating to this Agreement or the breach thereof shall be settled by arbitration ... ." **Id.** at 547, 328 A.2d at 500. There, as here, there was no limitation in the language of the contract as to the nature of the dispute the parties agreed to settle by arbitration. In reference to this language, the court held as follows:

> [The arbitration agreement] is framed in the broadest conceivable language from which it must be concluded that the parties intended the scope of the submission to be unlimited. Where, as here, there is an unlimited arbitration

> clause, any dispute which may arise between the parties concerning the principle contract is to be settled pursuant to its terms.

Id. at 551-52, 328 A.2d at 501.

The School District's claim for professional negligence against the Architect is specifically premised upon the Architect's purported negligent performance **under the contract.**[14] The acts upon which the tort claim is based are temporally and factually the same as those supporting the claim for breach of contract. The language of the arbitration provision is broad and does not exempt negligent acts from its coverage and, in conjunction with Section 1.1.4 of the Architectural Agreement, contemplates claims arising out of the Architect's asserted failure to perform its contractual obligations with the requisite level of professional care. As such, we find and hold that the School District's tort claim against the Architect arises out of and relates to the Architectural Agreement and, therefore, is subject to and must be decided by arbitration.[15]

In light of our decision regarding the Architect's motion to compel arbitration, it is unnecessary and would be inappropriate for us to address the Architect's remaining motions for sum-

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[14] Moreover, the independent viability of a claim in negligence may be fairly questioned in this case. Under the gist of the action doctrine, where a plaintiff alleges that the defendant committed a tort in the course of carrying out a contractual agreement, where the tort arises out of the performance of contractual duties, and where the "gist" or "essential ground" of the action is contractual, then the claim in tort is generally held to be merely collateral to a claim for breach of contract and should be dismissed. **Etoll, Inc. v. Elias/Savion Advertising, Inc., supra** at 19 (doctrine applied to claim for fraud); **Bash v. Bell Telephone Co.,** 411 Pa. Super. 347, 601 A.2d 825 (1992) (doctrine applied to claim for negligence). **See also, Factory Mkt., Inc. v. Schuller Int'l., Inc.,** 987 F. Supp. 387 (E.D.Pa. 1998) (negligence and fraud claims for failure to repair leaking roof barred under the gist of the action doctrine). The doctrine serves to preclude plaintiffs from recasting ordinary breach of contract claims into tort claims. **Etoll, Inc., supra** at 14.

The thrust of the claim asserted in Count IV of the Complaint is improper performance of contractual obligations (Complaint, Paragraphs 9, 26-27, 36-38, 46). As such, the contract is not collateral but central to the essence of this claim.

[15] Were we to find to the contrary with respect to the claim in tort, the consequence would be litigation of Count IV of the Complaint (**i.e.,** the claim in tort) in court and arbitration of Count II of the Complaint (**i.e.,** that for breach of contract) before the American Arbitration Association. Division of the School District's claims against the Architect promotes neither efficient, consistent nor expeditious resolution of disputes.

mary judgment and the same will be dismissed as moot. "[I]f a dispute between parties is properly the subject of an agreement to arbitrate, arbitration is the procedure to follow." **Santiago v. State Farm Insurance Co.,** 453 Pa. Super. 343, 347, 683 A.2d 1216, 1218 (1996). Therefore, leave shall be granted to the Architect to raise such matters in the proceedings before the arbitrator.[16]

Our decision to grant the Architect's Motion to Compel Arbitration does not violate the holding in **Thermal C/M Services, Inc v. Penn Maid Dairy Products,** 2003 WL 22019954 (Pa. Super. 2003). In that case, the Superior Court held that because separate litigation was already pending in court between the owner of a building project and its contractor, the owner would not be required to participate in a separate arbitration proceeding between the contractor and sub-contractors of the project, notwithstanding an arbitration provision in the contract between the owner and contractor. In **Thermal C/M Services,** the Superior Court reasoned that because the litigation pending in court would decide the same issue sought to be arbitrated by the contractor in the arbitration proceedings, under the circumstances, to direct the owner's participation in the arbitration proceeding would create piecemeal litigation violative of Pa. R.C.P. No. 213(a)'s goals to uphold judicial efficiency, maintain the consistency of verdicts, and save the parties from the expenses associated with duplicative litigation.

Unlike **Thermal C/M Services,** the specter of duplicative litigation and its potential consequences has been created in this case by the School District. The Construction Agreement between the School District and the Contractor contains a provision for mandatory arbitration of disputes between the two (Construction Agreement, General Conditions, Section 4.5.1). The General Conditions of the Construction Agreement further provide that arbitration of disputes between the School District and the Contractor, and between the School District and the Architect, should not be joined unless all parties agree to do so in writing (General Conditions, Section 4.5.5). Under these circumstances, we believe it would be fundamentally unfair to permit the School District in an action commenced by it to circumvent, by the joinder of other parties, its contractual obligation to arbitrate its disputes with the Architect.

At the same time, we recognize that the Architect will remain a party to these proceedings on the basis of the General Contractor's cross-claim. Because of this joinder, the Architect was required to participate in these proceedings independently of its participation resulting from the direct claims of the School District against it. In consequence, it cannot be seriously argued that the Architect's conduct has gained it an undue advantage or resulted in prejudice to the School District such that the Architect should be held to have relinquished its right to arbitration. **Keystone Technology Group, Inc. v. Kerr Group, Inc.,** 824 A.2d 1223, 1226 (Pa. Super. 2003).

[16] The School District also argues that the parties to the Agreement did not intend that the obligation to arbitrate would survive completion of the project. While **Chester City School Authority, supra,** appears to hold to the contrary, the issue of whether disputes subject to arbitration are confined by the terms of the

II. **Motion for Summary Judgment of the General Contractor**

The General Contractor argues that the claims brought against it by the School District are barred by the May 12, 1995 Release Agreement.

Because the Release Agreement exempts from release those claims predicated on latent defects, to be barred, the School District's claims must arise from other than a latent defect. Latent defects are defined in the Release Agreement as being "hidden or concealed defect[s], which could not be discovered by reasonable and customary observation or inspection with ordinary care as a result of material or workmanship performed by [the General Contractor], its subcontractors or materialman. Further, said defect[s] shall be such that [the School District] shall have had no knowledge." (Release Agreement, Section 5.2.1)

The language in Section 5.2 appears to contain internal ambiguity.[17] While initially excluding from its coverage claims for latent defects **as a result of improper or defective materials,** the term "latent defect" is itself defined as a defect which "could not be discovered by reasonable and customary observation or inspection with ordinary care as a result of materials **or workmanship.**" Since the School District's claims are principally premised on defective workmanship, not defective materials, it becomes necessary to determine whether a latent defect must result from the use of improper or defective materials, or may additionally be caused by improper workmanship. If confined to the former, the School District's claims relying on alleged defective workmanship by the General Contractor would be barred.

Architectural Agreement to disputes which occur before the completion of the project, or whether such disputes are barred by the applicability of a contractual statute of limitations, are questions for the arbitrator. **Ambridge Borough Water Authority v. Columbia, supra** at 550, 328 A.2d at 500-501. Whether a party's demand for arbitration is timely, is for the arbitrators, not the courts. **Highmark Inc. v. Hospital Service Association of Northeastern Pennsylvania,** 785 A.2d 93, 100-101 (Pa. Super. 2001), **appeal denied,** 568 Pa. 713, 797 A.2d 914 (2002).

[17] "The determination of whether a contract is ambiguous is a question of law." **Sun Company, Inc. (R&M) v. Pennsylvania Turnpike Commission,** 708 A.2d 875, 878 (Pa. Commw. 1998).

Unfortunately, the ambiguity cannot be resolved on the face of this record. Before rules of contractual construction may be applied, such as the rule that ambiguous language in a contract is to be construed against the drafter and in favor of the other party if the latter's interpretation is reasonable, the intentions of the parties must first be inquired into.

> Rules of construction serve the legitimate purpose of aiding courts in their quest to ascertain and give effect to the intention of parties to an instrument. They are not meant to be applied as a substitute for that quest. Where a document is found to be ambiguous, inquiry should always be made into the circumstances surrounding the execution of the document in an effort to clarify the meaning that the parties sought to express in the language which they chose. … It is only when such an inquiry fails to clarify the ambiguity that the rule of construction … should be used to conclude the matter against that party responsible for the ambiguity, the drafter of the document.

Burns Manufacturing Co. v. Boehm, 467 Pa. 307, 313 n.3, 356 A.2d 763, 766 n.3 (1976) (citations omitted). **See also, Sun Company, Inc. (R&M) v. Pennsylvania Turnpike Commission,** 708 A.2d 875, 879 (Pa. Commw. 1998). The intention of the parties, if not clear from the face of the document, can only be determined after the parties have been permitted to present evidence as to their intentions and the fact-finder has been provided an opportunity to fathom the meaning of the parties.[18]

If, following the presentation of evidence, it is determined that latent defects include those arising from defective workmanship, a further inquiry must be made to determine whether the claims made by the School District arise from latent defects: were the claims known by the School District prior to execution of the Release Agreement, or could or should the

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[18] The record before us does not reflect who prepared the Release Agreement. The Agreement was apparently prepared to resolve a payment dispute between the parties over work performed by the General Contractor and additional payments requested (Release Agreement, Section 1). Pursuant to the terms of the Release Agreement, an additional payment of $22,000 was made to the General Contractor (Release Agreement, Section 2).

claims have been known by the School District with reasonable and customary observation or inspection.[19]

Here, the General Contractor relies on evidence which, if believed, supports the Contractor's position that the source of water permeation at the high school prior to execution of the Release Agreement was diffuse, was not confined to roof leaks, and included water penetration of the masonry walls. That the School District may not have known of the alleged faulty workmanship hidden behind the walls is, in the General Contractor's thinking, immaterial: the School District knew the end result of such failure—water penetration—and in spite of such knowledge agreed to release the General Contractor from responsibility for this problem. Under Pennsylvania law, absent a finding of fraud, duress or mutual mistake, of which there is no evidence, the Release Agreement is a valid contractual obligation, binding on all parties according to its terms. **McDonnell v. Ford Motor Company,** 434 Pa. Super. 439, 446, 643 A.2d 1102, 1106 (1994), **appeal denied,** 539 Pa. 679, 652 A.2d 1324 (1994). The General Contractor further contends that reasonable and customary inspection and testing of the walls would have revealed, and, when undertaken in 1999, did in fact, reveal the underlying construction and design defects of which the School District now complains.[20] Therefore, by definition, the alleged defects were not latent. So argues the General Contractor.

Conversely, the School District relies on evidence which, if believed, supports the School District's position that prior to May 12, 1995, it had no knowledge and no reason to believe water was penetrating the masonry walls. To the contrary, the

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[19] We are also aware that the Release Agreement does not purport to release the General Contractor from liability for future conduct and that the sealant work was performed in 1996, approximately fifteen months after the Release Agreement was executed.

[20] Consistent with this position, the General Contractor's expert expressed the following opinion:

> It is the writer's concluding opinion that the defects cited in the Complaint [and the School District's expert reports] were discoverable by [the School District] had a reasonable inspection of the known building leakage and wall cracking been performed prior to the signing of the Release Agreement. …

(Report of Henry R. Naughton, P.E., dated April 17, 2001, p. 5).

evidence relied upon by the School District supports the conclusion that such defects were concealed by the walls themselves. Only after invasive testing procedures were undertaken by trained professionals—removal of concrete masonry units, site probing, water spray testing, metal detection surveys and related review and analysis of construction design documents—were the deficiencies discoverable.

Factually, the parties dispute whether moisture was penetrating the masonry walls prior to May 12, 1995; whether such penetration, if it existed, was known by the School District; whether the defects of which the School District complains were reasonably discoverable by the School District and should have been discovered by the School District prior to execution of the Release Agreement; and whether the defects are latent defects within the meaning of the Release Agreement language. The evidence upon which the parties rely for their respective positions on these issues supports the position taken by each and presents factual disputes requiring submission to a fact-finder.[21] Accordingly, the factual issues outstanding preclude granting the General Contractor's motion.

ORDER OF COURT

AND NOW, this 18th day of September, 2003, upon consideration of the Defendant Wallace & Watson Associates, P.C.'s Second Motion for Summary Judgment, Plaintiff's Answer thereto, and having heard argument thereon and reviewed the pleadings, affidavits, depositions and other documents of record, it is hereby ORDERED and DECREED that:

1. That portion of Wallace & Watson Associates, P.C.'s Motion in the Nature of a Motion to Compel Arbitration is sustained. Pursuant to the arbitration provision found in Section 7.1 of its contract with the Defendant, Wallace & Watson Associates, P.C., Plaintiff shall be permitted to pursue against the Defendant, Wallace & Watson Associates, P.C., any claims relating to the High School construction project.

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[21] Unless reasonable minds could not differ as to the conclusion, the question of whether a party acted reasonably or had actual knowledge of certain facts are issues of fact to be determined by the collective judgment, wisdom and experience of jurors. **Harvey v. Hansen,** 299 Pa. Super. 474, 486, 445 A.2d 1228, 1234 (1982); **Long v. Manzo,** 452 Pa. Super. 451, 456, 682 A.2d 370, 373 (1996), **appeal denied,** 548 Pa. 624, 693 A.2d 967 (1997).

2. Defendant Wallace & Watson Associates, P.C.'s remaining grounds for Summary Judgment are dismissed as moot. Said Defendant is granted leave to raise such matters in the proceedings before the arbitrator.

3. Counts II and IV of the Complaint, claims sounding in contract and negligence, respectively, against the Defendant, Wallace & Watson Associates, P.C., are dismissed.

ORDER OF COURT

AND NOW, this 18th day of September, 2003, upon consideration of the Motion for Summary Judgment filed by the Defendant, Canjalyn Constructors, Inc., the responses filed by the Plaintiff, Lehighton Area School District, and the Additional Defendants, the Morgan Company, Inc. and Pecora Corporation, and after consideration of the pleadings, affidavits, depositions and other filings of record and arguments of counsel, it is hereby

ORDERED and DECREED that Defendant, Canjalyn Constructors, Inc.'s, Motion for Summary Judgment is denied.

ORDER OF COURT

AND NOW, this 18th day of September, 2003, upon consideration of the Motion for Summary Judgment filed by the Additional Defendant, Kraus Adams Roofing, Incorporated, the answers thereto and having heard argument thereon and reviewed the pleadings, affidavits, depositions and other documents of record, it is hereby

ORDERED and DECREED that the Motion for Summary Judgment of the Additional Defendant, Kraus Adams Roofing, Incorporated, is denied. The Court finds there exists a genuine issue of material fact with respect to the nature of the work performed by this Additional Defendant, as well as the extent of liability, if any, of this Additional Defendant.[22]

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[22] With respect to Kraus Adams' request that this matter be submitted to arbitration in accordance with the contract existing between it and Canjalyn Constructors, Inc. (see Motion for Summary Judgment, Paragraph 13(f)), joinder of an additional defendant pursuant to Pa. R.C.P. No. 2252 has precedence over an arbitration provision. **School District of Philadelphia v. Livingston-Rosenwinkel, P.C.,** 690 A.2d 1321, 1323 (Pa. Commw. 1997). Additionally, Kraus Adams' failure to raise this issue previously by preliminary objections or in its new matter raises an issue of waiver.

ORDER OF COURT

AND NOW, this 18th day of September, 2003, upon consideration of the Motion for Summary Judgment filed by the Additional Defendant, Kern Masonry, Inc., and the answers thereto, and having heard argument thereon and reviewed the pleadings, affidavits, depositions and other documents of record, it is hereby

ORDERED and DECREED that the Motion for Summary Judgment of the Additional Defendant, Kern Masonry, Inc., is denied.

ORDER OF COURT

AND NOW, this 18th day of September, 2003, upon consideration of the Motion for Summary Judgment filed by the Additional Defendant, The Morgan Company, Inc., and the answers thereto, and having heard argument thereon and reviewed the pleadings, affidavits, depositions and other documents of record, it is hereby

ORDERED and DECREED that the Motion for Summary Judgment of the Additional Defendant, The Morgan Company, Inc., is granted. The evidentiary facts developed and filed of record are insufficient to establish the elements of breach and causation essential to sustain a prima facie cause of action in negligence or otherwise against this Additional Defendant.

COMMONWEALTH OF PENNSYLVANIA vs. DANIEL HEFFELFINGER, Defendant

Criminal Law—DUI—Suppression—Blood Sample—Necessity for Warrant—Voluntariness of Statements Made in Hospital

1. The provisions of Section 1547 and 3755 of the Vehicle Code, whether acting separately or in conjunction with one another provide authorization for the police to request and obtain blood test results from a person suspected of driving under the influence without the prior issuance of a search warrant.

2. Compliance with Section 1547(a)(1) requires, **inter alia,** the existence of probable cause and a prior request by a police officer to a person suspected of driving under the influence before testing may occur. When the driver is unconscious or otherwise incapable of providing consent, or where a sample of the driver's blood has previously been withdrawn for medical purposes, the requirement of a request is excused.

3. Compliance with Section 3755 requires, **inter alia,** the existence of probable cause and when emergency room personnel do not separately make the

determination of probable cause, a police request to hospital personnel to perform blood testing. Without such request, the officer's probable cause cannot be imputed to the medical attendants. No prior request by a police officer and opportunity to refuse must first be made to the driver.

4. Where probable cause exists to believe a person may have been driving under the influence and the police request hospital personnel to provide a sample of the driver's blood for chemical testing, a blood sample previously drawn by the hospital for medical purposes only may be released without the necessity of a warrant. Under such circumstances, the driver does not possess an objectively reasonable expectation of privacy in the blood sample taken.

5. The fact that a person suspected of driving under the influence has sustained serious injuries, is medicated and is hospitalized and confined to bed in an intensive care unit does not create a per se rule that the person is incapable of making voluntary statements or knowingly, intelligently and voluntarily waiving his **Miranda** rights. The test of voluntariness is whether the person possessed the ability to exercise an unfettered will to refuse to speak. The test of whether the waiver was knowing and intelligent is whether the person possessed the cognitive ability to reason and think and make rational decisions at the time of waiver.

6. Where a person appears lucid; provides detailed, coherent and appropriate responses to police questioning; and exhibits the ability to engage in complex thought processes—and is under no compulsion to answer questions and suffers from no mental or emotional impairment preventing the exercise of free will—a waiver of **Miranda** rights is valid and statements made are admissible.

NO. 132 CR 02

WILLIAM E. McDONALD, Esquire, Assistant District Attorney—Counsel for Commonwealth.

BRIAN J. COLLINS, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, J.—October 10, 2003

Before the Court is Defendant's Omnibus Pretrial Motion to suppress the blood alcohol test results of Defendant's blood derived from a blood sample withdrawn by personnel of St. Luke's Hospital, as well as statements made while the Defendant was hospitalized following a two-vehicle accident. Defendant has been charged with homicide by vehicle while driving under the influence (75 Pa. C.S. §3735(a)), homicide by vehicle (75 Pa. C.S. §3732), driving under the influence of alcohol (75 Pa. C.S. §§3731(a)(1) and 3731(a)(4)(i)), and other offenses. For the reasons which follow, the Motion is denied.

FACTUAL BACKGROUND

On August 20, 2000, at approximately 4:49 P.M., Trooper John F. Kratzer of the Pennsylvania State Police arrived at the

scene of a two-vehicle accident on White Street (SR/2005), a two lane highway in Bowmanstown, Carbon County, Pennsylvania (Defendant's Exhibit No. 2, Police Accident Report, p. 1). The accident occurred approximately thirteen minutes earlier when Defendant, the driver of a 1988 Plymouth Reliant K, turned into the opposing lane of traffic and caused a head-on collision with a vehicle driven by Melissa Sue Whiteman (Defendant's Exhibit No. 2, Police Accident Report, pp. 1 and 2). Trooper Kratzer, whose headquarters was at the Lehighton Baracks in Carbon County, became the investigating officer for this accident.

At the scene, Trooper Kratzer was advised by an emergency medical technician that the Defendant had a very strong odor of alcohol on his breath and that there was an open beer can in Defendant's vehicle. The Trooper witnessed and photographed this can (Defendant's Exhibit No. 2, Police Accident Report, p. 4). Elizabeth Barrett, six years old and a passenger in the vehicle driven by Ms. Whiteman, died the following day from injuries received in the accident (Defendant's Exhibit No. 2, Police Accident Report, p. 5).

Defendant sustained serious injuries in the accident and was life-flighted for treatment to St. Luke's Hospital in Bethlehem, Pennsylvania where he was admitted to the emergency room at approximately 5:45 P.M. on August 20, 2000 (Joint Exhibit No. 1, Medical Records, Trauma Flow Sheet, p. 1 and Trauma Service Evaluation Form, p. 1). Defendant went into seizure and was intubated at the scene (Joint Exhibit, Medical Records, Trauma Flowsheet, p. 1 and Trauma Service Evaluation Form, p. 4). Defendant was also heavily medicated. By the time Defendant was admitted to the hospital, he was pharmacologically paralyzed (Joint Exhibit, Medical Records, Discharge Summary). As of August 21, 2000, Defendant's intubation and sedation continued to prevent him from being interviewed (Defendant's Exhibit No. 2, Police Accident Report, p. 5).

On August 24, 2000, Defendant was extubated. By August 24, 2000, Defendant's sedative hypnotics were discontinued and, by August 25, he was able to follow complex commands (Joint Exhibit No. 1, Medical Records, Discharge Summary; N.T., 1/30/03, p. 50). Defendant was discharged from the hospital on September 4, 2000 (Joint Exhibit No. 1, Medical Records, Discharge Summary).

On Saturday, August 26, 2000, Trooper Robert Grossi, who was asked to assist Trooper Kratzer in his investigation of the accident, interviewed Defendant in the Intensive Care Unit at St. Luke's Hospital. Before asking Defendant questions about the accident, Trooper Grossi advised Defendant of the reason for the interview and asked for biographical information. In doing so, Trooper Grossi wanted to preliminarily test Defendant's level of competence. After this information was obtained and after assuring himself that Defendant was capable of being interviewed and that Defendant understood the questions and the purpose of the interview, Defendant was advised of his **Miranda** rights and then questioned about the accident.

The interview began at approximately 5:20 P.M. and concluded at 6:50 P.M. (N.T., 1/30/03, pp. 17-18). A ten minute recess occurred between 6:20 P.M. and 6:30 P.M. when the Trooper left the room to permit the supervising nurse to check Defendant's condition (N.T., 1/30/03, p. 17). During the interview, the Defendant was lucid, he had no difficulty communicating, and his responses to Trooper Grossi's questions were appropriate and coherent (N.T., 1/30/03, pp. 15, 27). At the end of the interview, Trooper Grossi reviewed with Defendant the information he had recorded and was assured by Defendant that this information was accurate (N.T., 1/30/03, p. 16).

In the interview, Defendant acknowledged that he was the driver of the Plymouth Reliant and was the only occupant of this vehicle, that he had driven past his friend's home and was in the process of turning around when the accident occurred, and that he never saw the other vehicle. Although Defendant could not recall the actual collision or what happened afterwards, Defendant was able to recall his activities earlier in the day. While describing these activities, Defendant admitted that he had consumed two beers at his home the morning of the accident before helping his brother move from one apartment to another. Defendant stated he was sure of this amount because "if you drink more than two beers in an hour, you can go over the limit." (N.T., 1/30/03, pp. 12-13) When told by Trooper Grossi that it was common practice during emergency treatment for a hospital to draw blood and that the police would likely have Defendant's blood tested for alcohol content, the Defendant admitted to drinking six beers, but no more, and again stated that he was sure that he did not drink more than

two beers in an hour because he did not want to go over the legal limit (N.T., 1/30/03, p. 14). Defendant further admitted that he first told the officer he only had two beers because he did not want to get into trouble, not because he was mistaken (N.T., 1/30/03, pp. 14-15).

A sample of Defendant's blood was in fact drawn from Defendant at St. Luke's Hospital at 6:00 P.M. on August 20, 2000 (N.T., 1/30/03, p. 66; Commonwealth Exhibit No. 2, Blood Alcohol and Toxicology Request/Chain of Custody). This sample was placed in storage and delivered the same date at 8:00 P.M. to Trooper Andrew Thomas Watkins of the Bethlehem Barracks (N.T., 1/30/03, pp. 67-68; Commonwealth Exhibit No. 2, Blood Alcohol and Toxicology Request/Chain of Custody and Defendant's Exhibit No. 1, Property Record). At 8:14 P.M. on August 20, 2000, the Bethlehem Barracks confirmed with the Lehighton Barracks that the blood sample had been obtained from the hospital (N.T., 1/30/03, p. 77).

The taking of a blood sample from both the Defendant and the operator of the other vehicle was originally requested by Trooper Kratzer between 6:00 and 6:15 P.M. on August 20, 2000 (N.T., 1/30/03, pp. 73, 75-76). Trooper Kratzer made this request to the Lehighton Barracks, not to the hospital directly. Eventually this request reached St. Luke's Hospital and culminated in Trooper Watkins arriving at the hospital to receive the blood sample (N.T., 1/30/03, pp. 60-62, 73-74).

Trooper Watkins reached the hospital at approximately 7:50 P.M. and, as indicated above, received the sample at 8:00 P.M. (N.T., 1/30/03, pp. 64-66). Prior to receiving this sample of Defendant's blood, Trooper Watkins executed a blood alcohol and toxicology request form pursuant to which he certified that a determination of probable cause had been made that Defendant was operating a motor vehicle while under the influence of alcohol and that, as a law enforcement officer, he was requesting that the hospital take and provide the police with a blood sample from the Defendant (Commonwealth Exhibit No. 2, Blood Alcohol and Toxicology Request/Chain of Custody). Defendant's blood alcohol content was subsequently determined to be 0.18 percent (Defendant's Exhibit No. 2, Police Accident Report, p. 16).

Defendant argues that absent a showing by the Commonwealth that the police request for a sample of Defendant's blood

was received prior to the blood being drawn, the issuance of a warrant is a constitutional prerequisite to the police obtaining the blood sample for testing. Stated differently, if the blood sample was originally drawn solely for medical purposes, according to Defendant, before this sample could be provided to the police for BAC testing, a warrant was required. Here, it is undisputed that no warrant was issued. It is also legally acknowledged that the blood was drawn from the Defendant before the hospital received Trooper Kratzer's request.[1]

I. SUPPRESSION OF BLOOD EVIDENCE—NECESSITY FOR WARRANT

Ultimately, the legal issue we must confront is whether, in response to a request by the police for a blood sample pursuant to Sections 1547 and 3755 of the Vehicle Code, 75 Pa.C.S. §§1547, 3755,[2] a hospital may provide blood from a sample previously drawn by the hospital for medical purposes or must

[1] The burden of proof in a suppression hearing is upon the Commonwealth to show by a preponderance of the evidence that evidence is admissible. **Commonwealth v. Wanner,** 413 Pa. Super. 442, 452, 605 A.2d 805, 810 (1992). The blood was drawn by hospital personnel at 6:00 P.M. Trooper Kratzer's request to his station was not made until sometime between 6:00 and 6:15 P.M. Because no evidence was presented as to when the request to draw the blood was first received by the hospital, the record does not support a finding that the request was received prior to the drawing of Defendant's blood.

[2] "Section 3755 and the implied consent law, 75 Pa.C.S. §1547, comprise a statutory scheme which both implies the consent of a driver to undergo blood testing in certain circumstances and requires hospital personnel to release the blood test results at the request of, among others, a police officer." **Commonwealth v. Shaw,** 564 Pa. 616, 770 A.2d 295, 298 (2001).

Section 3755 states:

> §3755. Reports by emergency room personnel
>
> (a) General rule.—If, as a result of a motor vehicle accident, the person who drove, operated or was in actual physical control of the movement of any involved motor vehicle requires medical treatment in an emergency room of a hospital and if probable cause exists to believe a violation of section 3731 (relating to driving under the influence of alcohol or controlled substance) was involved, the emergency room physician or his designee shall promptly take blood samples from those persons and transmit them within 24 hours for testing to the Department of Health or a clinical laboratory licensed and approved by the Department of Health and specifically designated for this purpose. This section shall be applicable to all injured occupants who were capable of motor vehicle operation if the operator or person in actual physical control of the movement of the motor vehicle cannot be determined. Test results shall be released upon request of the person tested, his attorney, his physician or governmental officials or agencies.

draw a new sample of blood in order for the sample to be provided without the need for a search warrant. In **Commonwealth v. Shaw,** 564 Pa. 616, 770 A.2d 295 (2001), relied upon by the Defendant, the Supreme Court held that the release of the defendant's BAC test, taken for independent medical purposes, and not pursuant to Section 3755(a), without a warrant and in the absence of exigent circumstances, violated Article I, Section 8, of the Pennsylvania Constitution.

In **Shaw,** a state trooper obtained from a hospital the results of a blood alcohol test performed by hospital personnel for independent medical purposes. No prior request for the test was made by the trooper, nor was a warrant obtained prior to receiving the results. The Pennsylvania Supreme Court held that suppression of the BAC test results was required under Article I, Section 8, of the Pennsylvania Constitution because of a patient's reasonable expectations of privacy in his medical records (**i.e.,** the blood alcohol test results) which, once prepared, document the blood alcohol content at a specific point in time. At issue in Shaw was the release of hospital records containing the results of blood alcohol testing not, as here, the delivery of a blood sample.

(b) Immunity from civil or criminal liability.—No physician, nurse or technician or hospital employing such physician, nurse or technician and no other employer of such physician, nurse or technician shall be civilly or criminally liable for withdrawing blood or obtaining a urine sample and reporting test results to the police pursuant to this section or for performing any other duty imposed by this section. No physician, nurse or technician or hospital employing such physician, nurse or technician may administratively refuse to perform such tests and provide the results to the police officer except as may be reasonably expected from unusual circumstances that pertain at the time of admission.

Section 1547 reads, in pertinent part, as follows:

§1547. Chemical testing to determine amount of alcohol or controlled substance.

(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 purposes 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; or

(2) ....

The significance of the distinction between the police obtaining from a hospital the results of blood alcohol testing and a blood sample is one founded, at least in part, on the implied consent law, 75 Pa.C.S. §1547. Section 1547(a)(1) of the law eliminates the need to obtain a warrant to request and conduct chemical tests, but not to seize medical records. **Commonwealth v. Riedel,** 539 Pa. 172, 651 A.2d 135 (1994) (concurring opinion), **quoted with approval in Shaw, supra,** 770 A.2d at 299.

In this case, we have accepted Defendant's position that the Commonwealth has failed to prove that at the time of withdrawal, Defendant's blood was drawn pursuant to Section 3755.[3] Accepting this premise—that the blood was drawn by the hospital for medical purposes only—Defendant's rights were not violated when the blood was drawn because such decision involved solely private actors and not the government or its agents. **Commonwealth v. Johnson,** 556 Pa. 216, 727 A.2d 1089, 1097-98 (1999), **cert. denied,** 528 U.S. 1163, 120 S.Ct. 1180, 145 L.Ed. 2d 1087 (2000).[4] Nor did delivery of the blood sample to the police violate Article I, Section 8's privacy concerns. Under the implied consent law, assuming the police had probable cause to believe Defendant was driving under the influence,[5] Defendant did not possess a reasonable expectation of privacy in the sample of his blood drawn by the hospital.

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[3] See footnote 1 above. Of course, if the sample was in fact drawn by the hospital for the purpose of conducting a BAC test because requested by the police or on the hospital's own initiative, after a finding of probable cause, the dictates of Section 3755 have been complied with.

[4] In situations such as the present one, the constitutionality of two separate and distinct searches must be examined. **Commonwealth v. Riedel,** 539 Pa. 172, 177-78, 651 A.2d 135, 138 (1994). The first search occurs when the blood sample is taken. The second occurs when the results of blood testing, or as in our case, the blood sample itself, is turned over to the police.

[5] Although contested by Defendant, we find probable cause existed for the police request. "Probable cause exists where the officer has knowledge of sufficient facts and circumstances to warrant a prudent person to believe that the driver has been driving under the influence of alcohol or a controlled substance." **Commonwealth v. Simon,** 440 Pa. Super. 428, 434, 655 A.2d 1024, 1027 (1995), **appeal denied,** 542 Pa. 645, 666 A.2d 1055 (1995) (**quoting Commonwealth v. Welshans,** 397 Pa. Super. 439, 443, 580 A.2d 379, 381 (1990), **aff'd,** 529 Pa. 571, 605 A.2d 1222 (1992)). In **Simon,** the court wrote:

> The Superior Court 'has repeatedly upheld probable cause to conduct a blood alcohol test under subsection (a)(1) of the implied consent statute where

The privacy interest protected by Article I, Section 8, does not preclude all searches and seizures, but only those which are unreasonable. "[T]he proper function of Art. I, §8 of the Pennsylvania Constitution, is 'to constrain, not against **all** intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner.' " **Commonwealth v. Shaffer,** 714 A.2d 1035, 1037 (Pa. Super. 1998), **aff'd,** 566 Pa. 592, 782 A.2d 996 (2001) (emphasis in original) (**quoting Commonwealth v. Barton,** 456 Pa. Super. 290, 294-95, 690 A.2d 293, 296 (1997), **appeal denied,** 549 Pa. 695, 700 A.2d 437 (1997)).

As with the Fourth Amendment, Article I, Section 8's privacy protection is neither absolute nor should it be applied mechanically: it must always be examined in relation to competing, oftentimes conflicting, state and private interests. Counterbalancing a driver's privacy interest in the chemical make up of his own blood is the government's interest where driving under the influence is suspected of not only preserving evanescent evidence but of "facilitat[ing] [the] prosecution of chemically impaired drivers," and thereby protecting the public. **Shaw, supra,** 770 A.2d at 308 (Castille, J., dissenting). We recognize, as did the court in **Riedel, supra** at 182, 651 A.2d at 141, that once Defendant's blood was drawn, there was no danger that his blood alcohol content would evanesce and hence the justification of exigent circumstances to excuse the need for a warrant is not applicable.[6]

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the defendant has looked and smelled like he has consumed alcohol and a serious one car or head-on accident has occurred.' **Commonwealth v. Smith,** 382 Pa.Super. 288, 297, 555 A.2d 185, 189 (1989), **allocatur denied,** 524 Pa. 607, 569 A.2d 1366 (1989). Probable cause exists, moreover, where 'a serious motor vehicle accident has occurred involving a driver who was found in a semiconscious state with the odor of alcohol on his breath. Accordingly, the absence of other physical characteristics of intoxication, such as an unsteady gait, a disheveled appearance and slurred speech, is inconsequential to our decision.' **Commonwealth v. Pelkey,** 349 Pa.Super. 373, 379, 503 A.2d 414, 416 (1985) (citations omitted).

Id. at 435, 655 A.2d at 1027-28.

[6] In **Schmerber v. California,** 384 U.S. 757, 768, 86 S.Ct. 1826, 1834, 16 L.Ed.2d 908 (1966), the United States Supreme Court held that the importance of collecting blood samples justified waiving the warrant requirement under the "exigent circumstances exception" to the Fourth Amendment warrant requirement.

In circumstances like the present one, the implied consent law diminishes any expectation of privacy an alcohol-impaired driver reasonably has to the taking of a blood sample for either medical or legal purposes. Section 1547(a)(1) is not limited on its face to consent to chemical testing of a driver's blood to be withdrawn but, we believe, also includes consent to chemical testing of blood which has already been withdrawn when the other criteria of the law have been complied with.

In **Commonwealth v. Seibert,** 799 A.2d 54, 64 (Pa. Super. 2002), **reargument denied** (April 2, 2002), the court stated:

> 'Under the Pennsylvania implied consent statute, once an officer determines there is probable cause to believe a person operated a motor vehicle under the influence of alcohol and requests that the hospital personnel withdraw blood, the officer is entitled to the release of the test results.' **Commonwealth v. Barton,** 456 Pa.Super. 290, 690 A.2d 293, 298 (1997) (citation omitted). This is true even if medical staff previously drew the blood and a request by the police for a driver's BAC came after the blood was drawn. **See Barton, supra.** In this case, requiring another vial of blood to be drawn in order to facilitate Officer Lengle's request would unnecessarily narrow Sections 3755 and 1547. Rather, since the hospital previously, without police direction, drew samples of Appellant's blood, Officer Lengle's request for a BAC was properly performed on the previously drawn sample. **See Barton, supra.** We specifically note that Appellant does not dispute that, had the blood sample been drawn at Officer Lengle's request, he would have been entitled to the results. The fact that the Trooper made the request after the blood was drawn does not require a different outcome in this case. **See Barton, supra.**

Id. at 64. This language is equally applicable to the present situation.

In this case, unlike in **Shaw,** it was a sample of blood, not the BAC test results which were provided to the police. Additionally, unlike **Shaw,** the police made a specific, direct request to the hospital that a sample of Defendant's blood be provided for

testing.[7] Therefore, whether the Defendant's blood was withdrawn for independent medical purposes and a sample then given to the police for testing or whether a separate vial of blood was withdrawn for the sole purpose of giving the sample to the police for BAC testing is immaterial. Under either scenario, Defendant's reasonable expectation of privacy was not violated.[8]

The initial taking of Defendant's blood was lawful. Because we find the request for a sample of Defendant's blood was supported by probable cause and use of a sample previously drawn involves only a minimal intrusion into Defendant's privacy—certainly far less than that which would result from a second sample of blood being drawn—and comports with the intent and purpose of the implied consent law, no reasonable expectation of privacy existed in the sample of blood provided to the police.[9] "An individual whose constitutionally protected rights are not violated cannot claim any injury by a warrantless police

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[7] Contrary to Defendant's assertions, a request for Defendant's blood was clearly made by the police before receipt by Trooper Watkins of Defendant's blood sample. In addition to the explicit request by Trooper Watkins contained in the blood alcohol and toxicology request/chain of custody form (Commonwealth Exhibit No. 2), we conclude and find from the evidence presented that Trooper Kratzer's original request for a sample of Defendant's blood was ultimately communicated to the hospital prior to Trooper Watkin's arrival at the hospital. We also note that a police request for a sample of Defendant's blood for chemical testing under Section 1547 need not be preceded by an opportunity for the driver to refuse testing where the driver is unconscious or otherwise incapable of providing consent, or whose blood was removed for medical purposes. **Commonwealth v. Riedel, supra** at 183, 651 A.2d at 142.

[8] In express response to the dissent's prediction that police in the future would feel compelled to routinely order an additional "legal purposes" blood withdrawal and test, since they would not know whether the hospital's withdrawal of blood from a suspected drunken driver was for medical purposes or pursuant to the requirements of Section 3755, the majority in **Shaw** explained that its decision "only requires that police officers request that a BAC test be conducted on any blood withdrawn by the hospital for independent medical purposes, or in the absence of such, that blood be withdrawn for the sole purpose of conducting a BAC test." **Commonwealth v. Shaw, supra,** 770 A.2d at 299 n.4.

[9] "In order to claim a constitutionally-protected right in an item seized, the defendant must show: (1) that he had a subjective expectation of privacy; and (2) that the expectation is one that society is prepared to recognize as reasonable and legitimate." **Commonwealth v. Johnson, supra,** 727 A.2d at 1098.

seizure." **Commonwealth v. Johnson, supra,** 727 A.2d at 1098.[10]

II. SUPPRESSION OF HOSPITAL STATEMENTS

Defendant next argues that at the time of his questioning by Trooper Grossi, he was subjected to custodial interrogation and did not knowingly, voluntarily, and intelligently waive his **Miranda** rights. Specifically, Defendant contends that at the time of his meeting with Trooper Grossi, the severity of his injuries, in combination with the medication administered, affected him cognitively and made it impossible for him to voluntarily waive his **Miranda** rights and provide any reasoned statement.

Because the Fifth Amendment right to counsel and the concomitant rights guaranteed by **Miranda** arise when an individual is in "custodial interrogation," we must first decide whether Defendant was in custody at the time he was questioned.

> 'Whether a person is in custody for **Miranda** purposes depends on whether the person is physically denied his freedom of action in any significant way or is placed in a situation which he reasonably believes that his freedom of action or movement is restricted by this interrogation.' **Commonwealth v. Williams,** 539 Pa. 61, 74, 650 A.2d 420, 427 (1994) (citations omitted). The subjective intent of the interrogating officer is not relevant to a determination of whether an interrogation was custodial. Rather, the paramount focus is on whether the individual being interrogated reasonably believes that his freedom of action is being restricted. **Id.**

Commonwealth v. Ellis, 700 A.2d 948, 954-55 (Pa. Super. 1997), **appeal denied,** 556 Pa. 669, 727 A.2d 127 (1998). Interrogation, within the meaning of **Miranda,** includes either express questioning or its functional equivalent, that is "any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response

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[10] **Cf. Commonwealth v. Riedel, supra,** in which the Supreme Court held that under the Fourth Amendment of the United States Constitution "where an officer has probable cause to request a blood test pursuant to 75 Pa.C.S. §3755(a), the failure to verbalize the request shall not bar the officer from obtaining the results of a medical purposes blood test without a warrant." **Id.** at 183, 651 A.2d at 141.

from the suspect." **Commonwealth v. Whitehead,** 427 Pa. Super. 362, 368, 629 A.2d 142, 145 (1993). "The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police." **Id.**[11]

Trooper Grossi's meeting with the Defendant at St. Luke's Hospital occurred on August 26, 2000, six days after the motor vehicle accident in which Defendant was injured. The police had tried to interview Defendant earlier but were unable to do so, due to his medical condition. No evidence exists that prior to Defendant's interview, Defendant's room at the hospital was guarded or that the police in any manner restricted access to the Defendant or access by the Defendant to others.

The interview occurred in a glass-enclosed room visible from the outside by the supervising nurse (N.T., 1/30/03, p. 8). Defendant was in bed at the time of the interview; his movements appeared to Trooper Grossi to be slow, as if from soreness (N.T., 1/30/03, pp. 7-8, 24).

We have no doubt that Defendant sustained serious injuries in the accident. Defendant's discharge diagnosis described these injuries as a closed head injury with small right subdural hematoma, multiple facial fractures of the maxillary bones and mandible, multiple facial lacerations, left pneumothorax, third metatarsal fracture on the right, soft tissue wound—right thigh, and right calcaneus fracture. We also are aware that Defendant was initially heavily medicated and sedated due to his injuries. However, no evidence was presented that any of the medications Defendant was taking as of the time of the interview affected his reasoning ability. Nor is there any question in our mind that the Defendant was sore and experiencing discomfort and some pain at the time of the interview.

Defendant did not testify at the suppression hearing. Consequently, we have no direct evidence from the Defendant as to his subjective belief regarding his ability to avoid or terminate the interview by Trooper Grossi or his perceived level of consciousness, clarity of thought, and understanding and ability to intelligently respond to the questions asked. Nor has Defen-

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[11] Two separate requirements must be met to show custodial interrogation. The individual must be "in custody" and must be interrogated. Here, the sole issue is whether Defendant was "in custody."

dant himself presented any evidence disputing the factual observations made and testified to by Trooper Grossi.

The circumstances of Defendant's interview, more fully discussed below, do not convince us that Defendant was confined by police conduct or that Defendant was placed in a situation in which he could reasonably believe that his freedom of action or movement was restricted by Trooper Grossi's questioning—Defendant's inability to leave was caused by his physical condition, not police restraint. **Cf. Commonwealth v. Johnson, supra** (half hour questioning of defendant confined to a hospital room by gunshot wound and not by police restraint held to be noncustodial). Nevertheless, even if we were to find Trooper Grossi's questioning of Defendant to have been custodial, we do not find Defendant's waiver of his **Miranda** rights to have been invalid or his statements to Trooper Grossi to be involuntary.

The issues we must consider have been well-stated in **Ellis.** There, the court stated:

> Before an individual may be subjected to custodial interrogation, he or she must make a knowing and intelligent waiver of his or her privilege against self-incrimination and right to counsel after adequate warning as to those rights. **Commonwealth v. Williams,** 539 Pa. 61, 650 A.2d 420 (1994); **Commonwealth v. Chacko,** 500 Pa. 571, 459 A.2d 311 (1983). The test for determining whether a waiver is knowing and voluntary is multi-faceted. In order to determine the voluntariness of a waiver, we must ascertain whether the waiver was the result of an intentional choice that was not subjected to undue governmental pressure. **Commonwealth v. Cephas,** 361 Pa.Super. 160, 522 A.2d 63 (1987). To determine whether the waiver was knowing and intelligent, we focus upon the defendant's cognitive processes, i.e., whether the defendant was aware of the nature of the choice that he made in relinquishing his **Miranda** rights. **Id.**

Id. at 955. Our review must consider the totality of the circumstances surrounding Trooper Grossi's questioning of the Defendant. **Commonwealth v. Hunt,** 263 Pa. Super. 504, 398 A.2d 690 (1979). "When assessing voluntariness pursuant to

the totality of the circumstances, a court should look at the following factors: the duration and means of the interrogation; the physical and psychological state of the accused; the conditions attendant to the detention; the attitude of the interrogator; and any and all other factors that could drain a person's ability to withstand suggestion and coercion." **Commonwealth v. Johnson, supra,** 727 A.2d at 1099.

Prior to interviewing the Defendant, Trooper Grossi received permission from the supervising nurse to do so (N.T., 1/30/03, p. 39). At the outset of the interview, in order to test Defendant's level of awareness and cognitive processes, Trooper Grossi first asked some basic background information including Defendant's name, his address, telephone number and some information about his injuries (N.T., 1/30/03, pp. 9, 28). All responses were appropriate. Trooper Grossi further testified that "if I thought that he wasn't lucid, I would have told my Corporal, listen, I don't want to interview this guy. I don't think it's right." (N.T., 1/30/03, p. 27)

Trooper Grossi then advised Defendant of his constitutional rights, the purpose of the interview, and the possibility of charges due to the seriousness of the accident (N.T., 1/30/03, p. 9). The Defendant responded that he understood his rights and would speak to the Trooper (N.T., 1/30/03, pp. 9-10). Trooper Grossi further advised the Defendant that he was not under arrest and that he could stop the interview at any time (N.T., 1/30/03, pp. 9, 11). Defendant was informed of his constitutional rights and indicated he understood those rights before being questioned by Trooper Grossi about the accident (N.T., 1/30/03, pp. 10-11).

Throughout the interview, according to Trooper Grossi, the Defendant was lucid, alert and cooperative. At one point, Defendant even drew a map for the Trooper (N.T., 1/30/03, p. 18). At no time did Trooper Grossi find the Defendant to be unable to understand the questions or the purpose of the interview. Moreover, notwithstanding the length of the interview, after the supervising nurse checked Defendant's condition, she indicated Trooper Grossi could continue with the interview (N.T., 1/30/03, p. 17). Defendant made no complaints of pain until near the end of the interview and the interview then ended (N.T., 1/30/03, p. 15).

Isidore Mihalakis, a physician by training and a board certified pathologist with a sub-specialty in forensic pathology, testified that Defendant was no longer being administered sedatives as of August 24, 2000, and that, throughout the interview, Defendant's responses were coherent and detailed and exhibited an ability to engage in complex thought processes, not simply responses by rote (N.T., 1/30/03, pp. 48-49, 53). In particular, Dr. Mihalakis, in the context of Defendant's entire interview, viewed Defendant's accusations that the emergency medical technicians may have placed beer in his car, or that the occupants of the other car may have knocked him over the head and dragged his car to where it was found, as fabrications by Defendant to avoid responsibility rather than a symptom of disorientation (N.T., 1/30/03, p. 49).

In whole, we find Trooper Grossi's and Dr. Mihalakis' testimony credible and accept their conclusions that, during the interview, Defendant was capable of and did think clearly, that Defendant understood the purpose and nature of the interview, and that Defendant possessed and exhibited the ability to exercise voluntary and reasonable choice.

RAYMOND R. VEES and KATHLEEN A. VEES, Petitioners vs. CARBON COUNTY BOARD OF ASSESSMENT APPEALS and PALMERTON AREA SCHOOL DISTRICT, Respondents

Civil Action—Tax Assessment Appeal—Discovery—Uniformity/Equal Protection Challenge—Proof of Discriminatory Motive/Discriminatory Effect—Presumptions

1. Discovery in a tax assessment appeal is a matter of discretion with the trial court, not a matter of right.

2. In a tax assessment appeal, the trial court must determine whether property is being fairly valued and uniformly assessed. The standards set by an aggrieved party or taxing body in evaluating its decision whether or not to file an appeal are irrelevant.

3. Absent clear proof of a discriminatory motive or a discriminatory effect, a school district's practice of appealing tax assessments whenever the sales price of property exceeds the actual value of such property as determined by the Assessment Board by a certain fixed amount (here $15,000.00) is prohibited by neither the tax assessment law or principles of uniformity and equal protection found in the state and federal constitutions.

NO. 02-2527

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DANIEL A. MISCAVIGE, Esquire—Counsel for Board of Assessment.

WILLIAM G. SCHWAB, Esquire—Counsel for Palmerton Area School District.

MEMORANDUM OPINION

NANOVIC, J.—October 16, 2003

In this case, Appellants seek to convert what would ordinarily be a routine tax assessment appeal into one of first impression. Appellants claim the criteria used by a taxing district—here a school district—in determining whether to file appeals from the assessed valuations of real estate within its geographic jurisdiction results in a violation of due process and the equal protection clause of the United States Constitution and of the uniformity clause of the Pennsylvania Constitution.

This case began with an appeal to the Carbon County Board of Assessment Appeals (the "Board") on August 21, 2002 by the Palmerton Area School District ("School District") from the assessment of property owned by Raymond R. Vees and Kathleen A. Vees (the "Owners") for the year 2003.[1] The property (the "Property") consists of approximately eighty-five acres—primarily farm land with some wooded areas and wetlands—located in Towamensing Township, Carbon County, Pennsylvania.

Following a county-wide reassessment effective for the tax year 2001, the Property was initially assessed at Forty-Five Thousand Dollars ($45,000.00) for the years 2001 and 2002. The School District claimed in its appeal that the Property had been purchased by the Owners in April, 2002, for One Hundred Seventy Thousand Dollars ($170,000.00) and asked that the assessed value be revised to reflect its then current actual value. On appeal the Board adjusted the assessed value of the property from Forty-Five Thousand Dollars ($45,000.00) to Eighty Thousand Nine Hundred Fifty Dollars ($80,950.00).

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[1] Pursuant to Section 706 of the Fourth to Eighth Class County Assessment Law, 72 P.S. §5453.706, any taxing district having an interest in a property assessment is entitled to the same appeal and procedural due process rights as are given to individual taxpayers. **Millcreek Township School District v. Erie County Board of Assessment Appeals,** 737 A.2d 335, 337 (Pa. Commw. 1999), **appeal denied,** 563 Pa. 655, 759 A.2d 389 (2000).

From that decision, the Owners appealed to this Court requesting a de novo review. The Owners claim in their petition that the Board's assessment is excessive and that the valuation made by the Board violates principles of due process, equal protection and uniformity.[2] Such claims undoubtedly are the proper subject of a tax assessment appeal.

At the time of hearing and through pretrial discovery,[3] the Owners attempted to establish that the School District systematically appeals property assessments relying on a predetermined formula pursuant to which if the assessed valuation varies by more than Fifteen Thousand Dollars ($15,000.00) from the recent sales price, an appeal is filed. The relevance of this evidence was objected to by the School District and sustained by the Court.

In essence, the Owners appear to argue that the process by which the School District selects which cases to appeal creates disparate treatment of similarly valued properties whose only distinguishing feature is the recency of sale. The fallacy of this argument, we believe, is that while evidence of unequal treatment of similar properties for assessment purposes by the assessing authorities would indeed be relevant in a tax assessment appeal, evidence of the reason why an appeal is taken by an aggrieved party is not.

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[2] In their challenge, the Owners have not distinguished between protections afforded under the state and federal constitutions or whether they are relying upon the state (**e.g.,** Article VIII, Section 1) or federal constitution (**e.g.,** the Fifth and Fourteenth Amendments), or both, for their challenge (**See** Petition for Appeal, Paragraph 6). The distinction in any event appears immaterial in the context of the present challenge. "In matters of taxation, allegations of violations of the equal protection clause of the United States Constitution and the uniformity clause of the Pennsylvania Constitution are analyzed in the same manner, requiring equality of burden upon classes or things subject to the tax in question." **Downingtown Area School District v. Chester County Board of Assessment Appeals,** 819 A.2d 615, 618 (Pa. Commw. 2003) (en banc) (quotations and citations omitted). The Owners have not explained, and we will not speculate, as to the nature of the due process claim; the issue is waived.

[3] Absent local rules of court permitting discovery in tax assessment appeals, a practice not endorsed by the Carbon County Local Rules, or a motion requesting the court to permit discovery in a particular case, a request not made here, discovery is not applicable to a statutory tax assessment appeal, **Tanglwood Lakes Community Association v. Pike County Board of Assessment,** 164 Pa. Commw. 170, 642 A.2d 581 (1994).

When fully examined, the core of the Owners' argument is that the School District's conduct results yearly in the selective reassessment of specific properties on the basis of recent sales prices. Implicitly, if not directly, the Owners argue that this process if undertaken by the Board under like circumstances would be forbidden and, therefore, is equally prohibited when undertaken by the School District.

There is little question that the Board itself is prevented from engaging in the piecemeal reassessment of individual properties based solely upon recent sales figures. **Radecke v. York County Board of Assessment Appeals,** 798 A.2d 265, 267 (Pa. Commw. 2002) ("[T]he purpose of an adjustment should only be to correct clerical or mathematical errors, not to bring an assessment into line with the property's current market value.").[4] Absent completion of a formal county-wide reassessment, the Board is barred by principles of uniformity from implementing sporadic adjustments in the valuation of specific properties as a means of keeping the tax base current. While the use of recent sales is initially appealing as a means of providing a fair picture of the actual market value of a particular property and is relatively inexpensive and easy to implement, the inequity resulting from valuing similar, or even identical, properties differently simply because one property was recently sold and the other wasn't is apparent.

The direct answer to the Owners' argument is simple: the School District is not the Board. Pursuant to Section 602.1 of the Fourth to Eighth Class County Assessment Law (the "Assessment Law"), 72 P.S. §5453.602a, it is the Board, not the School District, which is prohibited from initiating periodic changes in the valuations of individual parcels without the occurrence of a triggering event: (1) when improvements are made to or removed from a property; (2) when land is divided and conveyed in smaller parcels or (3) when the economy depreciates or appreciates to such an extent that real estate values, in

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[4] **Cf. O'Merle v. Monroe County Board of Assessment Appeals,** 95 Pa. Commw. 141, 144, 504 A.2d 975, 976 (1986) ("[A]lthough no explicit provision of the Fourth to Eighth Class County Assessment Law permits the correction of prior assessment errors, selective reassessment to correct errors will be presumed authorized based on both the intent of the assessment and upon the mandates of the uniformity provision of the Pennsylvania Constitution.")

general, are affected.[5] However, "neither a taxpayer nor a taxing district is prohibited from appealing an assessment even though no triggering event has occurred." **Millcreek Township School District v. Erie County Board of Assessment Appeals,** 737 A.2d 335, 338 (Pa. Commw. 1999). Further, the School District is neither intended to be neutral, nor is the School District treated as an arbiter of disputes involving assessed valuations. Instead, the School District has a recognizable stake in the outcome of assessed valuations—its tax base—and is entitled to the same rights of appeal as any aggrieved party, including a taxable owner. 72 P.S. §5453.706; **Millcreek Township School District v. Erie County Board of Assessment Appeals, supra** at 337.

Constitutionally, it is as egregious to deprive a municipal entity of its rights as it is a private individual. The position taken by the Owners would entitle any owner of real estate wishing to reduce his taxes to challenge an assessment but would bar any taxing district seeking to equitably adjust upwards its tax base from doing so. The Owners' position seeks to relegate a taxing district to a position inferior to that of a property owner—the right to respond to a challenge raised by a taxable owner but not to initiate a challenge.

At a deeper analytical level, the Owners' position prejudges the substantive merits of the School District's challenge and presupposes, without any objective data, that the School District's criteria for challenging assessments exacerbates rather than promotes uniformity. The Owners ask us to assume that the School District's decision to challenge assessments on the basis of recent sales will create a higher ratio of assessed value to market value for properties which have been challenged than the comparable ratio for properties which have not been chal-

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[5] Changes in assessment by the Assessment Board are justified; "(1) when a county-wide reassessment is undertaken; (2) when the assessment is appealed, either by the taxpayer under §701 of the Law, 72 P.S. §5453.701, or by the municipality under §706 of the Law, 72 P.S. §5453.706; (3) when a downward adjustment is necessary under §703c of the Law, 72 P.S. §5453.703c; (4) when one of the three conditions, set forth in §602.1 of the Law, 72 P.S. §5453.602a, occurs; or (5) to correct a mathematical or clerical error under **Callas** [referring to **Callas v. Armstrong County Board of Assessment,** 70 Pa. Commw. 272, 453 A.2d 25 (1982)]." **Althouse v. County of Monroe,** 159 Pa. Commw. 467, 473, 633 A.2d 1267, 1269 (1993) (footnotes omitted).

lenged. On what basis this assumption is made is unstated. To prove lack of uniformity, the Owners point to neither evidence of the fair market value of similar properties of the same nature in the neighborhood and proof of the assessments of each of those properties and the ratio of assessed value to actual or market value (**See Brooks Building Tax Assessment Case,** 391 Pa. 94, 101, 137 A.2d 273, 276 (1958)); the ratios of assessed values to market values as the latter are reflected in actual sales of any other real estate in the taxing district for a reasonable period prior to the assessment date (**See Deitch Company v. Board of Property Assessment,** 417 Pa. 213, 224, 209 A.2d 397, 402-403 (1965)); or the common level ratio as established by the State Tax Equalization Board (**See Hromisin v. Board of Assessment Appeals of Luzerne County,** 719 A.2d 815, 819 (Pa. Commw. 1998), **allocatur denied,** 558 Pa. 626, 737 A.2d 1227 (1999)).

The Owners ask us to assume too much. Instead, once the Assessment Board has been convinced of the merits of the challenge—as occurred here—it is logical and reasonable to require the property owner on appeal to present evidence to support the claim of lack of uniformity. The Board's assessment is presumptively valid. **Fosko v. Board of Assessment Appeals, Luzerne County,** 166 Pa. Commw. 393, 646 A.2d 1275 (1994).

In the present case, the Owners presented no evidence and made no attempt to establish that the fair market value of their Property was not that contended by the School District, or that the assessed value of their Property, once adjusted by the Board on the basis of its current fair market value, was **in fact** overassessed in relation to other similarly situated properties. Nor did the Owners prove that the School District's practice of setting objective standards on which to base its decision whether to appeal a tax assessment demonstrated deliberate, purposeful discrimination by a taxing body. To the contrary, the use of sales price as a test of actual value not only has a rational basis in practice but is expressly approved by the Assessment Law. 72 P.S. §§5453.602(a), 5453.704; **cf. Butler Area School District et al. Appeal,** 100 Pa. Commw. 452, 459-60, 515 A.2d 326, 329-30 (1986) **appeal denied,** 516 Pa. 643, 533 A.2d 714 (1987) (concluding there exists no inherent discriminatory intent or effect in Sections 602(a) and 704(b)(1) of the Assessment Law,

72 P.S. §§5453.602(a) and 5453.704(b)(1), simply because Section 602 sets the market value of all properties within the county at a certain point in time and Section 704 authorizes the value of properties to be adjusted to current market value in an assessment appeal).

There exists neither a presumption nor an inference that to permit a School District to selectively appeal assessments would result in nonuniformity of taxation in violation of Article VIII, Section 1 of the Pennsylvania Constitution. On this point, the Commonwealth Court has stated:

> A taxpayer alleging that a tax violates the uniformity clause must show that there is a deliberate discrimination in the application of the tax or that the application of the tax has a discriminatory effect. **City of Lancaster v. County of Lancaster,** 143 Pa.Cmwlth. 476, 599 A.2d 289 (1991), **petition for allowance of appeal denied,** 530 Pa. 634, 606 A.2d 903 (1992). Here, the trial court determined that permitting the [School] District to appeal assessments absent a triggering event would result in a lack of uniformity in the taxing of properties. However, such reasoning also applies when property owners appeal their assessments. Thus, it matters not whether the [School] District or the property owner appeals the assessment. Neither action should cause the Board of Assessment, or the courts, to create and maintain a nonuniform assessment of property. Exercise of appeal rights by both the [School] District and the property owner, will ensure that the uniformity required by our state constitution is maintained.

Millcreek Township School District v. Erie County Board of Assessment Appeals, supra at 339. "[T]he constitutional mandate requiring uniformity is met where the taxing authority assesses all property at the same percentage of its actual value; application of such a uniform ratio assures each taxpayer will be held responsible for its **pro rata** share of the burden of local government." **Butler Area School District et al Appeal, supra** at 458-59, 515 A.2d at 329 (emphasis in original) (**citing Appeal of Johnstown Associates,** 494 Pa. 433, 431 A.2d 932 (1981)).

At the time of hearing, the Owners acknowledged that the Property was purchased in April, 2002 in an arm's length trans-

action for One Hundred Seventy Thousand Dollars ($170,000.00). The School District employed an appraiser, James J. Shober, III, who testified that the market value of the Property as of May 9, 2003 was One Hundred Sixty-Eight Thousand Dollars ($168,000.00). No different opinion of value was offered by the Owners. Nor did the Owners present any evidence of comparable properties assessed differently than the Property. Although the Owners sought to introduce evidence of the process by which the School District determined which properties to challenge, the Owners made absolutely no effort to prove that the effect of the School District's selection criteria resulted in actual disparate or unequal treatment of the Property. Under the evidence presented, we find no error in the Board's revision of the assessed value of the Property.

In accordance with the foregoing, we make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The fair market value of the Property for the 2003 tax year was One Hundred Sixty-One Thousand Nine Hundred Dollars ($161,900.00).

2. The predetermined ratio used to assess taxpayers in Carbon County for the 2003 tax year was fifty percent of the fair market value.

3. The common level ratio as determined by the State Tax Equalization Board for properties in Carbon County for the year 2003 was forty-five percent of the fair market value.

4. Carbon County's most recent county-wide reassessment was effective for the tax year 2001.

CONCLUSIONS OF LAW

1. The fair market value of the Property for the tax year 2003 is One Hundred Sixty-One Thousand Nine Hundred Dollars ($161,900.00).

2. The common level ratio published by the State Tax Equalization Board on or before July 1, 2002 varies by less than fifteen percent from the established predetermined ratio set by the Carbon County Commissioners for the year 2003.[6]

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[6] In **appeal of Butler A.S.D., supra** at 457 n.5, 515 A.2d at 328 n.5, the court described how the fifteen percent deviation is to be computed.

3. The appropriate ratio of assessed value to market value to be applied to the actual value of real estate in Carbon County for the tax year 2003 is the County's established predetermined ratio of one-half.

4. The assessed value of the Owners' Property for the tax year 2003 is Eighty Thousand Nine Hundred Fifty Dollars ($80,950.00).[7]

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[7] At the time of the hearing in this matter, evidence was presented that construction of a home had begun on the Property and that this construction would result in a new determination of value. Due to this construction, a separate tax appeal has been filed by the Owners for the tax year 2004. Because no evidence was presented at the hearing before us as to the value of this improvement, we have not valued the Property for the 2004 tax year although ordinarily required to do so. 72 P.S. §5453.704(f); **Chartiers Valley School District v. Board of Property Assessment, Appeals and Review,** 154 Pa. Commw. 81, 97, 622 A.2d 420, 429 (Pa. Commw. 1993). If required to be decided, in fairness to the parties, we would not do so without taking additional evidence. **Green v. Schuylkill County Bd. of Assessment Appeals,** 565 Pa. 185, 772 A.2d 419, 432 n.10 (2001). If the parties dispute the assessment for the 2004 tax year and desire the Court to hold a hearing at this time, an appropriate motion for the taking of evidence should be presented within thirty days of the date of this decision.

JOHN DILLOW, Plaintiff vs. EDWARD JOHN MYERS and FUNK WATER QUALITY COMPANY, Defendants

Civil Action—Personal Injuries—Motor Vehicle Accident—Workers' Compensation Benefits—Third Party Litigation—Employee's Right To Plead, Prove and Recover Amount of Workers' Compensation Benefits Paid—Employer's Settlement With Defense Carrier of Right to Subrogation for Less Than Amount of Benefits Paid—Amount of Lien to Which Employee's Tort Recovery Is Subject—Statutory Bar to Recovery From Third Party of First Party Benefits to Which Employee Eligible—Receipt of Workers' Compensation Wage Loss Benefits Not a Bar to Recovery of First Party Income Loss Benefits

1. Settlement of workers' compensation benefits in the form of medical expenses and lost wages paid by an employer, or on its behalf, with the defendant's liability insurance carrier, does not limit the plaintiff, in his suit against a third party tort-feasor, from pleading, proving or recovering the amount of workers' compensation benefits paid.

2. Notwithstanding the settlement by an employer with the defendant's liability insurance carrier of its right to subrogation for an amount less than the full amount of medical expenses and lost wages paid to or on behalf of the employee, any amount recovered by the employee in his third party tort litigation will be subject to a subrogation lien in the full amount of workers' compensation benefits actually paid.

3. The defendant in a third party work-related motor vehicle accident claim for personal injury is entitled to a reduction in the amount of plaintiff's claim by any amounts for which the plaintiff was eligible to receive first party benefits under plaintiff's personal automobile insurance policy.

4. Receipt of workers' compensation wage loss benefits does not preclude an employee's eligibility for income loss benefits under his personal automobile insurance policy. Workers' compensation wage loss benefits while primary, are not exclusive, and the amount of income loss benefits to be made available under the MVFRL is eighty percent of the difference between the employee's pre-injury weekly gross income and the weekly workers' compensation wage loss benefits actually received.

NO. 00-2100

RONALD W. SHIPMAN, Esquire—Counsel for Plaintiff.

MARK S. SIGMON, Esquire—Counsel for Defendants.

MEMORANDUM OPINION

NANOVIC, J.,—October 23, 2003

Before us is Defendants' Motion in Limine asking that Plaintiff be precluded from introducing evidence of his medical expenses and lost wages to the extent the same have been paid by his employer's workers' compensation carrier. In addition, Defendants ask that Plaintiff be precluded from introducing evidence of any wage loss claim to the extent Plaintiff's first party wage loss coverage under his personal automobile insurance policy provided coverage for such loss.

FACTS

The facts are not in dispute (**See** Defendants' Motion in Limine and Plaintiff's Answer, ¶¶1-13 inclusive). On November 5, 1998, John Dillow (the "Plaintiff"), sustained injuries in a motor vehicle accident while in the course and scope of his employment with the Pennsylvania Commission (the "Commission") as a maintenance worker. At the time, Plaintiff was seated in a dump truck owned by the Commission and parked on the shoulder of the road, when his truck was struck from behind by a truck driven by the Defendant, Edward John Myers, an employee of the Defendant, Funk Water Quality Company.

As a result of the accident, Plaintiff claims to have sustained injuries to his neck, head, ear, lower back, and coccyx. The Commission, as a self-insured employer, acquired a statutory subrogation lien of Fifty Seven Thousand Two Hundred Twenty Dol-

lars and Thirty-Nine Cents ($57,220.39) for workers' compensation benefits paid to and on behalf of the Plaintiff for medical expenses and lost wages. Of this amount, Forty-Eight Thousand Four Hundred Thirty-Four Dollars and Twenty-Two Cents ($48,434.22)[1] was for lost wages paid directly to the Plaintiff; the remaining Eight Thousand Seven Hundred Eighty-Six Dollars and SeventeenCents ($8,786.17) was for medical expenss.

On April 18, 2003, the Commission agreed with Defendants' liability insurance carrier to settle its subrogation claim of Fifty Seven Thousand Two Hundred Twenty Dollars and Thirty-Nine Cents ($57,220.39) for the payment of Forty Thousand Dollars ($40,000.00). This amount has been paid by Defendants' insurance carrier. No release of the Commission's subrogation lien has been executed nor has the Commission formally assigned its lien to Defendants' carrier.

DISCUSSION

I. **Subrogation of Workers' Compensation Benefits**

Defendants first argue that this court preclude the Plaintiff from introducing evidence of medical bills and lost wages covered by workers' compensation. Defendants argue that because the subrogation lien in this case has been "extinguished" by the settlement between the Commission and their insurance carrier, Sections 1720 (relating to subrogation) and 1722 (relating to preclusion of benefits) of the Motor Vehicle Financial Responsibility Law (MVFRL), 75 Pa. C.S. §§1720 and 1722, prohibit the Plaintiff from introducing evidence of the workers' compensation amounts paid.

Section 1720 of the MVFRL, provides:

> In actions arising out of the maintenance or use of a motor vehicle, there shall be no right of subrogation or reimbursement from a claimant's tort recovery with respect

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[1] This amount equals two-thirds of Plaintiff's actual wage loss totaling Seventy-Two Thousand Six Hundred Fifty-One Dollars and Thirty-Three Cents ($72,651.33). (In the typical case, the Workers' Compensation Act requires the payment of sixty-six and two-thirds percent (66 2/3%) of the wages of the injured employee. 77 P.S. §511). The difference, Twenty-Four Thousand Two Hundred Seventeen Dollars and Eleven Cents ($24,217.11), represents lost wages for which Plaintiff has not received workers' compensation benefits and against which Defendants seek to credit first party wage loss benefits to which Plaintiff was entitled under his personal automobile insurance policy.

> to workers' compensation benefits, benefits available under section 1711 (relating to required benefits), 1712 (relating to availability of benefits) or 1715 (relating to availability of adequate limits) or benefits paid or payable by a program, group contract or other arrangement whether primary or excess under section 1719 (relating to coordination of benefits).[2]

Section 1722 provides:

> In any action for damages against a tortfeasor, or in any uninsured or underinsured motorist proceeding, arising out of the maintenance or use of a motor vehicle, a person who is eligible to receive benefits under the coverages set forth in this subchapter, or workers' compensation, or any program, group contract or other arrangement for payment of benefits as defined in section 1719 (relating to coordination of benefits) shall be precluded from recovering the amount of benefits paid or payable under this subchapter, or workers' compensation, or any program, group contract or other arrangement for payment of benefits as defined in section 1719.

Effective August 31, 1993, revisions to the Workers' Compensation Act repealed Sections 1722 and 1720 insofar as they relate to workers' compensation benefits. **See** Section 25(b) of the Act of July 2, 1993, P.L. 190, No. 44 ("Act 44").

In **Carlson v. Bubash,** 432 Pa. Super. 514, 520, 639 A.2d 458, 461 (1994), **appeal denied,** 540 Pa. 592, 655 A.2d 982

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[2] Section 1719 of the MVFRL provides for coordination of benefits:

> (a) General rule.—Except for workers' compensation, a policy of insurance issued or delivered pursuant to this subchapter shall be primary. Any program, group contract or other arrangement for payment of benefits such as described in section 1711 (relating to required benefits) 1712(1) and (2) (relating to availability of benefits) or 1715 (relating to availability of adequate limits) shall be construed to contain a provision that all benefits provided therein shall be in excess of and not in duplication of any valid and collectible first party benefits provided in section 1711, 1712 or 1715 or workers' compensation.
>
> (b) Definition.—As used in this section the term 'program, group contract or other arrangement' includes, but is not limited to, benefits payable by a hospital plan corporation or a professional health service corporation subject to 40 Pa.C.S. Ch. 61 (relating to hospital plan corporations) or 63 (relating to professional health services plan corporations).

75 Pa.C.S. § 1719.

(1995), the Superior Court interpreted Section 1722 not only to preclude recovery, but to preclude the introduction of medical bills and expenses into evidence where a plaintiff was eligible to receive such benefits as first party benefits under his own automobile insurance policy. Defendants argue that because their insurance carrier reached a settlement with the Commission and Plaintiff will no longer be liable to his employer for benefits paid, the rationale underlying Act 44—the recovery of workers' compensation benefits through subrogation against monies recovered from a third party tort-feasor for injuries sustained in a work-related automobile accident—is nullified. Absent subrogation, according to Defendant, Plaintiff is precluded from introducing any evidence relating to Plaintiff's medical bills and lost wages to the extent they were paid by his employer. We find this argument unpersuasive.

Ordinarily, when a workers' compensation carrier pays benefits to or on behalf of an individual, the carrier acquires a subrogation lien against any potential tort recovery from a third party.[3] The cause of action for the underlying claim of subrogation accrues on the date of injury. **DePaul Concrete v. Workers' Compensation Appeal Board (White),** 734 A.2d 481, 486-87 (Pa. Commw. 1999), **appeal denied,** 562 Pa. 664, 753 A.2d 821 (2000). However, the lien is not recoverable until the plaintiff settles his claim or is awarded a judgment.

The Plaintiff utilizes the reasoning of **Pennsylvania Mfrs. Association Insurance Co. v. Wolfe,** 534 Pa. 68, 626 A.2d 522 (1993), to argue that he should be permitted to introduce evidence of the amounts covered by workers' compensation. In accordance with this decision, the rights of a subrogee employer can be no greater than those of the employee and are taken subject to the same limitations. Further, "[t]he worker's compensation carrier is not entitled to any subrogation until the

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[3] The Pennsylvania Workmen's Compensation Act, Section 319, provides for an employer's, hence the employer's insurer's, claim to subrogation to the extent of compensation payable. Section 319 provides in pertinent part:

> Where the compensable injury is caused in whole or in part by the act or omission of a third party, the employer shall be subrogated to the right of the employe, his personal representative, his estate or his dependents, against such third party to the extent of the compensation payable under this article by the employer.

77 P.S. §671.

injured employee has the 'right' to and receives such compensation." **Id.** at 74, 626 A.2d at 525.

We agree with the Plaintiff that the principles of subrogation espoused in **Pennsylvania Mfrs. v. Wolfe** are applicable in this case. Act 44 and its repeal of Sections 1720 and 1722 of the MVFRL to the extent they relate to workers' compensation benefits express a clear legislative policy deferential to the priority and repayment of workers' compensation benefits vis-à-vis subrogation.[4] Pursuant to this policy, an employee in an action against a third party tort-feasor is entitled to plead, prove and recover benefits paid or payable by workers' compensation.

The Commission's settlement of its then liquidated claim did not extinguish or reduce its inchoate lien on a fund which had yet to be created. Whether payment of this lien, contingent upon creation of a fund, is to be made to the Commission or Defendants' carrier, and how allocated, is a matter between them and is not now before us. The lien not having been released or extinguished still exists; therefore, the settlement between the Commission and Defendants' carrier has no effect on the introduction into evidence of medical bills and lost wages by Plaintiff.

Even were we to find, however, that the statutory subrogation lien was extinguished, Plaintiff's proof of his damages would not be compromised. "Historically, workers' compensation benefits have been considered a collateral source of recovery in a

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[4] Subrogation serves the following purposes:

> [T]he rationale for the right of subrogation is threefold: to prevent double recovery for the same injury by the claimant, to insure that the employer is not compelled to make compensation payments made necessary by the negligence of a third party, and to prevent a third party from escaping liability for his negligence ... . '[Subrogation] is just, because the party who caused the injury bears the full burden; the employee is made "whole," but does not recover more than what he requires to be made whole; and the employer, innocent of negligence, in the end pays nothing.' Thus where a third party's negligent conduct causes injury to an employee actually engaged in the business of his employer, there is a clear, justifiable right to subrogation under Section 319 of the Act.

City of Meadville v. Workers' Compensation Appeal Board (Kightlinger), 810 A.2d 703, 704-705 (Pa. Cmwlth. 2002) (citations omitted), **reargument denied** (December 10, 2002).

plaintiff's action against the third party tortfeasor." **Palmosina v. Laidlaw Transit Company, Inc.,** 445 Pa. Super. 121, 123, 664 A.2d 1038, 1039 (1995). Under the collateral source rule, a defendant may not introduce evidence that a plaintiff has received compensation on account of his injury from a source other than the defendant. Application of the collateral source rule is not dependent on the existence of subrogation.[5] Defendant's request that the court bar the introduction of relevant evidence on damages because subrogation with respect to such damages does not exist implicitly violates the rationale of the collateral source rule.

To the extent Plaintiff argues any recovery he obtains against Defendants should be reduced by the amount Defendants' carrier paid to the Commission—Forty Thousand Dollars ($40,000.00)—and not the full amount of workers' compensation benefits paid—Fifty Seven Thousand Two Hundred Twenty Dollars and Thirty-Nine Cents ($57,220.39)—Plaintiff seeks to reap a windfall to which he is neither equitably nor fairly entitled. Whatever may be the agreement between the Commission and Defendants' carrier as to any division of the lien proceeds, if recovery by the Plaintiff is realized, it is clear that Plaintiff was neither an express party nor a third party beneficiary to the agreement. Nothing in the agreement between the Commission and Defendants' carrier suggests that Plaintiff is

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[5] Generally, '[t]he collateral source rule provides that payments from a collateral source shall not diminish the damages otherwise recoverable from the wrongdoer.' **Johnson v. Beane,** 541 Pa. 449, 664 A.2d 96, 100 (1995). This rule 'was intended to avoid precluding a claimant from obtaining redress for his or her injury merely because coverage for the injury was provided by some collateral source, **e.g.** insurance.' **Beechwoods Flying Service, Inc. v. Al Hamilton Contracting Corp.,** 504 Pa. 618, 476 A.2d 350, 352 (1984); **see also, id.** at 353 (the rule is 'intended to prevent a wrongdoer from taking advantage of the fortuitous existence of a collateral remedy'); **Denardo v. Carneval,** 297 Pa.Super. 484, 444 A.2d 135, 140 (1982) ('Pennsylvania law is clear; the victim of a tort is entitled to the damages caused by the tortfeasor's negligence regardless of compensation the victim receives from other sources'), **citing, inter alia, Boudwin v. Yellow Cab Co.,** 410 Pa. 31, 188 A.2d 259 (1963).

Griesser v. National R.R. Passenger Corp., 761 A.2d 606, 609 (Pa. Super. 2000). **See also, Palmosina v. Laidlaw Transit Company, Inc.,** 445 Pa. Super. 121, 664 A.2d 1038 (1995) (absent express legislation to the contrary, the legislature's elimination of the workers' compensation carrier's traditional right of subrogation did not by itself preclude an employee's recovery of amounts paid by workers' compensation in third party litigation).

to receive the benefits of a double recovery: both workers' compensation benefits and overlapping recovery from a third party tort-feasor.

In settling with the Commission, Defendants' carrier has in all probability reduced, not simply deferred, its risk as a liability carrier in a third party proceeding for the payment of workers' compensation benefits. To find otherwise would be contrary to the judicial policy of encouraging parties to compromise and settle their disputes, and that of the MVFRL of minimizing premiums. **Danko v. Erie Insurance Exchange,** 428 Pa. Super. 223, 229, 630 A.2d 1219, 1222 (1993), **aff'd,** 538 Pa. 572, 649 A.2d 935 (1994). Therefore, any amount Plaintiff recovers will be subject to a statutory subrogation lien in the full amount of Fifty-Seven Thousand Two Hundred Twenty Dollars and Thirty-Nine Cents ($57,220.39).

II. **Preclusion of Claims for Which First Party Benefits Exist**

Defendants next argue that Plaintiff is precluded from introducing evidence to prove the amount of wage loss that was recoverable under his personal automobile insurance policy. At the time of the accident, Plaintiff was the owner and named insured for two vehicles: a 1989 GMC truck and 1991 Chevrolet Blazer. Plaintiff's policy contained a $10,000.00 wage loss benefit.[6] This amount was apparently neither requested nor received by Plaintiff from his carrier. **See** 75 Pa. C.S.A. §1713(a) (setting forth order of priority for recovery of first party benefits; first in priority is policy under which person is a named insured).

On this point, the law is clear. Section 1722 provides that anyone eligible to receive first party benefits may not recover against a third party the amount of such benefits paid or payable. 75 Pa. C.S. §1722. "[A] person is 'eligible' to receive income loss benefits under the MVFRL when he has actually purchased such benefits." **Carroll v. Kephart,** 717 A.2d 554, 557 (Pa. Super. 1998). Further, evidence of the loss for which benefits exist, when nonrecoverable against a third party, is irrelevant and cannot be introduced at trial on the third party claim. **Carlson v. Bubash, supra** at 520, 639 A.2d at 461.

[6] The policy provided for income loss benefits in a maximum amount of no more than Ten Thousand Dollars ($10,000.00) to be paid at a rate not to exceed One Thousand Dollars ($1,000.00) per month.

Plaintiff argues that because he was working at the time of the accident, he is limited to recovering workers' compensation benefits and was not eligible to receive benefits within the meaning of Section 1722. In essence, Plaintiff claims that workers' compensation benefits are primary and supplant eligibility for benefits from his own insurance carrier. This same argument was made, and rejected, in **Danko v. Erie Insurance Exchange, supra.**

In **Danko,** the plaintiff/employee was injured in a motor vehicle accident while in the course of her employment. At the time of the accident, her average weekly wage was One Hundred Fifty-Two Dollars and Sixty Cents ($152.60). Her employer's workers' compensation insurance carrier paid her workers' compensation benefits in the amount of One Hundred Thirty-Nine Dollars and Sixty-Seven Cents ($139.67) per week, an amount based upon the applicable minimum compensation rate rather than two-thirds of her average weekly wage. **See** 77 P.S. §511. The difference between her average pre-injury weekly gross income and the workers' compensation benefits she received was Twelve Dollars and Ninety-Three Cents ($12.93). Plaintiff requested that eighty percent of this amount (**i.e.,** $10.34 per week) be paid by the defendant, her motor vehicle insurer, as first party income loss benefits.

In holding in favor of the plaintiff, the court was required to interpret Section 1712 of the MVFRL, 75 Pa. C.S.A. §1712(2)(i). This section provides that the income loss benefit to be provided by an insurer includes an amount equal to "eighty percent of actual loss of gross income." The court held that the proper interpretation of this provision, consistent with the protection afforded claimants under the MVFRL, was to require that the weekly workers' compensation benefits received first be subtracted from the gross weekly income the employee earned at the time of the accident, and that the difference represents the "actual loss of gross income" referred to in the statute. The defendant had argued that no income loss benefits were due because the proper method to calculate income loss benefits was to multiply the plaintiff's pre-injury average weekly gross income by eighty percent and then subtract from that amount any weekly workers' compensation benefits actually paid, a figure which exceeded eighty percent of plaintiff's weekly gross income at the time of the accident.

In reaching this decision, the Court made the following comment which is equally relevant to the present case:

> It is important to recognize that the plaintiff is not seeking benefits in this case that would result in a windfall or a double recovery. She merely claims a percentage of her actual gross income loss which has not been fully covered by workmen's compensation benefits. Even with the income loss benefits we find she is entitled to receive, under the provisions of both her insurance policy and the MVFRL, she will not reach the level of gross income she enjoyed prior to her injury. In that regard, we note that the MVFRL, in 75 Pa. C.S.A. §1719, contains a coordination of benefits provision, which makes workmen's compensation benefits primary for income loss and other benefits which might be due a claimant who suffers disability in a work-related accident involving the use or maintenance of a motor vehicle. … The plaintiff's proposed interpretation is entirely consistent with that aspect of the statute. The workmen's compensation benefits will still be considered primary, in their entirety, in offsetting the plaintiff's lost income. The defendant insurer will not be paying any income loss benefits in duplication of workmen's compensation proceeds received by the plaintiff. Rather, its payments will be based only upon the Section 1712 'actual loss of gross income' suffered by the plaintiff, comprised of the difference between the weekly workmen's compensation amount she receives and her gross pre-injury weekly wage.

Id. at 231-32, 630 A.2d at 1223-24 (footnote omitted).[7] Significantly, Section 1719 excludes workers' compensation from

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[7] **Cf. Hertel v. Parke,** 48 D. & C. 3d 456 (Lycoming Cty. 1987). In **Hertel,** the amount of medical expenses and loss in wages claimed by plaintiff were paid by workers' compensation. Defendant argued such amounts were also recoverable by plaintiff as first party benefits and, therefore, Section 1722 precluded their recovery against defendant in a third party claim. In granting defendant's demurrer, the Court held that plaintiff was entitled to the benefits covered by Section 1711 of the MVFRL even though the benefits were also covered by workers' compensation. **Id.** at 459. Therefore, plaintiff was barred from also recovering the loss from defendant. To hold otherwise would have required the court to find that the legislature "intended a person injured in an automobile accident while in the course of his employment could sue a tort-feasor for medical expenses and lost wages while all others injured in similar accidents could not." **Id.** at 459. This the court was not prepared to do.

those benefits over which automobile insurance is primary, but does not state that workers' compensation is exclusive when both are involved.

In this case also, Plaintiff's recovery of first party wage loss benefits would not result in a windfall or double recovery to the Plaintiff. Instead, such payments would supplement, not duplicate, wage loss benefits for which Plaintiff received workers' compensation. Of Plaintiff's total wage loss claim, Twenty-Four Thousand Two Hundred Seventeen Dollars and Eleven Cents ($24,217.11) represents lost wages for which Plaintiff has not received any workers' compensation payments. The income loss benefits which Plaintiff was eligible to receive under his personal automobile insurance policy and which Defendants seek to offset against this figure are less than eighty percent of Plaintiff's actual loss of gross income. Therefore, Plaintiff may neither recover, nor attempt to prove, the Ten Thousand Dollars ($10,000.00) in income loss benefits to which he was entitled under the MVFRL.

ORDER OF COURT

AND NOW, this 23rd day of October, 2003, it is hereby

ORDERED AND DECREED that the MOTION IN LIMINE of Defendants Edward John Myers and Funk Water Quality Company is GRANTED, in PART, and DENIED, in PART. Defendants' Motion is denied to the extent that we find, as a matter of law, that the Plaintiff may plead, prove and recover those amounts paid to him by the Pennsylvania Turnpike Commission subject to a subrogation lien in the amount of Fifty-Seven Thousand Two Hundred Twenty Dollars and Thirty-Nine Cents ($57,220.39) in accordance with our Memorandum Opinion of this same date.

Defendants' Motion is GRANTED to the extent that we find that Plaintiff shall be precluded from proving or recovering a total actual wage loss claim in excess of Sixty-Two Thousand Six Hundred Fifty-One Dollars and Thirty-Three Cents ($62,651.33).

COMMONWEALTH OF PENNSYLVANIA vs. ALPHONSO DALESSIO, Defendant

Criminal Law—Severance/Consolidation of Various Drug-Related Offenses Contained in Separate Informations—Three-Part Test for Joinder—Admissibility if All Offenses Arise From the Same Criminal Episode or if All Offenses are Admissible in the Separate Trial of Each

1. In determining whether separate charges contained in separate informations may be joined or must be severed for trial a three-part test exists to be applied by the trial court: (1) whether the evidence of each of the offenses would be admissible in a separate trial for the other; (2) whether such evidence is capable of separation by the jury so as to avoid the danger of confusion; and (3) whether the defendant will be unduly prejudiced by consolidation of the offenses.

2. Alternatively, Section 110(1)(ii) of the Crimes Code requires compulsory joinder and trial of separate offenses arising from the same criminal episode unless the court orders a separate trial of one or more of the charges. Whether various offenses arise from the same criminal episode requires a determination of whether the charges are logically and/or temporally related and share common issues of law and fact.

3. The prosecution of three separate drug sales occurring over a six week period as part of a single investigation of drug dealing by the defendant, involving the same confidential informant as the purchaser and involving the same or similar amounts of the same drug, and culminating in the seizure of drugs and drug paraphernalia at the defendant's home, may be tried together.

NO. 632 CR 02

NO. 633 CR 02

NO. 634 CR 02

NO. 635 CR 02

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

GERALD F. STRUBINGER, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, J.—October 28, 2003

The Defendant, Alphonso Dalessio, has been charged with a series of drug-related offenses over a six-week period, each involving the sale of a small amount of cocaine to the same confidential informant. Two of the three sales alleged occurred at the same location, at or about the same time of day. Each alleged purchase was the subject of surveillance by the Pennsylvania Office of Attorney General, Bureau of Narcotics Investigation and Drug Control, and members of the Carbon-Monroe Drug Task Force.

FACTUAL BACKGROUND

The first sale occurred on October 4, 2002, when the confidential informant telephoned Defendant and arrangements were made for Defendant to meet Stewart Counterman for the purchase of cocaine. On this date, the confidential informant drove to the agreed upon location in Lehighton, Carbon County, Pennsylvania, where he was met by Mr. Counterman. Mr. Counterman entered the confidential informant's vehicle where, in exchange for Three Hundred Fifty Dollars ($350.00), the confidential informant purchased 3.4 grams of cocaine packaged in ten individual aluminum foil packets.

On October 5, 2002, the confidential informant again telephoned the Defendant to purchase cocaine. A short time later, the Defendant and the confidential informant met at the same location where the first sale had occurred, spoke briefly—during which time Defendant told the confidential informant that in approximately fifteen minutes he should expect to meet Mr. Counterman, and then separated. Later that same date, at the same location, Mr. Counterman appeared, entered the confidential informant's vehicle and sold the confidential informant 2.9 grams of cocaine wrapped in ten separate aluminum foil packets. The price was Three Hundred Fifty Dollars ($350.00).

Separate informations were filed for each of the sales of October 4, and October 5, 2002, docketed to numbers 632 CR 02 and 633 CR 02 respectively. In each, Defendant was charged with one count of possession of a controlled substance,[1] possession with intent to deliver a controlled substance,[2] delivery of a controlled substance[3] and criminal conspiracy.[4]

On November 15, 2002, the confidential informant telephoned Defendant to again purchase cocaine. On this occasion, the sale occurred directly between the Defendant and the confidential informant at Defendant's residence in Summit Hill, Carbon County, Pennsylvania, an apartment leased by Defendant's live-in girlfriend. While inside the apartment, Defendant sold the confidential informant 2.7 grams of cocaine for Two

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[1] 35 P.S. §780-113(a)(16).

[2] 35 P.S. §780-113(a)(30).

[3] 35 P.S. §780-113(a)(30).

[4] 18 Pa. C.S. §903(a)(1).

Hundred Dollars ($200.00). The cocaine was packaged in a small clear plastic baggy. For this sale, Defendant was charged with possession of a controlled substance,[5] possession with intent to deliver a controlled substance[6] and delivery of a controlled substance.[7] These charges are docketed to number 634 CR 02.

On this same date, following the sale to the confidential informant, the police executed an arrest warrant for Defendant at Defendant's apartment. During a consensual search of the apartment, police discovered additional cocaine and various items of drug paraphernalia, including a digital scale and one bottle of inositol powder. Defendant was charged in a separate information with possession of a controlled substance[8] and possession of drug paraphernalia.[9] These charges are docketed to number 635 CR 02.

Although written notice of joinder as required by Pa. R.Crim.P. 582 has not been filed, the parties do not dispute that the Commonwealth notified the Defendant of its intent to join for trial all charges made against the Defendant and that we should treat the notice as having been properly made. (Stipulation at bail reduction hearing, 10/27/03). Defendant, in his Omnibus Pretrial Motion, moved, **inter alia,** to sever the trial of the offenses charged in each information. It is this motion which we address in this opinion.

Defendant contends that the incidents charged in each information are unrelated and must be severed because to do otherwise will permit evidence of several different transactions to be introduced in one proceeding, thereby creating the possibility that Defendant will be convicted of all offenses, not because of Defendant's actual guilt, but because the jury may use the evidence of one or more of the offenses to infer a criminal disposition and, on the basis of that inference, convict the Defendant of the other offenses. We disagree with Defendant's position and will deny his motion for the reasons which follow.

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[5] 35 P.S. §780-113(a)(16).

[6] 35 P.S. §780-113(a)(30).

[7] 35 P.S. §780-113(a)(30).

[8] 35 P.S. §780-113(a)(16).

[9] 35 P.S. §780-113(a)(32).

DISCUSSION

Severance is not required where the separate offenses are part of one continuous criminal episode or transaction, or where evidence of each crime is independently admissible in the trial of the other offenses charged. The Rules of Criminal Procedure establish the substantive standards for joinder and severance of offenses and defendants, and state in pertinent part:

> Rule 582. Joinder—Trial of Separate Indictments or Informations
>
> (A) Standards
>
> (1) Offenses charged in separate indictments or informations may be tried together if:
>
> (a) the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion; or
>
> (b) the offenses charged are based on the same act or transaction.
>
> ....
>
> Rule 583. Severance of Offenses or Defendants
>
> The court may order separate trials of offenses or defendants, or provide other appropriate relief, if it appears that any party may be prejudiced by offenses or defendants being tried together.

Pa. R.Crim.P. 582 and 583.

These rules establish three separate levels of analysis which must be made by a trial court in determining whether offenses charged in separate informations may be tried together:

> ... the court must ... determine: [1] whether the evidence of each of the offenses would be admissible in a separate trial for the other; [2] whether such evidence is capable of separation by the jury so as to avoid danger of confusion; and, if the answers to these inquiries are in the affirmative; [3] whether the defendant will be unduly prejudiced by the consolidation of offenses.

Commonwealth v. Boyle, 733 A.2d 633, 635 (Pa. Super. 1999) (citations and quotations omitted). Each level will be examined separately.

I. **Admissibility of Evidence of Other Offenses**

In seeking consolidation of separate offenses appearing in separate informations, the Commonwealth must show more than that the crimes charged are of the same class or type. **Commonwealth v. Newman,** 528 Pa. 393, 399-400, 598 A.2d 275, 278 (1991). An evidentiary basis permitting evidence of the commission of one crime in the prosecution of the other must be established.

In **Commonwealth v. Morris,** 493 Pa. 164, 425 A.2d 715 (1981), the case prompting the adoption of what is now Rule 582(A)(1)(a), the Supreme Court stated:

> It is a principle of long standing in this Commonwealth that evidence of a distinct crime, except under special circumstances, is inadmissible against a defendant who is being tried for another crime because the commission of one crime is not proof of the commission of another, and the effect of such evidence is to create prejudice against the defendant in the jury's mind. **Commonwealth v. Fortune,** 464 Pa. 367, 373, 346 A.2d 783, 786 (1971); **Commonwealth v. Wable,** 382 Pa. 80, 84, 114 A.2d 334, 336 (1955). The general rule, however, allows evidence of other crimes to be introduced to prove (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme, plan or design embracing commission of two or more crimes so related to each other that proof of one tends to prove the others; or (5) to establish the identity of the person charged with the commission of the crime on trial, in other words, where there is such a logical connection between the crimes that proof of one will naturally tend to show that the accused is the person who committed the other. **Commonwealth v. Fortune, supra; Commonwealth v. Wable, supra.** Thus, although the law does not allow use of evidence which tends solely to prove that the accused has a 'criminal disposition,' evidence of other crimes is admissible for certain purposes if the probative worth of this evidence outweighs the tendency to prejudice the jury.

Id. at 175, 425 A.2d at 720. Three more exceptions to the general rule of exclusion of prior crimes have also evolved:

> to impeach the credibility of a defendant who testifies in his trial; [in] situations where [a] defendant's prior criminal his-

> tory had been used by him to threaten or intimidate the victim; [and in] situations where the distinct crimes were part of a chain or sequence of events which formed the history of the case and were part of its natural development (sometimes called 'res gestae' exception).

Commonwealth v. Boyle, supra at 636 (citations and quotations omitted).

Here, evidence of each of the sales would be admissible in a separate trial for any one of the sales under the common scheme exception to the general rule of exclusion of other crimes. As explained in **Commonwealth v. Newman,** this exception requires that "there are shared similarities in the details of each crime" not "that the similarities necessary to establish 'common design' may only be found 'in the acts which compose the crime and which are performed by the perpetrator.' " **Id.** at 400, 598 A.2d at 278. Here, each of the sales were arranged between the same persons for similar amounts of the same drug at or about the same price over a six-week period. The same confidential informant was the buyer in each instance and such informant's testimony is critical to the prosecution on all sales. **Cf. Commonwealth v. Boyle, supra** (evidence of five separate drug transactions during a one-month period properly consolidated for trial; admissibility permitted under the common scheme exclusion as well as relevant to establish the likelihood that defendant was actively involved in each related transaction and, if defendant took the stand, admissible to impeach credibility).

The admissibility of the offenses arising from the search of Defendant's apartment falls within that exception which provides for admissibility "where the distinct crimes were part of a chain or sequence of events which form the history of the case and were part of its natural development." **Commonwealth v. Boyle, supra** at 636. Consequently, even without consolidation, evidence of the offenses charged in each separate information would be admissible in any single prosecution.

II. **Danger of Confusion**

Three separate transactions in the sale of cocaine have been alleged in these proceedings together with the charges arising from the search of Defendant's residence. The facts of each are not complex or voluminous and, we believe, are easily distin-

guishable by a single jury. We conclude, therefore, that a single jury would be able to understand and separate the issues raised in each transaction from one another without difficulty and without confusing the facts of one event with those of another.

III. **Danger of Prejudice**

Finally, we must determine whether the danger of prejudice to the Defendant by consolidation outweighs the benefit of judicial economy. The fact that the Defendant suffers prejudice from admission of relevant evidence connecting him to the crimes charged is not in and of itself grounds for severance. **Commonwealth v. Paolello,** 542 Pa. 47, 71, 665 A.2d 439, 451-52 (1995). On this factor, the prejudice referred to is:

> not simply prejudice in the sense that [defendant] will be linked to the crimes for which he is being prosecuted, for that sort of prejudice is ostensibly the purpose of **all** Commonwealth evidence. The prejudice of which Rule 1128 [now numbered as Rule 583] speaks is, rather, that which would occur if the evidence tended to convict [defendant] only by showing his propensity to commit crimes, or because the jury was incapable of separating the evidence or could not avoid cumulating the evidence.

Commonwealth v. Newman, supra at 401, 598 A.2d at 279 (quotations and citations omitted) (emphasis in original).

As already discussed, evidence of each offense is capable of separation by the jury and the jury should have little difficulty evaluating individually each offense charged. Since we have already determined that evidence of each offense is admissible in a separate trial of the others under an evidentiary exception, consolidating the offenses for trial will not result in the admission of irrelevant or unduly prejudicial evidence with respect to any individual offense.

A review of the evidence presented at the hearing on Defendant's Omnibus Pretrial Motion fairly permits the inference that Defendant was engaged in drug trafficking and had an established mode of selling drugs. Under these circumstances, Defendant's decision to deal in drugs is the cause of the prejudice of which he now complains. To deny the Commonwealth the opportunity to join his charges for trial would unfairly hinder the Commonwealth in its efforts against drug trafficking. As noted by the Superior Court under similar circumstances,

"[a]ttempting to cloak [the defendant's] business under the guise of isolated incidents offends common sense while demeaning the perilous efforts of narcotics officers who pursue these predators." **Commonwealth v. Boyle, supra,** 733 A.2d at 638.[10]

ORDER OF COURT

AND NOW this 28th day of October, 2003, in accordance with our Memorandum Opinion of this same date to which this Order is attached, Defendant's Omnibus Pretrial Motion in the nature of a motion for severance is DENIED.

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[10] Under Pa. R.Crim.P. 582(A)(1)(b) offenses charged in separate informations may be tried together if the offenses charged are based on the same act or transaction. What constitutes the "same criminal episode" or transaction is oftentimes a difficult question to answer. **Commonwealth v. Bracalielly,** 540 Pa. 460, 471, 658 A.2d 755, 761 (1995).

> To interpret the 'single criminal epidsode' test in such a manner as to permit successive trials for each of the alleged transactions would clearly be offensive to the prohibition against successive prosecution as well as an unjustifiable expenditure of judicial resources. The interpretation of the term 'single criminal episode' must not be approached from a hypertechnical and rigid perspective which defeats the purpose for which it was created. **Cf. Commonwealth v. Jenkins,** 500 Pa. 144, 454 A.2d 1004 (1982) (**Davenport** rule to be interpreted to '... accomplish the purposes sought to be achieved by the requirement of a prompt arraignment.') Thus, where a number of charges are logically and/or temporally related and share common issues of law and fact, a single criminal episode exists, and separate trials would involve substantial duplication and waste of scarce judicial resources. In such cases, failure to consolidate will bar successive prosecutions.

Commonwealth v. Hude, 500 Pa. 482, 494, 458 A.2d 177, 183 (1983) (finding a series of eleven separate drug sales by defendant to the same confidential informant over a four-month period arose from the same criminal episode).

"[I]n determining if the 'logical relationship' prong of the test has been met, we must also be aware that a mere de minimis duplication of factual and legal issues is insufficient to establish a logical relationship between offenses. Rather what is required is a substantial duplication of issues of law and fact." **Commonwealth v. Bracalielly, supra** at 472, 658 A.2d at 761. Whether a logical relationship exists between charges requires a showing that the separate offenses or transaction share (**i.e.,** have in common) issues of law and fact. **Bracalielly, supra** at 472 n.28, 658 A.2d at 761 n.28. Here also, the same confidential informant was involved for each of the three sales for which the Defendant was charged and the purchases were part of a single ongoing investigation of Defendant's alleged participation in drug trafficking. Accordingly, although not argued by the Commonwealth, we believe Section 110 of the Crimes Code, 18 Pa.C.S. §110(1)(ii), serves as an alternate basis in support of consolidation.

COMMONWEALTH OF PENNSYLVANIA vs. PENNY SHELTON, Defendant

Criminal Law—Unlawful Actions of Police As Basis To Suppress Evidence of Subsequent Criminal Conduct in Response to Such Actions—Challenge To Search of Home Consented to by Third Party Owner—Standing of Occupant of Home To Challenge Propriety of Search

1. Absent a finding that police conduct is an element of the crime charged, the initial actions of the police, even if subsequently determined to be improper or unlawful, do not justify or require suppression of evidence of criminal conduct arising in response to and after the complained of actions of the police.

2. Where police rely upon consent as the basis for a warrantless search, the Commonwealth has the burden of proving by a preponderance of the evidence that the consent was freely and voluntarily given. When the police assert that an arrest warrant exists, consent by a homeowner to search the premises for the subject of the warrant "is instinct with coercion—albeit colorably lawful coercion" and is not voluntary.

3. The occupant of a home who demonstrates a legitimate personal privacy interest in the area searched or effects seized has standing to challenge the legality of a search ostensibly consented to by the homeowner.

NO. 073CR03

JOSEPH MATIKA, Esquire, Assistant District Attorney—Counsel for Commonwealth.

ANDREW B. ZELONIS, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, J.—November 7, 2003

FACTUAL BACKGROUND

On November 22, 2002 at approximately 3:45 A.M., Officer Todd Woodward of the Summit Hill Police Department, with Officers Sommers and Hobbs of the Lansford and Coaldale Police Departments respectively, as back-up, responded to 352 East Fell Street, Summit Hill, Carbon County, Pennsylvania, in search of Payne Shelton. During the previous two hour period, Officer Woodward first learned that Mr. Shelton was wanted for a violation of his state parole, having failed to appear at a halfway house where he was residing, that an arrest warrant had been issued for his arrest, that Mr. Shelton was reported to be at his mother's home in Summit Hill, and that Mr. Shelton was considered dangerous. The property at 352 East Fell Street is the home of Gloria Shelton, Payne Shelton's mother, and is owned by her.

As the three officers approached Mrs. Shelton's home, Officers Woodward and Sommers went to the front door of the home; Officer Hobbs secured the back door exit. When Officer Woodward knocked on the front door, Mrs. Shelton answered the door and invited both officers inside. The officers identified themselves and the purpose for their visit: to determine if Payne Shelton was in the home. By this time, Officer Hobbs had returned to the front of the home where he remained standing near the front door. All three officers were in full uniform and armed.

Officer Woodward informed Mrs. Shelton that they had received a report that her son had failed to return to his halfway house and was believed to be at her home. Mrs. Shelton denied any knowledge of Payne being in the home. When asked by Officer Woodward if the officers could search the home to confirm Payne's absence, Mrs. Shelton consented to such a search. Mrs. Shelton was not told beforehand that she had the right to refuse consent.

Officer Sommers remained in the living room with Mrs. Shelton as Officer Woodward searched both the first and second floors of the home. Payne Shelton was not discovered. However, while searching the second floor, Officer Woodward shown his flashlight through the partially opened door of one of the upstairs bedrooms. Startled and enraged by the intrusion, Penny Shelton (the "Defendant") screamed from inside the room for Officer Woodward to leave—to get out of her home. Defendant at the time was in bed, with blankets as her only cover. She then draped herself in a blanket and, while shouting obscenities, chased Officer Woodward down the stairs to the living room.

When told that her mother consented to the search, Defendant became angry with her mother for letting the police in the home, asked if they had a warrant, was told no, and continued to curse. Both officers tried unsuccessfully to calm the Defendant down and informed both the Defendant and her mother that they were leaving. As they did so, the Defendant pursued both officers outside and continued screaming obscenities.

Outside, Defendant was asked to lower her voice to avoid disturbing the neighborhood. Defendant persisted, directing her vulgarities both at the officers and her neighbors. Defendant

was then informed that she would be cited for disorderly conduct and, if she continued, would be charged with persistent disorderly conduct. Despite these warnings, the Defendant continued her tirade, screaming "f_ _ _ you" and "f_ _ _ the neighbors" and yelling loudly "hey, neighbors … can you f_ _ _ ing hear me? … F_ _ _ you!" For this conduct, which occurred outside the home, Defendant was charged with two counts of persistent disorderly conduct,[1] both misdemeanors, and two counts of disorderly conduct,[2] both summary offenses.

Before us is Defendant's omnibus pretrial motion requesting that all evidence against the Defendant be suppressed as the fruit of an illegal search of her home. For the reasons which follow, we will deny this motion.

DISCUSSION

A. **Suppression of Evidence Prompted by Unlawful Police Conduct**

Preliminarily, and ultimately dispositive, it must be noted that no evidence was discovered or seized in the search of 352 East Fell Street which Defendant requests to be suppressed. Rather, Defendant argues that "but for" the police's presence and search, the confrontation would never have occurred and, therefore, if the police were not legally authorized to be in the home, Defendant's conduct in response cannot be criminal. Defendant seeks to place on the police responsibility for her conduct. This position has neither logical nor legal merit but, more importantly, for purposes of the present motion, the argument being made is in reality one of a defense based on issues of culpability or justification; the issue is not accurately one of suppression.

That Defendant was upset, even enraged, at being disturbed by police entering her bedroom at 4:00 A.M. while she was in bed, unclothed, is understandable. There is no evidence that Defendant was doing anything illegal or improper. There is also no evidence that once the police were aware of Defendant's presence they did anything coercive or otherwise violative of her rights. To the contrary, the police, with Defendant at their heels, retreated to the first floor and, in fact, exited the home.

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[1] 18 Pa. C.S. §§5503(a)(2), (3).

[2] 18 Pa. C.S. §§5503(a)(2), (3).

While outside, despite repeated warnings, Defendant continued to scream obscenities, not only at the police, but also at what appears to be an otherwise quiet, sleeping neighborhood. It is for this conduct—committed after the police's arrival and in the presence of the police—for which Defendant was criminally charged, not for past conduct of which evidence obtained from the home is to be introduced as proof.

Contrary to Defendant's belief, it is not the law of this Commonwealth that we "focus upon the initial actions of the police officers as a catalyst for all that flowed therefrom," and, if such actions were improper, that we suppress all evidence which was subsequently obtained. **Commonwealth v. Biagini,** 540 Pa. 22, 655 A.2d 492 (1995). In **Biagini,** both defendants[3] were arrested without probable cause, physically resisted the police, and were convicted of resisting arrest and aggravated assault of a police officer. The Supreme Court reversed the defendants' convictions for resisting arrest because an essential element of the offense, a lawful arrest, could not be proven.

However, it is the **Biagini** court's reasoning in refusing to reverse defendants' convictions for aggravated assault with which we are concerned. Defendants argued that it was the unlawful actions of the police which elicited their responses and that, since the initial encounter was an "unlawful arrest," all of the criminal charges which arose as a consequence of that arrest should be dismissed. The Supreme Court rejected this argument. In doing so, the court found critical to its decision that a lawful arrest was not an element of the offense of aggravated assault. Therefore, even if the arrest was illegal, if the elements of the offense charged are met, the crime, as defined by the Crimes Code, has occurred. Accordingly, defendants convictions for aggravated assault were upheld. **See also, Commonwealth v. Britt,** 456 Pa. Super. 633, 691 A.2d 494 (1997), **appeal denied,** 549 Pa. 695, 700 A.2d 437 (1997) (reversing trial court's order suppressing all evidence related to an incident in which defendants were prosecuted for aggravated assault and reckless endangerment when, in a violent and reckless manner, they fled from police officers who had properly identified themselves, injuring one officer).

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[3] **Biagini** consolidated two companion cases for review: **Commonwealth v. Biagini** and **Commonwealth v. Barry W.**

B. **Standing As a Prerequisite to Challenging Police Conduct**

Assuming, arguendo, that Defendant's conduct in response to alleged illegal police conduct is the proper subject of a suppression motion under these circumstances, Defendant's standing to challenge the legality of the search must be examined. Only if Defendant was the victim of an invasion of privacy will Defendant be entitled to benefit from a determination that the search of 352 East Fell Street was constitutionally infirm.

Standing to object to the admission of evidence obtained as the result of an illegal search requires a finding that the illegal police conduct violated rights personal to the Defendant.

> The fourth amendment to the Constitution of the United States guarantees that 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. …' To the same effect is Pa.Const. art. I, §8, P.S. These rights are personal in nature. **Commonwealth v. Ross,** 452 Pa. 500, 307 A.2d 898 (1973). 'There is no necessity to exclude evidence against one [person] in order to protect the rights of another. No rights of the victim of an illegal search are at stake when the evidence is offered against some other party.' **Alderman v. United States,** 394 U.S. 165, 174, 89 S.Ct. 961, 967, 22 L.Ed.2d 176, 187 (1969). In order to obtain standing to challenge the legality of the search, appellee must establish that he, rather than his mother, was the victim of an invasion of privacy.

Commonwealth v. White, 459 Pa. 84, 88-89, 327 A.2d 40, 42 (1974), **cert. denied,** 421 U.S. 971, 95 S.Ct. 1967, 44 L.Ed. 2d 461 (1975) (finding that a son had standing to object to the illegal seizure of his property from his mother's apartment, his temporary residence, following a search to which his mother had consented). **Cf. Commonwealth v. Merbah,** 270 Pa. Super. 190, 411 A.2d 244 (1979) (finding occupant in motor vehicle without standing to challenge search of vehicle consented to by owner).

"In order to prevail on … a [suppression] motion … a defendant is required to separately demonstrate a personal privacy interest in the area searched or effects seized, and that such interest was 'actual, societally sanctioned as reasonable, and

justifiable.' " **Commonwealth v. Hawkins,** 553 Pa. 76, 718 A.2d 265, 267 (1998). "[I]n order to establish a legally cognizable expectation of privacy, a defendant must establish 'either a possessory interest, a legitimate presence or a characteristic of ownership … from which society could recognize an expectation of privacy.' " **Commonwealth v. Carlton,** 549 Pa. 174, 701 A.2d 143, 145 (1997) (**quoting Commonwealth v. Gordon,** 546 Pa. 65, 73, 683 A.2d 253, 257 (1996)). "Standing can be demonstrated by the existence of one of the following personal interests: (1) presence on the premises at the time of the search and seizure; (2) **a possessory interest in the evidence improperly seized;** (3) that the offense charged includes as an essential element of the prosecution's case, the element of possession at the time of the contested search and seizure; or (4) a propriety or possessory interest in the searched premises." **Commonwealth v. Whiting,** 767 A.2d 1083, 1089 n.8 (Pa. Super. 2001), **appeal denied,** 568 Pa. 691, 796 A.2d 982 (2001) (emphasis in original).

Here, although Defendant was not the owner of the property at 352 East Fell Street, and was apparently a guest in her mother's home, Defendant was clearly present on the premises at the time of the search and maintained a possessory, if not proprietary interest, in her bedroom. Accordingly, Defendant has established a direct personal privacy interest which was intruded upon thereby conferring standing.

C. **Standard of Consent Necessary To Justify a Warrantless Search**

On the issue of authorization for the search, we do not believe that a voluntary consent to search was provided by Defendant's mother. The burden of proof is on the Commonwealth to demonstrate by the preponderance of the evidence that consent was freely given. **Bumper v. North Carolina,** 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed. 2d 797 (1968).

The Commonwealth relies primarily upon Mrs. Shelton's consent to search as the basis for the warrantless search of her home.[4] That Mrs. Shelton was the owner of the home where

[4] To the extent the Commonwealth argues that the existence of an arrest warrant for Payne Shelton authorized the entry into the home, even without consent, and diminishes Defendant's privacy expectations, we disagree. First, although the police may have had a good faith basis for their belief, it was not proven that a

she resided and possessed the actual and apparent authority to consent to the search, we do not question.

> It is well established the police may conduct a warrantless search when a third party has given consent to such search if that third party 'possesses common authority over or other sufficient relationship to the premises or effects sought to be inspected.' **Commonwealth v. Lowery,** 305 Pa.Super. 66, 451 A.2d 245, 247 (1982)(citing **United States v. Matlock,** 415 U.S. 164, 168, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974)). In **Commonwealth v. Silo,** 480 Pa. 15, 389 A.2d 62 (1978), our Supreme Court iterated under what circumstances a third party may validly consent to a search and seizure of a defendant's item(s). The **Silo** court stated the following law:
>
> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property ... but **rests rather on mutual use of the property by persons generally having joint access or control for most purposes** ... .

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valid arrest warrant for Payne Shelton in fact existed, nor that 352 East Fell Street was the residence of Payne Shelton. More importantly, Defendant was not the subject of the arrest warrant. **Cf. Payton v. New York,** 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed. 2d 639 (1980) (police armed with an arrest warrant alone and "reason to believe" that a suspect is within can enter a suspect's own home and seize evidence in plain view) and **Commonwealth v. Stanley,** 498 Pa. 326, 446 A.2d 583 (1982) (valid arrest warrant and "reason to believe" defendant was within third party's apartment justified police entry into the apartment, arrest of the defendant and seizure of firearm incident to a lawful arrest) with **Steagald v. United States,** 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed. 2d 38 (1981)(absent exigent circumstances, the Fourth Amendment rights of the resident of a home protect the resident from seizure of property (here cocaine) unless a search warrant authorizing entry into the premises has been issued; arrest warrant for non-resident third party believed to be in the premises insufficient) and **Commonwealth v. Martin,** 423 Pa. Super. 228, 230-31, 620 A.2d 1194, 1196 (1993) ("When the search and seizure of an individual occurs in the home of a third party, two interests are implicated: (1) the arrestee's interest in being free from unreasonable search and seizure; and (2) the homeowner's interest in being free from an unreasonable search of his home. ... The **Steagald** court concluded that to allow police, acting alone and without exigent circumstances, to determine when to search the home of a third party for the subject of an arrest warrant would create a significant potential for abuse.").

> **Silo, supra** at 23, 389 A.2d at 66 (emphasis added) (citing **United States v. Matlock,** 415 U.S. 164, 171 n.7, 94 S.Ct. 988, 39 L.Ed. 2d 242 (1974)).

Commonwealth v. Whiting, supra at 1091 (emphasis in original). **See also, Illinois v. Rodriguez,** 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed. 2d 148 (1990) (warrantless entry of a residence is valid when based on the consent of a person whom the police, at the time of entry, reasonably believe has common authority over the premises). **Cf. Commonwealth v. Garcia,** 478 Pa. 406, 387 A.2d 46 (1978) (finding that because mother had the power to determine the extent of her daughter's authority to admit people to the home, sixteen-year-old daughter did not have co-equal dominion and control over the home and, therefore, could not validly consent to the search and seizure of items contained therein and used in prosecution of mother).

Nor do we question that the search made by Officer Woodward was objectively reasonable and within the scope of the consent given by Mrs. Shelton. **Florida v. Jimeno,** 500 U.S. 248, 251, 111 S.Ct. 1801, 1803-1804, 114 L.Ed. 2d 297, 302 (1991) ("The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?"). Officer Woodward testified that he only searched those areas which were within plain view.

Where we differ from the Commonwealth's analysis is in its assertion that Mrs. Shelton's consent was voluntary. "In order for consent to be valid, it must be unequivocal, specific, and voluntary. … Consent must also be given free from coercion, duress, or deception. … The voluntariness of consent is a question of fact that is determined by looking at the totality of the circumstances." **Commonwealth v. Edwards,** 735 A.2d 723, 725 (Pa. Super. 1999) (citations omitted).

At the hearing on Defendant's omnibus pretrial motion, Officer Woodward testified that he was advised by the State Parole Board (the "Board") that a warrant for Payne Shelton's arrest had been issued. Officer Sommers testified that when the police entered Mrs. Shelton's home on November 22, she was told that the Board had obtained a warrant for her son's arrest. Only then was she asked, and did she provide, her consent.

Although it is true that an arrest warrant is qualitatively different from a search warrant and Mrs. Shelton was advised that the arrest warrant obtained was one obtained by the Board and was not told that this warrant was being relied upon by the police that morning, the distinction, we believe, is not one which would have been readily recognized and understood by a seventy-eight-year-old woman recovering from a recent knee operation who was awakened in her home at 3:45 A.M. In order to assure that consent was freely and voluntarily given under these circumstances, we believe it was incumbent upon the police, once reference was made to an arrest warrant for her son, to specifically advise Mrs. Shelton that she had an absolute right to refuse the police request to search her home. Although " 'voluntariness' [does not require] proof of knowledge of a right to refuse as the **sine qua non** of an effective consent to search," a person's knowledge of a right to refuse is a factor, among all of the surrounding circumstances, to be taken into account in determining voluntariness. **Schneckloth v. Bustamonte,** 412 U.S. 218, 234 and 248-49, 93 S.Ct. 2041, 2051 and 2059, 36 L.Ed. 2d 854, 867 and 875 (1973); **Commonwealth v. Cleckley,** 558 Pa. 517, 738 A.2d 427 (1999) (valid consent under Pennsylvania Constitution, Art. I, §8, does not require as a mandatory prerequisite that a person be informed of the right to refuse consent).

In **Bumper v. North Carolina, supra,** the court held that consent is invalid when it "has been given only after the official conducting the search has asserted that he possesses a warrant." Such a situation, "is instinct with coercion—albeit colorably lawful coercion. Where there is coercion, there cannot be consent." Specifically, the court stated:

> When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. The result can be no different when it turns out that the State does not even attempt to rely upon the validity of the warrant, or facts to show that there was, in fact, any warrant at all.

> When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent.

Id., 391 U.S. at 549-550, 88 S.Ct. at 1792, 20 L.Ed. 2d at 802-803. **See also, Commonwealth v. White, supra** (officers' presentation to mother of what appeared to be a valid search warrant, which was in fact invalid, precluded finding of mother's voluntary consent to search her home).

In this case, the totality of the circumstances show no more than that Mrs. Shelton "acquiesced to a claim of lawful authority," not that she voluntarily consented to a search of her home by three police officers at 3:45 A.M.[5] Notwithstanding that we find the search to have been illegal and Defendant to have standing to raise this issue the basis of the charges against the Defendant arise not out of the search but out of Defendant's conduct once the search was concluded. It is for this reason that we deny Defendant's omnibus pretrial motion.

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[5] In so finding, we do not believe that the police acted in bad faith or intended in any manner to confuse, intimidate or improperly coerce Mrs. Shelton.

LINDA A. FRITZINGER, LEONARD A. FRITZINGER, and LINDA A. FRITZINGER, as Administratrix of the Estate of BRIAN P. DeLONG, Deceased, Plaintiffs vs. VINCENT DAVID ROOS and LINDA MAY ROOS, Defendants

Civil Action—Number and Allocation of Peremptory Challenges—Carrying Firearm Without a License/Negligence Per Se—Easement Rights As Affecting a Claim of Self-Defense and Use of Deadly Force—Appropriateness of Rebuttal Testimony for Impeachment—Justification As a Bar to Claims of Battery and Negligent Infliction of Emotional Distress—Inconsistent Verdict/Necessity of Objections To Preserve the Record—Weight of the Evidence—Punitive Damages/Wealth of the Defendant As an Element—Punitive Damages As the Subject of Delay Damages

1. Defendant's violation of Section 6106 of the Uniform Firearms Act (**i.e.,** carrying a firearm without a license) does not entitle the Plaintiff, injured when shot with the firearm by Defendant, to a charge of negligence **per se.**

2. Pursuant to Rule 221, the number and division of peremptory challenges may be adjusted by the Court in order to obtain an overall fair and balanced distribution between the parties.

3. In assessing punitive damages the wealth of a defendant is a relevant factor but not an essential factor. The jury may base its award of punitive damages entirely on its assessment of a defendant's conduct.

4. The defense of justification in the use of deadly force is not dependent on the location or ownership of the property when the conduct occurs outdoors. As a consequence, no instruction on the property rights of an easement holder is required.

5. Rebuttal testimony is proper both to impeach a defense witness and to explain or clarify the sequence of events controverted by defense testimony.

6. Intentional torts are conceptionally distinct from actions in negligence. Therefore, the same conduct cannot be simultaneously intentional and negligent toward the same person. To find to the contrary creates an inconsistent verdict.

7. When an inconsistent verdict is caused by the Court's instructions, to protect the record, an affected party must raise an objection while the jury is impaneled in order to provide the court and the jury with an opportunity to reconsider and correct any inconsistency. Failure to timely object waives the issue for later review.

8. A verdict supported by evidence which is not inherently improbable or at variance with admitted or proven facts or with ordinary experience will not be set aside as being against the weight of the evidence.

9. Delay damages, as provided for by Rule 238, are to be computed on compensatory damages only. Punitive damages are not the proper subject of delay damages.

NO. 99-1191

RICHARD J. ORLOSKI, Esquire—Counsel for Leonard A. and Linda A. Fritzinger and the Estate of Brian P. DeLong.

BENJAMIN NICOLOSI, Esquire—Counsel for Vincent D. and Linda M. Roos.

MEMORANDUM OPINION

NANOVIC, J.—December 9, 2003

FACTUAL BACKGROUND

On July 4, 1998, twenty-five-year-old Brian P. DeLong ("DeLong") was shot and killed; his stepfather, Leonard A. Fritzinger ("Fritzinger"), was shot and wounded; and his mother, Linda A. Fritzinger, Leonard A. Fritzinger's wife, was present and witnessed the shooting death and injury respectively of both her son and husband. The Defendant, Vincent David Roos ("Roos"), fired the gun that killed DeLong and injured Fritzinger.

The events precipitating this tragedy began when Ronald Pratt ("Pratt") first confronted Roos at his home on July 4, 1998. Roos' home is located in a rural area of West Penn Town-

ship, Schuylkill County, Pennsylvania. A former railroad bed running in an east-west direction on both sides of Ridge Road, public road running generally in a north-south direction, serves as the entranceway to the home. Starting from Ridge Road and heading west, the railroad bed crosses several other properties before reaching and traveling across Roos' property on its westward course. A private driveway leads from the railroad bed to Roos' home. The combined distance from Ridge Road to the home along the railroad bed and private driveway is approximately one-half mile through a wooded area.

On July 4, 1998, Pratt and his girlfriend, Krista Kemmerer ("Kemmerer"), were guests at an all-day outdoors July 4th party being hosted by the Fritzingers. The Fritzinger property abuts Ridge Road with their home located approximately one hundred and seventy-nine feet distant in a northerly direction from the intersection of the railroad bed and Ridge Road. That afternoon, while riding an ATV, Pratt drove back to the Roos home. There he met Roos for the first time. When Roos asked who he was and why he was there, Pratt was rude and sarcastic: he stated he had no name and was illiterate and unable to read a no trespassing sign he had passed to reach Roos' home (N.T., 8/13/02, pp. 129, 146; N.T., 8/14/02, p. 211). Roos then told Pratt he was trespassing and should leave. Pratt complied (N.T., 8/13/02, pp. 99-100).

That night, however, Pratt, with Kemmerer as his passenger, returned on the ATV to the Roos' property and set off what has been described as a quarter stick of dynamite (N.T., 8/13/02, pp. 104-106). It was approximately 9:00 P.M. and becoming dark (N.T., 8/14/02, p. 212). From inside their home, Roos and his wife, Linda May Roos (Vincent David Roos and Linda May Roos are referred to collectively herein as the Defendants), heard an explosion and went outside to investigate. Nothing was found. Deciding to investigate further, Roos climbed into his jeep and drove toward Ridge Road looking for what had caused the explosion.

When Roos reached Ridge Road, he saw Pratt walking by himself and began yelling and screaming at Pratt about people riding four wheelers and setting off fireworks on his property (N.T., 8/13/02, pp. 117-118, 121; N.T., 8/14/02, pp. 125, 181; N.T., 8/15/02, pp. 155, 179). Pratt was soon joined by DeLong

and then by Fritzinger, all of whom were standing near the driver's window of Roos' jeep—approximately one to two feet away—with Roos seated inside.

Prior to this occasion, the relationship between Fritzinger and Roos was strained: Fritzinger believed Roos was excessive and wrong when reacting to members of Fritzinger's family or guests being on the railroad bed. Believing Roos was again overreacting, and unfairly blaming Pratt, Fritzinger leaned his head into the jeep, got in Roos' face and told Roos he was sick and tired of his "bull s_ _t" (N.T., 8/12/02, p. 227; N.T., 8/13/02, p. 121; N.T., 8/14/02, p. 125; N.T., 8/16/02, p. 30). At the same time, boasting, Fritzinger stated that he knew Roos carried a gun and he didn't care (N.T., 8/12/02, p. 227; N.T., 8/14/02, pp. 176, 193-194). Then, according to Pratt and Fritzinger, Roos pulled out a gun, all three stepped back stunned and with their arms extended in defense, and Roos began firing (N.T., 8/13/02, pp. 121-123; N.T., 8/14/02, p. 126).

Fritzinger was hit in the right upper arm and, spinning from the impact, fell to the ground (N.T., 8/12/02, pp. 253-254; N.T., 8/13/02, pp. 87, 123). Bleeding profusely, and believing he was fatally shot, Fritzinger headed toward his home murmuring that he was dying and pleading for someone to get help.

DeLong was shot in the left upper chest, the bullet traveling downward through his left lung and lodging in his thoracic spinal cord. He dropped to his knees, paralyzed, grasped for breath and stopped breathing while in Pratt's arms (N.T., 8/13/02, pp. 123-125). He was pronounced dead later that evening.

At trial, Roos claimed he was acting in self-defense. Roos testified DeLong came at him first from behind Pratt, followed by Fritzinger (N.T., 8/15/02, pp. 18, 26); that the two repeatedly grabbed him about the head, neck and shoulders and were attempting to pull him out of his jeep through the driver's window; that he was pulled partially through the window—to the level of his armpits—on at least three occasions (N.T., 8/15/02, p. 33); that he believed the three intended to beat him badly, perhaps kill him, and that he was engaged in a life and death struggle. Roos stated that he warned that he had a gun and would use it, that one of the three said they didn't care, that DeLong and Fritzinger kept lunging and pulling, and that, in desperation, he grabbed a handgun laying on the front passen-

ger seat and shot blindly in the direction of the three (N.T., 8/15/02, pp. 36, 40-41). The gun was a five round, thirty-eight caliber revolver, fully loaded (N.T., 8/12/02, p. 204). The number of shots taken was uncertain—at least two, perhaps three.

In contrast, Pratt and Fritzinger testified that the three men never placed their hands on Roos and never threatened to physically harm him (N.T., 8/12/02, p. 223; N.T., 8/13/02, pp. 122-123, 141; N.T., 8/14/02, pp. 126, 172, 186). Both testified that Roos suddenly pulled a gun and without warning shot (N.T., 8/13/02, pp. 121-123; N.T., 8/14/02, pp. 126, 138). Both Fritzinger and his wife, and Kemmerer, testified that when Roos finished shooting, he drove forward, turned around on Ridge Road, and as he headed back toward his home, with DeLong lying on the ground, commented that he got what he deserved (N.T., 8/14/02, pp. 144, 163; N.T., 8/15/02, pp. 158-159, 188-189; Kemmerer Deposition, p. 74).

That night, when Fritzinger saw Roos yelling at Pratt and approached the two, Linda Fritzinger walked behind her husband (N.T., 8/14/02, pp. 197-198). She was on Ridge Road, approximately ninety feet away, when the shooting occurred. She witnessed both her husband and son being shot (N.T., 8/15/02, pp. 156, 175-176). At one point, Linda Fritzinger herself was in the direct line of fire (N.T., 8/15/02, pp. 158, 188-189).

As her husband headed for their home, Linda Fritzinger saw blood pouring from the exit wound in her husband's back and heard her husband cry for help and state that it wouldn't be long before he died (N.T., 8/15/02, pp. 157-158). She saw her son take his last step and pleaded with him to fight for his life (N.T., 8/15/02, pp. 156-158, 188-189). Unable to reach her son—Roos was still there, with a gun—she followed her husband and, hysterical and barely able to talk, called 911. (Kemmerer Deposition, pp. 74).

DISCUSSION

Following a six-day trial, the jury returned a verdict against Roos for both negligent and intentional misconduct and awarded damages in excess of 3.6 million dollars to the three Plaintiffs collectively: the Estate of DeLong was awarded Twelve Thousand One Hundred Seventy-Six Dollars and Forty-Nine Cents ($12,176.49) on the wrongful death claim, One Million One Hundred Forty-Five Thousand Four Hundred Seventy-Four

Dollars and Thirty-Six Cents ($1,145,474.36) on the survival action and One Million Five Hundred Thousand Dollars ($1,500,000.00) in punitive damages; Fritzinger was awarded Two Hundred Thousand Dollars ($200,000.00) in compensatory damages and Two Hundred Fifty Thousand Dollars ($250,000.00) in punitive damages; Linda Fritzinger was awarded Two Hundred Fifty Thousand Dollars ($250,000.00) in compensatory damages and Two Hundred Fifty Thousand Dollars ($250,000.00) in punitive damages. The jury also determined that Linda Roos was negligent but that her negligence was not a substantial factor in causing injuries to the Plaintiffs.

Both parties have filed separate motions for a new trial: the Plaintiffs' motion is with respect to Linda May Roos alone. Additionally, Plaintiffs have filed a motion for delay damages. We will address each motion separately.

Plaintiffs' Motion for a New Trial

Prior to the trial of this case, Roos was charged criminally with capital murder, various assault-related offenses, and carrying a firearm without a license.[1] Roos was acquitted of the homicide and assault charges, but convicted of the firearms violation. The conviction was upheld on appeal to the Superior Court.

Plaintiffs sought to introduce evidence of this conviction arguing that the conviction was relevant to a finding of negligence **per se (**N.T., 8/8/02, pp. 4-6). In pretrial rulings responsive to Defendants' motion in limine, we determined that the conviction was both irrelevant to a charge of negligence **per se** and unduly prejudicial if permitted in evidence. Plaintiffs challenge this decision.

"The concept of negligence **per se** establishes both duty and the required breach of duty where an individual violates an

[1] 18 Pa.C.S. §6106(a)(2). This section of the Uniform Firearms Act provides:

§6106. Firearms not to be carried without a license

(a) Offense defined.

(1) ....

(2) A person who is otherwise eligible to possess a valid license under this chapter but carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license and has not committed any other criminal violation commits a misdemeanor of the first degree.

applicable statute, ordinance or regulation designed to prevent a public harm. ...” **Shamnoski v. PG Energy,** 765 A.2d 297, 302 (Pa. Super. 2000) (emphasis in original), **appeal granted,** 567 Pa. 719, 786 A.2d 989 (2001). “[T]he doctrine of per se liability does not create an independent basis of tort liability but rather establishes, by reference to a statutory scheme, the standard of care appropriate to the underlying tort.” **Cabiroy v. Scipione,** 767 A.2d 1078, 1082 (Pa. Super. 2001) (quotation and citation omitted), **appeal denied,** 566 Pa. 656, 782 A.2d 541 (2001). To establish negligence **per se,** a plaintiff must prove not only that a person breached a statutory duty but also that the resulting injury was the same kind of harm that the statute sought to prevent and to a person within the class of persons the statute was intended to protect. **Wagner v. Anzon, Inc.,** 453 Pa. Super. 619, 627, 684 A.2d 570, 574 (1996), **appeal denied,** 549 Pa. 695, 700 A.2d 443 (1997). “The reason for these requirements is to determine whether the policy behind the legislative enactment will be appropriately served by using it to impose and measure civil damages liability.” **McCloud v. McLaughlin,** 2003 WL 22785043, ¶13 (Pa. Super. 2003).

With respect to Section 6106, the objective of this statute is to enforce the registration and screening of persons who carry a firearm. No evidence was presented that training in the use of firearms is a prerequisite to obtaining a license. To the contrary, no license is required to purchase, use or even possess a firearm. What is proscribed by the statute is the carrying of a firearm in any vehicle or concealed on one’s person. Further, as a matter of simple logic, it does not follow that the illegal presence of a firearm in a vehicle has anything to do with the standard of reasonableness and how the firearm is used.[2]

Section 6106 does not protect against the kind of harm which occurred here. In this case, Roos’ use, not his possession, of a firearm is what caused Plaintiffs’ injuries. Stated differently, even had Roos possessed a license, it is unlikely that

[2] The unlicensed possession of a firearm may, however, be circumstantial evidence of an intent to commit a crime. 18 Pa.C.S. §6104. **Cf. Commonwealth v. Kelly,** 555 Pa. 382, 724 A.2d 909 (1999) (finding instruction premised upon Section 6104 created a mandatory presumption of intent which unfairly interfered with the jury’s duty to find the facts beyond a reasonable doubt) with **Commonwealth v. Hall,** 830 A.2d 537 (Pa. 2003) (upholding constitutionality of permissive inference in the context of the entire factual record that person who commits a crime with a firearm he was unlicensed to carry intended to commit the crime).

the result would have been different. The licensure of the handgun had nothing to do with how the gun was used on July 4, 1998.

This vacuum between Roos' violation of Section 6106 and the harm caused is even greater when applied to Linda Roos, the sole object of Plaintiffs' motion. To suggest that she knew or could have anticipated what would happen that evening when her husband drove down their driveway verges on speculation (N.T., 8/14/02, pp. 55, 71). To have granted Plaintiffs' request, we believe, would have unfairly interfered with the jury's duty to make this finding.

We also question whether Plaintiffs have sustained any prejudice from our ruling. The award of a new trial requires not only the existence of error but also that harm has been sustained from the mistake. **Luzerne Cty. Flood Protection Authority v. Reilly,** 825 A.2d 779 (Pa. Commw. 2003).[3] "The doctrine of negligence **per se** does no more than satisfy a plaintiff's burden of establishing a defendant's negligence. It does not end the inquiry. The plaintiff still bears the burden of establishing causation." **Cabiroy, supra** at 1079 (emphasis in original). It was on this element, causation, that the jury found Plaintiffs' evidence against Linda Roos wanting. Proof of Roos' conviction and a negligence **per se** instruction regarding the conviction would not have strengthened Plaintiffs' proof of causation; the failure to provide either did not prejudice Plaintiffs.

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[3] In **Luzerne Cty. Flood Protection Authority v. Reilly,** 825 A.2d 779 (Pa. Commw. 2003), **quoting** the Pennsylvania Supreme Court, the court explained:

> It is important to recognize that the trial court's decision whether to grant a new trial rests on its preliminary or predicate decision as to whether any reasons exist for granting a new trial. In other words, there are two levels to a trial court's decision whether to grant a new trial: First, the court must determine whether, colloquially speaking, a 'mistake' (or mistakes) was made at trial. Second, the court decides whether the mistake (or mistakes) is sufficient basis for granting a new trial. The first decision—whether a mistake was made—may involve factual, legal, or discretionary matters. However, the second and ultimate decision—whether to grant a new trial—is always a discretionary matter because it requires consideration of the particular circumstances of the case.
>
> An appellate court reviewing the decision to grant a new trial, therefore, essentially reviews that decision at two levels. First, it examines the trial court's underlying decision as to whether a mistake was made. ...
>
> ....

Defendant Roos' Motion for a New Trial

1. Peremptory Challenges

At the time of jury selection, four separate groups of parties existed, each represented by separate counsel: (1) the present Plaintiffs; (2) the present Defendants; (3) Pratt, who the Defendants joined as an additional defendant and who filed a counterclaim against the Defendants;[4] and (4) Heather Handwerk, DeLong's fiancée, who had commenced a separate action against the Rooses and Pratt which was consolidated for trial purposes.[5] The Court provided each of the parties with four peremptory challenges. Roos argues this was error.[6]

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> [Next,] it reviews the decision to grant a new trial by applying an abuse of discretion standard. ... In considering whether the record supports the trial court's decision, the appellate court is to defer to the judgment of the trial court, for the trial court is uniquely qualified to determine factual matters. Further, an abuse of discretion occurs not merely when the trial court reaches a decision contrary to the decision that the appellate court would have reached. Rather, an abuse of discretion occurs 'when the course pursued represents not merely an error of judgement, but where the judgement is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will.'

Id. at 782. (**quoting Morrison v. Department of Public Welfare**, 538 Pa. 122, 133-35, 646 A.2d 565, 571-72 (1994) (citations and footnotes omitted)). "Finally, a review of a denial of a new trial requires the same analysis as a review of a grant. **Harman [ex rel. Harman] v. Borah,** 562 Pa. 455, 467, 756 A.2d 1116, 1122 (2000)." **Id.** at 783.

As the court noted in **Harman:**

> The harmless error doctrine underlies every decision to grant or deny a new trial. A new trial is not warranted merely because some irregularity occurred during the trial or another trial judge would have ruled differently; the moving party must demonstrate to the trial court that he or she has suffered prejudice from the mistake.

Id. at 467, 756 A.2d at 1122.

[4] On the third day of trial, the Defendants withdrew their complaint against Pratt and Pratt withdrew his counterclaim against Defendants (N.T., 8/14/02, pp. 4-5). These claims were then dismissed by order of court (Order of Court dated August 14, 2002).

[5] On the first day of trial, before evidence began, Heather Handwerk's claim against Pratt and the Defendants was settled (N.T., 8/12/02, pp. 6-8).

[6] At the time of **voir dire,** Defendants objected to the allocation of peremptory challenges made by the Court on the basis that Heather Handwerk, Pratt and the Plaintiffs, shared a common interest contrary to that of the Defendants. At the time, it was not the practice of the Court to automatically record **voir dire** in civil cases and, therefore, a record of this objection does not exist. Notwithstanding the absence of this record, the Court recalls the objection being made on the basis indicated and believes the objection has been properly preserved for review.

Pa. R.C.P. 221 governs the allocation of peremptory challenges in civil cases. The Rule provides generally for four peremptory challenges per party but allows the court discretion to adjust this number to achieve a fair distribution of challenges.

The allocation of peremptory challenges which was used followed the general rule and resulted in a division of eight peremptory challenges to the claimants' side of this case (**i.e.,** Plaintiffs and Handwerk) and eight to the defense side (**i.e.,** Defendants and Pratt). Roos' argument that Pratt's interests were more closely aligned with the Plaintiffs' than with defending his own exposure to personal liability is not as simple as Roos portrays: Defendants joined Pratt in this action and did so with the clear purpose of attributing liability to him. It could be expected that not only Defendants, but also Heather Handwerk and Plaintiffs, would seek to impose liability on Pratt: Pratt was a primary and original defendant in Handwerk's suit. Further, Pratt's claim for personal injuries contained in his counterclaim against Defendants was perceived, at least by Defendants, as being weak: a claim for intentional infliction of emotional distress unaccompanied by physical injury or physical impact and without any supporting expert medical testimony (**See** Defendants' Omnibus Motion in Limine and Motion for Partial Dismissal, Motion 5; N.T., 8/13/02, p. 137). Under these circumstances, based upon the parties' respective interests at the time of jury selection, we do not believe the allocation of peremptory challenges was erroneous.

Finally, Roos has failed to demonstrate that he has been prejudiced by the allocation of peremptory challenges. On point is **Leaphart v. Whiting Corp.,** 387 Pa. Super. 253, 564 A.2d 165 (1989), **appeal denied,** 525 Pa. 619, 577 A.2d 890 (1990):

> However, aside from sheer numbers, the appellants have failed to allege how they were prejudiced by the distribution of challenges. In fact, the **voir dire** was not transcribed. Consequently, we do not know the character of the jury or the number of challenges actually used. Unable to discern an unjust result presently, we find that the trial court's ruling was not an abuse of discretion.

Id. at 262, 564 A.2d at 170. Moreover, rather than indicating prejudice, the jury's verdict finding that any negligence of Linda Roos was not a substantial factor in causing harm to the Plaintiffs evinces a deliberate, objective treatment of the evidence.

2. **Punitive Damages**

In assessing punitive damages, the fact-finder may consider (1) the character of the act; (2) the nature and extent of the harm; and (3) the wealth of the defendant. **Judge Technical Services, Inc. v. Clancy,** 813 A.2d 879, 889 (Pa. Super. 2002). The jury was instructed with respect to this standard (N.T., 8/19/02, pp. 152-154).

Roos argues that punitive damages cannot be considered absent some evidence of a defendant's net worth and that none was presented here. This is not the law. While evidence of net worth may indeed be relevant to an award of punitive damages, it is not mandatory and creates the potential for the jury to render its award on an impermissible basis. **Shiner v. Moriarty,** 706 A.2d 1228, 1242 (Pa. Super. 1998), **appeal denied,** 556 Pa. 701, 729 A.2d 1130 (1998) ("Moreover, we reject the suggestion that evidence of net worth is mandatory, indeed the Supreme Court has indicated that such evidence creates a significant potential for the jury to render its award on an impermissible basis.").

Punitive damages are collateral or ancillary to a tort claim and are only recoverable upon a showing of outrageous conduct, that is, "for acts done with a bad motive or with a **reckless indifference** to the interests of others." **Judge Technical Services, Inc. v. Clancy, supra** at 889 (quotations and citations omitted) (emphasis in original). In determining the reasonableness of punitive damages "the degree of reprehensibility is the primary indicator ..." and "... the reprehensibility inquiry takes into consideration the fact that some wrongs are more blameworthy than others." **Clancy, supra** at 888 (quotations and citations omitted). The jury may base its award of punitive damages entirely on its assessment of a defendant's conduct. **Reading Radio, Inc., v. Fink,** 833 A.2d 199, 215 (Pa. Super. 2003); **see also, Viener v. Jacobs,** 834 A.2d 546, 561 (Pa. Super. 2003).

Roos' argument that he did not present evidence of the consequences to him of this incident—his criminal prosecution, conviction, and punishment and the effect on his personal life—because Plaintiffs did not present evidence regarding his net worth indicates a tactical decision. In the belief that Plaintiffs failed to prove this element of damages, Roos elected not to present evidence (N.T., 8/16/02, pp. 101-102). Nothwithstanding

this belief, at no time was Roos prohibited by any ruling of the Court from introducing evidence of his net worth or any evidence relevant to the issue of punitive damages.[7]

3. **Rights of an Easement Holder**

Roos next argues that it was error for the Court not to charge on the property rights of an easement holder. We disagree.

The exact status of who possessed what rights and interests in the railroad bed and how acquired was never proven by either party and was believed by all to be irrelevant. Whether the shooting occurred on Roos' property or elsewhere, the standard of care owed by Roos in his claim of self-defense while outdoors was unaffected (N.T., 8/8/02, pp. 7-9; N.T., 8/16/02, pp. 107-108; N.T., 8/19/02, pp. 167-168). Nor has Roos objected to the accuracy of the charge given by the Court with respect to the use of deadly force.

The issue is not, however, as Roos suggests—what were Roos' actual legal rights in the railroad bed, since these were never proven (**e.g.,** was the railroad bed in fact legally abandoned). Whether Roos was right or wrong as a matter of real estate law in barricading the railroad bed where it exited his property or in posting the railroad bed as "private property" and keeping others from its use was not the issue;[8] the issue was whether, notwithstanding the correctness of Roos' beliefs with respect

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[7] Roos' argument that punitive damages are prohibited because Fritzinger at one point testified that he did not believe Roos left his home that evening with the intent of hurting anyone is misplaced (N.T., 8/14/02, p. 190). Although unobjected to, this testimony was obviously speculative and not binding on the jury whose province it was to determine if Roos' conduct merited punitive damages. Moreover, Fritzinger's testimony was limited to Fritzinger's belief as to Roos' state of mind at the time Roos left his home, not his state of mind at the time he pulled the trigger and shot blindly at Pratt, DeLong and Fritzinger.

[8] At the far side of Roos' property, Roos erected barriers preventing further travel going west on the railroad bed. However, Defendants' deed evidences the reservation of a right-of-way across Defendants' property for the benefit of property to the west of Defendants'. (Roos deed, Plaintiffs' Exhibit 9).

The area on the left-hand side of the railroad bed near Ridge Road was posted by Roos with a "no trespassing" sign; the area on the right-hand side in the same vicinity was also posted with a Pennsylvania Fish Commission sign designating the entrance to a walk-in fishing area. The presence of the Pennsylvania Fishing Commission sign, undisputed by Roos, evidences a limited quasi-public right to use the railroad bed (N.T., 8/15/02, pp. 44-45).

to his property rights, was Roos' use of deadly force justified as a matter of substantive tort law.[9]

The instruction Roos requested would have introduced a new and collateral issue into these proceedings and caused juror confusion. Absent any suggestion that Roos had the right to use deadly force because Plaintiffs were on his easement, a jury instruction on the rights of an easement holder was irrelevant. Refusal to give the instruction permitted the jury to focus on the real issue—the reasonableness of Roos' claim of self-defense on July 4, 1998—and has not caused prejudice.

4. **Rebuttal Testimony of Trooper Luciani**

Luciani was the lead investigating officer for this case and the second police officer to arrive at the Roos' residence on July 4, 1998. Luciani was called to testify by Plaintiffs in their case in chief. Luciani testified, **inter alia,** that he spoke with Roos that evening and that Roos told him he had obtained the gun from inside the home (N.T., 8/12/02, pp. 197, 214, 257-259). This testimony was relevant to Roos' state of mind that evening—whether Roos anticipated the possible use of a deadly weapon when he drove down his driveway that evening or whether, as he testified, the handgun was coincidentally in his jeep when he encountered Pratt, DeLong and Fritzinger. It was also relevant to whether negligence could be attributed to Linda Roos if the jury found that she provided Roos the gun from within the home or gave Roos the keys to his jeep knowing that he was carrying a firearm which he had obtained from within the home (N.T., 8/16/02, pp. 64-65, 67-68).

On the defense side of the case, Roos denied speaking with Luciani (N.T., 8/14/02, p. 203; N.T., 8/16/02, pp. 13, 16-18). Roos stated that it was because of Luciani's demands and demeanor that he refused to speak with him. Specifically, Roos testified that when Luciani first entered his home that evening and identified himself, he slammed his badge on the table, whis-

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[9] Roos' conduct and subjective beliefs with respect to the railroad bed were, however, relevant to determining whether his conduct on July 4, 1998 was unreasonably motivated by a desire to protect property at the expense of human life (N.T., 8/15/02, pp. 9-12, 180-181). On this issue, counsel agreed prior to the taking of testimony that the actual legal rights of Roos in the railroad bed would not be litigated but that what their beliefs were with respect to those rights could be inquired into (N.T., 8/8/02, pp. 7-9; N.T., 8/16/02, pp. 107-108).

pered briefly to Trooper Minchhoff—the first trooper who arrived at the scene—and then went outside and returned with a waiver form (presumably a written waiver of **Miranda** rights) which he again slammed on the table and demanded Roos sign (N.T., 8/16/02, p. 18).

Plaintiffs then asked to recall Luciani for rebuttal for two specific purposes: Luciani's conduct with respect to his badge and the timing of when he arrived and presented the waiver form to Roos. According to Plaintiffs, Luciani never slammed his badge down and it was not until Roos was presented with the waiver form—fifteen minutes after his arrival—that he refused to speak further with Luciani (N.T., 8/16/02, pp. 79-81). Under Plaintiffs' version, more time elapsed between Luciani's arrival and his request that Roos sign the waiver form, than that suggested by Roos. It was during this time period that Plaintiffs claim Roos spoke with Luciani. Rebuttal for these limited purposes was permitted.

Luciani's testimony in rebuttal consists of five pages and was confined to the two issues Plaintiffs indicated (N.T., 8/16/02, pp. 78-83). A party may properly offer rebuttal evidence "to explain, repel, counteract, or disprove facts [as opposed to opinions] given in evidence by the adverse party." **Mitchell v. Gravely International, Inc.,** 698 A.2d 618, 623 (Pa. Super. 1997) (Popovich, J., dissenting) (**quoting** Black's Law Dictionary (5th Ed. 1979) for definition of "rebuttal evidence"). Here, Luciani's testimony served to explain his conduct upon entering the Defendants' home and to clarify the sequence of events between him and Roos. Further, this was proper rebuttal testimony impeaching Roos.

> Admission of rebuttal evidence is a matter within the sound discretion of the trial court. **Commonwealth v. Weiss,** 565 Pa. 504, 776 A.2d 958 (2001). Some rebuttal evidence may be offered as a matter of right, while other rebuttal evidence, even that evidence which should have been given in a case in chief, can be admitted within the discretion of the trial court provided the action of the court is not arbitrary or capricious. **Mitchell v. Gravely International Inc.,** 698 A.2d 618 (Pa.Super.1997). Rebuttal evidence is proper where it is offered to discredit testimony of an opponent's witness. **Mitchell v. Gravely Intern.,**

Inc., 698 A.2d 618 (Pa.Super.1997). Where the evidence proposed goes to the impeachment of his opponent's witness, it is admissible as a matter of right. **Clark v. Hoerner,** 362 Pa. Super. 588, 525 A.2d 377 (1987).

Commonwealth, Dept. of Gen. Ser. v. U.S. Mineral Products Co., 809 A.2d 1000, 1033-34 (Pa. Commw. 2002). Finally, Roos affirmatively acquiesced in the scope of rebuttal testimony permitted by the Court (N.T., 8/16/02, pp. 42-44).

5. **Inconsistency of the Verdict**

During the course of trial, both the number of the parties and the issues to be determined were reduced. By the time the case went to the jury for deliberation and verdict, DeLong, through his estate, was pursuing a claim for wrongful death and survival premised upon battery and negligence, Fritzinger was pursuing a claim for battery and negligence, and Linda Fritzinger was pursuing a claim for negligent infliction of emotional distress. All three Plaintiffs were also claiming punitive damages.

The jury returned a verdict finding in favor of the Plaintiffs on all claims submitted to it. Roos claims the form of the verdict, in finding Roos liable for both battery and negligence, is inconsistent and must be set aside.

At trial, both the parties and the Court struggled with the structure of the verdict slip and the interrelationship between Plaintiffs' claims and Roos' claim of self-defense (N.T., 8/16/02, pp. 57-63, 69-78). Defendants argued that if the jury found Roos justified in his claim of self-defense, inherent in that determination was a finding that Roos actually and reasonably believed he was in imminent danger of death or serious bodily harm and that it was necessary to use deadly force for his own protection.[10] This argument is grounded on the premise that necessity knows no law. Given these necessary findings for justification, Defendants argued that if the jury accepted Roos'

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[10] The requisite elements of self-defense, at least in the criminal context, are:

> (1) the actor must have reasonably believed himself to be in imminent danger of death or bodily harm, and that it was necessary to use deadly force against the victim to prevent such harm; (2) the actor must have been free from fault in provoking or continuing the difficulty which resulted in the slaying; and (3) the actor must have violated no duty to retreat.

Commonwealth v. Powers, 484 Pa. 198, 204 n.1, 398 A.2d 1013, 1015 n.1 (1979).

defense, he could not be found liable for intentional or negligent wrongdoing (N.T., 8/16/02, pp. 57-60). Plaintiffs disagreed and argued that even if Roos was justified in its use, the manner in which Roos used deadly force could be found to be negligent (N.T., 8/16/02, pp. 61-63). The Court accepted Defendants' position and so charged the jury (N.T., 8/16/02, p. 63; N.T., 8/19/02, p. 122). **Cf. Commonwealth v. Fowlin,** 551 Pa. 414, 710 A.2d 1130, 1132 (1998) (a "defender may not be simultaneously found to have justifiably acted in self-defense and be criminally liable for crimes involving recklessness or malice"). Plaintiffs excepted to this decision; Defendants did not (N.T., 8/19/02, pp. 6-7, 172-173).

At the same time, Plaintiffs argued that if the jury rejected Roos' claim of justification, his use of deadly force was not only intentional, but **per se** unreasonable. In effect, Plaintiffs argued that if justification barred Plaintiffs' claims in their entirety, the absence of justification opened the door for Roos' conduct to simultaneously be negligent and intentional (N.T., 8/16/02, pp. 58, 61, 77). Defendants were unsure of the legitimacy of Plaintiffs' position and neither explicitly challenged nor conceded this point (N.T., 8/16/02, pp. 59-60, 73-74).

The instructions given to the jury, with respect to the intentional tort of battery (N.T., 8/19/02, pp. 117-119) and negligence (N.T., 8/19/02, pp. 123-131), were within the guidelines of the suggested jury instructions. We believe both the jury instructions and verdict slip were proper insofar as they clearly, accurately and adequately advised the jury as to what needed to be determined with respect to Plaintiffs' claims for battery and negligence. However, we also instructed the jury in accordance with Plaintiffs' requests (N.T., 8/19/02, pp. 159-160).

In retrospect, we believe the jury should have been instructed that if Roos' claim of self-defense was rejected by the jury, Roos could only be found liable for battery, not negligence. This follows since intentional misconduct is not simply a different degree of negligence but a different and distinct form of misconduct.[11] Intentional misconduct, in contrast to negligence,

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[11] In Pennsylvania there are no degrees of negligence. There is but one standard of care, "reasonable care." However, "the care which it is reasonable to require of the actor varies with the danger involved in his act and is proportionate to it." **Stewart v. Motts,** 539 Pa. 596, 601, 654 A.2d 535, 537 (1995) (**quoting** Restatement (Second) of Torts §298 cmt. b (1965)).

requires both an intent to act (**i.e.,** a voluntary act) and an intent to cause a specific result or a belief to a substantial certainty that it will occur. **McNeal v. City of Easton,** 143 Pa. Commw. 151, 157, 598 A.2d 638, 641 (1991) (**quoting** Restatement (Second) of Torts §8A (1965) (definition of intent)).

Roos' claim of self-defense and justification necessarily implied a conscious decision to use force to protect himself. Once the jury found Roos' use of a deadly weapon was without justification, it necessarily followed that Roos was liable for battery. If Roos actually, but unreasonably, believed deadly force was necessary, he committed a battery. **Cf. Commonwealth v. Soto,** 441 Pa. Super. 241, 657 A.2d 40 (1995).[12] This notwithstanding, the issue has been waived and may not be raised for the first time in post-trial motions.

On this point, Roos objected neither to our instructions to the jury before the jury retired nor to the jury's verdict finding Roos simultaneously liable for intentional and negligent misconduct before the jury was dismissed (N.T., 8/16/02, pp. 57-63; N.T., 8/19/02, pp. 5-7, 169-173). To be preserved, an objection to an erroneous instruction must be timely, specifically and separately made by each party before the jury retires. **Cruz v. Northeastern Hospital,** 801 A.2d 602, 610-611 (Pa. Super. 2002).

> '[W]here a party fails to specifically object to a trial court's jury instruction, the objection is waived and cannot subsequently be raised on appeal.' **Randt v. Abex Corp.,** 671 A.2d at 232; **see** Pa.R.C.P. 227(b) (requiring that all exceptions to the charge to the jury be taken before the jury retires).

Id. at 610-11. **See also,** Pa. R.C.P. 227(b).

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[12] In language relevant to these proceedings, Judge Olszewski, in a concurring opinion, stated:

> In examining a defendant's belief about the need to use deadly force in self-defense, a court must consider both a subjective and an objective component. [**Commonwealth v. Hill,** 427 Pa. Super. 440, 445-47, 629 A.2d 949, 952 (1993)]. 'First, the defendant must have acted out of an honest, bona fide belief that he was in imminent danger. Second, the belief must be reasonable in light of the facts as they appeared to him. The first element is entirely subjective; the second element is entirely objective.' **Id.**

Commonwealth v. Soto, 441 Pa. Super. 241, 242, 657 A.2d 40 (1995).

Futhermore, where a party seeks a new trial on the basis that the jury's verdict is inconsistent because of improper or ambiguous jury instructions, in order to provide the trial court with an opportunity to correct or clarify its instructions, and permit the jury to further deliberate and reconcile the inconsistency in accordance with its fact-finding function, the party must object while the jury is still impaneled. Thus,

> the **Picca** [referring to **Picca v. Kriner,** 435 Pa. Super. 297, 645 A.2d 868 (1994)] waiver rule is only applicable to cases in which a litigant's failure to object to improper or ambiguous jury instructions or interrogatories causes an inconsistent verdict. The waiver rule should not be applied to cases in which the verdict is clear and unambiguous, albeit problematic, troublesome or disappointing.

Gorski v. Smith, 812 A.2d 683, 707 (Pa. Super. 2002) (**quoting King v. Pulaski,** 710 A.2d 1200, 1204 (Pa. Super. 1998)). Here, the verdict was consistent with the court's instructions but inconsistent legally because of those instructions. By failing to object, the instructions, albeit erroneous, are part of the law of this case.

In this case, we would further exacerbate the error by awarding a new trial. The verdict of the jury shows clearly that the jury did not accept Roos' claim of self-defense and intended to find Roos liable for the Plaintiffs' damages. To award a new trial and open the possibility of a defense verdict on liability would defeat the rationale underlying the award of a new trial when a court instruction is erroneous: the opportunity for a fair and just verdict to be reached. Rather than opening the possibility for right to prevail, the award of a new trial in this case would create the possibility for substantial injustice.[13]

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[13] To award a new trial as Roos suggests, to permit a jury to determine what portion of Roos' acts and damages are negligent and what portion are intentional, would serve no useful purpose. The measure of damages is unaffected by whether the correct basis of liability was intentional or negligent misconduct.

We are aware that the basis of liability may well affect whether insurance coverage exists for the damages awarded. This consequence, however, we do not believe justifies disturbing the jury's verdict. Evidence of insurance is irrelevant and prejudicial to determining liability and should not be a factor in awarding a new trial. Pa.R.E. 411.

6. **Weight of the Evidence**

Roos claims the weight of the evidence does not support any verdict against him and in favor of DeLong and Fritzinger. He also claims that the weight of the evidence fails to establish that Linda Fritzinger was able to witness any negligent or intentional misconduct by him and further fails to establish that she sustained any physical injuries related to this incident.

A verdict rendered by a jury should not lightly be set aside as being against the weight of the evidence:

> A new trial will be granted on the grounds that the verdict is against the weight of the evidence 'only where the verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail. ... [The appellant] is not entitled to a new trial where the evidence is conflicting and the [finder of fact] could have decided either way.'

Watson v. American Home Assurance Co., 454 Pa. Super. 293, 302, 685 A.2d 194, 198 (1996), **appeal denied,** 549 Pa. 695, 700 A.2d 443 (1997). To the same effect:

> A new trial will not be granted on the basis of a weight of the evidence claim unless evidence supporting the verdict is so inherently improbable or at variance with admitted or proven facts or with ordinary experience as to render the verdict shocking to the court's sense of justice.

Wagner v. Anzon, Inc., supra at 636, 684 A.2d at 578 (**quoting Brindley v. Woodland Village Restaurant,** 438 Pa. Super. 385, 399, 652 A.2d 865, 872 (1995)).

Although Roos is correct that inconsistencies and conflicts exist in the evidence, in a case of this nature—sudden, explosive and highly emotional—it would be rare if inconsistencies did not exist. Conflicts in evidence are natural and normal and do not in themselves necessitate that a verdict be set aside as against the weight of the evidence. **Ty-Button Tie, Inc. v. Kincel and Co., Ltd.,** 814 A.2d 685 (Pa. Super. 2002). Furthermore, the credibility of conflicting testimony is to be determined by the jury, who are free to believe some, all or none of the evidence presented. **Smith v. Putter,** 832 A.2d 1094, 1099 (Pa. Super. 2003). The jury is not required to believe completely

any one statement but is entitled to sort through all the evidence and determine what actually happened. **Commonwealth v. Marks,** 704 A.2d 1095, 1099 (Pa. Super. 1997), **appeal denied,** 555 Pa. 686, 722 A.2d 1056 (1998). The test for granting a new trial on the basis that the verdict is against the weight of the evidence is not, as Roos suggests, the selective use of only that evidence favorable to his position but whether the verdict rendered is "so contrary to the evidence [as a whole] as to shock one's sense of justice."

In this case, the jury heard five days of testimony from all the key witnesses who were available to testify. We have thoroughly reviewed this testimony and believe the evidence fairly supports the jury's verdict. Some of this evidence has already been identified in our statement of the background facts and will not be repeated.

Roos stipulated that he shot and killed DeLong and did not dispute that he shot and injured Fritzinger (N.T., 8/12/02, pp. 63-64). The jury's verdict finding that Roos was not justified in his use of deadly force and, therefore, is responsible for damages for battery is amply supported by the evidence. The jury's verdict that Roos acted unreasonably in grabbing a loaded firearm and firing blindly at the Plaintiffs, and was therefore negligent, is also supported by the evidence. Roos' claim that a deadly struggle ensued in which he was repeatedly and violently pulled through the window of his jeep was belied by the total absence of any bruises or abrasions to his upper body, notwithstanding that he was bare-chested throughout the entire struggle (N.T., 8/12/02, pp. 71, 246-247). Roos' version was further at variance with the ballistic evidence opining that had the shooting occurred within a distance of four to five feet, soot or stipple would have been evident on DeLong's body; none was present (N.T., 8/13/02, pp. 23-24; N.T., 8/13/02, p. 231).

On Linda Fritzinger's claim for negligent infliction of emotional distress, the Court instructed the jury that Mrs. Fritzinger must have been located at or near the scene of the occurrence and not a distance away from it; that she must have had a direct emotional impact from the sensory and contemporaneous observation of the shooting of her husband and death of her son, as opposed to learning of the shooting from others after its

occurrence; and that, in addition to the emotional distress claimed, she must have suffered physical harm or injury or establish that the emotional distress was accompanied by physical illness or physical symptoms as a result of observing the shooting (N.T., 8/19/02, pp. 131-133). No objections were made to these instructions.[14]

"In order to recover for negligent infliction of emotional distress a plaintiff must establish, as in any other negligence case, the defendant's breach of a duty and damages proximately caused thereby. In the context of a claim for emotional distress the action may be sustained under the impact rule [**Knaub v. Gotwalt,** 422 Pa. 267, 220 A.2d 646 (1966)], the zone of danger rule [**Niederman v. Brodsky,** 436 Pa. 401, 261 A.2d 84 (1970)] or the bystander rule [**Sinn v. Burd,** 486 Pa. 146, 404 A.2d 672 (1979)]." **Shumosky v. Lutheran Welfare Services,** 784 A.2d 196, 199 (Pa. Super. 2001) (explaining the case law development in Pennsylvania of awarding damages for negligent infliction of emotional distress); **Kazatsky v. King David Memorial Park,** 515 Pa. 183, 192-93, 527 A.2d 988, 992-93 (1987).[15] Under the bystander rule, in addition to proving the elements of a cause of action for negligence, in order to circumscribe the area of liability, three factors determine whether

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[14] **See also, Krysmalski by Krysmalski v. Tarasovich,** 424 Pa. Super. 121, 132, 622 A.2d 298, 303 (1993), **appeal denied,** 535 Pa. 675, 636 A.2d 634 (1993) (a sensory observation is not restricted to a visual observation; any human sense can be involved, such as hearing, as well as eyesight).

[15] The formulations contained in **Knaub, Niederman** and **Sinn,** present alternate methods to establish a case for negligent infliction of emotional distress and do not chronologically replace the prior formulations. **Brown v. Philadelphia College of Osteopathic Medicine,** 449 Pa. Super. 667, 675-76, 674 A.2d 1130, 1134 (1996) (quotations and citations omitted). Of these, the impact rule remains the basic means to plead the cause of action. **Id.** at 676, 674 A.2d at 1134. The impact rule has been stated as follows:

> [W]here ... a plaintiff sustains bodily injuries, even though trivial or minor in character, which are accompanied by fright or mental suffering directly traceable to the peril in which the defendant's negligence placed the plaintiff, then mental suffering is a legitimate element of damages.

Id. at 679, 674 A.2d at 1135-36. In **Stoddard v. Davidson,** 355 Pa. Super. 262, 513 A.2d 419 (1986), the jostling and jarring of an automobile's occupants while it drove over a corpse was held to be sufficient physical impact.

the injury to the plaintiff was reasonably foreseeable (**i.e.,** was the proximate cause):[16]

> (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.

Kazatsky, supra at 194, 527 A.2d at 993. **See also, Brezenski v. World Truck Transfer, Inc.,** 755 A.2d 36, 45 (Pa. Super. 2000) ("absent a finding of negligence, the negligent infliction of emotional distress claim cannot survive").

Emotional distress is described in **Kazatsky** as "fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry and nausea." **Id.** at 199, 527 A.2d at 996 (Larsen, J. concurring) (**quoting** Restatement (Second) of Torts §46 cmt. j). For negligently caused emotional distress to be compensable, it must be accompanied by physical impact or some related physical trauma. "It is the general rule of this Commonwealth that there can be no recovery of damages for injuries resulting from fright or nervous shock or mental or emotional disturbances or distress unless they are accompanied by physical injury or physical impact." **Brown v. Philadelphia College of Osteopathic Medicine, supra,** 760 A.2d at 871 (**quoting Simmons v. Pacor, Inc.,** 543 Pa. 664, 676-77, 674 A.2d 232, 238 (1996)). "[A] plaintiff must demonstrate some type of physical injury in order to sustain a cause of action for

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[16] While actual and proximate causation are "often hopelessly confused", a finding of proximate cause turns upon:

> whether the policy of the law will extend the responsibility for the [negligent] conduct to the consequences which have in fact occurred ... . The term 'proximate cause' is applied by the courts to those more or less undefined considerations which limit liability even where the fact of causation is clearly established.

Brown v. Philadelphia College of Osteopathic Medicine, 760 A.2d 863, 868 (Pa. Super. 2000) (quotations and citations omitted), **appeal denied,** 566 Pa. 632, 781 A.2d 137 (2001).

negligent infliction of emotional distress." **Fewell v. Besner,** 444 Pa. Super. 559, 568, 664 A.2d 577, 581 (1995).

This requirement of physical injury is satisfied when the emotional distress is accompanied by physical manifestations or symptoms of its existence. **Armstrong v. Paoli Memorial Hospital,** 430 Pa. Super. 36, 633 A.2d 605 (1993), **appeal denied,** 538 Pa. 663, 649 A.2d 666 (1994) (holding that plaintiff's immediate loss of bladder and bowel continence together with non-transitory depression, nightmares and insomnia constituted physical impact); **Love v. Cramer,** 414 Pa. Super. 231, 606 A.2d 1175 (1992), **appeal denied,** 533 Pa. 634, 621 A.2d 580 (1992) (holding that symptoms of severe depression, nightmares, stress and anxiety requiring psychological treatment could constitute a sufficient physical manifestation to permit recovery for negligent infliction of emotional distress). **See also,** Restatement (Second) of Torts §436A cmt. c.[17] Depending upon the immediacy and obviousness of the nexus, expert testimony may or may not be required to establish the connection between the distress and the physical manifestations. **Krysmalski by Krysmalski v. Tarasovich,** 424 Pa. Super. 121, 135, 622 A.2d 298, 305 (1993) (no medical evidence was necessary to make out bystander claim for negligent infliction of emotional distress).[18]

Linda Fritzinger testified that she saw her husband shot, saw him bleeding, saw him return to their home and believed he was dying (N.T., 8/15/02, pp. 156-159, 175). She testified that her son was shot next; that she saw him take his last step and

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[17] This comment, quoted with approval in **Brown v. Philadelphia College of Osteopathic Medicine, supra** at 681, 674 A.2d at 1136, provides:

> [L]ong continued nausea or headaches may amount to physical illness, which is bodily harm; and even long continued emotional disturbance, as for example in the case of repeated hysterical attacks, or mental aberration may be classified by the courts as illness, notwithstanding their mental character.

[18] In the context of a claim for intentional infliction of emotional distress, the Supreme Court stated that competent medical evidence is necessary to substantiate the nature and extent of severe emotional distress. **Kazatsky v. King David Memorial Park,** 515 Pa. 183, 197, 527 A.2d 988, 995 (1987). While the majority does not state that physical injury is required for intentional infliction of emotional distress, in the concurring opinion of Justice Larsen, it is indicated that there is no absolute necessity for physical results. **Kazatsky, supra** at 200 n.1, 527 A.2d at 996 n.1. **See also, Hackney v. Woodring,** 539 Pa. 266, 652 A.2d 291 (1994)(reversing Superior Court's holding that expert medical testimony was not required to show intentional infliction of emotional distress).

saw him fall; and that she pleaded with him to fight for his life and to breathe (N.T., 8/15/02, pp. 156-158, 188-189). She testified that by the time the medical personnel arrived, she was in shock and had stopped breathing and couldn't stop shaking (N.T., 8/15/02, pp. 159-160, 188-189). She testified that for over three years she has experienced nightmares of what she witnessed, flashes coming out of the gun and her son dying (N.T., 8/15/02, pp. 156-157, 169). She testified and her doctor testified that she suffered from anxiety, depression, nightmares and headaches resulting from the trauma she witnessed and required medical treatment for these problems (N.T., 8/15/02, p. 164; Kraus Deposition, pp. 15-16, 18-19, 22, 24, 39).

In short, the weight of the evidence available to the jury amply supports the jury's verdict. Our sense of justice is not offended by the verdict.

Delay Damages

The parties agree that Plaintiffs are entitled to delay damages for the period from June 29, 2000, one year after the date of service of original process on Defendants, through and including April 8, 2002, the date the case would have been tried had Plaintiffs not requested a continuance. **See Cruz v. Northeastern Hospital,** 801 A.2d 602 (Pa. Super. 2002) (excluding delay damages for the period of time during which the plaintiff caused the delay). The parties also agree on the applicable interest rates at which delay damages are to be computed. The only area of disagreement is with respect to whether delay damages are to be calculated for and added to the amount of punitive damages. Assessment of delay damages is a function of the court, not the jury.

Rule 238(a)(1) provides only for the addition of delay damages to the amount of compensatory damages awarded at trial. Pa. R.C.P. 238(a)(1). In addition to the clear, unambiguous language of the rule, this same issue has been addressed by our Supreme Court. In **Colodonato v. Consolidated Rail Corp.,** 504 Pa. 80, 470 A.2d 475 (1983), the court stated:

> [p]unitive damages, like damages for delay, involve an award in **excess** of actual damages. [Emphasis in original.] It is this exposure to additional financial liability which creates the incentive to settle. ... The augmentation of punitive damage awards with delay damages would not only be im-

> proper but also, in our view, unnecessary to accomplish the salutary purposes of **Rule 238.** [Emphasis added.]

Id. at 89, 470 A.2d at 480.

We, therefore, compute delay damages only on the amount of compensatory damages awarded to the Plaintiffs. These computations are as follows:

(A) **Estate of Brian DeLong**

2000: 186/365 x 9.5% x $1,157,650.85	=	$56,042.99
2001: 10.5% x $1,157,650.85	=	$121,553.34
2002: 98/365 x 5.75% x $1,157,650.85	=	$17,872.23
Total Delay Damages for the Estate of Brian Delong		$195,468.56[19]

(B) **Leonard Fritzinger**

2000: 186/365 x 9.5% x $200,000	=	$9,682.19
2001: 10.5% x $200,000	=	$21,000.00
2002: 98/365 x 5.75% x $200,000	=	$3,087.67
Total Delay Damages for Leonard Fritzinger		$33,769.86

(C) **Linda Fritzinger**

2000: 186/365 x 9.5% x $250,000	=	$12,102.74
2001: 10.5% x $250,000	=	$26,250.00
2002: 98/365 x 5.75% x $250,000	=	$3,859.59
Total Delay Damages for Linda Fritzinger		$42,212.33

The amount of delay damages in total to all three Plaintiffs is Two Hundred Seventy-One Thousand Four Hundred Fifty Dollars and Seventy-Five Cents ($271,450.75).

In accordance with Rule 238, these amounts will be added to the jury's verdict for compensatory damages.

CONCLUSION

For the foregoing reasons, both parties' motions for a new trial will be denied. Delay damages will be computed only on the portion of the verdict representing compensatory damages.

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[19] Of this amount of delay damages, Two Thousand Fifty-Six Dollars ($2,056.00) is attributable to the wrongful death claim and One Hundred Ninety-Three Thousand Four Hundred Twelve Dollars and Fifty-Six Cents ($193,412.56) to the survival action.

DAVID KOCH and LOUISE KOCH, h/w, and HEATHER ANN KOCH, Plaintiffs vs. SIGNATURE BUILDING SYSTEMS, INC. and SCOTT R. BEERS, MARY BEERS, MATT BEERS and DAVE SUKINKA, individually and d/b/a BEERS MODULAR and MOBILE HOMES, Defendants vs. ELECTROMODE, Additional Defendant

Civil Action—Products Liability—Breach of Warranty—Malfunction Theory—Expert Testimony—Emotional Distress As an Element of Damages for Breach of Contract

1. Under the malfunction theory of warranty, plaintiffs must prove an actual malfunction or defect in a product in order to establish a **prima facie** case. Proof of the cause of the malfunction or defect is not required.

2. Where the product claimed to be defective consists of multiple components and the defect claimed is not only in the product as a whole, but in a specific part of that product whose defect is not apparent, the claimant has the burden of establishing a defect in the component part before the malfunction theory of warranty can be relied upon to prove a breach of warranty claim against the manufacturer of the component part.

3. Where the matter before the fact-finder is beyond the skill and training of an ordinary layperson, and cannot be understood from knowledge gained by practical experience and common sense, it is incumbent upon the plaintiff as part of his burden to present expert testimony.

4. The appearance of a mysterious black substance on the ceilings and walls of a newly constructed modular home within months of its construction and delivery to the buyer, while perhaps showing a defect in the home as a whole, does not establish a defect in any specific component of the home—here baseboard heaters—absent evidence that the component part claimed to be defective is itself the cause of the black substance.

5. Claims of emotional distress will not lie in a breach of contract action except where (1) the breach was wanton or reckless, (2) the breach caused bodily harm, and (3) the wanton or reckless breach of contract to render a performance was of such a character that it was foreseeable to the defendant when the contract was made that the breach would cause mental suffering for reasons other than pecuniary loss.

NO. 00-0195

EDWARD B. McDAID, Esquire—Counsel for Plaintiffs.

TERRENCE J. McDONALD, Esquire—Counsel for Defendant, Signature Building Systems, Inc.

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AMENDED MEMORANDUM OPINION

NANOVIC, J.—January 14, 2004

FACTUAL BACKGROUND

Five months after moving into their new home, David Koch and Louise Koch (Plaintiffs) discovered what the parties have described as a "black shadowy substance" on the surface of various walls and ceilings of their home. What the substance is; whether the cause is Defendants' conduct; whether, because of it, the home is defective; whether the substance poses a health risk to the Plaintiffs are all issues in this case.

The home is a "Mayfield 9" modular home manufactured by the Defendant, Signature Building Systems, Inc. ("Signature"), and sold to the Plaintiffs and installed by the Defendant, Beers Modular and Mobile Homes ("Beers"). Signature and Beers (both are referred to collectively herein as the Defendants) as the manufacturer and seller of modular homes respectively were merchants with respect to such goods at the time of sale. The Additional Defendant, Electromode ("Electromode"), is the manufacturer of the electric baseboard heating units existing in the home at the time of purchase.

The home was purchased pursuant to an agreement between the Plaintiffs, as buyers, and Beers, as seller, dated February 1, 1996. Pursuant to this agreement, Beers installed and erected the modular home on Plaintiffs' property. On July 20, 1996, Plaintiffs took possession and moved into the home.

In December 1996, Plaintiffs first noticed the black substance on the walls and ceiling of the home. This condition was reported to Defendants, however, despite various efforts by Defendants to eliminate and correct the problem, including replacement of the baseboard heating units, the problem persisted. In consequence, on February 2, 2000, Plaintiffs commenced suit, by complaint, against Signature and Beers. In their complaint, Plaintiffs claim that "the foreign substance has rendered the premises uninhabitable and constitutes a breach of express warranties and warranties of fitness for a particular purpose and merchantability," and that the presence of the substance has caused the Plaintiffs to suffer "severe emotional distress and physical upset and injury for which additional dam-

ages are claimed." (Complaint, paragraphs 15 & 19)[1] Later, on the basis of allegations that the black substance was a result of the malfunction of, or a defect in, the electric baseboard heating in the home which was manufactured by Electromode, Defendants were granted leave to join Electromode in these proceedings. Defendants have filed joinder complaints joining Electromode under theories of negligence, strict liability and breach of warranty. Plaintiffs have continued to live in the home until the present time.

Both the Defendants and Electromode have filed Motions for Summary Judgment which are now before us for disposition.

DISCUSSION

In their motion, Defendants argue that Plaintiffs have failed to present any evidence to support their claims of breach of warranty or contract, or any basis for an award of damages for emotional distress or personal injuries. Plaintiffs admit that they have failed to produce any expert reports which (1) identify the etiology of the black substance present on the interior surfaces of their home; (2) establish a causal link between any acts or omissions of the Defendants and the black substance; or (3) establish a causal link between the existence of the black substance and the personal injuries alleged in their complaint (**See** Defendants' Motion and Plaintiffs' Answer, paragraph 26). Electromode likewise contends, and Defendants admit, that Defendants in their joinder of Electromode in these proceedings have failed to present any expert opinion identifying a defect in the Electromode heaters or stating that the presence of the black substance was caused by Electromode heaters (**See** Electromode's Motion and Defendants' Answer, paragraph 20). Both Defendants and Electromode further contend that such information is essential to the claims made against them. Plain-

[1] In particular, the Plaintiff, Louise Koch, claims that she has developed allergies and asthma requiring medical treatment and care. The Plaintiffs' daughter, Heather Ann Koch, also a named Plaintiff in Plaintiffs' suit, who resides in the home with her parents, claims that she has developed asthma and severe headaches requiring medical treatment and care. Her theory of libility—breach of express warranties and warranties of fitness for a particular purpose and merchantability—are the same as her parents. Accordingly, for convenience, we have subsumed Heather's claims within those of her parents in addressing Defendants' and Additional Defendant's motions for summary judgment.

tiffs respond that they purchased a new modular home from Defendants; that the development of black areas throughout the home within months of its delivery, which have continued to appear, is an inherent defect; that neither they nor any third party have done anything in the home, beyond those things which would normally be associated with everyday living activities, that could account for the development of the black substance; and that this is all they are required to prove to establish the home is defective and in breach of warranty.

Under Pa. R.C.P. 1035.2, a court may grant summary judgment on an evidentiary record that either: (1) shows that the material facts are undisputed; or (2) contains insufficient evidence of facts to make out a **prima facie** cause of action or defense. **McCarthy v. Dan Lepore & Sons Co., Inc.,** 724 A.2d 938 (Pa. Super. 1998), **reargument denied** (March 4, 1999), **appeal denied,** 560 Pa. 693, 743 A.2d 921 (1999), **reconsideration denied** (December 6, 1999). The court's review of the record "must be conducted in the light most favorable to the non-moving party, and all doubts regarding the existence of a genuine issue of material fact must be resolved against the moving party." **Young v. Commonwealth, Dept. of Transportation,** 560 Pa. 373, 744 A.2d 1276, 1277 (2000), citing **Ertel v. Patriot-News Co.,** 544 Pa. 93, 98, 674 A.2d 1038, 1041 (1996), **cert. denied,** 519 U.S. 1008, 117 S.Ct. 512, 136 L.Ed. 2d 401 (1996). In addition,

> [f]ailure of a non-moving party to adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof such that a jury could return a verdict in its favor establishes the entitlement of the moving party to judgment as a matter of law.

Young, supra at 1277. Summary judgment may only be granted in cases where, based upon the evidentiary record, it is clear and free from doubt that the moving party is entitled to judgment as a matter of law. **Sebelin v. Yamaha Motor Corp., USA,** 705 A.2d 904 (Pa. Super. 1998).

Moreover, a plaintiff cannot successfully oppose a motion for summary judgment on the basis of conclusions or suppositions made in the plaintiff's complaint. **Delate v. Kolle,** 667 A.2d 1218 (Pa. Commw. 1995), **appeal denied,** 544 Pa. 677, 678 A.2d 367 (1996). In order to defeat a motion for summary judgment, specific facts must be set forth either by way of af-

fidavit, deposition testimony, or some other form of proof. **DeWeese v. Anchor Hocking Consumer and Industrial Products Group,** 427 Pa. Super. 47, 628 A.2d 421 (1993); **Atkinson v. Haug,** 424 Pa. Super. 406, 622 A.2d 983 (1993).

In order to prove a **prima facie** case of breach of warranty, a plaintiff must prove the existence of the warranty, breach thereof, causation and damages. To establish a breach of either the implied warranty of marketability or the warranty of fitness for a particular purpose, the plaintiff must show that the product purchased from the defendant was defective. **Lenkiewicz v. Lange,** 242 Pa. Super. 87, 363 A.2d 1172 (1976). Similarly, in actions in negligence and strict liability the claimant must prove that the product was defective and that a defect caused the injury. **Riley v. Warren Manufacturing, Inc.,** 455 Pa. Super. 384, 688 A.2d 221 (1997); **Sherk v. Daisy-Heddon,** 498 Pa. 594, 450 A.2d 615 (1982). Plaintiffs, and apparently Defendants as well, rely on the proposition that they can establish responsibility, whether sounding in tort or contract, by demonstrating that the product functioned improperly in the absence of abnormal use and reasonable secondary causes. Quoting **MacDougall v. Ford Motor Co.,** 214 Pa. Super. 384, 257 A.2d 676 (1969), **overruled on other grounds** in **REM Coal Co., Inc. v. Clark Equipment Co.,** 386 Pa. Super. 401, 563 A.2d 128 (1989), Plaintiffs argue:

> Proof of the specific defect in construction or design causing a mechanical malfunction is not an essential element in establishing breach of warranty. 'When machinery "malfunctions", it obviously lacks fitness regardless of the cause of the malfunction. Under the theory of warranty, the "sin" is the lack of fitness as evidenced by the malfunction itself rather than some specific dereliction by the manufacturer in constructing or designing the machinery.'

Id. at 389, 257 A.2d at 679.[2]

Here, however, Plaintiffs have not necessarily proven a defect arising out of the product so much as they have proven a defect on the product which may or may not be cosmetic: black stains on different walls and ceiling surfaces. Plaintiffs have admitted that they cannot identify the cause and origin of this

[2] The court in **MacDougall** makes clear that the test and standard is the same whether in warranty or strict liability.

substance. We do not know, and apparently Plaintiffs do not know, whether the substance is something that is part of the home or caused by the manner of construction, or whether it has somehow gotten into the home.

As we understand the malfunction theory of warranty, Plaintiffs must prove an actual malfunction or defect in the product in order to establish a **prima facie** case. In both **MacDougall** and **Ducko v. Chrysler Motors Corp.,** 433 Pa. Super. 47, 639 A.2d 1204 (1994), cases cited by Plaintiffs in support of their position, plaintiffs presented evidence that the steering mechanisms in relatively new cars malfunctioned, causing the drivers to lose control. The Superior Court in both cases held that despite the absence of expert testimony, the failure of the steering in and of itself, in the absence of a reasonable secondary cause or misuse by the plaintiff, would take the breach of warranty claim to the jury.

Although we believe that the evidence to which the Plaintiffs refer does not meet the threshold requirements of the malfunction doctrine, we also believe that on the record before us, in evaluating Plaintiffs' claims, we may consider the report of Electromode's expert, Dale J. Cagwin. Mr. Cagwin inspected Plaintiffs' home on September 3, 2002. At that time he observed that certain areas of the attic insulation were not tightly packed against the ceiling. This condition was also observed in a July 1997 report of Keystone Inspection Service. According to the Cagwin report, when walls and attics are poorly insulated or gaps exist between insulation and framing members, cold air from outside and from within the attic space can migrate to spaces on the interior side of the insulation and cool framing members. When this occurs, and when warm moist air from within the home comes into contact with the cold air and the cooled framing members, moisture in the air condenses and the condensed moisture, combined with the building materials, creates an environment for mold to grow.

Samples Mr. Cagwin took of the black substance were examined using polarized light microscopy. The tests identified a significant amount of the substance as mold and Mr. Cagwin opined in his report that based upon the condition of the attic insulation and his testing, mold was the cause of the black stain

in Plaintiffs' home.[3] Mr. Cagwin further noted in his report that Mrs. Koch testified in depositions that in November of 1999 she saw moisture at the location of one of the black stains on the ceiling and that drops of moisture fell from the stained area. If believed, this evidence would support a finding that the black substance has as its cause a defect in the construction of the home. This scenario would also explain why the black substance did not appear and was not discovered until December 1996, shortly after the first heating season in which the Plaintiffs were in the home. **Cf. Tatlovich v. Pennsylvania Nat'l Mutual Casualty Ins. Co.,** PICS case no. 03-1692 (C.P. Beaver Co., October 10, 2003) (finding that because mold damage in plaintiffs' bathroom may have been caused by water damage, a covered peril in plaintiffs' homeowner's policy, the efficient proximate cause rule defeated defendant insurer's motion for summary judgment on the basis of the policy's mold exclusion).

That the evidence will sustain a viable claim of breach of warranty against Signature and Beers does not mandate the same result with respect to Defendants' claims against Electromode. Electromode is the manufacturer of only a component part of the home, electric baseboard heating units. While the evidence as a whole permits the finding of a defect in the home, absolutely no evidence has been presented identifying a defect in the Electromode heaters or identifying the heaters as the cause of the black substance.[4] Absent proof of a malfunction of the heating system and elimination of other potential causes of the black substance (**e.g.,** mold), the claims against Electromode require expert testimony. **Spino v. John S. Tilley Ladder Co.,** 448 Pa. Super. 327, 671 A.2d 726 (1996), **aff'd,** 548 Pa. 286, 696 A.2d 1169 (1997).

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[3] Defendants' expert, Harry M. Neill, based on samples of the black substance collected on February 10 and February 24, 2003, concludes that the black deposits are not fungal (mold) growth, and states that in order to possibly identify the black deposits, additional samples must be taken and tested. There is no indication that this has occurred.

[4] **Demmler v. SmithKline Beecham Corp.,** 448 Pa. Super. 425, 434, 671 A.2d 1151, 1155 (1996), **appeal denied,** 546 Pa. 655, 684 A.2d 557 (1996), ("there must be some reasonable connection between the act or omission of the defendant and the injury suffered by the plaintiff " (**quoting Burnside v. Abbott Laboratories,** 351 Pa. Super. 264, 274, 505 A.2d 973, 978 (1985))).

Expert testimony is required when the matter before the fact-finder involves skill and training beyond that of an ordinary layman. On this point, the Superior Court stated:

> Frequently, the jury, or the court trying a case without a jury, is confronted with issues which require scientific or specialized knowledge or experience in order to be properly understood. Certain questions cannot be determined intelligently merely from the deductions made and inferences drawn from practical experience and common sense. On such issues, the testimony of one possessing special knowledge or skill is required in order to arrive at an intelligent conclusion. ... In these matters, where laymen have no knowledge or training, the court and jury are dependent on the explanations and opinions of experts.
>
> In a logical and fundamental sense, a verdict is worth only as much as the evidence upon which it is based. In a complex case, a jury, in order to reach an intelligent conclusion, is dependent on expert testimony. If the jury is enlightened, it will reach the right verdict. Unaided by the explanations and opinions of those with specialized knowledge or skill, the ultimate conclusion might just as well be based on evidence presented in a language unfamiliar to the jury. Unless the jury is comprised of experts in the field, the verdict is based on mere conjecture. Such a verdict is worthless.

Dion v. Graduate Hospital of the University of Pennsylvania, 360 Pa. Super. 416, 425, 520 A.2d 876, 881 (1987) (citation omitted). **See also, Electron Energy Corp. v. Short,** 408 Pa. Super. 563, 573, 597 A.2d 175, 180 (1991), **aff'd,** 533 Pa. 66, 618 A.2d 395 (1993) (holding that the question of whether heating and cooling system was defective required expert testimony).

No expert report has been produced that relates in any way to the heaters. With respect to Defendants' claim of negligence against Electromode, not only is the record barren of any evidence of a defect in the heating system, or that the heating system somehow caused the black substance, there is also no evidence that Electromode failed to exercise due care in the manufacturing or supplying of the heaters.

We do, however, agree with Defendants' contention that Plaintiffs have not proven a basis for damages for personal in-

juries or emotional distress. Plaintiffs have not presented any evidence to establish that the black substance, whatever it is, is harmful. Nor have Plaintiffs presented any evidence that this substance caused, or even could cause, them to suffer any of their alleged health problems. This is not a case where the conditions of which Plaintiffs complain are so clearly caused by Defendants' conduct that expert testimony is not required.

Further, in actions for breach of contract, claims for emotional suffering will not lie except where (1) the breach was wanton or reckless, (2) the breach caused bodily harm, and (3) the wanton or reckless breach of contract to render a performance was of such a character that it was foreseeable to the defendant when the contract was made that the breach would cause mental suffering for reasons other than pecuniary loss. **Rodgers v. Nationwide Mutual Insurance Co.,** 344 Pa. Super. 311, 496 A.2d 811 (1985). To meet this standard, the conduct which constitutes breach must be close to outrageous. **Id.** at 320, 496 A.2d at 815-16, **citing Harrison v. Nationwide Mutual Fire Insurance Company,** 580 F. Supp. 133, 135-36 (E.D. Pa. 1983). The evidentiary record in this case does not show any breach by the Defendants, let alone a breach which meets this exacting standard. The Plaintiffs may not, therefore, recover for emotional distress or personal injuries in this case.

COMMONWEALTH OF PENNSYLVANIA, Plaintiff vs. RODERICK ALAN ELLIOTT, Defendant

Criminal Law—Custodial Interrogation—Investigative Detention— ***Miranda*** *Warnings—****Corpus Delicti*** *Rule—Closely Related Crime Exception*

1. A person is seized by police when, considering the totality of the circumstances, a reasonable person based on objective criteria would believe that he was not free to decline the police's request or terminate the encounter.

2. A person is "in custody" when, under the totality of the circumstances, the conditions and/or duration of the detention become so coercive as to constitute the functional equivalent of formal arrest.

3. **Miranda** warnings are required prior to a custodial interrogation but not during an "investigative detention."

4. A custodial interrogation must be supported by probable cause. In contrast, reasonable suspicion that a person has committed, is committing, or is about to commit a crime must support an investigative detention.

5. The unexplained absence of a driver from the scene of a one-car accident—in which violations of the Vehicle Code are suspected—with the car aban-

doned and blocking traffic, justifies an investigative detention of a driver, when located, to determine what occurred.

6. The **corpus delicti** rule bars the use of an accused's statements as the sole evidence against him to prove the existence of a crime. Before such statements may be used, independent evidence must establish (1) a loss has occurred and (2) the loss occurred as a result of a criminal agency.

7. The closely related crime exception to the **corpus delicti** rule permits use of an accused's statements against him for more than one crime even though the **corpus delicti** for only one of the crimes charged has been shown. For this exception to apply, the relationship between the crimes must be sufficiently close so that the purpose behind the **corpus delicti** rule—to avoid the accused admitting to a crime that did not occur—is not violated.

NO. 527 CR 02

JOSEPH J. MATIKA, Esquire, Assistant District Attorney—Counsel for Commonwealth.

WILLIAM G. SCHWAB, Esquire and JOSEPH V. SEBELIN, JR., Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, J.—January 13, 2004

Before us is Defendant Roderick Alan Elliott's Omnibus Pretrial Motion in the nature of a motion to suppress evidence and for habeas corpus relief. Based upon the evidence received at the hearing on Defendant's motion, we make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On July 26, 2002, at approximately 1:08 a.m., Officer Carl Breiner of the Nesquehoning Borough Police Department was dispatched to the scene of a one-vehicle accident on State Route 209 in the Borough of Nesquehoning, Carbon County, Pennsylvania near its boundary with the Borough of Jim Thorpe, Carbon County, Pennsylvania.

2. Officer Breiner arrived on the scene at approximately 1:14 a.m. and observed a 1998 Mercury Tracer blocking the northbound lane of traffic. State Route 209 is a two-lane highway, one lane heading north and one south. The officer testified it was a calm night.

3. After a preliminary investigation, Officer Breiner was able to determine that the vehicle, for reasons unexplained from the physical evidence present, drove off the road on the right-hand side, traveled up an embankment, struck a rock causing damage

to the undercarriage, returned to the road, and came to rest blocking the entire northbound lane of traffic. Skid marks were not present prior to the point where the vehicle left the road but were present at the point where the vehicle returned to the road. The front two tires of the vehicle were flat and the vehicle was obviously inoperable.

4. Through Officer Breiner's observations he was able to determine that the accident was recent and had occurred shortly before his arrival.

5. At the time of Officer Breiner's arrival, neither the driver of the vehicle nor any passengers were present from whom Officer Breiner could obtain information as to why the accident occurred.

6. Officer Breiner ran a vehicle registration search and learned the vehicle was leased. At this point he entered the vehicle, which was unlocked and, while searching in the glove compartment for an owner's card or insurance information, located a receipt from a rental agency containing the name and telephone number of the person leasing the vehicle.

7. At Officer Breiner's request, this number was called by the Carbon County Communications Center. The person answering advised the Communications Center that the driver of the vehicle, Roderick Alan Elliott ("Defendant"), had contacted them minutes earlier and reported that he was located at The Inn at Jim Thorpe where he had made arrangements to stay overnight. This information was relayed to Officer Breiner.

8. When Officer Breiner learned of the identity and location of the driver, he directed three other officers who responded to the scene after his arrival and at his request to go to The Inn at Jim Thorpe to locate the driver and advise him that Officer Breiner wanted to speak with him. The time was approximately 1:45 a.m. Officer Breiner remained at the scene to complete his investigation and to wait for the arrival of a towing service for the removal of the Mercury Tracer.

9. The three officers, all in uniform, went to The Inn at Jim Thorpe and learned from the desk clerk that the Defendant had registered to spend the evening. Two of the officers went to Defendant's hotel room. There they knocked on the door and found the Defendant inside, awake and undressed.

10. The Defendant was advised of the purpose of the officers' visit, was told that the investigating police officer would like to speak with him about the accident, and was asked if he would come downstairs for these purposes. The Defendant voluntarily agreed to immediately come downstairs.

11. While the Defendant dressed, one of the officers remained in the Defendant's room and the second remained outside in the hallway. The third officer came upstairs as the other two were waiting for Defendant. The Defendant was not questioned by any of the officers while they waited for him to dress.

12. At some point prior to the officers' going downstairs with the Defendant to meet with Officer Breiner, Officer Breiner had been contacted, was advised that the Defendant was located, and told the officers that he would be there soon.

13. Once the Defendant's vehicle had been removed from the highway, Officer Breiner went to The Inn at Jim Thorpe. Officer Breiner arrived at the Inn at approximately 2:05 a.m. Upon his arrival Officer Breiner found the three officers outside the Inn with the Defendant.

14. The Defendant and the three officers exited the Inn moments before Officer Breiner's arrival. Officer Breiner met with the Defendant outdoors in plain view of the public and passing motorists.

15. Officer Breiner identified himself to the Defendant and asked the Defendant why his vehicle was sitting in the middle of State Route 209. The Defendant responded that he had had a few beers, fell asleep and drove up the embankment.

16. While speaking with Officer Breiner, the Defendant exhibited classic symptoms of intoxication: slurred speech, a strong odor of alcohol and bloodshot eyes.

17. The Defendant admitted to the officer that he had not had anything to drink since the accident. A preliminary breath test revealed a reading of 0.12 percent.

18. The Defendant was then administered three field sobriety tests and failed all three. At this point, Defendant was placed under arrest for driving under the influence and later advised of the Implied Consent Law.

19. Defendant agreed to submit to a blood alcohol test. The results of the test from the Hazleton General Hospital Laboratory indicated a blood alcohol content of 0.128 percent.

20. Defendant has been charged with two counts of driving under the influence of alcohol, one count for driving while under the influence of alcohol to a degree which rendered him incapable of safe driving and one count for driving while the amount of alcohol by weight in his blood was 0.10% or greater. 75 Pa. C.S. §§3731(a)(1) and 3731(a)(4)(i). Defendant has also been charged with one count of careless driving and one count of failure to drive within the proper lane of traffic, both summary offenses. 75 Pa. C.S. §§3714 and 3309(1).

DISCUSSION

In Defendant's Omnibus Pretrial Motion he contends, **inter alia,** that when the police officers asked him to come downstairs to speak with the investigating officer he was then under arrest and entitled to **Miranda** warnings before being questioned. It is undisputed that **Miranda** warnings were not given. From this, Defendant argues that all information subsequently obtained from him, including any statements made, the results of the field sobriety tests and his blood alcohol test results, should be suppressed. Defendant further argues that any statements made by him acknowledging that he was the driver of the vehicle and had been drinking earlier violate the **corpus delicti** rule and should be suppressed.

SUPPRESSION—APPLICABILITY OF *MIRANDA* (REQUIREMENT OF A CUSTODIAL INTERROGATION)

On the first issue, we must determine whether Defendant was, in fact, in custody at the point when the police asked him to come downstairs to be questioned about the motor vehicle accident in which he was involved. When the historical basis of a constitutional provision is inconclusive in evaluating the reasonableness of certain conduct, the reasonableness of such conduct for search or seizure purposes will be evaluated "under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." **Wyoming v. Houghton,** 526 U.S. 295, 300, 119 S.Ct. 1297, 1300, 143 L.Ed. 2d 408, 414 (1999).

Where reasonable suspicion exists that a person police encounter has or may have committed a crime, police are justified

in stopping and briefly questioning that person to investigate their suspicions. The person is under no obligation to respond and the police are under no obligation to provide **Miranda** warnings. If the person's answers and information gathered are insufficient to provide probable cause to arrest, the person must be released. **Berkemer v. McCarty,** 468 U.S. 420, 439, 104 S.Ct. 3138, 3150, 82 L.Ed. 2d 317, 334 (1984). Only if the defendant is in custody when questioned is he entitled to **Miranda** warnings. **Commonwealth v. Haupt,** 389 Pa. Super. 614, 625-26, 567 A.2d 1074, 1080 (1989). "Warnings are not required ... where general on-the-scene investigatory questioning is conducted to determine whether a crime has been committed or is in progress." **Commonwealth v. Grimes,** 436 Pa. Super. 535, 541, 648 A.2d 538, 541 (1994), **appeal quashed by** 543 Pa. 702, 670 A.2d 642 (1995).

Our courts have recognized three categories of interaction between citizens and the police: a "mere encounter" (or request for information) which need not be supported by any level of suspicion, but carries no official compulsion to stop or to respond; an "investigative detention" which must be supported by reasonable suspicion and permits the police to temporarily stop an individual to investigate the grounds supporting the suspicion; and a "custodial detention" which is the functional equivalent of an arrest and which must be supported by probable cause. **Commonwealth v. Mendenhall,** 552 Pa. 484, 715 A.2d 1117, 1119 (1998). "An investigative detention occurs when a police officer temporarily detains a person by means of physical force or a show of authority for investigative purposes." **Commonwealth v. Bradley,** 724 A.2d 351, 355 (Pa. Super. 1999), **appeal denied,** 560 Pa. 693, 743 A.2d 913 (1999). To justify such a detention, "the police need not establish their suspicions to a level of certainty, a preponderance or even a fair probability." **Commonwealth v. Epps,** 415 Pa. Super. 231, 233, 608 A.2d 1095, 1096 (1992). "The touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.' " **Pennsylvania v. Mimms,** 434 U.S. 106, 108-109, 98 S.Ct. 330, 332, 54 L.Ed. 2d 331, 335 (1977) **(per curiam)** (**quoting Terry v. Ohio,** 392 U.S. 1, 19, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968)).

In the present case more than a mere encounter is involved: We do not believe a reasonable person in Defendant's position would believe he was free to leave or simply close the door and ignore the police officers' request to come downstairs and be questioned about the accident involving his motor vehicle.[1] Accordingly, we find that Defendant was effectively seized at the moment he was asked to come downstairs to be questioned.

Whether the degree of restraint imposed on the Defendant was confined to that of an investigative detention or reached the level of a custodial interrogation must next be determined. The distinction for our purposes is one between an investigatory stop to investigate suspicious conduct and a custodial interrogation in which the accused is physically deprived of his freedom of action in a significant way or is placed in a situation in which he reasonably believes that his freedom of action is significantly restricted by such interrogation. "Interrogation is police conduct calculated to, expected to, or likely to evoke admission." **Commonwealth v. Mannion,** 725 A.2d 196, 200 (Pa. Super. 1999) (en banc) (quotations and citations omitted).

"Among the factors generally considered in determining whether a detention is investigative or custodial are: the basis

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[1] In **Commonwealth v. McClease,** 750 A.2d 320 (Pa. Super. 2000), the court stated:

> In determining whether a 'mere encounter' has risen to the level of an 'investigative detention,' the focus of our inquiry is on whether a 'seizure' of the person has occurred. **Commonwealth v. Mendenhall,** 552 Pa. 484, 715 A.2d 1117, 1120 (1998). Within this context, our courts employ the following objective standard to discern whether a person has been seized: '[W]hether, under all the circumstances surrounding the incident at issue, a reasonable person would believe he was free to leave.' **Commonwealth v. Smith,** 732 A.2d 1226, 1232 (Pa.Super. 1999) (emphasis added) [sic]. **See also Commonwealth v. Matos,** 543 Pa. 449, 672 A.2d 769, 774 (1996). Thus 'a seizure does not occur simply because a police officer approaches an individual and asks a few questions.' **United States v. Kim,** 27 F.3d 947, 950 (3d Cir.1994).
>
> Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the **threatening presence of several officers,** the display of a weapon by an officer, some physical touching of the person of the citizen, **or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.**
>
> **United States v. Mendenhall,** 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980) (emphasis added).

McClease, supra at 324-25.

for the detention (the crime suspected and the grounds for suspicion); the duration of the detention; the location of the detention (public or private); whether the suspect was transported against his will (how far, why); the method of detention; the show, threat, or use of force; and, the investigative methods used to confirm or dispel suspicions." **Commonwealth v. Douglass,** 372 Pa. Super. 227, 245, 539 A.2d 412, 421 (1988), **appeal denied,** 520 Pa. 595, 552 A.2d 250 (1988). "In determining whether an individual [is] in custody, a court must examine all of the circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." **Stansbury v. California,** 511 U.S. 318, 322, 114 S.Ct. 1526, 1528-29, 128 L.Ed. 2d 293, 298 (1994) (per curiam) (citations and quotations omitted). It is at that point that our courts have determined that the danger of coercion, whether explicit or tacit, unfairly affects the free and intelligent exercise of choice and requires the police to explain to an individual being questioned his Fifth Amendment rights. While both an investigative detention and a custodial interrogation are seizures within the meaning of the Fourth Amendment, "the latter entails a much great [sic] intrusion on an individual's liberty and privacy interests." **Atwater v. City of Lago Vista,** 532 U.S. 318, 363, 121 S.Ct. 1536, 1562, 149 L.Ed. 2d 549, ___ (2001) (O'Connor, J., dissenting). "It was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the Court to impose the **Miranda** requirements with regard to custodial questioning." **Beckwith v. United States,** 425 U.S. 341, 346-47, 96 S.Ct. 1612, 1616, 48 L.Ed. 2d 1, 7-8 (1996) (citations and quotations omitted). "Fidelity to the doctrine announced in **Miranda** requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated. Thus, we must determine whether [the totality of the circumstances exert] upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights." **Berkemer v. McCarty, supra** at 437, 104 S.Ct. at 3148-49, 82 L.Ed. 2d at 333.

The test is an objective one based upon the totality of the circumstances. The determination of custody "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." **Stansbury, supra** at 323, 114 S.Ct. at 1529, 128 L.Ed. 2d at 298. The standard is to be measured from the viewpoint of a reasonable person innocent of any crime. **Commonwealth v. Jones,** 474 Pa. 364, 373, 378 A.2d 835, 840 (1977), **cert. denied,** 435 U.S. 947, 98 S.Ct. 1533, 55 L.Ed. 2d 546 (1978); **Florida v. Bostick,** 501 U.S. 429, 438, 111 S.Ct. 2382, 2388, 115 L.Ed. 2d 389 (1991) (the reasonable person test presupposes an innocent person). The standard is the same under the Pennsylvania and Federal Constitutions. **Commonwealth v. Busch,** 713 A.2d 97, 100-101 n.5 (Pa. Super. 1998).

In this case there is no dispute from the facts in evidence that the police were validly conducting an investigation into a one-vehicle accident in which the vehicle was left on the highway blocking traffic and the driver left the scene without explanation. The circumstances of the driver's absence at the scene were suspicious and the issue we must decide is not whether Officer Breiner's questions were justified—they were—but whether coercive tactics were employed by police, albeit unwittingly, in questioning Defendant.

That the police, after ascertaining the driver's identity and whereabouts, were within their authority in going to Defendant's room and knocking on his door with the intention of asking him some questions cannot be gainsaid. **Commonwealth v. Roland,** 535 Pa. 595, 609, 637 A.2d 269, 276 (1994) (Montemuro, J., dissenting). Further, the nature and purpose of the investigation actually conducted by the police was not accusatorial or intended to elicit a confession but was clearly fact-finding. The record does not suggest that the police engaged in questioning "calculated to elicit incriminating statements" from the Defendant. Defendant had been identified as the driver of the vehicle and the police wanted to find out what had happened and why he had left the scene. An array of possibilities existed, many of which would not involve criminality.

There is no evidence that when the police officers approached Defendant they intended to arrest him or that prob-

able cause to arrest even existed—to the contrary, commission of a summary offense outside the presence of a police officer will not ordinarily justify a warrantless arrest. **Commonwealth v. Bullers,** 410 Pa. Super. 176, 599 A.2d 662 (1991), **aff'd,** 536 Pa. 84, 637 A.2d 1326 (1994), **reargument denied** (May 4, 1994); **Commonwealth v. Streater,** 422 Pa. Super. 502, 619 A.2d 1070 (1993), **appeal discontinued,** 534 Pa. 653, 627 A.2d 731 (1993); **cf. Atwater v. City of Lago Vista, supra** (if probable cause exists the Fourth Amendment does not preclude a warrantless, full custodial arrest for minor criminal offenses punishable only by a fine, however, States may choose to impose more restrictive safeguards through statutes limiting warrantless arrests for minor offenses). Still, reasonable suspicion of a possible violation of the Vehicle Code (**e.g.,** Section 3309(1) (driving within a single lane), Section 3714 (careless driving), Section 3746 (duty to report accident involving disabled vehicle)) existed and the police were justified, within the parameters of that suspicion and the unexplained absence of the driver from the scene, to detain and question the Defendant. **Commonwealth v. Douglass, supra** at 243, 539 A.2d at 420 ("Under the Fourth Amendment, … a policeman who lacks probable cause but whose 'observations lead him to reasonably suspect' that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to 'investigate the circumstances that provoke suspicion' "); **cf. United States v. Hensley,** 469 U.S. 221, 229, 105 S.Ct. 675, 680, 83 L.Ed. 2d 604, 612 (1985) (reserving decision on whether **Terry** stops are permitted regardless of the seriousness of the crime involved). The investigation at this point was continuing and ongoing.

When the police first contacted the Defendant he was awake although apparently preparing to go to bed. From the viewpoint of a reasonable person innocent of any crime who had left his car parked on a state highway late at night blocking one lane of a two-lane highway, this visit was natural and likely anticipated. Nor should it be forgotten that a driver under certain circumstances has a statutory duty to remain at the scene and cooperate with police in their investigation of an accident. **See** 75 Pa. C.S. §§3742, 3743 and 3744; **Commonwealth v. Mannion, supra** at 202.

The police, on approaching the Defendant, were not confrontational but clearly stated the reason for their visit and asked if the Defendant would come downstairs so he could be questioned by the investigating officer about the accident involving his automobile. The request was simply that, a request—not a command, order or directive. The Defendant just as clearly recognized the reason for the request and agreed voluntarily, without reservation, that he would come down immediately. The questioning of the Defendant to learn the cause of the accident was done quickly, efficiently and with minimal intrusion to the liberty and privacy interests of the Defendant.

It is, of course, true that an arrest may be effectuated without the actual use of force and without a formal statement of arrest. **Commonwealth v. Douglass, supra** at 242, 539 A.2d at 419. However, not every restriction of freedom, accompanied by questions, implies a custodial interrogation.

> It is well settled that a custodial detention involves something more than mere exercise of control over the suspect's freedom of movement. While a suspect may certainly walk away from a **mere encounter** with a police officer, **every** traffic stop and **every Terry** stop involves a stop and a period of time during which the suspect is not free to leave but is subject to the control of the police officer detaining him.

Id. at 242, 539 A.2d at 419 (emphasis in original). Whether an encounter is to be deemed "custodial" must be determined with reference to the totality of the circumstances. Ultimately, we must determine whether the stop "exerts upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights." **Id.** at 242-43, 539 A.2d at 420. If, under the totality of the circumstances, the conditions and duration of the detention become the functional equivalent of arrest, **Miranda** warnings are required.

To our knowledge, no force was threatened or implied by the police. The Defendant was not transported any great distance, but simply asked to come downstairs into a public area where Officer Breiner wanted to speak with him. Nothing suggests that the circumstances under which Defendant was questioned were hostile or coercive. The questions asked, which were

natural for the circumstances, and Defendant's responses, together with Officer Breiner's visual observations, led Officer Breiner to reasonably conclude that Defendant was intoxicated and was likely intoxicated at the time of the accident.

Although Defendant was first approached in his hotel room by two officers—the third did not come upstairs until Defendant began dressing—none of the officers questioned Defendant about what had occurred, waiting instead for Officer Breiner to arrive, and only one officer entered Defendant's room. Defendant was permitted to dress in private behind a closed door. At no time did the Defendant testify that he felt threatened, intimidated or dominated by the surrounding circumstances. Defendant does not claim that his statements were involuntary or that menacing police tactics were employed. **Cf. Commonwealth v. Zogby,** 455 Pa. Super. 621, 689 A.2d 280 (1997), **appeal denied,** 548 Pa. 653, 698 A.2d 67 (1997) (finding custodial interrogation where, at 4:00 a.m., police entered the bedroom of defendant, a suspected hit and run driver, shook defendant awake, and directed defendant outside to be questioned; defendant's motion to suppress oral statements and physical evidence granted).

The absence of physical restraints or coercive tactics and the presence of cooperation and consent by Defendant throughout are persuasive evidence of a reasonable investigative detention. What we recently stated in **Commonwealth v. Yorgey,** 16 Carbon Cty. L.J. 50 (2003), is equally applicable here:

> We believe [the police officers'] conduct while investigating this incident was reasonable, responsible and properly focused on the events and on-the-spot observations giving rise to [their] suspicions. Defendant's conduct, in turn, was consistent with that of a willing and cooperative party. The record does not support a belief that Defendant was physically deprived of his freedom in any significant way or that he was placed in a situation in which he reasonably believed that his freedom of action or movement was restricted by [police officers'] questions. Neither the conditions nor duration of Defendant's detention became so coercive as to constitute the functional equivalent of formal arrest.

Id. at 58. For similar reasons, we find the Defendant here was subject to an investigative stop at the time of questioning and

was not in police custody. While perhaps inconvenient, the degree of intrusion was not unreasonable for Fourth Amendment purposes. Defendant's Motion to Suppress for failure to provide **Miranda** warnings is accordingly denied.

SUPPRESSION—THE *CORPUS DELICTI* RULE

Defendant next argues that the **corpus delicti** rule protects him from the use of statements made by him to the police to prove their case against him.

"The **corpus delicti** rule places the burden upon the prosecution to establish that a crime has actually occurred before a confession or admission of the accused connecting him to the crime can be admitted." **Commonwealth v. Verticelli,** 550 Pa. 435, 706 A.2d 820, 822 (1998) (emphasis added), **abrogated on other grounds by Commonwealth v. Taylor,** 831 A.2d 587 (Pa. 2003).

> The '**corpus delicti** consists of the occurrence of a loss or injury resulting from some person's criminal conduct.' **Commonwealth v. McMullen,** 545 Pa. 361, 681 A.2d 717, 721 (1996). The **corpus delicti** rule requires the Commonwealth to present evidence that: (1) a loss has occurred; and (2) the loss occurred as a result of a criminal agency. **Commonwealth v. May,** 451 Pa. 31, 301 A.2d 368, 369 (1973). Only then can 'the Commonwealth … rely upon statements and declarations of the accused' to prove that the accused was, in fact, the criminal agent responsible for the loss. **Id.** 'The grounds on which the rule rests are the hasty and unguarded character [that] is often attached to confessions and admissions and the consequent danger of a conviction where no crime has in fact been committed.' **Commonwealth v. Turza,** 340 Pa. 128, 16 A.2d 401, 404 (1940).

Id., 831 A.2d at 590 (emphasis in original).

The quantum of proof required to permit admission of the statements is proof

> by a preponderance of the evidence that a crime has been committed. **Commonwealth v. Reyes,** 545 Pa. 374, 381-382, 681 A.2d 724, 727 (1996), **cert. denied,** 520 U.S. 1174, 117 S.Ct. 1445, 137 L.Ed.2d 551 (1997). That is, the evidence must be more consistent with a crime than an accident, although the possibility of an accident need not be eliminated. **Commonwealth v. Bardo,** 551 Pa. 140, 709

> A.2d 871, 874 (1998). The **corpus delicti** may be established by circumstantial evidence. **Reyes** at 382, 681 A.2d at 727.
>
> A higher quantum of proof is required to permit **consideration** of those statements once in evidence: The factfinder may only consider a defendant's extra-judicial statements in making the ultimate determination of guilt where the evidence as a whole, including the inculpatory statements, establishes the **corpus delicti** beyond a reasonable doubt. **Id.** 'The criminal responsibility of a particular defendant does not form part of the corpus delicti, [sic] and may be proven by a confession.' **Commonwealth v. Daniels,** 281 Pa.Super. 334, 340, 422 A.2d 196, 199 (1980).

Commonwealth v. Friend, 717 A.2d 568, 569-70 (Pa. Super. 1998) (emphasis in original) (footnote omitted). For purposes of the rule, the identity or criminal responsibility of the accused is not a component of the rule. **Commonwealth v. Verticelli, supra,** 706 A.2d at 825 n.7. Further, the rule only applies to inculpatory statements. **Id.** at 824.

The **corpus delicti** rule is one of evidence and not one of substantive law. **Commonwealth v. Verticelli, supra,** 706 A.2d at 822. On this basis alone, then, we believe it would be appropriate to dismiss Defendant's motion since, not until trial, can it fully be determined whether sufficient evidence exists independent of Defendant's statements to prove the existence of a crime. For this reason, for instance, it is inappropriate for a court, which has granted a suppression motion to, on the basis of the evidence suppressed, also grant habeas corpus relief since the Commonwealth, at trial, may be able to prove its case through other evidence. **Commonwealth v. Keller,** 823 A.2d 1004, 1012 n.5 (Pa. Super. 2003), **appeal denied,** 832 A.2d 435 (Pa. 2003).

Still, we believe it helpful to explain, on the face of the record before us, why the rule would not bar Defendant's statements. Defendant contends, in this case, that his admission to Officer Breiner that he was the driver of the car and had been drinking previously may not be admitted before the **corpus delicti** for driving under the influence is first established independent of his statements. Defendant argues, as did the defendant in **Verticelli,** that the Commonwealth has not established the **cor-**

pus delicti of the crime of driving under the influence because only Defendant's statement proves that he was the driver of the Mercury Tracer and, without this statement, the Commonwealth has no evidence that the driver of the motor vehicle was under the influence of alcohol at the time of the accident. This premise, however, is incorrect.

Prior to Officer Breiner's decision to look for Defendant at The Inn at Jim Thorpe, Officer Breiner had learned that the vehicle involved in the accident was rented to Defendant and Defendant's name and telephone number appeared in the vehicle on a receipt from the rental agency. When this number was called, the person answering advised that Defendant was the driver of the vehicle and that Defendant, moments earlier, had stated he had made arrangements to stay at The Inn at Jim Thorpe that evening. It was this chain of events which first identified Defendant as the driver of the vehicle and his whereabouts and led Officer Breiner to The Inn at Jim Thorpe.

The circumstances of the accident observed by Officer Breiner at the scene were suspicious for more than a routine accident. No indications were apparent that the accident was caused by external forces such as a sudden emergency, bright sunlight or treacherous road conditions. The implication was that internal factors personal to the driver such as drowsiness, the influence of alcohol or inattentiveness were the cause.

Equally, if not more suspicious was the absence of the driver from the scene or factors such as the presence of emergency personnel to explain his absence. The accident involved a single vehicle, clearly inoperable, blocking the northbound lane of traffic and apparently abandoned by the driver. These circumstances, at a minimum, suggested that the driver had, without explanation, left the scene of an accident, and perhaps had panicked and fled.

Although the facts and circumstances first available to Officer Breiner at the scene did not unerringly establish the **corpus delicti** for driving under the influence, or even reasonably suggest intoxication as the cause of the accident, the circumstances did, within reason, imply that careless driving and a failure to drive within the proper lane of traffic had occurred. 75 Pa. C.S. §§3309(1), 3714. Defendant's statements to Officer Breiner that he had been drinking, fell asleep and drove

up the embankment were both material and relevant to these summary offenses. When combined with Officer Breiner's direct observations of Defendant, Officer Breiner had a reasonable suspicion that Defendant had been driving under the influence and had a reasonable and legitimate basis to request field sobriety tests and blood alcohol testing.

The closely related crime exception to the **corpus delicti** rule "comes into play where an accused is charged with more than one crime, and the accused makes a statement related to all the crimes charged, but the prosecution is only able to establish the **corpus delicti** of one of the crimes charged. Under those circumstances where the relationship between the crimes is sufficiently close so that the introduction of the statement will not violate the purpose underlying the **corpus delicti** rule, the statement of the accused will be admissible as to all the crimes charged." **Commonwealth v. Verticelli, supra,** 706 A.2d at 823 (emphasis added). "Where a defendant's confession relates to two separate crimes with which he is charged, and where independent evidence establishes the **corpus delicti** of only one of those crimes, the confession may be admissible as evidence of the commission of the other crime." **Commonwealth v. Taylor, supra,** 831 A.2d at 592 (quotation and citation omitted). The fact that the offenses are of two different grades, here a summary offense and a misdemeanor, is of no import. **Commonwealth v. Verticelli, supra,** 706 A.2d at 825-26 (finding rule applicable to an admission relevant to proof of driving under the influence for which the **corpus delicti** was not established but for which the **corpus delicti** of leaving the scene of an accident, a summary offense, was established). What is required is that the "relationship between the crimes ... is sufficiently close so that the introduction of the confession does not violate the purpose underlying the **corpus delicti** rule." **Commonwealth v. Taylor, supra,** 831 A.2d at 594 (emphasis in original).

> The purpose behind the **corpus delicti** rule is the ultimate consideration in determining whether two crimes are closely related so as to implicate the exception. Where the relationship between the crimes to which the defendant has confessed is close and the policy underlying the **corpus delicti** rule—to avoid convictions for crimes that did not

> occur—is not violated, the exception renders the confession admissible for all closely related crimes.

Id. at 595-96 (emphasis in original). The relationship between the crimes must be sufficiently close "so as to avoid admitting a confession for a crime that did not occur … ." **Id.** at 594.

More than Defendant's statements link the summary offenses of careless driving and driving on roadways laned for traffic with the misdemeanor offense of driving under the influence. The offenses occurred simultaneously and, although the offenses share at least one common element—driving—they are also closely related in that driving carelessly and a failure to remain within the correct lane of traffic are symptomatic of an individual who is incapable of safe driving.

When approached and asked as to why his vehicle was parked in the center of Route 209, Defendant's explanation, in conjunction with Officer Breiner's observations from the scene and observations of Defendant, formed a legitimate basis to charge Defendant with driving under the influence. The information available to Officer Breiner at the time he first approached Defendant when combined with the appropriateness of the questions asked and the surrounding circumstances convince us that Defendant was not taken advantage of or unduly induced to confess to a crime that did not occur.

Defendant's remaining challenges contained in his Omnibus Pretrial Motion are dependant upon the success of his motions for suppression. Since, for the reasons stated, the motions will be denied, Defendant's remaining motions for habeas corpus relief will likewise be denied.

CONCLUSIONS OF LAW

1. At the time Officer Breiner directed the police officers to Defendant's room, Officer Breiner had reasonable suspicion to believe the Defendant was the driver of the motor vehicle abandoned at the scene of the accident he was investigating and that Defendant had violated the Motor Vehicle Code, specifically, by driving carelessly and outside of his lane of traffic.

2. Officer Breiner's suspicions constituted reasonable, objective grounds to detain the Defendant and question him about the motor vehicle accident he was investigating and Defendant's involvement in that accident.

3. The police officers' request that the Defendant come downstairs to be questioned was for legitimate law-enforcement purposes, reasonable under the circumstances, and did not transform the detention into a custodial interrogation. The request was knowingly and voluntarily agreed to by the Defendant.

4. The questioning of Defendant was neither hostile nor coercive, was performed incident to a proper investigation, and was conducted in a manner that was appropriate to effectively confirm or dispel their suspicions.

5. The statements made by Defendant to Officer Breiner were voluntary and not the product of a custodial interrogation. The statements were not required to be preceded by **Miranda** warnings.

6. At the time of Defendant's arrest, Officer Breiner's belief that Defendant had been driving while intoxicated was legitimate and reasonable. Defendant was arrested based upon sufficient probable cause.

7. The blood test in question was administered with Defendant's consent, at the request of a police officer having reasonable grounds to believe the Defendant had been driving while under the influence of alcohol.

8. Prior to Officer Breiner's speaking with Defendant or obtaining information from him, the **corpus delicti** for careless driving and failure to drive within the proper lane of traffic was established by independent evidence.

9. The relationship of the crimes of careless driving and failure to drive within the proper lane of traffic with driving under the influence, as evidenced by the facts in this case, meets the requirements of the closely related crime exception to the **corpus delicti** rule.

10. Use of Defendant's admissions and statements to Officer Breiner to prove the offense of driving under the influence with which Defendant has been charged will not violate the **corpus delicti** rule.

WILLIAM A. VEANUS and GISELLA C. VEANUS, Plaintiffs vs. WILLIAM N. SHIPWASH, JR. and KRISTA A. CAMPBELL, Defendants

Civil Action—Procedure To Enforce Settlement Agreement—Scope of Relief Available—Effect of the Form of the Underlying Action—Applicability of the Landlord and Tenant Act

1. The court in which a settlement agreement has been reached with respect to pending litigation has the inherent authority and power when disputes arise as to the agreement to interpret and, as appropriate, enforce the agreement upon the filing of a petition for enforcement.

2. The authority of the court to enforce a settlement agreement and provide relief is not necessarily limited to the form of action by which the underlying litigation was commenced and, at a minimum, extends to those claims encompassed by the pleadings of the underlying action. Accordingly, **in personam** collateral relief can be provided in an action commenced in mortgage foreclosure when the pleadings include a claim for personal liability.

3. The authority and power of the court to enforce a settlement agreement upon petition is not restricted by the provisions of the Landlord and Tenant Act of 1951 even though the settlement agreement requires one of the parties to vacate leased premises by a definite date. The provisions of the Landlord and Tenant Act of 1951 being in derogation of the common law must be strictly construed. As such, the Landlord and Tenant Act of 1951 which was intended to codify and consolidate four existing statutes bearing on the Landlord/Tenant relationship did not abrogate the common-law authority of the court to enforce compromises of litigation pending before the court.

NO. 02-1219

CAROLE J. WALBERT, Esquire—Counsel for Plaintiffs.

JORGE M. PEREIRA, Esquire—Counsel for Defendants.

MEMORANDUM OPINION

NANOVIC, J.—January 21, 2004

In these collateral proceedings, Plaintiffs ask this court to dismiss Defendants' petition to enforce a settlement agreement reached in an underlying action for mortgage foreclosure. For the reasons which follow, we will deny Defendants' request.

FACTUAL BACKGROUND

The underlying action began on June 17, 2002, when the Plaintiffs, William A. and Gisella C. Veanus ("Plaintiffs"), filed a complaint in mortgage foreclosure against the Defendants, William N. Shipwash, Jr. and Krista A. Campbell ("Defendants") with respect to the real property located at 154 Bridge Street, Lehighton, Carbon County, Pennsylvania (the "Property"). At

the time, Defendants were the owners of the Property and the named mortgagors in the mortgage being foreclosed upon. The mortgage was originally entered with Citizens National Bank on November 1, 1991 and subsequently assigned to the Plaintiffs by assignment dated March 5, 2002.

Defendants purchased the Property on November 1, 1991. At the time, Defendants were involved in a relationship and contemplating marriage. At some point this relationship ended and Defendant, William N. Shipwash, Jr., became involved with Tamara Lambert to whom he is now married and to whom title to the Property was transferred by deed dated October 21, 2002. In their complaint, Plaintiffs alleged that Defendants failed to make any payments on the mortgage since July 1, 2001 and demanded judgment in the amount of Sixty-Three Thousand Two Hundred Forty-Two Dollars and Sixty-Nine Cents ($63,242-.69).

In addition to holding the mortgage on the Property, Plaintiffs leased the Property from Defendants pursuant to a lease agreement dated October 5, 1996 (the "Lease Agreement") and resided in the home on the Property.[1] The Lease Agreement described an interest in Plaintiffs to purchase the Property and provided that if Plaintiffs purchased the Property a portion of the rent would be applied toward the purchase price. The amount of the purchase price, however, is not stated in the Lease Agreement.

On September 26, 2002, the Defendant William N. Shipwash, Jr. ("Shipwash") filed an answer, new matter and a counterclaim to the amended complaint[2] in which he alleged that Plaintiffs had willfully failed to make rental payments to him since July 5, 2001 in a deliberate effort to cause him to default on the payments owed under the note and mortgage; that, in consequence, he was unable to make the mortgage payments since July 2001; that Plaintiffs had purchased the original note and mortgage from Citizens National Bank with the intent of

[1] The Lease Agreement is signed only by the Plaintiff, William A. Veanus, and the Defendant, William N. Shipwash, Jr. Rent under the Lease Agreement is to be paid to William N. Shipwash, Jr.

[2] Defendant William N. Shipwash, Jr. filed preliminary objections to the complaint on August 16, 2002; an amended complaint was filed on September 5, 2002.

obtaining legal and equitable title to the Property through foreclosure proceedings; and that Plaintiffs were in default of the Lease Agreement, thereby entitling Shipwash to back rent and to re-enter and retake possession of the Property. Preliminary Objections to Shipwash's new matter and counterclaim on the basis of Pa. R.C.P. 1148 were filed on October 15, 2002.[3] On October 31, 2002, pursuant to a praecipe signed by counsel for both parties, the underlying action was marked settled, discontinued and ended.

On January 29, 2003, Defendants filed the petition to enforce the settlement agreement which is now before us. In this petition, Defendants attach a copy of a letter settlement agreement dated October 21, 2002 (the "Letter Agreement") pursuant to which the parties purportedly agreed to settle the underlying action. The Letter Agreement provided: (1) the mortgage would be satisfied by a payment to Plaintiffs of Sixty-Five Thousand Sixty-Six Dollars and Twenty-Two Cents ($65,066.22) on October 21, 2002; (2) the Defendants' claims for back rent under the Lease Agreement would be forgiven; (3) the Plaintiffs would forgive and waive any claims to title or possession of the Property they may have as a result of the Lease Agreement; (4) the Plaintiffs would be permitted to remain on the Property until January 21, 2003 rent free, would vacate the Property no later than January 21, 2003—leaving the Property in satisfactory condition without the removal of any fixtures or improvements, and would "be penalized in the form of rent payment in the amount provided for in the Lease Agreement" if they failed to vacate the Property by January 21, 2003; (5) the parties would exchange mutual releases releasing one another from any and all claims they might have against the other; (6) the underlying action would be marked settled, discontinued and ended; and (7) a settlement agreement would be prepared for the parties' review. With respect to this final provision, Paragraph 9 of the Letter Agreement states: "The foregoing terms are essential, but not the exclusive or complete terms of settlement and this

[3] Rule 1148, entitled "Counterclaim," provides:

> A defendant may plead a counterclaim which arises from the same transaction or occurrence or series of transactions or occurrences from which the plaintiff's cause of action arose.

firm [referring to Defendants' counsel] shall prepare a Settlement Agreement for the parties' review."

The terms of the Letter Agreement are not in dispute. Nor, apparently, do the parties dispute that closing on the sale of the Property to Tamara Lambert was held on October 21, 2002 and from the sales proceeds Sixty-Five Thousand Sixty-Six Dollars and Twenty-Two Cents ($65,066.22) was immediately paid to the Plaintiffs. The dispute arises because Plaintiffs did not vacate the Property by January 21, 2003. Defendants claim the parties agreed that if Plaintiffs did not vacate the Property by January 21, 2003, any payments made after this date would not entitle the Plaintiffs to continued possession of the Property but that Plaintiffs would be subject to immediate eviction proceedings and be required to pay all costs and legal expenses incurred by Defendants. In contrast, Plaintiffs claim that if they failed to vacate the Property by January 21, 2003, they were required only to pay rent in the amount provided for in the Lease Agreement.

A formal settlement agreement was never signed by the parties. However, on October 28, 2002, Defendants' counsel sent to Plaintiffs' counsel a draft of a settlement agreement for Plaintiffs' review and execution. This draft contained several provisions not expressly identified in the Letter Agreement including, **inter alia,** the following: (1) that payment by Plaintiffs after January 21, 2003 would in no way "equate to a written and/or oral lease granting the [Plaintiffs] any right of possession and/or title to the real property"; (2) that Plaintiffs "will be subject to immediate eviction proceedings with [Defendants'] costs and legal expenses paid by [Plaintiffs]"; (3) that the parties waived the right to trial by jury in any litigation arising out of or relating to the agreement; and (4) that in the event of any dispute under the agreement, the parties agreed to the jurisdiction of the Court of Common Pleas of Northampton County, Pennsylvania. The draft also included several provisions of a housekeeping nature which, although not stated explicitly in the Letter Agreement, could be contemplated by experienced counsel including, **inter alia,** the following: (1) an integration clause providing that the agreement stated the entire agreement between the parties and superseded all prior agreements, understandings and representations and (2) that any changes or

modifications to the agreement would need to be executed by the parties to be binding and enforceable.

For reasons which are not clear from the record before us, Plaintiffs did not promptly return an executed copy of the draft agreement or request revisions. When Plaintiffs did respond, by letter dated January 15, 2003, Plaintiffs stated only that the draft did not accurately reflect the parties' agreement and that if Paragraph 7 of the agreement, not in issue here, were revised in a certain manner the agreement would be forwarded to Plaintiffs for their signature. Before this process was concluded, on January 20, 2003, Plaintiffs contacted the Defendants and asked for an additional sixty days to vacate the Property. This request was unacceptable to Defendants. Defendants advised Plaintiffs that in reliance on Plaintiffs' agreement to vacate the Property by January 21, 2003 they had advised their current landlord that they would be leaving their apartment by January 31, 2003, that Plaintiffs had breached the settlement agreement, and that they would immediately file a complaint in ejectment and an emergency petition to enforce the settlement agreement.

This petition as previously stated was filed on January 29, 2003. The petition includes a request that Plaintiffs be ejected from the Property. We have also been advised that on the same date a complaint in ejectment was filed on behalf of Tamara Lambert against the Plaintiffs.

In their answer to the petition, Plaintiffs claim, **inter alia,** that the settlement agreement prepared by Defendants did not reflect the agreement of the parties; that, pursuant to the agreement actually reached, if the Plaintiffs remained on the Property after January 21, 2003, eviction of Plaintiffs would require Defendants to comply with the provisions of the Pennsylvania Landlord and Tenant Act; and that the relief Defendants requested in their petition could not be obtained, as a matter of law, in the manner and forum sought by Defendants.

Hearing on the petition was originally scheduled for February 14, 2003. This hearing was continued at Plaintiffs' request due to counsel's unavailability and because the emergency issue of possession of the Property was resolved, Plaintiffs having vacated the Property. The hearing was continued a second time at Defendants' request and rescheduled for June 20, 2003.

At the hearing, Defendants sought enforcement of the written settlement agreement prepared by their counsel, including attorney's fees, additional rent and storage fees allegedly incurred by Shipwash and Lambert when they were unable to move into the Property before January 31, 2003, and payment of rent from the Plaintiffs for the period that they remained on the Property after January 21, 2003. Plaintiffs asserted that we are without jurisdiction to grant the type of relief requested and that the petition is an invalid attempt to circumvent the provisions of the Landlord and Tenant Act. Plaintiffs moved that the petition be dismissed for want of jurisdiction.

Prior to ruling on Plaintiffs' petition we asked the parties to brief these threshold issues. This has occurred and we are now prepared to address the propriety o Defendants' petition and the issue of our jurisdiction.

DISCUSSION

The principal issue we must address is whether we have jurisdiction to grant **in personam** collateral relief on a petition to enforce a settlement where the underlying action is **in rem—i.e.,** in mortgage foreclosure—and, if so, whether the provisions of Pennsylvania's Landlord and Tenant Act of 1951 limit the extent of the relief we may provide.

REGULARITY OF PROCEEDINGS

Ordinarily, a settlement agreement may be enforced by petition to the court having jurisdiction of the subject matter of the litigation. **Woodbridge v. Hall,** 366 Pa. 46, 48, 76 A.2d 205, 206 (1950). Defendants argue that petitioning this court to enforce the alleged settlement agreement is the only remedy available to them, relying on the following language from **Melnick v. Binenstock,** 318 Pa. 533, 179 A. 77 (1935):

> A party seeking to enforce an agreement compromising pending litigation is not at liberty to institute in any court any action he sees fit; especially is this true as here, where the agreement has been in part performed. A compromise or settlement of litigation is always referable to the action or proceeding in the court where the compromise was effected; it is through that court the carrying out of the agreement should thereafter be controlled. Otherwise the compromise, instead of being an aid to litigation, would be only

productive of litigation as a separate and additional impetus.

Id. at 536, 179 A. at 78.

In **Melnick,** the plaintiff originally brought suit in equity on a theory of fraud and asked, **inter alia,** for damages of Eight Thousand Dollars ($8,000.00). The parties entered a settlement that provided the defendants would either transfer to the plaintiff stock that was purchased with money he had paid to defendants or return the plaintiff's money, with interest. A final decree was subsequently entered by the trial court to this effect. Plaintiff later brought separate suit on the settlement agreement. The Supreme Court upheld the trial court's decision that plaintiff's suit was barred on the grounds of **res judicata.** The court stated: "[E]quity does not lose its grasp on that subject-matter even though an agreement of compromise or settlement affected it. Where disputes arise as to the compromise, that court, by petition or otherwise, must interpret it and order what shall be done." **Id.** at 537, 179 A. at 78.

In **Cameron v. Great Atlantic & Pacific Tea Co.,** 439 Pa. 374, 266 A.2d 715 (1970), the Pennsylvania Supreme Court again dealt with a court's jurisdiction to enforce a settlement agreement, this time in an action at law. In **Cameron,** during trial, the parties settled plaintiffs' personal injury claim against various defendants for Fifty-Five Thousand Dollars ($55,000.00). The settlement agreement, in the form of a stipulation of settlement read into the record and later transcribed and signed by counsel for the parties, was clear as to the amount of settlement but indefinite as to the source of payment. When payment was not made, upon plaintiffs' petition for entry of judgment against all defendants in the amount of Fifty-Five Thousand Dollars ($55,000.00), the petition was granted without hearing and without any interpretation by the trial court as to the settlement agreement or its terms with respect to the defendants' liability **inter se.** The trial court held that the issue of the defendants' liability **inter se** was not properly justiciable by the court as part of the petition to enforce settlement. This, the Supreme Court held, was error. Instead, according to the court, it was incumbent on the trial court to hold a hearing on plaintiffs' petition and interpret and, if necessary, enforce the parties' settlement agreement. The Supreme Court premised the rationale for its decision on its holding in **Melnick.**

In both cases, the trial court had jurisdiction to award the type of relief agreed to in the settlement agreement had the action not been settled. In **Melnick,** the plaintiff sought enforcement of an agreement that he would be paid Eight Thousand Dollars ($8,000.00) to settle a suit in which he was asking for damages of Eight Thousand Dollars ($8,000.00). In **Cameron,** the plaintiffs sought damages and later petitioned the trial court to enter judgment in the amount agreed to by the parties. The plaintiffs in these cases merely sought enforcement of an agreement under which they would receive relief of the same type they might have received had they pursued the action. In other words, the courts in each case had full power in the underlying action to award certain relief to the plaintiffs and the terms the parties agreed to did not go beyond this.

In contrast, the underlying suit in the case **sub judice** was commenced as an action in mortgage foreclosure. Rule 1141(a) defines a foreclosure action as one which "shall not include an action to enforce a personal liability." Pa. R.C.P. 1141(a). Rule 1148 limits a counterclaim to one "which arises from the same transaction or occurrence or series of transactions or occurrences from which the plaintiff's cause of action arose." Pa. R.C.P. 1148.

> As the courts of Pennsylvania have applied this Rule [**i.e.,** Rule 1148], only those counterclaims are permitted that are part of or incident to the creation of the mortgage relationship itself. **Id.** [**Chrysler First Business Credit Corp. v. Gourniak,** 411 Pa. Super. 259, 264-66, 601 A.2d 338, 341 (1992)]. Rule 1148 does not permit a counterclaim arising from a contract related to the mortgage, such as a contract for sale of real property.

Cunningham v. McWilliams, 714 A.2d 1054, 1057 (Pa. Super. 1998), **appeal denied,** 557 Pa. 651, 734 A.2d 861 (1999). Here, Defendants' counterclaim was neither "part of" or "incident to" the creation of the mortgage and, under the Rule, was clearly prohibited.

However, before Plaintiffs' objection to the counterclaim was ruled upon, the parties, at least ostensibly, settled the case and in doing so purported to resolve both the claims in the complaint and the counterclaim. By this conduct, we believe Plaintiffs waived any objection they might otherwise have had

to our assumption of jurisdiction to interpret and, if warranted, enforce settlement of those claims encompassed within the pleadings. **See Insilco Corp. v. Rayburn,** 374 Pa. Super. 362, 368, 543 A.2d 120, 123 (1988) ("However, where a mortgagee fails to follow Pa. R.C.P. 1141 and includes in a mortgage foreclosure complaint a request not only for an **in rem** judgment of foreclosure on the mortgaged property but also an **in personam** judgment against the individuals who executed the mortgage for their personal liability on the note or bond accompanying the mortgage, the judgment in mortgage foreclosure can be both **in rem** and **in personam** provided that the mortgagor waives any objection to the inclusion of the assumpsit action for a personal judgment in the mortgage foreclosure proceeding.") (emphasis in original).

Rule 1148 is a rule of procedure, not one of substantive rights, and its provisions must yield to the interest of securing the "just, speedy and inexpensive determination" of the dispute. Pa. R.C.P. 126; **see also, Maher v. Maher,** 835 A.2d 1281 (Pa. 2003) (holding that the Rules of Civil Procedure relating to actions for support are rules of procedure, not substantive law, and that the rules in and of themselves do not create a substantive right). "Substantive rights are those affected when the application of the statute imposes new legal burdens on past transactions or occurrences." **Cole v. Czegan,** 722 A.2d 686, 690 (Pa. Super. 1998), **reargument denied** (December 16, 1998) (**quoting McMahon v. McMahon,** 417 Pa. Super. 592, 600-601, 612 A.2d 1360, 1364 (1992)). We therefore conclude that we have jurisdiction to interpret and, as appropriate, enforce any settlement agreement reached by the parties. We now consider whether the Landlord and Tenant Act of 1951 limits the relief we may grant.

PRE-EMPTION OF RELIEF

A landlord's rights of possession against a tenant are covered by the Landlord and Tenant Act of 1951, 68 P.S. §§250.101-250.602 (the "Act"), including specifically, Article V, Recovery of Possession. Possession under the Act for failure of a tenant to vacate can be obtained pursuant to a summary proceeding to evict—68 P.S. §§250.501-250.513 and the related Rules of Civil Procedure for District Justices, Rules 501 through 582—or an action in ejectment, 68 P.S. §250.511. It is, however, by no

means clear that the remedies provided by the Act are the exclusive means by which a landlord may regain possession of leased premises when the lease has expired. **See Kuriger v. Cramer,** 345 Pa. Super. 595, 607, 498 A.2d 1331, 1337 (1985).

This is not a question of subject matter[4] or primary[5] jurisdiction, both of which we possess. The question of the exclusivity of the Act is not apparent from the Act which is itself in derogation of the common law.[6]

> Close scrutiny of the **Landlord** and **Tenant Act** of 1951 reveals that when enacted, it was intended to be a codification and consolidation of four existing **landlord** and **tenant** statutes only and did not also consolidate existing principles of common law. The 1951 **act** indicates a desire to consolidate the four unwieldy earlier acts which were over-

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[4] The test to determine a court's inability to act because it lacks subject matter jurisdiction is well established:

> The test of jurisdiction is the competency of the court to hear and determine controversies of the general class to which the case presented for consideration belongs. The question is whether the court has power to enter into the inquiry **and not whether it is able to grant the relief sought in the particular case.**

Cooper-Bessemer Company v. Ambrosia Coal and Construction Company, 447 Pa. 521, 524, 291 A.2d 99, 100 (1972) (emphasis added) (citation omitted).

The courts of common pleas are provided for in our state constitution: "There shall be one court of common pleas for each judicial district … (b) having unlimited original jurisdiction in all cases except as may otherwise be provided by law." Pa. Const. Art. 5, §5. With respect to subject matter jurisdiction of the courts of common pleas, the Judicial Code provides that:

> Except where exclusive original jurisdiction of an action or proceeding is by statute … vested in another court of this Commonwealth, the courts of common pleas shall have unlimited original jurisdiction of all actions and proceedings. …

42 Pa. C.S. §931(a).

[5] "[T]he doctrine of primary jurisdiction holds that where an agency has been established to handle a particular class of claims, the court should refrain from exercising its jurisdiction until the agency has made a determination." **Jackson v. Centennial School District,** 509 Pa. 101, 107, 501 A.2d 218, 221 (1985).

[6] At common law possession was always gotten by action of ejectment. The Landlord and Tenant Act of 1951 and all the similar statutes which preceded it, such as the Act of December 14, 1863, P.L. (1864) 1125, and the Act of March 31, 1905, P.L. 87, are statutes permitting a summary proceeding to get possession and are, therefore, in derogation of the common law and must be strictly construed.

Dyarman v. Dyarman, 7 D. & C. 2d 6512, 651, 652 (Cumberland Cty. 1956).

> technical, difficult to apply and sometimes ineffective in providing the remedy intended.

Wofford v. Vavreck, 22 D. & C. 3d 444, 448 (Crawford Cty. 1981) (emphasis added) (footnote omitted). As a codification and consolidation of statutes dating back to the 1800s, we do not believe the Landlord and Tenant Act of 1951 abrogates the common law authority of a court to enforce a settlement reached in underlying litigation before that court. **Commonwealth v. Chiappini,** 566 Pa. 507, 782 A.2d 490, 492 (2001).

Moreover, the petition filed by Defendants cannot, in fairness, be construed as self-help and does not contravene the purposes of the Act. Nor are Defendants technically seeking to evict Plaintiffs. "An eviction is an act by a landlord or a third person that interferes with a tenant's possessory right to the demised premises." **Kuriger v. Cramer, supra** at 608, 498 A.2d at 1338. An eviction, therefore, is the termination of the lease before the end of the term for a breach of one of its conditions. An action to recover real property at the expiration of the term is conceptually different.

Here, under either version of the parties' settlement, Plaintiffs were to vacate the Property by January 21, 2003. By failing to do so prior to the filing of Defendants' petition, Plaintiffs were at best holdover tenants and, in an action in ejectment pursuant to Section 511 of the Act, would be entitled to no notice to quit. **Sherman v. Brooks,** 20 D. & C. 4th 59 (York Cty. 1993).

In the unique circumstances of this case, we do not believe our power to adjudicate the parties' settlement has been divested. The origin of the rights Defendants claim is their counterclaim which preceded the parties' settlement and it is the terms of that settlement which Defendants seek to enforce in their petition. In that counterclaim, Defendants alleged, **inter alia,** a premeditated scheme by Plaintiffs to force Defendants into default on the mortgage and to divest Defendants of their equity in the Property. **Cf. Porreco v. Maleno Developers, Inc.,** 717 A.2d 1089 (Pa. Commw. 1998) (the origin of the rights claimed in a settlement agreement is decisive as to whether exclusive jurisdiction exists in the Board of Claims on a claim against the Commonwealth, not simply that a contract is involved). To accept Plaintiffs' position that the provisions of the

Act bar our granting relief in these proceedings when Plaintiffs' right to remain on the Property under the settlement was clearly limited and only one of several multiple claims being simultaneously resolved serves only to proliferate litigation, runs contrary to the concept of judicial economy, and defeats the judicial policy of promoting settlements. Therefore, a hearing will be scheduled to determine whether the essential terms of a settlement agreement were reached by the parties; whether the agreement, if any, was breached; and whether Defendants are legally entitled to recover any damages for Plaintiffs' failure to vacate the Property on or before January 21, 2003.[7]

ORDER OF COURT

AND NOW, this 21st day of January, 2004, upon consideration of Plaintiffs' Motion to Dismiss Defendants' Emergency Petition to Enforce Settlement Agreement and Eject Plaintiffs, and in accordance with our Memorandum Opinion of this same date, it is hereby

ORDERED and DECREED that the Motion is Denied.

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[7] Because Tamara Lambert is the present owner of the Property, the standing of Defendants as former owners to request that Plaintiffs be ejected from the Property has been properly raised by Plaintiffs. **Cf. Brennan v. Shore Brothers, Inc.,** 380 Pa. 283, 285, 110 A.2d 401, 402 (1955) ("Ejectment is a possessory action only, and can succeed only if the plaintiff is out of possession, and if he has a present right to immediate possession."). This issue, however, is moot since Plaintiffs have vacated the property.

Still in issue is Defendants' standing to claim overdue rent from Plaintiffs for the period after January 21, 2003, because Defendants no longer own the Property, **see** 68 P.S. §250.104, and Defendants' standing to claim compensation for additional rent and storage fees allegedly incurred by Tamara Lambert when she was unable to enter the Property following Plaintiffs' failure to vacate after January 21, 2003.

> The question of standing is rooted in the notion that for a party to maintain a challenge to an official order or action, he must be aggrieved in that his rights have been invaded or infringed. The law of standing provides that one cannot evoke the jurisdiction of the court to enforce private rights or to maintain a civil action for the enforcement of such rights, unless he or she has, in an individual or representative capacity, some real interest in the cause of action, or a legal right, title or interest in the subject matter or controversy.

Kellogg v. Kellogg, 435 Pa. Super. 581, 585-86, 646 A.2d 1246, 1248 (1994) (**quoting Jackson v. Garland,** 424 Pa. Super. 378, 383, 622 A.2d 969, 971 (1993)). Because a party's standing is a separate issue from a court's subject matter jurisdiction, **In Re Adoption of W.C.K.,** 748 A.2d 223, 228 (Pa. Super. 2000), **appeal denied,** 567 Pa. 734, 788 A.2d 378 (2000), these issues will need to be addressed by Defendants at the time of hearing.

COMMONWEALTH OF PENNSYLVANIA vs. JOSEPH ANTHONY CHEEHAN, Defendant

Criminal Law—DUI—Meaning of the Terms "Drive," "Operate" and "In Actual Physical Control"

1. The terms "drive," "operate" and "in actual physical control" contained in Pennsylvania's Driving Under the Influence Statute are not synonymous with one another.

2. The term "drive" requires a showing that the motor vehicle at the time in question be, in fact, in motion. The concept of "actual physical control" involves the control of the movements of either the machinery of a motor vehicle or of the management of the vehicle itself, without a requirement that the entire vehicle be in motion.

3. A defendant found asleep, seated in the driver's seat of a motor vehicle on a public highway, with its engine running, and who admitted to having consumed alcoholic beverages at another location, is sufficient to support an inference that defendant was previously driving the motor vehicle.

4. A defendant found asleep, seated in the driver's seat of a motor vehicle on a public highway, with its engine running, and which had previously been heard being revved, is sufficient to support an inference that defendant was in control of the machinery of the motor vehicle.

NO. 692 CR 01

MICHAEL D. MUFFLEY, Esquire, Assistant District Attorney—Counsel for Commonwealth.

ROBERT T. YURCHAK, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, J.—December 26, 2003

Joseph A. Cheehan ("Cheehan"), the Defendant in these proceedings, has appealed the Order of Sentence entered by this Court on October 27, 2003 after Cheehan was found guilty in a non-jury trial of two counts of driving under the influence.[1] This opinion is filed in support of the verdict in accordance with Pa. R.A.P. 1925(a).

FACTUAL BACKGROUND

On October 16, 2001, shortly after 11:00 P.M., Irene Davis heard a car revving its engine outside her home on West Ludlow Street in the Borough of Summit Hill, Carbon County, Pennsylvania. The car was a black SUV parked directly in front of her home. This revving continued for approximately an hour

[1] 75 Pa. C.S. §§3731(a)(1), 3731(a)(4)(i).

and a half. Sometime after 12:00 A.M. Ms. Davis called the police about the presence of this vehicle.

Officer Brian Dalesandro of the Summit Hill Borough Police Department was dispatched to the scene around 12:30 A.M. When he arrived, Officer Dalesandro observed that the vehicle was running and shined his light into the car. Cheehan, who was reclined in the driver's seat, appeared to be asleep. Officer Dalesandro knocked on the window of the driver side door and Cheehan sat up and rolled down his window. The officer immediately noticed the odor of alcohol and could see that Cheehan's eyes were bloodshot and glossy. When Officer Dalesandro asked Cheehan his name and what he was doing, Cheehan identified himself and replied that he must have fallen asleep before going into his house. He stated he had been at his friend's house on Market Street, which is approximately four blocks east and four blocks north of his home at 322 West Ludlow Street according to Officer Dalesandro, and had consumed five beers that night while visiting his friend. At no time that evening did Cheehan offer any explanation as to how he had traveled from his friend's house to his home.

Officer Dalesandro then asked Cheehan to exit his car and directed him to the front of the vehicle, where he asked Cheehan to perform several field sobriety tests, including the finger-to-nose test, the one-leg stand, and the nine step heel-to-toe test. During this testing, Cheehan asked several times if they had to do this, and stated that he lived right across the street. Cheehan's poor performance on the tests indicated to Officer Dalesandro that he was most likely under the influence of alcohol and incapable of safely operating a vehicle. Officer Dalesandro arrested Cheehan and informed him of his rights. At approximately 1:12 A.M., Cheehan's blood was drawn at the Miners' Memorial Hospital in Coaldale, Pennsylvania. The sample was given to Officer Dalesandro for testing. Blood tests performed at the Hazleton General Hospital showed a blood alcohol content of 0.149%.

Cheehan was found guilty, after a bench trial on June 4, 2003, of two counts of Driving Under the Influence: one count for driving, operating or having physical control of the movement of a motor vehicle while under the influence of alcohol to a degree which rendered him incapable of safe driving, and one

count for driving, operating or having physical control of the movement of a motor vehicle while the amount of alcohol by weight in his blood was 0.10% or greater. 75 Pa. C.S. §§3731 (a)(1), 3731(a)(4)(i). Cheehan raises three issues on appeal: (1) that the evidence was insufficient to prove he had been driving a motor vehicle; (2) that the evidence was insufficient to prove that he had been "in actual physical control" of a motor vehicle; and (3) that the accuracy of the Blood Alcohol Test was not established as of the time of the alleged driving.

DISCUSSION

There is no dispute that at the time of his arrest Cheehan was intoxicated and incapable of safe driving. The only question is whether Cheehan was driving, operating, or in actual physical control of the movement of a motor vehicle at a time when he was intoxicated.

The Vehicle Code proscribes a person from driving, operating or being in actual physical control of the movement of a motor vehicle while under the influence of alcohol to a degree which renders him incapable of safe driving or while the amount of alcohol by weight in his blood is 0.10% or greater. 75 Pa. C.S. §3731(a)(1), (4)(i).[2] Cheehan argues that to prove a violation of these Sections requires either direct evidence of driving or circumstantial evidence sufficient to support an inference that the defendant was driving a vehicle at a time when he was intoxicated. We disagree. When direct evidence of a violation does not exist, the inference which must be established by circumstantial evidence is either that the operator was driving **or that the operator was in actual physical control of the machinery of the motor vehicle or of the management of the movement of the motor vehicle itself at a time when he was intoxicated.**

In support of his position, Cheehan relies heavily on the decision of **Commonwealth v. Saunders,** 456 Pa. Super. 741, 691 A.2d 946 (1997), **appeal denied,** 550 Pa. 696, 705 A.2d 1307 (1997). In that case, a panel of the Superior Court stated that "[t]he most recent Superior Court cases indicate that something more than a defendant behind the wheel, with the motor running, is required to establish actual physical control of the

[2] For convenience, we refer generically to both conditions as being ones of intoxication.

vehicle; [that] there must be evidence to support an inference indicating that the vehicle had been driven by the defendant while he was intoxicated." **Id.** at 748, 691 A.2d at 949. To the extent Cheehan argues from this statement of the Superior Court that a conviction of driving under the influence based upon actual physical control requires proof that a defendant at some point had also been driving the motor vehicle while he was intoxicated, we respectfully disagree. The argument fails to fully recognize that the crime of driving under the influence can be committed not only by a person who drives but also by one who "operates" or is "in actual physical control" of a vehicle. Cheehan's interpretation renders the terms "operate" and "actual physical control" meaningless.

Implicit in Cheehan's argument is the belief that the terms "drive," "operate" and "in actual physical control" are not only interrelated but synonymous: that the terms "operate" and "in actual physical control" merely duplicate the term "drive" and have no separate independent legal significance. This belief ignores both black letter principles of statutory construction and an understanding and appreciation of the history and development of Pennsylvania's driving under the influence statute.

As a matter of statutory construction, the Statutory Construction Act of 1972 tells us that effect should be given to all of the provisions of a statute, 1 Pa. C.S. §§1921(a), 1922(2), and that earlier judicial interpretations of terms by a court of last resort should be heeded when the legislature includes those terms in a subsequent statute. 1 Pa. C.S. §1922(4); **Commonwealth, Department of Transportation v. Farner,** 90 Pa. Commw. 201, 205, 494 A.2d 513, 515-16 (1985). A statute is to be construed as a unified body, each word playing a part. The words of Section 3731—"drive," "operate" or "in actual physical control"—are in the disjunctive and on their face imply separate meanings.

That this is an accurate reading of the statute is supported by reference to Section 3731 and its amendments, and its predecessor, the 1959 Vehicle Code. This history was reviewed in **Commonwealth v. Crum,** 362 Pa. Super. 110, 523 A.2d 799 (1987) as follows:

> Section 1037 of the Vehicle Code, Act of April 29, 1959, P.L. 58, **formerly** 75 P.S. § 1037 provided that '[i]t shall be

unlawful for any person to **operate** a motor vehicle … while under the influence of intoxicating liquor …' (emphasis added). In **Commonwealth v. Kallus,** 212 Pa.Super. 504, 243 A.2d 483 (1968), this Court interpreted the word 'operate', as used in the statute, as follows: 'it is not necessary that the vehicle itself must be in motion but that it is sufficient if the operator is in actual physical control of either the machinery of the motor vehicle or of the management of the movement of the vehicle itself.' **Id.** … at 507, 243 A.2d at 485. In **Kallus,** the defendant, who was found seated in the driver's seat of the car behind the steering wheel, with the engine running, car in gear, the rear wheels spinning, and the left wheel spinning against the main portion of the highway, was determined to have operated the vehicle for purposes of section 1037.

In 1976, 75 P.S. § 1037 was repealed by 75 Pa.C.S.A. § 3731, as enacted by the Act of June 17, 1976, P.L. 162, § 1. This statute provides, in relevant part, that, '[a] person shall not **drive** any vehicle while … under the influence of alcohol … .' (emphasis added). In **Commonwealth v. Brown,** 268 Pa.Super. 206, 407 A.2d 1318 (1979), this Court concluded that since the term 'operate' is a broader term than 'drive', the legislature intended to limit the scope of the statute when it substituted the term 'drive' for the term 'operate'. Thus we found that '[i]n order to prove that a defendant charged with a violation of § 3731 "drove" a motor vehicle, evidence must be adduced showing that the vehicle was (at the time in question), in fact, in motion.' **Id.** … at 211, 407 A.2d at 1320.

This holding was further delineated in **Commonwealth v. Matsinger,** 288 Pa.Super. 271, 431 A.2d 1043 (1981), wherein the court found that **Brown** does not require direct evidence of motion, but rather, circumstantial evidence may be sufficient. In applying this standard, the court held that evidence that the defendant was found asleep behind the wheel of his vehicle with the motor running and the car in gear was sufficient to support an inference that the vehicle had been in motion and that appellant had been in control.

In 1982, 75 Pa.C.S.A. § 3731 was amended to the version of the statute we now have before us. 75 Pa.C.S.A. §

> 3731 (a), as amended by the Act of December 15, 1982, P.L. 1268, § 9 provides that, '[a] person shall not drive, operate, or be in actual physical control of the movement of any vehicle while … under the influence of alcohol … .' Upon review of this version of the statute, it is clear that the legislature intended to expressly broaden the scope of section 3731. The Commonwealth Court, upon passing on the meaning of the phrase 'actual physical control of the movement of a motor vehicle', considered this history of 75 Pa.C.S.A. § 3731.
>
> In accordance with the statutory construction principles that effect should be given to all of the words of the law, 1 Pa.C.S. § 1921(a), 1922(2), and that earlier judicial interpretations of terms should be heeded when the legislature includes those terms in a subsequent statute, 1 Pa.C.S. § 1922(4), this court must conclude that the concept 'actual physical control' in the present chemical test section conveys the same meaning as that which the Superior Court had accorded to the concepts of operating and having physical control—as involving control of the movements of either the machinery of the motor vehicle or of the management of the vehicle itself, without a requirement that the entire vehicle be in motion.
>
> **Commonwealth v. Farner,** 90 Pa.Commw. 201, 205, 494 A.2d 513, 515-516 (1985).

Id. at 113-14, 523 A.2d at 800-801.

In **Crum,** the defendant was found slumped across the front seat of his car, with the motor running and the lights on. The car was parked along the berm of a public road. These facts were held sufficient to support an inference that defendant was in control of either the machinery of the motor vehicle or the management of the motor vehicle itself, despite the fact that defendant's vehicle was not observed in motion. **Id.** at 115, 523 A.2d at 802.

The evidence in this case supports both an inference that Cheehan was "driving" while intoxicated and an inference that Cheehan "operated" or was "in actual physical control of the movements of either the machinery of the motor vehicle or of the management of the movement of the vehicle itself" while intoxicated. In **Saunders,** the court held in the context of a

habeas corpus proceeding that an intoxicated person behind the wheel of a stationary automobile with its engine running and located in the parking lot of a convenience store which did not sell alcoholic beverages and which was restricted to customers of the convenience store was sufficient to establish not only that the defendant obtained the alcoholic beverages (and most likely consumed them) prior to his physical presence in the parking lot, but also to support an inference that the defendant drove his automobile, while intoxicated, to the parking lot. **Saunders, supra** at 748, 691 A.2d at 950. In the present case, Cheehan was intoxicated behind the wheel of his car stopped on a public street, albeit in an area where parking was permitted, with the motor running and admitted that the alcohol he had consumed was consumed not in his residence but at a friend's home approximately eight blocks away. In **Saunders,** the court acknowledged that the alcoholic beverages consumed by the defendant could have been obtained from a private "after-hours" club as close as two and one-half blocks away or from a bar as close as one hundred yards away. The similarity of these facts to **Saunders** equally supports the inference that Cheehan drove his automobile while intoxicated to the front of his residence.

In addition to this inference, the evidence clearly establishes an inference that Cheehan "operated" or was "in actual physical control" of the movement of a vehicle while he was intoxicated. These terms, as previously stated, are broader and more encompassing than the term "drive." The terms do not require a showing that the defendant was behind the wheel of a moving vehicle or that the defendant was awake or conscious when observed by the police. It is sufficient that the evidence establish that the defendant was "in actual physical control" of either the machinery of the motor vehicle or of the management of the movement of the vehicle itself while intoxicated.

In **Commonwealth v. Farner,** 90 Pa. Commw. 201, 494 A.2d 513 (1985), the Superior Court quoted with approval the statement that "[a] driver has 'actual physical control' of his car when he has real (not hypothetical), bodily restraining or directing influence over, or domination and regulation of, its movements of machinery." **Id.** at 204, 494 A.2d at 515. The term actual physical control is not simply the ability to control either the machinery of a motor vehicle or the management of

the movement of the vehicle itself, but the actual exercise of that power. To be in actual physical control, a defendant must do something more than simply sit behind the wheel of a running vehicle which has not yet moved. **Cf. Commonwealth v. Byers,** 437 Pa. Super. 502, 650 A.2d 468 (1994) (defendant's presence in the driver's seat of his car, parked and running in the parking lot of a bar where he had been drinking, was not sufficient to show actual physical control), abrogated by **Commonwealth v. Wolen,** 546 Pa. 448, 450-51 n.4, 685 A.2d 1384, 1386 n.4 (1996) (plurality opinion) (determination of driving under the influence does not involve consideration of whether person who is in actual physical control of a vehicle posed a safety hazard to the public).

That a fair and legitimate inference exists that Cheehan was "in actual physical control" of his car at a time when he was intoxicated is clear. First, Cheehan was in the driver's seat and alone in the car. Second, the keys were obviously in the ignition, the engine was running, and the car was on a public street, albeit stationary and in a legal parking area in front of his home. Third, Cheehan had been heard revving the engine prior to Officer Dalesandro's arrival and the vehicle was idling when Officer Dalesandro arrived. Fourth, when questioned by Officer Dalesandro as to what he was doing, Cheehan stated that he must have forgotten to go into his home, implying that after he reached his home he fell asleep in his car and forgot to get out. **See also, Commonwealth v. Grimes,** 436 648 A.2d 538 (1994) (police officer's observation of defendant revving the engine of his truck for five minutes sufficient to show defendant was in actual physical control of the vehicle), **appeal quashed by** 543 Pa. 702, 670 A.2d 642 (1995), cited with approval in **Commonwealth v. Saunders, supra** at 747, 691 A.2d at 949.

The test of whether a person is in actual physical control of a motor vehicle is determined based upon a totality of the circumstances. These circumstances include the location of the vehicle, whether the engine was running and whether there was other evidence indicating that the defendant had driven the vehicle at some point prior to the arrival of the police on the scene. **Commonwealth v. Wolen, supra** at 450, 685 A.2d at 1385 (plurality opinion). While consideration of whether the evidence indicates that the defendant had actually driven the

motor vehicle is a factor in making the determination of actual physical control, it is not a requirement.[3] In this case, Cheehan, by revving the engine of his automobile, exercised control over the machinery of his vehicle.

For the aforementioned reasons, we believe that this Court did not error in finding Cheehan guilty of driving under the influence. Accordingly, we respectfully ask that Cheehan's conviction be sustained.

[3] Cheehan has also argued that the accuracy of the Blood Alcohol Test (BAC) was not established as of the time of the alleged driving. Subsection (a.1)(1)(i) of §3731 provides that it is prima facie evidence that a person had a BAC of 0.10% or more at the time of driving, operation or actual physical control of a vehicle if the BAC of the blood taken is 0.10% at the time the chemical test is performed. 75 Pa. C.S. §3731(a.1)(1)(i). Subsection (a.1)(2) requires that such chemical test be done on a sample obtained within three hours after operation of the vehicle. 75 Pa. C.S. §3731(a.1)(2). In this case, Ms. Davis first noticed the revving of the automobile's engine in which Cheehan was located at shortly after 11:00 P.M., the likely time when Cheehan arrived home that evening in his car from his friend's. A sample of Cheehan's blood was taken at 1:12 A.M. Therefore, at most, approximately two hours passed between the time Cheehan drove or had actual physical control of the vehicle and the drawing of his blood. This is well within the time limit of the statute and the blood test was properly admitted. For this reason, we find no merit in Cheehan's second argument.

STEPHEN E. POMPELLA and KIM A. POMPELLA as husband and wife, Petitioners/Plaintiffs vs. HELEN ANN JONES and ROBERT JONES, SR. et al., Respondents/Defendants

Civil Action—Real Property—Easements by Implication and by Prescription—Automatic Tacking With Conveyance of the Dominant Estate—Extinguishment of Easements by Adverse Use—Reasonable Restraints on Usage of an Easement

1. Easements by implication have as their goal the ascertainment of the intention of the parties as revealed by the totality of the circumstances surrounding the conveyance.

2. An easement by implication based upon apparent usage requires that the usage for which an easement is claimed be at the time of severance of title open, visible, permanent and continuous. The necessity for the continued use of the easement is a consideration, but not a requirement, for this form of implied easement.

3. An easement by necessity requires strict necessity at the time of severance of title as an element for its existence. A finding that the claimed easement is convenient or beneficial to the dominant estate is insufficient.

4. An easement for ingress and egress is implied when an owner of property subdivides it into lots and streets according to a plan and thereafter sells lots according to the plan.

5. A purchaser of property for which a private road is called for as a boundary in the deed description acquires by implication an easement in the use of the road.

6. An easement by prescription requires adverse, open, continuous, notorious and uninterrupted usage of the property for twenty-one years. When the usage is proven to be open, notorious, continuous and uninterrupted for the prescriptive period, a presumption exists that the usage is adverse and under claim of right.

7. Easements pass by conveyance of the estates to which they are appurtenant. Transfer of such easements is inherent in a conveyance of the dominant estate and, in contrast to the conveyance of fee title, require no separate description or writing to support them.

8. In contrast to the elements required to acquire title to property by adverse possession, the nature of the adversity necessary to extinguish an easement over a servient tenement must demonstrate a usage inconsistent with the use made and rights held by the easement holder, not merely possession which is inconsistent with another's claim of title.

9. The owner of the dominant estate is not entitled to exercise easement rights in a manner which unreasonably infringes upon or substantially impairs the use and enjoyment of the servient estate.

10. The owner of property bounded on two sides by a public street and another side of which is the ending point of a private road described in the deed of the common grantor of all properties abutting on the private road possesses an easement by implication to use the road as a means of access to his property subject to the limitation that use of the road be at reasonable speeds to secure the safety and protection of the abutting property owners

NO. 02-1965

RICHARD MARUSAK, Esquire—Counsel for Plaintiffs.

EDWARD P. McNELIS, Esquire—Counsel for Defendants, Helen Ann Jones and Robert Jones, Sr., wife and husband, and Robert Jones, Jr. and Holly Jones, husband and wife.

ADJUDICATION AND DECREE NISI

NANOVIC, Chancellor—December 26, 2003

On August 30, 2002 the Plaintiffs, Steven E. Pompella and Kim A. Pompella, as husband and wife (the "Plaintiffs"), brought an action in equity claiming easements by necessity, implication and prescription in, to and over a private road and seeking to enjoin Helen Ann Jones and Robert Jones, Sr., husband and wife, and Robert Jones, Jr. and Holly Jones, husband and wife (the "Joneses") from closing, obstructing or otherwise interfering with the use of the road by the Plaintiffs. The Joneses, in a counterclaim, claim similar rights in the road. After hearing

and review of the submissions of the parties, we make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Relevant to this litigation are two intersecting unnamed private roads. Road one runs generally in an east/west direction between two parallel public roadways running north and south—Vine Street,[1] to the east, and South River Street to the west—in East Side Borough, formerly East White Haven, Carbon County, Pennsylvania ("Road 1"). The second road connects Road 1 with the property of the Plaintiffs and, beginning at Road 1 as its northern terminus, runs south to and ends at property owned by the Plaintiffs (the "Pompella property"), a distance of approximately 140 1/2 feet ("Road 2"). Road 2 parallels South River and Vine Streets and is approximately one hundred fifty-eight feet east of South River Street and approximately eighty-three feet west of Vine Street.

2. The Pompella property was purchased by the Plaintiffs from Mr. Pompella's mother, Eleanore Pompella Fulk and her husband, Gerald J. Fulk, by deed dated April 17, 1969 and recorded in Carbon County Deed Book Volume 295 at page 449.

3. The Pompella property extends the entire distance between South River and Vine Streets, a distance of approximately two hundred fifty feet, and consists of two contiguous rectangular parcels each extending the entire width between South River and Vine Streets. Parcel No. 1 is the northernmost of these two parcels and is the parcel with which Road 2 directly connects.

4. The Plaintiffs' home, in which they maintain full-time residence, is located on Parcel No. 1.

5. The Defendant, Helen Ann Jones, is the sole title owner of two separate rectangular parcels divided by Road 1, each abutting on South River Street (the "Jones property"). Parcel A is on the north side of Road 1 and is located between South River Street and the area where Road 2 would continue, if extended north of Road 1. Parcel B is on the south side of Road 1 and is located between South River Street and Road 2. This

[1] Vine Street was formerly called Second Street. The deeds for the different properties involved in this litigation refer to the private road running between South River Street and Second Street.

parcel is bounded by Road 1 on the north and the Pompella property (Parcel No. 1) on the south.

6. The residence of Helen Ann Jones and her husband, Robert Jones, Sr., is located on Parcel A of her property.

7. The residence of Helen Ann Jones' son, Robert Jones, Jr., and his wife, Holly Jones, is located on Parcel B of the property owned by Helen Ann Jones.

8. The Defendant, Debra Lee Jones, is the owner of property immediately west of Road 2 and directly south of Road 1. Her property is bounded on the north by Road 1, on the west by Road 2, on the east by Vine Street, and on the south by property now owned by Vera A. Becker, Francis A. Becker, Michele L. Becker and Suzette M. Becker (the "Beckers").

9. The Beckers' property is bounded on the west by Road 2, on the north by the property of Debra Lee Jones, on the east by Vine Street, and on the south by the Pompella property (Parcel No. 1).

10. A rough sketch, not to scale, of the relative locations of Roads 1 and 2, and the properties of the Plaintiffs, Helen Ann Jones, Debra Lee Jones and the Beckers is attached to this Adjudication and marked as Appendix "A".

11. At one time, the aforesaid properties of the Plaintiffs (Parcel No. 1), Helen Ann Jones, Debra Lee Jones and the Beckers were a part of the Sunnyrest Sanatorium, a sanitarium for the treatment of tuberculosis patients. The sanatarium consisted of a unified area comprised of a group of lots and buildings improved with a common source of water supply and sewer facilities and various roads, including Roads 1 and 2.

12. After the sanitarium ceased operations, through various mesne conveyances that portion of the sanitarium property now owned by the Plaintiffs (Parcel No. 1), Helen Ann Jones, Debra Lee Jones and the Beckers became the property of Edward and Ruth Keck, husband and wife, Margaret Keck Miller, and Clara Keck Patterson (the "Kecks").

13. The Kecks are the most recent common grantors of the properties of the Plaintiffs (Parcel No. 1), Helen Ann Jones, Debra Lee Jones and the Beckers. Each of these properties was initially conveyed by the Kecks in 1947. The order and date of each conveyance from the Kecks was as follows: the property of Helen Ann Jones—Parcel A, March 26, 1947 and Par-

cel B, September 29, 1947; the property of Debra Lee Jones—March 27, 1947; the Beckers' property—May 20, 1947; and the Pompella property (Parcel No. 1)—June 21, 1947. Since their original conveyance by the Kecks, each of these properties has remained intact under separate ownership without further subdivision.

14. The deeds of conveyance from the Kecks refer to each of the properties conveyed as being part of various enumerated lots between Second (now Vine) and South River Streets according to the map of the Borough of East White Haven (now East Side Borough). A copy of this map was never presented in evidence.

15. The deeds of conveyance for the properties conveyed by the Kecks further describe the various boundaries of the different properties as being in and along Roads 1 and 2, as appropriate, rather than extending to the center lines of these roads. The deed to the Pompella property, in its first course, describes the property as being bounded, in part, by the southerly end of Road 2. The deeds of conveyance from the Kecks do not expressly grant, or otherwise expressly reserve, an easement in, to or over Roads 1 or 2 to any of the surrounding property owners whose lands border or connect with these roads.

16. The Beckers' property was first purchased from the Kecks by Frank H. Becker and Vera A. Becker, his wife, by deed dated May 20, 1947. Prior to the purchase of this property by Frank and Vera Becker, Mr. and Mrs. Becker resided in the home on the property for approximately three years (N.T., p. 153). Significantly, the home faces Road 2 and, for approximately seven years before Vine Street was later improved in the 1950s, Mr. and Mrs. Becker used Road 1, from its intersection with South River Street, as the principal means of access to their home (N.T., pp. 164-165).

17. At the time the Kecks severed title for each of the properties involved in this litigation, Roads 1 and 2 were unimproved dirt or gravel roads. No evidence was presented that these roads were ever dedicated by the property owner to public use, or open to or used by the public.

18. At the time of the original conveyance by the Kecks of the properties now owned by the Plaintiffs (Parcel No. 1), Helen

Ann Jones, Debra Lee Jones and the Beckers, each deed expressly stated that the property conveyed was part of a group of lots and buildings formerly known as the "Sunnyrest Sanatorium" and that the sanitarium property was served by a common source of water supply and sewer facilities that the grantees for themselves, their heirs, legal representatives and assigns would preserve and not interfere with, but that the grantors assumed no responsibility for the maintenance of water or sewer pipes or water supply nor of any roads on said plot.

19. The common grantors, the Kecks, are deceased and their successors in interest, having been named in this action as defendants, are Marian Keck Stephens, Ruth Elizabeth Keck Gayman, Philip Hess, Jackson Hess, David Hess and Jean Patterson Maranuk.[2]

20. The Pompella property (Parcel No. 1) was originally conveyed by the Kecks by Deed dated June 21, 1947 to Stephen E. Pompella and Eleanore Pompella, husband and wife, the parents of the Plaintiff, Stephen E. Pompella. At the time of this conveyance, the home in which the Plaintiffs reside existed on the property (N.T., p.139). At that time, the only means of vehicular access to the home was by use of Road 1, from either South River Street or Vine Street, to its intersection with Road 2 and use of Road 2 to the home.

21. At the time of the conveyance of the Pompella property (Parcel No. 1) from the Kecks to Stephen E. Pompella and Eleanore Pompella, the combined width of Road 2 and an adjacent concrete walkway on the western side of the road was eleven feet (Plaintiffs' Exhibit Nos. 1 and 9). The width of Road 2 at the present time is approximately eleven feet. The width of Road 1 is also approximately eleven feet (N.T., p. 39).

22. The Plaintiffs' home has been the primary residence of the Pompella family from 1947 until the present. Stephen E. Pompella resided in the residence until his death on July 2, 1960. The Plaintiff, Stephen E. Pompella, originally resided in the residence with his parents and since acquiring ownership of the home with his wife in 1969 has continued to reside in the home. As of the date of the hearing, the Plaintiff, Stephen E.

[2] The aforesaid Keck heirs were named in these proceedings as possible indispensable parties holding title to Roads 1 and 2. The heirs have not actively participated in this litigation and are not represented by counsel.

Pompella, was fifty-five years of age and had resided in the home a total of fifty-two years.

23. Approximately one year after acquiring ownership of the Pompella property (Parcel No. 1), Mr. Pompella's father hand-dug a driveway from Vine Street to the home. The driveway is less than seventy-five feet in length with a steep grade downhill from Vine Street and a sharp curve.

24. Since residing in the home, both generations of the Pompella family have continuously and routinely, on a daily basis, used Roads 1 and 2, as well as the hand-dug driveway, as a means of ingress, egress and regress to their home. Frequently, the direction of travel to the home is from Vine Street and departure is by way of Roads 1 and 2.

25. The Plaintiffs and their predecessors in title have not asked permission to use Roads 1 and 2 and have used these roads whenever they saw fit.

26. The Defendant, Helen Ann Jones, and her predecessors in title to the Jones property, for a period in excess of twenty-one years, have continuously and routinely, whenever desired and without permission, used Road 1 between South River Street and its intersection with Road 2 as a means of ingress, egress and regress to the Jones property, Parcels A and B.

27. Eleanore Pompella operated a beauty salon on the Pompella property from 1961 through 1969. During her tenure as proprietor, Eleanore Pompella leased the salon to another beautician for one year in the late 1960s. The patrons of the beauty salon accessed or departed from the Pompella property via the hand-dug driveway and Roads 1 and 2.

28. During the winter months, with snow and ice on the ground and because of its steepness and curve, it is difficult to use the hand-dug driveway as a means of exiting the Pompella property to Vine Street. At such times, the most convenient and practical means of departure is through use of Roads 1 and 2. The grade of Road 2 is relatively level and that of Road 1 from its intersection with Road 2 to South River Street is downhill and less than half the grade of the hand-dug driveway.

29. The relationship between the Plaintiff, Stephen E. Pompella, and the Joneses is strained. Beginning in 1977, through the present, the Defendant, Robert Jones, Sr., in the belief that the Plaintiffs do not have easement rights in Roads 1 and 2, has

periodically, on an average of twice a year, engaged in conduct designed to notify the Plaintiffs that they do not have the right to use the section of Road 1 from its intersection with Road 2 to South River Street. This conduct has consisted of placing signs stating "private road," "road closed" or "no trespassing" along Road 1 near its intersection with Road 2 or obstructing that section of Road 1 west of Road 2 with vehicles and equipment, the use of a chain, or piles of wood, rocks or other debris designed to prevent the Plaintiffs from using the road.

30. On those occasions when the signs were erected, or the obstructions were passable, the Plaintiffs continued to use Road 1 and drove around the obstructions to access South River Street. At times, the Plaintiffs have reported the obstructions to the local police, however, the police have advised the Plaintiffs that the dispute is a private matter. Until July 20, 2002, the obstructions have been of a temporary nature and have been removed within two to three days.

31. On July 20, 2002, the Plaintiffs' daughter accidentally hit and killed a dog owned by Robert Jones, Jr. and his wife, Holly Jones, while driving on Road 2.

32. On July 20, 2002, Robert Jones, Jr. erected a chain-link fence enclosing his backyard and extending onto Road 2 a distance of approximately five feet (N.T., pp. 23-24). The presence of this chain-link fence prevents the use of Road 2 by the Plaintiffs.

33. On September 4, 2002, Robert Jones, Jr. erected a wooden fence extending onto Road 2 a distance of approximately eight feet and also placed a boulder on the road (N.T., p. 23). The presence of this wooden fence and boulder further prohibits the use of Road 2 by the Plaintiffs.

34. On August 30, 2002, the Plaintiffs commenced the present action against the Joneses, Debra Lee Jones and the Beckers seeking a decree granting them the right to an easement over Roads 1 and 2 and requesting that the Joneses be directed to remove all obstructions interfering with the Plaintiffs' use of Roads 1 and 2 and that the Plaintiffs be permitted to use these roads as a means of ingress, egress and regress to their home. In an amended complaint filed on November 19, 2002, the Keck's heirs were added as named defendants.

DISCUSSION

The Plaintiffs rely on a number of theories to support their claims to use Roads 1 and 2. In doing so, the Plaintiffs appear to blur, or perhaps not recognize, the distinct elements of each claim—where they overlap and where they diverge—and in particular fail to fully develop the different circumstances underlying an easement by implication. Understanding these differences, however, is critical to an evaluation of the Plaintiffs' claims.

The common thread underlying an easement by implication is the notion that the easement exists because it can be inferred from the intention of the parties as revealed by an examination of all of the circumstances surrounding the conveyance. "Where an easement or other right is not expressed and is sought to be implied as attached to the grant of the fee, the same must clearly appear from the intention of the parties as shown by the terms of the grant, the surroundings of the property and the other **res gestae** of the transaction." **McAndrews v. Spencer,** 447 Pa. 268, 270, 290 A.2d 258, 259 (1972) (quotations and citations omitted) (emphasis added); **see also, Lerner v. Poulos,** 412 Pa. 388, 392, 194 A.2d 874, 876 (1963) ("The determination of the existence or creation of an implied easement depends upon the intention of the parties as inferred from the circumstances existing at the time of the severance of the tract.").

> An easement created by implication arises as an inference of the intention of the parties to a conveyance of land. The inference is drawn from the circumstances under which the conveyance was made rather than from the language of the conveyance. To draw an inference of intention from such circumstances, they must be or must be assumed to be within the knowledge of the parties. The inference drawn represents an attempt to ascribe an intention to parties who had not thought or had not bothered to put the intention into words … .

Bucciarelli v. DeLisa, 547 Pa. 431, 438 n.2, 691 A.2d 446, 449 n.2 (1997) (**quoting** Restatement of Property, §476, cmt. a). Therefore,

> [t]o draw such an inference the prior use must have been known to the parties at the time of the conveyance, or, at least, have been within the possibility of their knowledge at

> that time. Each party to a conveyance is bound not merely to what he intended, but also to what he might reasonably have foreseen the other party to the conveyance expected. Parties to a conveyance may, therefore, be assumed to intend the continuance of uses known to them which are in considerable degree necessary to the continued usefulness of the land. Also they will be assumed to know and to contemplate the continuance of reasonably necessary uses which have so altered the premises as to make them apparent upon reasonably prudent investigation … .

Id. at 436-37, 691 A.2d at 448 (**quoting** Restatement of Property, §476, cmt. j).

There exists in our case law at least four clearly recognized factual patterns pursuant to which an easement to use a road is implied: (1) the severance or partition of land among multiple owners whose separate parcels are traversed by a road or way, whose continued existence is manifested by surrounding circumstances to have been intended, (2) the necessity of access, (3) the sale of a lot with reference to a map or plan of streets and alleys, and (4) the description of land as bounded by a street or way. **Balog v. Marlow and Sheets,** 30 D. & C. 3d 170, 178 (Somerset Cty. 1980), **aff'd,** 312 Pa. Super. 609, 459 A.2d 29 (1983). The present case involves, arguably, all four categories.

Easements by Necessity and by Implied Reservation Based on Prior Use

The law of easements by implication at severance of title was recently, and extensively, discussed by our Supreme Court in **Bucciarelli, supra.** There, the court stated:

> The traditional test for implied easement at severance of title is set out in **Burns Manufacturing v. Boehm,** 467 Pa. 307, 313-14, 356 A.2d 763, 767 (1976):
>
> It has long been held in this Commonwealth that although the language of a granting clause does not contain an express reservation of an easement in favor of the grantor, such an interest may be reserved by implication, and this is so notwithstanding that the easement is not essential for the beneficial use of the property … . The circumstances which will give rise to an impliedly reserved easement have been concisely put by Chief Justice Horace Stern speaking for the Court in **Tosh v. Witts,** [381 Pa. 255, 113 A.2d 226 (1955)]:

> '[W]here an owner of land subjects part of it to an open, visible, permanent and continuous servitude or easement in favor of another part and then aliens either, the purchaser takes subject to the burden or the benefit as the case may be, and this irrespective of whether or not the easement constituted a necessary right of way.' **Tosh v. Witts, supra,** 381 Pa. at 258, 113 A.2d at 228.

(Citations omitted.) The **Boehm** court further stated:

> Easements by implied reservation … are based on the theory that continuous use of a permanent right-of-way gives rise to the implication that the parties intended that such use would continue, notwithstanding the absence of necessity for the use.

467 Pa. at 314 n.4, 356 A.2d at 767 n.4.

Id. at 437-38, 691 A.2d at 448-49 (footnote omitted).[3]

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[3] In **Graff v. Scanlan,** 673 A.2d 1028, 1032 n.4 (Pa. Commw. 1996), the court stated:

> Implied easements on the grounds of necessity must be distinguished from implied easements from a prior use (also referred to as easements by implied reservation). The two types of easements are often confused by both litigants and the courts because both easements require unity of ownership and subsequent severance. **See generall,** 11 Am.Jur. Proof of Facts 3d 601, **Way of Necessity.** An easement by necessity arises upon a showing that there was a conveyance of a part of a tract of landing in such a manner that the part conveyed or the part retained is denied access to a public road. Conversely, an implied easement from a prior use '[is] based on the theory that continuous use of a permanent right-of-way gives rise to the implication that the parties intended that such use would continue, notwithstanding the absence of necessity for the use.' [**Burns Manufacturing v.] Boehm,** 467 Pa. [307,] 314 n.4, 356 A.2d [763,] 767 n.4 [(1976)].

To the extent necessity is an element, or more accurately a consideration, in determining whether an easement by implied reservation exists, the "showing of necessity [does] not mean to require a showing of 'absolute necessity,' but rather [requires] only that the claimed easement be shown to be convenient or beneficial to the dominant estate." **Daddona v. Thorpe,** 749 A.2d 475, 486 (Pa. Super 2000) (citation omitted), **appeal denied,** 563 Pa. 697, 761 A.2d 550 (2000). In contrast,

> [a]n easement implied on the grounds of necessity is always of **strict necessity;** it never exists as a mere matter of convenience. **Possessky v. Diem,** 440 Pa.Superior Ct. 387, 655 A.2d 1004 (1995). Further, an easement by necessity does not exist when an owner can get to his own property through his own land, and the necessity must not be created by the party claiming the easement. **Ogden.** [referring to **Ogden v. Grove,** 38 Pa. 487 (1861)].

Graff, supra at 1032 (emphasis in original) (footnotes omitted). The requirement of absolute necessity, that the land in effect be landlocked, precludes the finding of an easement by necessity in favor of the Pompella property which is bounded on two sides by public roads.

The requirement that an easement by implication at the time of severance of title be open, visible, permanent and continuous

> simply means that the use involved shall not have been occasional, accidental or temporary. This means the use shall have been of such a character as to enable the claimant to rely reasonably upon the continuance of such use … . It is submitted that … any well-defined route should be held to satisfy the 'permanent' or 'continuous' prerequisite for implication.

Id. at 439, 691 A.2d at 449-50 (**quoting** 4 Powell on Real Property §34.08(2)(c) (1996)). These requirements "have as their purpose the creation of a test to determine whether an easement was intended at severance and whether the person against whom the easement is asserted had notice, actual or constructive, that such an easement existed." **Id.** at 439-40, 691 A.2d at 450. Accordingly, only the attending circumstances known to the parties at the time of conveyance are relevant. **Lease v. Doll,** 485 Pa. 615, 622 n.7, 403 A.2d 558, 562 n.7 (1979).[4]

In the present case, although it is clear that at one time the properties before us were combined and were operated as a unified complex, as a sanitarium, we have been provided no maps or pictures or other evidence of how the sanitarium

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[4] Whereas previous case law supported the belief that Pennsylvania subscribed to both the traditional test and the Restatement test (referring to the Restatement of Property, primarily Section 476) in deciding whether an easement had been created by implication, in **Daddona v. Thorpe, supra** at 485, the Superior Court, relying on the Supreme Court's decisions in **Burns Manufacturing v. Boehm,** 467 Pa. 307, 356 A.2d 763 (1976) and **Bucciarelli v. DeLisa,** 547 Pa. 431, 691 A.2d 446 (1997), determined that any conflict in this area is controlled by the traditional test. The traditional test requires proof that at the time of separation of title there was an open, visible, continuous and permanent use of the alleged easement. The test, at least as stated by our Supreme Court, does not contain an element of necessity. The Restatement test is a flexible balancing approach balancing all relevant facts, including whether the easement is necessary to the beneficial enjoyment of the property conveyed, and focuses entirely upon ascertaining the intent of the parties. **See Mann-Hoff v. Boyer,** 413 Pa. Super. 1, 8-9, 604 A.2d 703, 707-708 (1992), **appeal denied,** 531 Pa. 655, 613 A.2d 560 (1992). Because the requirements of the traditional test are circumstantial evidence of the intent of the parties to the conveyance, direct proof of such intent is uniquely relevant but not a separate element of the test. **Cf. Daddona, supra** at 485-86 (appearing to find that the Supreme Court in **Bucciarelli** imposed direct proof of the parties' intent as a separate requirement for the traditional test).

grounds were laid out, the interrelationship between the roads and other improvements of the sanitarium, when the sanitarium ceased operation, and what use, if any, was made of the sanitarium grounds from the time operations ceased until the time title to the properties was severed, including, most importantly, the condition and use of the property at the time of severance. We do not know and will not speculate whether at the time of severance the condition and appearance of Roads 1 and 2 were such as to imply an easement by reservation based upon prior use. The evidence presented by the Plaintiffs was not sufficient to determine whether at the time of severance Roads 1 and 2 were so open, visible, permanent and continuous as to infer, on the basis of prior usage, that the Kecks intended to create an easement at severance and that the respective purchasers from the Kecks were aware of this intent.

Easements Implied by Reference to a Map

The absence of evidence further precludes our finding of an easement by implication arising from a conveyance which refers to or incorporates a plan of lots.

> It is well settled that the grantee of a lot, which is sold according to a plan of lots on which streets or alleys not previously opened or projected as a public street are plotted out by the grantor, acquires an easement over those streets and alleys as a private right of property arising out of the grant, of which he cannot be deprived without compensation[.]

Potis v. Coon, 344 Pa. Super. 443, 449, 496 A.2d 1188, 1192 (1985) (quotations and citations omitted). Further,

> **References to a plan contained in deeds make the plan a part of the deed** or conveyance and constitute a dedication of the streets, alleys and ways shown on the plan, to the use of the purchasers as public ways[.] …

Id. at 450, 496 A.2d at 1192 (emphasis in original). The requirements of prior use or necessity do not apply to an easement created by reference to a map or plot of lots. **Id.** at 455, 496 A.2d at 1195.

The deeds placed in evidence by the Plaintiffs show unmistakably that the properties involved in this litigation were part of the common development formerly known as the Sunnyrest Sanatorium. This development consisted of a group of lots and

buildings, common improvements and an internal system of walkways and roadways. This is evidenced not only by the recital contained in each of the deeds from the common grantor and the use of private roads as describing property boundaries, but also by the reference in each of these deeds to the various lots depicted on the Map of the Borough of East White Haven of which they are a part and, for instance, to the description of the common property line for the Beckers' property and that of Debra Lee Jones as being midway between Blaisdale Cottage and Cottage No. 6. The foregoing suggests strongly that a map for the development exists, however, no map was placed in evidence nor do the deeds in issue incorporate by reference or purport to convey pursuant to any plot or plan of lots developed by the common grantor.

Easement Implied From Property Descriptions Referring to an Abutting Road

> It is settled law in this state, that when a public street or highway is called for as a boundary in a deed, the grantee takes title in fee to the middle of the street, if the grantor had title to it, and did not expressly or by clear implication reserve it: … Where the street called for a boundary is not a public highway, nor dedicated to public use, the grantee does not take title in fee to the centre of it, but by implication acquires an easement or right of way only over the lands: …

Spackman v. Steidel, 88 Pa. 453, 458 (1879). Regardless of whether or not the abutting landowner takes title to the center of the road, an easement by implication and the right of the grantee to use the road arises. **Bieber v. Zellner,** 421 Pa. 444, 446-47, 220 A.2d 17, 18 (1966).

In the present case, no evidence was presented that Roads 1 and 2 were ever used by the public in general, or dedicated or accepted for public use.[5] No evidence was presented of a recorded subdivision plan or of the applicability of the Act of May 9, 1889, P.L. 173, 36 P.S. §1961, pertaining to the statutory limitation period during which municipal entities possess

[5] The "dedication" of land results when a landowner offers property for public use and it is accepted by or in behalf of the public. The dedication largely depends on the intention of the owner of the land. **Coffin v. Old Orchard Development Corp.,** 408 Pa. 487, 186 A.2d 906 (1962).

the power to accept for public use roads laid out by a subdivider on a plotted street. **Rahn v. Hess,** 378 Pa. 264, 106 A.2d 461 (1954). Absent such evidence, we must conclude that the parties before us, through their predecessors in title, did not acquire title to the center of Roads 1 and 2.[6]

"Where, as here, descriptions in a deed refer to a driveway as a boundary which is not a highway or dedicated to public use, the grantee does not take title in fee to the center of it, but by implication acquires an easement or right of way over the lands." **Hoover v. Frickanisce,** 169 Pa. Super. 443, 446, 82 A.2d 570, 572 (1951). This statement of the law applies not only to a driveway, but to any roadway, not dedicated to public use, which is described as the boundary of a parcel of real estate. **McAndrews v. Spencer, supra** at 270, 290 A.2d at 259. Additionally,

> [t]he rights of a non-abutting property owner within the plan are no less than those of a property owner abutting upon the street in question[.] … The non-abutting property owner's rights in the street grid of the plan are not limited to those streets which are necessary to the enjoyment of his property or which materially benefit or add to its value[.]

Potis v. Coon, supra at 451, 496 A.2d at 1193 (quotations and citations omitted). "There is in such a case, an implied covenant that there is a way corresponding with the one described in the deed, that so far as the grantor is concerned it shall be continued, and that the grantee, his heirs and assigns, shall have the benefit of it." **Vinso v. Mingo,** 162 Pa. Super. 285, 288, 57 A.2d 583, 584-85 (1948) (quotations and citations omitted). "Because it arises by implication and not by necessity, the easement encompasses the entire right of way." **Scoppa v. Myers,** 341 Pa. Super. 61, 64, 491 A.2d 148, 150 (1985), **appeal denied** (August 27, 1985).

The sequence of the conveyances by the common grantor; the reference in each deed to boundary points on one or both of Roads 1 and 2; the presence of the Plaintiff's home on the Pompella property at the time of the original conveyance of

[6] This conclusion is significant only to the extent of identifying the record title owner of the roads and, in consequence, the real party in interest against whom the Plaintiffs' claim of a prescriptive easement lies. For this purpose, the Plaintiffs wisely and properly joined the Kecks as indispensable parties in these proceedings.

this property by the Kecks to Mr. Pompella's parents with the ultimate destination of Road 2 ending at the Pompella property and no other private roads, at the time, providing access to the home; and the use of Road 1 by Vera A. Becker and her husband for almost three years prior to any of the conveyances by the Kecks as the primary means of access to the Beckers' home which itself faced on Road 2, all confirm the right of the abutting property owners' use of Roads 1 and 2.

Easements by Prescription

> 'An easement or right-of-way by prescription arises by adverse, open, continuous, notorious, and uninterrupted use of the land for twenty-one years.' **Waltimyer v. Smith,** 383 Pa.Super. 291, 294, 556 A.2d 912, 913 (1989). Moreover,
>
> In establishing a prescriptive easement, constant use need not be demonstrated in order to establish the continuity of the use. Rather, 'continuity is established if the evidence shows 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.'
>
> **Newell Rod and Gun Club, Inc. v. Bauer,** 409 Pa.Super. 75, 81, 597 A.2d 667, 670 (1991) (**quoting Dunlap v. Larkin,** 342 Pa.Super. 594, 608, 493 A.2d 750, 757-58 (1985)).

Matakitis v. Woodmansee, 446 Pa. Super. 433, 440, 667 A.2d 228, 231 (1995), **appeal denied,** 545 Pa. 680, 682 A.2d 311 (1996). "[W]here 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 is a title which cannot be afterwards disputed." **Loudenslager v. Mosteller,** 453 Pa. 115, 117, 307 A.2d 286, 287 (1973) (quotation and citation omitted).

Our courts have also determined that "[p]roof of an open, notorious, continuous and uninterrupted use for the prescriptive period, without evidence to explain how it began, raises a presumption that it is adverse and under claim of right." **Kaufer v. Beccaris,** 401 Pa. Super. 1, 5, 584 A.2d 357, 359 (1991). "Once this presumption is raised, the burden shifts to the owner of the servient tenement to show by affirmative proof that the use was by virtue of some license, indulgence, permission or

agreement inconsistent with a claim of right by the other party." **Id.** at 5, 584 A.2d at 359.

On the evidence presented, we have no difficulty in concluding that not only did the Plaintiffs and their immediate predecessors in interest, Mr. Pompella's parents, believe that they were entitled to use Roads 1 and 2 as a means of access to their home but that they in fact utilized these roads for this purpose on a continuous basis, without requesting permission, for the prescriptive period. This use was open, continuous, notorious and uninterrupted beginning in 1947 with the purchase by Mr. Pompella's parents of their home and continued uninterrupted until at least 1977 when the Joneses first began asserting rights in the roads inconsistent with those of the Plaintiffs.[7] For approximately eight years, this use included the operation of a beauty salon in which Mr. Pompella's mother's customers entered and left the premises on a regular basis using the disputed roads.

Extinguishing Easement Rights

The Joneses claim that notwithstanding any interest the Plaintiffs may have acquired by implication or otherwise in the roads, this interest was extinguished by their assertion of rights in the roads inconsistent with those of the Plaintiffs. On this issue, we first recognize that the standards applicable to acquiring title to property by adverse possession are different from the standards for extinguishing an easement over a servient tenement.

> The standards for determining the acquisition of title to land by adverse possession and for determining whether an easement over property has been extinguished by adverse possession contain the same basic elements—in each situation, the possession that will acquire title or extinguish an easement must be actual, continuous, adverse, visible, notorious and hostile possession of the land in question for

[7] "Tacking" of adverse use by successive owners for the prescriptive period to establish an easement by prescription, in contrast to acquiring fee title by adverse possession, does not require an actual conveyance of the claimed rights of a predecessor to the successor. **Predwitch v. Chrobak,** 186 Pa. Super. 601, 603, 142 A.2d 388, 389 (1958). Easements are "appurtenances" of the dominant estate and require no deed or writing to support them. Easements pass by conveyance of the estates to which they are appurtenant. **Id.** at 603-604, 142 A.2d at 389 (citations omitted).

> the prescriptive period of twenty-one years. **See, e.g., Dunlap v. Larkin, supra** and cases cited therein, **and Stozenski v. Borough of Forty Fort,** 456 Pa. 5, 317 A.2d 602 (1974). However, the focus of these standards is markedly different in the two situations, for conduct that is sufficient to acquire title to land may not be sufficient to extinguish someone else's easement over (or use of) that land. To extinguish an easement over (or use of) the servient tenements, the servient tenement owner must demonstrate a visible, notorious and continuous adverse and hostile use of said land which is inconsistent with the use made and rights held by the easement holder, not merely possession which is inconsistent with another's claim of title.

Estojak v. Mazsa, 522 Pa. 353, 361, 562 A.2d 271, 274-75 (1989).

The occasional and sporadic acts of the Joneses prior to July 20, 2002 in posting the roads as private property and erecting temporary barriers obstructing the use of the roads did not meet the level of continuous, adverse and hostile use necessary to deprive a property owner of his easement interests. We also note that the easement rights of the Plaintiffs in the roads, and that of their predecessors in title, whether by implication or prescription, vested prior to 1977. To the extent the Joneses claim their failure to object or take action earlier was an accommodation and indulgence to the Plaintiffs and, therefore, was permissive, the contention is without merit. "Although it is clear that permissive use will not support an easement by prescription, it is equally clear that '[a]bsence of objection by the owner to use of the land is not equivalent to a grant of permission by him such as will preclude the acquisition of title to an easement by prescriptive use.' " **Kaufer v. Beccaris, supra** at 6, 584 A.2d at 359. "Mere silence in the face of open, continuous and uninterrupted use by the owner of the dominant tenement is insufficient to change the adverse nature of such use to a permissive use." **Id.** at 6, 584 A.2d at 360.[8]

[8] For reasons similar to those we discussed for the Plaintiffs' claims in their case in chief, we also find in favor of Helen Ann Jones, the sole owner of the Jones property, Parcels A and B, on her claim for an implied easement based upon the description of her properties as abutting on a private road, and her claim for a prescriptive easement on that portion of Road 1 located between South River Street and the intersection of Road 1 with Road 2. Her remaining counterclaims, as with the case of the those of the Plaintiffs, are denied.

Requirement That a Dominent Tenament Owner Exercise His Rights Reasonably

As we understand the Joneses' complaints, the Joneses claim the Plaintiffs have abused their use of the road and drive at excessive and unsafe speeds, dangerous to the Joneses' children and their families. The Joneses are not without a remedy for these concerns.

"The owner of a dominant estate may not exercise the rights granted to him or her without regard to the rights of the servient owner." **Purdy v. Zaver,** 398 Pa. Super. 190, 198, 580 A.2d 1127, 1131 (1990). In **Sides v. Cleland,** 436 Pa. Super. 618, 648 A.2d 793 (1994), **appeal denied,** 540 Pa. 613, 656 A.2d 119 (1995), the owner of the servient estate claimed that the right-of-way to his property was being abused by the volume of traffic, excessiveness of use, and travel at unsafe and dangerous speeds. At issue was the scope of use for the right-of-way.

In addressing the owners' concerns and finding that the rights of the dominant tenant may not unreasonably interfere with the use of the servient estate, the trial court restricted the use of the right-of-way to daylight walking and vehicles traveling no more than ten miles per hour. These restrictions were held by the appellate court to be eminently reasonable and were upheld.

CONCLUSIONS OF LAW

1. Equity has jurisdiction of this action.

2. The evidence presented was insufficient to prove the area designated as Roads 1 and 2 was dedicated to public use.

3. Based upon the evidence presented, the title to Roads 1 and 2 remains in the Kecks and their successors in interest. Neither the Kecks nor their successors in interest have an obligation to maintain these roads.

4. Neither the Plaintiffs nor the Joneses have acquired an easement by implication in Roads 1 or 2 by virtue of apparent usage at the time of severance of title.

5. Neither the Plaintiffs nor the Joneses have acquired an easement by implication in Roads 1 or 2 by virtue of an easement of necessity.

6. Neither the Plaintiffs nor the Joneses have acquired an easement by implication in Roads 1 or 2 by virtue of a conveyance pursuant to a map or plot of lots.

7. The Plaintiffs and the Defendant, Helen Ann Jones, in their capacity as property owners, have acquired an easement by implication in Roads 1 and 2 by virtue of a conveyance bounded by a private road.

8. The Defendants, Robert Jones, Sr., Robert Jones, Jr., and Holly Jones, have not acquired an easement by implication in Roads 1 or 2 by virtue of a conveyance bounded by a private road.

9. The Plaintiffs' and Helen Ann Jones' easements by implication are in common with those of other property owners whose properties abut either Roads 1 or 2. These easements exist in Roads 1 and 2 over their entire length and width.

10. The Plaintiffs have acquired an easement by prescription in Roads 1 and 2.

11. The Defendant, Helen Ann Jones, has acquired an easement by prescription in that section of Road 1 located between South River Street and the intersection of Road 1 with Road 2.

12. The Joneses have failed to meet their burden of establishing adverse possession of the disputed roads sufficient to extinguish the private rights of ingress and egress held by the Plaintiffs in these properties.

13. The Plaintiffs are entitled to a decree restraining the Joneses from in any way unreasonably interfering with or obstructing the Plaintiffs' use of Roads 1 and 2 for the purpose of ingress and egress to their property.

14. The Joneses are entitled to reasonable restrictions on the Plaintiffs' use of the roads sufficient to protect the safety and security of the Joneses' use of their properties and that of their guests and invitees.

DECREE NISI

AND NOW this 26th day of December, 2003, after hearing and upon consideration of the record and the submissions by the parties, it is hereby ORDERED and DECREED

1. That the Plaintiffs, Stephen E. Pompella and Kim A. Pompella, and the Defendant, Helen Ann Jones, in their capacity as property owners of Parcel No. 1, and Parcels A and B respectively, depicted on Appendix "A," possess an easement of passage in Roads 1 and 2 over the entire length and at a width of eleven feet.

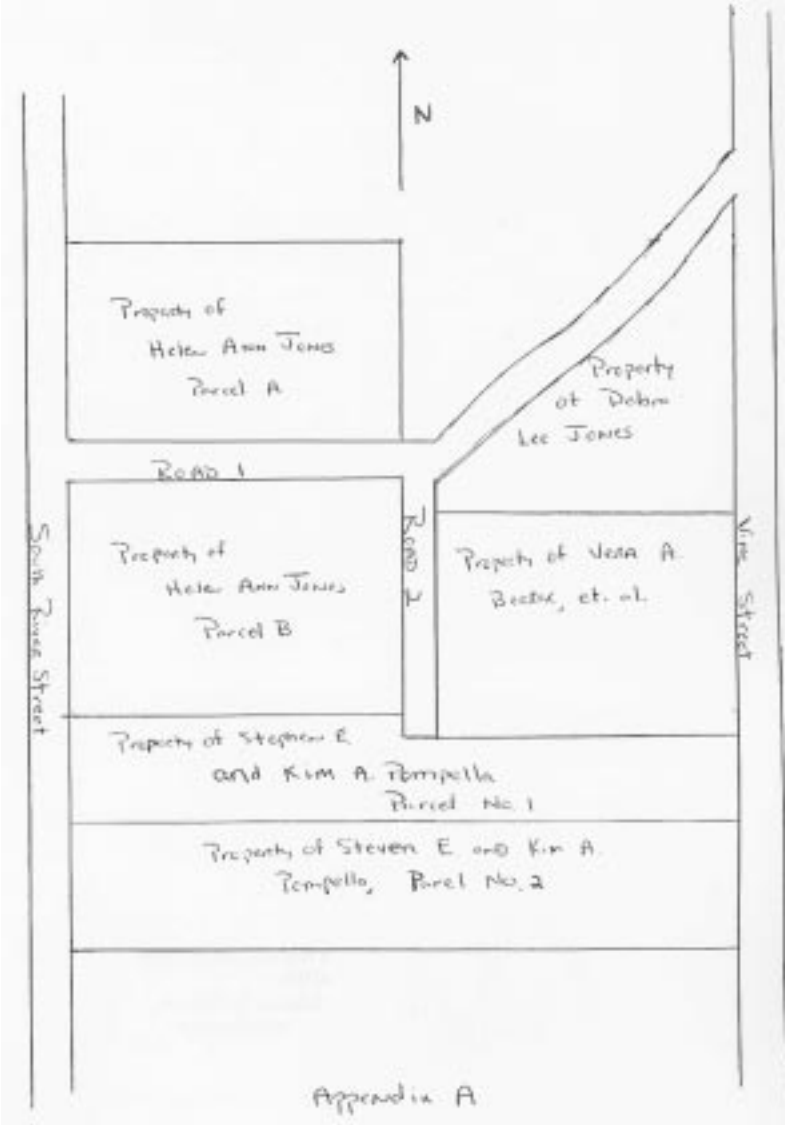
2. That the Defendants, Helen Ann Jones and Robert Jones, Sr., wife and husband, and Robert Jones, Jr. and Holly Jones, husband and wife, be enjoined and restrained from interfering with or otherwise obstructing the Plaintiffs' free and uninterrupted use of Roads 1 and 2 for purposes of ingress and egress to the Pompella property, Parcel No. 1.

3. That the Defendants, Helen Ann Jones and Robert Jones, Sr., wife and husband, and Robert Jones, Jr. and Holly Jones, husband and wife, are directed to remove all fencing, dirt piles, rocks or other obstructions to travel placed by them on either Roads 1 or 2 within a width of eleven feet within thirty (30) days of the date of this Decree.

4. That the Plaintiffs as well as other users of Roads 1 and 2 shall not drive or operate motor vehicles on these roads at a speed greater than ten miles per hour.

5. That the costs of these proceedings shall be borne equally between the Plaintiffs and the Defendants, Helen Ann Jones and Robert Jones, Sr., wife and husband, and Robert Jones, Jr. and Holly Jones, husband and wife.

6. That the Prothonotary shall, unless a Motion for Post-Trial Relief is filed within ten (10) days, upon praecipe of either the Plaintiffs or any of the Defendants, enter this Decree Nisi as a Final Decree and cause a copy of the Final Decree together with a copy of the plan of lots attached hereto, "Appendix A", to be recorded in the Carbon County Recorder of Deeds Office.


N
Property of
Helen Ann Jones
Parcel A
Property
of Debra
Lee Jones
Road 1
Property of
Helen Ann Jones
Parcel B
Road 2
Property of Vera A.
Beebe, et. al.
South River Street
Vine Street
Property of Stephen E.
and Kim A. Pompella
Parcel No. 1
Property of Steven E. and Kim A.
Pompella, Parcel No. 2

Appendix A

COMMONWEALTH OF PENNSYLVANIA vs. VIRGINIA LOUISE CARLSON, Defendant

Criminal Law—DUI—Eligibility for ARD—Legality of District Attorney Policy Imposing a Lifetime Ban Where ARD Previously Offered and Accepted

1. The initial decision to recommend a case for ARD lies solely within the discretion of the District Attorney.

2. Paramount to the proper implementation of any ARD program is to assure that inclusion/exclusion promotes one or both of the objectives sought to be achieved by the program's existence: protection of the public and/or the rehabilitation of the defendant.

3. The District Attorney's consideration of a prior ARD as the basis for denying a subsequent application for ARD for a charge of driving under the influence is not improper even where the prior ARD is over seven years old.

4. The District Attorney's policy of denying admittance into the ARD program to those who have previously received ARD for a charge of driving under the influence, as applied in this case, where defendant's previous ARD occurred nine years prior to the incident underlying the pending charges, is neither arbitrary nor an abuse of discretion.

NO. 272 CR 02

MICHAEL D. MUFFLEY, Esquire, Assistant District Attorney—Counsel for Commonwealth.

STEPHEN P. VLOSSAK, SR., Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, J.—February 4, 2004

The Defendant challenges the District Attorney's unwritten policy of denying accelerated rehabilitative disposition ("ARD") for a defendant charged with driving under the influence ("DUI") who has previously received ARD for a DUI offense regardless of when the prior disposition occurred. For the reasons which follow, we will deny Defendant's motion.

PROCEDURAL AND FACTUAL BACKGROUND

On April 18, 2002, the Defendant, Virginia Louise Carlson, was charged with two misdemeanor counts of driving under the influence[1] and the summary offense of careless driving.[2] In accordance with Carbon County's Local Rules and the Pennsylvania Supreme Court's Rules for ARD, Local Rule 311.1 and

[1] 75 Pa. C.S. §§3731(a)(1) and 3731(a)(4)(i).

[2] 75 Pa. C.S. §3714.

Pa. R.Crim.P. 310-320, respectively, Defendant applied for admission into the ARD program. The application was denied on the sole basis that Defendant had previously received ARD in 1993 for a DUI charge.

It is the policy of the District Attorney's Office to deny admission into the ARD program for a charge of DUI when the defendant has previously received an ARD disposition for a DUI offense. Defendant argues that this policy, rather than being an exercise of discretion, is an abdication and/or abuse of discretion by the District Attorney's Office violative of Defendant's due process and equal protection rights under both the state and federal constitutions. Defendant asks that we order the District Attorney to present the case for ARD disposition by the court.

"ARD … is a pretrial disposition of certain cases, in which the attorney for the Commonwealth agrees to suspend prosecution for an agreed upon period of time in exchange for the defendant's successful participation in a rehabilitation program, the content of which is to be determined by the court and applicable statutes." **Commonwealth v. Lutz,** 508 Pa. 297, 303, 495 A.2d 928, 931 (1985). The program for ARD generally was developed by our Supreme Court in 1972 pursuant to its rulemaking authority under Art. 5, Section 10 of the Pennsylvania Constitution and, for DUI cases in particular, is mandated by Section 1552 of the Motor Vehicle Code. 75 Pa. C.S. §1552. The purpose of the program is the recognition that some "cases which are relatively minor or which involve social or behavioral problems … can best be solved by programs and treatments rather than by punishment." **Id.** at 303, 495 A.2d at 931 (**quoting** the President's Commission on Law Enforcement and the Administration of Justice).

While both the Supreme Court's Rules and the Motor Vehicle Code provide for the availability of ARD in DUI cases, neither sets forth the criteria by which a defendant is selected for consideration and admission into the program. In **Lutz,** the Supreme Court held that under its rules only district attorneys —not the defendant, or other parties—may move for the admission of a defendant into ARD. **Commonwealth v. Lutz, supra** at 305, 495 A.2d at 932. Whether the district attorney does so is within his sole discretion. "An ARD recommendation

is solely in the province of the prosecutor, and admission of an offender into the program is by the grace of the trial court upon the Commonwealth's motion." **Commonwealth v. Pypiak,** 728 A.2d 970, 972 (Pa. Super. 1999) (**quoting Commonwealth v. Stranges,** 397 Pa. Super. 59, 68, 579 A.2d 930, 934 (1990)). "The trial court's function is not to 'rubber stamp' the ARD recommendation; rather, the court is free to come to its own decision as to whether ARD will be beneficial to the defendant and to the community." **Commonwealth v. Cline,** 800 A.2d 978, 981 (Pa. Super. 2002), **appeal denied,** 573 Pa. 676, 822 A.2d 703 (2003).

The exercise of discretion by the District Attorney in this regard, while vast, is not unfettered. However, before we may find an abuse of discretion, we must conclude that the criteria relied upon by the District Attorney was "wholly, patently and without doubt **unrelated** to the protection of society and/or the likelihood of a person's success in rehabilitation, such as race, religion or other such obviously prohibited considerations …." **Commonwealth v. Lutz, supra** at 310, 495 A.2d at 935 (emphasis in original). Further, "[a]dmission to an ARD program is not a matter of right, but a privilege." **Id.** at 307, 495 A.2d at 933.

The district attorney is society's representative who by virtue of his office has the authority and responsibility of deciding when a case should be prosecuted. "Since the judgment about who can benefit from ARD is subjective, and since society may be seriously damaged by a wrong judgment, the district attorney is not to be faulted if he errs on the side of caution." **Commonwealth v. Lutz, supra** at 310, 495 A.2d at 934.

"Paramount to the proper implementation of any ARD program is to assure that inclusion/exclusion promotes one or both of the objectives sought to be achieved by the program's existence: protection of the public and/or the rehabilitation of the defendant." **Commonwealth v. Darkow,** 426 Pa. Super. 219, 224-25, 626 A.2d 1173, 1176 (1993), **appeal denied,** 537 Pa. 629, 642 A.2d 483 (1994). It may well be that a defendant with a history of convictions or ARDs arising from DUI charges is a bad choice for ARD and that such history is relevant in predicting the defendant's character and amenability for rehabilitation. It may also be that once a defendant has been afforded

and accepted the opportunity for ARD for DUI, and then recommits the offense, prosecution is the best means of assuring compliance in the future. Such considerations properly focus on public protection and the likelihood of whether the defendant will benefit from participation in the ARD program. Regardless of how we might weigh such considerations, it is the sole province of the district attorney to initially determine whether a defendant likely will benefit from another ARD or whether the public is better protected by denying the defendant access to ARD. Absent an arbitrary exercise of its discretion, it is not only improper but an abuse of judicial authority to interfere with the exercise of an executive decision by the district attorney.[3]

In **Commonwealth v. Belville,** 711 A.2d 510 (Pa. Super. 1998), the defendant argued that because her previous ARD disposition occurred over seven years earlier, and because the record regarding the disposition had been expunged, consideration of her prior record and her failure to disclose it was prohibited. In that case, the defendant's admission into the ARD program for a DUI offense had occurred nine years prior to the DUI charge then pending. The District Attorney's policy there, like in the case **sub judice,** was to deny admittance into the ARD program to those who had previously received ARD. The court held "it both proper and completely appropriate for the district attorney to have considered appellant's prior ARD, notwithstanding its expunction from her record." **Id.** at 513. Similarly, the court in **Commonwealth v. Darkow, supra,** concluded that consideration of a prior ARD as a basis for refusing to offer a subsequent ARD is not improper even where the prior ARD is over seven years old. In language equally applicable to the present case, the court stated:

> From our examination of the Rules of Criminal Procedure governing ARD, the applicable provisions of the Motor Vehicle Code and the case law interpreting the objective(s) sought to be achieved under its auspices, we find it

[3] In **Commonwealth v. Gano,** 781 A.2d 1276 (Pa. Super. 2001), the court noted that in York County, the District Attorney's Office "considers any of the following to constitute an 'aggravating circumstance' in a DUI related case: a blood alcohol content above .230; the arresting officer's objection to ARD admission; the defendant's failure to cooperate; driving without a license; or a prior criminal history." **Id.** at 1279 n.6.

> proper for the District Attorney to have looked to a prior ARD admission (notwithstanding its 8-year-old status) as a basis for refusing the appellant entry into the Delaware County ARD program.

Commonwealth v. Darkow, supra at 225, 626 A.2d at 1176.

"ARD recommendations issued by the district attorney reflect his or her view of what is beneficial to the community and are historically given great judicial deference." **Commonwealth v. Gano,** 781 A.2d 1276, 1279 (Pa. Super. 2001). Under **Lutz,** a district attorney may base a decision to grant or deny admission to ARD on any consideration relating to the protection of society and the rehabilitation of the defendant. Here, Defendant's previous admission to the ARD program occurred nine years prior to the occurrence of the incident underlying the present charges. That time period is comparable to the eight and nine-year periods separating the earlier admission into the ARD program for DUI and the subsequent denial for admission on a latter DUI charge challenged in **Darkow** and **Belville,** respectively.[4] In both instances, the exercise of discretion by the District Attorney was upheld by the Superior Court. Under the circumstances of this case, we find that the reasons for the District Attorney's denial of Defendant's application for admission into the ARD program—prior admission to ARD for DUI—were neither arbitrary nor based upon a prohibited consideration and, therefore, must be upheld.

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[4] In both cases, the statute then in force prohibited ARD consideration of cases where the defendant had accepted ARD for a DUI charge within seven years of the date of the current offense. 75 Pa. C.S.A. §3731(d). In **Darkow,** the court expressly stated that "the 7-year statute of limitations does not foreclose the Commonwealth from examining conduct of the defendant which falls outside the perimeters of the established time period." **Id.** at 224, 626 A.2d at 1176. We note that the Pennsylvania legislature recently passed Act 24 of 2003 which amended Section 3731(d) of the Vehicle Code, effective February 1, 2004. Unless the previous DUI charge involved a blood alcohol content of less than 0.10 percent, the statutory bar for admission into an ARD program for DUI is now that period within ten years of the current offense. 75 Pa. C.S.A. §3807(a)(2)(i).

BONITA J. DOPIRA, Plaintiff vs.
DANIEL J. DOPIRA, Defendant

BONITA J. DOPIRA, Plaintiff vs.
DANIEL J. DOPIRA, Defendant

DANIEL J. DOPIRA, Plaintiff vs.
BONITA J. DOPIRA, Defendant

Civil Action—Child Support/Alimony Pendente Lite—*Standard of Review for Exceptions From Hearing Officer's Report—Computation of Net Monthly Income—Importance of Cash Flow Rather Than Federal Tax Income—Disallowance of Depreciation for Rental Real Estate—Effect of Gains and Losses From Subchapter S Corporations Passed Through to the Shareholders*

1. In reviewing the recommendation of the hearing officer for either child support or alimony **pendente lite,** the trial court has plenary jurisdiction to conduct an independent review of the record and, when appropriate, to substitute its judgment for that of the hearing officer.

2. In determining the amount of income available for support, income must reflect the actual available financial resources and not the off-time fictional financial picture which develops as a result of expenses or deductions taken against income as permitted by the federal income tax laws. The deductions or losses reflected on corporate books or individual tax returns are irrelevant to the calculation of available income unless they reflect an actual reduction in available cash. Cash flow is to be considered, not federally taxed income.

3. Depreciation expenses are to be deducted from gross income in support matters only when they reflect actual reductions in taxpayer's personal income. Because the depreciation amount for real estate commonly does not reduce the actual dollar income of the taxpayer, this amount is not deducted from a taxpayer's income in determining his total income upon which a support order is computed.

4. Because, for tax purposes, the gains and losses of a Subchapter S corporation are passed through to its shareholders to be reported as gains or losses on their individual tax returns without necessarily being realized gains or losses of the shareholders, such reported gains and losses must be carefully evaluated to determine whether cash flows which would otherwise be available to pay support are being sheltered.

5. When actual earnings do not truly reflect a parent's earning capacity or power, the court in computing the amount of support owed may base the parent's obligation on his "earning capacity" rather than actual income, taking into account the nature and extent of the parent's property and other financial resources.

NO. 62DR99

NO. 00DR1286

NO. 219DR00

LAWRENCE M. KLEMOW, Esquire—Counsel for Daniel J. Dopira.

BARRY C. SHABBICK, Esquire—Counsel for Bonita J. Dopira.

MEMORANDUM OPINION

NANOVIC, J.—February 4, 2004

Before the court are two petitions of the Petitioner, Daniel J. Dopria ("Father"), to modify his obligation for child support and alimony **pendente lite** for the period from August 1, 2001 until the present, due to various changes in the custodial status of the parties' son and alleged changes in Father's income.

FACTUAL AND PROCEDURAL BACKGROUND

The parties are the parents of one child, Brandon, born August 6, 1993. Primary custody of Brandon initially existed with the Respondent, Bonita J. Dopira ("Mother"), however, that arrangement has undergone several changes since at least September 7, 2001. Between September 7, 2001 and January 3, 2002, primary custody was transferred to Father. Then, as of January 3, 2002, custody was allocated fifty-six percent to Father and forty-four percent to Mother. Finally, since July 15, 2002, custody has been shared equally between the parties.

Divorce proceedings between the parties have been pending since August 20, 1998,[1] and the parties have been separated since March 1998. Mother is a former grade school teacher whose employment was terminated for cause on January 23, 2001. Her average monthly net income at the time was One Thousand Nine Hundred Sixty-Four Dollars ($1,964.00). This amount has been continuously used to calculate her support obligation and is not disputed in these proceedings. **See** Pa. R.C.P. 1910.1602(d) (ordinarily no relief from support obligation where party fired for cause).

Father is the owner of two businesses, a convenience store called the Switchback Mini-Mart located in Summit Hill and a remodeling business known as Daniel Dopira Remodeling. Both businesses are incorporated as Subchapter S corporations. Additionally, Father actively invests in the stock market and receives interest, dividends and rental income from various real estate holdings.

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[1] Divorce proceedings docketed to no. 98-1615 were originally commenced by Father on August 20, 1998, and discontinued as of April 10, 2000. A new divorce complaint, docketed to no. 00-1286, was filed by Mother on July 11, 2000. This action remains outstanding as an active divorce proceeding.

The most recent final order of support is dated April 17, 2001, with an effective date of August 1, 2000. At the time this order was entered, Father's net monthly income taken from his 2000 federal income tax return was computed by the Hearing Officer to be Six Thousand Nine Hundred Forty-Three Dollars ($6,493.00) with gross annual income of Eighty-Six Thousand One Hundred Fifty Dollars ($86,150.00) from the following sources:

a) Officer's compensation from the mini-mart—	$26,000.00
b) Taxable interest—	$ 4,800.00[2]
c) Dividend income—	$ 5,900.00
d) Net rental income—	$ 3,850.00
e) Capital gains (from stock sales)—	$38,000.00
f) Retained mini-mart income—	$12,400.00[3]
Total Income	$90,950.00

In making these findings, the Hearing Officer expressly recognized Father's control of assets and his ability to control income from the mini-mart and remodeling businesses for tax and other purposes and that "it was apparent in reviewing the returns that many of Mr. Dopira's personal expenses were buried in the business enterprises."

On August 1, 2001, Father filed a petition to modify the existing orders of child support and alimony **pendente lite** on the basis of a lower salary, losses in his businesses, and the absence of capital gains in 2001.[4] A second petition to modify child support was filed by Father on September 25, 2001, on

[2] This figure appears to have been inadvertently omitted by the Hearing Officer in her previous computation of Father's gross total annual income for the year 2000. With this figure excluded, the total is $86,150.00

[3] This figure represents the amount of depreciation expense claimed on the 2000 federal income tax return of the mini-mart. The Hearing Officer reasoned that this amount was nothing but a paper loss and, therefore, should pass through as income to Father.

[4] The written petition requests a modification of the child support order only, however, there appears to have been confusion in the forms provided to Father for filing and that it was Father's intent to request modification of both the child support and alimony **pendente lite** orders. This understanding was evidenced by a letter of the Domestic Relations Conference Officer dated January 18, 2002, making a recommendation on Father's petitions and was also acknowledged and confirmed at the time of the hearing before the Hearing Officer (N.T., pp. 106-108, 110).

the basis of a change in the custodial relationship, the parties' son being then in Father's primary custody as of September 7, 2001.

Father's petitions were heard before a hearing officer on July 12, 2002. At the hearing, Father testified that the capital gain of Thirty-Eight Thousand Dollars ($38,000.00) reported in 2000 was for that year only and not repeated. Father explained that the stock market in general was depressed, that his investments had substantially decreased in value, and that he had incurred capital losses of nearly Ninety-Six Thousand Dollars ($96,000.00) in 2001. Father further testified that the proceeds of stock sold by him in 2001 were used to loan monies to the mini-mart, to establish a sheltered "521" college account for his son, and for his personal expenses. The proceeds used for these purposes approximated $40,000.00, $25,000.00, and $10,000.00 to $15,000.00 respectively (N.T., pp. 19, 65-66).

Father also testified at the hearing on July 12, 2002, that the gross income of the remodeling business had declined in 2001 from that in 2000 and that he had drawn no compensation from the business in either year. In support of his testimony, Father placed in evidence the 2001 federal tax returns for the Switchback Mini-Mart, Daniel Dopira Remodeling and his personal return. From these returns, the following sources and amounts of gross income actually available to Father for his personal use are identified as follows:

a) Officers' compensation from the mini-mart—	$19,400.00
b) Taxable interest -—	$ 2,537.00
c) Dividend income—	$ 1,906.00
d) Net rental income—	$16,176.00[5]
Total gross income	$40,019.00[6]

[5] This figure equals total reported gross rental income of Twenty-Nine Thousand Two Hundred Eleven Dollars ($29,211.00) less reported actual rental expenses of Thirteen Thousand Thirty-Five Dollars ($13,035.00). Depreciation expenses of Five Thousand Six Hundred Ninety Dollars ($5,690.00) claimed on Schedule E have been omitted from the expenses attributable to rental properties for support purposes. Because a party's actual cash flow or disposable income is generally not reduced by amounts deducted for depreciation of real estate, such deductions should ordinarily be added back to net income. **McAuliffe v. McAuliffe,** 418 Pa. Super. 39, 43, 613 A.2d 20, 22 (1992).

[6] Schedule D attached to Father's personal income tax return showed actual capital losses of Ninety-Five Thousand Nine Hundred Ninety-Six Dollars

In a report and recommendation dated November 22, 2002, the Hearing Officer did not accept as reliable Father's testimony or evidence. The Hearing Officer found that all income reported by Father and his businesses was subject to Father's control and manipulation and did not accurately reflect Father's income for 2001. On this basis, the Hearing Officer made no adjustments to Father's income from that previously computed for the year 2000. Father's support obligation was then computed on the basis of the same net monthly income figures for the parties used to compute the amount of support and alimony **pendente lite** in the court order of April 17, 2001. Father's exceptions to the Hearing Officer's findings and conclusions were argued before us on July 11, 2003, and are now before us for disposition.

In his exceptions, Father challenges the sources and amounts of his income as determined by the Hearing Officer. While the Hearing Officer did not necessarily err in relying upon Father's 2000 individual and corporate federal tax returns as the primary basis for determining Father's income or earning capacity in 2000, we believe, absent an articulable basis for accepting Father's 2000 tax return and not accepting Father's 2001 returns, similar consideration should be given to Father's 2001 tax returns.

For the reasons which follow, we believe Father's obligation to pay support should be based on the financial information gleaned from his 2001 tax returns with one exception: Father's fixed annual compensation from the mini-mart should be computed at Twenty-Six Thousand Dollars ($26,000.00) rather than the figure of Nineteen Thousand Four Hundred Dollars ($19,400.00) claimed. Based on these figures, and an adjusted annual income of Forty-Six Thousand Six Hundred Nineteen Dollars ($46,619.00),[7] Father's net monthly income

($95,996.00). Because the maximum capital loss permitted to be claimed is Three Thousand Dollars ($3,000.00) regardless of the actual loss, this is the amount by which Father's taxable income has been reduced in his return. This loss, in any event, is a realized loss in value of a capital asset, rather than a loss of income and, as such, will not be used to reduce the amount of Father's income (N.T., pp. 24-25).

[7] Father owed no federal income taxes for the year 2001 and, in fact, reported a total net loss of income on his 2001 individual tax return of Four Thousand One Hundred Twelve Dollars ($4,112.00). Since no federal taxes were paid by Father on this amount and Father has failed to present any evidence as to what amount, if any, of F.I.C.A. payments or state or local income taxes were actually paid by him, this amount will be considered as Father's net annual income for 2001 for purposes of support.

available for support is Three Thousand Eight Hundred Eighty-Four Dollars and Ninety-Two Cents ($3,884.92). Applying this figure to the guidelines, along with Mother's net monthly income of One Thousand Nine Hundred Sixty-Four Dollars ($1,964.00), the orders for child support and alimony **pendente lite** should be as follows:

Eff. Date	**Child Support Bonnie v. Daniel No. 62 DR 99**	**Child Support Daniel v. Bonnie No. 219 DR 00**	**Alimony *Pendente Lite* (APL) No. 00-1286**
8/1/01	$693.00		$368.00
9/7/01		$445.00[8]	$576.00
1/3/02		$286.00[8, 9]	$576.00
7/15/02	$465.00[8, 10]		$431.00

DISCUSSION

In reviewing the Hearing Officer's recommendation, we must conduct an independent review of the record before the Hearing Officer and the findings and conclusions made from that record. **Neil v. Neil,** 731 A.2d 156, 159 n.4 (Pa. Super. 1999). We are not bound to follow the Hearing Officer's recommendation simply because the record contains sufficient evidence to support the recommendation. **Goodman v. Goodman,** 375 Pa. Super. 504, 507, 544 A.2d 1033, 1035 (1988). Instead, "[a]fter careful consideration, the court … for a reason which satisfies the court, may enter an order which deviates from the recommendation." **Hoag v. Hoag,** 435 Pa. Super. 428, 646 A.2d 578, 582 (1994), **aff'd,** 541 Pa. 620, 664 A.2d 1354 (1995) (**quoting** Pa. R.C.P. 1910.11, comments).

Under the support guidelines our first and primary task is to determine the actual financial condition of the parties. "In determining the reasonable needs of the child or spouse seeking support and the ability of the obligor to provide support, the guideline shall place primary emphasis on the net incomes and earning capacities of the parties, with allowable deviations for unusual needs, extraordinary expenses and other factors, such as the parties' assets, as warrant special attention." 23 Pa.C.S. §4322(a). Accordingly, we are not confined in our consideration to actual earnings but must and should consider a

[8] This figure has been adjusted in accordance with Pa. R.C.P. 1910.16-4(e).

[9] This figure has been adjusted in accordance with Pa. R.C.P. 1910.16-4(c)(1).

[10] This figure has been adjusted in accordance with Pa. R.C.P. 1910.16-4(c)(2).

party's earning capacity and property interests and capital resources. **Commonwealth ex rel. Gitman v. Gitman,** 428 Pa. 387, 397, 237 A.2d 181, 186 (1967).

It is the general rule that earning capacity, not actual earnings, determines support. **MacKinley v. Messerschmidt,** 814 A.2d 680, 683 (Pa. Super. 2002), **reargument denied** (2/6/03); **Akers v. Akers,** 373 Pa. Super. 1, 4, 540 A.2d 269, 270 (1988). When actual net earnings do not reflect earning power or capacity, we must examine earning capacity as the measure of a party's financial ability in determining the basis of a support computation. "A person's earning capacity is defined not as an amount which [a] person could theoretically earn, but as that amount which the person could realistically earn under the circumstances, considering his or her age, health, mental and physical condition and training." **Strawn v. Strawn,** 444 Pa. Super. 390, 395, 664 A.2d 129, 132 (1995) (internal quotation marks omitted). In sum, "[i]n evaluating a spouse's support obligation, [we] must consider the spouses' income, potential earning capacity, and other property and financial resources." **Haselrig v. Haselrig,** 2003 WL 22966306 (Pa. Super. 2003). "[I]n addition, the amount of the award must be fair, non-confiscatory, and attendant to the circumstances of the parties." **Id.**

1. **Computation of Father's Income Available for Support**

The determination of Father's income available for support is complicated in this case by Father's interest in three separate Subchapter S corporations: the Switchback Mini-Mart, Daniel Dopira Remodeling, and Distance Learning Network, the first two of which Father controls and the third in which Father owns a minority interest (N.T., pp. 10, 28-29, 37). On Father's personal income tax return for 2001, Father reports cumulative losses of Thirty-Five Thousand Three Hundred Sixty-Four Dollars ($35,364.00) from these businesses. Included in this amount is Thirteen Thousand Seven Hundred Twenty-Four Dollars ($13,724.00) and One Thousand Seven Hundred Seventy-Five Dollars ($1,775.00) in depreciation expenses for the mini-mart and remodeling businesses respectively, and passive income of Four Thousand Seven Hundred Forty-Five Dollars ($4,745.00) from the Distance Learning Network, as reported from Schedule K-1 for that business. The reason we have not added these depreciation expenses or included the income from

Distance Learning Network in Father's disposable income available for support requires some explanation.

(a) Treatment of Depreciation—Rental Real Estate

The test for determining whether depreciation is a proper deduction from income available for support is whether the amount of depreciation claimed shields funds which otherwise would have been available for support.

> It is well established that depreciation and depletion expenses, permitted under federal income tax law without proof of actual loss, will not automatically be deducted from gross income for purposes of determining awards of alimony and equitable distribution. In determining the financial responsibilities of the parties to a dissolving marriage, the court looks to the actual disposable income of the parties:
>
> [T]hat income must reflect actual available financial resources and not the oft-time fictional financial picture which develops as [the] result of depreciation deductions taken against … income as permitted by the federal income tax laws. Otherwise put, **'cash flow' ought to be considered and not federally taxed income.**
>
> **Commonwealth ex rel. Hagerty v. Eyster,** 286 Pa. Super. 562, 568-69, 429 A.2d 665, 668-69 (1981) (citations omitted). **Accord, Flory v. Flory,** 364 Pa. Super. 67, 527 A.2d 155 (1987); **Parkinson v. Parkinson,** 354 Pa. Super. 419, 512 A.2d 20 (1986).
>
> **Depreciation and depletion expenses should be deducted from gross income only where they reflect an actual reduction in the personal income of the party claiming the deductions,** [such as where, e.g., he or she actually expends funds to replace worn equipment or purchase new reserves. This is not the case here. Mr. Cunningham does not claim on appeal, nor did he claim below, that he in fact spent any of his $24,000 income to replace worn equipment or purchase new coal reserves.]

Labar v. Labar, 557 Pa. 54, 731 A.2d 1252, 1254-55 (1999) (emphasis in original) (bracketed information inserted from original quote) (**quoting Cunningham v. Cunningham,** 378 Pa. Super. 280, 282, 548 A.2d 611, 612-13 (1988), **appeal denied,** 522 Pa. 576, 559 A.2d 37 (1989)).

Under this test, credit for depreciation against rental income derived from real estate is ordinarily disallowed since there has been no current loss of actual cash flow attributable to the capital asset being expensed through depreciation. On this point, Justice Musmanno, **quoting** the Superior Court in **Commonwealth ex rel. Rankin v. Rankin,** 170 Pa. Super. 570, 573, 87 A.2d 799, 800 (1952), stated:

> Such deduction for annual depreciation of real estate by a taxpayer is proper in determining the amount of net income subject to the tax. But although the Internal Revenue Code sanctions deductions for depreciation of income-producing real estate such depreciation does not reduce the actual dollar income of the taxpayer, and does not enter into a computation of a husband's total income upon which a support order may be based. A man's first duty is to his wife and only actual business expenses may be deducted to determine his income to which she may look for her support.

Commonwealth ex rel. Gitman v. Gitman, supra at 393-94, 237 A.2d at 185. "[O]nly the portion of depreciation representing monies actually available to the defendant for his personal use should be taken into account when making a support award." **Cunningham v. Cunningham, supra** at 288, 548 A.2d at 616 (Cirillo, P.J., dissenting). On this basis we have added back to net income the total amount of depreciation claimed by Father for rental real estate in Schedule E of his individual income tax return. **See supra** footnote 5.

(b) Treatment of Losses and Depreciation of a Subchapter S Corporation

The amounts of depreciation claimed by the mini-mart and remodeling businesses on the corporate returns and passed through to Father on his individual income tax return must be separately analyzed. In this context, it is important to understand the relationship between a Subchapter S corporation and its shareholders. The income and losses of a Subchapter S corporation pass through the corporation to its individual shareholders and are reported on their individual tax returns even though there is no actual income received or loss sustained by the shareholders. The shareholders of these corporations, based on their percentage of stock ownership, absorb the federal tax

liability of the profits and losses of the corporation at the shareholder's individual tax rate. The amount of this income or loss passed on to the shareholder is reported in a Schedule K-1 prepared by the corporation for each shareholder. By this process, although a federal income tax return is filed for the corporation, the double taxation feature of corporations is eliminated for Subchapter S corporations. To find that merely because a party's individual tax return reports income or loss from a Subchapter S corporation, this income or loss correspondingly increases or decreases the amount of disposable income available for support misconceives and unsoundly intertwines principles of taxation with the availability of income and assets for support. Instead, we must "look behind" these reported losses or gains to determine the party's true income and cash flow.

To the extent the Hearing Officer found that depreciation taken by the mini-mart should be considered additional income to Father (**see supra** footnote 3),[11] the Hearing Officer necessarily and contemporaneously determined that the corporation is being used to shelter monies in the amount of the depreciation expense that otherwise would have been dispersed and made available to Father for support. While this might be accurate if it were established that excessive and unnecessary capital expenditures were made or that the level of retained earnings was unwarranted or funding the expenditures, the record before us will not sustain such a finding.

> When it is alleged that the corporation has sheltered cash flows, the sources of those cash flows must be identified; i.e., it must be shown that the cash flows **could have been** disbursed to shareholders. In cases where cash flows which could have been disbursed to shareholders have instead been disbursed for business expenses, the corporation must show that the expenditures were necessary for the continued operation and smooth running of the business in order to refute an allegation that the corporation has sheltered cash flows.

Labar v. Labar, supra, 731 A.2d at 1257 (emphasis in original).

[11] Unfortunately, what we believe was an error in computing Father's income for the year 2000 was compounded when the same figure was again used for the computation of Father's income in the year 2001.

Conceptually, depreciation is a means of expensing capital acquisitions over time. Here, without any evidence of record in support of such position, the Hearing Officer, in effect, determined that all of the funds used to purchase the assets of the mini-mart being depreciated in its 2001 return should not have been used for this purpose and, instead, were available for distribution and should have been disbursed to the shareholders as income.[12] Such a finding cannot be sustained where the only evidence of record with respect to the purchase of the assets being depreciated is that the assets were purchased before 2001, the source of the funds for the purchases being unproven.

Nor will the record sustain a finding that cash flows of the mini-mart have been sheltered by depreciation funded from retained earnings: the retained earnings of the mini-mart decreased from a balance of One Thousand Six Hundred Thirty-Nine Dollars ($1,639.00) at the end of 2000 to a negative balance of Twenty-Nine Thousand Eight Hundred Forty-Five Dollars ($29,845.00) at the end of 2001 (Father's Exhibit 2, 2001 corporate tax return for the mini-mart, Schedule L). At the same time, loans from shareholders increased from One Hundred Seven Thousand Five Hundred Thirty-Three Dollars ($107,533.00) to One Hundred Forty-Seven Thousand Five Hundred Thirty-Three Dollars ($147,533.00), and the equity of the business decreased from Twenty-Six Thousand Six Hundred Thirty-Nine Dollars ($26,639.00) to minus Four Thousand Eight Hundred Forty-Five Dollars ($4,845.00) suggesting that perhaps the source of funds for corporate acquisitions was corporate borrowings rather than the cash from operations.

In any event, as already stated, "before inquiry as to the necessity of capital expenditures is made, it must first be established that the sources of the funds used to make the capital expenditures were cash flows which **could have** instead been disbursed to shareholders." **Labar, supra,** 731 A.2d at 1258 (emphasis in original). "It cannot automatically be assumed from the evidence of record that the source of the funds used to make the expenditures was sheltered cash flows. If the source

[12] Under the premise implicit in the Hearing Officer's finding, that the amount of depreciation claimed is a sheltered cash flow, the entire cost of each item purchased **in the year of purchase** should have been included in Father's disposable income for that year rather than a deferred inclusion of only that portion of the total purportedly unnecessary capital expeditures equal to the amount of each yearly depreciation deduction. **Labar v. Labar, supra,** 731 A.2d at 1258-59 n.10.

of the funds used to make these capital expenditures is identified as cash flows which could have instead been distributed to the shareholders, then and only then does the question arise whether the expenditures were unnecessary and therefore properly included in the calculation of Husband's disposable income." **Id.** at 1258-59 (footnote omitted).[13]

(c) Treatment of Gains of a Subchapter S Corporation

The Hearing Officer's report does not appear to attribute to Father for support purposes the reported income of Four Thousand Seven Hundred Forty-Five Dollars ($4,745.00) from the Distance Learning Network identified on Father's individual income tax return, Schedule E, as passive income from this Subchapter S corporation. This we believe to be correct. Father, from the testimony presented, is a minority shareholder of this business and has control of neither the amount nor timing of its distributions. Nor does the record support a finding that this income reported on his income tax return is readily available to him and is anything other than "paper income." **Labar v. Labar, supra,** 731 A.2d at 1257; **Fennell v. Fennell,** 753 A.2d 866 (Pa. Super. 2000).

2. **Burden of Establishing Changed Circumstances and Modification Requested**

In acting upon Father's petitions to reduce his obligations for child support and alimony **pendente lite,** we understand that as the petitioner, it is his burden to support the allegations of changed circumstances set forth in the petitions. **Banks v. Banks,** 275 Pa. Super. 439, 446, 418 A.2d 1370, 1374 (1980), **appeal after remand,** 330 Pa. Super. 128, 478 A.2d 1387 (1984); **Olson v. Olson,** 384 Pa. Super. 224, 228, 558 A.2d 93, 95 (1989). We are also cognizant that when dealing with a close corporation controlled by one of the parties it is incumbent upon us to carefully scrutinize the expenses and deductions of the corporation to assure that, although legal for corporate income tax purposes, deductions of the corporation which improve Father's standard of living and have the effect of perquisites are properly considered in augmenting Father's income or earning capacity. **Commonwealth ex rel. Gitman v. Gitman,**

[13] Likewise, the depreciation claimed in the 2001 corporate tax return of the remodeling business is attributable to a 1995 motor vehicle placed in service on January 1, 1995, with no evidence as to the source of the acquisition costs.

supra at 391-92, 237 A.2d at 183-84; **Commonwealth ex rel. Banks v. Banks,** 330 Pa. Super. 128, 478 A.2d 1387 (1984). Personal expenses paid through a business such as entertainment and automobile expenses are a reliable measure of cash flow and should be included as income for purposes of calculating support. **Heisey v. Heisey,** 430 Pa. Super. 16, 19, 633 A.2d 211, 212 (1993). In this regard, not only is it the policy of the law "to make all of a husband's resources available for the support of his wife and family," **Commonwealth ex rel. Gitman, supra** at 392, 237 A.2d at 184 (quotations and citations omitted), but also to make clear that "child support is a paramount duty of a parent." **MacKinley v. Messerschmidt, supra,** 814 A.2d at 683. "Support, child or spousal, assures a reasonable living allowance to the party requiring support." **King v. King,** 390 Pa. Super. 226, 236, 568 A.2d 627, 631 (1989) (**quoting Laughlin v. Laughlin,** 372 Pa. Super. 24, 28, 538 A.2d 927, 929 (1988)).

In focusing on cash flow, Father has admitted the actual receipt of compensation from the mini-mart in the amount of Nineteen Thousand Four Hundred Dollars ($19,400.00) for the year 2001, together with interest and dividend payments of Two Thousand Five Hundred Thirty-Seven Dollars ($2,537.00) and One Thousand Nine Hundred Six Dollars ($1,906.00) respectively. His depreciation expenses on his individual return for rental real estate, while unquestionably proper for accounting and tax purposes, are paper expenses not diminishing cash flow and are properly included in disposable income for purposes of support.

In examining Father's corporate tax returns, we are not convinced that Father is not drawing some personal benefits from the mini-mart and remodeling businesses and that Father's yearly earning capacity is not greater than Nineteen Thousand Six Hundred Dollars ($19,600.00). Father testified that approximately sixty percent of his time is spent attending to the mini-mart and forty percent to the remodeling business, that he draws no compensation from the remodeling business, that the remodeling business has been a losing proposition, that in his estimation there is little likelihood of increased business, and that his counsel has advised him that he should be dedicating his full-time efforts to the mini-mart. The clear weight of this evidence is that Father's efforts and time would be more pro-

ductive and profitable if spent elsewhere and that Father has available additional positive earning capacity which is being wasted.

We also question the unilateral and arbitrary basis by which Father sets his fixed compensation for the mini-mart (N.T., pp. 16-17). Father, without explanation, reduced his salary from the mini-mart from Twenty-Six Thousand Dollars ($26,000.00) in 2000 to Nineteen Thousand Six Hundred Dollars ($19,600.00) in 2001 notwithstanding that 2000 was a banner year and that Father identified no reason why, at the outset of the year 2001, his salary should be reduced. Moreover, the 2001 tax return for the mini-mart contains a miscellaneous lump sum deduction of Three Thousand One Hundred Forty-One Dollars ($3,141.00). Under the circumstances, we do not believe it inappropriate, unfair or confiscatory to assign to Father a minimum earning capacity of Twenty-Six Thousand Dollars ($26,000.00) annually for his employment by the mini-mart and in the remodeling business. This amount, we believe, is realistic, not theoretical, and, is entirely consistent with Father's previous year's salary from the mini-mart.[14]

Orders of support and alimony **pendente lite** consistent with this opinion are being filed this same date.

[14] In considering Father's support obligation, we have taken into consideration that Mother is currently living rent free in the marital home (N.T., p. 104). We also note that the expenses of health insurance for both Father and the parties' son is paid for by the mini-mart (N.T., pp. 56-58).

COMMONWEALTH OF PENNSYLVANIA vs. HECTOR MEREGILDO, Defendant

Criminal Law—Search and Seizure—Investigatory Detention/ Traffic Stop—Erratic Driving—Credible Explanation

1. A traffic stop premised on a perceived violation of the Motor Vehicle Code requires the arresting officer to possess articulable and reasonable grounds to suspect a violation of the Motor Vehicle Code, tantamount to probable cause, prior to the stop.

2. Prior to the police subjecting a citizen to an investigatory detention, the totality of the circumstances must objectively support a reasonable suspicion based on specific and articulable facts, which when taken together with rational inferences from those facts, objectively warrant the conclusion that the person is then engaged in unlawful activity.

3. Erratic driving is not a **per se** violation of the Vehicle Code. However, in conjunction with other facts, erratic driving may form the basis for probable

cause to believe a provision of the Motor Vehicle Code is being violated or a reasonable suspicion that criminal activity is afoot and that the person stopped is involved in that activity.

4. A police officer's observations of a motor vehicle crossing the center and fog lines of a two lane highway while negotiating sharp curves, without danger to oncoming traffic, is equally consistent with innocent behavior and, therefore, insufficient in and of itself, to support a probable cause finding that some provision of the Vehicle Code is being violated or that reasonable suspicion exists to believe that the driver is involved in criminal activity.

NO. 340 CR 03

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

JOSEPH J. YEAGER, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, J.—February 18, 2004

DISCUSSION

The Defendant, Hector Meregildo, asks this Court to suppress physical evidence obtained as the result of a search incident to his arrest, which he claims was preceded by an illegal investigatory detention, and inculpatory statements subsequently made by him.

FACTUAL BACKGROUND

On April 25, 2003, at approximately 7:30 P.M., Chief Sean Smith of the Nesquehoning Borough Police Department was a passenger in a vehicle being driven by Janene Miller, an agent with the Office of Attorney General, in which Detective Brian Biechy of the Lehighton Borough Police Department was also present. The officers were in an unmarked car, were out of uniform and were then working undercover investigating reports of drug trafficking in Carbon County. Moments earlier, the three had completed a controlled buy and were returning to the Borough of Nesquehoning, Carbon County, Pennsylvania, traveling north on State Route 209 with the Defendant's vehicle in front of them traveling in the same direction.

After passing the Panther Valley High School and entering the Borough limits, they observed the Defendant's vehicle sway back and forth from left to right on two occasions with the two driver side wheels of the vehicle on each occasion first crossing the center yellow lines and then, with the vehicle moving in the opposite direction, the two right passenger wheels crossing the

white fog line on the right-hand side of the road. The area where this occurred is known locally as the Wash Shanty Hill with the road at this location winding through a series of sharp curves before entering the Borough as the main road through town (N.T., Suppression Hearing, 1/26/04, pp. 8-9). Route 209 in this area is two lanes, one heading north, the other south.

As they continued to follow the Defendant's vehicle, Chief Smith radioed the Carbon County Communications Center, reported what he had observed about Defendant's erratic driving and requested that a uniformed police officer be advised of the situation and investigate. Defendant drove appropriately and without incident through the downtown area of the Borough, properly stopped at a traffic light, made a normal left-hand turn, and then traveled a short distance before making a right-hand turn and pulling into the parking lot of a CVS pharmacy. At this point, Chief Smith again radioed the Communications Center and advised as to their location.

At the parking lot, Defendant exited his vehicle and headed toward the entrance to the pharmacy. As he did so, Chief Smith exited the police vehicle and called for the Defendant to stop. Defendant complied. Chief Smith then approached the Defendant, told him who he was, that he had observed the Defendant weaving back and forth while driving, and that a uniformed police officer had been called and was on his way (N.T., Preliminary Hearing, 6/04/03, p. 22).[1] During this time, Chief Smith was joined by Officer Biechy who identified himself to the Defendant. As the three waited for more police to arrive, Chief Smith noted that Defendant's eyes were red and glassy, his speech slow and slurred, and that, as he spoke to Defendant, Defendant rocked back and forth (N.T., Preliminary Hearing, 6/04/03, pp. 9, 24).

Within approximately three to five minutes of Chief Smith's arrival at the parking lot, Officer Wuttke, also of the Nesquehoning Borough Police Department, and later Officer Lorah of the same department, arrived at the scene. By the time Officer Lorah arrived, Officer Wuttke had placed Defendant under arrest for driving under the influence.

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[1] By stipulation of the parties, the notes of testimony for the preliminary hearing were admitted, and made part of the record at the suppression hearing held on January 26, 2004.

Upon Officer Lorah's arrival, Officer Wuttke advised him that Defendant was under arrest and asked Officer Lorah to search the Defendant and place Defendant into the back of the police cruiser. Officer Lorah then performed a pat-down search. During this search, pills were discovered, later identified as Xanax, in Defendant's jacket pocket, and three small bags with white powder, later identified as crack cocaine, were found in the back of Defendant's coat. The bags of cocaine weighed 11.4 grams.

Defendant was **Mirandized** and interviewed at the scene. Defendant identified the pills as being Xanax and confirmed the powder as being cocaine. Defendant further acknowledged that he had purchased the drugs in Reading, Pennsylvania, that the drugs were purchased for himself and several other people, and that he had received money from these other people to purchase the drugs. During the pat-down search, One Thousand Thirty Dollars ($1,030.00) was also found on Defendant's person.

On the same date as his arrest, Defendant was charged with possession with intent to deliver and unlawful possession of a controlled substance (**i.e.,** cocaine), 35 Pa. C.S. §§780.113(a)(30) and 780.113(a)(16), respectively, and misbranding of medication, the Xanax being unlabeled. 35 Pa. C.S. §780.113(a)(8). Defendant was never charged with driving under the influence or any moving violation.

DISCUSSION

In requesting suppression of the evidence seized and the statements made by Defendant, Defendant focuses on the legality of his initial detention by Chief Smith in the parking lot and his subsequent arrest for driving under the influence. Defendant contends that Chief Smith had neither reasonable suspicion nor probable cause to detain him for a violation of the Vehicle Code and that Officer Wuttke's later arrest was tainted by this initial detention.

> The Fourth Amendment to the United States Constitution and Article 1, Section 8 of the Pennsylvania Constitution protect individuals from unreasonable searches and seizures, thereby ensuring the 'right of each individual to be let alone.' **Schneckloth v. Bustamonte,** 412 U.S. 218, 236, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); **Commonwealth v.**

> **Blair,** 394 Pa.Super. 207, 575 A.2d 593, 596 (1990). To secure this right, courts in Pennsylvania require law enforcement officers to demonstrate ascending levels of suspicion to justify their interactions with citizens as those interactions become more intrusive. **See Commonwealth v. Ellis,** 541 Pa. 285, 662 A.2d 1043, 1047 (1995).

Commonwealth v. Huff, 833 A.2d 227, 230 (Pa. Super. 2003).

Where reasonable and articulable grounds exist that a person police encounter has or may have committed a crime, police are justified in stopping and briefly questioning that person to investigate their suspicions.

> An investigative detention occurs when a police officer temporarily detains an individual by means of physical force or a show of authority for investigative purposes. **Commonwealth v. Lopez,** 415 Pa.Super. 252, 258, 609 A.2d 177, 180, **appeal denied,** 533 Pa. 598, 617 A.2d 1273 (1992). **See also, Commonwealth v. Lewis,** 535 Pa. 501, 636 A.2d 619 (1994). Such a detention constitutes a seizure of a person and thus activates the protections of the Fourth Amendment and the requirements of **Terry v. Ohio,** 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Id. at 230. Such conduct also activates the protections of Article I, Section 8 of the Pennsylvania Constitution. **Commonwealth v. Stevenson,** 832 A.2d 1123, 1127 (Pa. Super. 2003). "[I]n determining whether reasonable suspicion exists for a **Terry** stop, the inquiry is the same under either Article 1 [sic], Section 8 of the Pennsylvania Constitution or the Fourth Amendment of the United States Constitution." **Id.** at 1127.

"To decide whether a seizure has occurred, a court must consider all the circumstances surrounding the encounter to determine whether the demeanor and conduct of the police would have communicated to a reasonable person [innocent of any crime] that he or she was not free to decline the officer's request or otherwise terminate the encounter." **Commonwealth v. Reppert,** 814 A.2d 1196, 1201-1202 (Pa. Super. 2002) (**en banc**). When Defendant was confronted in the parking lot by Chief Smith, then told that he had been followed, that he had been observed driving all over the road, and that uniformed police had been called out and were coming to the scene, Defendant was detained and not free to leave. At that point in

time, the totality of the circumstances—the request to stop, the intimation of illegal conduct, the presence of two officers and being notified that uniformed police were enroute to the scene—was sufficiently coercive that a reasonable person innocent of any crime would have thought he was being restrained. **Commonwealth v. Beasley,** 761 A.2d 621, 625 (Pa. Super. 2000), **appeal denied,** 565 Pa. 661, 775 A.2d 801 (2001); **see also, Commonwealth v. Martin,** 705 A.2d 887, 891 (Pa. Super. 1997), **appeal denied,** 555 Pa. 738, 725 A.2d 1219 (1998) ("A statement by a law enforcement official that a person is suspected of illegal activity is persuasive evidence that the Fourth Amendment and Article I, Section 8 of the Pennsylvania Constitution have been implicated."), cited with approval in **Commonwealth v. Boswell,** 554 Pa. 275, 721 A.2d 336, 343 (1998) (**per curiam**) (opinion in support of affirmance).[2] The question then becomes was this detention constitutionally justified.

Technically, this case does not involve a traffic stop: Defendant voluntarily stopped and parked his vehicle before he was confronted by the police. **See Commonwealth v. Stevenson, supra** at 1130 n.7. However, because it was Defendant's driving that prompted his detention, the Supreme Court's decision in **Commonwealth v. Gleason,** 567 Pa. 111, 785 A.2d 983 (2001), is relevant to our review.[3] There, the defendant crossed the fog line twice over a distance of approximately one quarter

[2] See also, Preliminary Hearing, 6/04/03, pp. 22-23 (acknowledging that Defendant was detained at this point); **cf. Commonwealth v. Martin, supra** at 891 (police request asking for defendant's cooperation, unaccompanied by statements of suspicion of criminal activity or coercion, to step outside café to speak to police held to be a consensual encounter); **Commonwealth v. Boswell, supra,** 721 A.2d at 339-40 ("No constitutional provision prohibits police officers from approaching a citizen in public to make inquiries of them.").

[3] We recognize that the standard for an "investigative detention" or **Terry** stop is "reasonable suspicion" to believe that criminal activity is afoot, whereas the standard for traffic stops is "probable cause" to believe a violation of the Motor Vehicle Code has occurred. **Commonwealth v. Stevenson, supra** at 1131 n.9. Both standards measure the legality of the initial stop which, while not technically a traffic stop in the case **sub judice,** was apparently prompted by a perceived violation of the Motor Vehicle Code. Therefore, while disagreement may exist as to the applicable standard to be applied in the present case, we conclude that under either standard neither a traffic stop nor an investigative detention was justified on the basis of the conduct observed by Chief Smith preceding Defendant's detention. Such conduct was equally consistent with innocent behavior and, at most, supported an unfounded suspicion or hunch that criminal activity was in play as opposed to a "particularized and objective basis."

of a mile. The vehicle crossed the fog line by six to eight inches each time, for a period of one to two seconds. No other vehicles were on the road at the time. **Id.** at 985. Under these circumstances, the Supreme Court determined that the officer lacked probable cause to stop Gleason's vehicle and reinstated the trial court's order granting the suppression of evidence. **Id.** at 989. In **Gleason,** the court repeated the standard it announced earlier in **Commonwealth v. Whitmyer,** 542 Pa. 545, 668 A.2d 1113 (1995), for effecting a proper traffic stop for a motor vehicle violation: "[B]efore stopping a vehicle, an officer must be able to articulate specific facts which establish probable cause to believe that the vehicle or its driver was in violation of some provision of the Vehicle Code." **Commonwealth v. Gleason, supra,** 785 A.2d at 986. **See also, Whitmyer, supra** at 551, 668 A.2d at 1116 (the standard of probable cause to believe that the vehicle or the driver was in violation of some provision of the Vehicle Code is the same as that of "articulable and reasonable grounds to suspect a violation" of the Vehicle Code contained in Section 6308(b) of the Code).

Gleason has been interpreted by the Superior Court to mean that perceived erratic driving alone is not a violation of the Vehicle Code and does not constitute probable cause for a traffic stop. **Commonwealth v. Battaglia,** 802 A.2d 652, 657 (Pa. Super. 2002), **appeal denied,** 2003 WL 23006193 (Pa. 2003). However, when combined with other evidence, exaggerated or erratic driving may justify a traffic stop. If, for instance, the vehicle's crossing over a center or fog line creates a safety hazard, the evidence may be sufficient to establish a violation of Section 3309(1) (driving on roadways laned for traffic). **Commonwealth v. Masters,** 737 A.2d 1229, 1231-32 (Pa. Super. 1999), **appeal denied,** 562 Pa. 664, 753 A.2d 816 (2000). Similarly, a violation of Section 3714 (careless driving) requires a showing that the defendant's driving created a substantial risk of injury to another vehicle or person. 18 Pa. C.S. §302(b)(4)

Of course, situations may exist where the initial stop of a vehicle is not based upon a traffic offense thereby requiring justification for the stop under **Terry. See Commonwealth v. Huff, supra** at 230-31 (finding officer's observations of suspected drug usage in vehicle stopped at traffic light, if reasonable, formed proper basis to justify vehicle stop). Whether the grounds necessary to support a **Terry** investigatory detention are less stringent than those required to find probable cause for a Vehicle Code violation was not discussed.

(definition of criminal negligence); **cf. Commonwealth v. Bullick,** 830 A.2d 998, 1003 (Pa. Super. 2003) (finding the **mens rea** necessary to support the offense of reckless driving is a requirement that defendant drive in such a manner that there existed a substantial risk that injury would result from his driving, **i.e.,** a high probability that a motor vehicle accident would result from driving in that manner, and that he was aware of that risk and yet continued to drive in such a manner, in essence, callously disregarding the risk he was creating by his own reckless driving).

Nevertheless, "there is no basis for 'profiling' a suspected drunk driver merely on the basis of observing undisciplined operation of a vehicle which does not form the basis for a conclusion that there has been a violation of the Vehicle Code." **Commonwealth v. Battaglia, supra** at 657; **cf. Commonwealth v. Jackson,** 428 Pa. Super. 246, 251, 630 A.2d 1231, 1234 (1993), **appeal denied,** 537 Pa. 647, 644 A.2d 733 (1994) (holding that in the absence of a firmly established successful drug courier profile, "[a] mere showing of innocent behavior is insufficient" to justify an investigative stop). In its simplest terms: "Erratic driving is not **per se** a violation of the Vehicle Code." **Id.** at 656 n.8; **cf. Commonwealth v. Farrell,** 448 Pa. Super. 492, 672 A.2d 324 (1996) (upholding a vehicle stop where anonymous tip that person with certain first name had driven a certain type of vehicle to a certain tavern while intoxicated was independently corroborated by police, following which trooper observed erratic driving before conducting valid investigatory stop of vehicle).

Is this case then legally distinguishable from **Gleason**? While factually it is evident that the extent or degree of Defendant's weaving is greater than that reported in **Gleason**—Defendant here having weaved from one extreme edge of the lane of traffic to the other and in doing so having not only crossed the fog line twice with both tires of the passenger side of his automobile, but also crossed the yellow center line twice with both tires of the driver's side of the vehicle—in neither case was an actual safety hazard proven (N.T., Preliminary Hearing, 6/04/03, pp. 12-13, 15-16). Moreover, while **Gleason** involved a four lane divided highway, the present case involves a two lane road with a series of winding turns explaining, at least in part, the reason for Defendant traveling from one side to the other of his lane

of traffic. That Defendant's driving did not pose an imminent threat to others is revealed not only by the officers' decision not to immediately pull Defendant over but the simultaneous decision to allow Defendant to drive through the center of town. This Defendant did without mishap and without any outward sign of in any manner violating the Vehicle Code (N.T. Preliminary Hearing, 6/04/03, pp. 15-19).

Defendant has not been cited for a single violation of the Vehicle Code. Nor has the Commonwealth identified a single provision of the Vehicle Code which it claims was violated by the Defendant or for which the officers possessed reasonable suspicion to stop the Defendant. While Chief Smith's observations of Defendant's red and glassy eyes, slowed and slurred speech, and swaying while standing, in conjunction with Defendant's erratic driving, clearly provide sufficient indicia of intoxication to justify an arrest for driving under the influence, Defendant's driving alone does not. Yet, it was Defendant's driving which prompted Chief Smith to detain the Defendant; the other indicia of intoxication Chief Smith observed were only observed after Defendant was detained. Nor was Defendant at any time observed staggering or was any odor of alcohol detected on his breath (N.T., Preliminary Hearing, 6/04/03, pp. 21, 24). **Commonwealth v. Stevenson, supra** at 1131 (finding Commonwealth's failure to articulate facts giving rise to a reasonable suspicion of any criminal activity compelled decision that arresting officer lacked reasonable suspicion for an investigative detention).[4]

A detention must be justified on the facts available to the officer at or prior to the detention, not those subsequently developed. **Commonwealth v. Reppert, supra** at 1203-1204. To permit the validity of the detention to turn on after-discovered evidence would emasculate the protections provided by the Fourth Amendment and Article I, Section 8 of the Pennsylvania Constitution. This we will not do.

> The seriousness of criminal activity under investigation, whether it is the sale of drugs or the commission of a violent crime, can never be used as justification for ignoring or

[4] In ruling on a suppression motion, the burden is on the Commonwealth to establish by a preponderance of evidence that "the challenged evidence was not obtained in violation of the defendant's rights." Pa. R.Crim.P. 581(H). **See also, Commonwealth v. Stevenson, supra** at 1126-27.

> abandoning the constitutional right of every individual in this Commonwealth to be free from instrusions upon his or her personal liberty absent probable cause.

Commonwealth v. Beasley, supra at 624 (**quoting, Commonwealth v. Polo,** 563 Pa. 218, 759 A.2d 372, 376 (2000)).

In accordance with the foregoing, Defendant's pretrial motion for suppression will be granted.

ORDER OF COURT

AND NOW, this 18th day of February, 2004, upon consideration of Defendant's Motion to Suppress Evidence, and after hearing thereon, it is hereby

ORDERED and DECREED that the Motion is GRANTED and that all physical evidence seized from Defendant in consequence of the search of his person incident to his arrest for driving under the influence, and all incriminating statements made by him in consequence thereof, are suppressed as the fruit of an illegal search and seizure.

COMMONWEALTH OF PENNSYLVANIA vs. GERALD J. SMITH, Defendant

Criminal Law—PCRA—Second or Subsequent Petition—Timeliness As a Jurisdictional Prerequisite—Prima Facie Assertion of a Serious Miscarriage of Justice As a Threshold Requirement to Consideration of the Merits

1. Where a petitioner, without benefit of counsel, is indigent and has not been represented by counsel in previously filed petitions under the PCRA, the court will appoint counsel to assist the petitioner even though the petition appears to be untimely. Under such circumstances, petitioner is entitled to the appointment and assistance of counsel to determine and, if necessary, to plead and argue that an exception to the PCRA's one-year time limitation applies.

2. A petitioner under the PCRA has the burden of establishing both eligibility for relief under the PCRA and that the petition has been timely filed. Where the petition has not been filed within one year of the sentence becoming final, and fails to meet any of the statutory exceptions to the PCRA's one-year time bar, the PCRA court is without jurisdiction to determine the merits of the petition.

3. The after-discovered evidence exception to the PCRA's requirement that a petition be filed within one year of the judgment of sentence becoming final requires the petitioner to plead and prove (1) that the facts upon which the claim is predicated were unknown to him and could not have been ascertained earlier by the exercise of due diligence and (2) that these new facts constitute exculpatory evidence that would have changed the outcome of the trial if it had been introduced.

4. In addition to the requirement of timeliness, for a second or subsequent proceeding under the PCRA, the petitioner must demonstrate a serious miscarriage of justice before the merits of the petition can be entertained.

5. Where the asserted basis of a second or subsequent petition, filed beyond the one-year deadline of the PCRA, is impeachment evidence claimed to be newly discovered, but which in fact was witnessed by the petitioner, and was previously litigated on direct appeal, neither the threshold requirements of timeliness nor a demonstrated miscarriage of justice have been met, and the petition is properly dismissed without addressing its merits.

NO. 22 CR 95

DAVID W. ADDY, Esquire, Assistant District Attorney—Counsel for Commonwealth.

CHARLES F. SMITH, JR., Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, J.—March 1, 2004

The Defendant has appealed from our Order dated December 30, 2003, dismissing his petition for relief under the Post Conviction Relief Act ("PCRA"). **See** 42 Pa. C.S. §§9541-9546. This opinion is filed pursuant to Pa. R.A.P. 1925(a).

FACTS AND PROCEDURAL HISTORY

On September 13, 1995, Defendant was convicted by a jury of unlawful possession of cocaine, possession with intent to deliver, and criminal conspiracy. 35 Pa. C.S. §§780.113(a)(16) and (30), and 18 Pa. C.S. §903(a)(1). An aggregate sentence of five to ten years incarceration in a state correctional facility was imposed on October 12, 1995. On direct appeal the Superior Court affirmed the judgment of sentence. **See Commonwealth v. Smith,** 455 Pa. Super. 659, 686 A.2d 1367 (1996) (Unpublished Memorandum dated September 3, 1996). Defendant's Petition for Allowance of Appeal to the Pennsylvania Supreme Court was denied by Order dated March 31, 1997. **See Commonwealth v. Smith,** 547 Pa. 748, 692 A.2d 565 (1997) (Table). Defendant did not file a petition for writ of **certiorari** with the United States Supreme Court, thereby, by operation of law, making his judgment of sentence final on July 2, 1997.

Defendant's petition now before us, by our count, is Defendant's fifth PCRA petition.[1] Defendant's most recent previous PCRA petition was filed on December 12, 2000, dismissed by this court on April 25, 2001, and affirmed on appeal by the Superior Court. **See Commonwealth v. Smith,** 797 A.2d 1026 (Pa. Super. 2002) (Unpublished Memorandum dated February 21, 2002). In affirming the dismissal of Defendant's petition, the Superior Court specifically determined that Defendant's petition was time-barred by the one-year statute of limitations contained in Section 9545(b)(1) of the PCRA. 42 Pa. C.S. §9545(b)(1). No further appeal was taken from that decision.

Defendant's current PCRA petition was filed on February 3, 2003. Court appointed counsel was provided to Defendant[2]

[1] Previous petitions were filed on September 16, 1996; March 6, 1997; April 19, 1999, and December 12, 2000. Although Defendant's filing on April 19, 1999 was entitled "Motion to Correct Illegal Sentence," in legal effect the petition was one under the PCRA: Challenges to a conviction or sentence beyond the time for filing a post-sentence motion or direct appeal "must be treated as a PCRA petition, since the PCRA is the exclusive vehicle for obtaining post-conviction collateral relief." **Commonwealth v. Kutnyak,** 781 A.2d 1259, 1261 (Pa. Super. 2001).

[2] "An indigent petitioner is entitled to representation by counsel for a first petition filed under the PCRA. This right to representation exists 'throughout the post-conviction proceedings, including an appeal from disposition of the petition for post-conviction relief.' " **Commonwealth v. Brown,** 836 A.2d 997, 998-99 (Pa. Super. 2003) (**quoting** Pa. R.Crim.P. 904(E)) (citation omitted). In those instances where counsel is not appointed, the Pennsylvania Supreme Court has long held that

> [w]here … PCHA petitioner is not represented by counsel, the dismissal of his petition may not serve as final litigation of the issues there presented, nor may it constitute a knowing and understanding waiver of the right to litigate any other issues. Since no counsel was appointed to assist Appellant at the time he filed his first petition, the PCHA judge erred in using the dismissal of the first petition as a basis for the finding that all of the issues raised in the second petition had either been waived or finally litigated.

Commonwealth v. Williams, 573 Pa. 613, 828 A.2d 981, 989 (2003) (**quoting Commonwealth v. Smith,** 459 Pa. 583, 586, 330 A.2d 851, 852-53 (1975)). Consistent with this reasoning, if the PCRA court dismisses a **pro se** timely petition prior to the appointment of counsel, a subsequent counseled petition may not be treated as an untimely second petition. **Id.** at 990 (finding under similar circumstances—an uncounseled withdrawal of a **pro se** petition in the absence of a colloquy to determine whether the withdrawal is knowing, voluntary and deliberate—that the second petition should be treated as a first petition **nunc pro tunc**).

This reasoning, however, does not transform an untimely filed earlier **pro se** petition to a timely one. In the present case, Defendant's first PCRA petition filed after his judgment of sentence became final was that filed on April 19, 1999, itself filed more than twenty-one months after the judgment of sentence became final. **See supra** footnote 1.

and directed in our Order of March 12, 2003 to "consider whether Defendant's petition meets the time limits on filing a petition under the Post Conviction Relief Act or raises issues previously litigated and, as appropriate, after evaluating Defendant's claims and the record in the case, to either seek to withdraw after filing a 'no-merit' letter pursuant to **Commonwealth v. Finley/Commonwealth v. Turner** or to file an amended petition raising those claims considered meritorious by counsel." A hearing on the petition was scheduled for August 8, 2003, however, by letter of August 4, 2003, Defendant's counsel candidly advised that the petition was, in fact, untimely and, therefore, without merit, and that no hearing was necessary for the court to rule on the petition.

Pending further review of the file, the scheduled hearing of August 8, 2003, was continued and later canceled. Next, by order dated August 7, 2003, we indicated our intent to dismiss the petition. In doing so, we specifically identified the basis for dismissal as untimeliness. **See** Pa. R.Crim.P. 907(1) (disposition without hearing). Defendant responded by filing an amended petition on September 2, 2003. In this amended petition, Defendant made no attempt to factually plead or prove that the underlying petition was eligible for an enumerated exception to the PCRA's one-year filing deadline.

We are also aware that, ordinarily, once a PCRA petition has been decided and dismissed, and the ruling on it has become final, the jurisdiction of the court system over such petition ceases and a petitioner's subsequent petitions must independently meet the time limitations and requirements of the PCRA. **Commonwealth v. Robinson,** 837 A.2d 1157, 1162 (Pa. 2003). In this context, it becomes significant that the Superior Court in affirming the PCRA court's dismissal of Defendant's **pro se** petition filed on December 12, 2000, expressly rejected Defendant's contention that he was entitled to counsel, finding instead that since the petition was untimely, the merits of the issue could not be addressed. Such reasoning has since been rejected by our Supreme Court. **See Commonwealth v. Smith,** 572 Pa. 572, 818 A.2d 494 (2003) (holding that indigent petitioners, who file their first PCRA petition, even though facially untimely, are entitled to the appointment and assistance of counsel to determine and, if necessary, to plead and argue that an exception to the PCRA's one-year time limitation applies).

The petition filed on February 3, 2003 is the first PCRA petition for which counsel has been provided to Defendant. Given the now rejected former view of the Superior Court on the right to counsel for an indigent petitioner, acting **pro se,** whose petition appeared to be untimely; the intervening pronouncement by our Supreme Court; and the procedural complexities presented by the serial petitions filed by Defendant, we believe the appointment of counsel to be justified. Pa. R.Crim.P. 904(D).

The petition and amended petition were dismissed by Order dated December 30, 2003 from which a timely appeal has been filed.[3] A statement of matters complained of on appeal was requested on January 28, 2004 pursuant to Pa. R.A.P. 1925(b) and complied with on February 6, 2004.

DISCUSSION

The PCRA requires that a petition be filed within one year of the date the judgment becomes final. 42 Pa. C.S. §9545(b)(1). Defendant's judgment of sentence became final on July 2, 1997, 90 days after the Pennsylvania Supreme Court's denial of allowance of appeal was entered on April 3, 1997. U.S.Sup.Ct. Rule 13 (petition for writ of **certiorari** to review the judgment of sentence is deemed timely when it is filed within 90 days after discretionary review has been denied by the Pennsylvania Supreme Court). Defendant's petition filed on February 3, 2003 was almost six years beyond this date.

Defendant has failed to plead facts sufficient to properly invoke any one of the three enumerated exceptions to the one-year limitation contained in 42 Pa. C.S. §9545(b)(1)(i)-(iii): (1) illegal interference by government officials in the presentation of the claim; (2) after-discovered facts or evidence upon which the claim rests which were unknown and could not have been ascertained with due diligence; or (3) an after-recognized constitutional right that has been held to apply retroactively. For an exception to preserve an otherwise untimely filing, the petition must allege, and the petitioner must prove, one or more of the exceptions, and the petition invoking the exception must be filed within 60 days of the date the claim could have been presented. 42 Pa. C.S. §9545(b)(2). **Commonwealth v. Beasley,** 559 Pa. 604, 741 A.2d 1258, 1261 (1999) ("[I]t is the petitioner's burden to plead in the petition and prove that one of the exceptions applies."). This is a jurisdictional necessity. **Commonwealth v. Palmer,** 814 A.2d 700, 704-705 (Pa. Super. 2002) **appeal denied,** 832 A.2d 436 (Pa. 2003) ("[T]he courts lack jurisdiction to grant PCRA relief unless the petitioner can plead and prove that one of the exceptions to the time bar applies.").

[3] Prior to this appeal, counsel who was initially appointed to represent Defendant was permitted to withdraw. Present counsel was appointed for appeal purposes.

A petitioner under the PCRA must satisfy both the eligibility and timeliness requirements of the PCRA. 42 Pa. C.S.A. §§9543 and 9545. The only conceivable exception to the time bar of the PCRA to which Defendant alludes in his amended petition filed on September 2, 2003, that of after-discovered evidence under Section 9545(b)(ii), is patently spurious. This exception requires Defendant to plead and prove that "the facts upon which the claim is predicated were unknown to him and could not have been ascertained earlier by the exercise of due diligence," 42 Pa. C.S. §9545(b)(1)(ii), and that "these new facts constitute 'exculpatory evidence' that 'would have changed the outcome of the trial if it had been introduced.' 42 Pa. C.S. §9543(a)(2)(vi)."[4] **Commonwealth v. Palmer, supra** at 706. Defendant must also "plead and prove specific facts that demonstrate his claim was raised within the sixty-day time frame of subsection 9545(b)(1)(ii)." **Commonwealth v. Gallman,** 838 A.2d 768, 775 (Pa. Super. 2003).

In his amended petition, Defendant characterizes as newly-discovered evidence threatening statements allegedly made in the presence of his sister by one of the Commonwealth's witnesses, Agent Jeffrey P. Aster, which statements Defendant claims established bias which he was entitled to present to the jury. The petition is silent as to exactly when and how Defendant first learned of the claimed threats and Defendant "fails to offer a reasonable explanation as to why this information, with the exercise of due diligence, could not have been obtained ear-

[4] "To be entitled to relief under the PCRA, a petitioner must plead and prove by a preponderance of the evidence that the conviction or sentence arose from one or more of the errors enumerated in 42 Pa. C.S. §9543(a)(2), and that the issues raised in the petition have not been previously litigated or waived. 42 Pa. C.S. §9543(a)(3)." **Commonwealth v. Payne,** 794 A.2d 902, 905 (Pa. Super. 2002), **appeal denied,** 570 Pa. 680, 808 A.2d 571 (2002). Section 9543(a)(2)(vi) provides for post-conviction relief when a petitioner can prove a claim of newly discovered exculpatory evidence.

> To warrant relief, after-discovered evidence must meet a four-prong test: (1) the evidence could not have been obtained before the conclusion of the trial by reasonable diligence; (2) the evidence is not merely corroborative or cumulative; (3) the evidence will not be used solely for purposes of impeachment; and (4) the evidence is of such a nature and character that a different outcome is likely.

Commonwealth v. Choice, 830 A.2d 1005, 1008 (Pa. Super. 2003). The nature of the testimony Defendant seeks to introduce, as discussed above, is solely for purposes of impeachment.

lier." **Commonwealth v. Palmer, supra** at 708-709. The record, however, indicates that the incident to which Defendant refers occurred in the presence of Defendant; as such, there was no after-discovered evidence. This issue, in fact, was addressed at Defendant's trial (N.T., at pp. 56-57), and again examined and rejected by the Superior Court in its Opinion of September 3, 1996, on direct appeal (Memorandum Opinion, pp. 7-8). Therefore, not only does Defendant clearly fail to meet the timeliness requirements of the PCRA—the petition having been filed beyond the PCRA's one-year deadline and more than sixty days after Defendant first learned of this evidence, it has previously been litigated and been determined to be without substantive merit. **See** 42 Pa.C.S. §§9543(a)(3) and 9544(a)(2); **Commonwealth v. Morales,** 549 Pa. 400, 701 A.2d 516, 521 (1997) (post-conviction relief on claims previously litigated on appeal not available by alleging ineffective assistance of counsel).

Courts are without jurisdiction to consider the merits of a PCRA petition that is filed in an untimely manner. Additionally, for a second or subsequent post-conviction proceeding, it is incumbent upon Defendant to demonstrate a serious miscarriage of justice before the merits of the petition can be entertained. **Commonwealth v. Lawson,** 519 Pa. 504, 513-14, 549 A.2d 107, 112 (1988). "A miscarriage of justice, like prejudice, can only occur where it is demonstrated that a particular omission or commission was so serious that it undermined the reliability of the outcome of the proceeding." **Id.** at 514, 549 A.2d at 112 (Papadakos, J., concurring). "This standard is met only if petitioner can demonstrate either: a) the proceedings resulting in his conviction were so unfair that a miscarriage of justice occurred which no civilized society can tolerate; or b) he is innocent of the crimes charged." **Commonwealth v. Austin,** 721 A.2d 375, 377 (Pa. Super. 1998). Such a determination is not a merits determination but a precondition for addressing the merits of a second or subsequent post-conviction proceeding. **Commonwealth v. Palmer, supra** at 709 n.18.

CONCLUSION

Defendant has met neither the requirements of timeliness nor the **Lawson** standard of a demonstrated miscarriage of justice, threshold requirements for considering the merits of his petition. Being without jurisdiction to consider such issues, it

would be inappropriate for us to consider the substantive merits of the issues raised in Defendant's concise statements of matters complained of on appeal. Instead, summary dismissal of Defendant's petition was both appropriate and required. Accordingly, we respectfully request that our decision of December 30, 2003, be affirmed.

COMMONWEALTH OF PENNSYLVANIA vs. FRANCIS L. MOYER, Defendant

Criminal Law—Domestic Dispute—Warrantless Search and Seizure for Victim—Requirement of Probable Cause—Exigent Circumstances—Illegal Entry Into Home by Police—Physical Resistance by Owner—Prosecution for Resisting Arrest—Legality of Police Conduct As Defense for the Offense of Persistent Disorderly Conduct

1. The report of domestic violence in the front of an alleged assailant's residence does not in and of itself provide probable cause to believe the alleged victim, whose whereabouts is otherwise unknown to the police, is inside the home and in imminent danger of further abuse or in urgent need of medical attention. Absent such information, the police are without basis to forcibly enter the alleged assailant's home without a warrant for the professed purpose of checking on the welfare of the alleged victim.

2. A homeowner who physically resists an illegal, albeit good faith, forcible entry and search of his home by police may not be convicted of resisting arrest.

3. Physical resistance to an arrest or the performance of a duty by police is never justified. The legal conclusion that the police have acted illegally is not a defense to criminal prosecution for conduct which meets all of the elements of the crime charged.

4. The improper entry of police into Defendant's home does not prevent Defendant's prosecution for persistent disorderly conduct where a **prima facie** showing of the elements of such offense is established by the Commonwealth.

NO. 583 CR 02

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

GEORGE T. DYDYNSKY, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, J.—March 29, 2004

The Defendant in this case, Francis L. Moyer, has filed a Motion to Suppress Evidence, claiming police officers illegally entered his home and arrested him. He also asks that the

charges against him for resisting arrest[1] and persistent disorderly conduct[2] arising from this incident be dismissed.

FACTUAL BACKGROUND

On November 3, 2002, at approximately 1:00 A.M., the police received a report of a domestic dispute occurring on the street outside Defendant's home at 241 Carbon Street in Lehighton, Carbon County, Pennsylvania. Officer Scott Prevosnyak and Corporal Neal Ebbert of the Lehighton Borough Police Department arrived at the scene within approximately two minutes of the call. Upon their arrival, a neighbor who had witnessed the incident told the officers that "they" were "going at it again," presumably referring to the Defendant and his girlfriend, Sally Hartman ("Hartman"), and that the two had been outside yelling and screaming at one another and that Defendant had smashed the window of a vehicle with rain spouting while Hartman was inside. Neither the vehicle nor Hartman were present when the police arrived, however, the police did observe glass on the roadway and eight feet of rain spouting lying on the steps and sidewalk in front of Defendant's home. The neighbor did not know where Hartman had gone but stated that Defendant was inside his home (N.T., pp. 9, 25).

Prior to this incident, the police were aware that the relationship between Defendant and Hartman was volatile and often violent. Numerous protection from abuse orders had been obtained by each against the other (N.T., pp. 22-23). Officer Prevosnyak testified that he himself had investigated at least eight or nine prior instances involving domestic violence and property disputes between the two (N.T., p. 12). When he responded to one call ten to twelve months earlier, he arrived to find Hartman with a broken nose. The police were also aware that the two had three young children who resided in the home at 241 Carbon Street.

With the intent of determining the whereabouts and condition of Hartman, the police knocked on the front door of Defendant's home and were met there by Defendant.[3] When

[1] 18 Pa. C.S. §5104.

[2] 18 Pa. C.S. §5503(a)(1).

[3] To be precise, the home at this location is a double home with one side being numbered as 241 Carbon Street and the other 243 Carbon Street, both sides being owned by Defendant. When the police knocked on the door at 241 Carbon Street,

questioned as to what had happened, Defendant denied that anything had happened. When asked to see Hartman in order to check on her welfare, Defendant denied that there had been a problem and stated that the police were not needed. When asked for permission to enter the home, Defendant began to close the door. As he did so, Corporal Ebbert placed his foot inside the doorway and his arm against the upper half of the door. Defendant pushed from the opposite direction. While Defendant pushed to close the door and Corporal Ebbert struggled to keep the door open, the Defendant suddenly released the door. When he did so, both Corporal Ebbert and Officer Prevosnyak, who was pushing Corporal Ebbert from behind, plunged headlong into the home where they stumbled into the Defendant; all three collided against the wall on the opposite side of the front room (N.T., p. 63). There the Defendant began swinging and flailing wildly at both officers. The officers attempted without success to calm down and control the Defendant and ordered him to cease and desist. Ultimately, Defendant was tackled to the ground where he was subdued and handcuffed. Once Defendant was under control, Officer Prevosnyak and Corporal Ebbert searched the residence. Hartman was not present; the children were asleep in bed.

Defendant, who by this time was under arrest, was taken outside by the police. While outside, Defendant made loud, vocal noises and continued to struggle with Corporal Ebbert. Corporal Ebbert repeatedly ordered Defendant to quiet down, requests ignored by Defendant. Not until Corporal Ebbert placed Defendant up against the police cruiser did Defendant calm down. At this point, it was approximately 1:15 A.M.

Later that evening, Hartman returned a call from the police and advised she did not want to press charges. Defendant has been charged with resisting arrest and persistent disorderly conduct.

DISCUSSION

In this case, we must decide whether police are authorized to force their way into the home of a person suspected of abus-

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Defendant appeared at the door of 243 Carbon Street, the other half of the home, and told the officers they were at the wrong home. A common porch fronts both homes. The officers walked across this porch and met Defendant at the door of 243 Carbon Street.

ing his paramour, absent a warrant, when the victim of the abuse is believed to be inside and in danger of further abuse. We must further determine whether Defendant's prosecution for resisting arrest and persistent disorderly conduct is dependent upon the legality of the police's entry into Defendant's home where, but for that entry, Defendant would not have engaged in the conduct with which he is charged.

Validity of Search

Defendant challenges the legality of the police entry and search of his home pursuant to the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution. In examining the police's authority to enter and search Defendant's home, we begin with the premise that a search, without consent, requires probable cause and that warrantless searches are presumed to be unreasonable. **Commonwealth v. Walker,** 836 A.2d 978, 981 (Pa. Super. 2003).[4] In this case, Defendant did not consent to the warrantless entry into his home.

The protections of the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution are particularly demanding when an exception to the warrant requirement is claimed with respect to a suspect's home, the primary refuge from government intrusion. **Commonwealth v. Richter,** 791 A.2d 1181, 1184 (Pa. Super. 2002). One well-recognized exception, and that relied upon by the Commonwealth in this case, is that of exigent circumstances. **Commonwealth v. Griffin,** 785 A.2d 501, 505 (Pa. Super. 2001).

In examining the exigent circumstances exception in a case involving a reported domestic dispute, the Superior Court, in an en banc decision, wrote:

> The exigent circumstances exception to the warrant requirement recognizes that some situations present a com-

[4] Article I, Section 8 of the Pennsylvania Constitution and the Fourth Amendment of the United States Constitution protect against unreasonable searches and seizures. Probable cause is the standard by which reasonableness is measured under these constitutional mandates. **Commonwealth v. Petroll,** 696 A.2d 817, 825 n.5 (Pa. Super. 1997), **aff'd,** 558 Pa. 564, 738 A.2d 993 (1999). The determination of probable cause is based upon the "totality of the circumstances" test set forth by the United States Supreme Court in **Illinois v. Gates,** 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983), and adopted by the Pennsylvania Supreme Court in **Commonwealth v. Gray,** 509 Pa. 476, 503 A.2d 921 (1985).

> pelling need for instant arrest, and that delay to seek a warrant will endanger life, limb or overriding law enforcement interests. In these cases, our strong preference for use of a warrant must give way to an urgent need for immediate action.
>
> In determining whether exigent circumstances exist, a number of factors are to be considered. Among the factors to be considered are: (1) the gravity of the offense, (2) whether the suspect is reasonably believed to be armed, (3) whether there is above and beyond a clear showing of probable cause, (4) whether there is a strong reason to believe that the suspect is within the premises to be searched, (5) whether there is a likelihood that the suspect will escape if not swiftly apprehended, (6) whether the entry was peaceable, and (7) the time of the entry, i.e., whether it was made at night. These factors are to be balanced against one another in determining whether the warrantless intrusion was justified.
>
> Other factors may also be taken into account, such as whether there is hot pursuit of a fleeing felon, a likelihood that evidence will be destroyed if police take the time to obtain a warrant, or a danger to police or other persons inside or outside the dwelling.

Commonwealth v. Richter, supra at 1184-85 (quotations and citations omitted). In dissent, Judge Johnson noted that "[a]ll decisions made pursuant to the exigent circumstances exception [to the warrant requirement] must be made cautiously, for it is an exception which by its nature can very easily swallow the rule unless applied in only restricted circumstances." **Id.** at 1188 (quotations and citations omitted). "Ultimately, the exigent circumstances exception is a balancing of an individual's right to be free from unreasonable intrusions against the needs of law enforcement in investigating a crime quickly, and preventing the disappearance of evidence necessary to convict criminals." **Commonwealth v. Roland,** 535 Pa. 595, 608, 637 A.2d 269, 275 (1994) (Montemuro, J., dissenting).

"Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries."

Commonwealth v. Santiago, 736 A.2d 624, 631 (Pa. Super. 1999), **appeal denied,** 561 Pa. 665, 749 A.2d 470 (2000). The "police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." **Welsh v. Wisconsin,** 466 U.S. 740, 749-50, 104 S.Ct. 2091, 80 L.Ed. 2d 732 (1984). This is particularly true when reviewing a warrantless intrusion into an individual's home where the expectation of privacy protected under the Fourth Amendment has been held to be greatest. **Commonwealth v. Gutierrez,** 750 A.2d 906, 909 (Pa. Super. 2000).

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: 'The right of the people to be secure in their … houses … shall not be violated.' That language unequivocally establishes the proposition that '[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' **Silverman v. United States,** 365 U.S. 505, 511, 5 L.Ed. 2d 734, 81 S.Ct. 679 [683], 97 A.L.R.2d 1277. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Payton v. New York, 445 U.S. 573, 589-90, 100 S.Ct. 1371, 1381-82, 63 L.Ed. 2d 639, 653 (1980). Indeed, "it is difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home." **Jones v. U.S.,** 357 U.S. 493, 498, 78 S.Ct. 1253, 2 L.Ed. 2d 1514 (1958).

In **Commonwealth v. Wright,** 560 Pa. 34, 742 A.2d 661 (1999), our Supreme Court stated:

> It is widely recognized that situations involving the potential for imminent physical harm in the domestic context implicate exigencies that may justify limited police intrusion into a dwelling in order to remove an item of potential danger.

Id., 742 A.2d at 664. The volatility of domestic disputes and the threat of imminent violence may, under certain circumstances,

justify a warrantless search of a residence to ensure the safety and protection of persons suspected of being abused. Whether such is, in fact, the case depends on the nature, extent and source of the police's knowledge, the existence of probable cause to believe a victim is in danger, and the severity and immediacy of the harm reasonably suspected. Critical to a determination of exigent circumstances is whether the delay in obtaining a warrant would risk the infliction of serious bodily injury.

We find, and the Commonwealth concedes, that while the police at the time they entered the Defendant's residence had probable cause to believe a crime had been committed in front of Defendant's home and that Defendant committed the crime, they did not have grounds to arrest Defendant (N.T., pp. 47, 93-94). The authority to arrest conferred by Section 2711 of the Crimes Code (Probable cause arrests in domestic violence cases) did not exist because there was no evidence of recent physical injury to Hartman. Nor generally does the power to arrest exist for a misdemeanor offense committed outside of the presence of the police. **Commonwealth v. Smith,** 380 Pa. Super. 484, 489, 552 A.2d 292, 294 (1988), **appeal denied,** 524 Pa. 596, 568 A.2d 1247 (1989); **Commonwealth v. Streater,** 422 Pa. Super. 502, 619 A.2d 1070 (1993) (**en banc**), **appeal discontinued** by 534 Pa. 653, 627 A.2d 731 (1993).

The question then becomes, is the presence of probable cause that a crime of domestic violence has been committed, outside the presence of the police and outdoors, in front of the alleged assailant's home, sufficient in and of itself to justify a warrantless search of the assailant's home for the alleged victim, when the police do not know where the victim is, do not know whether the victim has been injured, and do not know whether the victim is in continued danger. The neighbor's statement to the police that she did not know where Hartman was meant either that she did not know whether or not Hartman was inside the home, or that she knew that Hartman was not in the home and had left the scene but did not where Hartman had gone.

At best, the information upon which the Commonwealth relies to validate its search of Defendant's home is uncertain and inconclusive. Perhaps Hartman was inside the home, perhaps she wasn't. While sufficient to support the possibility that

Hartman may have been in the home, this level of suspicion is not sufficient to form an objective, reasonable belief at the time police entered Defendant's home that Hartman was probably in the home.

Constitutionally, probable cause to search requires a fair probability that contraband or the items searched for will be found in a particular place. **Commonwealth v. Torres,** 564 Pa. 86, 764 A.2d 532, 537 (2001). "Probable cause [to arrest] exists when the facts and circumstances within the officer's knowledge are sufficient to warrant a person of reasonable caution in the belief that an offense has been or is being committed. ... Mere suspicion is not a substitute for probable cause." **In the Interest of O.A.,** 552 Pa. 666, 717 A.2d 490, 495 (1998); **see also, Brinegar v. United States,** 338 U.S. 160, 176, 69 S.Ct. 1302, 1311, 93 L.Ed. 2d 1879 (1949) (probable cause is a "practical non-technical standard"). "It is only the probability, and not a **prima facie** showing, of criminal activity that is the standard of probable cause for a warrantless arrest." **Commonwealth v. Quiles,** 422 Pa. Super. 153, 167, 619 A.2d 291, 298 (1993) (**en banc**) (emphasis in original). In this case, at the time the police entered Defendant's home, they did not possess probable cause to believe that a crime had been, was being or would be committed inside the home or that Hartman was in imminent danger of further abuse or in urgent need of medical attention.

This absence of probable cause is fatal to the Commonwealth's claim that exigent circumstances justified warrantless entry into Defendant's home. "Absent probable cause and exigent circumstances, the entry of a home without a warrant is prohibited under the Fourth Amendment." **Commonwealth v. Roland, supra** at 599, 637 A.2d at 270. Exigent circumstances alone, unaccompanied by probable cause, cannot justify the search. Nor can the good faith belief of the police that Hartman might have been in the home and might be in danger. **See Commonwealth v. Edmunds,** 526 Pa. 374, 586 A.2d 887 (1991) (rejecting, on state constitutional grounds, good faith exception to the exclusionary rule). At the same time, the absence of probable cause to believe Hartman was inside Defendant's home when the police entered necessarily and critically undermines the Commonwealth's assertion of exigent circumstances.

Resisting Arrest

Having determined that the officers were not justified in entering Defendant's home by force, the next question to be addressed is whether a defendant can be convicted of resisting arrest for physically opposing an illegal search of his home. The elements of resisting arrest are set forth in Section 5104 of the Crimes Code:

> A person commits a misdemeanor of the second degree if, with the intent of preventing a public servant from effecting a lawful arrest or discharging any other duty, the person creates a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the resistance.

18 Pa. C.S. §5104.

In **Commonwealth v. Biagini,** 540 Pa. 22, 655 A.2d 492 (1995), the court found in the context of a police officer's investigation of a public disturbance that defendant's physical resistance to the officer while inside defendant's home could not sustain a charge of resisting arrest since the arrest, being unsupported by probable cause, was illegal. **Id.** at 32, 40, 655 A.2d at 497, 501. In **Biagini,** the only element under consideration was the lawfulness of the arrest. With respect to this element, the court held that a "lawful" arrest, in contrast to an "unlawful" one, is an essential element of the offense of resisting arrest. **Id.** at 38, 655 A.2d at 500.

The same reasoning dictates that when the search of a residence is without probable cause, even though undertaken in good faith, police who are not lawfully present in a suspect's home are not lawfully discharging their duties at the time the homeowner physically resists an illegal and forcible entry into his home. Under such circumstances, the arrest is illegal and will not support the charge of resisting arrest.[5] We hasten to

[5] To argue in the context of police conduct which exceeds lawful authority that Defendant's resistance was directed at preventing the police from searching his home, rather than preventing his arrest, is without merit. In essence, such argument asserts that the resistance for which the Defendant is being charged is that against the officer's **"discharging any other duty"** element of resisting arrest, rather than that of the officer's "effecting a lawful arrest." This same position was taken by the dissent in **Biagini,** and rejected by the majority. In the dissent's view, the majority ignored the element of preventing the discharge of any other duty as an alternate element of resisting arrest and improperly concentrated on the ele-

add that even under such circumstances, if the homeowner, by the nature or extent of his resistance, "attempts to cause or intentionally or knowingly causes bodily injury to a police officer … **in the performance of duty**" such conduct will support a charge of aggravated assault pursuant to 18 Pa. C.S. §2702(a)(3). **Commonwealth v. Biagini, supra** at 34, 655 A.2d at 498 (emphasis in original). "[T]here does not exist in Pennsylvania a right to resist arrest, [in] any circumstances." **Id.** at 36, 655 A.2d at 499.[6]

Disorderly Conduct

The defendants in **Biagini** argued, as does the Defendant here, that it was the unlawful actions of the police which provoked their responses and that, since the initial encounter was an "unlawful arrest," all of the criminal charges which arose as a consequence of that arrest should be dismissed. The Supreme Court rejected this argument.

It is not the law of this Commonwealth that we "focus upon the initial actions of the police officers as a catalyst for all that flowed therefrom," and, if such actions were improper, that we suppress all evidence which was subsequently obtained, or exempt from criminal liability all conduct of a defendant which follows. To do so would impose upon the police responsibility for a defendant's own conduct. **Commonwealth v. Biagini, supra** (only where the legality of the arrest is an element of the offense charged will an unlawful arrest act to bar the prosecution of such offense). Therefore, our conclusion that the officers' entry into Defendant's home was improper is not a defense to criminal charges arising from Defendant's conduct which

ment of the lawfulness of the arrest. **Id.** at 39-40, 655 A.2d at 501 (emphasis in original). In the dissent's view, even though the arrest was illegal, because the police were acting within the scope of their employment (**i.e.,** the investigation of a public disturbance), the defendant's resistance satisfied this element of the offense. The reasoning of the majority prohibits unlawful police conduct from simultaneously serving as the basis of the "discharge of any other duty" element of resisting arrest.

[6] In this case, as noted by the Commonwealth, while there appears to be sufficient evidence to justify a charge of aggravated assault on the police officers during their struggle with Defendant, the police have not filed a charge for aggravated assault. The court in **Biagini** also noted the distinction between the legality of the arrest and the manner of executing the arrest. When the police engage in the use of excessive/deadly force in making an arrest, the right of self-defense allows an individual to protect himself in this extreme situation. **Commonwealth v. Biagini, supra** at 36, 655 A.2d at 499.

occurred after such entry and for which the **prima facie** elements of the crimes charged have been made out. **See also, Commonwealth v. Britt,** 456 Pa. Super. 633, 691 A.2d 494 (1997), **appeal denied,** 549 Pa. 695, 700 A.2d 437 (1997) (reversing trial court's order suppressing all evidence related to an incident in which defendant was prosecuted for aggravated assault and reckless endangerment when, in a violent and reckless manner, after being unlawfully detained, he fled from police officers who had properly identified themselves, injuring one officer).

The charge of persistent disorderly conduct at issue here provides:

> (a) Offense defined.—A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:
>
> (1) engages in fighting or threatening, or in violent or tumultuous behavior;
>
> * * *
>
> (b) Grading.—An offense under this section is a misdemeanor of the third degree if the intent of the actor is to cause substantial harm or serious inconvenience, or if he persists in disorderly conduct after reasonable warning or request to desist. Otherwise disorderly conduct is a summary offense.

18 Pa. C.S. §5503(a)(1) and (b). It is apparent from this definition that a lawful search is not an element of this offense. Equally apparent is that "being both vulgar and loud to a police officer, while in a private residence, does not constitute disorderly conduct." **Commonwealth v. Biagini, supra** at 27-28, 655 A.2d at 495. However, it is Defendant's conduct while outside his home which supports this charge.

There is no dispute that Defendant fought with the police and, by Officer Prevosnyak's account, continued to struggle loudly and violently while being taken to the police car, to the point that Corporal Ebbert placed Defendant on top of the police cruiser to again subdue him. Officer Prevosnyak testified that the Defendant was repeatedly told to calm down and quiet down, both inside and outside the house. Defendant's behavior once outside the house clearly created a public annoyance, inconvenience or alarm, or recklessly created a risk thereof;

it occurred in a residential neighborhood after 1:00 A.M. Therefore, a **prima facie** showing of each element of persistent disorderly conduct has been made out.

CONCLUSION

In accordance with the foregoing, the charge of resisting arrest, Count I of the information, will be dismissed. The balance of Defendant's Motions to Suppress and to Quash the Information will be denied.

ORDER OF COURT

AND NOW this 29th day of March, 2004, upon consideration of Defendant's Motions to Suppress and to Quash Information, and after hearing thereon, it is hereby

ORDERED and DECREED that Count I of the information (resisting arrest) be and is hereby quashed and said charge, that of resisting arrest, be and is hereby dismissed.

In all other respects, Defendant's motion is denied.

COMMONWEALTH OF PENNSYLVANIA, Plaintiff vs. JOHN CLELAND, Defendant

COMMONWEALTH OF PENNSYLVANIA, Plaintiff vs. MICHAEL WHAH, Defendant

Criminal Law—Burglary/Criminal Trespass—Defense of Premises Being Open to the Public—Suppression—Search Warrant—Exclusionary Rule/ Independent Source Rule—Redaction of Tainted Evidence To Establish Probable Cause—Effect of Deliberate and Knowing Misstatements of Material Fact in Affidavit of Probable Cause—Remedy for Violation of Rule of Criminal Procedure

1. As defined in the Crimes Code, a conviction for burglary or criminal trespass cannot be sustained for the entry into premises, or a portion thereof, then and there open to the public. In contrast, entry into a portion of premises otherwise open to the public, which portion is clearly restricted to and reserved for employees, is not a defense to such charges.

2. Entry into a store during normal business hours and the removal of a safe from an area restricted to employees, and used as an office, does not bar a prosecution for burglary or criminal trespass.

3. Conspiracy and accomplice liability are related, and at times overlapping, but separate bases of criminal liability. One who engages in a conspiracy is also an accomplice. An accomplice, however, is not, on that basis alone, also a conspirator.

4. The exclusionary rule does not mechanically require the suppression of evidence obtained pursuant to a search warrant whose affidavit of probable

cause contains information obtained in violation of a defendant's constitutional rights and information validly obtained. Instead, pursuant to the independent source rule, a corollary of the exclusionary rule, it is incumbent on the reviewing court to redact the tainted portions of the supporting affidavit (**i.e.,** those portions which include illegally obtained information). If the remaining portions of the affidavit establish probable cause, then the evidence obtained as a result of the execution of the search warrant will not be suppressed.

5. Where the basis of probable cause contained in an affidavit in support of a search warrant is deliberate or knowing misstatements of material fact by the affiant, the affidavit is defective. A change in an informant's basis of knowledge of criminal activity, from that of an observer to that of a participant, is not by itself a material misstatement of fact when the fundamental facts implicating the defendant in the crime remain the same.

6. The suppression of evidence is not an appropriate remedy for violation of a rule of criminal procedure when the violation does not implicate fundamental, constitutional concerns, is not conducted in bad faith, or has not substantially prejudiced the defendant.

NO. 208 CR 03

NO. 209 CR 03

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

BRIAN B. GAZO, Esquire—Counsel for Cleland.

STEPHEN P. VLOSSAK, SR., Esquire—Counsel for Whah.

MEMORANDUM OPINION

NANOVIC, J.—April 29, 2004

FACTUAL BACKGROUND

On February 25, 2003, at approximately 3:37 A.M., a surveillance camera at Boyer's Supermarket in Lansford, Carbon County, Pennsylvania, recorded the theft of the store's portable safe from the manager's office near the front entrance of the store. A tall thin white male, between six foot one inch and six foot three inches in height, can be observed on the film entering the store, side-stepping an interior front floor mat, turning left, walking a short distance, and then passing through two separate spring-hinged half doors—the first leading to an express checkout counter and the second from the checkout counter into the manager's office—removing the safe from beneath the office's counter and then lifting the safe and running out the front door. This area near the front of the store has been described as an open booth divided into two sections: the front portion is the express checkout and service counter; the

rear portion—separated from the front section by a swinging-gated half-door—is the manager's office where the safe was located beneath the counter (Preliminary Hearing, pp. 7-9, 21, 36-37).

At the time of the theft, the store was open to the public for business. The theft, however, was not immediately detected. By side-stepping the front mat, the intruder bypassed the activation of a buzzer which would otherwise signal the entrance of a customer into the store. When the theft was discovered several hours later, and the tape viewed by the police, the police also noted that the man who entered was wearing an undersized light-colored hooded sweatshirt, tight fitting blue jeans with a straight-leg cut, and cowboy boots. Additionally, based upon the person's apparent knowledge of the store—as evidenced by the perpetrator's avoiding detection in side-stepping the front mat and knowing the location of the safe, that it was portable and unsecured to the premises, and that it could be removed and carried by one person—the police suspected that the intruder was someone familiar with the store or knew someone familiar with the store. While interviewing store employees, the police learned that a former employee, Stacey Conrad, dated a person—now known as the Defendant, John Cleland—fitting the general description of the person on the videotape. Police attempts to reach Ms. Conrad were unsuccessful and she could not be located.

That same day, the police began viewing store security tapes from previous dates. One tape, that of February 10, 2003, depicted John Cleland in the store with Conrad at approximately 3:00 A.M. In this tape, Cleland fit the same description apparent from the tape of the crime: he was a white male of approximately six foot three inches in height, was of slender build, had long thin legs, and wore straight legged jeans and cowboy boots. In the tape of February 10, 2003, Conrad was wearing a gray hooded sweatshirt which was the same or similar to that worn by the intruder and which appeared too large for her.

On February 27, 2003, the police responded to a domestic disturbance at Conrad's mother's home in Lansford. Conrad, who was then unemployed and in the company of Cleland, had given her mother $200.00 in cash. Cleland's dress again was the same as that of the person on the February 25th tape. Believing

Cleland to be the person in that tape, the police arrested and charged Cleland with the theft from Boyer's. A search incident to Cleland's arrest revealed an additional $258.00 on his person (Suppression Hearing, p. 38). Cleland told the police he had left home that evening with $1,000.00 in cash. He also claimed that the money came from the sale of his truck several days earlier; however, the buyer identified by Cleland denied having purchased the truck or giving him money. At this same time, Conrad was arrested for driving under the influence and placed in prison.

When later interviewed in prison, Conrad told the police that she was present during several conversations where Cleland and the Defendant, Michael Whah, discussed stealing money from Boyer's. At the time of the theft, Conrad was residing in Whah's home in Drums, Pennsylvania, with Cleland; Whah was also living in the home with his girlfriend. Conrad also stated that on February 25, 2003, both Defendants left Whah's home together, at approximately 2:45 A.M. and returned at 5:00 A.M., and that Cleland was then wearing a gray hooded sweatshirt, blue jeans and brown boots. She further stated that while eating breakfast with the two following their return, Whah told Cleland that the money was in Whah's room. During this same interview, Conrad identified the location within Whah's home where the tools used to open the safe were kept.

Conrad also told the police that she had advised Cleland how to bypass the front alarm; that Whah had stated he needed money to pay for his home; and that earlier that day Whah and Cleland had discussed driving to Boyer's to steal money. At some time later, Conrad admitted that she, in fact, was with the Defendants when they drove from Drums to Boyer's on February 25, 2003; that Whah was the driver and parked his SUV in front of Boyer's while Cleland entered the store; that Cleland exited the store with the safe and placed the safe in the back seat of the SUV; that the three returned to their home in Drums; that in the basement of the home Cleland and Whah used various tools to cut a hole in the bottom of the safe; that Conrad put her hand through the hole and withdrew approximately $13,000-.00 in cash and checks from the safe; that the money was given to Cleland; and that Cleland subsequently hid the money in a location unknown to her.

Based on their own investigation, the information they first received from Conrad—before she acknowledged being part of the theft, and a conversation with a confidential informant who stated that he had been in the Whah residence and that Whah stored large amounts of drugs in his home, the police secured a search warrant from a local magistrate to search Whah's home for purposes of obtaining evidence related to the theft, as well as evidence of drug trafficking by Whah.[1] The search warrant was executed on March 6, 2003. No evidence of drugs or drug paraphernalia was found in the home and no evidence of the theft was found among Whah's property (Preliminary Hearing, pp. 37-38). The police, however, did discover keys to Boyer's store in a black duffle bag located in the bedroom Cleland shared with Conrad; these keys were identified by a store manager as being kept in the safe that had been removed. Also located in Cleland's bedroom was an extra large gray hooded sweatshirt.

Both Cleland and Whah have been charged with identical crimes: burglary,[2] theft by unlawful taking,[3] theft by receiving stolen property,[4] criminal conspiracy,[5] and criminal trespass.[6] Both have also filed omnibus pretrial motions in the nature of a writ of habeas corpus with respect to the crimes of burglary and criminal trespass, claiming the necessary elements for each has not been met, and for the suppression of evidence, claiming that probable cause did not exist for the issuance of the search warrant and that the Rules of Criminal Procedure were not complied with.[7]

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[1] An earlier search warrant, obtained for Cleland's former residence in Kelayres, Pennsylvania, produced no evidence, Cleland having previously moved from that location. By agreement of the parties, Defendants' motion to suppress any evidence gathered from the execution for this warrant, there being none, was granted without prejudice to any other pending motions to suppress.

[2] 18 Pa. C.S. §3502(a).

[3] 18 Pa. C.S. §3921(a).

[4] 18 Pa. C.S. §3925(a).

[5] 18 Pa. C.S. §903(a).

[6] 18 Pa. C.S. §3503(a)(1)(i).

[7] Whah has also argued that because the crime he is alleged to have conspired to commit is restricted to that of burglary, and because there is no evidence that he entered Boyer's Supermarket or took any property from the building, the charges of criminal conspiracy and theft by unlawful taking must be dismissed. Whah's argument ignores the accomplice theory of liability. 18 Pa. C.S. §306(v). Failure to

DISCUSSION

Habeas Corpus

Defendants argue that because Boyer's Supermarket was open to the public at the time the theft occurred, the statutory definitions of burglary and criminal trespass preclude a conviction of either. The Commonwealth retorts that Cleland's entry into the store by subterfuge both permits and justifies the charges. The answer, not surprisingly, lies in the language of the Crimes Code.

Burglary is defined in Section 3502(a) of the Code as follows:

> §3502. Burglary
>
> (a) Offense defined.—A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with intent to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter.

18 Pa. C.S. §3502(a). The succeeding section of the Code, in language applicable to this case, defines criminal trespass in the following terms:

> §3503. Criminal Trespass
>
> (a) Buildings and occupied structures.—
>
> (1) A person commits an offense if, knowing that he is not licensed or privileged to do so, he:

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charge or even an acquittal of conspiracy, does not preclude the possibility of guilt as an accomplice.

> Rejection of a conspiracy theory does not eliminate the possibility of concerted action in the perpetration of a crime. A conspirator agrees with another to commit a crime and makes an overt act in furtherance thereof. The inchoate crime of conspiracy is thus committed regardless of whether the substantive crime occurs. An accomplice knowingly or voluntarily cooperates with or aids another in the commission of a crime. **Commonwealth v. Manchas,** 430 Pa. Super. 63, 633 A.2d 618, 627 (1993), **allocatur denied,** 539 Pa. 647, 651 A.2d 535 (1994). The aid rendered makes that person guilty of the substantive offense.
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> Despite the similarities between conspiratorial culpability and accomplice liability, a jury verdict concluding that an individual is not a conspirator does not require a concomitant conclusion that the same individual is not an accomplice.

Commonwealth v. Tolbert, 448 Pa. Super. 189, 214-15, 670 A.2d 1172, 1185 (1995), **appeal denied,** 548 Pa. 613, 693 A.2d 588 (1997), **cert. denied,** 522 U.S. 891, 118 S.Ct. 230, 139 L.Ed. 2d 162 (1997); **see also, Commonwealth v. Allen,** 425 Pa. Super. 615, 618-19, 625 A.2d 1266, 1268 (1993).

> (i) enters, gains entry by subterfuge or surreptitiously remains in any building or occupied structure or separately secured or occupied portion thereof; … .

18 Pa. C.S. §3503(a)(1)(i). The same Section of the Code, under subsection c, provides:

> (c) Defenses.—It is a defense to prosecution under this section that:
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> (2) the premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises; … .

18 Pa. C.S. §3503(c). Finally, the term "occupied structure" used in both Section 3502 and Section 3503 is defined as follows:

> 'Occupied structure.' Any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present.

18 Pa. C.S. §3501.

At common law, burglary was the nighttime breaking and entering of the dwelling house of another with intent to commit a felony therein. According to the Superior Court, the reason for including the phrase "open to the public" in Section 3502 of the Crimes Code was "to bring the law of burglary closer to its common law ancestor which sought to protect private premises from crime." **Commonwealth v. Cost,** 238 Pa. Super. 591, 601, 362 A.2d 1027, 1032 (1976). **See also, Commonwealth v. Hagan,** 539 Pa. 609, 615, 654 A.2d 541, 544 (1995) ("Under the common law, burglary was 'a forcible invasion of the right of habitation.' ").

Under Section 3502, one who enters premises held open to the public or to which he is permitted to enter is not a burglar.[8]

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[8] Burglary, as defined by Section 3502, requires proof of the following three elements beyond a reasonable doubt: (1) entry of a building or occupied structure, or separately secured or occupied portion thereof, by the defendant; (2) with the contemporaneous intent on the part of the defendant of committing a crime therein; and (3) at a time when the premises are not open to the public and the defendant was not then licensed or privileged to enter. **Commonwealth v. Franklin,** 306 Pa. Super. 422, 427, 452 A.2d 797, 799 (1982). The purpose of the burglary statute is "to protect the sanctity of the building and the safety of the persons and contents within it." **Commonwealth v. Giddings,** 454 Pa. Super.

The burden is upon the Commonwealth to prove, as an element of the offense, that the premises were not open to the public at the time of entry, regardless of the actor's intent at the time he entered the premises. **Cost, supra** at 599, 362 A.2d at 1031.

In this case, the Commonwealth has stipulated that Boyer's was open to the public at the time of entry. Therefore, regardless of any criminal intent Cleland may have harbored when he entered the front door, standing alone, Cleland's entry into the store, even if duplicitous as suggested by the Commonwealth, is insufficient to sustain a conviction of burglary.

The more difficult question, one not answered by the court in **Cost,** is whether a thief's entry into a business place during business hours bars a prosecution for burglary when the theft occurs from within a partially enclosed area of the business premises where business customers are not permitted—here the manager's office. In **Cost,** the court expressly declined to decide whether the entry of defendant's accomplice into the area behind the tavern's bar and the taking of money from the cash register located behind this bar "could support a conviction of burglary on the grounds that there was an entry of a '… separately secured … portion … .' of the premises." **Commonwealth v. Cost, supra** at 599 n.5, 362 A.2d at 1031 n.5.

On this issue we believe that the manager's office—described as an open booth, with a swinging gate, and which bore no lock and required no breaking or forced entry for Cleland to pass through—was not separately secured. **Cf. Commonwealth v. Cook,** 377 Pa. Super. 356, 547 A.2d 406 (1988) (unauthorized entry by defendant into a store's stockroom, open only to employees and not to members of the public, the door to which had been closed and secured by an unlocked padlock, in which defendant was discovered carrying a bag containing concealed clothing from both the store and the stockroom, held sufficient to sustain conviction for criminal trespass of a separately secured portion of the building under Section 3503(a)(1)(i)). At the same time, we also conclude that the area bounded by the manager's office was a separately occupied section of the store.

524, 530, 686 A.2d 6, 9 (1996), **appeal denied,** 548 Pa. 643, 695 A.2d 784 (1997), **overruled on other grounds by Commonwealth v. Clark,** 746 A.2d 1128 (Pa. Super. 2000), **appeal denied,** 564 Pa. 700, 764 A.2d 1064 (2000). The purpose of the criminal trespass statute is "to prevent unlawful intrusion onto real property[.]" **Commonwealth v. White,** 342 Pa. Super. 1, 8, 492 A.2d 32, 36 (1985).

As an area obviously reserved for and restricted to store employees, the booth was not an area held open to the public or to which Cleland was licensed or privileged to enter.

In explaining what is a separately secured or occupied portion of a building or occupied structure, the Superior Court has quoted with approval the following official commentary to Section 221.1 of the Model Penal Code:

> The provision as to separately secured or occupied portions of buildings and structures takes care of the situation of apartment houses, office buildings, steamships with many private cabins, etc., where occupancy is by unit. It is the unit rather than the structure which must be safeguarded, even against the occupants of other units in the same structure.

Commonwealth v. White, 371 Pa. Super. 578, 581-82, 538 A.2d 887, 889 (1988), **appeal denied,** 519 Pa. 660, 546 A.2d 622 (1988) (ladies' room of Society Hill Club entered by male intruder held to be a separately secured or occupied portion of the building within the meaning of Section 3503(a)(1)(i)). In **White,** the court found the ladies' room of the Society Hill Club to be a "separately secured or occupied" portion of the building "for precisely the same reason that an office in an office building is—it is reserved for the exclusive use of only a subset of the total population authorized to use the larger structure." **Id.** at 582, 538 A.2d at 889.

That Boyer's Supermarket was opened for business and, in this sense, open to the public at the time Cleland allegedly entered, is not in dispute. That the manager's office at the front of the store was reserved for use by employees only and not open to the general public, appears clear from the evidence presented by the Commonwealth. Therefore, while Cleland's entry into the store itself will not sustain a conviction for either burglary or criminal trespass, his entry into the manager's office, if proven, will.[9]

[9] Notwithstanding the similarity in language, criminal trespass is not a lesser included offense of burglary. **Commonwealth v. Carter,** 482 Pa. 274, 393 A.2d 660 (1978). The two are distinguished by the intention of the actor. Whether the defendant subjectively believed his presence in a building or occupied structure was privileged or licensed is irrelevant for burglary. The only question is whether the premises were in fact open to the public or whether the actor was licensed or privileged to enter. In contrast, since the defendant's subjective belief is an element

Suppression

Defendants next claim that the information upon which the magistrate relied in approving the issuance of a search warrant for Whah's home was tainted by illegally obtained information and, therefore, any evidence obtained when the warrant was executed must be suppressed as the fruit of an unlawful search. More broadly stated, Defendants claim that if only properly obtained and reliable information is considered, the affidavit does not provide a substantial basis for the magistrate to make a probable cause determination.

Defendants first argue that the similarity of Cleland's general physical appearance and dress with that of the true thief, as described in the warrant's affidavit and which appears in the testimony of record, is only superficial and was insufficient to establish probable cause for Cleland's arrest. If Defendants are correct, the cash seized incident to Cleland's arrest and his statement as to the source of this cash—the alleged sale of his truck which was discredited by further investigation—was illegally obtained evidence and improperly considered by the magistrate in issuing the warrant (Suppression Hearing, pp. 38, 40). We agree. **In the Interest of: M.D.,** 781 A.2d 192, 198 (Pa. Super. 2001) ("Clearly, blue jeans and a gray hooded sweatshirt is not unusual attire, and the officer did not even indicate whether his suspect possessed any specific physical or racial characteristics which would assist in separating possible suspects from ordinary, law-abiding citizens."). Such information must be suppressed under the fruit-of-the-poisonous-tree doctrine, the poisonous tree being the illegal arrest.[10]

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of criminal trespass, the defendant's actual belief that he was privileged or licensed to enter can provide a basis for acquittal of this charge. **Id.** at 277, 393 A.2d at 661. Scienter is not an element of burglary. For purposes of sentencing, however, where the facts show that in practical effect the defendant committed a single criminal act, the two merge. **Commonwealth v. Franklin, supra** at 430, 452 A.2d at 801.

[10] The fruit-of-the-poisonous-tree doctrine "requires the exclusion of tangible evidence seized during an unlawful search, and derivative evidence, both tangible and testimonial, acquired as a result of the unlawful search." **United States v. Herrold,** 962 F.2d 1131, 1137 (3d Cir. 1992), **cert. denied,** 506 U.S. 958, 113 S.Ct. 421, 121 L.Ed. 2d 344 (1992). "[E]vidence which is obtained as a direct result of an illegal search and seizure may not be used to establish probable cause for a subsequent search." **United States v. Barajas-Avalos,** 359 F.3d 1204, 1212 (9th Cir. 2004).

Defendants also challenge, as a basis for issuing the warrant, the assertions in the affidavit that Whah was involved in drug trafficking. The affidavit states that the police spoke with a confidential informant who had provided information to other law enforcement agencies, which resulted in the issuance of a search warrant and the arrest of various individuals allegedly involved in the sale of illicit narcotics supplied by Whah, and that this same informant advised the undersigned affiant that Whah conceals large amounts of drugs in a false wall in the basement of his home. The affidavit does not state the circumstances or number of times or when most recently the confidential informant was in Whah's home and observed illicit drugs, and does not state any predictive behavior or corroborative evidence or any other information from which the police or magistrate in this case could independently evaluate the credibility of the confidential informant, the reliability of his information that large amounts of drugs had been concealed in Whah's home, or the validity of the conclusion that evidence of drug trafficking was still present and was likely to be discovered in Whah's home. Such information as is contained in the affidavit, Defendants argue, was insufficient to permit the magistrate to independently assess the "veracity" and "basis of knowledge" of the confidential informant and whether the information received by the affiant was probably reliable. With this, we also agree. Without being provided such underlying information, the magistrate could not determine whether there existed a fair probability that contraband or evidence of a crime would be found in Whah's home at the time of executing the warrant. **Commonwealth v. Conner,** 452 Pa. 333, 340, 305 A.2d 341, 345 (1973); **Commonwealth v. Haggerty,** 388 Pa. Super. 67, 564 A.2d 1269 (1989), **appeal denied,** 525 Pa. 577, 575 A.2d 109 (1990) ("The necessity to establish the time frame concerning which the search warrant is sought is to avoid staleness as a warrant can only issue upon probable cause that exists at the time of issuance." **Id.** at 71-72, 564 A.2d at 1271). The bootstrapping of one search warrant upon the strength of another cannot be mechanically condoned.[11]

[11] "In determining whether the warrant is supported by probable cause, the magistrate may not consider any evidence outside the four-corners of the affidavit." **Commonwealth v. Ryerson,** 817 A.2d 510, 513 (Pa. Super. 2003). Unless the magistrate is provided sufficient information to independently determine the reli-

Although we agree with Defendants that Cleland's arrest, at the time made, was illegal, and that the magistrate's consideration in issuing the warrant of any evidence obtained from this arrest, as well as consideration of possible drug trafficking by Whah, was improper, we do not believe that such consideration requires suppression of any evidence seized pursuant to the warrant. Defendants' assumed premise, that the inclusion of illegally obtained evidence or evidence whose reliability is not established in a probable cause affidavit inextricably taints and precludes a finding of probable cause to support the issuance of a search warrant, is too broad.[12] Expanding the cost to society already imposed by the exclusionary rule on the prosecution of criminal activity is not warranted where probable cause is evident in the affidavit based on information legally obtained from independent sources.[13] When the affidavit contains a mixture of both lawfully and unlawfully obtained information, it is the responsibility of the court to independently review the affidavit and redact that which has been unlawfully obtained. If, in

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ability of the information contained in the affidavit and the reliability of the sources of that information, the information provided will be insufficient to establish probable cause and to meet the specificity test relating to time, place and alleged criminal activity required to be contained within the four corners of the affidavit. **Commonwealth v. Edmunds,** 526 Pa. 374, 403 n.12, 586 A.2d 887, 902 n.12 (1991) (the information presented to the magistrate must be in writing; oral statements of the affiant to a magistrate, even if under oath, may not be considered in determining whether probable cause has been established); **see also,** Pa. R.Crim.P. 203(B) ("The issuing authority, in determining whether probable cause has been established, may not consider any evidence outside of the affidavits.").

[12] "Where a search warrant authorizes seizure of some items for which there is probable cause and other items for which there is no probable cause, the warrant is not [fully] invalid. In such cases, suppression will be required only of the evidence which was seized without probable cause." **Commonwealth v. Bagley,** 408 Pa. Super. 188, 215-16, 596 A.2d 811, 824 (1991), **appeal denied,** 531 Pa. 637, 611 A.2d 710 (1992), **cert. denied,** 506 U.S. 1002, 113 S.Ct. 606, 121 L.Ed. 2d 541 (1992).

[13] The independent source doctrine is a corollary to the exclusionary rule.

> [T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse position, that they would have been in if no police error or misconduct had occurred. … When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.

United States v. Herrold, supra at 1139-40 (citations and quotations omitted).

doing so, the information remaining establishes probable cause, the warrant should be upheld. **United States v. Barajas-Avalos,** 359 F.3d 1204, 1216 (9th Cir. 2004) ("A reviewing court should excise the tainted evidence and determine whether the remaining, untainted evidence would provide a neutral magistrate with probable cause to issue a warrant."). "[T]he inclusion of illegally obtained evidence will not invalidate a search warrant if the warrant is also based upon other sources which are valid and sufficient to constitute probable cause." **Commonwealth v. Cosby,** 234 Pa. Super. 1, 5-6, 335 A.2d 531, 533 (1975) (quotation and citations omitted); **see also, United States v. Herrold,** 962 F.2d 1131, 1138 (3d Cir. 1992) ("[E]ven assuming that some factual averments in the affidavit are tainted, they do not vitiate a warrant which is otherwise validly issued upon probable cause reflected in the affidavit.").[14] The question we must therefore answer is whether, after redacting evidence derived from Cleland's arrest and excising those averments in the affi-

[14] The policy underlying the independent source doctrine is that the police not be placed in a worse position than they would have been in had they not engaged in illegal activity.

> To promote this interest, the Court's use of 'affect' in **Murray [Murray v. United States,** 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed. 2d 472 (1988)] must be understood to signify affect in a **substantive** manner. Thus, the fact that an application for a warrant contains information obtained through an unlawful entry does not **per force** indicate that the improper information 'affected' the justice's decision to issue the warrant and thereby vitiate the applicability of the independent source doctrine. Rather, if the application contains probable cause apart from the improper information, then the warrant is lawful and the independent source doctrine applies, providing that the officers were not prompted to obtain the warrant by what they observed during the initial entry.

United States v. Herrold, supra at 1141-42. In this opinion, the court later concluded:

> Hence, we are satisfied that the district court focused on the wrong question when it held '[t]he Government has not presented any evidence proving by a preponderance of the evidence that the Magistrate's decision to grant the search warrant was entirely independent of the information discovered during the illegal warrantless entry.' The government was not required to make such a showing which probably could have been made only by producing the justice as a witness so that he could be asked to reconstruct his state of mind when he issued the warrant. Rather, the government was required to establish that a neutral justice would have issued a warrant based on the untainted information in the affidavit which the police had acquired prior to their entry into [Defendant's] trailer.

Id. at 1143.

davit alleging drug trafficking by Whah, the affidavit nonetheless establishes probable cause to support the warrant.

"The starting point in determining whether a search and seizure conducted pursuant to a search warrant was unreasonable is to question whether probable cause existed to issue the search warrant." **Commonwealth v. Clark,** 412 Pa. Super. 92, 95, 602 A.2d 1323, 1325 (1992), **appeal denied,** 533 Pa. 606, 618 A.2d 398 (1992), **cert. denied,** 507 U.S. 1030, 113 S.Ct. 1846, 123 L.Ed. 2d 470 (1993). Probable cause exists when the information presented, reviewed in a practical, non-technical manner, supports a fair probability that contraband or evidence of a crime will be found in a particular place. Such a probability must be "supported by less than **prima facie** proof but more than mere suspicion." **United States v. Bennett,** 905 F.2d 931, 934 (6th Cir. 1990). It requires "only a probability or substantial chance of criminal activity, not an actual showing of such activity." **Illinois v. Gates,** 462 U.S. 213, 244 n.13, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983).

> The legal principles applicable to a review of the sufficiency of probable cause affidavits are well settled. Before an issuing authority may issue a constitutionally valid search warrant, he or she must be furnished with information sufficient to persuade a reasonable person that probable cause exists to conduct a search. The standard for evaluating a search warrant is a 'totality of the circumstances' test as set forth in **Illinois v. Gates,** 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983), and adopted in **Commonwealth v. Gray,** 509 Pa. 476, 503 A.2d 921 (1985). A magistrate is to make a 'practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.' The information offered to establish probable cause must be viewed in a common sense, non-technical manner. Probable cause is based on a finding of the probability, not a prima facie showing of criminal activity, and deference is to be accorded a magistrate's finding of probable cause.

Commonwealth v. Ryerson, 817 A.2d 510, 513-14 (Pa. Super. 2003). The role of the reviewing court in determining

whether probable cause exists to issue a search warrant is limited to "ensur[ing] that the magistrate had a 'substantial basis for … conclud[ing]' that a search would uncover evidence of wrongdoing." **Gates, supra** at 238-39, 103 S.Ct. at 2332; **Commonwealth v. Bonasorte,** 337 Pa. Super. 332, 346, 486 A.2d 1361, 1369 (1984).[15]

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[15] In attacking the validity of a search warrant at a suppression hearing, a defendant is entitled to go beyond the four corners of the search warrant and attack deliberate and material misstatements by the affiant. **Commonwealth v. Hall,** 451 Pa. 201, 302 A.2d 342 (1973). The reliability and credibility of the affiant, including the truthfulness of the recitals in the warrant alleging the informant's previous reliability, are important factors to consider in determining whether the issuing magistrate's substantial basis finding should be upheld. "Where a police officer makes a knowing misstatement of material fact in [an affidavit in support of an application for] a search warrant, the warrant is invalid and any evidence obtained pursuant to that warrant is inadmissible." **Commonwealth v. Bonasorte,** 337 Pa. Super. 332, 346-47, 486 A.2d 1361, 1369 (1984).

The information provided by Conrad tying Defendants to the crime is substantial. It is also, according to Defendants, unreliable. This, Defendants claim, is illustrated by Conrad's change in story: the basis of her knowledge shifting from that of an observer to that based on her actual involvement and participation in the theft. This change, coupled with factual inconsistencies, Defendants contend, brands Conrad inherently suspect as a source of information and renders the information provided by her incapable of reasonably supporting a legitimate claim of probable cause. With this view, we disagree.

"Misstatements of fact [by an affiant] will invalidate a search and require suppression only if they are deliberate and material." **Commonwealth v. Bonasorte, supra** at 347, 486 A.2d at 1369. "A material fact is one without which probable cause [for] search would not exist." **Commonwealth v. Clark,** 412 Pa. Super. 92, 96, 602 A.2d 1323, 1326 (1992). "In deciding whether a misstatement is material, the test is not whether the statement strengthens the application for the search warrant, but rather whether it is essential, to it." **Commonwealth v. Cameron,** 445 Pa. Super. 165, 171, 664 A.2d 1364, 1367 (1995), **appeal denied,** 544 Pa. 622, 675 A.2d 1242 (1996).

As an identified informant, Conrad's shift in the basis of her knowledge from that of an observer to that of an accomplice, thereby subjecting herself to criminal responsibility, strengthens, not lessens, her veracity. **Commonwealth v. Matthews,** 446 Pa. 65, 70, 285 A.2d 510, 512 (1971) (reliability of identified informant established by declaration against penal interest). More importantly, this change does not constitute a deliberate or knowing misstatement of material fact: under either version, the time, place and Defendants' involvement in the criminal activity with which they've been charged has remained the same.

Additionally, to the extent Defendants challenge the truthfulness of the facts recited in the affidavit, Defendants' challenge is to that of the veracity of the informant—Conrad—not that of the police officer affiant. Defendants correctly cite **Commonwealth v. Clark, supra,** as authority to support this challenge. **Clark,** however, is at odds with an earlier panel decision of the Superior Court

When the challenged information is severed from consideration, the affidavit nonetheless established probable cause to believe that evidence or the fruits of the theft would be located at Whah's home. **See also, Commonwealth v. Torres,** 564 Pa. 86, 764 A.2d 532, 538 (2001) (reviewing court must accord deference to the issuing authority's probable cause determination). After reciting the officer's experience and familiarity with investigating criminal activity, the affidavit sets forth the re-

holding that under both the federal and state constitutions a challenge to the information presented in a probable cause affidavit is restricted to a challenge to the veracity of the affiant. **Commonwealth v. Bradshaw,** 290 Pa. Super. 162, 434 A.2d 181 (1981) (credibility of affiant, not informant, is issue of probable cause hearing). With this statement we agree.

A defendant is entitled—constitutionally, legally and historically—not to have his privacy invaded unreasonably by governmental agents in order to enforce the law. The vehicle to assure this protection is afforded is the standard of probable cause presented objectively, accurately and truthfully by the affiant and reviewed objectively, practically and fairly by a neutral and detached magistrate. The test of probable cause "is designed to protect us from unwarranted and even vindictive incursions upon our privacy." **Commonwealth v. Edmunds, supra** at 398, 586 A.2d at 899 (**quoting Commonwealth v. Miller,** 513 Pa. 118, 127, 518 A.2d 1187, 1191 (1986)).

In **Edmunds,** the court upheld defendant's challenge to a warrant which on its face failed to meet the test of probable cause: the warrant failed to support a time frame within which the magistrate could reasonably infer that the criminal conduct observed was recent and would most likely still be in progress at the time the warrant was requested. The court held, unlike the "good faith" exception to the exclusionary rule found by the United States Supreme Court in **United States v. Leon,** 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed. 2d 677 (1984), that the history and policy underlying Article I, Section 8 of the Pennsylvania Constitution precludes the introduction of evidence seized where probable cause is lacking on the face of the warrant.

Neither the holding nor reasoning of **Edmunds** suggest that when probable cause appears on the face of the warrant and it is later determined that an informant, who the police legitimately and reasonably believed and found reliable, deliberately and knowingly provided misstatements of material fact, that the search and consequent invasion of privacy is constitutionally unsound and such as to require the suppression of evidence seized pursuant to the warrant. To invalidate the fruits of state action which reasonably, in good faith and in accordance with the law relies on information provided by a private party—later determined to be inaccurate—represents a fundamental and dramatic shift in what evidence must be suppressed and one which we believe should only be made by an express and unmistakable pronouncement of our Supreme Court. **See Commonwealth v. Kean,** 382 Pa. Super. 587, 596, 556 A.2d 374, 378 (1989), **appeal denied,** 525 Pa. 596, 575 A.2d 563 (1990) ("[B]oth state and federal constitutional limitations on 'unreasonable searches and seizures' apply exclusively to the conduct of persons who are acting as instruments or agents of the state."). If, then, the police have a reasonable belief in

sults of the officer's immediate investigation of the scene: his review of the security tape and its depiction of the intruder, the reasons why the officer believes the intruder was familiar with the store and the safe, the officer's viewing of a separate tape made several days prior to the theft in which Cleland is depicted with his girlfriend, Conrad, an employee of Boyer's with knowledge of the store's operation and use of the safe, and in which Cleland's physical traits and dress and movements, as observed by the officer, strongly resemble those of the intruder. The affiant recites the statements obtained from Conrad in which she allegedly heard the Defendants discussing their plans to rob Boyer's; that she saw the Defendants leave Whah's home on February 25, 2002, at approximately 2:45 A.M. and return at approximately 5:00 A.M.; that Cleland's dress at the time of departure matched that of the intruder depicted on the security tape; and that the same morning she heard Whah tell Cleland that some of the money would be in Whah's bedroom. The affiant also reported that later, Cleland, who was unemployed, gave Conrad $200.00 in cash; that Cleland had been staying with Whah at Whah's home for the past four months; and that Conrad provided information where, within the home, the tools used to open the safe were located and where, she believed, the safe was discarded.[16]

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the truthfulness of the information provided by the informant, and such information is factually sufficient to establish probable cause, the protections against unreasonable searches and seizures provided by both the Fourth Amendment and Article I, Section 8, of the Pennsylvania Constitution are not violated. In this respect we agree with the holding in **Bradshaw** and disagree with that in **Clark.** Parenthetically, we also note that **Bradshaw** was cited with approval by the Superior Court, **en banc,** in **Bonasorte, supra** at 339 n.4, 486 A.2d at 1365 n.4.

See also, Franks v. Delaware, 438 U.S. 154, 171, 98 S.Ct. 2674, 2684, 57 L.Ed. 2d 667, 682 (1978), in which the Supreme Court, **in dicta,** stated that "[t]he deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant." "In **Franks,** it was held that a court must invalidate the warrant and suppress the fruits of the search if the criminal defendant can prove that the **affiant** made deliberate misstatements or made statements with reckless disregard for the truth and these statements were necessary to the finding of probable cause." **Commonwealth v. Bradshaw, supra** at 165, 434 A.2d at 182 (emphasis in original).

[16] Defendants also argue that Chapter 2 of the Rules of Criminal Procedure has been violated, specifically Rules 208 and 209, by the failure of the police while executing the warrant to properly sign, witness or prepare an inventory and provide a copy to the issuing Magistrate, and that this violation requires the suppression of any evidence obtained pursuant to the warrant. The "exclusion/suppression of evi-

CONCLUSION

In accordance with the foregoing, the charges of burglary and criminal trespass will remain. Defendants' Motion to Suppress the Information obtained from the search authorized by the warrant will be denied. However, Defendants' Motion to Suppress the Information obtained from the search of Cleland incident to his arrest will be sustained.

ORDER OF COURT

AND NOW, this 29th day of April, 2004, upon consideration of the respective Defendants' Omnibus Pretrial Motions

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dence is not an appropriate remedy for every violation of the Pennsylvania Rules of Criminal Procedure concerning seaches and seizures. It is only where the violation also implicates fundamental, constitutional concerns, is conducted in bad-faith or has substantially prejudiced the defendant that exclusion **may** be an appropriate remedy." **Commonwealth v. Mason,** 507 Pa. 396, 406-407, 490 A.2d 421, 426 (1985) (emphasis in original). In **Mason,** our Supreme Court, **quoting Commonwealth v. Musi,** 486 Pa. 102, 115-16, 404 A.2d 378, 385 (1979), stated:

> A rule of exclusion is properly employed where the objection goes to the question of the reliability of the challenged evidence … or reflects intolerable government conduct which is widespread and cannot otherwise be controlled. … Experience does not suggest there has been such a widespread and flagrant abuse of rule 2008(a) [now Rule 208] that would require the fashioning of a per se exclusionary rule for its violation. … Therefore, the imposition of a sanction requiring the exclusion of evidence that results from a search where there has not been compliance with the rule must depend upon the relationship of the violation to the reliability of the evidence seized. Here, there was probable cause for the entry and search and there is no dispute that the rifle was in fact found on the premises described in the warrant and seized pursuant to that search. Thus, appellant's rights were not prejudiced by the officer's failure to fully comply with the mandates of the rule.
>
> Federal cases interpreting a comparable rule of criminal procedure, **see** Rule 41(d) of the Federal Rules of Criminal Procedure, have concluded that although important, the procedures required for execution and return of the warrant are ministerial and that irregularities should not void an otherwise valid search absent a showing of prejudice. ... We accept the wisdom of this approach and hold that where, as here, appellant has failed to demonstrate that she was prejudiced from the violation of this rule a request to suppress the fruits of the search is not justified.

Id. at 403-404, 490 A.2d at 424-25 (internal citations and emphasis omitted). **See also, Commonwealth v. DeGeorge,** 319 Pa. Super. 244, 466 A.2d 140 (1983), **rev'd on other grounds,** 506 Pa. 445, 485 A.2d 1089 (1984) (violation of former Rule 2009(a), now Rule 209(a), requiring return of an inventory of the items seized, does not require exclusion of evidence). As stated in **Commonwealth v. Ryan,** "[t]he failure to file the inventory with the Clerk of Courts office did not violate any of defendant's constitutional rights, did not invalidate the search warrant, nor did it affect its execution." 268 Pa. Super. 259, 263, 407 A.2d 1345, 1347 (1979).

and after hearing thereon and following review of the parties' respective briefs, it is hereby

ORDERED and DECREED as follows:

1. By agreement of the parties, the Motion to Suppress the Results of the Search of the residence at 38 Third Street, Kelayres, Schuylkill County, Pennsylvania, pursuant to the warrant bearing warrant control number 010-03, is granted without prejudice to the parties on any other pending motions to suppress.

2. The Motion to Suppress the monies discovered on the person of John Cleland and his statement regarding the source of these monies following his arrest on February 27, 2003, is granted.

3. The remaining motions of both Defendants are denied.

PANTHER VALLEY SCHOOL DISTRICT, Plaintiff vs. PANTHER VALLEY EDUCATION ASSOCIATION, Defendant

Civil Action—Pennsylvania Public Employe Relations Act (Act 195)—Interpretation of Collective Bargaining Agreement—Mandatory Arbitration—Standard of Judicial Review—Essence Test

1. Under the Pennsylvania Public Employe Relations Act (Act 195), questions arising out of a collective bargaining agreement, its meaning and interpretation, must be submitted to final and binding arbitration.

2. The essence test, the standard for judicial review of an arbitration award under Act 195, is highly deferential to the decision of the arbitrator. Under this test, two questions are asked: (1) whether the issue submitted to arbitration, as properly defined, is encompassed within the terms of the collective bargaining agreement; and (2) whether the arbitrator's award can be rationally derived from the collective bargaining agreement. If both questions are answered in the affirmative, the arbitrator's award must be upheld.

3. The essence test is utilized not only in reviewing the substantive merits of an arbitrator's decision, but also in reviewing the question of arbitrability, that is, the jurisdiction of the arbitrator to hear and decide the dispute.

4. The meaning of undefined and unclear terms of a collective bargaining agreement whose interpretation is necessary to resolving a dispute encompassed by the agreement is within the exclusive domain of the arbitrator's authority. In accordance with this requirement, the undefined terms "professional employee" and "just cause" present in the parties' collective bargaining agreement were properly submitted to arbitration where the meaning of such terms was critical to the dispute between the parties.

5. The arbitrator properly applied the terms of the parties' collective bargaining agreement and the facts surrounding the grievant's dismissal as a teacher to conclude that the grievant had standing to challenge her dismissal and that her

dismissal violated the just cause provision of the parties' collective bargaining agreement.

NO. 04-0239

ROBERT T. YURCHAK, Esquire—Counsel for Plaintiff.

MARTIN A. HERRING, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, J.—May 19, 2004

FACTUAL AND PROCEDURAL BACKGROUND

On November 14, 2002, the Panther Valley School District (the "School District") terminated Tina Keiser's (Keiser) employment with the School District as a full-time high school emotional support teacher for failing to maintain her certification as a teacher with the Pennsylvania Department of Education (the "Department"). In its notice of termination, the School District advised Keiser that termination was required in order for the School District to be in compliance with the Department's certification regulations.

Pursuant to the grievance procedure provided for in the collective bargaining agreement between the School District and the Panther Valley Education Association (the "Association"), Keiser filed a grievance. The grievance was denied first by the School District's superintendent, Dr. Robert Mauro, on December 3, 2002, then by the School District's Board of Directors (the "Board") in January 2003. On Keiser's appeal to arbitration, the appeal was sustained. From that decision, the School District has appealed to this Court.

At the time Keiser's employment with the School District commenced, she possessed an Instructional Level I Certificate. This certificate expired at the end of the 2001-02 school year and needed to be converted to a Level II Certificate by the beginning of the first semester of the 2002-03 school year in order for Keiser to remain eligible to teach. 24 P.S. §12-1201. In October 2002, a routine audit conducted by the Department revealed that the School District was not in possession of a copy of Keiser's Level II Certificate.

Keiser had originally mailed her application to convert her certification from a Level I to a Level II to the Department in June 2002. When Keiser was advised in October 2002 that the

School District had not received a copy of her Level II Certificate, she immediately contacted the Department and learned that the Department had never received the application. She was advised to reapply.

Keiser mailed a new application to the Department on November 8, 2002. The application was received by the Department on November 12, 2002. On November 19, 2002, five days after Keiser's termination on November 14, 2002, the Department converted her Level I certification to a Level II and made it retroactive to November 1, 2002.

DISCUSSION

In its appeal to this Court, the School District raises two basic issues: (1) that the arbitrator erred in determining Keiser possessed standing to arbitrate her claim and (2) that the arbitrator abused her discretion in deciding the merits of the claim. More specifically, the School District contends that once Keiser's teaching certificate lapsed, under the provisions of the collective bargaining agreement she was no longer a person encompassed by its protection and, therefore, was not entitled to file a grievance. Related, but qualitatively different, is the issue of whether Keiser's dismissal was for just cause: did Keiser's conduct in permitting her certificate to lapse and subsequent conduct in failing to timely obtain recertification constitute just cause within the meaning of the collective bargaining agreement sufficient to justify her dismissal.

In addressing these issues, we must first recognize our role as a reviewing court and that the award being reviewed was entered pursuant to the parties' collective bargaining agreement and the Pennsylvania Public Employe Relations Act ("Act 195"), 43 P.S. §§1101.101-1101.2301. In reviewing an arbitrator's award under Act 195, the applicable provision of the Uniform Arbitration Act, 42 Pa. C.S. §§7301-7362, is 42 Pa. C.S.A. §7302(d)(2).[1] **State System of Higher Education, (Cheyney University) v. State College University Professional Association (PSEA-NEA),** 560 Pa. 135, 743 A.2d 405, 411 n.6 (1999), **citing Pennsylvania State Education Association v.**

[1] This provision provides that "[A] court in reviewing an arbitration award … shall … modify or correct the award where the award is contrary to law and is such that had it been a verdict of a jury the court would have entered a different judgment or a judgment notwithstanding the verdict." 42 Pa. C.S. §7302(d)(2).

Appalachia Intermediate Unit 08, 505 Pa. 1, 5, 476 A.2d 360, 362-63 (1984); **Mifflinburg Area Education Association by Ulrich v. Mifflinburg Area School District,** 555 Pa. 326, 724 A.2d 339, 344 n.6 (1999) (the judgment n.o.v. standard provided by Section 7302(d)(2) of the Uniform Arbitration Act served as the basis for and is the equivalent of the essence test).

As will be discussed in greater detail below, the issues presented by the School District are ones of contractual interpretation and, as such, were correctly submitted to arbitration. Act 195 mandates that disputes over the interpretation of the terms of a collective bargaining agreement be submitted to final and binding arbitration if they are unable to be resolved at an earlier stage of the grievance process. 43 P.S. §1101.903. The parties' collective bargaining agreement contains this required provision (Collective Bargaining Agreement, Article XIII, Section 1, Step IV).

On appeal from an arbitrator's award under Act 195, it is not appropriate for us "to immerse [ourselves] into the fray and to reassess the judgment of the arbitrator." **Danville Area School District v. Danville Area Education Association, PSEA/NEA,** 562 Pa. 238, 754 A.2d 1255, 1261 (2000). Only a limited and deferential judicial review of the arbitrator's decision is permitted. The test to be utilized, known as the "essence test," requires this Court to answer two questions:

> First, we ask whether the issue submitted to arbitration, as properly defined, is encompassed within the terms of the collective bargaining agreement. Second, we inquire into whether the arbitrator's award can be rationally derived from the collective bargaining agreement.

Office of the Attorney General, Commonwealth of Pennsylvania v. Council 13, American Federation of State, County Municipal Employees, 844 A.2d 1217, 1222 (Pa. 2004). If both questions are answered in the affirmative, the arbitrator's decision must be upheld—regardless of how we might have ruled had the question been originally submitted to us for decision. "When an issue, properly defined, is within the terms of a collective bargaining agreement and the arbitrator's decision can in a rational way be derived from the terms of the agreement, one can say that the decision draws its 'essence' from the agreement, and reversal is not warranted even if a court believes that

the decision, though rational, is incorrect." **State System of Higher Education, supra,** 743 A.2d at 412 (**quoting Delaware County v. Delaware County Prison Employees Independent Union,** 552 Pa. 184, 713 A.2d 1135, 1137 (1998)). An arbitrator's award draws its essence from the collective bargaining agreement if the arbitrator's "interpretation can in any rational way be derived from the agreement, viewed in light of its language, its context, and any other indicia of the parties' intention … ." **State System of Higher Education, supra,** 743 A.2d at 411.

Consistent with the goals of binding arbitration—to inexpensively, efficiently and expeditiously resolve employment disputes between labor and management—decisions rendered by an arbitrator must be honored absent extraordinary circumstances. **State System of Higher Education, supra,** 743 A.2d at 409-10. Integral to these goals is the essence test and its strong deference to the award of the arbitrator chosen by the parties. Under the essence test "a court will only vacate an arbitrator's award where the award indisputably and genuinely is without foundation in, or fails to logically flow from, the collective bargaining agreement." **State System of Higher Education, supra,** 743 A.2d at 413. The essence test applies both to issues of arbitrability and the merits of the arbitrator's decision. **Hanover School District v. Hanover Education Ass'n.,** 814 A.2d 292, 295 (Pa. Commw. 2003), **aff'd,** 839 A.2d 183 (Pa. 2003); **see also, State System of Higher Education, supra,** 743 A.2d at 414-16; and **Danville Area School District, supra,** 754 A.2d at 1262.

Arbitrability of Dispute

The School District's challenge to Keiser's standing to grieve her dismissal is premised first on the belief that Keiser's only rights under the collective bargaining agreement arise from her status as a professional employee and from the further belief that a professional employee includes only teachers who hold a teaching certificate. On the basis of these two premises, and the language of Article XIV, Section 1 of the collective bargaining agreement,[2] the School District concludes that once Keiser's

[2] Article XIV, Section 1, of the collective bargaining agreement states in relevant part:

> No professional employee shall be disciplined, reprimanded, reduced in rank or compensation or deprived of any professional advantage without just cause.

teaching certificate lapsed she was no longer a "professional employee" and no longer possessed any rights under the collective bargaining agreement to demand that her dismissal be with just cause, or even to challenge her dismissal before an arbitrator. These premises, we believe, are misplaced.

The term "professional employee" is not defined in the collective bargaining agreement and the parties do not agree on its meaning. This dispute clearly raises an issue of interpretation of a term of the agreement. While the School District seeks to confine the meaning to that which appears in Section 1101(1) of the School Code, 24 P.S. §11-1101(1), and as interpreted by the Commonwealth Court in **Occhipinti v. Board of School Directors of Old Forge,** 76 Pa. Commw. 516, 518, 464 A.2d 631, 632 (1983)—that is, a professional employee is one who holds a teaching certificate—the term is not so limited in Act 195.[3]

Moreover, the collective bargaining agreement does not confine the standard of just cause for measuring the propriety of disciplinary action solely to professional employees. Article XIV, Section 3, states: "The Board agrees that no member of the collective Bargaining Unit shall be disciplined without just cause." Under this provision, there is no implied prerequisite to standing that the grievant is or was a professional employee—either as defined in the School Code or as defined in Act 195—only that the grievant be a member of the collective bargaining unit.

Article II, the Recognition Clause of the collective bargaining agreement, states that the Association is the bargaining agent "for those Elementary, Middle and High School Teachers, Librarians, Guidance Counselors and Nurses …, hereinafter called the Bargaining Unit, and for the employees properly included in collective bargaining for public employees." Clearly, Keiser,

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[3] Act 195 defines a "professional employe" as follows:

> 'Professional employe' means any employe whose work: (i) is predominantly intellectual and varied in character; (ii) requires consistent exercise of discretion and judgment; (iii) requires knowledge of an advanced nature in the field of science or learning customarily acquired by specialized study in an institution of higher learning or its equivalent; and (iv) is of such character that the output or result accomplished cannot be standardized in relation to a given period of time.

43 P.S. §1101.301(7).

as a teacher, was a member of this bargaining unit. In addition, Article XIII, the Grievance Procedure, permits the initiation of a grievance by the person or persons aggrieved and provides for the "orderly and expeditious resolution of grievances arising out of the interpretation of the terms of this agreement … ." **Cf. Danville Area School District v. Danville Area Education Association, supra,** 754 A.2d at 1262 (noting "the agreement did not limit the grievance process to 'employees' but permitted 'persons' to initiate a grievance."). Section 6 of this same Article states: "It shall be the firm policy of the Board to assure every member of the Bargaining Unit the use of the grievance procedure without fear of reprisal or without prejudice in any manner to his professional or employment status."

Absent an explicit exclusion, implicit in collective bargaining agreements governed by Act 195 is the notion that discipline is to be meted out fairly, that employees should not be disciplined without just cause, and that the grievance process protects against arbitrary disciplinary action affecting employee rights and benefits. **Hanover School District v. Hanover Education Association, supra** at 297-98. The various sections of the collective bargaining agreement cited above evidence an intent by the parties to provide employees covered by the agreement with standing to challenge discipline, including discharge, which is the severest form of discipline. At a minimum such sections raise a question of contractual interpretation properly before the arbitrator. **Pennsylvania Labor Relations Board v. Bald Eagle Area School District,** 499 Pa. 62, 451 A.2d 671 (1982). In **Bald Eagle,** the court held that the involvement of the judiciary in disputes arising under Act 195 is inimical to the rapid and certain resolution of labor disputes and that, as between the courts and the arbitrator, the arbitrator has initial jurisdiction over the issue of the arbitrability of the grievance dispute. **Id.** at 65-66, 451 A.2d at 672.

Supportive of our determination that the essence test, as to the issue of arbitrability, has been met, is the following language appearing in **Hanover School District v. Hanover Education Ass'n, supra:**

> When the dispute involves something as fundamental to the employment relationship as an employer's attempt to withhold employment through a disciplinary termination or

> suspension, the ability of the employee to seek redress through arbitration is not to be discarded lightly. Clearly, the best evidence that parties to a public employment collective bargaining agreement intended not to arbitrate a particular class of disputes is an express provision in the agreement excluding these questions from the arbitration process.

Id. at 297. There is nothing in the collective bargaining agreement to suggest that an employee, who is a bargaining unit member fired for an alleged lack of certification, is excluded from the rights afforded in the agreement's grievance and arbitration process. In determining that the arbitrator's decision in favor of arbitrability is rationally derived from the collective bargaining agreement, we note additionally that a fundamental distinction exists between an irrational award and one choosing between different viable interpretations of the same contract language, the latter being the case before us.[4]

Merits of Dispute

The collective bargaining agreement provides that no employee can be dismissed without just cause. Based upon this language and the grievance and arbitration procedure for settling disputes arising under the contract, there can be little doubt that disputes involving disciplinary action, including termination, are encompassed within the terms of the collective bargaining agreement. Whether Keiser's discharge was appropriate under the terms of the collective bargaining agreement is a question of contract interpretation. **Council 13, supra,** 844 A.2d at 1221. This point, we believe, is not contested by the School District. Where the School District concentrates its challenge is on the second prong of the essence test—whether the arbitrator's determination can be rationally derived from the collective bargaining agreement.

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[4] We note also that a distinction exists between an award which is "rational" and one which is "reasonable." "[I]n the context of review of an Act 195 labor arbitration award, determining an award to rationally be derived from a collective bargaining agreement connotes a more deferential view of the award than the inquiry into whether the award is reasonable. … Thus, we find that in this very limited context, a review of the 'reasonableness' of an award is not the proper focus." **State System of Higher Education (Cheyney University) v. State College University Professional Association (PSEA-NEA),** 560 Pa. 135, 743 A.2d 405, 413-14 n.8 (1999).

Before us, as it did before the arbitrator, the School District argues that the undisputed facts establish just cause to sustain Keiser's dismissal. These facts include that Keiser was employed as a full-time high school teacher; that only persons with a certificate are qualified to teach in Pennsylvania, 24 P.S. §12-1201; that Keiser permitted her certificate to lapse; and that, at the time Keiser was terminated from employment, she was not in possession of a valid teaching certificate. While we agree that these facts would support a finding of just cause, they do not inexorably require it.

Because the term "just cause" is not defined in the collective bargaining agreement, its meaning was one for the arbitrator to determine. **Council 13, supra,** 844 A.2d at 1224. In **Council 13,** our Supreme Court noted that the undefined term just cause is not capable of an easy and concrete definition. It is not synonymous with a finding of factual misconduct by an employee, but instead takes into account factors such as "whether there was any investigation; post-discharge misconduct and pre-discharge misconduct; a grievant's past employment record, length of service, post-discharge rehabilitation; and unequal treatment of other employees for similar misconduct." **Council 13, supra,** 844 A.2d at 1225. Most importantly, by failing to more precisely define this term, the parties have delegated to the arbitrator the function of determining what constitutes just cause in a particular work setting, taking into consideration any special circumstances which may exist. For this Court, on review, to reinterpret the terms of the collective bargaining agreement would usurp the discretion the parties by contract vested in the arbitrator, a consequence which will not be countenanced on appellate review. **Council 13, supra,** 844 A.2d at 1226.

> It is the arbitrator's construction which was bargained for and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

State System of Higher Education, supra, 743 A.2d at 410 (**quoting United Steelworkers v. Enterprise Wheel and Car Corp.,** 363 U.S. 593, 599, 80 S.Ct. 1358, 4 L.Ed. 2d 1424 (1960)). Courts, on reviewing an arbitrator's award, are to avoid a review of the merits of the controversy. **Id.** at 410-11.

In sustaining Keiser's appeal and concluding that the School District did not meet its burden of establishing Keiser's termination was supported by just cause, the arbitrator noted multiple factors: that neither Keiser's professional employee contract, nor her hire letter, conditioned her employment on continued valid certification; that prior to November 7, 2002, the exact date when Keiser's certificate would lapse was unknown to both Keiser and the School District and was difficult to compute; that Keiser was never advised to submit her application by a specific date; that prior to November 11, 2002, Keiser was never told by the School District that if she did not receive her new certificate by the end of the 2001-02 school year or the beginning of the 2002-03 school year she would be subject to termination; that the School District's Board was aware that Keiser's renewal certificate was retroactive effective to November 1, 2002, when it denied her grievance in January 2003; that the Pennsylvania Department of Education never determined that the School District was out of compliance from August 25, 2002 to November 1, 2002;[5] that at the time of its decision to terminate Keiser, no penalties for employing an uncertificated teacher were pending against the School District or even remotely suggested by the Pennsylvania Department of Education; and that there were other teachers whose certificates had lapsed who were not terminated. Such factors, impinging as they do on questions of notice, expectations, justification, fairness and disparate treatment, are clearly appropriate to delving into the meaning of the undefined term "just cause." Nor can we fairly say that the arbitrator acted irrationally in concluding, after review of these factors, that Keiser's termination was without just cause.

CONCLUSION

After examining the reasoning expressed by the arbitrator and applying the essence test, we believe both the arbitrator's interpretation and application of the collective bargaining agreement is derived from the language of the agreement. The issues addressed by the arbitrator were within the terms of the collective bargaining agreement and were resolved by rationally ap-

[5] Thus, the evidentiary record did not substantiate the School District's rationale that it needed to terminate Keiser to comply with the Department's regulations.

plying those terms to the parties' dispute. Having so concluded, pursuant to our circumscribed standard of review, the arbitrator's determination must be upheld.

ORDER OF COURT

And now this 19th day of May, 2004, the Petition of the Panther Valley School District for Review and Application to Vacate the Arbitrator's Award is denied and the decision of the arbitrator dated January 5, 2004, is hereby affirmed.

COMMONWEALTH OF PENNSYLVANIA vs. WILLIAM B. EICHELE, Defendant

Criminal Law—Admissibility of Hearsay Testimony—Right of Confrontation—Effect of ***Crawford v. Washington****—Retroactivity*

1. Prior to the U.S. Supreme Court's decision in **Crawford v. Washington, infra,** the admission of an unavailable witness' statement against a criminal defendant at trial was governed by the Court's decision in **Ohio v. Roberts, infra.** Pursuant to that decision, admissibility of the hearsay statement did not violate the Confrontation Clause, provided the statement bore "adequate indicia of reliability." To meet that test, the evidence had to either (1) fall within a "firmly rooted hearsay exception" or (2) bear "particularized guarantees of trustworthiness."

2. Under **Crawford,** the relevant inquiry is no longer whether the statement falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." Instead, it must first be determined whether the statement at issue is testimonial in nature. If testimonial, the Sixth Amendment's Confrontation Clause bars the use of the statement unless the witness is unavailable to testify at trial and the defendant had a prior opportunity for cross-examination. Where nontestimonial hearsay is at issue, the admissibility of the statement is dependent upon the standard evidentiary rules, including the rules applicable to hearsay and hearsay exceptions; ordinarily, the Confrontation Clause is not implicated with respect to nontestimonial statements.

3. In **Crawford,** the Supreme Court did not provide a comprehensive definition of "testimonial." Nevertheless, the hallmark of a testimonial statement appears to be a solemn declaration made for the purpose of establishing or proving some fact and made with an understanding that the statement would likely be used for some formal purpose. Notwithstanding the absence of a comprehensive definition, the Supreme Court did state that at a minimum, a "testimonial" statement includes "prior testimony at a preliminary hearing, before a grand jury or at a former trial; and to police interrogations."

4. Whether an "excited utterance" constitutes a testimonial statement was not addressed by the Supreme Court. Such a statement is dependent for its reliability, and in consequence its admissibility, on being both spontaneous and contemporaneous; such statements are not the product of deliberation or reflection. Conceptionally, such statements are at the opposite end of the hearsay spectrum from testimonial statements.

5. Defendant's petition for post-conviction relief on the basis of the admission of out-of-court statements allegedly violative of the principle announced in **Crawford** will be denied where the statements referred to are not testimonial in nature, and, in some cases, do not qualify as hearsay. **Crawford** has no application retroactively when the alleged out-of-court statements are not testimonial.

NO. 331 CR 93

WILLIAM E. McDONALD, Esquire, Assistant District Attorney—Counsel for Commonwealth.

WILLIAM B. EICHELE—Pro se.

MEMORANDUM OPINION

NANOVIC, J.—June 4, 2004

On May 2, 1990, the body of Judith Dashev, a forty-three year-old female, was discovered in a drainage ditch along Badger Road in the town of Kirkwood, Broome County, New York. Investigation by the New York State Police revealed that Ms. Dashev was killed by William B. Eichele, the Defendant, at the home of Richard Haag located at Lake Harmony, Kidder Township, Carbon County, Pennsylvania sometime between May 1 and May 2, 1990.

Defendant was charged, **inter alia,** with third-degree murder, aggravated assault and recklessly endangering another person[1] and, following a jury trial, convicted of these offenses on January 20, 1994. On March 11, 1994, Defendant received an aggregate sentence of not less than ten and no more than twenty years in a state correctional institute to be served consecutive to another sentence previously imposed. Following direct appeal proceedings, Defendant's judgment of sentence became final on January 2, 1996, ninety days after his petition for allowance of appeal was denied by the Pennsylvania Supreme Court. **See** U.S. Supreme Court Rule 13 (petition for writ of **certiorari** to review a judgment of sentence is deemed timely when it is filed within ninety days after discretionary review has been denied by the Pennsylvania Supreme Court).

Defendant filed a **pro se** petition for post-conviction relief, his first, on December 24, 2001. **See** Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. §§9541-46. In accordance with

[1] 18 Pa. C.S. §§2502(c), 2702(a)(1) and 2705, respectively.

Pa. R.Crim.P. 904(B), counsel was appointed to represent Defendant on this petition. On December 31, 2002, we dismissed the petition as untimely. That decision was affirmed by the Pennsylvania Superior Court on September 25, 2003. No further review of the dismissal of Defendant's first petition was requested.

Now before us is Defendant's second petition for post-conviction collateral relief, again **pro se,** filed on May 17, 2004. Defendant again requests appointment of counsel which we will deny.[2] In his second petition, Defendant raises numerous issues which have been previously litigated on direct appeal and denied, or found to be untimely in Defendant's earlier PCRA petition. **See** 42 Pa. C.S.A. §9544 (previous litigation and waiver). To the extent Defendant seeks to raise any additional new issues, such issues likewise are clearly time-barred, with one possible exception, to be addressed in this opinion. **Commonwealth v. Palmer,** 814 A.2d 700 (Pa. Super. 2002), **appeal denied,** 574 Pa. 764, 832 A.2d 436 (2003) (the PCRA's requirement that a petition be filed within one year of the date the judgment becomes final is mandatory and jurisdictional in nature; unless the petitioner can plead and prove that one of the exceptions to this time-bar applies, the court lacks jurisdiction to grant PCRA relief).

Defendant argues that at trial his constitutional right to confront and cross-examine his accusers was denied in light of the United States Supreme Court's recent decision in **Crawford v. Washington,** ___ U.S. ___, 124 S.Ct. 1354, ___ L.Ed. 2d ___ (2004). Defendant asserts that Richard J. Kadien ("Kadien") was permitted to testify with respect to out-of-court statements by Rob Lishansky and David Harding, and that Deborah L. Otterson ("Otterson") was permitted to testify regarding out-of-court statements by Richard Haag. In neither instance, does Defendant specifically identify the out-of-court statements of which he complains.

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[2] There is no right to appointment of counsel on a second or subsequent petition for post-conviction collateral relief for which an evidentiary hearing is not needed to dispose of the petition. Pa. R.Crim.P. 904(B). For the reasons discussed in the text, no hearing is necessary to dispose of Defendant's petition. Pa. R.Crim.P. 907(1).

On March 8, 2004, the Supreme Court decided **Crawford**.[3] In that decision, the Supreme Court addressed the issue of the impact of the Sixth Amendment's Confrontation Clause on the introduction of hearsay evidence by the Commonwealth in a criminal trial.[4] Previously the Court had held that the Confrontation Clause did not "bar admission of an unavailable witness's statement against a criminal defendant if the statement bears 'adequate indicia of reliability'. To meet that test, evidence must either fall within a 'firmly rooted hearsay exception' or bear 'particularized guarantees of trustworthiness'." **Id.** at 1358, **citing Ohio v. Roberts,** 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed. 2d 597 (1980). The test was solely one of reliability as determined by the historical basis of the hearsay exception claimed and the facts developed at trial, a legal issue to be decided by the trial judge, and was not dependent on whether the hearsay exception at issue was testimonial in nature or whether the opportunity to cross-examine the declarant of the state-

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[3] In contending that this issue is not barred by the PCRA's one-year period of limitations, Defendant relies on the following exception to the one-year time bar appearing in 42 Pa. C.S.A. §9545(b)(1)(iii):

> the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

The PCRA requires that this exception, like the other enumerated exceptions to the one-year time bar, be filed within sixty days of the date the claim could have been presented. 42 Pa. C.S.A. §9545(b)(2). This sixty-day time period is likewise mandatory and jurisdictional in nature and must be respected by the Court. **Commonwealth v. Fahy,** 558 Pa. 313, 737 A.2d 214, 222 (1999).

Defendant's petition filed on May 17, 2004, was filed seventy days after **Crawford** was decided. Defendant's attempt to circumvent this statutory requirement by averring in his petition that he immediately filed for relief upon learning of the **Crawford** decision will not avail Defendant. **See Commonwealth v. Baldwin,** 789 A.2d 728 (Pa. Super. 2001) (finding late filing under Section 9545(b)(2) not excused by petitioner's incarceration and prompt filing upon learning of the constitutional issue). Notwithstanding our conclusion that Defendant's newly discovered **Crawford** issue is itself time-barred, for purposes of completeness we will address this issue. Parenthetically, we note that it is also arguable whether the Supreme Court's recent and clarifying pronouncements in **Crawford** are retroactive.

[4] The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." The same right is protected by Article I, Section 9 of the Pennsylvania Constitution.

ment previously existed. **Id.** at 1369. The opportunity to cross-examine was simply a factor in determining reliability.

In **Crawford,** after reviewing its historical context and underpinnings, the Court held that the Confrontation Clause only applies to testimonial hearsay, that is, hearsay which is the equal or equivalent of **ex parte** testimony and that, with respect to testimonial hearsay, such statements may only be admitted if the declarant is actually unavailable for trial **and** only if the defendant had a prior opportunity to cross-examine.[5]

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.' Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

Id. at 1370. Under the test announced in **Crawford,** a critical distinction is drawn between hearsay which is testimonial in nature and hearsay which is not.

The hallmark of testimonial statements appears to be solemn declarations or affirmations made in a formal proceeding or formal manner, or in an official setting, for the purpose of establishing or proving some fact which the declarant expects or reasonably should expect will be used for further legal proceedings. **Id.** at 1364. Nevertheless, the Supreme Court explicitly left open for the future "any effort to spell out a comprehensive definition of 'testimonial.' " **Id.** at 1374. In doing so, the Court also stated: "whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interroga-

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[5] "[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." **Crawford v. Washington,** ___ U.S. ___, 124 S.Ct. 1354, 1369 n.9, ___ L.Ed. 2d ___ (2004).

tions." **Id.** at 1374. "Where testimonial evidence is at issue …, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." **Id.** at 1374.

In contrast, "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does **Roberts,** and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." **Id.** at 1374. Examples of nontestimonial hearsay provided by the Court are business records or statements in furtherance of a conspiracy. **Id.** at 1367. The admissibility of this form of hearsay is dependent on reliability factors for which the prior opportunity to cross-examine is not a necessary condition for admissibility.

We have examined thoroughly the trial testimony of both Kadien and Otterson. Kadien was the senior investigator of the New York State Police first called to the scene when Ms. Dashev's body was discovered. Kadien oversaw the investigation and prosecution of the case. At no point does Kadien mention Lishansky in his testimony. Kadien's sole reference to Harding is to identify Harding as an ID specialist who was present when Dashev's apartment was searched (N.T., 1/13/94, p. 31). No out-of-court statements attributable to Harding are referred to. Accordingly, this claim of a constitutional confrontation violation is without any evidentiary basis and clearly without merit.

Otterson was Haag's girlfriend at the time Dashev was killed. She was present when Defendant arrived at Haag's home at Lake Harmony with Dashev, his girlfriend, at approximately 10:00 P.M. on April 30, 1990. The evening of May 1, 1990 Otterson and Haag spent the night together in the master bedroom on the second floor of Haag's home while Defendant and Dashev used a bedroom on the first floor. The following morning, at approximately 9:00 A.M., Haag went to check Defendant's bedroom. Haag had earlier asked Defendant to leave and apparently believed he was already gone. When he opened the door, Otterson heard Haag exclaim "Oh, my God!; I can't believe it. Oh, my God; Don't go in there." (N.T., 1/13/94, p. 147) When Otterson asked, "What's the matter?", Haag responded, "I think she's dead." (N.T., 1/13/94, p. 147) Otterson entered

the room regardless and observed Dashev lying dead on the floor with her hands tied behind her back, her feet tied together and her head covered with duct tape (N.T., 1/13/94, p. 148).

Assuming these are the statements of which Defendant complains, they are not only a classic example of an excited utterance, but clearly non-testimonial.[6] By definition, an excited utterance is one made "while the declarant was under the stress of excitement caused by a startling event or condition." Pa. R.E. 803(a). An excited utterance depends for its reliability, and consequently its admissibility, on being both spontaneous and contemporaneous; it is not the product of deliberation or reflection. **Cf. White v. Illinois,** 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed. 2d 848 (1992) (finding that a "spontaneous declaration" was a firmly-rooted hearsay exception—in accordance with the **Roberts** standard—and, therefore, the Sixth Amendment did not bar its admissibility at trial).

Conceptually, an excited utterance is at the opposite end of the hearsay spectrum from testimonial hearsay. Haag's statements, as reported by Otterson, do not exhibit any of the hallmarks of a testimonial statement: one which is solemn, deliberate and anticipated to be used formally. These statements, then, are not governed by the **Crawford** decision and no error occurred in their admission.

For the foregoing reasons, a notice of our intent to dismiss Defendant's petition without a hearing will be issued this same date. The allegations in the petition are insufficient to warrant

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[6] Other statements which Otterson attributes to Haag were either non-hearsay or offered for a purpose other than the truth asserted. To the extent Otterson testified that she overheard Haag asking Defendant to leave, this is the equal of a command or verbal act and not hearsay. **Commonwealth v. Jones,** 374 Pa. Super. 431, 435, 543 A.2d 548, 550 (1988), **appeal denied,** 522 Pa. 573, 559 A.2d 35 (1989). That portion of this same conversation in which Otterson stated she heard Haag tell the Defendant, "You are not doing the right thing; I don't know what you are doing," was specifically stricken by the Court and the jury instructed to completely disregard such evidence (N.T., 1/13/94, pp. 138-139). When Otterson testified that after Defendant had left, Haag received a call—purportedly from Defendant—in which the caller requested both Otterson and Haag to leave the home for two hours, Defendant's testimony was to the same effect (N.T., 1/13/94, p. 149; N.T., 1/18/94, p. 550). Not only are all of these statements nontestimonial and, therefore, not affected by **Crawford,** to the extent any of such statements were arguably admitted in error, the error was harmless.

relief and, because of the time constraints imposed by the PCRA, no purpose would be served by any further proceedings.

ORDER OF COURT

Notice of Proposed Dismissal of Petition Under Post-Conviction Relief Act

AND NOW, this 4th day of June, 2004, upon consideration of Defendant's Petition under the Post Conviction Relief Act ("PCRA"), and it appearing that there are no genuine issues of material fact and that Petitioner is not entitled to post-conviction collateral relief, and that no purpose would be served by any further proceedings, it is hereby

ORDERED and DECREED that the Court intends to DENY and DISMISS the Petition for the following reasons:

1. The issues raised by Petitioner have either been fully litigated or could have been previously raised on direct or collateral appeal and are therefore waived.

2. Petitioner's Petition is untimely being time barred by not only the one-year period of limitations provided for in Paragraph 1 of Section 9545(b) of the PCRA, but also, with respect to Petitioner's **Crawford** claim, by the sixty-day time limit in Section 9545(b)(2).

3. The testimony of neither Richard J. Kadien nor Deborah L. Otterson was violative of the United States Supreme Court's recent decision in **Crawford v. Washington.**

4. Defendant is entitled to file a response to this Order notifying of our intent to dismiss the petition within twenty (20) days of the date of this notice.

For the further reasons more fully stated in our accompanying Memorandum Opinion of this same date, it is further ORDERED and DECREED that Petitioner's Motion for Appointment of Counsel and request for a hearing be, and the same hereby are, DENIED. Defendant's request to proceed **in forma pauperis** is granted.

COMMONWEALTH OF PENNSYLVANIA vs. KEITH VAN KRAYCAR, Defendant

Criminal Law—Evidence—Impeachment by Prior Bad Acts—Right of Confrontation— Use of Extrinsic Evidence To Contradict Witness' Testimony—Collateral Issue

1. Under the majority common-law view, the testimony of a witness who a party seeks to impeach by prior bad acts may not be contradicted by extrinsic evidence on a collateral issue. Pennsylvania, however, does not permit impeachment by either intrinsic or extrinsic evidence of a collateral specific bad act.

2. The Right of Confrontation guaranteed by the Sixth Amendment to the United States Constitution guarantees to a criminal defendant the right to cross-examine a material witness on issues probative of the witness' credibility.

3. Where a criminal defendant charged with sexually abusing a minor seeks to establish that the minor has previously falsely accused another of sexually abusing her in a substantially similar manner to the accusations filed against the defendant, the Right of Confrontation entitles the defendant to cross-examine the minor on this issue. If the minor denies the falsity of her prior accusations against the third party, the defendant will be prohibited from introducing extrinsic contradictory evidence on this collateral issue.

NO. 008 CR 03

NO. 191 CR 03

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

DAVID W. SKUTNIK, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, J.—June 8, 2004

PROCEDURAL FACTUAL BACKGROUND

The Defendant in these proceedings, Keith Van Kraycar, has been charged with various counts of sexually abusing a minor, his stepdaughter, during a two-year period beginning when the child was twelve years old.[1] At trial, Defendant intends to present testimony that his stepdaughter previously made materially similar accusations of sexual abuse against her natural father, later recanted, and to then argue that the alleged victim has a propensity to lie and should not be believed. A Motion **in limine** seeking to preclude the admission of evidence on this

[1] The specific offenses charged are statutory sexual assault, involuntary deviate sexual intercourse, sexual assault, aggravated indecent assault, indecent assault, endangering the welfare of children, and corruption of minors. 18 Pa. C.S. §§3122.1, 3123(a)(7), 3124.1, 3125(a)(1) and (8), 3126(a)(1) and (8), 4304 and 6301(a), respectively.

issue by the Defendant has been filed by the Commonwealth and is now before the Court for disposition. No prior independent adjudication to determine the truth or falsity of the alleged victim's accusations against the natural father has occurred.

DISCUSSION

The disputed evidence is directed at impeaching the victim's credibility and is offered solely for this purpose.[2] If it were undisputed that the victim previously made false accusations against her natural father of a substantially similar nature to those now being made against the Defendant, as Defendant claims, the weight such evidence bears on her credibility **vis-à-vis** her present accusations should properly be placed before the jury. Absent this use, the evidence Defendant seeks to introduce is irrelevant to any material issue in this case: whether or not the victim was previously sexually abused by another has absolutely no relevance separate and apart from its use to attack the credibility of the victim's testimony that she was abused by the Defendant.[3]

[2] Since the witness' accusations of previous sexual assault do not reflect upon her reputation for chastity or promiscuity, or impute her past sexual conduct, as the statutory term "conduct" is properly understood, the proposed evidence does not violate the Rape Shield Law, 18 Pa. C.S. §3104(a). **Commonwealth v. Johnson,** 536 Pa. 153, 158, 638 A.2d 940, 942 (1994) ("To be a victim is not 'conduct' of the person victimized.").

[3] It is important to recognize that whether or not the victim was in fact abused by her natural father is a collateral issue in this case. The test for what constitutes a collateral issue and whether extrinsic evidence may be introduced to contradict a witness' testimony is well stated in **Commonwealth v. Wright,** 308 Pa. Super. 263, 454 A.2d 122 (1982), wherein the Pennsylvania Superior Court wrote:

> Extrinsic evidence is improperly admitted in rebuttal if it is relevant only to a collateral matter. Thus our focus is whether the issue upon which this testimony was admitted was material or collateral. In determining what is and what is not a collateral matter, it was stated in **Commonwealth v. Kline,** 163 Pa. Super. 408, 62 A.2d 73, 74, 75 (1948) (**quoting Commonwealth v. Petrillo,** 341 Pa. 209, 223, 19 A.2d 288, 295 (1941):
>
> No witness can be contradicted on everything he testifies to in order to 'test his credibility.' The pivotal issues in a trial cannot be 'sidetracked' for the determination of whether or not a witness lied in making a statement about something **which has no relationship to the case on trial.** The purpose of trials is not to determine the ratings of witnesses for general veracity. A witness can be contradicted only on matters germane to the issue trying. There is no rule more firmly established than this: 'No contradiction shall be allowed on collateral matters.' (citations omitted)

Evidentiary Basis of Impeachment

The evidentiary basis upon which Defendant relies to discredit the victim's testimony is that of prior bad acts which are probative of truthfulness but which have not led to a conviction: she lied before and she is lying now. While recognized in many common-law jurisdictions, this mode of impeachment does not appear to exist in Pennsylvania. On this issue, the Superior Court in **Butler v. Flo-Ron Vending Co.,** 383 Pa. Super. 633, 557 A.2d 730 (1989), **appeal denied,** 523 Pa. 646, 567 A.2d 650 (1989), stated:

> [W]e believe it to be equally well settled in Pennsylvania that a witness, subject to an exception hereafter referred to, may not be impeached by showing particular instances of misconduct disconnected with and collateral to the issue being tried, whether disclosed by cross-examination or extrinsic proofs … . It has long been the rule in Pennsylvania ... that a witness may not even be cross-examined as to such former acts of misconduct. (**Stout v. Rassel,** 2 Yeates, 334; **Elliott v. Boyles,** 31 Pa. 65; **Commonwealth v. Williams,** 209 Pa. 529, 58 A. 922; **Commonwealth v. Payne,** 205 Pa. 101, 54 A. 489; **Marshall v. Carr,** 271 Pa. 271, 114 A. 500). Perhaps the witness here should be placed in the category of a party rather than a witness for a party, but even so, his credibility may not be impeached by evidence involving collateral matters … . 'A witness may be interrogated as to his conviction of such an offense as affects his credibility. **Commonwealth v. Racco,** 225 Pa. 113 [73 A. 1067, 133 Am.St.Rep. 872]. But it is not proper practice to ask him as to his guilt of some alleged crime not connected with the case on trial, and for which he was never convicted … .'

Id. at 643, 557 A.2d at 735 (emphasis added) (**quoting Berliner v. Schoenberg,** 117 Pa. Super. 254, 260-61, 178 A. 330, 332 (1935)); **compare** Pa. R.E. 608(b)(1) (prohibiting either the use of cross-examination or extrinsic evidence of specific

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'The test of materiality of a fact brought out on cross-examination is whether the party cross-examining would be entitled to prove it as part of his own case.' Henry, Trial Evidence, 3d Ed. §470 (emphasis in original). **See also, Herr v. Erb,** 163 Pa. Super. 430, 435, 62 A.2d 75, 77 (1948); **McGoldrick v. Pennsylvania Railroad Company,** 430 Pa. 597, 241 A.2d 90, 92-93 (1968) (contradicting evidence is collateral if it may not be admitted into evidence for any purpose independent of the contradiction).

Id. at 267-68, 454 A.2d at 124 (emphasis in original).

instances of the witness' conduct to attack or support the character of the witness) with Federal Rule of Evidence 608(b) (permitting, in the discretion of the court, cross-examination only on specific instances of misconduct probative of truthfulness).

Moreover, evidence of the victim's abuse by her natural father, whether true or not, does not purport to establish any bias against or hostility toward the Defendant, or a motive to fabricate evidence. **Cf. Commonwealth v. Black,** 337 Pa. Super. 548, 487 A.2d 396 (1985) (permitting defendant to impeach his daughter's accusations that she was raped by defendant by extrinsic evidence of daughter's consensual sexual relationship with her brother whom defendant removed from the home since the existence of this incestuous relationship was important to establish the daughter's possible bias against and hostility toward the defendant and a motive to fabricate evidence, a distinct basis of impeachment from that of prior bad acts); **see also, Commonwealth v. Fernsler,** 715 A.2d 435, 439 (Pa. Super. 1998) ("evidence tending to directly exculpate the accused by showing that the alleged victim is biased and thus has a motive to lie, fabricate, or seek retribution is admissible at trial") and **Commonwealth v. Wall,** 413 Pa. Super. 599, 625, 606 A.2d 449, 462 (1992), **appeal denied,** 532 Pa. 645, 614 A.2d 1142 (1992) (holding that the alleged victim's previous participation in the successful prosecution of her mother's paramour for sexually abusing her—resulting in victim's removal from the home—was relevant, admissible evidence to the defense of fabrication to explain motive for making similar allegations against the defendant in order to be removed from defendant's home).

Right of Confrontation

Although collateral and not supported by a specifically identifiable evidentiary basis for impeachment, the evidence Defendant seeks to question the victim about is undeniably relevant to the victim's credibility in this case and impinges upon the rights to which Defendant is entitled under the Confrontation Clause. The Confrontation Clause of the Sixth Amendment to the United States Constitution, applicable to the states through the Due Process Clause of the Fourteenth Amendment, provides that in "all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against

him."[4] "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." **Maryland v. Craig,** 497 U.S. 836, 845, 110 S.Ct. 3157, 3163, 111 L.Ed. 2d 666 (1990). "[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose ... infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony." **Delaware v. Fensterer,** 474 U.S. 15, 22, 106 S.Ct 292, 295, 88 L.Ed. 2d 15 (1985) (per curiam). Likewise, in **Commonwealth v. Spiewak,** 533 Pa. 1, 617 A.2d 696 (1992), the Pennsylvania Supreme Court found that a defendant should not be precluded "… from offering evidence which is so highly probative of the witness's credibility that such evidence is necessary to allow/permit a jury to make a fair determination of the defendant's guilt or innocence." **Id.** at 13, 617 A.2d at 702.

The right of confrontation guaranteed by the Sixth Amendment provides the Defendant with the constitutional right to challenge the credibility of a witness through cross-examination. "[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." **Davis v. Alaska,** 415 U.S. 308, 316-17, 94 S.Ct. 1105, 1110, 39 L.Ed. 2d 347, 353-54 (1974). This right is critical when the accusations are uncorroborated by physical evidence of sexual abuse, as here, and wholly dependent on the credibility of the alleged victim.

The right to present evidence probative of a victim's credibility is nevertheless not unlimited:

> It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues,

[4] The same right is protected in Art. I, Section 9 of the Pennsylvania Constitution.

> the witness' safety, or interrogation that is repetitive or only marginally relevant.

Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed. 2d 674 (1986). **See also, Alford v. United States,** 282 U.S. 687, 694, 51 S.Ct. 218, 220, 75 L.Ed. 624 (1931) ("The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted.").

The misconduct which Defendant seeks to introduce in this case—purported allegations of false accusations of a substantially similar nature—are peculiarly relevant to the reliability of the victim's accusations being levied upon the Defendant. Has the alleged victim again wrongfully cried wolf, or has there indeed always been a wolf to which society has sadly closed its eyes. The subject is a proper one for cross-examination and one which the jury should hear.

Nevertheless, as a collateral matter it would be inappropriate to have the issue consume the trial and distract the jury's attention from the true issue in this case: whether or not the alleged victim was in fact abused by the Defendant. Therefore, while we believe the victim may be properly cross-examined about the veracity of her previous accusations of prior sexual assault against her natural father, if denied, that is, if the victim maintains the accuracy of such accusations, the Defendant will not be permitted to present extrinsic evidence to establish that the victim fabricated her previous claims of sexual assault. Under this ruling, if the past acts of misconduct affecting credibility are denied by the witness—here the allegations of false accusations of a substantially similar nature—the witness may not be contradicted upon a collateral matter. **Commonwealth v. Johnson,** 536 Pa. 153, 159, 638 A.2d 940, 942 (1994); **see also, Commonwealth v. Baez,** 554 Pa. 66, 720 A.2d 711, 723-25 (1998), **cert. denied,** 528 U.S. 827, 120 S.Ct. 78, 145 L.Ed. 2d 66 (1999) (permitting cross-examination of principal witness to murder with respect to the extent of cocaine use prior to the murder, the severity of which was minimized by the witness, but prohibiting impeachment witness offered to contradict and prove the severity of the principal witness' cocaine problem prior to the murder finding this to be a collateral mat-

ter). "A collateral matter is one which has no relationship to the matter on trial." **Commonwealth v. Johnson, supra** at 159, 638 A.2d at 943.

CONCLUSION

In accordance with the foregoing, we will permit the Defendant, through counsel, to cross-examine the Defendant's stepdaughter with respect to her prior and potentially false accusations of sexual abuse by her natural father with the caveat that Defendant will be bound by the witness' answer.

ORDER OF COURT

AND NOW, this 8th day of June, 2004, upon consideration of the Commonwealth's Motion **in limine,** the submissions of the parties, and argument thereon, and in accordance with the attached memorandum opinion accompanying this order, it is hereby

ORDERED and DECREED that the Commonwealth's Motion **in limine** is GRANTED in part. The Defendant, through counsel, shall be permitted to cross-examine the alleged victim with respect to alleged false accusations of prior sexual assault made by her against her natural father of a substantially similar nature to those being made against the Defendant; however, the Defendant shall not be permitted to present any extrinsic evidence contrary to the alleged victim's responses to cross-examination on this issue.

GREGORY D. SERFASS, Plaintiff vs. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE, OFFICE OF CHILDREN, YOUTH AND FAMILIES, Defendant

Civil Action—Child Protective Services Law—Disclosure of Identity of Person Making Report

1. Among the stated purposes of the Child Protective Services Law (the "Act"), 23 Pa. C.S. §§6301-6385 is that to encourage the immediate and early reporting of child abuse. To promote this purpose the Act explicitly mandates that the identity of the person reporting child abuse not be disclosed.

2. An express statutory privilege, one which is both rational and reasonable, should not be lightly set aside.

3. A father's belief, that mother or others on her behalf, may be the source of an unfounded report of child abuse, is insufficient to overcome the presumptive validity and necessity of the Act's bar to disclosing the identity of the reporter of alleged child abuse notwithstanding the possible relevance of such information to discrediting the mother or attacking her credibility in pending custody proceedings.

NO. 03-1762

WILLIAM J. McCARTHY, III, Esquire—Counsel for Plaintiff.

MYRA SACKS, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, J.—June 23, 2004

FACTUAL AND PROCEDURAL BACKGROUND

On or about December 18, 2002, the Plaintiff, Gregory D. Serfass ("Father"), received notice that he was the subject of an investigation by the Carbon County Office of Children and Youth Services ("Children and Youth") because an unidentified individual or individuals reported that Father sexually abused his son, Nicholas. The report of abuse was investigated by Children and Youth and ultimately determined to be unfounded on or about February 14, 2003.

Father is involved in separate child custody proceedings in Northampton County and suspects that his estranged wife ("Mother") maliciously made the allegations of abuse to deprive him of custody of his children, or acted in concert with others for the same purpose. Mother has denied involvement in the allegations.

Alleging that the identity of the party or parties who reported the allegations to Children and Youth is relevant and important information in his custody proceedings, Father requested a copy of the report made to Children and Youth and that the identity of the reporting party be disclosed. A copy of the report redacted to remove the name of the reporting source and any persons who cooperated in the investigation was provided to Father, however, the Defendant, Commonwealth of Pennsylvania, Department of Public Welfare ("DPW"), has denied Father's request to identify the reporting source.

On July 21, 2003, Father commenced the present suit seeking to compel DPW to provide Father with copies of all reports, documents and/or records concerning the charges of sexual abuse filed against him and to disclose the identity of the party or parties filing such charges.[1] DPW has filed a number

[1] Since the filing of this action, Father has acknowledged that he is not entitled to receive confidential information contained in the requested records and reports and has elected not to pursue such request (Father's Brief in Opposition to Preliminary Objections, p. 6).

of preliminary objections to the complaint, one of which we believe to be dispositive of all others and which we will grant: Father has failed to state a claim upon which relief can be granted.[2]

DISCUSSION

The confidentiality provisions of the Child Protective Services Law (the "Act"), 23 Pa. C.S. §§6301-6385, are integral to its purposes and allow for only limited exceptions. 23 Pa. C.S. §§6302(b) (stating purposes of Act) and 6339 (imposing blanket confidentiality on all reports and information obtained concerning alleged instances of child abuse). The exceptions fall within one of two broad categories of persons authorized to receive information gathered under the Act: (1) limited access to file information under specific circumstances to persons and agencies **outside** the circle of privacy created by the Act, 23 Pa. C.S. §6340(a); and (2) almost complete access to file information to any person who is the "subject of a report" and thereby included **within** the circle of privacy circumscribed by the Act, 23 Pa. C.S. §6340(b). **Commonwealth v. Kennedy,** 413 Pa. Super. 95, 102, 604 A.2d 1036, 1040 (1992), **appeal denied,** 531 Pa. 638, 611 A.2d 711 (1992).

As the alleged perpetrator of abuse, Father is one of the "subject[s] of the report" as defined by the Act and entitled to

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[2] DPW has filed the following objections: (1) that the relief Father seeks is equitable in nature and, because common-law equity jurisdiction does not exist in Pennsylvania, absent a statute authorizing the relief sought, which Father has failed to identify, the Court is without power to grant Father's request, **see Commonwealth v. Ryan,** 459 Pa. 148, 155, 327 A.2d 351, 354 (1974) ("There is no common law equity jurisdiction in Pennsylvania; a court may exercise only those equitable powers which have been specifically conferred by the legislature."); (2) that the Judicial Code vests exclusive original jurisdiction of this matter in the Commonwealth Court, **citing** 42 Pa. C.S. §761(a); Plaintiff, however, cites to 23 Pa. C.S. §6340(a)(5.1) as conferring authority upon this Court to obtain the information requested; (3) that absent an exception, of which none have been identified, this Court itself is prohibited from receiving or reviewing confidential child abuse information, 23 Pa. C.S. §6340; (4) that Father in this action is seeking to collaterally attach DPW's previous denial of his request and has failed to preserve the issue for review, **see B.T. v. Department of Public Welfare,** 828 A.2d 436 (Pa. Commw. 2003), **appeal denied,** 845 A.2d 819 (Pa. 2004); (5) that no right exists to obtain the requested information; and (6) that to the extent the relief sought by Father would require DPW to act affirmatively, Father's claim is barred by principles of sovereign immunity, see 1 Pa. C.S. §2310; **Youst v. Pennsylvania Department of Transportation,** 739 A.2d 625, 627 (Pa. Commw. 1999).

almost complete access to file information. Section 6340(b) provides:

> (b) Release of information to subject of report.—At any time and upon written request, a subject of a report may receive a copy of all information, except that prohibited from being disclosed by subsection (c), contained in the Statewide central register or in any report filed pursuant to section 6313 (relating to reporting procedure).

23 Pa. C.S. §6340(b). This information, with the identity of the person making the report excised, has been provided to Father. Section 6340(c) provides:

> (c) Protecting identity of person making report.—Except for reports pursuant to subsection (a)(9) and (10), the release of data that would identify the person who made a report of suspected child abuse or the person who cooperated in a subsequent investigation is prohibited unless the secretary finds that the release will not be detrimental to the safety of that person. Law enforcement officials shall treat all reporting sources as confidential informants.

23 Pa. C.S. §6340(c).

Notwithstanding the specific bar to disclosure of the identity of the person making the report contained in Section 6340(c), Father argues that this Court has the authority "in connection with any matter involving custody of a child" to request and review any reports and files which the Court considers relevant. 23 Pa. C.S. §6340(a)(5.1). While such authority undoubtedly exists in the court, its exercise by this Court would be of no avail to Father. The ability of the court to obtain the information authorized by Section 6340(a)(5.1) and the bar imposed by Section 6340(c) against releasing the identity of the reporting party "unless the secretary finds that the release would not be detrimental to the safety of that person" are neither inconsistent nor in conflict with one another. Nothing contained in Section 6340(a)(5.1) authorizes, much less supersedes, the disclosure expressly prohibited by Section 6340(c). **See** 1 Pa. C.S.A. §1932 (construing statutes or parts of statutes in **pari materia**); **cf. Pennsylvania v. Ritchie,** 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed. 2d 40 (1987) (finding that a criminal defendant's Sixth Amendment rights under the United States Constitution did not entitle a defendant accused of sexually molesting his

daughter to personally view all materials in the Child Welfare Services file; an **in camera** review of the county agency records by the trial court and disclosure to the defense of only those materials that might change the outcome of the trial struck the proper balance between the confidentiality interest protected by statute and the defendant's due process rights).

Moreover, Father has alleged no finding by the secretary that release of the information Father requests would not be detrimental to the safety of the reporter of the abuse. To the contrary, in denying Father's request, DPW expressly acknowledged that disclosure of the identity of such persons is only permitted under exceptional circumstances and that such circumstances did not exist in this case.[3]

That the information Father requests may indeed be relevant to the pending custody proceedings in Northampton County is not the standard by which we must measure the request. Instead, because the privilege of confidentiality created by the Act is qualified, rather than absolute, the interests protected by this privilege must be weighed against the interests Father seeks to advance in the custody proceedings. **V.B.T. v. Family Services of Western Pennsylvania,** 705 A.2d 1325, 1334 (Pa. Super. 1998), **aff'd,** 556 Pa. 430, 728 A.2d 953 (1999). In **V.B.T.,** the court described the interests protected by the Act as follows:

> The confidentiality provisions of the [Act] have several clear functions in light of the statute's broad purposes: to encourage reporting of abuse by ensuring that persons with knowledge of abuse are not deterred from reporting it by the prospect of the abuser learning their identity and seeking retribution; to facilitate the investigation of abuse by assuring potential witnesses that the information they provide to investigators will not be made public; to facilitate the rehabilitation and treatment of abused children and their families by encouraging open, frank communications with agency personnel and treatment providers; to encourage the effective operation of the child protective service by

[3] It is appropriate in this respect to note that "DPW's interpretations of the requirements of the [Act] are entitled to deference because DPW is the agency charged with implementation of the statute." **In re Estate of Wagner,** 791 A.2d 444, 446 (Pa. Commw. 2002), **appeal granted,** 572 Pa. 694, 813 A.2d 848 (2002).

> enabling it to keep complete and comprehensive files on all aspects of a family's circumstances without fear that information placed in such files will be subject to scrutiny by persons not involved in the process of rehabilitating the family; and to prevent the innocent victims of abuse from also becoming victims of public stigma by guarding information about the intimate details of their lives from the prying eyes of outsiders.

Id. at 1335-36.

In contrast, Father seeks to obtain the identity of the reporter for possible use in discrediting Mother or attacking her character in the pending custody proceedings. Denial of the information requested will not foreclose Father's action. Nor is it alleged that denial will severely cripple Father's quest for primary custody. The contrary appears from our review of the report provided to Father.

With the exception of the identity of the reporter, Father has been provided a complete copy of the report. In this report, it is clear that the investigation was prompted by the child's asking, "Why does daddy touch me down there?" The child, according to the report, has a pervasive developmental disorder, was not consistent in his answers when questioned by the investigator, and did not appear credible. There is nothing in the report to suggest that the person reporting the alleged abuse acted other than out of an abundance of caution based on the child's statements.

In this case, it is not claimed that the information requested by Father implicates his constitutional rights or will advance one of the objectives of the Act. While it might well be true, as Father contends, that an unscrupulous parent can use the Act as a weapon in custody proceedings, it is also true that were we to grant Father's request, parents who sincerely believe a child is being abused by the other parent will be reluctant to report such abuse, if the report, later determined to be unfounded, opens the door for their identity to be disclosed and used against them in a pending custody proceeding. This is the very risk that the requirement of anonymity is intended to minimize.

When viewed broadly, the benefit Father seeks to derive from the information requested is dwarfed by the policy and purposes of the Child Protective Services Law. The Act's pur-

pose of encouraging the reporting of child abuse while at the same time withholding from disclosure the identity of the person making the report is both a valid purpose and a legitimate means of achieving that purpose. Indeed, the legislative decision to maintain the confidentiality of the reporting source demands our recognition notwithstanding the possible relevance which would exist if it were determined that Mother, or someone on her behalf, reported the alleged abuse:

> [P]rivileges which are established by constitution, common law or statute are 'designed to protect weighty and legitimate competing interests.' **Id.** Thus where the legislature has considered the interests at stake and has granted protection to certain relationships or categories of information, the courts may not abrogate that protection on the basis of their own perception of public policy unless a clear basis for doing so exists in a statute, the common law, or constitutional principles. **Commonwealth v. Moore,** 526 Pa. 152, 159, 584 A.2d 936, 940 (1991) ('[T]he general powers of the courts do not include the power to order disclosure of materials that the legislature has explicitly directed be kept confidential.') No such basis was found by the trial court or asserted by the plaintiffs in this case.

V.B.T., supra at 1335.

CONCLUSION

When balancing the competing interests of the Father and the Commonwealth in this case, the Commonwealth's interests in maintaining the confidentiality of the person who reported the suspected abuse is paramount. Under these circumstances, we will grant DPW's request to dismiss the complaint.

SCHLEICHER'S HOME SALES, INC., Plaintiff vs. WILLIAM HIGHLAND and SHELLY HIGHLAND, Defendants

Civil Action—Mechanics' Lien Law—Claim for Partial Performance—Petition To Strike Mechanic's Lien for Failure To Aver Why Performance Was Not Completed

1. Ordinarily, a mechanic's claim is premature and not properly entered until all work under the contract has been completed by the contractor.

2. When a mechanic's claim, on its face, is for partial performance of an entire contract, as part of a valid claim for work done, the contractor must aver an excuse, not attributable to the contractor's fault, for why the contract was not fully performed.

3. Where the contract contemplates mortgage financing and both parties acknowledge that the owner's mortgage application was denied after construction began, the contractor will be provided an opportunity to file an amended claim explaining why the contractor's work ceased rather than having the claim stricken for failure to originally make such averment.

NO. 04-0122

DEMETRIOS H. TSAROUHIS, Esquire—Counsel for Plaintiff.

ANTHONY ROBERTI, Esquire—Counsel for Defendants.

MEMORANDUM OPINION

NANOVIC, J.—June 30, 2004

PROCEDURAL AND FACTUAL BACKGROUND

On July 1, 2003, William and Shelly Highland (the "Highlands") signed an agreement with Schleicher's Home Sales, Inc. ("Schleicher"), as General Contractor, for the purchase of a "double wide" mobile home. Pursuant to the written agreement between the parties, the home was to be delivered and attached to a foundation to be constructed by Schleicher on the Highlands' land at 40A Center Avenue, Jim Thorpe, Carbon County, Pennsylvania. The total contract price for all work is stated to be One Hundred Twenty-Nine Thousand Dollars and Fifty Cents ($129,000.50). The contract also contains a provision that the Highlands "agree to choose financing source for mortgage and obtain mortgage to cover deal."

Both sides agree that the following work was completed by Schleicher: the removal of stumps and the delivery of ten loads of shale for the driveway entrance, the excavation for the foundation, and the installation of a frost footer. The parties disagree about when this work began and ended. Schleicher asserts that the work started after the signing of the contract on July 1, 2003, and was completed on September 28, 2003. On the other hand, the Highlands claim that the removal of the stumps, delivery of the shale and digging of the foundation was completed without their permission before the contract was signed on July 1, 2003, and that the frost footer was installed over their objections before July 31, 2003.

In addition, there is a dispute about whether Schleicher completed all work it was required to complete under the contract. Schleicher argues that all work performed by it was prop-

erly performed but that work ceased when the Highlands' application for a mortgage was denied and the Highlands were unable to meet their financial obligations under the contract. The Highlands contend that the agreement was contingent upon mortgage financing and that the contract could not be completed, through no fault of their own, when their loan application was refused.

Both sides also agree that notice of the intent to file a mechanic's claim was sent by Schleicher by certified mail to the Highlands on December 4, 2003, and that Schleicher later filed a mechanic's claim on January 19, 2004, in the amount of Eight Thousand Three Dollars ($8,300.00) plus finance charges in the amount of 1 and 1/2 percent per month, and for continuing costs and counsel fees from September 2003. The Highlands have filed preliminary objections to this claim and ask that the Court strike and dismiss the lien for failure to comply with various requirements of the Mechanics' Lien Law of 1963, 49 P.S. §§1101-1902, to be discussed below.

DISCUSSION

In this case, the Highlands' right to a mechanic's lien is asserted under and is regulated by the Mechanics' Lien Law of 1963 and Pennsylvania Rules of Civil Procedure 1651 through 1661 insofar as these provisions and rules are pertinent. "[T]he right to a mechanic's lien is entirely statutory, and, therefore, not only the right itself but the method of enforcing and defending it must depend upon the statute and must be pursued in strict compliance with it." **McCarthy v. Reese,** 419 Pa. 489, 491, 215 A.2d 257, 258 (1965).

> The Mechanics' Lien Law is a creature of statute in derogation of the common law and must be given strict construction. **King's Oak Liquidators v. Bala Cynwyd Hotel Associates,** 405 Pa.Super. 250, 592 A.2d 102 (1991). Therefore, any questions of interpretation should be resolved in favor of a strict, narrow construction. **Raymond S. Hess, Inc. v. Kutner,** 13 D. & C.3d 556, **aff'd,** 268 Pa.Super. 610, 413 A.2d 1125 (1979). In order to effectuate a valid lien claim, the contractor or subcontractor must be in strict compliance with the requirements of the Mechanics' Lien Law. **Castle Pre-Cast Superior Walls of Delaware, Inc. v. Strauss-Hammer,** 416 Pa.Super. 53, 610 A.2d 503

(1992). **See Este v. Pennsylvania R. Co.,** 27 Pa.Super. 521 (1905) (strict compliance applies to the substance of the Mechanics' Lien Law).

Delmont Mechanical Services, Inc. v. Kenver Corp., 450 Pa. Super. 666, 672, 677 A.2d 1241, 1244 (1996).

By statute, preliminary objections may be filed which question whether the entry of a mechanic's lien has been properly perfected. 49 P.S. §1505. Preliminary objections are limited to those claiming the property is exempt or immune from the lien, or for lack of conformity with the act. **Id.** In ruling on preliminary objections, where no testimony has been taken—as here—we "must examine the averments in the complaint, together with the documents and exhibits attached thereto, in order to evaluate the sufficiency of the facts averred." **Clemleddy Construction, Inc. v. Yorston,** 810 A.2d 693, 696 (Pa. Super. 2002), **appeal denied,** 573 Pa. 682, 823 A.2d 143 (2003). For these purposes, conclusions of fact or law are not considered. **Murray v. Zemon,** 402 Pa. 354, 356, 167 A.2d 253, 254 (1960).

"[P]reliminary objections will be sustained only where the case is free and clear of doubt." **Clemleddy Construction, Inc., supra** at 696 (citation and quotation marks omitted). "The impetus of our inquiry is to determine the legal sufficiency of the complaint and whether the pleading would permit recovery if ultimately proven." **Id.** at 696.

The narrow question presented to us in these proceedings is whether the facts pled in Schleicher's mechanic's claim satisfy the requirements of the Mechanics' Lien Act when all of the work to be performed by the contractor has not been completed. To do so, the claim on its face must be self-sustaining and establish that it is such a lien as the statute authorizes the claimant to file. **Wolf Co. v. Pennsylvania R.R.,** 29 Pa. Super. 439, 443 (1905).

> We must always bear in mind that this is not a common law action, but rather a claim to assert a peculiar type of lien against real estate under the provisions of a statute, strict compliance with which has always been demanded. Such liens are purely creatures of statutes; they did not exist at common law. Consequently, they are available only on such terms as the Legislature saw fit to provide: **Hoffman Lumber Co. v. Mitchell,** 170 Pa. Superior Ct. 326, 85 A.2d

> 664 (1952); **Associated Lumber & Mfg. Co. v. Mastroianni,** 173 Pa. Superior Ct. 310, 98 A.2d 52 (1953). The right to the lien arises not from the act of furnishing the labor and materials, but rather from the debt arising therefrom: **Horn & Brannen Co. v. Steelman,** 215 Pa. 187, 64 Atl. 409 (1906). The right to file a mechanics' lien must have a contract as its basis.

Murray v. Zemon, supra at 358, 167 A.2d at 255.

The Mechanics' Lien Law provides:

> Every improvement and the estate or title of the owner in the property shall be subject to a lien, to be perfected as herein provided, for the payment of all debts due by the owner to the contractor … for labor or materials furnished in the erection or construction … of the improvement … .

49 P.S. §1301.

> This language makes plain that the property is merely being subjected to a particular type of lien, to secure the payment of a certain type of debt. If there is no valid debt of that sort created, the lien can not be enforced; but failure to comply with the statutory requirements may defeat collection by means of the statutory procedure even though the debt itself may be a valid obligation, or damages may be recoverable for breach of contract.

Halowich v. Amminiti, 190 Pa. Super. 314, 154 A.2d 406, 408 (1959). "A mechanic's lien can be sustained only for work done or materials furnished and not for unliquidated damages for breach of contract." **Dyer v. Wallace,** 264 Pa. 169, 174, 107 A. 754, 755 (1919).

A claim for either labor or material not actually furnished sounds in damages and can never be made the subject of a mechanic's lien. **McCaig v. Yoch,** 24 Pa.D. 87 (Northumb. Cty. 1914). A mechanic's claim may however be filed for work actually done, even if not completed, provided, as a condition precedent to a valid filing, the claim shows on its face a valid reason for nonperformance not attributable to any fault of the contractor. **Fotheringham v. McPherson,** 17 D. & C.2d 199, 201 (Phila. Cty. 1957). "Where a contract has not been completed, a lien is defective which does not aver that the plaintiff was excused, prevented or hindered from performance by the defendant." **Robinson v. Davis,** 8 Del. Co. Reps. 237 (1901).

On this latter issue, in **Bohem v. Seabury,** 141 Pa. 594, 21 A. 674 (1891), the court sustained the striking of a lien entered on behalf of a contractor for only a portion of the work called for by the contract where there was no averment that the contractor had completed the contract, or that its completion had been prevented by the owner. The court stated:

> The lien was filed for a portion only of the work and materials referred to, amounting to $1,527.50; and there was no averment that he had completed the contract, or had been excused by the owner from doing so, or that the owner had prevented him from completing his contract. In other words, the lien upon its face showed that the contractor had not finished his work as specified in the contract. **Prima facie,** therefore, he was not entitled to recover; there was nothing upon the face of the lien which showed any right of action; on the contrary, it showed the reverse.

Id. at 596, 21 A. at 674. To the same effect **see Dyer v. Wallace, supra** at 175, 107 A. at 756 (citations omitted) ("[The contractor] might have filed a lien against the plant for the value of the work actually done ..., coupled with an averment that full performance of the contract on his part had been prevented by the owner; but what he seemingly attempted to do was to claim for a full performance while admitting that it had not been done.").

Although **Bohem** and **Fotheringham** were decided under prior statutes addressing mechanics' liens, the Acts of 1836 and 1905 respectively, the language of the present Mechanics' Lien Law which prescribes the contents of the claim is similar to the language of the previous acts in all material respects. **See Fotheringham, supra** at 201. Under the current statute, to perfect its lien, a claimant must "file a claim with the prothonotary as provided by this act within four (4) months **after the completion** of his work." 49 P.S. §1502(a)(1) (emphasis added). The term "completion of the work" is expressly defined to mean "performance of the last of the labor or delivery of the last of the materials **required by the terms of the claimant's contract or agreement,** whichever last occurs." 49 P.S. §1201(8) (emphasis added) Finally, Section 1305 of the Mechanics' Lien Law of 1963 provides:

> Except in case of destruction by fire or other casualty, where, through no fault of the claimant, the improvement is not completed, the right to lien shall nevertheless exist.

49 P.S. §1305.

It should also be noted that "[t]he Mechanics' Lien Law of 1963 was intended to protect the prepayment labor and materials that a contractor invests in another's property, by allowing the contractor to obtain a lien interest in the property involved. **A lien proceeding is not intended to settle the contractual obligations of the parties." Matternas v. Stehman,** 434 Pa. Super. 255, 264, 642 A.2d 1120, 1124 (1994) (emphasis added). "A mechanic's lien is simply a statutory security for enforcing the payment of certain claims which have supposedly added to the value of the property made subject to the statutory collection procedure. It is an additional concurrent and cumulative remedy **in rem,** given by statute, and does not derogate from any other available remedies such as **assumpsit.**" **Halowich v. Amminiti, supra,** 154 A.2d at 407; **see also,** 49 P.S. §1702 (effect of judgment on right to personal action).

In the present case, Schleicher's mechanic's claim on its face asserts that it contracted with the Highlands for the purchase of a mobile home and the construction on the Highlands' property of a foundation upon which the home would be located, together with preparatory site work, pursuant to a written agreement, a copy of which is attached as Exhibit "B" to the claim and incorporated by reference. Notwithstanding this description of the scope of the work to be performed by Schleicher, the only work specifically identified on Exhibit "C"—Schleicher's notice of intention to file a mechanic's lien dated September 4, 2003, and also incorporated by reference in the claim—as being actually performed by Schleicher pursuant to the contract is preparatory site work: the stump removal, delivery of shale, digging of the foundation, erection of a frost footer and placement of the drain tile. This same work is the only work described in an invoice also attached to the claim.

The claim made is for only part of the work to be performed by Schleicher under the contract. This work, while connected to the construction of a building or other structure, and therefore the proper subject of a mechanic's lien (**King's Oak Liquidators v. Bala Cynwyd Hotel Associates,** 405 Pa. Super. 250, 253, 592 A.2d 102, 103 (1991)), was clearly incidental to the overall object of the contract.

The contract, on its face, is not severable. Yet no averment is made in the claim to explain why Schleicher did not complete

its work nor was any evidence presented by deposition or otherwise to substantiate any right of action upon completion of only part of the work. Schleicher's position that it was excused from performance once the Highlands' application for a mortgage was denied and no reasonable assurances were provided that the Highlands could afford to proceed were made at the time of argument on the Highlands' preliminary objections.

In accordance with the foregoing principles, the Highlands' objection to Schleicher's claim on the basis that the claim is for part performance only with no averment to explain why the work was not completed is well taken. This objection, in effect, challenges the right of Schleicher to recover at all. Still, under the circumstances of this case, where the contract attached to the claim contemplates that the Highlands will obtain a mortgage to "cover the deal" and both parties acknowledge that the Highlands' application for a mortgage was denied, we believe it would be inappropriate to strike Schleicher's claim without first providing an opportunity to amend the claim and explain why the work was not completed. **See** 49 P.S. §1504 (amendment of claim).

In permitting the claim to be amended we note that "[w]hile a mechanic's lien is a purely statutory proceeding, and compliance with the requirements of the statute is necessary in order to give it validity, this rule only applies to essential requirements. In determining what are such requirements it should be borne in mind that a substantial compliance with the statutory requisites is all that is called for." **Este v. Pennsylvania R.R. Co.,** 27 Pa. Super. 521, 524 (1905). In this regard, neither Section 1503 (contents of claim) nor Section 1305 (right to lien in case of noncompletion of work) of the Mechanics' Lien Law expressly state that when a claim is filed for part performance only, a necessary prerequisite for the validity of the claim is a statement of the reasons why the work was not completed. 49 P.S. §§1502 and 1305.[1]

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[1] The Highlands remaining objections will be decided as follows:

(1) the Highlands' challenge to when Schleicher last worked on their property and assertion that this occurred more than four months prior to the filing of the claim, is an issue of fact properly resolved at the time of trial and not by preliminary objections. **G.E.M. Building Contractors and Developers Inc. v. Egidio's Inc.,** 14 D. & C.4th 609 (1992);

ORDER OF COURT

AND NOW, this 30th day of June, 2004, it is hereby

ORDERED and DECREED that the Plaintiff is granted thirty (30) days from the date of this Order to file an amended claim in accordance with the attached Opinion. Should the Plaintiff fail to file an amended claim, on motion of the Defendants, Plaintiff's claim for part performance which fails to explain why Plaintiff should be excused from performing all of the work described in its contract with Defendants will be dismissed and the lien entered thereunder stricken. Any such dismissal of Plaintiff's claim shall be without prejudice to Plaintiff from filing any civil action **in assumpsit,** or otherwise, against Defendants for work actually done and for any damages it may have sustained, if any, for breach of contract. Plaintiff's amended claim, if any, must comply with Section 1504 of the Mechanics' Lien Law and shall not include any claim for finance charges or for continuing counsel fees.

In accordance with the attached opinion, the remaining preliminary objections of Defendants are denied.

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(2) the Highlands' objection that Schleicher failed to give proper notice of its claim in accordance with Section 1501 of the Mechanics' Lien Law of 1963, 49 P.S. §1501, fails to recognize that this Section applies to subcontractors only and not contractors, as these terms are defined in the statute. **See City Lighting Products Co. v. The Carnegie Institute,** 816 A.2d 1196 (Pa. Super. 2003). Schleicher specifically states in its claim that it was the general contractor for the Highlands; further, the contract attached to the claim is one directly between the Highlands, as owners, and Schleicher, as general contractor. One of the reasons for the special notice requirements with respect to subcontractors is "to protect the owner from making payments to the contractor when his property is liable to be subjected to a lien, a concern not present in the instant case." **Este v. Pennsylvania R.R. Co., supra** at 524; and

(3) Because Schleicher's claim for interest and counsel fees is necessarily prospective, it is not the proper subject of a mechanic's lien claim which claims may be made only for material and labor actually provided and unpaid as of the date the claim is filed. **Dyer v. Wallace, supra** at 174, 107 A. at 755.

JIM THORPE AREA SCHOOL DISTRICT, Petitioner vs. MAR-PAUL CONSTRUCTION COMPANY, INC. and POPPLE CONSTRUCTION, INC., Respondents

Civil Action—Contracts—Agreement to Arbitrate—Rules of Contractual Construction—Contradictory Contractual Provisions

1. A court should make two inquiries in determining whether a claim should be submitted to arbitration under the arbitration clause of a contract: (1) whether a valid arbitration agreement exists between the parties; and (2) whether the plaintiff's claim is within the scope of the agreement.

2. In the interpretation of a contract, words should be given their ordinary and popularly accepted meaning, unless circumstances show a different meaning is applicable.

3. Where it is clear that parties to a contract intended to be bound by changes to that contract, the language that remains from the original contract should be interpreted in accordance with the changes.

4. When considering one interpretation of a contract over another, a court should consider the implications of each and determine which interpretation would produce a result most consistent with the parties' intent.

5. When two inherently contradictory provisions exist in the same contract, the latter provision must yield to the earlier provision.

NO. 03-3313

BRIAN SUBERS, Esquire—Counsel for Petitioner.

LISA M. LAMBERT, Esquire—Counsel for Respondent Mar-Paul Company, Inc.

RAYMOND P. WENDOLOWSKI, Esquire—Counsel for Respondent Popple Construction, Inc.

MEMORANDUM OPINION

NANOVIC, J.—July 19, 2004

Underlying the present controversy between the Jim Thorpe Area School District (the "School District"), as owner, and Mar-Paul Construction, Inc. (the "Contractor"), as general contractor, are a number of disputes arising out of the construction in 2002 of a new elementary school for the School District (the "Project"). Popple Construction, Inc. (the "Subcontractor") was a subcontractor employed separately by Mar-Paul to perform certain site preparation work on the Project. The question before us is whether the Construction Agreement between the School District and the Contractor requires these disputes to be arbitrated before the American Arbitration Association, the Contractor's and Subcontractor's position, or to be litigated in

the Carbon County Court of Common Pleas, the School District's position.

FACTUAL AND PROCEDURAL BACKGROUND[1]

In September 2001, the School District solicited bids and awarded contracts in accordance with the Pennsylvania Public School Code of 1949, as amended, for the construction of a new kindergarten through eighth grade school in Kidder Township, Carbon County, Pennsylvania. In October 2001, Mar-Paul was awarded the contract for general construction of the Project. A written construction agreement for the work was prepared by the School District and is dated February 4, 2002, and signed by the School District and Mar-Paul. The Construction Agreement consists, **inter alia,** of a Standard Form of Agreement between Owner and Contractor, AIA Document A101-1997 (the "Agreement"); the General Conditions of the Contract for Construction, AIA Document A201-1997 (the "General Conditions"); and Section 00800, Supplementary Conditions (the "Supplementary Conditions"). Mar-Paul's subcontract with Popple is dated January 10, 2002.

A Notice to Proceed was issued by the School District to the Contractor in February 2002, whereupon, at Mar-Paul's request, Popple promptly began site work on the Project. While performing this work, certain disputes, related to the moisture content of the soil on the site, arose between the School District, Mar-Paul and Popple. These disputes gave rise to a claim by Mar-Paul and Popple against the School District for which the School District denied liability. Since then, additional disputes relating to the Construction Agreement arose between Mar-Paul and the School District regarding the general construction of the Project. The amount at issue in these disputes, in the aggregate, exceeds $25,000.00.

The parties have attempted, without success, voluntary mediation of their disputes. Impasse having been reached, Mar-Paul has demanded for itself, and on behalf of Popple, mandatory arbitration with the American Arbitration Association. The School District opposes this request and pursuant to the Uniform Arbitration Act, specifically 42 Pa. C.S.A. §7304(b) (made

[1] In lieu of a hearing, the parties have filed of record a Stipulation of Facts and requested the Court to decide this matter based upon this stipulation, and the legal briefs and argument presented by counsel. We have complied with counsels' request.

applicable to common-law arbitration at 42 Pa. C.S.A. §7342 (a)),[2] has filed a Petition to Stay Arbitration Proceeding which is now before us for disposition.

DISCUSSION

Simply stated, the parties disagree on whether an agreement to arbitrate the underlying merits of their disputes exists. If such an agreement exists, the parties agree that the claims by, between and amongst them, which are known to date, are subject to the arbitration agreement. If no agreement to arbitrate exists, the parties further agree that the Carbon County Court of Common Pleas is the proper forum for the claims to be litigated.

While the courts of this Commonwealth favor and encourage arbitration, absent a clear, express and unequivocal agreement to arbitrate, we have no authority to compel the arbitration of claims. **Emlenton Area Municipal Authority v. Miles,** 378 Pa. Super. 303, 307, 548 A.2d 623, 625 (1988), **appeal denied,** 522 Pa. 613, 563 A.2d 498 (1989). When one party to an agreement seeks to prevent another from proceeding to arbitration, judicial inquiry is limited to determining (1) whether a valid agreement to arbitrate was entered into and, if so, (2) whether the dispute involved is within the scope of the arbitration provision. **Highmark Inc. v. Hospital Service Association of Northeastern Pennsylvania,** 785 A.2d 93, 98 (Pa. Super. 2001), **appeal denied,** 568 Pa. 713, 797 A.2d 914 (2002); **PBS Coal, Inc. v. Hardhat Mining, Inc.,** 429 Pa. Super. 372, 376, 632 A.2d 903, 905 (1993).

Ironically, this inquiry requires courts to apply

> two basic and seemingly contradictory propositions when deciding whether the parties have agreed to arbitrate a particular dispute:
>
> (1) arbitration agreements are to be strictly construed and not extended by implication; and (2) when parties have agreed to arbitrate in a clear and unmistakable manner, every reasonable effort should be made to favor the agreement unless it may be said with positive assurance that the

[2] An agreement to arbitrate in accordance with the rules of the American Arbitration Association falls under Pennsylvania's common-law arbitration provision. **Midomo v. Presbyterian Housing Development Co.,** 739 A.2d 180, 183 (Pa. Super. 1999).

> arbitration clause involved is not susceptible to an interpretation that covers the asserted dispute.
>
> **Emlenton Area Mun. Authority,** 548 A.2d at 625 (citations omitted). To resolve this tension, courts should apply the rules of contractual construction, adopting an interpretation that gives paramount importance to the intent of the parties and ascribes the most reasonable, probable, and natural conduct to the parties. **Id.** at 626 (citations omitted).

Midomo v. Presbyterian Housing Development Co., 739 A.2d 180, 190-91 (Pa. Super. 1999). Under these rules, "if a valid arbitration agreement exists between the parties and [plaintiffs'] claim is within the scope of the agreement, the controversy must be submitted to arbitration." **Highmark Inc., supra** at 98 (quotation marks and citations omitted).

In accordance with the foregoing, our first inquiry is to examine the relevant language of the Construction Agreement to determine whether a valid arbitration agreement exists between the School District and Mar-Paul. In this case, this requires that we examine Paragraph 4.6 of the General Conditions in its unaltered form, and as modified by the Supplementary Conditions.

The original provisions in the Construction Agreement pertaining to arbitration provided:

> 4.6 ARBITRATION
>
> 4.6.1 Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Subparagraphs 4.3.10, 9.10.4 and 9.10.5 [referring to exceptions not relevant to the instant dispute], shall, after decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to arbitration. Prior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with the provisions of Paragraph 4.5.
>
> 4.6.2 Claims not resolved by mediation shall be decided by arbitration which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect. The demand for arbitration shall be filed in writing with the other party to the Contract and

with the American Arbitration Association, and a copy shall be filed with the Architect.

4.6.3 A demand for arbitration shall be made within the time limits specified in Subparagraphs 4.4.6 and 4.6.1 as applicable, and in other cases within a reasonable time after the Claim has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings based on such Claim would be barred by the applicable statute of limitations as determined pursuant to Paragraph 13.7.

4.6.4 Limitation on Consolidation or Joinder. No arbitration arising out of or relating to the Contract shall include, by consolidation or joinder or in any other manner, the Architect, the Architect's employees or consultants, except by written consent containing specific reference to the Agreement and signed by the Architect, Owner, Contractor and any other person or entity sought to be joined. No arbitration shall include, by consolidation or joinder or in any other manner, parties other than the Owner, Contractor, a separate contractor as described in Article 6 and other persons substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration. No person or entity other than the Owner, Contractor or a separate contractor as described in Article 6 shall be included as an original third party or additional third party to an arbitration whose interest or responsibility is insubstantial. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of a Claim not described therein or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

4.6.5 Claims and Timely Assertion of Claims. The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.

4.6.6 Judgment on Final Award. The award rendered by the arbitrator or arbitrators shall be final, and judgment

> may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

General Conditions, Paragraph 4.6, pp. 23-24.

However, the Supplementary Conditions expressly modify these provisions, the preamble to which states:

> The following supplements modify, change, delete from, or add to the 'General Conditions of the Contract for Construction,' AIA Document A201, 1997 Edition. Where any Article of the General Conditions is modified or deleted by these supplements, the unaltered provisions of that article, paragraph, subparagraph or clause shall remain in effect as part of the Contract Requirements.

In regard to Article 4 of the General Conditions, the Supplementary Conditions specifically provide:

> **Page 23**
>
> 4.6 ARBITRATION
>
> Change the following sub-Article title as follows:
>
> '4.6 DISPUTE RESOLUTION'
>
> 4.6.1 Change the paragraph to read as follows:
>
> '4.6.1 Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Subparagraphs 4.3.10, 9.10.4 and 9.10.5, shall, after decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to dispute resolution in the Court of Common Pleas of Carbon County, Pennsylvania. Owner, Contractor and/or Subcontractors consent to such Jurisdiction and venue. Such controversies or Claims upon which the Architect has given notice and rendered a decision as provided in Subparagraph 4.4 shall be subject to dispute resolution upon written demand of either party. Dispute resolution may commence when 45 days have passed after a Claim has been referred to the Architect as provided in Paragraph 4.3 and no decision has been rendered.'
>
> 4.6.3 Change the paragraph to read as follows:
>
> '4.6.3 A demand for dispute resolution shall be made within the time limits specified in Subparagraph 4.4.6 and 4.6.1 as applicable, and in other cases within a reasonable time after the Claim has arisen, and in no event shall it be made after the date when institution of legal or equitable

proceedings based on such Claim would be barred by the applicable statute of limitations as determined pursuant to Paragraph 13.7.'

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4.6.4 Change the last sentence to read as follows:

'The foregoing agreement to litigate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.'

4.6.5 Change the paragraph to read as follows:

'4.6.5 Claims and Timely Assertion of Claims. The party filing a notice of demand for dispute resolution must assert in the demand all Claims then known to that party on which dispute resolution is permitted to be demanded.'

4.6.6 Change the paragraph to read as follows:

'4.6.6 Judgment on Final Award. The award rendered by the Court shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.'

Supplementary Conditions, pp. 00800-7 and 00800-8.

As is evident when comparing these provisions, Subparagraph 4.6.1 of the General Conditions, as modified by the Supplementary Conditions, provides for dispute resolution of all claims in the Court of Common Pleas of Carbon County. In contrast, Subparagraph 4.6.2 of the General Conditions, also as modified by the Supplementary Conditions, provides for arbitration of all claims in accordance with the rules of the American Arbitration Association. The primary disagreement between the parties as to whether an agreement to arbitrate exists centers on these two provisions: the School District argues that Subparagraph 4.6.1 places dispute resolution of all claims before the Court of Common Pleas in Carbon County; Mar-Paul and Popple argue that, with the exception of those claims meeting the jurisdictional limits of compulsory arbitration in the court system, Subparagraph 4.6.2 requires arbitration of all other claims with the American Arbitration Association.

Whether Subparagraph 4.6.1 and Subparagraph 4.6.2 can be construed consistent with one another, the position of Mar-Paul and Popple (hereinafter referred to for convenience as

"Mar-Paul"), or whether the provisions are irreconcilably inconsistent, the position of the School District, and the effect of any such inconsistency, requires an examination of several rules of contractual construction. **Hazleton Area School District v. Bosak,** 671 A.2d 277, 281 (Pa. Commw. 1996) ("Arbitration is a matter of contract and, as such, in construing the language of an arbitration provision, courts must resort to the rules of contractual construction."). When applying these rules, it must always be remembered that "[i]n interpreting a contract, the ultimate goal is to ascertain and give effect to the intent of the parties as reasonably manifested by the language of their written agreement." **Highmark Inc., supra** at 98 (quotation marks and citations omitted).

In determining the parties' intent, when the words of an agreement to arbitrate are clear and unambiguous, the intent of the parties must be determined from the agreement itself. **Village Beer and Beverage, Inc. v. Vernon D. Cox & Co., Inc.,** 327 Pa. Super. 99, 107, 475 A.2d 117, 121 (1984). Under this rule, ambiguity is not to be manufactured by the court. As to this rule, there can be little question that, on their face and when viewed in isolation, Subparagraphs 4.6.1 and 4.6.2 clearly appear to be inconsistent with one another.

Mar-Paul argues that this perceived inconsistency can be reconciled when the scope of our review is broadened to the entire Construction Agreement and all its terms. This view reflects the rule that in construing a contract, each and every part of it must be taken into account and, if possible, given effect. **Sommerset Community Hospital v. Allan B. Mitchell & Associates, Inc.,** 454 Pa. Super. 188, 203, 685 A.2d 141, 149 (1996). The four corners of the document must be examined to ascertain the intent of the parties. Moreover, where a contract may be interpreted in a manner giving effect to all of its provisions, that interpretation is preferred. **Emlenton Area Municipal Authority, supra** at 308, 548 A.2d at 626.[3]

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[3] This preference is conditioned on the resulting interpretation being reasonable and one which does not violate the parties' overall intent as determined by the agreement itself.

> The court will if possible give effect to all parts of the instrument and a construction which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable.

At the heart of this analysis Mar-Paul argues that the meaning of "dispute resolution" in Subparagraph 4.6.1 is the same as that of "alternate dispute resolution" and that, if so construed, Subparagraphs 4.6.1 and 4.6.2 are not inconsistent. "Alternative dispute resolution," Mar-Paul contends, is by definition a procedure for settling disputes by means other than litigation, including mediation, early neutral evaluation, mini-trial and, if the parties consent, arbitration. Black's Law Dictionary (6th ed. 1990). As so applied, Mar-Paul argues that Subparagraph 4.6.1's reference to dispute resolution in the Court of Common Pleas of Carbon County refers solely to the Court's compulsory arbitration program pursuant to 42 Pa. C.S.A. §7361 (b)(2)(ii), since this is the only dispute resolution program consistently available in the Carbon County Court of Common Pleas. Because compulsory arbitration in Carbon County is limited to claims of $25,000.00 or less, when the amount in controversy exceeds this amount, as here, Mar-Paul argues that the provisions of Subparagraph 4.6.2 are triggered and arbitration is required with the American Arbitration Association.

The flaw in this position is its initial premise, that the phrase "alternative dispute resolution" defines the meaning of "dispute resolution." The argument ignores the obvious: the word "alternative" qualifies and limits the meaning of "dispute resolution"; it does not define it.

In reaching this conclusion we believe that "alternative dispute resolution" is, in fact, what Mar-Paul contends it to be, an alternative to litigation. "Dispute resolution," in contrast, is a broader term whose meaning encompasses not only alternatives to litigation but also litigation itself as a means of deciding disputes. **Sgarlat v. Griffith,** 152 Pa. Super. 233, 234, 31 A.2d 555, 556 (1943), **rev'd,** 349 Pa. 42, 36 A.2d 330 (1944) (In the interpretation of contracts words are to be given their ordinary and popularly accepted meaning, unless circumstances show that a different meaning is applicable.). When read in the context of the language of Subparagraph 4.6.1, dispute resolution

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> An interpretation which gives a reasonable, lawful and effective meaning to all manifestations of intention is preferred to an interpretation which leaves a part of such manifestations unreasonable, unlawful or of no effect.

Armstrong v. Standard Ice Co., 129 Pa. Super. 207, 211, 195 A. 171, 172-73 (1937) (quotation marks and citations omitted).

in the Court of Common Pleas of Carbon County, includes compulsory arbitration for claims of $25,000.00 or less, the right to appeal the arbitration award and litigate the dispute **de novo,** and the right to litigate in the first instance claims of more than $25,000.00.

In buttressing its argument, Mar-Paul further relies upon the principle that ambiguous language in a contract is to be interpreted most strongly against the party who selected the language. **Village Beer and Beverage, Inc., supra** at 107, 475 A.2d at 121. While this is undoubtedly true, it is also true that a very real distinction exists between vague or ambiguous language and that which is hopelessly inconsistent. Courts will not blindly interpret an agreement against the drafter, when to do so would result in an interpretation contrary to that which ascribes the most reasonable, probable and natural meaning intended by the parties. **Sun Company, Inc. (R&M) v. Pennsylvania Turnpike Commission,** 708 A.2d 875, 878-79 (Pa. Commw. 1998) ("Under the rule of **contra proferentem,** any ambiguous language in a contract is construed against the drafter and in favor of the other party if the latter's interpretation is reasonable.").

Finding that Subparagraph 4.6.2 requires arbitration while Subparagraph 4.6.1 permits litigation, which most accurately reflects the parties' true intent? In making this determination we believe it significant that, in addition to Paragraph 4.6, in Paragraph 4.4 of the General Conditions entitled "Resolution of Claims and Disputes," the School District made numerous changes in the Supplementary Conditions which replaced the word "arbitration" with the words "dispute resolution in the Court of Common Pleas of Carbon County, Pennsylvania."

The rules of contractual construction are not intended to be divorced from common sense or human experience. To do otherwise would be contrary to the natural and probable intent of the parties. In this case, the numerous and extensive changes made by the School District to the General Conditions, which conditions consist of boilerplate language appearing on a copywrited form of the American Institute of Architects ("AIA"), reflect more an intent to change that language than an intent to be bound by what preceded the changes. These extensive changes to the General Conditions demonstrate a conscious effort and

tangible expression of the School District's intent to choose dispute resolution over arbitration.[4]

Subparagraph 4.6.4 is not to the contrary. This provision, when read consistently with the parties' election of the Court of Common Pleas of Carbon County as the forum for dispute resolution, simply states that should the parties prospectively and mutually agree to arbitrate certain matters, the parties to the arbitration will be circumscribed as provided in this subparagraph. The concluding sentence of this subparagraph which, as modified by the Supplementary Conditions, expressly refers to "the foregoing agreement to **litigate** [**i.e.,** 4.6.1] ...," reinforces this interpretation.

Likewise, when considering one interpretation over another, the implications of each should be considered. **Emlenton Area Municipal Authority v. Miles, supra** at 308, 548 A.2d at 626. Prior to the changes effected by the Supplementary Conditions, the General Conditions provided not only that the parties arbi-

[4] Interrelated to this inference, is the additional principle that in determining the intent of the parties to an agreement, courts may consider whether words were inadvertently omitted from the agreement, which, if included, would establish the intent of the parties. **Armstrong v. Standard Ice Co., supra.** There, the court stated:

> It is not unusual either in speech or writing to omit a word which the hearer or reader will naturally supply. In fact, such a situation is common where corresponding situations are treated in a single sentence. In supplying words omitted we do not make a contract for the parties or do violence to their own writing. We, on the contrary, seek the contractual intent from the writing itself.
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> * * *
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> In giving effect to the meaning of a writing particular words are sometimes wholly disregarded or, as here, supplied. Such an omission may always be supplied by construction of law, if from the context it appears with certainty what word or words were inadvertently omitted. In supplying omitted words which the context clearly shows must be read in connection with it to make the instrument the full expression of the manifest intention and understanding of the parties to it, the same is neither altered, varied, nor contradicted, but merely put in the shape in which it was intended it should be at the time it was executed.

Armstrong, supra, 195 A. at 173 (citations omitted).

It appears from the changes that were made, that the language on which Mar-Paul relies should consistently have also been changed, but wasn't. This oversight does not alter the overall intent, evidenced by the numerous changes actually made, to resolve all disputes through dispute resolution in the Court of Common Pleas of Carbon County.

trate all claims on which they could not agree, but that the arbitration be binding. General Conditions, Subparagraph 4.6.6. This language has been modified by the Supplementary Conditions to make final only those awards rendered by the Court; were we to accept Mar-Paul's position, and to direct the parties to proceed with arbitration, there is no provision remaining in the Construction Agreement which would make the award binding and would foreclose subsequent litigation of the claim. We doubt that either this consequence or an interpretation which would bind the parties to an award resulting from compulsory arbitration in the Court of Common Pleas, without further review, was intended by the parties.

Finally, in determining the parties' intent we refer to another principle of contractual construction: when two inherently contradictory provisions coexist in an agreement, the latter of the two provisions yields to the earlier provision. **Hoover v. Alexander,** 107 Pa. Super. 98, 102, 163 A. 389, 390 (1932) (**citing Harrity v. Continental-Equitable Title & Trust Co.,** 280 Pa. 237, 124 A. 493 (1924)). Under this principle, the arbitration clause being the latter of the two clauses, must yield to the dispute resolution clause.

CONCLUSION

In accordance with the foregoing, we believe the School District's construction of the various interrelating contractual provisions "ascribes the most reasonable, probable, and natural" intention of the parties. This intent to adjudicate disputes arising from the Construction Agreement is incongruous with an obligation to arbitrate and requires that the arbitration commenced by Mar-Paul and Popple before the American Arbitration Association be stayed.

ORDER OF COURT

AND NOW this 19th day of July, 2004, upon consideration of the Petition of the Jim Thorpe Area School District to stay the arbitration proceedings commenced by Mar-Paul Construction Company, Inc. and Popple Construction, Inc., and after review of the Stipulation of Facts presented by the parties and further consideration of the legal briefs and arguments presented by counsel, it is hereby

ORDERED and DECREED that the Petition is granted and the arbitration pending before the American Arbitration Association is hereby stayed.

JAY KAPLAN and ELLEN KAPLAN, Plaintiffs vs. MICHAEL DUDAK, MARIBETH DUDAK and DECKS 'N STUFF, Defendants

Civil Action—Partnerships—Dissolution of Partnership—Winding Up—Distribution of Partnership Property

1. Whether individuals are partners in a business is a question of intention and all surrounding facts and attending circumstances must be considered. Documentary evidence such as an application to register a fictitious name, a lease of the business premises and a sales agreement, prepared prior to any dispute as to who the partners were in a business, are persuasive evidence of the identity of the partners.

2. Property originally brought into partnership stock or subsequently acquired by purchase on account of the partnership is partnership property of which each partner is a co-owner. Whether property belongs to the partnership or an individual is a question of intention.

3. After a partnership dissolves, it continues to exist until the winding up of the partnership affairs is complete. Any partner who is not responsible for improperly dissolving the partnership has the authority to act on behalf of the partnership in winding up its affairs, but is obligated to act reasonably and in good faith.

4. Under the Uniform Partnership Act, upon dissolution of a partnership, assets are to be distributed first to creditors and partners to whom the partnership owes debts. Then, partnership assets should be distributed to the partners in accordance with their contributions. Where the contribution of each partner is unclear and partners have agreed to be equal partners and divide profits equally, capital contributions should also be divided equally upon dissolution.

NO. 01-0136

RONALD J. GORDON, Esquire—Counsel for Plaintiffs.

JEFFREY G. VELANDER, Esquire—Counsel for Defendants.

MEMORANDUM OPINION

NANOVIC, J.—July 16, 2004

The subject of this litigation is the liquidation and distribution of the business assets of a restaurant known as Edy's Place operated as a partnership for approximately five months by the Plaintiff, Jay Kaplan, the Defendant, Michael Dudak, and a third party, Kristi Chacon.[1] After a non-jury trial in this matter, we make the following

[1] By agreement and written waiver failed of record, Kristi Chacon and her husband, Edy Chacon, have disclaimed and waived any and all rights and interests they may have in the assets of Edy's Place and have been released by the parties with respect to any obligations or debts for which they might otherwise be responsible concerning this business (Plaintiffs' Exhibit No. 23).

FINDINGS OF FACT

1. In late May, early June, 1999, Jay Kaplan, Michael Dudak and Kristi Chacon reached an agreement to own and operate a restaurant to be known as Edy's Place at the same site of a previous restaurant, known as Edy's Bistro, located in Brodheadsville, Monroe County, Pennsylvania. The site was to be leased from Ismet Kalar and Guldane Kalar, his wife (the "Landlord").

2. Kristi Chacon is the daughter of James Stewart, one of the two previous owners of Edy's Bistro, the other being Tammy Torgerson. Kristi Chacon worked full-time at Edy's Bistro as a waitress, along with her husband, Edy Chacon, who was the chef (the "Chacons").

3. Prior to May 1999, the owners of Edy's Bistro were looking to expand their business and attracted the attention of Jay and Ellen Kaplan (the "Kaplans"), the Plaintiffs in these proceedings, to be investors.

4. During the period beginning near the end of 1998 and continuing until April 1999, the Kaplans invested approximately $45,000.00 into Edy's Bistro. These monies were used to pay bills and operating expenses, purchase equipment and renovate the business premises. Of this amount, the Kaplans paid the unpaid balance of $5,560.00 owed for equipment previously purchased by Edy's Bistro from Frank's Pizza, paid $3,650.00 to Edy's Bistro for construction work performed by Bob Syracuse, deposited $15,000.00 into Edy's Bistro's checking account to pay bills, wrote checks to Edy's Bistro for another $5,425.00 for the purchase of equipment by Edy's Bistro, and purchased equipment in the name of Jay Kaplan at a cost of $13,555.48.

5. Edy's Bistro was not profitable and by April 1999, the owners decided to quit the business.

6. The Kaplans and the Chacons discussed continuing the business as a partnership between them, however, during these discussions they learned from the Landlord that a mechanic's claim had been filed against the business by the Defendant, Decks 'N Stuff, Inc., a business owned and operated by the Defendant, Michael Dudak. The face amount of this mechanic's lien was $10,013.11.

7. The basis of the mechanic's claim was remodeling work performed on the premises by Decks 'N Stuff for the owners

and operators of Edy's Bistro. The Landlord advised the Kaplans and the Chacons that he would not lease the property to them unless the mechanic's lien was first released.

8. The Kaplans and Chacons met with Michael Dudak to discuss the release of Decks 'N Stuff's mechanic's lien. During the course of these discussions, in May 1999, an agreement was reached between the parties whereby Jay Kaplan, Kristi Chacon and Michael Dudak would become equal partners (the "Partners") in the operation of a restaurant, to be known as Edy's Place (Defendants' Exhibit 10). The general purpose of this Partnership was the owning and operation of the restaurant for profit. The term of the agreement was indefinite.

9. As part of the agreement between the parties, Decks 'N Stuff would release its mechanic's lien on the premises[2] and the Kaplans would contribute the equipment previously purchased by them for Edy's Bistro to the business. The Chacons were to continue as full-time employees of the business, to be paid a salary, and the Kaplans and the Dudaks would initially provide in-kind labor in the business as their schedules permitted.

10. In addition to the contribution of the equipment they had purchased for Edy's Bistro, the Kaplans requested that some additional consideration be given to the fact that they had already contributed substantial monies to Edy's Bistro. Because of these payments—the amount of which at the time was not disclosed to the Dudaks—the Kaplans asked that some monies be paid to them prior to the division of profits between the Partners. No specific amount was ever requested and no agreement was reached on this request by the Kaplans.

11. No written partnership agreement was ever prepared, nor do any contemporaneously written memoranda exist, specifically describing the duties and financial interests of each of the Partners in the Partnership.

12. The value of the respective assets contributed to the Partnership at the time of its formation by each of the Partners was never specifically identified, however, the Partners did agree to become equal partners and to divide profits equally.

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[2] During his discussions with the parties, Michael Dudak stated that he had other means by which to collect the amount owed on the mechanic's lien. **See** 49 P.S. §1702.

13. Between May 1999 and October, 1999 Edy's Place was owned and operated by the Partners.

14. Unfortunately for all parties, the business at this location continued to be unprofitable. Sometime in the fall of 1999, the Partners decided to sell the business and, on or about October 21, 1999, the business was sold to Bianca Realbuto ("Buyer") for a price of $50,000.00. The purchase price was to be paid $20,000.00 at the time of signing the Agreement of Sale and the balance in equal monthly installments of $594.04 over a five-year period. A promissory note in the face amount of $30,000.00 made payable to Jay Kaplan, Michael Dudak and Kristie Chacon jointly as individuals and lenders was provided to secure these payments.

15. The sale of the business occurred as agreed and the first payment of $20,000.00 was received and deposited by Michael Dudak into the Partnership's business checking account.

16. Michael Dudak used the monies received from the Buyer to pay business debts of Edy's Place and also paid himself $1,100.00 and the Defendant, Decks 'N Stuff, $9,100.00 from these monies.

17. Of the $9,100.00 paid to Decks 'N Stuff, $7,600.00 was not authorized by the Partners and the Partnership did not owe this money to Decks 'N Stuff (Plaintiffs' Exhibit Nos. 10 and 12). The payment to Decks 'N Stuff of $1,500.00 made on October 26, 1999 was properly owed and paid (Plaintiffs' Exhibit No. 18).

18. The payments totaling $1,100.00 made to Michael Dudak were not authorized by the Partners and the Partnership did not owe this money to Mr. Dudak (Plaintiffs' Exhibit Nos. 13, 15, 16 and 17).

19. With the exception of the payments totaling $8,700.00 to himself and Decks 'N Stuff, the remaining payments made from the Partnership checking account by Michael Dudak were proper payments for business debts and expenses.

20. The Partnership checking account was closed in December 1999.

21. The Buyer's operation of the restaurant also failed. None of the installment payments to be made under the sales agreement were ever paid.

22. Sometime in either December 1999, or January 2000, the Buyer contacted Michael Dudak and notified him that she was vacating the premises and leaving the equipment in place. She also requested that the Partners take back the equipment in exchange for releasing the obligation owed to the Partners under the promissory note.

23. At or about this same time, the Buyer was in default of the rental payments owed to the Landlord and the Landlord notified Michael Dudak that unless the equipment was removed it would be distrained and locked in place.

24. Michael Dudak advised Jay Kaplan of the Landlord's request and it was agreed between them that the equipment be removed and placed in storage. This was done by Michael Dudak with employees of Decks 'N Stuff.

25. In removing this equipment, Michael Dudak acted properly and in good faith.

26. During the first year the equipment was in storage, Michael Dudak advertised and attempted to find a buyer for this property. The best offer received was somewhere between $3,000.00 and $4,000.00. This offer was discussed by Mr. Dudak with Mr. Kaplan and it was agreed between them that the offer was too low and should be refused. The offer was never accepted.

27. After the first year of storage, the equipment was moved by Mr. Dudak to another location to avoid further storage fees. The equipment continues to be at this location. Insufficient evidence was presented for the Court to determine the present fair market value of the equipment currently in storage.

28. Since the time the equipment was removed from the restaurant location, the only item of equipment sold was a sink for which Mr. Kaplan received $300.00.

29. In 2001, the Kaplans paid $341.99 to the unemployment compensation fund on behalf of Edy's Place.

DISCUSSION

This case, unfortunately for the parties, is a case study of the importance when entering a business relationship with another to define by written agreement exactly what the relationship is and what the rights and obligations are to one another. In the absence of such an agreement, should a dispute later

arise, the parties risk having a court decide the most fundamental aspects of their relationship, oftentimes in ways unanticipated by the parties and in ways which would have been decided differently had the parties addressed the issues directly in their agreement.

Existence of Partnership

The parties in this case do not dispute that Edy's Place was organized as a partnership, however, they do dispute who the partners were.[3] The Dudaks contend that the only partners were Jay Kaplan, Michael Dudak and Kristie Chacon. The Kaplans claim that the Partnership included not only these three individuals but also their spouses, Ellen Kaplan, Maribeth Dudak and Edy Chacon, respectively. No written partnership agreement exists addressing this basic issue.

Whether individuals are in fact partners is a question of intention, not of law. **Barbet v. Ostovar,** 273 Pa. Super. 256, 265, 417 A.2d 636, 641 (1979). An agreement expressing this intention, either express or implied, must exist. **O'Donnell v. McLoughlin,** 386 Pa. 187, 125 A.2d 370 (1956). In ascertaining the parties' intention, all surrounding facts and attending circumstances may be considered. **Gohen v. Gravelle,** 411 Pa. 520, 192 A.2d 414 (1963).

On this issue, we find persuasive the documentary evidence prepared prior to the existence of any controversy between the parties. Significantly, the application to register Edy's Place as a fictitious name identifies only Jay Kaplan, Michael Dudak and Kristie Chacon as owners of the business with the form of the business designated as a partnership (Defendants' Exhibit No. 10). No other owners are identified. While various features may be indicia of a partnership, the indispensable feature of a partner is to be an owner of the business involved. 15 Pa. C.S. §8311(a).

The application is dated May 28, 1999, near the time when the parties first formed their business association, and is signed by each of the Partners. There is no claim that the application was fraudulently, accidently or mistakenly prepared. Our determination that Jay Kaplan, Michael Dudak and Kristie Chacon

[3] In the absence of agreement, the burden of proving a partnership is on the party seeking relief. **Barbet v. Ostovar,** 273 Pa. Super. 256, 271, 417 A.2d 636, 644 (1979) (Spaeth, J., Opinion in Support of Reversal).

were the only partners is supported by the lease for the business premises and the sales agreement, both of which are dated October 1999: in both, only Jay Kaplan, Michael Dudak and Kristie Chacon are named as lessees and sellers respectively.[4]

Determination of Partnership Property

Property originally brought into partnership stock or subsequently acquired by purchase on account of the partnership is partnership property in which each partner is considered a co-owner. 15 Pa. C.S. §§8313(a), 8342(a); **In re Estate of Rider,** 487 Pa. 373, 378, 409 A.2d 397, 400 (1979). Whether specific property is partnership property is largely a question of intention. **Id.**

While the Kaplans claim to have invested close to $45,000.00 in Edy's Bistro, the meaning and significance of this to the present case is unclear. The evidence is inconclusive as to whether the Kaplans were creditors of or partners in Edy's Bistro, and whether Jay Kaplan retained individual ownership of the equipment purchased in his name for use by Edy's Bistro or contributed this equipment to Edy's Bistro as a partnership asset. Also unclear is the value of the equipment, or of Jay Kaplan's interest in such equipment, at the time of his capital contribution to the Partnership and what, if any, property of Edy's Bistro was contributed to the Partnership, by whom and at what value.

Although the evidence is murky on these issues, there is no question that Mr. Kaplan intended and did contribute whatever interest he possessed in such equipment to the Partnership. Absent this contribution, there would be no basis for the Kaplans to ask that they be paid any monies in advance of profits being equally divided between the Partners. It is also clear that the Chacons agreed to continue their employment at the restaurant, for pay, and that a very real benefit was contributed by Michael Dudak in arranging for Decks 'N Stuff's mechanic's lien to be released, not satisfied, thereby allowing the restaurant to operate at the same location at which Edy's Bistro had operated.[5]

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[4] In the sales agreement, the Sellers are specifically identified as "Michael Dudak, Kristi Chacon and Jay Kaplan, t/a Edy's Place."

[5] Whether the mechanic's lien was validly perfected against the premises absent the written consent of the owner to the work performed by Decks 'N Stuff is doubtful. **Murray v. Zemon,** 402 Pa. 354, 167 A.2d 253 (1960).

Regardless of what was contributed by each Partner, and its value, it is clear that the Partners unanimously joined in the sale of the business—and consequently the dissolution and liquidation of the Partnership—and when they did so they treated all of the restaurant equipment as Partnership property subject to being sold by the Partnership (Plaintiffs' Exhibit No. 21, Agreement of Sale).

Winding Up Partnership Business

Under Pennsylvania law, a partnership is not terminated on dissolution. "Dissolution of a partnership is statutorily defined as 'the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on, as distinguished from the winding up, of the business.' " **Girard Bank v. Haley,** 460 Pa. 237, 242, 332 A.2d 443, 446 (1975), **quoting** 59 P.S. §91, now 15 Pa. C.S. §8351. "[A]fter dissolution, a partnership is not terminated but continues to exist until the winding up of partnership affairs is completed, and the authority remains to act for the partnership in winding up partnership affairs and completing transactions begun but not yet finished at the time of dissolution." **North Star Coal Co. v. Teodori,** 442 Pa. 583, 586, 277 A.2d 154, 156 (1971).

Any partner not responsible for improperly dissolving the partnership has the right and duty to act in winding up the affairs of the partnership. 15 Pa. C.S. §8359; **Hankin v. Hankin,** 279 Pa. Super. 179, 202 n.22, 420 A.2d 1090, 1102 n.22 (1980). In doing so, the partner acts in a fiduciary capacity vis-à-vis the other partners; the partner is obligated to act reasonably and in good faith. 15 Pa. C.S. §8334(a).[6] In this capacity, Michael Dudak was authorized to pay legitimate trade debts of the Partnership accrued in the ordinary course of business.[7]

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[6] Partners stand in a fiduciary relationship to copartners; each is under a duty to act for the benefit of all and not to gain individual advantage at the expense or to the detriment of other partners: Partnership Act of March 26, 1915, P.L. 18, part 4, section 21 [59 P.S. §54]. When a partnership has terminated, for whatever reason or by whatever means, the assets of the partnership must still be handled in accordance with this fiduciary principle.

Bracht v. Connell, 313 Pa. 397, 402, 170 A. 297, 299 (1933).

[7] Mr. Dudak has not claimed and would not be entitled to compensation for this work.

Generally speaking, a partner is not entitled to compensation for services in performing partnership matters or in winding up its affairs [**e.g.,** receiving

To the extent of the payments to Decks 'N Stuff totaling $7,600.00 and those payments Michael Dudak made to himself of $1,100.00, these payments were neither authorized nor ordinary and legitimate debts of the business and were improperly made. The payments bear a striking resemblance to the debt claimed by Decks 'N Stuff against Edy's Bistro and which formed the basis of Decks 'N Stuff's mechanic's lien. In making these payments, Michael Dudak breached his fiduciary obligation to the Partnership, and its members, and is subject to individual damages.

Division and Distribution of Partnership Property

In the absence of agreement, the provisions of the Uniform Partnership Act control the disposition and division of partnership property in dissolution. **Girard Bank v. Haley, supra** at 242, 332 A.2d at 446. Here, the parties agreed both to dissolve the partnership and to liquidate its assets by the sale to Bianca Realbuto.

As part and parcel of the sale to the Buyer, the Partners also agreed on the distribution of the liquidation proceeds. The $20,000.00 initial payment was to be used first to pay Partnership debts and the balance to be divided between the Partners. The $30,000.00 unpaid balance was secured by a promissory note payable jointly to the three Partners. By their conduct and by the closing documents executed in conjunction with the sale of the business, the Partners expressed their intent and agreement to an equal division of the proceeds from this sale. Any previous agreements of the Partners were merged into and superseded by this agreement.

This result in this case is consistent with that reached under the Uniform Partnership Act. In the case of an unequal contribution of capital, and absent an agreement to the contrary, the provisions of this Act provide that the return of capital "will be governed by the ordinary rule of law, which is: that the distribu-

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money due, paying firm debts and dividing the surplus, for the purposes of liquidation]. A right to compensation arises only where the services rendered extend beyond normal partnership functions [**e.g.,** performing acts similar to those of a liquidating partner who continues unfinished business in an effort to complete it profitably, or as a surviving partner who carries on the business after the termination of a partnership].

Kirby v. Kalbacher, 373 Pa. 103, 105, 95 A.2d 535, 540 (1953); **see also, Bracht v. Connell, supra** at 404, 170 A. at 300 and 15 Pa. C.S. §8331(6).

tion of capital upon dissolution of a partnership is in the same proportion in which such capital was furnished." **Glenn v. Weill,** 319 Pa. 380, 384, 179 A. 563, 565 (1935).

> 'Where a partnership is dissolved and its affairs are wound up, there must be a return of the firm capital to the partners contributing it, in order that there may be a distribution of the profits. Each partner's contribution is regarded as a firm debt to such partner, which must be repaid before there are any profits to be divided. Where one partner has advanced capital in excess of another, the amount advanced is a preferred claim upon the property of the firm. The distribution of capital upon dissolution is in the same proportion in which such capital was furnished.'
>
> A Pennsylvania case clearly establishing this principle and applying in its facts to the present case is Plumly's Appeal, 1 Mona. 177, [178, 16 Atl. 728], where the master said … : 'When the partnership came to an end, December 31, 1884, it was the plaintiff's right to have the assets converted into money, to have all liabilities to non-partners satisfied therefrom, and, out of what remained, to have returned to each partner his capital. If there was not sufficient for the return of the capital of each, the sum that was wanting should have been treated as a partnership loss: **Nowell v. Nowell,** 7 L. R. Eq. 538; and paid as other losses are payable; and, as has appeared, that was two-thirds by the defendant and one-third by the plaintiff.' In this particular the report of the master was confirmed by the court below, and by this court.

Adams v. Hubbard, 221 Pa. 511, 517, 70 A. 835, 837 (1908), **quoted in Glenn v. Weill, supra** at 383, 179 A. at 564; **see also, Lyman v. Wood,** 169 Pa. Super. 512, 83 A.2d 420 (1951); 15 Pa. C.S. §8362(3).

In accordance with these provisions, the assets are to be distributed first to third-party creditors and then to debt owed to partners. Here, no outstanding debt exists. The next level of distribution is that to partners in respect to capital. No Partnership books were maintained reflecting capital accounts and, as previously indicated, the value of the contribution of each Partner is uncertain and unclear. Under these circumstances, where a partner fails to keep a record of partnership transac-

tions and is unable to satisfactorily account for them, every presumption will be made against him. **Bracht v. Connell, supra** at 405, 170 A. at 301; **see also, Glazer v. Kurman,** 384 Pa. 283, 120 A.2d 892, 894 (1956) (where the tangled financial state of a partnership is brought about by defendant's wrongful conduct, the chancellor should and will resolve all financial ambiguities against the defendant). Accordingly, having found that the Partners agreed to become equal partners and to divide profits equally, we also find that any capital contributions made by the Partners were also to be divided equally. 15 Pa. C.S. §8362(4).

Liquidation of Partnership Assets

In the absence of agreement, the liquidation of partnership assets requires that partnership property be sold and distribution be made in cash, rather than in kind. 15 Pa. C.S. §8360(a).[8] Because the value of the assets in storage appears to be minimal, we do not believe the appointment of a receiver to liquidate these assets is justified or, after the payment of the expenses of a receiver, would serve the best interests of all the Partners.[9]

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[8] [I]n the present case we think there was an abuse of discretion and reversible error in the refusal of the court to direct the winding up of the affairs of the partnership and the sale of its assets through a receiver or otherwise. 'The general rule is that, upon dissolution of a partnership, it is the right of each partner to have the property converted into money by a sale': **Kelley v. Shay,** 206 Pa. 208, 55 A. 925, [927 (1903)]. In 47 C.J., §988, p. 1258, it is stated: 'In an action for a partnership dissolution and accounting, unless all the partners, by an honest and lawful agreement, assent to a distribution of the assets in specie, the entire property of the firm should, as a rule, be converted into cash by a sale of the assets, which sale ordinarily should include the good will of the firm. ...' Generally, a sale will not be ordered if prejudicial to an innocent partner (**cf. Dow v. Beals,** [149 Misc. 631,] 268 N.Y.S. 425) unless, as here, the innocent partner has consented to the sale.

Weissman v. Henkin, 154 Pa. Super. 12, 15, 34 A.2d 907, 909 (1943); **cf. Hankin v. Hankin,** 302 Pa. Super. 295, 300, 448 A.2d 1049, 1051-52 (1981) (distribution in kind may be appropriate in some cases).

[9] Whether a receiver should be appointed is left to the discretion of the Court.

'Such appointments rest in the sound discretion of the court; and, in exercising such discretion, it proceeds cautiously and is governed by a view of the whole circumstances of the case. No positive or unvarying rule can be laid down as applicable to all cases. If there be no danger to the property and

We also believe the parties would be better served by agreeing to an equal division, in kind, of the assets now in storage and will provide them that opportunity.[10] If, however, they are unable to agree, we will direct Michael Dudak to advertise and place for absolute auction these assets.[11]

> nothing to show the necessity or expendiency of appointing a receiver, none should be appointed: Kerron Receivers, pp. 4, 5, 9; Bispham's Eq., sec. 577.'

Moffett v. Peirce et al., 344 Pa. 16, 22, 24 A.2d 448, 450 (1942); **Hankin v. Hankin,** 279 Pa. Super. at 203, 420 A.2d at 1103 (In determining whether to appoint a receiver, among the factors to be considered are "the existence of dissension among the partners, dissipation of the partnership assets, fraud or mismanagement by the controlling partners, the denial of the plaintiff partner's rights as a partner, and the balance of necessity and benefits against injury incident to the appointment of a receiver."). The authority to appoint a receiver arises not from the Uniform Partnership Act but from "the court's equitable powers to appoint a receiver as an ancillary remedy in an action for another form of relief." **Id.** at 202-203 n.22, 420 A.2d at 1102 n.22.

[10] In this case, the parties have not argued whether once the equipment was repossessed after liquidation it retained its status as Partnership property owned by the Partners as tenants in partnership, 15 Pa. C.S. §8342(a), or whether the property was transformed into that in which each of the former Partners holds an equal and undivided interest as tenants in common. In the latter situation, a proceeding in partition would be appropriate in the division and sale of jointly-owned personalty. 68 P.S. §111. In such proceedings, property capable of proportionate division may be distributed equitably between the parties rather than being sold and the proceeds divided. The issue not having been raised, has been waived.

[11] In making our decision, we are also cognizant that the present action has been filed at law rather than in equity. The Complaint, while recognizing that partners are accountable to one another as fiduciaries and have the right to demand a formal account as to Partnership affairs, does not request the Defendants to state or file an account of the assets or the receipts and disbursements of the business of the Partnership, or seek the appointment of a receiver to liquidate assets. Still, the Complaint, after alleging that the Kaplans are entitled to "their rightful share of any such proceeds and any such amounts due and owing to Plaintiffs concerning the liquidation and/or sale of [the Partnership] assets," demands judgment in an amount not in excess of $50,000.00, together with costs and interest.

Whether we have jurisdiction at law to resolve all the claims presented in this case is a close question; one not raised by the parties. Ordinarily, because of the need for continuing court involvement and the forms of relief available, the exercise of equitable jurisdiction is preferable in actions between partners regarding partnership affairs:

> Notwithstanding the fact … that there is concurrent jurisdiction of law and equity of actions by partners against copartners in connection with partnership affairs, repeated decisions have indicated that resort in such cases should be had to proceedings in equity unless the partnership was for a single transaction, or, at least, unless the accounting required was not complicated, or unless the business had been wound up, all partnership matters settled, and a balance

CONCLUSIONS OF LAW

1. For a period of approximately five months, Edy's Place was owned and operated by Jay Kaplan, Michael Dudak and Kristi Chacon as equal and general partners.

2. The Partnership known as Edy's Place voluntarily dissolved upon the sale of its assets to the Buyer, Bianca Realbuto. It was at this point that the relationship between the Partners changed from that of carrying on a business for profit to that of winding up its affairs.

3. With the exception of an agreement to become equal partners and to divide profits equally, no evidence was presented as to the terms and conditions of any agreement reached between the Partners concerning their respective ownership interests, or their rights and duties with respect to the repayment of debts of the Partnership prior to its dissolution.

4. In the absence of a contrary agreement between partners, the rights and duties of the partners are governed by the provisions of the Uniform Partnership Act (the "Act"), 15 Pa. C.S. §§8301-8365.

5. In the absence of agreement to the contrary, the winding up and liquidating of a partnership is controlled by the Uniform Partnership Act.

6. Pursuant to the Act, upon dissolution each partner is to be repaid his contributions and the profits and losses of the

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> determined to be due. It is obvious that in all other cases the flexible methods of equity are better adapted to accomplish the proper distribution of the assets of the partnership and to determine the relative rights and obligations of the partners.

Donatelli v. Carino, 384 Pa. 582, 585, 122 A.2d 36, 38 (1956) (footnote omitted).

Here, the Partnership has previously been dissolved and its affairs wound up. The sole remaining issue is the division and liquidation of restaurant equipment previously liquidated, repossessed by necessity, placed in storage, and which appears to be of modest value. Under these circumstances, the remaining matters necessary to terminate the Partnership, which itself was approximately of only five months duration, should not be complicated and, we believe, are best dealt with at this time. The parties have had an opportunity to place all necessary facts before the Court and no further accounting is believed necessary. Accordingly, we conclude that the remedies at law are adequate and may be properly and appropriately exercised in this case. **Cf. Taylor v. Richman,** 395 Pa. 162, 168, 149 A.2d 69, 72 (1959) (In uncomplicated matters, an action for an accounting may be addressed in an action at law.).

partnership are to be divided equally between the partners. 15 Pa. C.S.A. §8331(1).

7. Pursuant to the terms of the agreement of sale entered with the Buyer, and the promissory note accepted in payment of the unpaid purchase price, the Partners agreed to an equal division of the proceeds received from liquidation of the Partnership assets.

8. The Partnership failed to maintain records stating the capital contribution of each Partner. In the absence of such records and clear evidence establishing the value of the contribution of each Partner to the Partnership at the time of its formation, it is appropriate and required where the Partners have agreed to be equal partners and to an equal division of profits that the capital contributions of the Partners be divided equally.

9. Prior to its dissolution, the Partnership accumulated no profits.

10. The Partners' entire interest in the Partnership was sold for $50,000.00 of which amount only $20,000.00 was ever received.

11. The $7,600.00 distributed by Michael Dudak to Decks 'N Stuff from the initial deposit of $20,000.00 received from the Buyer pursuant to the agreement of sale was never authorized by the Partnership and was an improper distribution of Partnership assets.

12. The payments which Michael Dudak made to himself of $1,100.00 from the initial deposit of $20,000.00 received from the Buyer were not authorized by the Partnership and were improper distributions of Partnership assets.

13. With the exception of the payments to Decks 'N Stuff totaling $7,600.00 and those to Michael Dudak totaling $1,100.00, the Kaplans have failed to establish that any other payments from the Partnership account were improper.

14. Ellen Kaplan and Edy Chacon were not partners in Edy's Place.

15. Maribeth Dudak was not a partner in Edy's Place and did not receive any payments or property from Edy's Place improperly.

16. Because the Chacons have waived all rights to recovery, on liquidation, all former assets of Edy's Place now being held

in storage by Michael Dudak should be divided on a 50/50 basis between Jay Kaplan and Michael Dudak.

17. Michael Dudak is obligated to pay Jay Kaplan the sum of $4,671.00, this amount representing one-half of the $7,600.00 paid to Decks 'N Stuff, one-half of the $1,100.00 paid to Michael Dudak, one-half of the proceeds from the sale of the sink for $300.00, and one-half of $341.99, the amount paid by Jay Kaplan on behalf of Edy's Place to the Unemployment Compensation fund.

18. The Defendant, Decks 'N Stuff, has been unjustly enriched to the extent of $7,600.00 from the payments made to it by the Defendant, Michael Dudak, from Partnership assets for which the Partnership was not indebted to this Defendant. **Schenck v. K.E. David, Ltd.,** 446 Pa. Super. 94, 666 A.2d 327 (1995), **appeal denied,** 544 Pa. 660, 676 A.2d 1200 (1996).

19. Any equipment of Edy's Place remaining in storage should be divided equally between Jay Kaplan and Michael Dudak, and in the absence of agreement as to its division should be sold and the proceeds divided equally between them.

20. Based on the foregoing Findings of Fact and Conclusions of Law, we issue the following:

VERDICT

AND NOW, this 16th day of July, 2004, in accordance with the above Findings of Fact and Conclusions of Law, we find in favor of the Plaintiff, Jay Kaplan, and against the Defendants, Michael Dudak and Decks 'N Stuff. We also find in favor of the Defendants and against the Plaintiff, Ellen Kaplan, and also in favor of the Defendant, Maribeth Dudak, and against the Plaintiff, Jay Kaplan.

It is further ORDERED, ADJUDGED and DECREED as follows:

1. Defendant, Michael Dudak, is hereby ordered to pay Plaintiff, Jay Kaplan, the sum of $4,671.00 with interest thereon from November 30, 1999. Said Defendant shall be given credit for any monies paid by or on behalf of the Defendant, Decks 'N Stuff, in accordance with Paragraph 2 of this Verdict.

2. The Defendant, Decks 'N Stuff, is hereby ordered to pay Plaintiff, Jay Kaplan, the sum of $3,800.00 with interest thereon from November 30, 1999.

3. The parties shall be provided a period of thirty (30) days from the date of this Verdict within which to reach agreement on an equal division of the remaining equipment of Edy's Place currently in storage. If the parties cannot amicably agree to a disposition of this property, it is directed that the Defendant, Michael Dudak, arrange within sixty (60) days thereafter for the property to be sold at an absolute public auction. After deduction for the costs and commissions of the sale, and the payment of $4,671.00 to the Plaintiff, Jay Kaplan, the net proceeds, if any, from such sale shall be distributed equally between the Plaintiff, Jay Kaplan, and the Defendant, Michael Dudak.

4. The costs of the these proceedings shall be paid by the Defendants, Michael Dudak and Decks 'N Stuff.

5. Pursuant to Pa. R.C.P. No. 227.4, the Prothonotary shall, upon praecipe, enter judgment on the decision if no motion for post-trial relief has been filed under Pa. R.C.P. No. 227.1 within ten (10) days after notice of filing this decision.

COMMONWEALTH OF PENNSYLVANIA vs.
JOHN CLELAND, Defendant

Criminal Law—Right to a Speedy Trial—Rule 600—Calculation of Excludable Time—Necessity for Commonwealth To Exercise Due Diligence

1. Rule 600(A)(2) requires that trial commence within 180 days for a defendant who is incarcerated. If the defendant has been incarcerated for more than 180 days, the defendant's remedy is immediate release on nominal bail, not dismissal of the charges.

2. In making the Rule 600 calculation, Rule 600(C) identifies certain periods that are to be excluded. For the time during which a defendant's pretrial motion is pending to be considered excludable, the Commonwealth must establish by a preponderance of the evidence that (1) the filing of the pretrial motion caused an actual delay in the commencement of trial; and (2) the Commonwealth exercised due diligence in opposing or responding to the motion.

3. Where defendant files a pretrial motion successfully challenging the pool from which prospective jurors are selected, and the Commonwealth's response is reasonable and timely, the period during which trial is delayed because of the motion is excludable for purposes of Rule 600(C).

NO. 208 CR 03

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

BRIAN B. GAZO, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, J.—August 25, 2004

Before us is Defendant John Cleland's petition claiming that he is entitled to immediate release on nominal bail pursuant to Rule 600(E) of the Pennsylvania Rules of Criminal Procedure. See Pa. R.Crim.P. 600(E).

PROCEDURAL AND FACTUAL BACKGROUND

Previously, by Order dated April 30, 2004, we calculated the period of non-excludable time for which the Defendant is entitled to credit under Rule 600(C) to be 169 days. This same order also confirmed May 10, 2004, as the date on which trial would commence.

Since April 30, 2004, trial has not occurred and Defendant has remained incarcerated. Defendant argues that this delay is not attributable to him, but to a breakdown in the court system for which he is not responsible, and which is therefore not excludable time under Rule 600.

Rule 600(A)(2) provides that trial must commence within 180 days of the filing of the criminal complaint, if the defendant is incarcerated on the matter. Under these circumstances—incarceration and a failure to commence trial within 180 days—the defendant is entitled to immediate release on nominal bail. **Commonwealth v. Abdullah,** 539 Pa. 351, 354, 652 A.2d 811, 812-13 (1995).

In computing whether 180 days have elapsed, "excludable time," a term derived from Rule 600(C), must be subtracted from the calculation. Excludable time consists of:

> (1) the period of time between the filing of the written complaint and the defendant's arrest, provided that the defendant could not be apprehended because his or her whereabouts were unknown and could not be determined by due diligence;
>
> (2) any period of time for which the defendant expressly waives Rule 600;
>
> (3) such period of delay at any stage of the proceedings as results from:
>
> (a) the unavailability of the defendant or the defendant's attorney;

(b) any continuance granted at the request of the defendant or the defendant's attorney.

See Pa. R.Crim.P. 600(C)(1)-(3). All other periods of delay, whether caused by the Commonwealth, by the court, or by other causes, are legally imputed to the Commonwealth and, consequently, are periods which the defendant is entitled to have counted in determining his eligibility for release. Rule 600(E); **Commonwealth v. Aaron,** 804 A.2d 39, 43 (Pa. Super. 2002).

In ruling on Defendant's Petition for Release, subsections (C)(1) and (2) of Rule 600 are inapplicable under the circumstances of this case. However, because Defendant has filed various pretrial motions and continuances since April 30, 2004, both subsections of Rule 600(C)(3) must be considered. These filings and the dates filed appear in the following summary of the relevant procedural history since April 30, 2004:

May 6, 2004—Defendant's petition challenging the jury array and requesting a stay of any jury trial pending the Court's decision.

May 7, 2004—Trial date continued by Court from May 10, 2004 to June 7, 2004 due to Defendant's outstanding petition challenging the jury array.

May 10, 2004—Order denying, as untimely, Defendant's petition challenging the jury array. Trial to commence on June 7, 2004.

May 19, 2004—Refiling of Defendant's petition challenging the jury array. This petition also specifically requested an evidentiary hearing and a stay of any trial proceedings until the issues raised were resolved by the Court.

May 28, 2004—Administrative Order directing the Commonwealth to file an answer to Defendant's petition on or before June 15, 2004.

June 3, 2004—Continuance by Defendant of trial scheduled for June 7, 2004 due to pending pretrial motion challenging jury array. Continuance granted and trial rescheduled for July 12, 2004.

June 15, 2004—Commonwealth's answer to Defendant's petition.

June 22, 2004—Order dated June 19, 2004 of the Honorable Albert A. Stallone granting Defendant's challenge to the venires from which prospective jurors are chosen with directive that the Master List System which existed prior to October 1, 2003 be reinstated and that a new jury array be selected from this list.[1]

June 28, 2004—Order continuing trial date from July 12, 2004 to August 9, 2004[2] in order to comply with Judge Stallone's Order of June 19, 2004.

July 6, 2004—Continuance by Defendant of August 9, 2004 trial date due to unavailability of defense counsel. Trial rescheduled for September 13, 2004.

DISCUSSION

In **Commonwealth v. Hill,** 558 Pa. 238, 736 A.2d 578 (1999), the court held that not all periods of time during which defense pretrial motions are pending are automatically excluded from the Rule 600 calculation. Instead, to be excludable time, the time necessary to decide the motion must cause an actual delay in the trial date and must result from the nature and contents of the motion itself, not from dilatory tactics of the Commonwealth in opposing or responding to the motion; otherwise, it cannot accurately be said that the filing of the motion alone renders the defendant unavailable for trial and causes a delay in the proceedings fairly attributable to the defendant. Specifically, the court stated:

> When a defendant is deemed unavailable for trial, the time is excludable from the Rule [600] calculation; however, the mere filing of a pretrial motion by a defendant does not automatically render him unavailable. Rather, a

[1] At the request of the Defendant, and with this Court's concurrence, Judge Stallone, a non-Carbon County judge, was specially appointed by our Supreme Court to hear Defendant's challenge since the objection "involves the process in which the Carbon County President Judge and the Carbon County Jury Commission are involved." (Petition Objecting to Jury Array, Paragraph 11) In granting Defendant's request for a new jury array, Judge Stallone directed that the Master List System which existed prior to October 1, 2003, be immediately reinstated and that a new jury array be selected from this list for Defendant's case.

[2] This trial date represents a specially created term of court for trials which are unable to be held in July because of the need to select a new jury array as required by Judge Stallone's Order of June 19, 2004.

> defendant is only unavailable for trial if a delay in the commencement of trial is caused by the filing of the pretrial motion. **See Polsky,** 493 Pa. at 406, 426 A.2d at 612; **Edwards,** 528 Pa. at 106-08, 595 A.2d at 53-54; **Kubin,** 432 Pa. Super. at 147, 637 A.2d at 1026-27. If a delay is created, in order to establish that the delay is excludable, the Commonwealth must demonstrate, by a preponderance of the evidence, that it exercised due diligence in opposing or responding to the pretrial motion. **See Polsky,** 493 Pa. at 406, 426 A.2d at 612; **Edwards,** 528 Pa. at 106-08, 595 A.2d at 53-54; **Kubin,** 432 Pa. Super. at 147, 637 A.2d at 1026-27. A delay caused by the Commonwealth's lack of due diligence will not constitute excludable time.

Id. at 587 (footnote omitted) (referring to prior Rule of Criminal Procedure 1100).[3] As with pretrial motions, we believe the reasoning of **Hill** applies equally to the effect of continuances requested by the defense: only if the continuance results in an actual trial delay and was not necessitated by dilatory conduct of the Commonwealth is the period of delay excludable time. **Commonwealth v. Aaron, supra** at 43 ("Any delay caused by the need to reschedule a trial because of a continuance attributable to the defense constitutes excludable time, even if the defendant was prepared to go to trial at an earlier date.").

The foregoing chronology makes evident that each of the motions and continuances filed by the Defendant since April 30, 2004, resulted in an actual delay of trial. That Defendant was, in fact, successful in challenging the jury selection process is not the standard for determining what is and is not excludable time. Nor is the test dependent on whether the Defendant was benefited or prejudiced by the delay. To the contrary, under **Hill,** the only question is whether the Defendant should be held responsible for the delay. Once it is determined that Defendant's conduct, or that of his counsel—here the filing of pretrial motions and continuance applications—caused an actual delay in the trial date, it must next be determined whether the Commonwealth exercised due diligence in opposing or responding to the motions. The requirement that the Commonwealth act with due diligence must be established whether the Commonwealth's claim to excludable time involves a question

[3] This opinion will refer to the Rule by its new designation as Rule 600.

of the Defendant's right to release on nominal bail, or dismissal of the charges.[4]

"Due diligence is a fact-specific concept that must be determined on a case-by-case basis. … Due diligence does not require perfect vigilance and punctilious care, but rather a showing by the Commonwealth that a reasonable effort has been put forth." **Commonwealth v. Hill, supra,** 736 A.2d at 588 (citations omitted). Only if the Commonwealth acts unreasonably in opposing or responding to a defendant's motions, and such conduct itself results in delay, will the delay be counted against the Commonwealth.[5]

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[4] Although Rule 600(G) appears on its face to require a due diligence analysis only after a violation of Rule 600 has occurred and Defendant is seeking dismissal of the charges, such a reading is too limited. In **Commonwealth v. Hill,** 558 Pa. 238, 736 A.2d 578, 591 (1999), the court made clear that the exercise of due diligence by the Commonwealth is a necessary part of the review not only in determining whether the charges should be dismissed but also in determining whether any time should be excluded under subsection (C)(3)(a). This approach, we believe, comports with the dual purpose of Rule 600: (1) the protection of the accused's speedy trial rights, and (2) the protection of society by recognizing society's right to effectively prosecute criminal cases in good faith. **Commonwealth v. Aaron,** 804 A.2d 39, 42 (Pa. Super. 2002); **see also, Commonwealth v. Monosky,** 511 Pa. 148, 152, 511 A.2d 1346, 1348 (1986) ("So long as there has been no misconduct on the part of the Commonwealth in an effort to evade the fundamental speedy trial rights of an accused, Rule [600] must be construed in a manner consistent with society's right to punish and deter crime.").

[5] In accordance with the foregoing, a logical sequential analysis to determine whether Rule 600 has been violated requires answers to the following questions:

> (1) has the mechanical run date, the date by which the trial must commence under Rule 600, been exceeded (**e.g.,** 180 days when the defendant is incarcerated and 365 days when the defendant is at liberty on bail). If the answer to this question is in the affirmative,
>
> (2) has the adjusted run date, the mechanical run date as modified or extended under subsection (C) for delay caused by the defendant—to be excludable time under subsection (C)(3) the delay must cause an actual delay in trial and the Commonwealth must act with due diligence during the period in dispute—been violated. If this question is also answered in the affirmative and the defendant is seeking to dismiss the charges,
>
> (3) is the delay excusable under subsection (G) because the circumstances occasioning the delay were beyond the control of the Commonwealth and it is determined that the Commonwealth, throughout the proceedings, exercised due diligence in prosecuting the charges.

Under this framework, it must be noted that where the defendant expressly waives Rule 600 pursuant to Rule 600(C)(2), the time is excludable regardless of whether the Commonwealth failed to act with due diligence. **Commonwealth v. Boczkowski,** 846 A.2d 75, 84 n.11 (Pa. 2004).

Here, we believe the preponderance of the evidence supports our determination that the Commonwealth acted promptly and with due diligence in responding to Defendant's pretrial motions. The Commonwealth timely filed an answer to Defendant's challenge to the jury array and was present at and participated in the hearings held before Judge Stallone on Friday and Saturday, June 18 and 19, 2004, respectively. While the motions raised constitutional issues of due process and equal protection under both the federal and state constitutions, at no time did Judge Stallone find that the array of prospective jurors challenged by Defendant was unrepresentative of the community or in any manner represented a discriminatory jury selection process prejudicial to the Defendant.[6] The sole basis for

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It must also be noted that because "Rule [600] is an administrative method by which we seek to give substance to the constitutional guarantee of a speedy trial for criminal defendants[,]" **Commonwealth v. Monosky, supra** at 153, 511 A.2d at 1348 (quotation marks and citation omitted),

> [a] speedy trial analysis mandates a two-step inquiry: (1) whether the delay violated Pennsylvania Rule of Criminal Procedure [600]; and, if not, then (2) whether the delay violated the defendant's right to a speedy trial guaranteed by the Sixth Amendment to the United States Constitution and by Article I, Section 9 of the Pennsylvania Constitution. **See Jones v. Commonwealth,** 495 Pa. 490, 499, 434 A.2d 1197, 1201 (1981) ('although Rule [600] was designed to implement the constitutional rights of an accused to a speedy trial, … constitutional guarantees [to a speedy trial] continued to provide a separate basis for asserting a claim of undue delay in appropriate cases') (citations omitted).

Commonwealth v. DeBlase, 542 Pa. 22, 30, 665 A.2d 427, 431 (1995). The constitutional analysis required by the United States Supreme Court in **Barker v. Wingo,** 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 2d 101 (1972), and used in evaluating whether a defendant's constitutional rights to a speedy trial have been violated under either the federal or state constitution, requires an examination of the following four factors:

> (1) whether the pretrial delay was uncommonly long; (2) whether the government or the criminal defendant is more to blame for that delay; (3) whether, in due course, the defendant asserted his right to a speedy trial; and (4) whether the defendant suffered prejudice because of the delay, **Barker, supra,** 407 U.S. at 530, 92 S.Ct. at 2191-92.

DeBlase, supra at 32, 665 A.2d at 432.

[6] To establish a **prima facie** violation of the requirement that a jury array fairly represent the community, [the defendant] must show that: (1) the group allegedly excluded is a distinctive group in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation of the number of such people in the community; and (3) this underrepresentation is due to systematic exclusion of the group in the jury

Judge Stallone's decision—that Section 4521 of the Judicial Code (42 Pa. C.S.A. §4521) was violated because the pool comprising the Master List System from which prospective jurors are selected was not approved by a majority vote of the Jury Selection Commission—was one which the Commonwealth, in its response to Defendant's petition, candidly acknowledged it was without sufficient information or knowledge to either admit or deny. This response was neither unreasonable nor one necessarily calculated to cause delay: had Judge Stallone determined that the petition was unfounded, trial would have occurred in July, if not earlier. In consequence of Judge Stallone's ruling, the earliest trial could be scheduled was in August 2004.

CONCLUSION

In accordance with the foregoing, we find that all delays in trial since May 10, 2004, are attributable to the Defendant and are excludable from the Rule 600 calculation.

ORDER OF COURT

AND NOW this 25th day of August, 2004, upon consideration of Defendant's Second Petition for Release on Nominal Bail pursuant to Pa. R.Crim.P. 600(E), and after hearing thereon and argument of counsel, and in accordance with the foregoing Memorandum Opinion, it is hereby

ORDERED and DECREED that said Petition is denied.

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selection process. 'Systematic' means caused by or inherent in the system by which juries were selected.

Commonwealth v. Estes, 851 A.2d 933, 935 (Pa. Super. 2004) (**quoting Commonwealth v. Johnson,** 576 Pa. 23, 838 A.2d 663, 682 (2003)). Absent a showing that usage of driver's license registration lists for purposes of jury selection is inherently biased—the pool from which jury arrays were selected in Carbon County after October 1, 2003—jury pool lists derived from this database are constitutionally valid, as are those derived from voter registration records. **Commonwealth v. Johnson, supra,** 838 A.2d at 682.

FAITH RICHARDS, As Administratrix of the Estate of LINDA STEWART, Plaintiff vs. JOSE and GEORGIA ROLDAN and JOHN and JANE DOE, Defendants

Civil Action—Breach of Contract—Substantial Performance—Damages—Estoppel—Waiver

1. The seller of real estate under an installment sales agreement who is obligated by the agreement to provide good and marketable title at the time of settlement and who is unable to do so, is barred from recovering damages for breach of contract from the buyer where the buyer's alleged breach had no relationship with the seller's inability to perform.

2. A seller of real estate under an installment sales agreement who accepts payments from the buyer in different amounts and at different times from those required by the agreement, and under circumstances evidencing an intent to continue the agreement in force, is estopped from terminating the agreement and declaring a forfeiture without first providing the buyer with reasonable notice of his intent and opportunity to cure the default.

3. Only a material breach of contract by one party will discharge the other from performance. Where the buyer under an installment sales agreement substantially but incompletely performs his obligations under the contract, the non-breaching seller, while entitled to damages, is not entitled to rescission of the contract or a discharge of his duties under the contract.

4. A buyer of real estate under an installment sales agreement who consents expressly or by his conduct to an extension of the time for settlement, even where the agreement provides that time is of the essence, waives the right to terminate the agreement on this basis. Under such circumstances, the time for settlement becomes indefinite and neither party can terminate the agreement without reasonable notice to the other.

5. Where the seller of real estate under an installment sales agreement is unable to provide good and marketable title, and the buyer fails or is unable to make payments as required by the agreement, and both agree to delay settlement without stating a new date, neither is entitled to recover damages against the other. Under these circumstances, both will be provided an opportunity to fulfill their respective obligations before pursing a claim against the other.

NO. 03-0867

JOSEPH V. SEBELIN, Esquire—Counsel for Plaintiff.

WILLIAM B. QUINN, Esquire—Counsel for Defendants.

MEMORANDUM OPINION

NANOVIC, J.—September 28, 2004

At issue in these proceedings is an agreement for the purchase of real estate located in Nesquehoning, Carbon County, Pennsylvania. The sale has not concluded, each party claiming the other has breached the agreement. Plaintiff, the administratrix of the estate of the Seller/Decedent, has filed a claim for ejectment, together with ancillary damages for loss of rental

income attributable to Defendants' alleged wrongful possession of the property. Defendants, by way of counterclaim, assert that Plaintiff and the Seller's breach of the agreement entitle them to a refund of the amounts paid, as purchasers, and for damages incurred incidental to their purchase and maintenance of the property. Following a non-jury trial held on February 13, 2004, we make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On August 10, 1999, a written Installment Sales Agreement (the "Agreement") was entered between Plaintiff's Decedent, Linda J. Stewart, also known as Linda Strohl, as Seller (hereinafter referred to at times as the "Seller" and at times as the "Decedent"), and Jose Roldan and Georgia N. Roldan, husband and wife, as Buyers, for the property known as 116 West High Street, Nesquehoning, Carbon County, Pennsylvania, and more fully described in Carbon County Deed Book 452, Page 203 (the "Property").

2. The Agreement was expressly intended to supersede a prior existing verbal agreement between the parties pursuant to which possession of the Property was taken by the Buyers in the latter part of 1998.

3. Pursuant to the Agreement, the sales price for the Property was $17,000.00 payable as follows: a down payment of $4,500.00, twelve equal monthly payments of $1,000.00 commencing September 5, 1999 and ending August 5, 2000, and a final installment of $500.00 on September 5, 2000.

4. Between August 18, 1998 and August 8, 1999 the Buyers paid the Seller $4,500.00, the amount of the down payment required by the August 10, 1999 Agreement, the receipt of which was expressly acknowledged in that Agreement. As of August 10, 1999, the unpaid balance of the contract price owed by the Buyers to the Seller was $12,500.00.

5. The Agreement further provided that if any scheduled monthly installment payment was paid after the fifteenth day of the month in which due, a late penalty equal to ten percent of the delinquent payment (**i.e.,** $100.00) would be due in addition to the monthly payment.

6. In addition, the Agreement provided that Buyers were responsible for the payment of all property taxes attributable to all tax periods after January 1, 1999.

7. Pursuant to the Agreement, Seller was to deliver good and marketable title at the time of settlement, such settlement to be held on or before September 5, 2000, time being of the essence. Formal tender of a deed and tender of the purchase monies were expressly waived.

8. Shortly after signing the Agreement, the Buyers learned that the Seller became indebted to Household Finance Corporation on July 29, 1997 in the amount of $14,199.36 and that this debt was secured by a lien on the Property.

9. At the time the Agreement was signed, the then outstanding principal unpaid balance for which the Seller was indebted to Household Finance Corporation was $13,728.30.

10. After learning of the encumbrance with Household Finance Corporation, Buyers requested and obtained from Seller an Addendum to the Agreement (the "Addendum") which Addendum prohibited the Seller from further encumbering the Property, required each of Buyers' installment payments to be applied directly to the Seller's loan obligation with Household Finance Corporation, and expanded the Buyers' remedies in the event the Seller failed to deliver clear and marketable title at the time of closing—or if such failure could be anticipated by the Buyers within thirty days of closing—to election of any of the following options:

(a) to accept the existing title upon date of closing;

(b) to cancel the Agreement and receive from Seller as liquidated damages a full refund of their down payment of $4,500.00 together with a full refund of the total amount of installments payments made to that date; or

(c) to pursue a civil action for damages in an appropriate court of law.

11. The Addendum was signed by the parties on September 28, 1999. On the same date, the parties also signed a Seller's Property Disclosure Statement as required by 68 P.S. §7304.

12. The Seller's Property Disclosure Statement identified various defects with the home located on the Property, including a leaking roof and problems with plumbing and the electri-

cal wiring. The Agreement previously signed by the parties on August 10, 1999 provided that the Property was being sold "as is."

13. Between August 10, 1999, the date of the Agreement, and September 5, 2000, the date settlement was to occur, the Buyers paid either to the Seller, or to Household Finance Corporation on behalf of the Seller, a total of $5,500.00.

14. Prior to September 5, 2000, the Seller advised the Buyers that she had insufficient monies to satisfy the debt owed to Household Finance Corporation and to provide the Buyers with good and marketable title as of the agreed upon settlement date. The Seller requested additional time to provide good and marketable title to the Property. The Buyers agreed to this request.

15. Between September 5, 2000 and January 8, 2003, the Buyers paid either to the Seller, or to Household Finance Corporation on behalf of the Seller, additional payments totaling $6,315.00. These payments were irregular both as to times and amounts.

16. On January 8, 2003, the Seller, Linda J. Stewart, died intestate. Decedent's death was sudden and unexpected.

17. On January 27, 2003, the Plaintiff, Faith Richards, was appointed as the Administratrix of the Decedent's estate by the Carbon County Register of Wills.

18. At the time of Decedent's death, Decedent was the sole legal title owner of the Property. While the Decedent had originally acquired title to the Property as a joint tenant with right of survivorship with her father, Charles Schoch, Sr., Decedent's father died in 1989, whereupon his interest in the Property passed by operation of law to the Decedent.

19. At the time of Decedent's death, the approximate unpaid principal balance of Decedent's debt on her loan from Household Finance Corporation was $9,386.88.

20. Between September 28, 1999 and Decedent's death on January 8, 2003, the parties by their conduct and by the payments made by the Buyers and accepted by the Seller evidenced their intent that the agreement to sell the Property from the Seller to the Buyers continued in effect.

21. With the exception of one payment in the amount of $300.00 made to Household Finance Corporation on or about

February 3, 2003, the Buyers have made no further payments to Decedent's estate, or to Household Finance Corporation on behalf of Decedent's estate, since the time of Decedent's death. This payment was made in reliance on the Plaintiff's assurances that the Plaintiff recognized and would honor the Seller's agreement to sell the Property to the Buyers.

22. Of the purchase price of $17,000.00, Buyers have paid either to the Seller, or to Household Finance Corporation on behalf of the Seller or Seller's estate, a total amount of $16,615.00. A portion of these monies, in an unknown amount due to the insufficiency of the evidence presented, was intended by Buyers to be used by Seller for the payment of real estate taxes billed after January 1, 1999.

23. Of the total number of scheduled installment payments made by the Buyers to the Seller after August 10, 1999, only one—that for September, 1999—was made before the fifteenth day of the month when due. Of the eleven months for which payments were either delinquent or not made at all, Seller was entitled to additional payments totaling $1,100.00 from Buyers. Of this amount, Buyers have paid $850.00.

24. For the year 2001, $445.76 in taxes, interest and costs was not paid by Buyers. This amount is owed by the Buyers to the Plaintiff, who has entered an agreement with the Carbon County Tax Claim Bureau for the payment of these taxes, interest, and penalties.

25. Plaintiff commenced the present suit by complaint filed on May 1, 2003.

DISCUSSION

From the facts, as set forth above, it is evident that although the contract[1] required the balance of the purchase price to be paid by September 5, 2000, and this did not occur, even had the payments been made, due to the amount of the debt owed to Household Finance Corporation, the Seller was unable to convey good and marketable title to the Buyers. For this reason,

[1] The Agreement and the Addendum are one integrated contract. **Huegel v. Mifflin Construction Co., Inc.,** 796 A.2d 350, 354-55 (Pa. Super. 2002) ("Where several instruments are made as part of one transaction they will be read together, and each will be construed with reference to the other; and this is so although the instruments may have been executed at different times and do not in terms refer to each other.").

the parties agreed to delay closing for a reasonable period to provide the Seller with an opportunity to arrange to pay off the amount owed to Household Finance Corporation. During this period, it is also clear that the Seller acquiesced in and consented to reduced payments by the Buyers, with the understanding nevertheless that the Buyers would be obligated to pay an additional $100.00 per month for each monthly payment required by the parties' contract made beyond the fifteenth day of the month in which due.

Implied by law as a condition precedent to a party's right to recover for damages for breach of contract, is proof that the party had the willingness and the ability to perform if there had been no breach by the other. **Alabama Football, Inc. v. Greenwood,** 452 F. Supp. 1191, 1194-95 (W.D.Pa. 1978). Plaintiff has clearly failed to meet her burden on this issue with the positive evidence presented by Buyers being consistently to the contrary. That the Agreement provided that time was of the essence, does not alter this outcome. **Sunseri v. Mancuso,** 362 Pa. 161, 66 A.2d 830 (1949).

We are also concerned that Plaintiff misperceives the legal distinction between substantial but incomplete performance of a contract by a defendant for which the plaintiff is entitled to damages and a material breach of the contract for which the plaintiff is entitled to not only damages but is relieved of his duty to perform. "The doctrine of substantial performance has been developed by the courts as an instrument of justice intended to avoid forfeiture because of technical, inadvertent or unimportant omissions." **First Mortgage Company of Pennsylvania v. Carter,** 306 Pa. Super. 498, 502, 452 A.2d 835, 837 (1982). "[O]nly material failure of performance by one party discharges the other … 'an immaterial failure does not operate as such a discharge.' " **Sgarlat v. Griffith,** 349 Pa. 42, 46, 36 A.2d 330, 332 (1944).[2] The doctrine of substantial performance

[2] The doctrine of substantial performance

'has been developed by the courts as an instrument of justice'[.] This court has always turned its face against forfeitures. We said in **Morgan v. Gamble,** 230 Pa. 165, 79 A. 410, [414]: 'The equitable doctrine of substantial performance is intended for the protection and relief of those who have faithfully and honestly endeavored to perform their contracts in all material and substantial particulars, so that their right to compensation may not be forfeited by reason of mere technical, inadvertent, or unimportant omissions or defects.'

does not excuse full performance; it does not, in this case, substitute partial payment for full payment; it does, however, require a critical, conscientious analysis of what performance has actually been given, and its consequences. **Id.** at 47-48, 36 A.2d at 333.[3] "[W]here … the benefits of substantial performance have been voluntarily accepted with knowledge that there have been omissions in achieving strict performance, the party accepting performance will be precluded from setting up such omissions as a defense to repayment of the loan that was made." **First Mortgage Company v. Carter, supra** at 503, 452 A.2d at 837.

Here, notwithstanding the Buyers' failure to make full payment, it is clear that the Buyers have made significant and legally substantial payments under the Agreement—Buyers have paid $16,615.00 of the total purchase price of $17,000.00. It is true also that in addition to the difference between these figures—$385.00—the Plaintiff is entitled to the balance outstanding for late payments totaling $250.00 and reimbursement of the Plaintiff's payment of property taxes, interest and penalties attributable to the year 2001 for which Buyers were responsible.

> The Restatement of Contracts, Section 274, p. 399, with reference to failure of consideration as a discharge of duty, in Subsection 1, makes it clear that only material failure of performance by one party discharges the other party. 'An immaterial failure does not operate as such a discharge'. And Section 275, pp. 402-3, gives the rules for determining materiality of a failure to perform. … [These things must be considered:] '(a) The extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated; (b) The extent to which the injured party may be adequately compensated in damages for lack of complete performance; (c) The extent to which the party failing to perform has already partly performed or made preparations for performance; (d) The greater or less hardship on the party failing to perform in terminating the contract; (e) The willful, negligent or innocent behavior of the party failing to perform. …'

Sgarlat v. Griffith, 349 Pa. 42, 46-47, 36 A.2d 330, 332 (1944).

[3] In **Cimina v. Bronich,** 517 Pa. 378, 537 A.2d 1355 (1988), the court cited with approval the following language from the Pennsylvania Law Encyclopedia:

> Any material failure of performance by one party to a contract not justified by the conduct of the other discharges the latter's duty to give the agreed exchange; but if the alleged breach was an immaterial failure of performance, and the contract was substantially performed, the provisions of the contract are still effective.

Id. at 384, 537 A.2d at 1358 (quoting P.L.E. Contracts §367).

In this case, we are convinced that the Seller not only permitted but consented to delayed payments by the Buyers. After September 5, 2000, until the Seller's death more than two years later, the Buyers made and the Seller accepted at least fourteen separate payments, eleven of which were applied directly to the Seller's debt obligation with Household Finance Corporation. In fact, of the twelve payments made to Household Finance Corporation between August 17, 2001 and February 3, 2002, all but one (that on November 13, 2001) were made by the Buyers. During this time, the Buyers remained in possession of the Property and there is no evidence that the Seller complained of payments being late.

Under these circumstances, the Seller is estopped from enforcing any technical breach by the Buyers.

> [W]here a contract provides for payments at certain times, and for forfeiture upon default, but the creditor, either by inaction or by an affirmative course of dealing, misleads the debtor into the belief that strict regularity of payments will not be insisted upon, he cannot thereafter declare a forfeiture unless he first gives reasonable notice to the debtor that in the future he will demand performance at the precise times specified in the contract. … [This] is a principle, not of law, but of equity. From the strict **legal** standpoint the creditor is entitled to enforce the forfeiture according to the terms of the contract, but **equity,** or a court administering equitable principles under legal forms, will not permit him to do so if by lulling the debtor into a false sense of security he has led him into a default which otherwise the debtor might have avoided. …

Cimina v. Bronich, 517 Pa. 378, 385, 537 A.2d 1355, 1359 (1988) (emphasis in original) (quoting **Knable v. Bradley,** 430 Pa. 153, 157, 242 A.2d 224, 226 (1968)). "The principle is general that wherever a contract not already fully performed on either side is continued in spite of a known excuse, the defense thereupon is lost and the injured party is himself liable if he subsequently fails to perform, unless the right to retain the excuse is not only asserted but assented to." **Gray v. Maryland Credit Finance Corp.,** 148 Pa. Super. 71, 25 A.2d 104, 106-107 (1942) (citations and internal quotation marks omitted).

With respect to the Buyers' counterclaim, by the parties' agreement to defer settlement the Buyers have waived any

claimed breach by the Seller. On this issue, the court in **Warner Co. v. MacMullen,** 381 Pa. 22, 28-29, 112 A.2d 74, 78 (1955) stated: "[E]ven if consideration be given to defendants' contention that settlement was not made within [the time agreed], there is here applicable the principle that even though the time fixed in an agreement for settlement is stated to be of the essence of the agreement, it may be extended by oral agreement or be waived by the conduct of the parties, and where the parties treat the agreement as in force after the expiration of the time specified for settlement it becomes indefinite as to time and neither can terminate it without reasonable notice to the other." [4] Prior to the commencement of the present suit, there is no evidence that either party provided notice to the other of their desire and ability to schedule and proceed to settlement.

In accordance with the foregoing, we will deny the Plaintiff's request for ejectment and the entry of a judgment against Defendants. We will also deny Defendants' counterclaim since Defendants, by their own proof, have both acknowledged and established that the parties mutually agreed to extend the date of closing.[5]

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[4] As to oral modifications of a written contract, even one which specifically provides that modifications may only be made in writing, such agreements are clearly valid:

> A written contract which is not for the sale of goods may be modified orally, even when the written contract provides that modifications may only be made in writing. **Universal Builders, Inc. v. Moon Motor Lodge, Inc.,** 430 Pa. 550, 244 A.2d 10 (1968). An agreement that prohibits non-written modification may be modified by subsequent oral agreement if the parties' conduct clearly shows the intent to waive the requirement that the amendments be made in writing. **Accu-Weather v. Prospect Communications,** 435 Pa.Super. 93, 644 A.2d 1251 (1994). An oral contract modifying a prior written contract, however, must be proved by clear, precise and convincing evidence. **Pellegrene v. Luther,** 403 Pa. 212, 169 A.2d 298 (1961).

Somerset Community Hospital v. Allan B. Mitchell & Associates, Inc., 454 Pa. Super. 188, 197, 685 A.2d 141, 146 (1996).

[5] In so ruling, Plaintiff's defense that the Buyers have failed to request an amendment of the pleadings or to properly plead items of special damages, and are bound by their pleadings as to what they may recover, is rendered moot. The Buyers' evidence as to payments made goes to the defense of substantial performance by them, not the recovery of damages. With respect to the amendment of pleadings generally, we note:

> A party may, at any time, with consent of an opposing party or by leave of court, amend his or her pleading. **See Ecksel v. Orleans Const. Co.,** 360 Pa.Super. 119, 519 A.2d 1021 (1987); Pa.R.C.P. 1033. A trial court has broad

Had Seller not died, we seriously doubt this matter would be in litigation. Notwithstanding this observation, we also understand that the current status cannot continue indefinitely and believe that a reasonable time has now passed for both sides to meet their respective obligations. We therefore suggest that the Buyers make a formal demand of settlement and tender the amount due. If the Seller's estate is unable to provide good and marketable title, Buyers will have available as a remedy the three options provided in the Addendum. Alternatively, the Plaintiff likewise can demand settlement, and tender a deed accompanied by good and marketable title. If Buyers are unable to comply, Plaintiff's claim will be ripe for a judgment against Defendants in the amount of the unpaid balance owed on the purchase price, late fees, and property taxes, interest and costs attributable to the year 2001 and subsequent years, if paid by the Plaintiff.

CONCLUSIONS OF LAW

1. The Agreement of August 10, 1999 and the Addendum of September 28, 1999 constitute an integrated contract.

2. On and prior to September 5, 2000, Plaintiff's, Decedent, Linda Stewart, was unable to convey good and marketable title for the Property at 116 West High Street, Nesquehoning, Carbon County, Pennsylvania to the Buyers.

3. By mutual consent between the Seller and the Buyers, the parties agreed to extend the original date for closing for a reasonable period. The parties, by their conduct, waived the time period prescribed in the original Agreement.

4. With the knowledge and acquiescence of the Seller, the Buyers were permitted to make reduced payments of the monthly installments owed by them to the Sellers, the Buyers being bound nevertheless by the obligation to pay an additional $100.00 for each $1,000.00 monthly payment identified in the parties' contract made beyond the fifteenth day of the month

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discretion in ruling on a party's motion to amend the pleadings. **Id.** An amendment will not be allowed, however, when it is against a positive rule of law, where it states a new cause of action after the statute of limitations has run, or when it will surprise or prejudice the opposing party. **Horowitz v. Universal Underwriters,** 397 Pa.Super. 473, 580 A.2d 395 (1990).

Somerset Community Hospital v. Allan B. Mitchell & Assocs., Inc., supra at 199, 685 A.2d at 147.

on which due. The Plaintiff is estopped by her conduct and that of the Seller from terminating the agreement between the Seller and the Buyers for the sale of the Property.

5. Plaintiff's Decedent did not breach her contract with the Buyers as mutually modified by them.

6. Buyers did not breach their contract with the Plaintiff's Decedent, as mutually modified by them.

7. In the alternative, to the extent it may be determined that Buyers have breached the agreement between the parties, any such breach has not been a material breach so as to justify the abrogation of the contract in light of all the facts presented.

8. A reasonable period of time has passed for the owner of the Property to satisfy the debt owed to Household Finance Corporation or otherwise arrange for the release of the Property from the lien held by Household Finance Corporation in order that good and marketable title for the Property can be conveyed to the Buyers. Upon tender of the balance of the monies owed by the Buyers to Plaintiff, Plaintiff is obligated to tender a deed and to provide good and marketable title of the Property to Buyers, excepting, however, any lien attributable to the non-payment of property taxes for all tax periods after January 1, 1999. **See Byrne v. Kanig,** 231 Pa. Super. 531, 539, 332 A.2d 472, 474-75 (1974).

9. Upon tender of a deed for the Property and assurances that good and marketable title will be provided, Plaintiff is entitled to payment of the full amount of all monies owed by the Buyers to the Plaintiff.

10. Buyers are responsible for the payment of all property taxes attributable to all tax periods after January 1, 1999.

11. The total amount owed by the Buyers to the Plaintiff as of the date of trial—consisting of the unpaid purchase price (**i.e.,** $385.00), late fees (**i.e.,** $250.00) and property taxes, interest and costs attributable to the year 2001 (**i.e.,** $445.76)—is $1,080.76.

An appropriate order will be entered.

ORDER OF COURT

AND NOW, this 28th day of September, 2004, in accordance with the above Findings of Fact and Conclusions of Law, it is hereby ORDERED and DECREED that Plaintiff's request

for ejectment is dismissed. It is further ORDERED and DECREED that Defendants' counterclaim is denied.

Pursuant to Pa. R.C.P. No. 227.4, the Prothonotary shall, upon praecipe, enter judgment in favor of Defendants and against Plaintiff on Plaintiff's claim for ejectment, and in favor of Plaintiff and against Defendants on Defendants' counterclaim, if no motion for post-trial relief has been filed under Pa. R.C.P. No. 227.1 within ten (10) days after notice of the filing of this decision.

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GAYLE MOYER, Plaintiff vs. CARBON COUNTY AREA VOCATIONAL TECHNICAL SCHOOL, Defendant

Civil Action—Employment Discrimination (Age and Gender)—Title VII of the Civil Rights Act—The Age Discrimination in Employment Act—The Pennsylvania Human Relations Act—The Equal Pay Act—Section 1983

1. In addition to claims barred by the applicable statute of limitations, the charging provisions of Title VII and the PHRA prohibit recovery for discrete acts of discrimination which occur more than 300 days and more than 180 days respectively prior to the filing of charges with the EEOC and PHRC, even if such acts are of the same nature and type as similar acts occurring within the prescribed periods.

2. In examining whether an employer's conduct violates Title VII, the ADEA, or the PHRA, the three-part analysis set forth in **McDonnell Douglas,** as modified by the United States Supreme Court's recent decision in **Desert Palace,** remains valid.

3. An employer's decision to maintain the status quo, in response to complaints of discrimination by an employee, is not an act of retaliation violative of Title VII.

4. To maintain a viable cause of action against a local governmental body under Section 1983, an employee must prove a discriminatory policy or custom of the agency, or a failure to act under circumstances demonstrating a deliberate indifference to the rights of persons under the federal constitution or federal law.

5. While an employee's claims under Title VII require proof of intentional discrimination, with the burden of persuasion at all times being on the employee, a claim under the Equal Pay Act requires only that the employee prove a disparity in pay between men and women doing equal work, whereupon the burden to justify the disparity rests with the employer.

6. When employment discrimination is claimed on the basis of age and gender by a plaintiff who received employment, but at a lower salary step than other employees subsequently hired for different teaching positions and who possessed varying degrees of experience, and where the evidence as a whole, taking into account the employer's explanation for its employment decisions is insufficient to permit a reasonable jury to conclude that the employer's decision was motivated, in whole or in part, by a protected characteristic, the employer is entitled to summary judgment as a matter of law.

NO. 01-0373

DONALD P. RUSSO, Esquire—Counsel for Plaintiff.

ROBERTA BINDER HEATH, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, J.—October 8, 2004

The Carbon County Area Vocational Technical School (hereinafter the "Vo-Tech" or the "School"),[1] the Defendant in these proceedings, moves for summary judgment on each of Plaintiff's claims against it. The Plaintiff, Gayle Moyer (hereinafter "Moyer"), is employed by the Vo-Tech as an English teacher. In her complaint, Moyer claims that the Vo-Tech pays her less than other similarly situated employees and that she has been discriminated against on the basis of her age and gender. The complaint alleges violations of Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Pennsylvania Human Relations Act, the Equal Pay Act, and 42 U.S.C. §1983.

The Vo-Tech denies that any preferential treatment was given to men or younger employees. Specifically, the Vo-Tech argues that the evidence does not meet the threshold requirements for the claims presented by Moyer. Additionally, the Vo-Tech contends that Moyer's claims for age and gender discrimination are based on events that fall outside the respective periods for filing claims with the Equal Employment Opportunity Commission ("EEOC") and the Pennsylvania Human Relations Commission ("PHRC"), and are untimely.

For the reasons that follow, the Vo-Tech's Motion is GRANTED in part and DENIED in part.

I. PROCEDURAL AND FACTUAL BACKGROUND

Moyer is a full-time English teacher at the Vo-Tech and has been so employed since October 17, 1996. At the time of her initial employment, Moyer was 43 years old. Her previous teach-

[1] The five school districts in Carbon County—the Jim Thorpe Area School District, the Lehighton Area School District, the Palmerton Area School District, the Panther Valley Area School District and the Weatherly Area School District—participate in and send students to the Vo-Tech. The Joint Operating Committee for the Vo-Tech, comparable to the board of directors for a school district, consists of five members, one member from each participating school district.

ing experience consisted of four separate long-term, ninety-day substitute positions, each at different schools; several per diem substitute positions; and teaching adult, evening G.E.D. classes for one year for the Hazleton Area School District.[2]

Moyer's starting salary with the Vo-Tech, $18,500.00, was at the first step of the salary schedule contracted for in the Collective Bargaining Agreement (the "CBA") which then existed between the Vo-Tech and the Carbon County Area Vocational-Technical School Teachers' Association, the teachers' union at the Vo-Tech. This salary was also the state minimum permitted salary. 24 P.S. §11-1142.1(a). Effective September 1, 1999, the step one salary was increased to $21,000.00.

At the time of Moyer's employment, the second salary step in the CBA was $23,500.00.[3] For some teachers this was their beginning salary. Although no written or other fixed standards existed to determine when a teacher would begin employment at the second step, generally, to be considered for a starting salary at the second step, the Vo-Tech required that an applicant for an academic position possess one year or more of continuous full-time teaching experience in the same public school system and for a vocational position, one or more years of teaching or trade experience. Subject to minimum base salaries required by the state and any contrary terms contained in the CBA, the step on the salary scale at which a teacher began his or her employment with the School was subject to negotiation with the School's joint operating committee and, in addition to experience, depended upon the needs of the School, principles of supply and demand, and the School's budget.[4]

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[2] The application for employment which Moyer submitted to the Vo-Tech and upon which the Vo-Tech appears to have relied in hiring Moyer refers to three separate long-term, ninety-day substitute positions. In depositions, Moyer testified that she in fact worked an additional ninety-day substitute position which was not included in her application. (N.T., Moyer, pp. 67-68).

[3] The step two salary was increased to $24,500.00 at or about the same time that the step one salary was increased to $21,000.00.

[4] Applicants for a teaching position at the School are first interviewed by an interview committee consisting of the School's vocational administrative director, the business administrator, and a high school principal. The interview committee then recommends a candidate to the joint operating committee, together with a starting salary. The joint operating committee is the final decision-maker on hiring and setting the entrance salary.

Teachers employed at the first step automatically jump to the second step salary after one year of satisfactory service. After reaching the second step, the increase in salary for each succeeding step is the same for each teacher each year. Following her first year of employment, Moyer was moved to the second salary step. Since then, she has received the same salary increments as all other teachers who reached the second step. She has also been granted tenure.

Between October 17, 1996, the date of Moyer's hire, and February 23, 2001, the date Moyer commenced suit in this Court, twenty-three teachers were hired by the Vo-Tech. Of these, thirteen were male and ten were female. Seventeen were under forty years of age and six were over forty years of age. Thirteen were hired at step one and ten at step two. With respect to those hired at step two, five were male and five female; seven of these were under forty years of age and three were over forty years of age. A tabulation of these hirings and data relevant to each is attached to this opinion as Appendix "A".

Moyer questions primarily the hiring of four teachers—Joseph Polashenski, William Hughes, Stephen Ferguson and Diane Hyjurick—as manifesting unlawful employment practices. Joseph Polashenski was hired as a math teacher in September of 1998 at a second step salary of $23,500.00. He was then thirty-four years old. This is the first hiring which Moyer believes evidences discrimination.

For eight years prior to his employment by the Vo-Tech, Polashenski had been a substitute teacher at two public schools, three years at one school and five years at the other. This experience included one half-year, long-term substitute teaching position at each of the two schools. It did not include one year or more of consecutive full-time teaching in a public school, the normal guideline for a starting salary at the second step.

In distinguishing Moyer's teaching experience from Polashenski's, Lyle Augustine, the Vocational Administrative Director for the Vo-Tech and the person on the interview committee recommending Polashenski for employment to the operating committee, testified that Moyer's long-term substitute teaching did not cover the same class for one year at the same school, but rather was scattered over three different schools teaching different students at varying grade levels. Augustine further noted

that the supply of math teachers is less than that for English teachers.

William Hughes was hired by the Vo-Tech in August 1999 as a special education instructor. He was then forty-six. At the time of his employment, Hughes was paid $25,100.00, the then current second step salary of $24,500.00, plus an additional $600.00 for having a Master's degree. Prior to his employment by the Vo-Tech, Hughes taught as an early intervention teacher for four months. At the time, Hughes was also in the process of obtaining a Master's degree in special education, had earned thirty-nine credits towards this goal, and was seeking certification as a supervisor in special education.

Diane Hyjurick was employed by the Vo-Tech in August 2000 as a math teacher. Prior to this employment, she taught in a parochial school for eleven years. She also held an Instructional I Public School Certification. Hyjurick was thirty-four at the time she was hired. Her starting salary, $24,500.00, was at the second salary step.

Neither William Hughes nor Diane Hyjurick possessed one or more years of public school teaching experience prior to their employment. In explaining their first year employment at the second salary step, Augustine testified that both received higher salaries because of mistakes he made in reading their applications. With respect to Hughes, Augustine testified he misread the date at which Hughes began teaching (N.T., Augustine, pp. 37-38, 43-44). With respect to Hyjurick, he mistook the parochial school at which she taught for a public school (N.T., Augustine, p. 27).

Stephen Ferguson was first employed by the Vo-Tech as a vocational teacher in September 1999 to teach heating, air conditioning and refrigeration. At the time he was twenty-nine years of age and had previously worked for six years as a school district maintenance man. Ferguson was originally hired at a step one salary, $21,000.00, without consideration of his trade experience. He resigned five weeks later. After reading a newspaper ad in the classifieds, he asked to be reinstated and that his trade experience be taken into account in setting his salary. In November 1999, Ferguson was reinstated, his trade experience was considered, and he was hired at a salary of $24,200.00, step two on the intern schedule. Due to the circumstances sur-

rounding his employment, a letter of agreement was executed between Ferguson and the Vo-Tech.

Moyer testified that she began to question the Vo-Tech's hiring practices when Polashenski was hired at the second step salary in 1998 (N.T., Moyer, p. 51). Moyer further testified that she heard that derogatory comments were made that suggested discrimination. Specifically, that Augustine stated to an unknown person: "Academic teachers are a dime a dozen." In addition, Augustine allegedly told another teacher, Stephanie Barto: "This job is not for people who are the head of a household, but instead it is a job for a dual income family." (N.T., Moyer, pp. 44-46) Moyer felt these comments were indicative of a belief among representatives of the Vo-Tech that teaching academics was a "woman's job." (N.T., Moyer, p. 45) On October 4, 1999, Moyer met with a union representative to discuss her claims of discrimination. The union concluded there was no merit to the claims.

On March 21, 2000, Moyer filed charges of discrimination with the EEOC against the Vo-Tech and the Pennsylvania State Education Association ("PSEA").[5] Simultaneously, charges were filed with the PHRC. Moyer's complaint with the EEOC was dismissed and a Notice of Right to Sue was issued on November 28, 2000. On February 23, 2001, Plaintiff filed her praecipe for a writ of summons.

On April 9, 2001, the PHRC sent Moyer a letter advising that her case with the PHRC had been dismissed and the file closed. Thereafter, on November 5, 2001, Moyer filed her complaint against the Vo-Tech and PSEA. An amended complaint was filed on January 11, 2002, in response to preliminary objections.

Both Defendants later filed a Motion for Summary Judgment asking that the case be dismissed for a number of reasons, including untimely filing of the charges with the EEOC and PHRC. Upon agreement of the parties, PSEA was dismissed from the action on November 4, 2003. The Vo-Tech's Motion is now before us for disposition.

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[5] Moyer's teachers' union, the Carbon County Area Vocational-Technical School Teachers' Association, is a local affiliate of the PSEA.

II. **DISCUSSION**

Summary judgment may be granted when the plaintiff, after completion of discovery relative to the motion, fails to meet her burden of proof to establish a **prima facie** case. Pa. R.C.P. 1035.2(2); **see also, Petrongola v. Comcast-Spectacor, L.P.,** 789 A.2d 204, 208 (Pa. Super. 2001). While the moving party has the initial burden of proving that there is no issue as to any material fact presented by the evidence, once this burden is met, the opposing party must "adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor. Failure to adduce this evidence establishes that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." **Ertel v. Patriot-News Company,** 544 Pa. 93, 101-102, 674 A.2d 1038, 1042 (1996), **cert. denied,** 519 U.S. 1008, 117 S.Ct. 512, 136 L.Ed. 2d 401 (1996) (relying upon the United States Supreme Court's interpretations of Federal Rule of Civil Procedure 56 and the attendant case law interpreting that Rule).

An issue is genuine if there is a sufficient evidentiary basis on which a reasonable jury could legitimately find for the non-moving party; a factual dispute is material if it might affect the actual outcome of the suit under the applicable law. **Anderson v. Liberty Lobby, Inc.,** 477 U.S. 242, 248-49, 106 S.Ct. 2505, 2510, 91 L.Ed. 2d 202 (1986).

Although the court must consider the whole record, when ruling on a motion for summary judgment the court must draw all reasonable inferences and view all facts in the light most favorable to the non-moving party. **Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.,** 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed. 2d 538 (1986). "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." **Liberty Lobby, supra** at 255, 106 S.Ct. at 2513. However, whether the weight of the evidence is sufficient to support a verdict in favor of the plaintiff remains a question of law. Summary judgment must be entered in favor of the moving party "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party. ..." **Matsushita, supra** at 586-87, 106 S.Ct. at 1356, 89 L.Ed. 2d at 552 (citations omitted).

A. **Statutory Time Bar Under Title VII and the PHRA**

We first address whether, and to what extent, Moyer's claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e **et seq.** ("Title VII"), and the Pennsylvania Human Relations Act, 43 P.S. §§951-963 (the "PHRA"), may be barred by the prescribed statutory period for filing charges with the EEOC and PHRC, respectively. Only as to these claims does this defense apply.[6]

Section 2000e-5(e)(1) of Title VII requires that a plaintiff in Pennsylvania alleging a violation of Title VII file a charge with the EEOC within 300 days after the alleged unlawful employment practice occurred. 42 U.S.C.A. §2000e-5(e)(1). This section is a charge filing provision that "specifies with precision" the prerequisites that a plaintiff must satisfy before filing suit. **National Railroad Passenger Corporation v. Morgan,** 536 U.S. 101, 109, 122 S.Ct. 2061, 2071, 153 L.Ed. 2d 106 (2002). Similarly, under the PHRA, a complaint with the PHRC must be filed within 180 days of the alleged act of discrimination. 43 P.S. §959(h).

Moyer's charge of discrimination was filed with the EEOC on March 21, 2000, and simultaneously cross-filed with the PHRC. Therefore, based solely on the filing date, Moyer is time-barred from recovery under Title VII for any acts that occurred prior to May 26, 1999[7] and cannot recover under the PHRA for acts occurring prior to September 23, 1999.[8]

Moyer raises several arguments as to why the statute should not apply to bar any part of her claims. Primarily, she argues the filing period should be tolled because she was not "fully aware" of the basis of her claim until sometime within the 300-day period immediately preceding the filing of the charges

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[6] The defense is one directed at a precondition to filing suit, technically not a statute of limitations, the latter of which is a true time bar to a cause of action. **Cf.** 43 P.S. §962(c)(2) (identifying two-year statute of limitations from the date of notice by the PHRC that it is closing the complaint).

[7] This date is 300 days before March 21, 2000. Because Moyer was hired in 1996, she cannot recover based on her own hiring. Likewise, she cannot recover based on the hiring of Polashenski in 1998.

[8] This date is 180 days before March 21, 2000. Based on this date, to the extent Moyer has raised a claim under the PHRA arising out of the hirings of Polashenski and Hughes, her claims are time-barred.

(Plaintiff's Supplemental Brief on the Issue of the Applicability of the Statute of Limitations, p. 2). She also argues that it is problematic to apply a time-bar due to the continuing nature of the violation (Plaintiff's Supplemental Brief, p. 2).

In contrast to a hostile work environment claim, which is composed of a series of separate acts that collectively constitute one "unlawful employment practice," recovery for separate and discrete acts of discrimination or retaliation that occur outside the statutory time period—even if similar in nature and type to those occurring within the filing period—is prohibited. **Morgan, supra** at 105, 122 S.Ct. at 2068. Discrete acts are those which are independent and isolated from other incidents or events. Discrete acts that are easy to identify include termination, failure to promote, denial of transfer, and refusal to hire. **Morgan, supra** at 114, 122 S.Ct. at 2073.

After its review of several cases, the United States Supreme Court in **Morgan** set forth the following relevant principles:

> First, discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the 180- or 300-day time period after the discrete discriminatory act occurred. The existence of past acts and the employee's prior knowledge of their occurrence, however, does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed. Nor does the statute bar an employee from using the prior acts as background evidence in support of a timely claim.

Morgan, supra at 113, 122 S.Ct. at 2072. In this case, the separate hirings of various persons at a higher salary step than Moyer were discrete acts, comparable to those which would have occurred had Moyer been hired at a reduced rate relative to current employees or been denied a promotion.

To the extent then that Moyer claims she has been discriminated against by the hirings of other employees which occurred outside the statutory filing period, Moyer's claims are barred.

These claims include those for Polashenski under Title VII and for Polashenski and Hughes under the PHRA.[9]

That such acts may not form the basis for recovery, does not mean that they are irrelevant to these proceedings. To the contrary, such conduct may be used as background evidence in support of a timely claim and as evidence of motive and intent regarding the Vo-Tech's subsequent conduct. Further, to the extent Moyer may have been discriminated against relative to other similarly situated teachers who began their employment at a step two salary on a date beyond the statutory period, which teachers continued to receive pay within the statutory period, Moyer's claim is timely. **Bazemore v. Friday,** 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed. 2d 315 (1986) (**per curiam**) ("Each week's paycheck that deliver[ed] less to a black than to a similarly situated white is a wrong actionable under Title VII. ..."); **see also, Cardenas v. Massey,** 269 F.3d 251, 256-58 (3d Cir. 2001); **Gandy v. Sullivan County,** 24 F.3d 861, 864 (6th Cir. 1994) (holding that a plaintiff's rights under the Equal Pay Act were violated with every check she received).

B. **Plaintiff's Gender and Age Discrimination Claims**

Title VII prohibits an employer from discriminating on the basis of gender. The statute provides as follows:

> It shall be an unlawful employment practice for an employer ... to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. Section 2000e-2(a). The Age Discrimination in Employment Act, 29 U.S.C. §§621-634 ("ADEA"), prohibits an

[9] Moyer has not pled a basis for the application of the discovery rule. **Coyne v. Porter-Hayden Co.,** 286 Pa. Super. 1, 6-7, 428 A.2d 208, 210 (1981) ("A plaintiff invoking the discovery rule to delay the commencement of the period of limitations must allege in his or her pleadings facts which show why the action could not have been brought earlier."). Further, the evidence of record establishes that Moyer was aware of each act of hiring as it occurred, believed she was being treated unfairly, and believed she had been discriminated against (N.T., Moyer, pp. 51-53). Moreover, as a matter of law, it is unclear whether an employee's lack of knowledge of the basis of her claim will excuse an otherwise untimely filing. **National Railroad Passenger Corp. v. Morgan,** 536 U.S. 101, 114 n.7, 122 S.Ct. 2061, 2073 n.7, 153 L.Ed. 2d 106 (2002).

employer from refusing to hire, or from discharging or otherwise discriminating against employees with respect to compensation, terms, conditions, or privileges of employment, because of age. Before reviewing these claims, we must first determine the correct standard for evaluating each claim.

1. **Standard of Proof**

Since the Supreme Court decided **McDonnell Douglas Corp. v. Green,** 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973), proof of employment discrimination followed one of two paths depending on the nature of the available evidence and the justification made by the employer for its decision. In cases where direct evidence of discrimination existed and the plaintiff sought to establish that gender or another prohibited factor was merely one of several motivating factors in the decision, a mixed-motive approach was used. Under this approach, in order to obtain a jury instruction on discrimination, the plaintiff needed to prove by direct evidence that "race, color, religion, sex, or national origin" played a motivating part in the employment decision. If this burden was met, the employer could "avoid a finding of liability ... by proving that it would have made the same decision even if it had not allowed gender to play such a role." **Price Waterhouse v. Hopkins,** 490 U.S. 228, 244, 109 S.Ct. 1775, 104 L.Ed. 2d 268 (1989).

Until the Supreme Court's decision in **Desert Palace, Inc. v. Costa,** 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed. 2d 84 (2003), a mixed-motive theory was often unavailable to plaintiffs because direct evidence of discrimination was necessary to meet a plaintiff's burden and many, if not most, employment discrimination cases involve only circumstantial evidence of an employee's intent to discriminate. Due to this heightened and at times confusing evidentiary burden—see **Fakete v. Aetna, Inc.,** 308 F.3d 335, 338 n.2 (3d Cir. 2002) ("[W]hile courts agree on what is **not** direct evidence—**e.g.,** statements made by non-decisionmakers unrelated to the contested employment decision, and other 'stray remarks'—there is no consensus on what is.")—plaintiffs without credible, direct evidence of discrimination were required to prove their case circumstantially under the three-part formula enunciated in **McDonnell Douglas:** first, that plaintiff prove a **prima facie** case with circumstantial evidence; second, that plaintiff's proof of a **prima facie** case shifts

the burden to the defendant to articulate a legitimate, non-discriminatory reason for the adverse action, failing which plaintiff is entitled to summary judgment in her favor; and third, that if the defendant meets its burden, plaintiff, to withstand summary judgment against her, must produce sufficient evidence from which a jury could reasonably conclude that the employer's explanation was in fact pretext (thus meeting the plaintiff's burden of persuasion). **McDonnell Douglas, supra** at 802-804, 93 S.Ct. at 1824-25.

Under the **McDonnell Douglas** sequence of shifting burdens, the burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff is at all times with the plaintiff: it is the burden of production that shifts. **Reeves v. Sanderson Plumbing Products, Inc.,** 530 U.S. 133, 143, 120 S.Ct. 2097, 2106, 147 L.Ed. 2d 105 (2000). For this reason, not only does the determination of whether or not a party has met its burden of production not involve a credibility assessment, if the burden is not met, the other is entitled to summary judgment. **Kroptavich v. PPL,** 795 A.2d 1048, 1055 (Pa. Super. 2002); **McDonnell Douglas, supra** at 802, 93 S.Ct. at 1824; **Reeves, supra** at 142, 120 S.Ct. at 2106.

To prove a **prima facie** case of discrimination under **McDonnell Douglas**—thereby creating a presumption of discrimination shifting the burden to the defendant to articulate a legitimate, non-discriminatory reason for its action—the plaintiff must prove that at the relevant time: (1) she was a member of the protected class; (2) she was qualified for the position; (3) she suffered from an adverse employment action; and (4) she was treated differently from similarly situated members of the unprotected class, or that the position at issue was filled by a member of the unprotected class.[10] Such evidence "raise[s] an

[10] In a gender discrimination case such as this, the protected class is women. **Pivirotto v. Innovative Systems, Inc.,** 191 F.3d 344 (3d Cir. 1999) (holding that a gender-discrimination plaintiff need not prove that she was replaced by someone of the opposite gender in order to meet her **prima facie** burden; she must, however, show that she was treated less favorably than others outside the protected class under circumstances that give rise to an inference of unlawful discrimination). In a case of age discrimination, the protected class are those individuals who are at least forty years of age. **O'Connor v. Consolidated Coin Caterers Corporation,** 517 U.S. 308, 313, 116 S.Ct. 1307, 134 L.Ed. 2d 433 (1996) (holding that a plaintiff alleging age discrimination need not show that his replacement was someone outside of the protected class, only that the adverse employment decision was a result of age; case assumes that application of the Title VII evidentiary framework set forth in **McDonnell Douglas** applies to a claim under the ADEA).

inference of discrimination only because we presume these acts, **if otherwise unexplained,** are more likely than not based on the consideration of impermissible factors." **Kroptavich, supra** at 1059 (**quoting Pivirotto v. Innovative Systems, Inc.,** 191 F.3d 344, 352 (3d Cir. 1999) (emphasis added)).[11]

The presumption of discrimination created by the plaintiff's **prima facie** case falls away once the defendant has given a non-discriminatory explanation for its decision. **Reeves, supra** at 143, 120 S.Ct. at 2106; **see also, Texas Dept. of Community Affairs v. Burdine**, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094-95, 67 L.Ed. 2d 207 (1981) ("The defendant need not persuade the court that it was actually motivated by the proffered reasons."). When the defendant meets its burden of production, "the **McDonnell Douglas** framework—with its presumptions and burdens disappear[s] ... [T]he sole remaining issue [is] discrimination **vel non.**" **Reeves, supra** at 142-43, 120 S.Ct. at 2106 (internal citations and quotation marks omitted). At this point, the plaintiff is "afforded the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reason, but were a pretext for discrimination." **Id.** at 143, 120 S.Ct. at 2106. To avoid summary judgment at this stage, the plaintiff must point to some evidence from which a fact-finder could reasonably conclude that (1) the employer's reasons are false and should not be believed; or that (2) an invidious discriminatory factor was more likely than not the motivating or determining reason for the employer's decision. **Kroptavich, supra** at 1059 (**citing Showalter v. Univ. of Pittsburgh Medical Ctr.,** 190 F.3d 231, 234 (3d Cir. 1999)).

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[11] 'Common circumstances giving rise to an inference of unlawful discrimination include the hiring of someone not in the protected class as a replacement or the more favorable treatment of similarly situated colleagues outside of the relevant class.' **Bullock v. Children's Hosp. of Phila.,** 71 F. Supp.2d 482, 487 (E.D. Pa. 1999). However, to succeed on the fourth prong, a plaintiff is not limited by either of these circumstances. Instead, a plaintiff need only present evidence adequate to create an inference that the employment decision was based on an illegal discriminatory criterion. **Id.** at 487-88 (**citing Pivirotto v. Innovative Sys., Inc.,** 191 F.3d 344, 355 (3d Cir. 1999)).

Wilson v. Seven Seventeen HB Philadelphia Corp., 2003 WL 22709073 *2 (E.D. Pa.).

Implicit in the **McDonnell Douglas** framework, commonly referred as the pretext test, is that a single motive—be it a legitimate or illegitimate one—explains the adverse action. The analysis involves an all or nothing finding for the plaintiff and for this reason is a more rigid and onerous standard for the plaintiff. In contrast, the mixed-motive test, while perhaps more realistic in identifying the true reasons behind a decision and acknowledging that employment decisions are multifaceted—involving as they do a variety of factors (legitimate and illegitimate, objective and subjective, rational and irrational)—restricted proof to the use of direct evidence. By doing so, the mixed-motive test while more generous in theory, was more limited in actual practice than the pretext analysis.

In **Desert Palace,** the United States Supreme Court found that the previous distinction made between direct and circumstantial evidence in evaluating a mixed-motive claim was erroneous in light of the express language of 42 U.S.C. §2000e-2(m), that under this statute (passed after **Price Waterhouse** and in response to a series of decisions of the United States Supreme Court interpreting the Civil Rights Acts of 1866 and 1964) a plaintiff "need only 'demonstrat[e]' that an employer used a forbidden consideration with respect to 'any employment practice.' " **Desert Palace, supra** at 98, 123 S.Ct. at 2153. Based on its reading of the statute, the court held that a plaintiff's burden in a Title VII mixed-motive case is met by presenting "sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence [whether direct or circumstantial] that 'race, color, religion, sex, or national origin' was a motivating factor for any employment practice." **Id.** at 101, 123 S.Ct. at 2155.[12]

[12] On the effect of **Desert Palace** on the type of evidence necessary to prove discrimination and the separate tests developed to evaluate this evidence, we agree with the following comment made in **Dunbar v. Pepsi-Cola Gen. Bottlers,** 285 F. Supp.2d 1180 (N.D. Iowa 2003):

> This court agrees that **Desert Palace** and §2000e-2(m) spell the demise of the 'false dichotomy' between the **McDonnell Douglas** framework, which applied where a plaintiff's claim was primarily supported by circumstantial evidence, and the **Price Waterhouse** framework, which applied where a plaintiff presented direct evidence of discrimination. **See Griffith,** 2003 WL 21976027 at *12 (explaining that this 'dichotomy' applied under Eighth Circuit law, **citing Mohr** 306 F.3d at 639-40); **see also, Desert Palace,** 539 U.S. at ___, 123 S.Ct. at 2152, 2155 (rejecting the 'direct evidence' rule

The court's decision in **Desert Palace** has caused the federal courts nationwide to struggle with the issue of whether the previous prevailing standards adopted for the mixed-motive and pretext tests remain valid in a Title VII action. **Carey v. Fedex Ground Package System, Inc.,** 321 F. Supp.2d 902, 914 (S.D. Oh. 2004). Three possibilities exist: (1) that **McDonnell Douglas** has been supplanted by the "same decision test" required by the Civil Rights Act of 1991 under Section 2000e-5(g)(2)(B) and has no continuing validity (the position advocated by Moyer);[13] (2) that **Desert Palace** changed nothing with regard to **McDonnell Douglas** and its burden-shifting analysis; or (3) that **McDonnell Douglas,** as modified in light of **Desert Palace,** remains the correct standard. **Carey, supra** at 915-16. Under this modified standard, to accommodate both pretext and mixed-motive cases, the third stage of the **McDonnell Douglas** paradigm is refined to provide that after the defendant has produced a legitimate, non-discriminatory reason for its conduct:

> the plaintiff must prove by the preponderance of the evidence either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative), **see Reeves,** 530 U.S. at 143, 120 S.Ct. 2097; or (2) that the defendant's reason, while true, is only **one** of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic (mixed-motive alternative). 42 U.S.C. §2000e-2(m). The latter showing may be

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espoused in, for example, **Mohr**). This court also believes that **Desert Palace** and §2000e-2(m) may spell the demise of the **Price Waterhouse** framework, instead conflating the analysis of **every** discrimination case into the question of whether the plaintiff has presented sufficient evidence, direct or circumstantial, for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.' 42 U.S.C. §2000e-2(m); **see also, Desert Palace,** 539 U.S. at ___, 123 S.Ct. at 2155; **Allen,** 340 F.3d at 557 n.4.

Id. at 1196.

[13] The same decision test requires plaintiff to demonstrate that an impermissible consideration was a motivating factor in the employer's adverse employment decision. Thereafter, defendant must assert as an affirmative defense that it would have taken the adverse employment action absent the impermissible consideration.

Lloyd v. City of Bethlehem, 2004 WL 540452 at *4 (E.D. Pa.).

> made with either 'direct' or 'circumstantial' evidence. **Desert Palace,** 539 U.S. at ___, 123 S.Ct. at 2155. If the plaintiff prevails under the **second** alternative, then if the defendant is to limit the remedies available to the plaintiff to injunctive relief, attorney's fees, and costs—i.e., to escape liability for damages—the burden shifts back to the defendant to prove the affirmative defense stated in §2000e-5(g)(2)(B), which is that the defendant 'would have taken the same action in the absence of the impermissible motivating factor.' 42 U.S.C. §2000e-5(g)(2)(B).

Dunbar v. Pepsi-Cola Gen. Bottlers, 285 F. Supp.2d 1180, 1197-98 (N.D. Iowa 2003). Having reviewed **Dunbar,** we are convinced and persuaded by its analysis and reasoning, as were the courts in **Carey** (applying standard to a claim of racial discrimination in violation of 42 U.S. §1981) and **Lloyd v. City of Bethlehem,** 2004 W.L. 540452 (applying standard to ADEA claim), and believe it states the correct standard.

2. **Application of the Standard**

The amount of evidence required by a plaintiff to meet her initial burden of establishing a **prima facie** case is "minimal" and appears to have been met in this case. **Kroptavich, supra** at 1055. It is not disputed that Moyer belongs to a protected class—is a female and over forty, or is qualified for the position—Moyer was employed by the Vo-Tech as an English teacher and has, in fact, served in this position since October 17, 1996. Whether her qualifications entitled her to initial employment at the second step is, of course, in dispute. With respect to the third and fourth elements, Moyer's starting salary was not at the higher paying second step and, in the cases of Polashenski and Hughes and that of Hyjurick (at this level of analysis), Moyer was treated less favorably than two comparably situated males and a person under forty, respectively. Although the parties dispute whether Moyer has made out a **prima facie** case, for purposes of further analysis, we have assumed she has.

The Vo-Tech's explanation—that the primary consideration given in each case was experience, with the supply of teachers for each subject taught being a factor—is on its face legitimate and non-discriminatory (see Appendix "A"). Although Polashenski did not have full-time teaching experience for one year or more at the same public school, in comparison to Moyer he

had more overall experience and, based on availability, math teachers are purportedly more difficult to attract than English teachers. Likewise, Hyjurick had more experience than Moyer, albeit at a parochial rather than a public school, and also taught math. Hughes possessed a Master's degree, was studying for his second, and, arguably, was a more impressive applicant than Moyer, although lacking her level of experience. As to this deficiency, Augustine testified that he misread the January 27, 1999 date on Hughes' application as September 27, 1998, due to slashes on the application—making the month appear to be the digit 9 rather than the number 1, and the year to be 98 rather than 99—which, as read by Augustine, indicated one year as opposed to a half year of continuous teaching experience. Additionally, Ferguson's six years experience as a maintenance man is not in dispute.

That its intentions were not discriminatory, the Vo-Tech argues, is further illustrated by the employment of Moyer herself and the history of her complaints. At the time Moyer applied to the Vo-Tech, approximately thirty to thirty-five other people also applied for the position, yet Moyer was hired irrespective of being a woman and over forty. After her employment, Moyer complained from the beginning about her pay, as did others similarly situated at the first step salary, not because of discrimination but because of the low wages paid by the Vo-Tech generally in comparison to other schools, including those in the Vo-Tech's participating school districts. Not until the employment of Polashenski in September 1998, more than two years after Moyer was hired, did Moyer first raise the specter of discrimination.

Legitimate reasons having been advanced by the Vo-Tech for its decisions, Moyer must point to triable, admissible evidence that will allow a fact-finder to find pretext and/or discrimination, in whole or in part. **Kroptavich, supra** at 1060. This may be done directly by positive proof (direct or circumstantial evidence) from which a reasonable jury could logically infer that age or gender was a motivating factor in the Vo-Tech's decision, even if not the only factor (the mixed-motive alternative), or indirectly by showing that the reasons proffered by the Vo-Tech for its decision are a façade for underlying discrimination (the pretext alternative). Such evidence need not be over-

whelming, nor, "as a matter of law, must a plaintiff produce evidence in excess of that produced in his **prima facie** case in order to prevail, ... although inferences acceptable at the **prima facie** stage may not satisfy the higher level of specificity usually required at the pretext stage." **Kroptavich, supra** at 1059 (citations omitted); **see also, United States Postal Service Board of Governors v. Aikens,** 460 U.S. 711, 714-15, 103 S.Ct. 1478, 1482, 75 L.Ed. 2d 403 (1983).

At this stage of the modified **McDonnell Douglas** analysis, the burden is upon Moyer to present

> 'evidence, direct or circumstantial, from which a reasonable jury could logically infer that [a protected characteristic] was a motivating factor in [the defendant's adverse employment action against the plaintiff].' **Allen,** 340 F.3d at 557 n.4. As explained above, that inquiry involves two alternatives, as [Moyer] must prove or generate genuine issues of material fact, based on direct or circumstantial evidence, either that (1) [the Vo-Tech's] proffered reasons are not true, but are instead a pretext for [age or gender] discrimination (pretext alternative), **see Reeves,** 530 U.S. at 143, 120 S.Ct. 2097; or (2) [the Vo-Tech's] reasons, while true, are not the **only** reasons for its conduct, and that another 'motivating factor' is [her age or gender] (mixed-motive alternative). 42 U.S.C. §2000e-2(m).

Paraphrasing **Dunbar, supra** at 1199. Ultimately, the question is whether the evidence is such that "a reasonable jury could return a verdict for the non-moving party." **Anderson v. Liberty Lobby, Inc., supra** at 248, 106 S.Ct. at 2510.

The only form of discrimination Moyer asserts is disparate treatment. Although we have tentatively determined that Moyer has presented a **prima facie** case of disparate treatment, to withstand summary judgment at the third stage of the **McDonnell Douglas** analysis, Moyer must present a "strong showing" that she was " 'similarly situated in all relevant respects' to a non-member of the protected class who is more favorably treated." **Dunbar, supra** at 1190. It is not the employer's burden to prove dissimilarity. **Texas Dep't of Community Affairs v. Burdine, supra** at 253, 101 S.Ct. at 1094. In rebutting the employer's explanation, even though the legal presumption of discrimination (arising from the initial presence of a **prima fa-**

cie case) no longer exists once the employer has met its burden of production, "the trier of fact may still consider the evidence establishing the plaintiff's **prima facie** case and inferences properly drawn therefrom ... on the issue of whether the defendant's explanation is pretextual." **Reeves, supra** at 143, 120 S.Ct. at 2106 (citation and internal quotation marks omitted).

In this case, the burden placed on Moyer at this level of analysis is not met by the minimal evidentiary threshold required to prove a **prima facie** case of discrimination. Such evidence neither undermines the Vo-Tech's articulated explanation for hiring Moyer at the first step salary nor, given the explanation, allows a reasonable fact-finder to infer discrimination. The Vo-Tech's explanation, Moyer's lack of a continuous year's teaching experience full-time with the same public school, has nothing to do with Moyer's general qualifications to be an English teacher. Moyer's **prima facie** case established only that she possessed the minimum qualifications to be employed as an English teacher, not that she was entitled to be employed at the second step. Further, given the inherent subjectivity in comparing the credentials of teachers who teach different subjects; Moyer's dissatisfaction from the outset with her low pay—not because of discrimination but because of the depressed pay scale of the Vo-Tech; and the lapse in time—more than two years—between when Moyer was first employed and the later employment of other teachers who she claims were similarly situated but paid more; the fact that Moyer has marginally met the requirements of a **prima facie** case does not contradict the Vo-Tech's explanation or by itself, considered in the light of the Vo-Tech's explanation, allow for an inference of intentional discrimination sufficient to present a jury question. A deeper review is required.

(a) **The pretext alternative**

To show pretext

> [t]he plaintiff must ... point to 'weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons [such] that a reasonable factfinder could rationally find them "unworthy of credence" ' and hence infer that the proffered nondis-

> criminatory reason 'did not actually motivate' the employer's action.

Kroptavich, supra at 1059 (**quoting Simpson v. Kay Jewelers,** 142 F.3d 639, 644 (3d Cir. 1998)). "Since the factual disputed issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent," to discredit the employer's proffered reason for its decision, "the plaintiff cannot simply show that the employer's decision was wrong or mistaken." **Fuentes v. Perskie,** 32 F.3d 759, 765 (3d Cir. 1994). A defendant's reasons will not be considered pretextual if the defendant acted upon a reasonable belief regarding the issue even if that belief was incorrect, ill-formed or ill-considered.

While it is permissible for a trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation, proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination. **Reeves v. Sanderson Plumbing Products, Inc., supra** at 147, 120 S.Ct. at 2108. By itself, it does not compel judgment for the plaintiff. **Id.** at 146-47, 120 S.Ct. at 2108. The plaintiff must convince the factfinder "**both** that the reason was false, **and** that discrimination was the real reason." **St. Mary's Honor Center v. Hicks,** 509 U.S. 502, 515, 113 S.Ct. 2742, 2752, 125 L.Ed. 2d 407 (1993); **see id.** at 519, 113 S.Ct. at 2754 ("It is not enough ... to **dis** believe the employer; the factfinder must **believe** the plaintiff's explanation of intentional discrimination." (emphasis in original)). On this point, the court in **Dunbar** stated:

> [A] showing that the employer's proffered reason is not 'the real reason' is not enough. **Reeves,** 530 U.S. at 153, 120 S.Ct. 2097. Rather, what the plaintiff's evidence must show, to avoid summary judgment or judgment as a matter of law, is ' "1, that the stated reasons were not the real reasons for [the plaintiff's] discharge; **and 2,** that age [or race, or sex, or other prohibited] discrimination was the real reason for [the plaintiff's] discharge.' **Id.** (quoting the district court's jury instructions as properly stating the law). The Supreme Court clarified in **Reeves** that, to meet this burden, 'a plaintiff's **prima facie** case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that

> the employer unlawfully discriminated.' **Id.** at 148, 120 S.Ct. 2097. Thus, a plaintiff must show, or at least generate a genuine issue of material fact, that the defendant's justification for its conduct is 'unworthy of credence.' **Smith v. Allen Health Sys., Inc.,** 302 F.3d 827, 833-34 (8th Cir. 2002) (citing **Reeves,** 530 U.S. at 143, 120 S.Ct. 2097). While a **prima facie** case may be strong enough, standing alone, to make this showing, that is not always the case, **and unlike the plaintiff's prima facie case, the evidence purportedly demonstrating pretext is '"viewed in light of the employer's justification."' Id.** at 835 (quoting **Sprenger v. Federal Home Loan Bank,** 253 F.3d 1106, 1111 (8th Cir. 2001)). As also explained above, evidence that similarly situated persons not sharing the plaintiff's protected characteristic were treated differently from the plaintiff is evidence of pretext. **See Scott,** 180 F.3d at 917.

Dunbar, supra at 1199 (emphasis added).

In this case, Moyer's evidence of pretext is fundamentally no different than the evidence forming the basis of her **prima facie** case: Moyer claims that persons of the opposite gender or who were younger than her were given favorable treatment. Additionally, Moyer claims that the Vo-Tech's primary explanation—the applicant's experience—is belied by and evidences pretext in at least two instances (**i.e.,** Hughes and Hyjurick) for which the Vo-Tech claims mistakes were made in the exercise of legitimate reasons for its decisions. However, when we view the evidence as a whole "in light of the employer's justification," we do not believe a reasonable jury could find that age or gender motivated the Vo-Tech's decision to employ Moyer at the first salary step.

First, the Vo-Tech did not have a written or firm policy that all teachers would begin employment at the first step or that only teachers with one full year of public school teaching experience could begin at the second step. While generally only those who had this experience began at the second step, the decision depended not only on experience but also on principles of supply and demand and the school's budget, and was subject to negotiation. That Moyer was employed at the first step did not violate any objective standard indicative of either preferential or prejudicial treatment.

Second, with the exception of Hughes, all of the teachers to whom Moyer refers as receiving preferential treatment had more

teaching experience than Moyer. With respect to Hughes, notwithstanding Augustine's testimony that the field in which Hughes was obtaining a second Master's degree—special education—was a difficult one in which to find qualified teachers and that he was impressed by Hughes' credentials, Augustine acknowledged that because of Hughes' limited teaching experience, Hughes should have been hired at the first salary step. The reason this did not occur, according to Augustine, was his mistake in reading Hughes' application and his erroneous belief in making his recommendation to the operating committee that Hughes actually had more than one year's teaching experience. A review of Hughes' application explains and supports Augustine's misreading of the dates.

To the extent Moyer contends the employment of Hyjurick at the second level evidences age discrimination, again we must examine the evidence as a whole in light of the Vo-Tech's proffered explanation. Hyjurick was thirty-four and taught math full-time for eleven consecutive years, three at the high school level, prior to her employment by the Vo-Tech; in comparison, Moyer was forty-three years old and had four separate three-month periods of substitute teaching in public schools. Although Augustine testified the Vo-Tech did not credit teaching in a parochial school as prior teaching experience, Augustine further testified that he mistook Hyjurick's high school teaching experience as being at a public school: he misread Hyjurick's reference in her application to Marian High School, located in Tamaqua, as being with the Tamaqua Area School District, a public school system. Though by itself this explanation may be questionable, it cannot be denied that Hyjurick did in fact have more overall teaching experience than Moyer and possessed an instructional one public school certificate at the time of her employment by the Vo-Tech. When viewed in the context of the entire record, as further discussed below, the evidence of pretext as to both Hughes and Hyjurick is tenuous.[14]

Essentially, Moyer claims she was discriminated against on the basis of her age and gender when she was hired at a first

[14] While Moyer points to Hughes to support her claim of gender discrimination, his employment is actually contrary to her claim for age discrimination. Hughes was forty-six years old when employed. Similarly, while Moyer points to Hyjurick's employment as demonstrating age discrimination, this employment simultaneously undercuts her claim of gender discrimination.

step salary. Yet when we consider those teachers, like Moyer, first hired for the 1996-1997 school year, all were hired at the first salary step. The same is true for those teachers first employed during the school years immediately preceding and succeeding that in which Moyer was employed. Therefore, among those teachers employed at the same time as Moyer—both male and female, both over and under forty—there is no disparity in the starting salary step.

In contrast, Hughes was employed three years after Moyer, and Hyjurick an additional one year later. This time difference, combined with the recognition that this is not a case where Moyer was terminated or demoted, but has instead been granted tenure and regular increases in her salary, the same as those provided to all other teachers who reached the second step, mitigates against a finding of discrimination. Nor can it be overlooked that notwithstanding approximately thirty to thirty-five other applicants for the position, Moyer who was then forty-three and female, was in fact employed by the Vo-Tech.

In the context of this case, that the Vo-Tech claims a mistake was made in the employment of two teachers out of twenty-three over the four-year period between October 17, 1996 and February 23, 2001, does not establish pretext. Were we to accept Moyer's position, the mere hiring of a male, regardless of age, or employment of a person younger than Moyer, regardless of when employed—and regardless of the number of applicants considered, the number of employees hired, or the potential for human error—would create an inference of discrimination sufficient to withstand summary judgment. We do not believe this is a correct view of the standard. **Cf. Simpson v. Kay Jewelers, supra** at 646 (evidence of differential treatment of "a single member of the non-protected class is insufficient to give rise to an inference of discrimination"). Instead, the totality of the circumstances must fairly give rise to an inference of unlawful discrimination when account is taken of the employer's explanation.[15] When we examine the record as a whole, taking

[15] Title VII and the ADEA prohibit only intentional discrimination "based on certain, discrete classifications; [they] do [] not prohibit employment decisions based on other factors, such as job performance, erroneous evaluations, personality conflicts, or even unsound business practices." **Zhuang v. Datacard Corp.,** 2004 WL 1887498 *12 n.8 (D. Minn.) (citation and internal quotation marks omitted). By enacting Title VII and the ADEA, Congress did not intend "to guarantee a job

into consideration the Vo-Tech's explanation and the characteristics of the various teachers employed by the Vo-Tech, we do not believe the evidence will sustain a finding that Moyer was treated differently than similarly situated males or employees under the age of forty at the relevant time (see Appendix "A").[16]

(b) **Mixed-motive alternative**

To show that discrimination was more likely than not a cause for the employer's action,

> the plaintiff must point to evidence with sufficient probative force that a factfinder could conclude by a preponderance of the evidence that age was a motivating or determinative factor in the employment decision.

Kroptavich, supra at 1059-60 (**quoting Simpson, supra** at 644-45).

For the same reasons we discussed under the pretext alternative, we do not believe Moyer has presented genuine issues of material fact that a prohibited factor motivated the Vo-Tech's decision to hire her at the first step. Moyer has not established that she was similarly situated in all relevant respects during the relevant time with respect to those teachers who were hired at the second step. She has not presented evidence, direct or circumstantial, from which a reasonable jury could logically infer

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to every person regardless of qualifications." **Griggs v. Duke Power Co.,** 401 U.S. 424, 430-31, 91 S.Ct. 849, 853, 28 L.Ed. 2d 158 (1971) (discussing Title VII). What was intended, and what is required, is "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." **Id.** at 430-31, 91 S.Ct. at 853. "[T]he employment-discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination." **Zhuang, supra** at *17 (citation and internal quotation marks omitted).

[16] We have not excluded from our consideration those remarks which Moyer attributes to Augustine as being demeaning. These remarks, if made, were inappropriate, ill-advised and insensitive. They could not, however, lead a reasonable jury to conclude that the decision to employ Moyer at the first salary step was based on her age or gender. Not only does Moyer fail to prove when the remarks were made, to whom, or under what circumstances, notwithstanding Augustine's role in interviewing Moyer and recommending her employment and salary to the School's operating committee, he did not have voting authority with respect to either. **Cf. Ezold v. Wolf, Block, Schorr & Solis-Cohen,** 983 F.2d 509, 545 (3d Cir. 1992) ("Stray remarks by nondecisionmakers or by decisionmakers unrelated to the decision process are rarely given great weight, particularly if they were made temporally remote from the date of decision.").

that age or gender was more likely than not a motivating factor in her initial employment at the first step.

> Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's **prima facie** case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law.

Reeves, supra at 148-49, 120 S.Ct. at 2109.

In this case, Moyer has not provided evidence sufficiently specific or probative of discrimination such that a reasonable jury could determine that the Vo-Tech's articulated reasons were a pretext for intentional discrimination or that age or gender discrimination motivated the Vo-Tech's decision, in whole or in part. Moyer's belief that discrimination was at work, however sincere, is no substitute for the requisite level of proof to present a jury question. Under prevailing jurisprudence and in the specific context of this case, where plaintiff creates "only a weak issue of fact as to whether the employer's reason was untrue and there [is] abundant and uncontroverted independent evidence that no discrimination [has] occurred," judgment as a matter of law is appropriate. **Id.** at 148, 120 S.Ct. at 2109. **See also, Anderson v. Liberty Lobby, supra** at 249-50, 106 S.Ct. at 2511 ("[I]f the [nonmoving party's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted.").[17]

[17] Although we do not believe Moyer is pursuing a claim against the Vo-Tech under the Pennsylvania Human Relations Act, 43 P.S. §§951-963, the issue is not entirely clear. The only count of Moyer's complaint which specifically identifies a claim under the PHRA is Count V. In that Count, directed solely against the PSEA, it is alleged that the PSEA has violated the PHRA by aiding and abetting the Vo-Tech in discriminatory conduct. However, Count VI of the complaint incorporates by reference the preceding paragraphs, including those contained in Count V. Count VI is a claim against the Vo-Tech alone, alleging a violation of 42 U.S.C. §1983.

The PHRA specifically prohibits discrimination in employment on the basis of race, color, religious creed, ancestry, handicap or disability, use of guide dogs, age, gender, or national origin. Claims brought under the PHRA are analyzed in accordance with the **McDonnell Douglas** framework, **Rinehimer v. Cemcolift, Inc.,** 292 F.3d 375 (3d Cir. 2002), and federal court interpretations of Title VII inform our courts' interpretations of the PHRA. **Kroptavich v. PPL,** 795 A.2d 1048, 1055 (Pa. Super. 2002). Consequently, insofar as the complaint asserts a violation of the PHRA against the Vo-Tech, consistent with our rulings on Moyer's claims under Title VII and the ADEA, the Vo-Tech is entitled to summary judgment.

C. **Plaintiff's Title VII Illegal Retaliation Claim**

Count III of Moyer's complaint alleges that the Vo-Tech engaged in illegal retaliation in violation of Title VII. 42 U.S.C. §2000e-3(a). In order to successfully establish a **prima facie** case of retaliation under Title VII, the plaintiff must show that: (1) she engaged in a protected employee activity; (2) the employer, either after or contemporaneous with such activity, took adverse employment action against her; and, (3) a causal connection exists between the two. **Shellenberger v. Summit Bancorp, Inc.,** 318 F.3d 183, 187-88 (3d Cir. 2003).

Moyer claims that the Vo-Tech's retaliation consisted of "Defendant's refusal to listen to her concerns, as well as its continued and obstinate refusal to adjust her salary to where it should have been" because she complained about discrimination (Complaint, Paragraph 83). Such conduct, even if proven, does not constitute an adverse employment action. An adverse employment action requires proof that the employer's alleged retaliatory actions actually altered the employee's compensation, terms, conditions or privileges of employment, deprived her of employment opportunities, or adversely affected her status as an employee. **Robinson v. City of Pittsburgh,** 120 F.3d 1286, 1300 (3d Cir. 1997).

To the extent Moyer claims she was discriminated against by the Vo-Tech's refusal to change her salary, the Vo-Tech's acts of discrimination, if any, occurred at the time of her employment in not receiving a second step salary, not thereafter, and is already the subject of her Title VII claim for gender discrimination. Moyer reached the second salary step after one year of teaching at the Vo-Tech. Since then, she has received the same incremental salary increases as every other employee who attained the second step.

Since Moyer's initial employment and placement at the first step salary, there has been no separate or additional act by the Vo-Tech adverse to Moyer's interests which Moyer has identified. Moyer's complaints subsequent to her employment and the Vo-Tech's refusal to change its initial employment decision is not an act of retaliation. Stated differently, but to the same effect, an adverse action which occurs before an employee/plaintiff engages in protected activity cannot serve as the basis for a valid retaliation claim. **Robinson v. City of Pittsburgh, supra**

at 1301; **see also, Pipkins v. City of Temple Terrace,** 267 F.3d 1197, 1201 (11th Cir. 2001).

D. **Plaintiff's Equal Pay Act Claim**

The Equal Pay Act of 1963, 29 U.S.C. §206 (the "EPA"), passed as an amendment to the Fair Labor Standards Act, prohibits gender-based wage discrimination. In pertinent part, the EPA provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

29 U.S.C. §206(d)(1). Unlike Title VII which prohibits a broad range of discrimination against a number of protected classes, the EPA prohibits only discrimination in pay based on gender; that is, it prohibits paying different "wages" to men and women for "equal" work.

Claims under the EPA follow a two-step burden shifting framework. A plaintiff must establish a **prima facie** case by showing that "employees of the opposite sex were paid differently for performing 'equal work'—work of substantially equal skill, effort and responsibility, under similar working conditions." **Stanziale v. Jargowsky,** 200 F.3d 101, 107 (3d Cir. 2000). Once the plaintiff presents a **prima facie** case, the burden of persuasion shifts to the employer to demonstrate one of the four affirmative defenses contained in the EPA.

In an EPA claim, unlike other discrimination claims, the employer bears the burden of persuasion at trial once the plaintiff has made out a **prima facie** case. To meet this burden, the employer must "submit evidence from which a reasonable factfinder could conclude not merely that the employer's proffered reasons could explain the wage disparity, but that the proffered

reasons do in fact explain the wage disparity." **Id.** at 107-108. Therefore, for an employer to prevail at summary judgment, the employer must prove one of the affirmative defenses " 'so clearly that no rational jury could find to the contrary.' " **Id.** at 107.

A **prima facie** case under the EPA is established once the plaintiff shows that even one employee of the opposite sex is being paid more for substantially similar work. **Price v. Lockheed Space Operations Co.,** 856 F.2d 1503 (11th Cir. 1988). Unlike Title VII, which requires a plaintiff alleging disparate treatment to show intentional discrimination, under the EPA the plaintiff is not required to prove that the disparity in pay was motivated by intentional discrimination based on gender. It is left for the employer, as a matter of defense, to show that a factor other than gender justified the pay disparity.

In Count IV of the Complaint, Moyer alleges the Vo-Tech violated the EPA by paying a higher salary to male employees with less seniority and experience (Complaint, Paragraphs 88, 90-91). We believe Moyer has presented evidence that some male teachers were paid more than she was for performing work of similar skill, effort and responsibility under the same working conditions. Here, Joseph Polashenski and William Hughes, academic teachers with less than one year of continuous full-time teaching in a public school, were hired at a second step salary. Therefore, the burden shifts to the Vo-Tech under the EPA.

The Vo-Tech's reasons for the pay disparity can best be placed under the fourth affirmative defense provided by the Act: "a differential based on any factor other than sex." The Vo-Tech claims with respect to Polashenski that prior experience and a smaller supply of math teachers from which to hire explains the disparity, and with respect to Hughes that a mistake was made. Though this may be correct, based on the record before us and the burden imposed by law on the employer, we cannot say that the evidence is so clear that no rational jury could find in favor of Moyer's EPA claim.

E. **Plaintiff's Equal Protection Claim**

Section 1983 of the Civil Rights Act of 1964 provides a cause of action for deprivation of rights and states as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Terri-

> tory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §1983. A claim under this section requires a showing that the Vo-Tech acted under color of state law, that Moyer was deprived of a right, privilege or immunity guaranteed by the constitution or under federal law, and that there is a direct causal link between the two. **Adickes v. S.H. Kress & Co.,** 398 U.S. 144, 150, 90 S.Ct. 1598, 1604, 26 L.Ed. 2d 142 (1970).

Moyer asserts a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution as the underlying basis for her Section 1983 claim. For the Vo-Tech to be liable under Section 1983, Moyer must provide evidence of a policy or custom and that this policy or custom caused the violation alleged. **Monell v. Department of Social Services,** 436 U.S. 658, 694-95, 98 S.Ct. 2018, 2037-38, 56 L.Ed. 2d 611 (1978).

> A policy is made 'when a decisionmaker possess[ing] final authority to establish municipal policy with respect to the action issues a final proclamation, policy or edict.' **Kneipp v. Tedder,** 95 F.3d 1199, 1212 (3d Cir.1996) **(**quoting **Pembaur v. City of Cincinnati,** 475 U.S. 469, 481, 106 S.Ct. 1292, 89 L.Ed. 2d 452 (1986) (plurality opinion)). A custom is an act 'that has not been formally approved by an appropriate decisionmaker,' but that is 'so widespread as to have the force of law.' **Bryan County,** 520 U.S. at 404, 117 S.Ct. 1382.

Natale v. Camden County Correctional Facility, 318 F.3d 575, 584 (3d Cir. 2003).

A local governmental agency's policy or custom may be shown by proving the existence of an officially adopted policy or decision to deprive individuals of their federal rights, the existence of an unofficial but widespread governmental policy or custom that results in deprivations of federal rights, or official action amounting to deliberate indifference toward the deprivation of federal rights. **City of Canton v. Harris,** 489 U.S.

378, 388, 109 S.Ct. 1197, 1204, 103 L.Ed. 2d 412 (1989); **see also, K.M. by and through his parents, J.M. and M.M. v. Independent School District No. 281,** 24 IDELR 533 (D.C. Minn. 1996) (finding that to hold a school district liable under Section 1983 a plaintiff must show that a policy or custom exists and harmed the plaintiff. Plaintiff must demonstrate (1) the existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employee, (2) deliberate indifference to or tacit authorization of such conduct by the governmental entity policymaking officials after notice to the officials of the misconduct, and (3) that plaintiff was injured by acts pursuant to the governmental agency's custom); **Shepard v. Kemp,** 912 F.Supp. 120 (M.D. Pa. 1995).

None of Moyer's evidence, even if taken as true, establishes a policy or custom of the Vo-Tech to discriminate or a continuing, widespread, persistent pattern of, or deliberate indifference to, discrimination. Deliberate indifference requires "something more culpable than negligent failure to recognize a high risk of harm to plaintiffs." **Shepard, supra** at 125. Accordingly, summary judgment will be granted on Moyer's Section 1983 claim.

III. **CONCLUSION**

Our conclusion that Moyer has not met her burden at the third stage of the **McDonnell Douglas** analysis with respect to her claims under Title VII and the ADEA is consistent with the observation that although the standard at this stage places a difficult burden on the plaintiff to avoid summary judgment, "it arises from an inherent tension between the goal of all discrimination law and our society's commitment to free decisionmaking by the private sector in economic affairs." **Fuentes v. Perskie, supra** at 765. Under this standard, it is not enough to suspect discrimination; a reasonable inference of intentional discrimination must fairly arise from the evidence when account is taken of the employer's legitimate, non-discriminatory reasons for its conduct. Additionally, these claims are time-barred, in part, by the filing requirements of charges with the appropriate administrative agencies.

In contrast, our decision to permit Moyer's EPA claim to proceed follows not only from the significant difference in burdens imposed on the Vo-Tech for this claim and those under

Title VII and the ADEA, but also from the difference in the nature of the claims themselves: under the EPA, Moyer need only produce evidence of a disparity in pay between men and women performing equal work; under Title VII and the ADEA, Moyer must prove intentional discrimination.

In denying Moyer's claims of retaliation and for violating Section 1983, we have determined that the Vo-Tech's decision to maintain the status quo in respect to Moyer's complaints is not an act of retaliation and that, absent proof of a policy or practice of discrimination, or a failing by the Vo-Tech amounting to deliberate indifference, Moyer cannot sustain her claim under Section 1983.

APPENDIX "A"

	DOB	Age at time of Hire Date	Operating Committee Meeting Hire Date	School Year of Hire	Subject Taught	Salary	Long-Term, Trade, or Permanent Experience
Ms. Tina Klotz (Keiser)	8/10/1973	22	8/17/1995	1995-96	Special Education	Salary step $18,500.00	NONE
Mr. Robert Kovac, Jr.	7/7/1970	25	8/17/1995	1995-96	English	Salary step $18,500.00	2–3 months of community college teaching
Mrs. Amy Delpais	1/20/1972	23	8/17/1995	1995-96	Math	Salary step $18,500.00	NONE
Ms. Brandi Gavornick	1/11/1971	24	8/31/1995	1995-96	Social Studies	Salary step $18,500.00	Daily substitute for 2 years
Ms. Stephanie Grigas (Barto)	8/3/1971	24	7/18/1996	1996-97	Marketing/ Distributive Education	Salary Step Masters $19,100.00	NONE
Mrs. Gayle Moyer	10/24/1952	43	10/17/1996	1996-97	English	Salary step $18,500.00	4 long-term (90 day) substitute positions, daily substitute taught GED classes

Mr. Daniel McLean	7/30/59	37	10/17/1996	1996-97	Industrial Electricity	Salary step $18,500.00	2 years substitute experience at Carbon County Vo-Tech
Mr. Thomas Wignot	7/20/1953	43	11/21/1996	1996-97	Physical Education/Health	Salary step $18,500.00	2 full years teaching college Physical education
Mrs. Judith Fisher	5/3/1953	44	8/21/1997	1997-98	English	Salary step $18,500.00	Daily substitute, summer school and home tutoring over approximately 6 years
Ms. Michelle Hunsicker	1/5/1974	23	8/21/1997	1997-98	Librarian	Salary step $18,500.00	NONE
Mr. Michael Lusch	7/29/1974	24	9/9/1998	1998-99	Physical Education/Health	Salary step $18,500.00	Part-time football coach for approximately a year

Mr. Joseph Polashenski	11/27/1963	34	9/17/1998	1998-99	Math	Salary Step 2 $23,500.00	8 Years Substitute Teaching in Public School, including 2 one-half year long-term substitute positions
Ms. Monique Everett	2/27/1970	29	7/15/1999	1999-00	Librarian	Salary Step 2 $24,500.00	2 Years—Public School
Mr. Bill Hughes	1/12/1953	46	8/19/1999	1999-00	Special Education (History)	Salary Step 2 Masters $25,100.00	Four Months Public School Special Education
Mrs. Michelle Moyer	11/12/1972	26	8/19/1999	1999-00	Long-Term Substitute Cosmetology	Salary Step 2 $24,500.00	2 Years—Public School, 5 Years Trade Experience
	9/22/2000			2000-01	Cosmetology		
Mr. Jeffrey Swoyer	1/24/1974	25	8/19/1999	1999-00	Welding	Salary Step 2 $24,500.00	5 Years—Public School, 4 years trade experience
Ms. Carol Brogan	8/23/1968	30	8/19/1999	1999-00	Math	Salary Step $21,000.00	Daily substituting over a 3 year period

Mr. Gabriel J. Flintosh	6/2/1961	38	9/16/1999	199-00	Physical Education/Health	Salary Step $21,000.00	1 1/2 years private school daily substituting 4 years
Mr. Stephen Ferguson	7/24/1970	29	9/16/1999 Resigned 10/21/1999	1999-00	Heating/AC/ Refrigeration Mechanic	Salary Step 2 $21,000.00	NONE (this was inaccurate— see reinstatement)
			Reinstated with Trade Experience) 11/10/1999	1999-00		Salary Step 2 Intern $24,200.00	Letter of Agreement and 6 Years Trade Experience
Mr. Jeffrey Hancock	3/20/1974	25	2/17/2000	1999-00	Physical Education/Health	Salary Step $21,000.00	Part-time teaching for approximately 4 months
Mr. Raymond Launderslager	1/31/1948	52	3/29/2000	1999-00	Math	Salary Step 2 $24,500.00	6 Years— Public School
Mr. Bryan Domin	4/2/1971	29	7/20/2000	2000-01	Long-Term Substitute— Electronics	Salary Step $21,000.00	NONE
Ms. Sara Banks	12/1/1972	27	8/17/2000	2000-01	Social Studies	Salary Step $21,000.00	NONE
Mrs. Diane Hyjurick	9/8/1965	34	8/17/2000	2000-01	Math	Salary Step 2 $24,500.00	11 Years— Parochial School + an Instructional Public School Certification

Mrs. Shirley Tirpak	2/21/1961	39	8/17/2000	2000-01	Special Education	Salary Step 2 $24,500.00	6 Years—Public School
Mrs. Gloria Bench	10/13/1944	55	9/22/2000	2000-01	Special Education	Salary Step $21,000.00	NONE (this was inaccurate—see reinstatement)
			10/25/2000	2000-01	(Correction Made)	Salary Step 2 $24,500.00	7 Years Public School
Mr. Brent Borzak	4/26/1978	22	10/30/2000	2000-01	Social Studies	Salary Step $21,000.00	1-2 months summer school, 1-2 months daily substitute
Mr. Jason Reitz	1/21/1970	30	12/21/2000	2000-01	Special Education	Salary Step $21,000.00	NONE
Mr. Douglas DelConte	10/27/1978	22	8/16/2001	2001-02	Welding Instructor	Salary Step $21,000.00	Trade Exp.—3 Years
Mr. Mark Horn	1/28/1978	23	1/17/2002	2002	Health and Physical Education	Salary Step 2 $24,500.00	Experience—2 years
Mr. George Cope	3/25/1963	39	4/18/2002	2002-03	Industrial Electricity	$32,000.00	Experience—1 year teaching—15 years trade experience
Mr. Brian Wirth	7/9/1976	26	7/25/2002	2002-03	Heating, Ventilation, AC and Refrigeration Instructor	$30,000.00	Trade Exp.—6 years

STEVEN McGUCKIN, NANCY McGUCKIN AND RODNEY GILBERT, Plaintiffs vs. E.J. KIRKPATRICK CONSULTING, INC. AND ERICKA KIRKPATRICK, Defendants vs. WESTFIELD INSURANCE COMPANY, JEANNE GILBERT AND LAMAR GILBERT, Claimants/Interpleaded Party Plaintiffs

Civil Action—Interpleader by Defendants—Scope of Claims Permitted by Interpleader Claimant—Scope of Discovery Permitted As Defined by the Pleadings—Appealability of Discovery Order—Collateral Order Doctrine

1. Fundamental to a defendant's request to interplead a third-party claimant is that the claim of the plaintiff and the third-party claimant are mutually inconsistent and if enforced in separate actions would expose the defendant to multiple liability arising out of a common asserted claim.

2. The grant of a defendant's request for interpleader does not restrict or limit the third party's claims against the defendant to that portion of the claim for which damages overlap but permits the third party to assert any claims or relief arising out of the same subject matter which forms the basis of plaintiff's claim against the defendant.

3. The scope of discovery is governed by what is relevant to the cause being tried and is generally defined by reference to the pleadings.

4. Generally, discovery orders authorizing or prohibiting discovery are not appealable since, under the final judgment rule, they do not constitute a final judgment as to all claims and as to all parties involved in the litigation.

5. The collateral order doctrine authorizing immediate appeals of collateral orders is an exception to the final judgment rule. For a discovery order to be collateral and therefore immediately appealable, the following criteria must be met: (1) the order appealed from must be separable from, and collateral to, the main cause of action; (2) the right involved must be too important to be denied review; and (3) the question presented must be such that if review is postponed until a final judgment is rendered in the case, the claimed right will be irreparably lost.

6. The court's order striking Defendants' objections to the Claimant's request for production of documents and directing the Defendants to comply with such request, which request sought information directly relevant to the Claimant's claim for breach of contract, is not separable from, or collateral to, the main cause of action. As such, it does not meet the requirements of a collateral order and does not permit the taking of an immediate appeal.

7. A party's appeal of a discovery order does not deprive the trial court of jurisdiction to hear and consider matters which are not involved in the claim on appeal provided the court can resolve such matters without prejudicing the rights of the party seeking review.

NO. 03-3164

GERALD F. STRUBINGER, Esquire—Counsel for Plaintiffs.

MICHAEL T. FOSTER, Esquire—Counsel for Defendants.

JOHN W. DORNBERGER, Esquire—Counsel for Claimant Westfield Insurance Company.

MEMORANDUM OPINION

NANOVIC, J.—October 19, 2004

The Defendants, E.J. Kirkpatrick Consulting, Inc. and Ericka Kirkpatrick, have appealed from our order dated July 27, 2004, dismissing Defendants' objections to the Claimant's, Westfield Insurance Company's (hereinafter referred to as Westfield), discovery requesting the production of various documents and directing Defendants to comply with the request within thirty days. This opinion is in support of that order. **See** Pa. R.A.P. 1925(a).

PROCEDURAL AND FACTUAL BACKGROUND

In February 2003, the Plaintiffs, Steven McGuckin and Nancy D. McGuckin, his wife, and Rodney Gilbert (hereinafter collectively referred to as the Plaintiffs), learned that their property at 1542 Strauss Valley Road, Lehighton, Carbon County, Pennsylvania, was contaminated with heating oil leaking from an above-ground storage tank located on the property (Plaintiffs' complaint, paragraph 5). Plaintiffs notified their homeowners insurance company, Westfield, of this problem, whereupon Westfield contracted with Defendants to provide environmental services, including, but not limited to, soil testing and analysis, disposal of contaminated soil and water, and final grading and restoration of the property (Plaintiffs' complaint, paragraphs 6 and 7; Westfield's complaint, paragraph 35).

At some point in performing these services, Defendants allegedly billed and demanded payment from Plaintiffs for work which was not completed (Plaintiffs' complaint, paragraph 9). When Defendants did not receive payment, Defendants ceased work, leaving Plaintiffs' property in a partially excavated and unfinished condition (Plaintiffs' complaint, paragraphs 9 and 10). Plaintiffs next filed suit against Defendants at the District Justice level and obtained a judgment against the Defendants in the amount of six thousand five hundred dollars ($6,500.00). It is this judgment which has been appealed by Defendants.

In Plaintiffs' complaint filed in response to the appeal taken by the Defendants, Plaintiffs assert a claim for breach of contract pursuant to the agreement between Westfield and Defen-

dants for Defendants to clean up Plaintiffs' property (Plaintiffs' complaint, paragraphs 7, 13, 15, 16 and 18). Thereafter, on December 9, 2003, Defendants, through their counsel, Michael T. Foster, Esquire, filed a petition for interpleader alleging, in pertinent part, that the contractual obligations on which Plaintiffs' suit is based arise out of the contract between the Defendants and Westfield; that Plaintiffs are, at best, third-party beneficiaries of that contract; and that Westfield as the actual party to the contract has made, or is expected to make, a demand upon the Defendants as a result of which Defendants will be subjected to double or multiple liability upon the same claim asserted by the Plaintiffs (Petition for Interpleader, paragraphs 11-15).

Upon receipt of Defendants' petition, we issued a rule on Plaintiffs to show cause as to why the relief requested by the Defendants should not be granted. This rule was made absolute on January 20, 2004, after the return date of the rule had expired and no response had been received. Our order making the rule absolute, in the form provided by Pa. R.C.P. 2304, directed Westfield as a party plaintiff to file a complaint within twenty (20) days after being served with copies of the petition for interpleader and Plaintiffs' complaint.

On March 31, 2004, Westfield filed its complaint against Defendants. In this complaint, Westfield alleges, **inter alia,** that the contamination of Plaintiffs' property by the heating oil released from the above-ground storage tank was a reportable release as defined by the Pennsylvania Department of Environmental Protection (hereinafter DEP) (complaint, paragraph 21); that on or about February 2003, Westfield entered an agreement with Defendants for Defendants to test, assess and clean up the contamination of Plaintiffs' property (complaint, paragraph 35); that, pursuant to the agreement, Defendants agreed to test Plaintiffs' property to determine the area and extent of the contamination and to develop a plan for the removal and cleanup of the contamination, all to be completed in accordance with the requirements of DEP (complaint, paragraphs 23, 25, 27, 28 and 39); that part of the services Defendants agreed to provide included the preparation of a report or assessment of the site contamination to be submitted to Westfield and DEP for review and evaluation so as to ensure compliance with DEP's regulatory requirements (complaint, paragraph 39); that De-

fendants have failed to provide the results of its soil sampling and assessment of the project site to either Westfield or DEP and have further failed to provide either with a closure report or assessment (complaint, paragraphs 45-47); that Westfield believes Defendants have not properly identified or classified contaminated soil on Plaintiffs' property and that, in consequence, the amount of soil Defendants excavated from Plaintiffs' property, an amount in excess of six hundred tons, exceeds that required to remediate the property (complaint, paragraphs 50 and 51); that Westfield will be required to employ additional environmental consultants to correct and complete work that Defendants were to perform (complaint, paragraphs 53 and 54); that Defendants falsely assured Westfield they were capable and competent to provide environmental services which they in fact were not qualified to perform and that, in billings to Westfield, Defendants misrepresented the true qualifications of the persons actually performing such services (complaint, paragraphs 63-76); and that, to date, Westfield has paid Defendants in excess of one hundred thirty-three thousand ($133,000.00) dollars for services performed at the project site (complaint, paragraph 33). Westfield's complaint asserts claims for breach of contract (Count I), breach of warranty (Count II), fraud and misrepresentation (Count III), breach of the implied duty of good faith and fair dealing (Count IV), and replevin (Count V), the latter requesting copies of the reports and analyses for which Defendants billed Westfield and which Westfield claims to have paid.

On March 11, 2004, Westfield served a request for production of documents upon Defendants to which Defendants objected on or about April 16, 2004. Westfield's request sought production of, among other things, all field notes, sample location drawings, waste manifest acceptance documents, soil and groundwater test results with supporting documentation, and draft reports. With the exception of responding that they did not know what exhibits or experts would be introduced at the time of trial, Defendants' response to every document request read as follows:

> This inquiry is objected to as being, but not limited to, well beyond the scope of the complaint and/or it's [sic] pleadings in this matter. While it is acknowledged that Plaintiff Westfield Insurance has filed its own complaint in this mat-

ter, it was filed without leave of court and is therefore improper under the Rules of Civil Procedure.

Westfield next filed a motion to strike Defendants' objections and to compel responses to Westfield's request for production of documents (hereinafter referred to as the "Motion to Compel") on May 7, 2004. In this motion, Westfield asserted that the documents sought are material and relevant to each of its claims against the Defendants.

A rule to show cause with respect to Westfield's motion was issued on May 11, 2004, and, on June 1, 2004, Defendants filed their responses to the motion. Defendants' answer does not challenge the material facts of the motion but argues that the claims made by Westfield in its complaint are beyond the scope of those contained in Plaintiffs' complaint and are therefore improper, and that Westfield seeks through the discovery process to obtain and to benefit from the work and services provided by Defendants without paying for this work. In its motion, Westfield alleges that because it has incurred and will continue to incur costs and fees in retaining another environmental consultant to complete the work Defendants were to perform, and in order to ascertain the full measure of its damages as well as to avoid duplication of services and mitigate its damages, it is important that it be permitted to obtain and review the documents it has requested to determine exactly what work was performed by Defendants and what work remains to be done (Motion to Compel, paragraphs 27-29).

Hearing/argument on Westfield's motion was originally scheduled for July 2, 2004. Defendants requested a continuance of this date, which request was opposed by Plaintiffs and Westfield. By order dated June 30, 2004, we granted Defendants' continuance request and, in the same order, rescheduled the matter to be heard on July 27, 2004, at 9:00 a.m.

On July 27, 2004, counsel for the Plaintiffs and for Westfield appeared in court; Defendants' counsel did not. Following argument, and after noting that Defendants had failed to file any legal memorandum in support of their opposition to the motion, in our order dated the same date we granted the motion and directed Defendants to provide full and complete responses to Westfield's document requests within thirty (30) days. Defendants have filed a timely appeal of this order to the Pennsylvania Superior Court.

DISCUSSION

A. **Appealability of Order**

Preliminarily, we seriously question the appealability of the order in question. Under the final judgment rule, a party aggrieved by a decision in a civil case has no right to appeal that decision until such time as final judgment as to all claims and as to all parties has been entered. Pa. R.A.P. 341(a). Generally, discovery orders are not appealable as they do not dispose of the litigation. **Makarov v. Lukenda,** 856 A.2d 163, 164 (Pa. Super. 2004); **see also, PECO Energy Co. v. Insurance Company of North America,** 852 A.2d 1230, 1233 (Pa. Super. 2004).

The order appealed from is one directing compliance with discovery requests and is clearly non-dispositive of the case. Defendants argue, however, that the appeal falls within the "collateral order" exception to the final judgment rule. This exception has been codified in Pa. R.A.P. 313. For an order to fall within the collateral order doctrine and become immediately appealable, all of the following must exist: (1) the order appealed from must be separable from, and collateral to the main cause of action; (2) the right involved must be too important to be denied review; and (3) the question presented must be such that if review is postponed until a final judgment is rendered in the case, the claimed right will be irreparably lost. Pa. R.A.P. 313(b); **see also, Makarov v. Lukenda, supra** at 164. Only if an issue can be decided without reference to the underlying claim is it separable from, and collateral to, the main cause of action. **Ben v. Schwartz,** 556 Pa. 475, 729 A.2d 547, 551-52 (1999) (holding also that the second prong of the test involves a determination that the issue is important not only to the particular parties but to rights which go beyond the particular litigation at hand and involve interests deeply rooted in public policy which should not be compromised notwithstanding the efficiency interests underlying adherence to the final judgment rule).

In this case, there is no claim that the information sought is protected by the attorney-client, work product or trade secret privileges. **Cf. PECO Energy Co., supra** at 1233 ("Appellate review is appropriate when a colorable claim of privilege is asserted."). Instead, the information sought and which is objected

to by Defendants is inextricably intertwined not only with the issue of whether Defendants have breached their agreement with Westfield, but also with the extent and nature of any damages which may have been sustained by such breach. Since the agreement on which Westfield premises its breach of contract claim against Defendants is the same agreement on which Plaintiffs base their claim of breach of contract, and since the claim for damages of both Plaintiffs and Westfield, at least as alleged in Defendants' petition for interpleader, overlaps, it logically follows that the information sought by Westfield with respect to its claim for breach of contract is, if not directly "relevant to the subject matter involved" in both claims, is at least "reasonably calculated to lead to the discovery of admissible evidence" in both. Pa. R.C.P. 4003.1.[1] Consequently, the order on appeal is neither separable from, nor collateral to, the main cause of action and does not meet the first prong of the collateral order test. As such, Defendants have appealed from a non-appealable interlocutory order. **See also, Makarov v. Lukenda, supra** (holding that order compelling discovery of information regarding the extent of plaintiff's injuries in personal injury litigation pertains directly to the ultimate issue in the underlying action and is therefore interlocutory and not appealable).[2]

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[1] To the extent Defendants argue that the granting of the discovery order **vis-à-vis** Westfield's replevin claim in a decision "on the merits" because, in the context of this claim, the granting of the discovery is co-extensive with the granting of relief on the merits, the issue is moot: On October 7, 2004, Westfield praeciped to discontinue the replevin claim.

[2] Our assessment of the viability of Defendants' appeal does not, in any way, effect our jurisdiction to act on Defendants' preliminary objections to Westfield's complaint or Defendants' motion to stay all proceedings pending the outcome of the appeal. While Pa. R.A.P. 1701(a) provides that after an appeal is taken, "the trial court … may no longer proceed further in the matter," this general prohibition is limited by Pa. R.A.P. 1701(c) to the particular claim "involved in [the] appeal." **Richards v. Trimbur,** 374 Pa. Super. 352, 543 A.2d 116 (1988). Therefore, should it later be determined that our order dated July 27, 2004, meets the criteria for being a collateral order, this conclusion does not deprive us of jurisdiction to rule on all matters not involved in the appeal. **Rosen v. Rosen,** 520 Pa. 19, 24, 549 A.2d 561, 564 (1988) ("The purpose of Rule 1701(c) is to prevent appeals of collateral issues from delaying the resolution of the basic issues where the proceeding below can continue without prejudicing the rights of the part[ies] seeking the interim review."). We will, however, defer ruling on Westfield's motion for sanctions as to the discovery order until after Defendants' appeal is disposed of by the Superior Court.

(B) **Propriety of Discovery Requests**

Addressing next the merits of the Defendants' appeal, in **PECO Energy Co. v. Insurance Company of North America,** the court, in language relevant to these proceedings, stated the following:

> The trial court is responsible for '[overseeing] discovery between the parties and therefore it is within that court's discretion to determine the appropriate measure necessary to insure adequate and prompt discovering of matters allowed by the Rules of Civil Procedure.' **Hutchison v. Luddy,** 414 Pa.Super. 138, 606 A.2d 905, 908 (1992) (citation and internal quotations omitted). Pennsylvania Rule of Civil Procedure 4003.1 states:
>
> **Rule 4003.1 Scope of Discovery Generally. Opinions and Contentions**
>
> (a) Subject to the provisions of Rules 4003.2 to 4003.5 inclusive and Rule 4011, a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party … .
>
> (b) It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
>
> Pa.R.C.P. 4003.1(a)(b). **See also, Lloyd v. CAT Fund,** 573 Pa. 114, 821 A.2d 1230, 1236 (2003). Generally, discovery 'is liberally allowed with respect to any matter, not privileged, which is relevant to the cause being tried.' **George v. Schirra,** 814 A.2d 202, 205 (Pa.Super.2002) (citations omitted).

Id. at 1233.

It is also not ground for objection that Defendants may be entitled to additional payment for the work they performed under the contract with Westfield. Whether the contract was breached by either side and what damages have been sustained, if any, is directly at issue in this litigation. The documents Westfield requests are clearly relevant to these issues. For Defendants to condition production of the documents on additional payments from either Westfield or the Plaintiffs is in a very real sense

placing the cart before the horse: Defendants may or may not be entitled to additional payments depending not only on what the parties agreed to but also on whether Defendants breached that agreement. Moreover, production of the documents requested by Westfield will in no way jeopardize Defendants' claim for any damages to which they may be entitled.

As already discussed, the information Westfield seeks is relevant not only to its own claim for breach of contract but also to that of Plaintiffs'. To the extent Defendants contend Westfield's claims are inappropriate to this litigation, that Westfield's claims are limited by amount and type to those asserted by Plaintiffs, Defendants appear to forget that they are the ones who, by their interpleader, invited the claims.[3]

Rule 2303(a)(1) reads, "[t]he petition for interpleader shall allege … that a claimant not a party of record has made or is expected to make a demand upon the defendant as a result of which the defendant is or may be exposed to double or multiple liability to the plaintiff and to such claimant as to **all or any part of** the claim asserted by plaintiff." Pa. R.C.P. 2303(a)(1) (emphasis added). This language, referring to the requirements of the allegations in the petition for interpleader, is not included in Rule 2309, which governs the statement of claim. Rule 2309 states that "each claimant interpleaded shall file a statement of claim against the defendant and any money or property paid or delivered by said defendant pursuant to an order of the court." Pa. R.C.P. 2309(a). The form of this order is provided for in Rule 2304. In accordance with such order, the claimant is made a party plaintiff to the proceeding and is enjoined from commencing or further prosecuting any action in any court against the defendant "to enforce **in whole or in part** any claim against the [defendant] set forth in [the petition for interpleader], except as a party to the [interpleader] action." Pa. R.C.P. 2304 (emphasis added). These rules when read **in pari materia** in no way act as a bar to claimant asserting additional claims arising out of the same subject matter or additional damages against the defendant in the statement of claim. Rather, Rule 2303(a) only acts as a bar to the granting of a petition for interpleader if the defendant fails to allege the potential for multiple liability.

[3] We are aware of no procedural law or rule that required Westfield, as asserted in Defendants' objections to Westfield's discovery, to seek leave of court before filing its complaint; in fact, the rules are to the contrary. Pa. R.C.P. 2304 and 2309.

More to the point, the essential element for interpleader is that "the respective claims are [in whole or in part] mutually inconsistent and if enforced in separate actions would expose the defendant to double liability in regard to the same matter." **McCrady-Rodgers Co. v. Housing Corporation,** 360 Pa. 275, 279, 61 A.2d 866, 868 (1948). However, "[i]nterpleader may be granted … even though the same claim is not asserted or the same relief is not demanded by both claimants." **Id.; see also,** Pa. R.C.P. 2306(c)(3).

This essential element for interpleader has been met in this case and was, in fact, the very basis upon which this court relied in granting Defendants' request to interplead Westfield. Both Plaintiffs' claims and those of Westfield for breach of contract appear from the pleadings to be premised on the same contractual obligations of Defendants created by the contract with Westfield, and to avoid inconsistent and contradictory results—and the possibility of duplicative awards—were properly interpleaded together.[4] At this point in the proceedings, although the claims of Plaintiffs and Westfield for damages are believed to overlap, it is uncertain whether they are identical. Regardless, to the extent both arise out of the same underlying conduct of Defendants which gives rise to damages to both Plaintiffs and Westfield for breach of contract, some of which overlap and some of which may not, once interpleader is granted, we believe principles of judicial economy and efficiency and fairness to the parties permits all such damages to be litigated in one proceeding. **See Smith v. Gaut,** 60 D.&C. 528, 531 (Wash. Cty. 1947) ("It is in the public interest as well as in the private

[4] On August 9, 2004, more than four months after the filing of Westfield's complaint, and after our order dated July 27, 2004, which is the subject of Defendants' appeal, Defendants filed objections to Westfield's complaint. Argument on these objections was held on September 29, 2004. At that time, Defendants argued that because Plaintiffs' claims were in trespass and Westfield's for breach of contract, trespass and replevin, Westfield violated the permissible scope of claims in an interpleader proceeding. This argument ignores the explicit language of Plaintiffs' complaint asserting that their claims are for breach or contract (Plaintiffs' complaint, paragraphs 18 and 19) and is inconsistent with Defendants' own petition for interpleader in which Defendants aver that the contract Plaintiffs claim has been breached is that between Defendants and Westfield and, that for this reason, Plaintiffs' claims are inconsistent with or duplicative of those made by Westfield, thereby exposing Defendants to double or multiple liability for the same claim (Petition for Interpleader, paragraphs 12 and 15).

interest of the defendant to avoid such additional suits when it is possible to do so by interpleading the adverse claimant in the suit first brought.”).[5]

[5] In response to our order pursuant to Pa. R.A.P. 1925(b) directing Defendants to file a concise statement of the matters complained of on appeal, Defendants have filed a rambling, inaccurate and imprecise statement which contains, in part, matters not of record and which obfuscates, rather than defines, the issues on appeal. We believe the foregoing opinion accurately and properly focuses on the real issue: Whether Westfield’s request for discovery is relevant to the claims properly raised in these proceedings.

To the extent Defendants allege they were not notified of, or provided an opportunity to participate in, the argument on Westfield’s motion to compel discovery, the record is to the contrary. The same order of June 30, 2004, which granted Defendants’ request to continue the argument/hearing rescheduled for July 2, 2004, also rescheduled the matter for July 27, 2004. Therefore, the Defendants’ claim that they received notice of the granting of the continuance but not of the new date is misleading.

When the case was first called for argument on July 27, 2004, and it was learned that counsel for Defendants was not present, the Court had a member of its staff contact Attorney Foster’s office to determine the reason for his absence. In the meantime, the case was placed at the end of the list of cases scheduled for argument. Prior to recalling the case, the court was advised that Attorney Foster would not be attending due to illness and that Attorney Clever, who apparently had been monitoring Attorney Foster’s mail during the previous week, reported that no notice of the rescheduled proceedings had been received during this period. Prior to that time period, however, the Prothonotary’s dockets reflect that notice of the rescheduled proceedings was forwarded to Attorney Foster’s office, as well as to counsel for the plaintiffs and Westfield. This notice, according to the Prothonotary’s records, was mailed to Attorney Foster on July 9, 2004, almost three weeks prior to the scheduled proceeding on July 27, 2004, and prior to the date Attorney Clever indicated he was checking Attorney Foster’s mail.

As indicated in the text, counsel for both Plaintiffs and Westfield were present for the scheduled argument/hearing and obviously received the notice sent by the Prothonotary’s office. Moreover, no evidence was taken or hearing held in Attorney Foster’s absence. Instead, an abbreviated argument was made by Westfield’s counsel and the matter was then taken under advisement. The motion was decided solely on the undisputed facts of record with respect to Westfield requesting and Defendants objecting to discovery, the issue as to the propriety of the discovery being one of law.

Westfield’s motion to compel filed on May 7, 2004, was accompanied by a memorandum of law as required by local rule. Local rule also requires that when a motion or petition is opposed, the answer to the petition also be accompanied by a memorandum of law. Rule L206.1(4)(E). In this case, Defendants’ answer filed on June 1, 2004, was not accompanied by a memorandum of law. Pursuant to local rule, a party who fails to file a brief as required by the rules is prohibited from arguing. Rule L211(3). In practice, this court has been lenient in the enforcement of the rule when no prejudice occurs to the opposing party. In this case, the court did not consider Defendants’ failure to file a responsive memorandum of law or to appear at the scheduled proceeding as a waiver of the issue. Rather, the issue was decided as an issue of law in accordance with the law, as we understand it.

CONCLUSION

In accordance with the foregoing, we respectfully request that our order denying Defendants' objections to Westfield's discovery and directing Defendants to comply with this discovery be affirmed.

As to questions of law, Defendants' counsel refers to no cases which hold that where a party has been provided an opportunity to brief an issue, argument in person is a concomitant requirement of due process. Under these circumstances, we do not believe we abused our discretion or violated any rights of Defendants by deciding a question of law on the basis of the undisputed matters of record. We further fail to see how Defendants have in any manner been prejudiced by the procedure followed in ruling on Westfield's motion to compel.

ECKMAN LUMBER COMPANY, INC., Plaintiff vs. DRIVER LEASING, INC., Defendant

Civil Action—Conceptual Distinction Between Contract and Tort As Separate Forms of Action—Application of the "Gist of the Action" Doctrine—Foreseeability of Consequential Damages and Their Recovery in Contract and Tort

1. Under the "gist of the action" doctrine whether a cause of action sounds in tort or in contract is determined by examining the source of the duties owed between the parties. If a contractual relationship exists between the parties, but the duty upon which the cause of action is based arises as a matter of social policy and is independent of any duty imposed by mutual consensus of the parties under the contract, the claim in tort is the "gist of the action" with the contract being collateral. Where, however, the parties' obligations are defined by the terms of the contract, and not by the larger social policies embodied by the law of tort, the essence of the claim is one for breach of contract.

2. Damages in a breach of contract action are limited to those as would naturally and ordinarily flow from the breach, were reasonably foreseeable and within the contemplation of the parties at the time they made the contract, and that can be proven with reasonable certainty. Damages in tort are limited by public policy to those proximately caused by the Defendant's conduct.

3. Where the Defendant agrees to provide competent and qualified drivers for Plaintiff's vehicles, Plaintiff's claim that Defendant was negligent in the employment, selection and supervision of the drivers provided to Plaintiff is barred by the "gist of the action" doctrine to a claim for a breach of contract. Plaintiff's claim that Defendant's drivers negligently operated Plaintiff's vehicles resulting in motor vehicle accidents and damages to Plaintiff sounds primarily in tort, with the contract being incidental, and is not barred by the "gist of the action" doctrine.

4. Where Plaintiff's claim for lost profits results from its use of specialized trailers which fact was known to the Defendant or of which fact the Defendant had reason to know, the Plaintiff is entitled to recover, if proven, the amount of such profits.

5. Plaintiff's claim of damages for increased liability insurance premium costs resulting from a motor vehicle accident in which its vehicle was involved is too remote and speculative to be legally cognizable in either tort or contract as having been reasonably foreseeable or within the contemplation of the parties at the time the contract was entered.

NO. 01-1148

CHARLES E. SHOEMAKER, JR., Esquire—Counsel for Plaintiff.

SALVATORE F. BELLO, JR., Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, J.—December 7, 2004

PROCEDURAL AND FACTUAL BACKGROUND

On August 7, 2000, Eckman Lumber Company, Inc., the Plaintiff in these proceedings, and Driver Leasing Company, the Defendant, entered into a written agreement for Defendant to provide truck drivers for Plaintiff's business. Plaintiff is engaged in the business of manufacturing and selling building trusses which are delivered to its customers using trucks and specialty trailers owned by Plaintiff. Pursuant to the parties' agreement, Defendant agreed to supply qualifed drivers for Plaintiff's vehicles. The agreement further provided that Plaintiff was responsible for maintaining liability insurance on its vehicles during the term of the agreement and that such insurance was to cover the operation of the vehicles by Defendant's drivers as additional insureds.

Within five months after the agreement was executed, and during the course of performing that agreement, Defendant's drivers, on three separate occasions, were involved in motor vehicle accidents resulting in damage to Plaintiff's trailers. Believing that Defendant should be held responsible for the uninsured portion of this property loss as well as other damages claimed by it, Plaintiff filed the present suit against Defendant. In its complaint, Plaintiff asserts three theories of liability: breach of contract (Complaint, Count I), vicarious liability attributable to the negligent operation of Plaintiff's vehicles by Defendant's employees (Complaint, Count II), and Defendant's direct negligence in the employment, training and supervision of its drivers (Complaint, Count III).

In addition to the property damage to its trailers, Plaintiff seeks damages, **inter alia,** for lost sales and profits for the period during which its trailers were being repaired and unable to be used for deliveries, and for the increased annual costs to Plaintiff to maintain liability insurance, including increased insurance premiums and deductibles, attributable to the accidents in which Defendant's drivers were involved. Plaintiff claims these damages were within the contemplation of the parties at the time they entered their agreement, thereby making them recoverable for breach of contract, and were equally foreseeable and therefore recoverable in tort.

Presently before this Court is Defendant's motion for partial summary judgment. In this motion, Defendant argues that Plaintiff's claims for negligence are barred by the "gist of the action" doctrine; that because the contract did not place Defendant on notice that Plaintiff utilized specialty trailers in its business, its claim for lost profits as a result of being unable to utilize its trailers and for which standard trailers were unsuitable replacements is an item of special damages not within the parties' contemplation, and therefore not eligible for recovery in a breach of contract action; and that Plaintiff's claim for consequential damages in the form of increased insurance premiums and deductibles is too speculative and remote to permit recovery.

DISCUSSION

A. **Applicability of the "Gist of the Action" Doctrine to Plaintiff's Claims in Tort**

As a general rule, courts are reluctant to permit tort recovery for a breach of contract. This reluctance stems in part from the conceptual distinction between a breach of contract claim and one for tort:

> Although they derive from a common origin, distinct differences between civil actions for tort and contractual breach have been developed at common law. Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals … . To permit a promisee to sue his promisor in tort for breaches of contract **inter se** would

> erode the usual rules of contractual recovery and inject confusion into our well-settled forms of actions.

Pittsburgh Construction Co. v. Griffith, 834 A.2d 572, 582 (Pa. Super. 2003), **appeal denied,** 852 A.2d 313 (Pa. 2004) (emphasis in original) (**quoting eToll, Inc. v. Elias/Savion Advertising, Inc.,** 811 A.2d 10, 14 (Pa. Super. 2002)). Consistent with maintaining the integrity of breach of contract and tort as separate forms of action, the "gist of the action" doctrine "operates to preclude a plaintiff from re-casting ordinary breach of contract claims into tort claims." **Pittsburgh Construction Co. v. Griffith, supra** at 581. Under this doctrine, "[w]hen a plaintiff alleges that the defendant committed a tort in the course of carrying out a contractual agreement, Pennsylvania courts examine the claim and determine whether the 'gist' or gravamen of it sounds in contract or tort; a tort claim is maintainable only if the contract is 'collateral' to conduct that is primarily tortious." **Yocca v. Pittsburgh Steelers Sports, Inc.,** 806 A.2d 936, 944 (Pa. Commw. 2002), **rev'd on other grounds,** 854 A.2d 425 (Pa. 2004) (**quoting Sunquest Information Systems, Inc. v. Dean Witter Reynolds, Inc.,** 40 F. Supp.2d 644, 651 (W.D. Pa. 1999)).

The "gist of the action" doctrine is not a **per se** rule barring recovery in tort whenever a contractual relationship exists between the parties and the defendant is performing under the contract at the time of the alleged tortious misconduct. To the contrary, a plaintiff may logically and legally maintain both negligence and contract claims in the same action when the plaintiff alleges that the defendant breached both specific contractual terms and a duty of care owed to the plaintiff. Only where the "gist of the action," "the essential ground or object of the action … without which there would be no cause of action," is in contract will a claim in tort be foreclosed by the doctrine. **eToll, Inc., supra** at 15 (**quoting American Guar. and Lia. Ins. Co. v. Fojanini,** 90 F. Supp.2d 615, 622-23 n.12 (E.D. Pa. 2000), **reconsideration granted in part,** 99 F. Supp.2d (E.D. Pa. 2000)).

"The test is not limited to discrete instances of conduct; rather, the test is, by its own terms, concerned with the nature of the action as a whole." **American Guar. and Lia. Ins. Co. v. Fojanini, supra** at 622.

> The gist of the action test allows courts to review the actual dispute in question to determine whether, under the facts of that particular case, the claim should sound in tort or contract. Under this test, a party cannot disrupt the expectations of the parties by supplanting their agreement with a tort action that claims that the party misperformed the agreement in question.

Factory Market, Inc. v. Schuller Intern., Inc., 987 F. Supp. 387, 394 (E.D. Pa. 1997). "In other words, a claim shall be limited to a contract claim when the parties' obligations are defined by the terms of the contracts, and not by the larger social policies embodied by the law of torts." **Pittsburgh Construction Co., supra** at 582 (**quoting eToll, Inc., supra** at 14). For a claim "to be construed as a tort action, the wrong ascribed to the defendant must be the gist of the action with the contract being collateral." **Redevelopment Authority of Cambria v. International Ins. Co.,** 454 Pa. Super. 374, 392, 685 A.2d 581, 590 (1996) (en banc), **appeal denied,** 548 Pa. 649, 695 A.2d 787 (1997) (internal quotation marks omitted).

In accordance with the foregoing, if the duty a defendant is accused of violating is defined by and exists only because of the contract, the gist of the action is in contract with any tort claim being necessarily collateral to the cause of action. Therefore, where a plaintiff asserts negligent performance of duties arising solely from a contract with the defendant, the doctrine bars recovery on a theory of tort. Under these circumstances, the alleged negligent act is in fact a failure to live up to a contractual duty and, as such, merely collateral to a contract claim for a breach of those duties. **eToll, Inc., supra** at 19.

The critical question we must answer in this case is whether Plaintiff's claims for negligence are the gist of the action, with the contract being collateral, or whether the claims for which Plaintiff is seeking redress in Counts II and III of the complaint are essentially breaches of contractual duties or wrongs independent of the contract. The issue is one of law.

On this issue, Plaintiff's claim against Defendant in Count III for direct negligence "essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of a contract." **eToll, Inc., supra** at 19 (**quoting Polymer Dynamics, Inc. v. Bayer Corp.,** 2000 WL 1146622 at

*6, 2000 U.S. Dist. Lexis 11493 at *19 (E.D. Pa. August 14, 2000)). While Plaintiff claims in this Count that Defendant was negligent in failing to provide qualified drivers properly supervised by Defendant, the sole source of Defendant's obligation or duty to provide any drivers for Plaintiff derives from the parties' contract. Under that contract, the Defendant "warrants and guarantees that all drivers are in compliance with all applicable State and Federal regulations [and] are qualified and licensed commercial operators" and that Defendant "shall at all times maintain operational control, direction and supervision" over its drivers (Contract, ¶4(c)). The duties which Plaintiff claims have been breached in Count III of the complaint arose only because of the bargained-for contractual relationship between the parties, and are expressly contained in the written contract between them.

Counts I and III of the complaint are in essence the same claim. The gravamen of the claims is that Defendant failed to fulfill a promise. With respect to this aspect of Plaintiff's claim, the negligence alleged parallels Defendant's obligations under the contract with Plaintiff, concerns the performance of those contractual duties, and is not so tangential to the parties' relationship as to make Defendant's alleged negligence the gist of the action.

In contrast, Plaintiff's claim against the Defendant in Count II of the complaint, arising out of Defendant's drivers' alleged negligence in the operation of Plaintiff's vehicles with liability premised on the principle of respondeat superior, is independent of the parties' contract. Defendant's drivers are not parties to the parties' agreement and their duty to operate Plaintiff's vehicles reasonably and safely arises out of a common-law duty to exercise ordinary care in the operation of a motor vehicle not only **vis-à-vis** the Plaintiff, but also with respect to all others, and not out of any contractual obligation. As the employer of "loaned employees" over whom the Defendant maintained control in the manner in which they performed their work, the Defendant remained the employer of such drivers legally responsible in tort for their conduct. **Wilkinson v. K-Mart,** 412 Pa. Super. 434, 438, 603 A.2d 659, 661 (1992). With respect to this claim, the true character of the claim is in tort, the contract being collateral. In so concluding, our decision is not in-

consistent with our ruling with respect to Count III: that the Defendant may have breached its obligation to provide qualified employees does not mean the specific accidents involved were caused by driver negligence; conversely, that the accidents may be the result of driver negligence does not mean Defendant's employees were unqualified to operate Plaintiff's vehicles.

B. **Recovery of Damages for Lost Profits**

Damages for losses suffered as a result of a breached agreement are limited to those which naturally and ordinarily flow from the breach and which were reasonably foreseeable and within the contemplation of the parties at the time the agreement was made. **Thorsen v. Iron and Glass Bank,** 328 Pa. Super. 135, 142, 476 A.2d 928, 931 (1984). Special damages, those which do not naturally and ordinarily flow from a breach, and which are not specifically dealt with by the parties or within their contemplation at the time of contract formation, even if factually caused by the breach, are not compensable in a breach of contract action.

On this point, Defendant argues that Plaintiff's claim for lost profits is solely the consequence of its use of specialty trailers in its commercial operations of which no reference is made in the contract and of which Defendant was unaware. According to Defendant, "but for Plaintiff's utilization of specialty trailers, Plaintiff would have been able to avoid any alleged lost profits by simply renting a replacement trailer with which to make deliveries." (Defendant's Brief in Support of Motion, p. 12) While Defendant does not dispute that the rental cost of a replacement trailer would be reasonably foreseeable and would ordinarily follow the breach of such a contract in the usual course of events, Plaintiff's claim for lost profits resulting from its use of specialized trailers, for which replacements could not be located, is, according to Defendant, not damages in the ordinary course of events or which reasonable men in the position of the parties would have foreseen as a probable result of the loss of use of a trailer.

On this issue, we will deny Defendant's motion. While the contract does not by name refer to specialty trailers, the contract clearly and unequivocally states that Defendant will provide drivers and/or dockmen for Plaintiff's vehicles with Defendant to maintain operational control and supervision over its

drivers, including the loading and unloading processes and the "day to day private carriage operation" of the Plaintiff (Motion for Summary Judgment and Answer, ¶18); Contract, ¶4(c)).

To the extent Defendant agreed to use Plaintiff's tractor trailers in shipping building trusses manufactured by Plaintiff, which trailers were in fact specialized, Defendant had reason to know of these general or particular requirements and needs of Plaintiff and implicitly agreed to the use of specialized trailers. **"[T]he basic test for the recovery of consequential damages is whether the losses were foreseeable (not foreseen) by the seller at the time he entered the contract."** (emphasis in original) "Most … courts have recognized that a seller is liable for all damages resulting from his breach if they arise from circumstances that the seller knew about or had reason to know about, even if he did not consciously assume the risk of such liability." **Frank B. Bozzo, Inc. v. Electric Weld Division,** 283 Pa. Super. 35, 51, 50, 423 A.2d 702, 709-10 (1980), **aff'd,** 495 Pa. 617, 435 A.2d 176 (1981); **see also,** Restatement (Second) of Contracts §351(2)(b).

To the extent Defendant claims it was unaware of Plaintiff's use of specialized trailers, there can be little doubt that Defendant knew of the type of trailer utilized by Plaintiff prior to date of the accidents at issue: the term of the contract is month to month with a thirty-day notice requirement for termination and the first accident occurred on October 19, 2000. To the extent Defendant claims the written agreement on its face does not describe the trailers as being specialized and that the introduction of evidence describing their specialized nature is barred by the parol evidence rule, when the terms of an agreement are not ambiguous on their face but become so in the context of extrinsic or collateral circumstances, parol evidence is admissible to resolve such latent ambiguity. **Yocca v. Pittsburgh Steelers Sports, Inc.,** 854 A.2d at 437.

C. **Recovery of Increased Insurance Costs**

Finally, with respect to Plaintiff's claim of increased insurance costs, Plaintiff must show that its damages (1) were such as would naturally and ordinarily result from the breach, (2) were reasonably foreseeable and within the contemplation of the parties at the time they made the contract, and (3) can be proven with reasonable certainty. **Barger v. Alliance Electric**

Inc., 34 D. & C. 4th 481, 484-85 (1996); **see also, Taylor v. Kaufhold,** 368 Pa. 538, 546, 84 A.2d 347, 351 (1951). In **Barger,** referring to defendant's counterclaim for increased workmen's compensation insurance premiums caused by plaintiff's alleged negligence in causing injury to one of defendant's employees, the court wrote:

> [B]ecause insurance premium increases result from a concurrence of many circumstances, the economic harm is too remote from the cause in fact to be attributable to [the Plaintiff]. Accordingly, this court found that the increase in [the Defendant's] premiums as a result of the injury to its foreman was not reasonably foreseeable by [the Plaintiff] or within the contemplation of the parties at the time the contract was made.

Id. at 485; **see also, Whirley Industries, Inc. v. Segel,** 316 Pa. Super. 75, 82, 462 A.2d 800, 804 (1983) (footnote omitted) ("[I]nsurance premium increases result from a concurrence of circumstances, including the owner's prior loss experience and the internal financial practices of the particular insurance carrier. The economic harm is too remote from the cause in fact to be attributable to the [Defendant].").

Moreover, with respect to maintaining motor vehicle insurance, the only paragraph of the parties' contract dealing with this issue is Paragraph 7 which states, in relevant part:

> 7. Insurance: During the term of this Contract the [Plaintiff] agrees to maintain liability insurance including all vehicles used by drivers provision [sic] pursuant to this Contract. Such insurance shall include coverage for bodily injury and property damage liability for combined limits of not less than $1,000,000.00, each occurrence. Such liability insurance shall further include [Defendant] and the drivers and/or dockmen it supplies under this Contract as additional insured.

(Contract, ¶7) Under this paragraph, Plaintiff assumed the expense and responsibility for obtaining liability insurance, including the risk of changing rates.

Based on the forgoing, we conclude that the cost of liability insurance for vehicles driven by Defendant's employees was a business expense that Plaintiff agreed to bear under the parties' agreement and that Plaintiff's claim for increased insurance costs

is too remote and speculative to permit recovery in either tort or contract.

CONCLUSION

For the reasons already stated, Count III of the complaint alleging direct negligence against the Defendant will be dismissed as being foreclosed by Count I under the "gist of the action" doctrine. Additionally, Defendant's motion for partial summary judgment on Plaintiff's claim for increased expenses for liability insurance as a result of damage claims paid out by Plaintiff's insurance carrier will be granted. The balance of Defendant's motion will be denied.

ORDER OF COURT

AND NOW this 7th day of December, 2004, upon consideration of Defendant's Motion for Partial Summary Judgment, Plaintiff's response thereto, the briefs of the parties and argument of counsel, and in accordance with our Memorandum Opinion of this same date, it is hereby

ORDERED and DECREED that Defendant's motion is granted in part and denied in part. Specifically, Count III of Plaintiff's Amended Complaint is stricken as is Plaintiff's demand for damages for increased insurance costs. The remaining requests for relief presented in Defendant's motion are denied.

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