

Carbon County Law Journal

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

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

Volume XVII

2004 - 2007

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

Contents

ELEANOR L. EBERHARDT, Plaintiff vs. BETTY JEAN REX, Defendant	1
HOWARD F. MILLER, Plaintiff vs. MAHONING VALLEY COUNTRY CLUB et al., Defendant.....	10
LISA MARIE DRAGONI, Plaintiff vs. JAMES F. DRAGONI, Defendant	18
COMMONWEALTH OF PENNSYLVANIA vs. KATHLEEN SEMMEL, Defendant.....	28
COMMONWEALTH OF PENNSYLVANIA vs. JAMES KANE, Defendant	34
COMMONWEALTH OF PENNSYLVANIA vs. JOHN CLELAND, Defendant	42
COMMONWEALTH OF PENNSYLVANIA vs. MICHAEL WHAH, Defendant	42
GERALD T. CALLAGHAN, JR., Appellant vs. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, Appellee.....	57
LORI GIBSON, Plaintiff vs. MASSIE C. GIBSON, III, Defendant and PENELOPE MANN, Additional Defendant.....	61
ANTHONY B. MARKUNAS, SHARON L. MARKUNAS, ANTHONY B. MARKUNAS, III andMATTHEW G. MARKUNAS, Petitioners vs. CARBON COUNTY BOARD OF ASSESSMENT APPEALS, Respondent and JIM THORPE AREA SCHOOL DISTRICT, Intervenor	68
SHANNON BOYLE, now SHANNON THORNTON, Plaintiff/ Appellee vs. ANGEL RAMIREZ & MARY RAMIREZ, Defendants/Appellants and JASON RAMIREZ, Defendant/ Appellee.....	79
COMMONWEALTH OF PENNSYLVANIA vs. PAMELA ANN HENDLEMAN, Defendant	94

BOROUGH OF SUMMIT HILL, Plaintiff vs. BRUCE J. MARKOVICH, Defendant vs. BOROUGH OF SUMMIT HILL, Counterclaim Defendant.....	100
STATEWIDE INVESTMENTS LTD. et al., Plaintiffs vs. JON NIKOLIC et al., Defendants.....	127
JOHN DILLOW, Plaintiff vs. ANNE MYERS, Personal Representative of the Estate of EDWARD JOHN MYERS, Deceased, and FUNK WATER QUALITY COMPANY, Defendants	132
THOMAS NUNEMACHER and ANGELINA NUNEMACHER, Plaintiffs vs. MARCUS SENSINGER, Defendant vs. THOMAS NUNEMACHER and ANGELINA NUNEMACHER, Additional Defendants.....	147
COMMONWEALTH OF PENNSYLVANIA vs. JOSEPH DONALD EVANS, JR., Defendant	165
COMMONWEALTH OF PENNSYLVANIA vs. STEPHANIE WEIRICH, Defendant	174
JULIA L. LESKIN, Plaintiff vs. DAVID CHRISTMAN, Defendant	184
JEAN BENNETT ROANE, Plaintiff vs. TIMOTHY A. BEERS and COBBLE RIDGE REALTY CORPORATION, Defendants	198
DANNY RANKOVICH and DANKA RANKOVICH, Plaintiffs vs. MICHAEL SIGNORE and BETHANN SIGNORE, Defendants	204
COMMONWEALTH OF PENNSYLVANIA vs. ALBERT E. BROOKE, Defendant	216
IN THE INTEREST OF C.W.M., a Juvenile	225
COMMONWEALTH OF PENNSYLVANIA vs. RALPH WAYNE FISHER, Defendant	238
GARY CHESLAK, Plaintiff vs. THE HONORABLE BARRY FEUDALE, Defendant.....	245
COMMONWEALTH OF PENNSYLVANIA vs. FREDERICK JOSEPH BAKER, Defendant.....	256

BOROUGH OF LEHIGHTON, Petitioner vs. LEHIGHTON BOROUGH POLICE OFFICERS' ASSOCIATION, Respondent	260
JAMIE CHEESMAN, Plaintiff vs. JACK FROST MOUNTAIN SKI AREA, JACK FROST-BIG BOULDER REAL ESTATE, BIG BOULDER CORPORATION, BLUE RIDGE REAL ESTATE COMPANY, Defendants.....	268
COMMONWEALTH OF PENNSYLVANIA vs. KAQUWAN MILLIGAN, Defendant.....	276
JIM THORPE AREA SCHOOL DISTRICT, Petitioner vs. JIM THORPE AREA EDUCATION ASSOCIATION, Respondent	287
KEVIN B. ANDREW, Plaintiff vs. JODI J. ANDREW, Defendant	300
COMMONWEALTH OF PENNSYLVANIA vs. NESTOR ECHEVARRIA, Defendant	304
COMMONWEALTH OF PENNSYLVANIA vs. DEWEY BOYD POWELL, Defendant	310
COMMONWEALTH OF PENNSYLVANIA vs. WILLIAM B. EICHELE, Defendant.....	312
GLEN ONOKO ESTATES, Plaintiff vs. HARALD NEIDERT and DIXIE NEIDERT, H/W, Defendants	322
GLEN ONOKO ESTATES, Plaintiff vs. LISA SMULLIGAN, Defendant	322
KEVIN B. ANDREW, Plaintiff vs. JODI J. ANDREW, Defendant	333
JEAN BENNETT ROANE, Plaintiff vs. TIMOTHY A. BEERS and COBBLE RIDGE REALTY CORPORATION, Defendants	337
BOROUGH OF LANSFORD, Plaintiff vs. RUSSELL HEFFELINGER, Defendant	349
RICHARD M. SMITH f/d/b/a SERVPRO OF CARBON COUNTY, WHITE HAVEN, Plaintiff vs. GREGG TIRPAK and BRIAN TIRPAK, Defendants.....	357

COMMONWEALTH OF PENNSYLVANIA vs. JOSHUA GERHART, Defendant	368
COMMONWEALTH OF PENNSYLVANIA vs. STEPHANIE GERHART, Defendant	368
JP MORGAN CHASE BANK, AS TRUSTEE, Plaintiff vs. STANLEY J. ZELLIN, JAMES MURPHY, RACHAEL KELLER, AND DAVID KELLER, Defendants.....	376
JOSEPH R. SEEMILLER, Plaintiff vs. CARMINE S. AMATO, HELEN A. AMATO and BENNETT FAMILY TRUST, Defendants	386
EARL W. BEERS and SUSAN A. BEERS By P/O/A GLENN BEERS, Appellants vs. ZONING HEARING BOARD OF TOWAMENSING TOWNSHIP, Appellee and BOARD OF SUPERVISORS OF TOWAMENSING TOWNSHIP, Intervenor.....	394
BEAVER DAM OUTDOORS CLUB, Plaintiff vs. HAZLETON CITY AUTHORITY, Defendant	407
JOHN McMAHON, Plaintiff vs. LEE CONKLIN, SUSAN CONKLIN, PLEASANT VALLEY WEST ASSOCIATION a/k/a PLEASANT VALLEY WEST CLUB, Defendants	415
JOHN E. DONCES, Petitioner vs.COMMONWEALTH OF PENNSYLVANIA,DEPARTMENT OF TRANSPORTATION, Respondent	430
LAKE HARMONY ESTATES PROPERTY OWNERS' ASSOCIATION, Plaintiff vs. MICHAEL J. DOUGHERTY and JOSEPHA D. DOUGHERTY, Defendants	444
TOWAMENSING TRAILS PROPERTY OWNERS ASSOCIATION, Plaintiff vs. KENNETH B. KNIBIEHLY, WILLIAM G. KNIBIEHLY and DOREEN S. KNIBIEHLY, Defendants.....	463
IN RE: TERMINATION OF PARENTAL RIGHTS of G.J.S. in and to A.J.M., a Minor	479
COMMONWEALTH OF PENNSYLVANIA vs. CHRISTOPHER DAVID KARPER, Defendant.....	496

DANKA RANKOVICH and DANNY RANKOVICH, Plaintiffs vs. MICHAEL SIGNORE and BETHANN SIGNORE, Defendants	506
JOHN FALLABEL, Plaintiff vs. SHANNON BROPHY- WOLTER, Defendant	517
IN RE: JAMES MURPHY, PETITION FOR APPOINTMENT OF BOARD OF VIEWERS TO LAY OUT AND OPEN A PRIVATE ROAD OVER PROPERTY OF TOWAMENSING TRAILS PROPERTY OWNERS' ASSOCIATION, INC.....	529
EUGENE A. RUTCH, Plaintiff vs. PENNSYLVANIA LIQUOR CONTROL BOARD, Defendant	545
COMMONWEALTH of PENNSYLVANIA vs. CHARLES BARRY FERNANDES, Defendant	554

**ELEANOR L. EBERHARDT, Plaintiff vs.
BETTY JEAN REX, Defendant**

*Civil Law—Equitable Partition—Real Estate—Pleading
Requirements—Claims for Contribution*

1. In a partition proceeding, claims for contribution and affirmative defenses must be specifically pled. The failure to plead the existence and terms of an agreement pursuant to which Defendant claims entitlement to contribution, waives the agreement as a basis for contribution.
2. A right of contribution as between remaindermen does not exist for the voluntary payment of property expenses by a remainderman on behalf of a life tenant legally obligated to make payment.
3. As between co-tenants, a right of contribution exists for the costs of repairs and maintenance necessary to preserve and protect the property interests of the co-tenants, as well as for payments made in respect of the property for which the co-tenants are jointly obligated. A co-tenant is under no joint or legal obligation to pay real estate taxes attributable to another co-tenant's interest in the property and, as to such payments, is not entitled to contribution from the other co-tenant.
4. Payments associated with the estate administration of a life tenant are not the proper subject of contribution between the remaindermen in a partition proceeding.

NO. 03-1463

IN PARTITION

WILLIAM B. QUINN, Esquire—Counsel for Plaintiff.

STEVEN R. SERFASS, Esquire—Counsel for Defendant.

DECISION AND ORDER

NANOVIC, J.—December 17, 2004

These proceedings began on June 27, 2003 when the Plaintiff filed a complaint in equity for the partition of real estate jointly owned by her and her sister, the Defendant. After a non-jury trial held March 25, 2004, we make the following

FINDINGS OF FACT

1. The Plaintiff, Eleanor L. Eberhardt, and the Defendant, Betty Jean Rex, are sisters and equal co-owners of the property located at 520 North Ninth Street in Lehighton, Carbon County, Pennsylvania (the "Property"). The Defendant lives nearby at 500 North Ninth Street and the Plaintiff lives in El Paso, Texas.

2. The Property consists of 0.176 acres and is improved with a single family detached residential dwelling. It is incapable of division into purparts. Valued as an entirety, the Prop-

erty has a current fair market value of \$100,200.00 (Plaintiff's Exhibit 1).

3. The Property was previously owned by Gertrude Bond, the mother of the Plaintiff and the Defendant. By deed dated September 28, 1984, Gertrude Bond conveyed the Property to the Plaintiff and the Defendant as tenants in common.

4. At the time of conveyance, Gertrude Bond reserved a life estate to herself for and during her natural life. Gertrude Bond (hereinafter referred to as the "Decedent") died on March 24, 2000.

5. From the time of the conveyance in 1984 up until the present, Defendant and her husband, Bert Rex, have paid expenses associated with the Property, including real estate taxes, utilities, homeowner's insurance and general maintenance of the Property.

6. Since title was conveyed to the Plaintiff and Defendant in 1984, the Defendant and her husband have paid real estate taxes attributable to the Property totaling \$25,839.37. Of this amount, \$6,864.62 was paid since Decedent's death in March of 2000 (N.T., p. 65; Defendant's Exhibits 3 and 11).

7. The Defendant and her husband have paid \$4,886.00 in homeowner's insurance premiums on the Property since 1984. Of this amount, \$1,046.00 has been paid since March of 2000 (N.T., p. 66; Defendant's Exhibits 5 and 11).

8. The Defendant and her husband have paid for maintenance of the Property since 1984, including installation of curbing in 1986 at a cost of \$1,081.55, macadamizing a driveway on the Property in 1986 at a cost of \$3,000.00 and replacement of the roof in 2001 for \$3,790.00 (N.T., pp. 67-71; Defendant's Exhibits 6, 7 and 11).

9. Bert Rex estimates the couple has paid \$10,693.22 from 1984 to the present for general maintenance of the Property, such as cutting the grass, trimming the trees and bushes, and shoveling snow (N.T., p. 72; Defendant's Exhibit 11). No evidence was presented as to how this estimate was reached or what portion of the estimate is attributable to the period prior to Decedent's death on March 24, 2000 and what portion to the period after March 24, 2000.

10. Since title was transferred in 1984, Defendant and her husband have paid a total of \$22,821.20 to the Borough of

Lehighton for utilities provided to the Property, including electric, water, sewage and garbage (N.T., pp. 66-67; Defendant's Exhibits 4 and 11). No evidence was presented as to whether the Property was occupied after Decedent's death, the need for utility services after March 24, 2000, or who benefited from these services.

11. In addition, the Defendant and her husband have made donations to the local fire company of \$25.00 a year since 1984, totaling \$500.00. These donations total \$100.00 since 2000 (N.T., pp. 74-75; Defendant's Exhibits 8 and 11).

12. As part of the administration of Decedent's estate, the Defendant and her husband have paid inheritance taxes and administration costs, including funeral expenses and counsel fees, in the amount of \$10,089.19 (N.T., pp. 95-99; Defendant's Exhibits 9, 10 and 11).

13. From October of 1994 to October of 1999, the Plaintiff and her husband contributed \$17,015.84 toward Decedent's care. This amount includes \$1,551.72 for cable T.V. service provided to the Property and \$15,464.12 in checks paid to the Defendant for Decedent's support and personal needs (N.T., pp. 47-53, 56; Plaintiff's Exhibit 2).

14. The parties have stipulated and agreed that the sale of the Property shall initially be confined to a private sale pursuant to which the Defendant shall be provided a thirty-day period in which to elect to purchase the Property at a price determined by the Court, taking into consideration any equitable charges to which the Defendant may be entitled for maintaining and improving the Property, and that should Defendant fail to exercise this option, the Property is to be placed for sale by the parties with a licensed real estate broker and sold at public and/or private sale.

DISCUSSION

At issue in this case is whether any of the expenses paid by the Defendant entitle her to a credit in a proceeding for equitable partition of the Property and, if so, the amount of the credit. At the outset, it must be noted that these proceedings are governed by the Pennsylvania Rules of Civil Procedure. Rules 1551 through 1574 are specifically applicable to the partition of real estate. We note also that the Rules are ones of procedure and, while specifying the manner in which to plead and

preserve issues for review, such as those asserting affirmative defenses and claims for restitution, they do not create substantive rights. **See Spears v. Spears**, 769 A.2d 523, 525 (Pa. Super. 2001) (failure to raise affirmative defenses in new matter as required by Rule 1030 results in waiver). Finally, the pleadings in this case are based on equitable claims alone and do not seek statutory relief. **Cf. Hairston v. Hairston**, 381 Pa. Super. 278, 553 A.2d 464 (1989) (only liens of record may be deducted from partition sale proceeds when the partition proceedings are brought pursuant to 68 P.S. §503, now repealed, effectively re-enacted in Section 3507 of the Divorce Code, 23 Pa. C.S.A. §3507; claims for expenses incurred for maintenance, taxes, mortgages, or for rental incomes must be brought in a separate action).

Pleading As a Prerequisite for Relevance

The Plaintiff argues that as a life tenant, the parties' mother, Gertrude Bond, was responsible for expenses of the Property incurred before her death in March of 2000, and that the Defendant voluntarily assumed payment of expenses prior to that date. We permitted the Defendant to present testimony from Decedent's counsel, Marianne Lavelle, Esquire, that when Decedent conveyed the Property to her daughters in 1984, it was intended and understood that the Plaintiff and Defendant would thereafter assume all expenses associated with the Property. The Plaintiff objected to this testimony arguing that Defendant failed to plead as an affirmative defense the existence of any agreement obligating the parties to pay the expenses of the life tenant. The Plaintiff further objected to the testimony based on the Dead Man's Statute, the Statute of Frauds, and attorney-client privilege. Attorney Lavelle's testimony was taken subject to Plaintiff's objections.

We conclude that evidence of any agreement between the parties and the Decedent is inadmissible in these proceedings, as it is outside the scope of the pleadings. Our Superior Court has stated:

Our courts have long held that the issues to be raised in a partition proceeding are limited to and circumscribed by the contents of the pleadings. **See e.g. Hoog v. Diehl**, 134 Pa. Super. 14, 19, 3 A.2d 187, 189 (1938) ('The bill and answer circumscribed the issues, and neither court nor Master could enlarge them.'); **see also**, 68 C.J.S. Partition,

§3150(b)(1) ('[A] tenant in common who in a partition suit seeks equitable compensation for improvements on the common property must specifically plead his claim . . . The issues are confined to those raised by the pleadings, and only such evidence is admissible as goes to prove the affirmative or negative of an issue thus raised.') . . .

Bednar v. Bednar, 455 Pa. Super. 487, 496, 688 A.2d 1200, 1204-1205 (1997), **appeal denied**, 548 Pa. 653, 698 A.2d 63 (1997). At no point in the partition proceedings does Defendant plead the existence of any agreement between the Decedent and the parties pursuant to which Decedent conveyed title of the Property to the parties in consideration of the parties assuming the expenses of the Property. Consequently, Defendant's evidence offered in support of such an agreement is irrelevant to the issues raised in the pleadings and was properly objected to by Plaintiff.¹

Contribution Between Remaindermen for Obligations of a Life Tenant

Plaintiff asserts that the Defendant is not entitled to a credit for expenses incurred before Decedent's death, as such expenses were Decedent's responsibility as the life tenant. We agree, in part. A life tenant is responsible for ordinary repairs and maintenance and must pay the "taxes, municipal assessments for sidewalk paving, and mortgage interest accruing during his ownership." **In re Felker**, 211 B.R. 165, 168 (Bankr. M.D. Pa. 1997) (quoting P. Nicholson Wood, *Ladner on Conveyancing in Pennsylvania* §1:05 at 8 (3rd ed. 1961)), **aff'd**, 168 F.3d 478 (3d Cir. 1998). However, a life tenant has no obligation to maintain insurance for the benefit of the remaindermen. **Gorman's Estate**, 321 Pa. 292, 295, 184 A. 86, 87 (1936). Thus, while the Defendant is not entitled to reimbursement for monies paid for the expenses of real estate taxes or utilities accruing prior to

¹ In her brief addressing this issue, Defendant states that the agreement is the subject of a separate action pending before this Court and docketed to No. 03-0987 (Defendant's Brief, p. 9). Since the pleadings docketed to No. 03-0987 are limited to a writ of summons, the issues in that proceeding are not ascertainable at this stage of the pleadings. For this reason, we also note that the previous inclusion of docket No. 03-0987 in the caption of this case, together with the correct docket number of 03-1463, was premature and in error, there having been no formal consolidation of the proceedings. Because Plaintiff's objection to the admission of evidence of an agreement between the Decedent and the parties is sustained, we need not decide Plaintiff's remaining objections to this evidence.

Decedent's death on March 24, 2000, the expense of obtaining homeowner's insurance and protecting the full value of the Property may be properly considered in an equitable partition proceeding. **Sivak Estate**, 161 Pa. Super. 323, 53 A.2d 858 (1947) (upon the partition of realty a tenant in common is entitled to an equitable charge against his co-tenants if he has paid a disproportionate share of the mortgage or fire insurance on the realty).

Contribution Between Remaindermen for Property Expenses

The Defendant contends she is entitled to reimbursement for property taxes, homeowner's insurance, utilities (including electric, water, sewage and garbage), general maintenance of the Property (including lawn care and snow removal), and donations to the fire company, in the form of a credit toward the purchase of the Property. Under Pennsylvania Rule of Civil Procedure 1570, a court should determine to what extent each of the parties is entitled to credit for "use and occupancy of the property, taxes, rents or other amounts paid, services rendered, liabilities incurred or benefits derived in connection therewith or therefrom." Pa. R.C.P. 1570(a)(5). This determination, in turn, requires the application of equitable principles.

The doctrine of contribution rests on the principle that, when the parties stand in **aequali jure**, the law requires equality, which is equity, and one of them shall not be obliged to bear a common burden in ease of the rest . . . [It] comes from the application of principles of equity to the condition in which the parties are found in consequence of some of them, as between themselves, having done more than their share in performing a common obligation. 13 C.J. 821.

Lohr's Estate, 132 Pa. Super. 125, 200 A. 135, 136 (1938) (internal quotation marks omitted).

Expenses which serve to preserve and protect the Property for the benefit of all owners, such as those for repairs and improvements of a necessary nature² and insurance,³ and those

² See **Bednar v. Bednar**, 455 Pa. Super. 487, 497, 688 A.2d 1200, 1205 (1997) ("As a general rule, where a cotenant places improvements on the common property, equity will take this fact into consideration on partition and will in some way compensate him for such improvements, provided they are made in good faith and are of a necessary and substantial nature, materially enhancing the value of the common property.").

³ See **Sivak Estate**, 359 Pa. 194, 58 A.2d 456 (1948).

discharging a joint obligation, such as mortgage payments,⁴ are properly shared among those benefiting from the payment. Thus, to the extent proven to benefit the Property as a whole or the common interests of all joint tenants, the Defendant is entitled to an equitable charge for the cost of insurance, utilities and the general and necessary maintenance of the Property since Decedent's death in March of 2000.

Defendant is not entitled to credit for amounts paid as a voluntary contribution to the local fire company or for real estate taxes.

The action for contribution is founded upon the equity arising from the payment by the plaintiff of more than his share of a liability existing at the time against both. Where the plaintiff is not liable for the debt, he has no right to volunteer a payment for the purpose of making the defendant his debtor. And where the defendant is not bound for it, the payment confers no benefit upon him. He is therefore under no obligation to reimburse the plaintiff.

Bednar v. Bednar, supra at 493-94, 688 A.2d at 1203 (**quoting Lohr's Estate, supra** at 128-29, 200 A. at 136). Because there exists no joint obligation for a tenant in common to pay the full amount of all taxes chargeable against the real estate, and because the payment by a tenant in common of his proportionate share of the taxes attributable to his interest in the real estate protects such tenant's undivided interest from being liened upon, or sold for a delinquency in the payment of taxes (72 P.S. §5511.12), a co-tenant who assumes the tax obligations of his fellow tenants does so as a volunteer. Absent evidence of any agreement, express or implied, that Plaintiff agreed to contribute to the tax payments for which Defendant now seeks credit, Defendant, as a volunteer, has no right to contribution.

In addition, Defendant argues she should receive a credit for the costs of various improvements and repairs to the Property paid for by herself and her husband, including replacement of a roof in October of 2001, curbing in 1986 and paving of a driveway in 1986. Because the work in 1986 occurred dur-

⁴ See **Fascione v. Fascione**, 272 Pa. Super. 530, 416 A.2d 1023 (1979) (husband was entitled to reimbursement for the amount of wife's portion of mortgage payment on marital domicile notwithstanding the fact that husband had retained exclusive possession of property for himself since mortgage payments would increase equity of both parties).

ing the lifetime of the Decedent, the life tenant, and was of a type for which the Decedent was responsible, Defendant is not entitled to reimbursement for these expenses. Defendant is, however, entitled to reimbursement for the costs of replacing the roof in 2001. A co-tenant is entitled to equitable compensation for improvements or repairs necessary to preserve and safeguard existing property for the common benefit of all owners. **Bednar, supra** at 497, 688 A.2d at 1205; **In re Dech's Appeal**, 57 Pa. 467 (1868) (joint tenant was entitled to contributions from his co-tenant for the expense of repairs necessary to the enjoyment of the property). Here, the evidence established that the roof was replaced because it was leaking and that repairs had to be made to prevent damage to the Property (N.T., pp. 42-43, 57-58). That the repairs enhanced the overall value of the Property is equally supported by the record (N.T., pp. 14, 20). Thus, we conclude Defendant is entitled to reimbursement for replacement of the roof in the amount of \$3,790.00.

Contributions Between Remaindermen for Expenses of Administering Life Tenant's Estate

Defendant also contends she is entitled to reimbursement for the payment of inheritance taxes attributable to Decedent's life estate and the costs of administering Decedent's estate advanced by her. The Defendant claims Plaintiff made no contribution to the payment of these expenses.

While Defendant may well have a claim as a creditor of the estate for expenses of the estate paid by her, an action in partition is not the proper proceeding in which to address this claim. The estate expenses for which Defendant claims reimbursement or a credit did not benefit the Property. Such claims may, however, be raised in the estate administration. "A fiduciary who uses her own funds to pay the debts of a decedent is subrogated to the rights of the creditors, but her rights are not higher than theirs, and since they would have been barred by their failure to bring actions within the period prescribed by the Fiduciaries Act, she is not entitled to payment out of the real estate." **Sivak Estate**, 161 Pa. Super. 323, 326, 53 A.2d 858 (1947), **affirmed**, 359 Pa. 194, 58 A.2d 456 (1948) (citing **Krick's Estate**, 342 Pa. 212, 20 A.2d 195 (1941)).

CONCLUSIONS OF LAW

1. The Plaintiff, Eleanor L. Eberhardt, and the Defendant, Betty Jean Rex, own the property located at 520 North Ninth Street, Lehighton, Carbon County, Pennsylvania as tenants in common, each owning an equal undivided interest in said premises. The fair market value of the Property is \$100,200.00.

2. From the time the Decedent conveyed title of the property to the parties on September 28, 1984, until her death on March 24, 2000, Decedent held a life estate in the Property. As a life tenant, Decedent was responsible for the costs of ordinary repairs and maintenance, and for the payment of real estate taxes, utility charges and other normal and customary expenses associated with the use and upkeep of the Property and necessary to avoid waste. There is, however, no duty on the life tenant to pay insurance for the benefit of the remaindermen.

3. To the extent Defendant paid costs and expenses for which the life tenant was legally responsible and later (*i.e.*, after March 24, 2000) paid real estate taxes on behalf of Plaintiff's proportionate interest in the Property, she did so as a volunteer. Payments voluntarily made by a co-tenant who is not under a joint obligation to do so or which are not necessary to benefit the interests of all owners of the Property are not the proper subject of an action for contribution in a partition proceeding. Contribution is appropriate, however, for the cost of insurance maintained on the Property by Defendant—both before and after Decedent's death—for the benefit of both parties.

4. As a co-tenant, Defendant is entitled to be reimbursed, pro rata, for the cost of general maintenance and utilities expended by her and accruing from March 24, 2000 for the benefit of the Property. Since the burden to prove these expenses is upon the Defendant, to the extent the record is silent as to when certain expenses were incurred or for whose benefit—thereby precluding a finding that they were incurred after March 24, 2000 or for the common benefit of all owners—no award may be made. **Bednar, supra** at 496, 688 A.2d at 1205.

5. Defendant is entitled to a credit or equitable charge for the cost of repairing and replacing the roof which expense was necessary to preserve and protect the Property and which enhanced the value of the Property.

6. Under the facts in this case, Defendant is entitled to a credit against the value of Plaintiff's interest in the Property in an amount equal to one-half of the aggregate of following expenditures: \$4,886.00 for the payment of homeowner's insurance on the Property since 1984 and \$3,790.00 for replacement of the roof in October of 2001. Defendant is not entitled to reimbursement for voluntary yearly donations to the fire company.

7. Defendant is not entitled to reimbursement in these proceedings for the payment of inheritance taxes or the costs and expenses of administering the Decedent's estate.

8. In accordance with the parties' stipulation, Defendant shall be provided an opportunity to purchase Plaintiff's interest in the Property by the payment of \$45,762.00 to the Plaintiff (*i.e.*, one-half of \$100,200.00 less one-half of \$8,676.00). Alternatively, if the Property is to be sold to a third party, Defendant shall first be paid \$8,676.00 from the net proceeds of the sale, following which the balance of such proceeds shall be equally distributed between the parties.

**HOWARD F. MILLER, Plaintiff vs. MAHONING VALLEY
COUNTRY CLUB et al., Defendant**

*Civil Law—Nonprofit Corporation—Termination of Membership—
Requirements of Statutory Due Process*

1. In terminating membership in a nonprofit corporation, the Nonprofit Corporation Law makes a distinction between termination for nonpayment of dues and assessments, and termination for other reasons. When the basis for termination is other than the nonpayment of dues and assessments, the corporation must provide the member with notice of the charges against him and an opportunity to contest the expulsion before the termination becomes final.

2. While post-termination proceedings to challenge the termination of a member, if provided for in the corporation bylaws at the time of termination and if regular, fair and just, meet the requirements of the Nonprofit Corporation Law, when such procedure does not exist at the time of termination, the convening of an ad hoc hearing before the same body which voted to terminate the member, and after the member has commenced proceedings in court to challenge the termination, does not comport with the procedural requirements of Section 5766(b)(1) of the Nonprofit Corporation Law.

3. While a member of a nonprofit corporation whose membership has been terminated for reasons other than the nonpayment of dues and assessments, and without the procedural protection required by Section 5766(b)(1) of the Nonprofit Corporation Law, may be entitled to reinstatement as a member, such decision is not a decision on the merits and does not foreclose further action by the corporation to terminate the member consistent with the law.

NO. 03-9266

ROBERT T. YURCHAK, Esquire—Counsel for Plaintiff.

GERALD F. STRUBINGER, Esquire—Counsel for Defendants.

MEMORANDUM OPINION

NANOVIC, P.J.—January 12, 2005

On or about April 25, 2003, the Board of Governors of the Mahoning Valley Country Club (hereinafter the “Club”) voted to terminate the Plaintiff’s, Howard F. Miller’s (hereinafter “Miller”), membership in the Club. Miller has challenged the validity of this action.

PROCEDURAL AND FACTUAL BACKGROUND

The Club is a nonprofit corporation governed by and existing under the Nonprofit Corporation Law of 1988, 15 Pa. C.S.A. §§5101-6162 (the “Nonprofit Corporation Law”). It consists of an eleven member Board of Governors (the “Board”) and 190 voting members. The day-to-day operations of the Club are conducted by the Board which is empowered to terminate membership under Article IX, Section 12, of the Bylaws.

Prior to his termination as a member, Miller was provided no notice of any charges preferred against him, was not offered the opportunity for a hearing to contest his expulsion, and was not advised of his right to appeal the Board’s decision. At the time of his expulsion, the Club’s Bylaws provided, in relevant part, as follows:

Section 12. Membership in the Club will terminate upon the occurrence of any of the following:

(c) Failure of a member to pay dues, fees, assessments and other charges due and owing to the Club, pursuant to Article X, Section 5 of these Bylaws.

(d) The vote of a two-thirds (2/3) majority of the Board to expel a member for willful infraction of the Rules and Regulations or any Bylaws of the Club by the member or any member of his or her immediate family, or for any act or conduct with [sic] the Board deems prejudicial or injurious to the best interests, welfare or character of the Club.

(Bylaws, Article IX, Section 12(c) and (d)). Miller’s membership was specifically terminated pursuant to Article IX, Section

12(d), of these Bylaws (Complaint, Exhibit "A", Club Letter dated May 8, 2003 advising of termination.)

On June 27, 2003, Miller commenced the present suit, by complaint, against the Club and against those individual members of the Board—ten in number—who voted in favor of his termination.¹ The complaint contains four counts describing the following causes of action: a breach of fiduciary duties by the individual Defendants in their management of the Club and actions in expelling Miller as a member (Count I), an action for an accounting of the Club's business affairs (Count II), an action to declare the Bylaws illegal and Miller's expulsion violative of Section 5766(b)(1) of the Nonprofit Corporation Law (Count III),² and an action to award just compensation for the value of Miller's proprietary interest in the Club and his loss in being denied the use and enjoyment of the Club's facilities (Count IV).³

Since the filing of the complaint, the Club, on or about August 13, 2003, amended the Bylaws and added subsection

¹ Suit was originally filed in the Carbon County Prothonotary's Office. In accordance with 42 Pa. C.S. §5103(c) and the mandates of the Pennsylvania Rules of Judicial Administration, Pa. R.J.A. 2156(1), by order dated August 14, 2003, this matter was transferred to the Orphans' Court Division of the Court.

² Although the jurisdiction of the Orphans' Court is statutory, in exercising this jurisdiction the Court has available to it all legal and equitable powers required for or incidental to the exercise of its jurisdiction. 20 Pa. C.S.A. §701; **see also, Freihofer Estate**, 405 Pa. 165, 168, 174 A.2d 282, 284 (1961) ("While it has often been said that the Orphans' Court is a Court of Equity, it is more accurate to say that in the exercise of its limited jurisdiction conferred entirely by statute, it applies the rules and principles of equity.") (citations and internal quotation marks omitted).

Pursuant to the jurisdiction vested in the Orphans' Court, while we are without power to invalidate the Club's Bylaws as requested by Miller in Court III of the Complaint, we do have the power to hear and determine any matter involving the application, interpretation or enforcement of any law regulating the affairs or members of a nonprofit corporation holding or controlling any property committed to charitable purposes. Pa. R.J.A. 2156(1); **Freihofer Estate, supra** at 168, 174 A.2d at 284.

³ In his complaint, Miller avers that the Club is a nonprofit Pennsylvania corporation incorporated pursuant to Section 501(c)(7) of the Internal Revenue Code as a proprietary corporation (Complaint, Paragraph 2). With respect to any proprietary interest Miller may hold in the Club, Section 5766(c) of the Nonprofit Corporation Law provides, **inter alia**, that unless otherwise provided in the by-laws, a member's right, title and interest in or to the corporation or its property shall cease on the termination of his membership. 15 Pa. C.S.A. §5766(c).

(e) to Section 12 of Article IX. This amendment provides as follows:

- (e) In the event termination of membership occurs under subsection (d) above the expelled member shall have the following appeal rights:
 - (i) Written notice of a de novo hearing shall be sent via regular mail to the expelled member at the expelled member's address contained in the expelled member's file at the Club and by posting on the Club's bulletin board;
 - (ii) The notice shall set forth the date and time of the de novo hearing and a copy of Article IX, Section 12;
 - (iii) Within ten (10) days of the meeting when the expulsion of membership was voted upon the Secretary shall send the expelled member and post on the Club's bulletin board the minutes of that part of the meeting where the reasons and vote of the Board are set forth;
 - (iv) The de novo hearing shall take place at the Club within thirty (30) days of the meeting when the termination of membership was voted upon;
 - (v) The minutes of the meeting when the member was expelled shall be first accepted, if they had not previously been so. The minutes aforementioned will be made part of the record of the de novo hearing;
 - (vii) [sic] The expelled member may only be represented by an attorney licensed to practice law in the Commonwealth of Pennsylvania, or the expelled member may represent himself or herself; and
 - (vii) The vote of a two-thirds (2/3) majority of the Board to expel the member at the de novo hearing for the reasons set forth in subsection (d) is required.

(Bylaws, Article IX, Section 12(e))

Subsequent to his termination, the Club also offered Miller an opportunity for a **de novo** hearing to be held on August 12, 2003 before the Board at which time Miller would be permitted to present evidence in defense of his expulsion (Petition for Preliminary Injunctive Relief, Exhibit "E", Letter dated July 17, 2003). This offer was refused.

Before us is Miller's motion for summary judgment with respect to Counts I, III and IV of the complaint.

DISCUSSION

We direct our attention first to Section 5766 of the Non-profit Corporation Law. Subsections (a) and (b) of this Section state:

§5766. Termination and transfer of membership

(a) General rule.—Membership in a nonprofit corporation shall be terminated in the manner provided in a bylaw adopted by the members. If the membership in any such corporation is limited to persons who are members in good standing in another corporation, or in any lodge, church, club, society or other entity or organization, the bylaws shall in each case define such limitations, and may provide that failure on the part of any such member to keep himself in good standing in such other entity or organization shall be sufficient cause for expelling the member from the corporation requiring such eligibility.

(b) Expulsion.—

(1) No member shall be expelled from any nonprofit corporation without notice, trial and conviction, the form of which shall be prescribed by the bylaws.

(2) Paragraph (1) of this subsection shall not apply to termination of membership pursuant to section 5544(c) (relating to enforcement of payment of fees, dues and assessments).

15 Pa. C.S.A. §5766(a) and (b). Since Miller was expelled pursuant to Article IX, Section 12(d) of the Bylaws, it appears unlikely that Article IX, Section 12(c) of the Bylaws or Section 5766(b)(2) of the Nonprofit Corporation Law has any application to these proceedings, however, the issue is not free from doubt.⁴

⁴ Other than the Board alleging that Miller's conduct was deemed prejudicial or injurious to the best interests, welfare and character of the Club, no further specificity as to the conduct complained of has been identified in the record before us. In Defendants' brief opposing Miller's motion for summary judgment, Defendants state that the conduct for which Miller's membership was terminated encompasses "his continuous actions and conduct which have been prejudicial and injurious to the best interest, welfare, and character of Mahoning Valley Country Club, Inc., **including failure to pay dues.**" (Defendants' brief in opposition to motion for summary judgment, p. 3) (emphasis added).

Miller argues that Section 5766 “requires [a] basic due process proceeding, although not perhaps with all the formality which a day in [a] court of record might entail,” **Randolph v. Spruce Cabin Camp Association**, 11 D. & C. 3d 71, 73 (Monroe Ct. 1979); that the Club’s Bylaws, as they existed at the time of his expulsion, contravened these due process requirements; that he was, in fact, summarily terminated as a member and denied any semblance of a regular, fair and just proceeding; and that the Club’s offer to hold a hearing, after his expulsion, to rectify any perceived deficiencies in the process by which he was expelled is an exercise in futility with a foregone conclusion. In response, the Club draws our attention to **Kennedy v. Electric Heights Housing Association**, 61 Pa. Commw. 348, 433 A.2d 639 (1981) where a nonprofit corporation’s post-termination hearing process was upheld.

In **Kennedy**, the bylaws in place at the time of the association’s board of directors’ decision to terminate the member provided the member with the right to a post-termination hearing before the board or to appeal the board’s decision to the full membership of the association with a **de novo** hearing before that membership. The member chose the latter course, at which time “evidence was presented regarding the [member’s] conduct, and he was allowed to produce his own evidence and to cross-examine the persons who had filed the complaint.” **Id.** at 350, 433 A.2d at 640. The court found the actual process followed in **Kennedy** to afford adequate due process and to comport with the requirements of Section 7767 of the then governing Not-for-Profit Code, which, similar to Section 5766 of the present law, provided that “a member of a nonprofit corporation such as the Association may be expelled only after notice, trial and conviction, the form of which is to be established in the bylaws adopted by the members.” **Id.** at 351, 433 A.2d at 641.

Procedurally, the facts in the instant case are significantly, and materially, different from those in **Kennedy**. Whereas in **Kennedy** the right to request a hearing before either the board or the entire membership was already in place as part of an established process enabling a member to challenge his expulsion, here, the opportunity for a hearing and to present evidence was only offered after the member was terminated and after suit was commenced in this Court. Unlike **Kennedy**, the

hearing offered to Miller was offered after he had already been terminated—perhaps in recognition of a fundamental defect in the process prescribed by the Club's Bylaws for expulsion of a member—rather than as part of an existing sequential process to determine whether he should be terminated.

It is significant also that in **Kennedy** the court held only that the process actually followed—a **de novo** hearing before the full membership, not a **de novo** hearing before the body which previously voted to expel—was neither fundamentally unfair nor violative of the provisions of the Not-for-Profit Code. In contrast, the opportunity for a hearing offered to Miller was before the Club's Board of Governors, the same body which had already prejudged his case and voted for termination. **Cf. In Re: Appeal of Redo**, 42 Pa. Commw. 468, 472, 401 A.2d 394, 396 (1979) (in the context of disciplinary proceedings before a township board of supervisors, evidence that the tribunal before which a case is heard previously prejudged the merits of the case constitutes evidence of actual bias which, if found to exist, serves to invalidate a decision **ipso facto**); **see also, Lyness v. Commonwealth, State Board of Medicine**, 529 Pa. 535, 546-47, 605 A.2d 1204, 1210 (1992) (“[W]here the very entity or individuals involved in the decision to prosecute are ‘significantly involved’ in the adjudicatory phase of the proceedings, a violation of due process occurs.”).

CONCLUSION

In accordance with the foregoing discussion, we conclude that the Bylaws in effect at the time Miller was terminated did not comply with the termination procedures required by 15 Pa. C.S.A. §5766(b)(1) and that, to the extent Miller's membership was terminated for reasons other than the nonpayment of dues and assessments, the Club's action in terminating Miller pursuant to Article IX, Section 12(d), of its Bylaws was invalid. While it may well be that Miller's expulsion was illegal and void and that he is entitled to reinstatement as a member of the Club, with full recognition of the rights and privileges of a member, because the record before us is unclear on whether the conduct for which Miller was expelled also included a failure to pay dues or assessments levied by the Club, we are unable to make this ultimate determination.

In so ruling, it is important that the parties understand that our decision as to the propriety of Miller's termination pursu-

ant to Article IX, Section 12(d), for conduct inimical to the best interests of the Club is not a decision on whether sufficient grounds exist to support Miller's termination. Instead, the decision is one based solely on the procedural requirements of Section 5766(b) (1), including as it does the basic right to notice and a hearing, and notions of fundamental fairness which require that a matter be both reasonably and fully considered only after each side to the controversy has been provided an opportunity to appear before the hearing body, to present evidence in support of his position, and to hear and cross-examine the adversary. Accordingly, our decision is without prejudice to the Club's right to terminate Miller as a member provided the charges are reasonable and the proceedings are in accordance with the Club's Bylaws which themselves must comply with the requirements of Section 5766(b)(1) of the Nonprofit Corporation Law.⁵

ORDER OF COURT

AND NOW this 12th day of January, 2005, upon consideration of Plaintiff's, Howard F. Miller's, motion for summary judgment, the answer of Defendants, the briefs of the parties and following argument of counsel and in accordance with our Memorandum Opinion of this same date, it is hereby

ORDERED and DECREED that to the extent the basis for Plaintiff's termination as a member of the Mahoning Valley Country Club was for reasons other than a failure to pay dues or assessments properly levied by the Club, we find the termination to be violative of the procedural requirements of Section 5766(b) (1) of the Nonprofit Corporation Law and therefore invalid and void. In all other respects, Plaintiff's motion for summary judgment is denied.

⁵ As to Miller's remaining requests for summary judgment, we find sufficient factual disputes and legal issues present to deny summary judgment on these claims.

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

Civil Law—Divorce—Equitable Distribution—Treatment of Retirement Benefits As Both a Marital Asset and a Source of Income—Classification of Engagement Ring As a Non-Marital Asset

1. Counting an asset twice, once as a source of income for support/alimony pendente lite and once for equitable distribution, is improper.
2. Retirement payments used to decide an award of alimony pendente lite, may not also be valued and allocated as a marital asset subject to equitable distribution.
3. As an inherently conditional gift, subject to a condition subsequent, the giving of an engagement ring does not become the absolute property of the recipient until marriage occurs.
4. Notwithstanding its conditional nature, the gift of an engagement ring is absolute in form at the time made, and does not thereafter, upon marriage, lose its status as being separate property of the recipient, not subject to equitable distribution.

NO. 01-1952

WILLIAM B. QUINN, Esquire—Counsel for Plaintiff.

BARRY CLARK SHABBICK, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—January 27, 2005

Before us are the parties' exceptions to the Master's Supplemental Report filed on May 3, 2004. Previously, we remanded the case to the Master for supplemental proceedings regarding the following issues:

- (1) Determining the present value, if any, of Husband's civil service pension subject to equitable distribution;^[1]

¹ In our Memorandum Opinion of May 23, 2003, we held that even though, as an employee of the United States Postal Service, Husband did not contribute to and was not entitled to social security retirement benefits, a portion of his contributions to the Civil Service Retirement System (CSRS) is, at least figuratively, in lieu of social security retirement benefits which, under federal law, are not subject to division and allocation in a state court proceeding. Under these circumstances, when the other spouse has social security benefits attributable to employment during the marriage—as here—the portion of the civil service pension benefits which are in lieu of social security benefits should not be valued as a marital asset.

Cornbleth v. Cornbleth, 397 Pa. Super. 421, 425, 580 A.2d 369, 371 (1990), **appeal denied**, 526 Pa. 648, 585 A.2d 468 (1991). Because the Master did not determine whether, after reduction of the present value of Husband's hypothetical social security benefits, there existed a portion of Husband's federal pension benefits which were the equivalent of a conventional pension subject to equitable distribution, we remanded for this computation.

(2) Determining the value of various items of jewelry given by the Husband to the Wife during the marriage for purposes of equitable distribution;

(3) Determining whether the values found by the Master on remand affected the scheme of equitable distribution previously recommended by the Master; and

(4) Acting on Husband's claim for alimony, alimony pendente lite, counsel fees and costs.

With the exception of the last factor, each is the subject of the parties' present exceptions.

HUSBAND'S PENSION BENEFITS

As of October 27, 2003, the date of the Master's hearing on remand, Husband was receiving monthly payments from his federal pension of approximately \$1,836.24, with yearly cost of living increases. The Master determined that the marital portion of Husband's pension benefits subject to equitable distribution had a present value of \$13,745.00.² This figure is not disputed by the parties.

In determining the effect of this value on the scheme of equitable distribution previously recommended, the Master also determined that the Wife had a separate pension valued at \$14,141.11 for equitable distribution purposes and reasoned that because the values of both pensions were roughly equivalent, there was no effect on the prior recommended scheme of distribution. In this reasoning, the Master erred. The value which the Master attributed to pension benefits of the Wife represented the Wife's accrued social security retirement benefits attributable to the Wife's earnings history from private employment; the Wife, in fact, has no separate pension benefits. This error, the subject of the Wife's Exceptions 2 through 5, is acknowledged by the Husband.

² The present value of the pension benefits as of August 27, 2003 was determined by Wife's expert, Pension Appraisers, Inc., to be \$284,939.95. To this figure was added the sum of \$46,521.23, representing pension payments Husband had received from the date of the parties' separation, identified in the report to be July 4, 2001, through August 27, 2003. The sum of these two figures, \$331,461.18, less the present value of the Husband's assumed social security benefits, \$121,600.80, provided an adjusted present value of \$209,860.38, against which Wife's expert applied a coverage fraction of 0.0655, and computed the marital portion of Husband's pension subject to equitable distribution to be \$13,745.85.

While recognizing the error, the Husband nevertheless argues that the Master's conclusion—that the value of the Husband's pension does not affect the division of marital assets between the parties—is correct, but for different reasons. On this issue, the Husband argues that notwithstanding the value of this marital asset which previously was not considered by the Master, there are equitable reasons why this asset is exempt from equitable distribution. Specifically, the Husband argues that because his pension was already considered as a stream of income in computing whether he should receive alimony pendente lite, it is improper to also value and consider these payments as an asset subject to equitable distribution³ (Husband's Exception 1).

In **Rohrer v. Rohrer**, 715 A.2d 463, 465 (Pa. Super. 1998), the court held that "money included in an individual's income for the purpose of calculating support payments may not also be labelled as a marital asset subject to equitable distribution." In this decision, the Superior Court made clear that where a stream of income was involved—at issue in **Rohrer** were the retained earnings of a Subchapter S corporation that accrued over several years—only those payments actually considered as a source for support should be excluded from equitable distribution, not payments which preceded the claim for support

³ Husband's claim for alimony pendente lite was filed on August 31, 2001 as a counterclaim in the divorce proceedings and was referred to a Domestic Relations Hearing Officer, who, by decision dated October 11, 2002 recommended denying Husband's claim. This recommendation was based on the equality of financial resources available to the parties, including the lack of a substantial disparity in their income, taking into account the Husband's monthly retirement benefits (Report of Hearing Officer, Husband's Exhibit 6 on remand).

At the time the Husband filed his exceptions to the Master's first report on August 29, 2002, the Hearing Officer's decision was not known. Further, at the time the Husband filed his exceptions, the Master had concluded that the Husband's pension benefits from the civil service retirement system were in lieu of social security and, therefore, not subject to equitable distribution. Consequently, at the time Husband's exceptions to the divorce proceedings were filed, there existed no reason for the Husband to claim that his retirement benefits should be excluded from equitable distribution on the basis that they were previously considered for support purposes.

In our Order dated May 23, 2003, remanding their matter to the Master, we specifically directed that "any additional issues which previously could have been raised by the parties, but have not been raised, are waived and shall not be raised on remand." Under the circumstances, we do not believe this issue has been waived by the Husband.

and had been retained as undistributed earnings of the corporation, or payments which otherwise had not been considered as income in calculating a spousal support obligation. In accordance with **Rohrer** and its rationale against “double dipping” (*i.e.*, using the same revenue as a source for “support” and for “equitable distribution”), it would similarly be error for us to exclude from consideration for equitable distribution the value of Husband’s pension benefits not considered or credited for alimony pendente lite purposes. **Cf. Miller v. Miller**, 783 A.2d 832, 835 (Pa. Super. 2001) (holding that the reverse of **Rohrer** is also true, that money received from the sale of an asset awarded in equitable distribution may not be included in an individual’s income for purposes of calculating support payments).

Husband raised his alimony pendente lite claim as a counterclaim on August 31, 2001. In reviewing Wife’s expert’s valuation of Husband’s pension benefits, the present value of these benefits as of August 27, 2003, not including payments received by the Husband from July 4, 2001 through August 27, 2003, is \$284,939.95. Subtracting from this value the estimated value of payments Husband has received from August 27, 2003 until the present time, \$31,216.08 (*i.e.*, 17 months at \$1,836.24 each), equals \$253,723.87. Subtracting further from this amount the present value of Husband’s assumed social security benefits from his earnings as a Postal Service employee, \$121,600.80, and applying the coverture fraction of 0.0655, yields a valuation for equitable distribution of \$8,654.06. It is this figure which we believe appropriate to consider for equitable distribution purposes.

VALUATION AND DIVISION OF JEWELRY

On remand, the Master found the value of jewelry purchased by the Husband for Wife during the marriage, and in Wife’s possession, to be \$5,944.00, and recommended that the Wife pay half of this value to Husband in equitable distribution. This value was higher than that at which the Wife valued the jewelry—\$625.00 (Wife’s Exhibit 5 on remand)—and, according to Wife, ignored Wife’s suggestion that the jewelry be awarded to Husband with no offsetting value to the Wife (Wife’s Exceptions 9 and 10).

With respect to the Master’s valuation of the jewelry at \$5,944.00, we find no error. This valuation is the subject of the

Wife's Exceptions 6 through 8. The value found by the Master is consistent with the value presented by the Husband on remand (Husband's Exhibit 5 on remand) and the cost of the jewelry as presented at the first hearing (Husband's Exhibit 2). The Wife's valuation does not identify a fair market or retail value, but only a dealer's price.

Husband also argues that the Master, by relying upon footnote 7 of our Memorandum Opinion dated May 23, 2003, failed to include as a marital asset the value of an engagement ring—valued at \$8,850.00—which the Husband gave to the Wife prior to their marriage and which the Husband contends, upon marriage, became a marital asset subject to equitable distribution (Husband's Exception 2). This issue is an intriguing one and one which to our knowledge has not previously been addressed by our courts.

In footnote 7 of our previous Opinion, we stated that the date of acquisition, rather than the method of acquisition, determines whether property is marital property. We further opined that because the engagement ring was acquired by Wife prior to marriage, it was not a marital asset. In support of his position, the Husband cites **Lindh v. Surman**, 560 Pa. 1, 742 A.2d 643, 645 (1999) for the principle that under Pennsylvania law the giving of an engagement ring has as an implied condition that the marriage must occur in order to vest title in the donee and that the marriage is a necessary prerequisite to the passing of absolute title.⁴

In **Lindh**, the issue before the Supreme Court was whether a man who gives his fiancée an engagement ring is entitled to a

⁴ Although the Master understandably did not address this issue on remand, relying expressly on footnote 7 of our Memorandum Opinion, and Wife contends that the issue has been waived and was not properly before the Master on remand, strictly speaking, footnote 7 of our Memorandum Opinion was dicta in that the only issues then before us were those raised by the parties' exceptions which, at the time, were limited to the issue of whether the Master erred in failing to place any value on the jewelry gifted by the Husband to the Wife. In failing to value this jewelry, we found that absent a **de minimis** value, the failure to value and award a marital asset in equitable distribution is allocation by default and must be corrected on remand.

On this issue, the Husband argues that at the time of the hearing on his original exceptions, he had neither the need nor the opportunity to address the issue of whether each individual item of jewelry was a marital asset since the issue had not been raised by either of the parties as being in dispute. Under these circumstances, we believe it would be inappropriate not to discuss the issue further.

return of the ring when the marriage does not occur. In deciding this issue, the court held first that the gift of an engagement ring is conditional, the condition being the performance of the marriage ceremony, and then held, for policy reasons which it found to be consistent with the national trend toward no-fault divorce law, that, regardless of who called off the marriage and for what reason, the donor was entitled to recover the ring, or its value, when the marriage did not occur. The court made no decision as to whether the engagement ring becomes a marital asset upon marriage, nor was the court's reasoning based upon equitable principles to be applied on a case-by-case basis.

In Pennsylvania, the Divorce Code defines marital property generally as being "all property acquired by either party during the marriage. . ." 23 Pa. C.S.A. §3501(a). Husband argues that because the gift of an engagement ring does not become absolute until the marriage ceremony, the gift of an engagement ring is acquired "during the marriage" and is therefore marital property. We disagree.

That the giving of an engagement ring is a conditional gift is beyond dispute. **Lindh v. Surman, supra**, 742 A.2d at 644. It is also clear that the condition of the gift is not acceptance of the marriage proposal, a condition precedent, but the marriage itself, a condition subsequent. **Id.** at 645. Once that condition is met, the conditional nature of the gift is moot and the ring becomes the absolute property of the recipient. **Ruehling v. Hornung**, 98 Pa. Super. 535, 540 (1930).

This condition, while likely mirroring the true intention of the parties, is one imposed by law because of the unique nature of an engagement ring. An engagement ring "is given as a pledge or symbol of the contract to marry. We think that it is always given subject to the implied condition that if the marriage does not take place either because of the death, or a disability recognized by the law on the part of, either party, or by breach of the contract by the donee, or its dissolution by mutual consent, the gift shall be returned." **Ruehling v. Hornung, supra** at 540. Moreover, we believe it clear that the donative intent underlying the giving of an engagement ring is specific to the prospective bride and intended solely for her use.

In **Lipton v. Lipton**, 134 Misc. 2d 1076, 514 N.Y.S.2d 158, (N.Y. Sup. Ct. 1986), a New York trial court stated:

An engagement ring is a gift to which a condition subsequent, the fulfillment of the marriage agreement, is attached. Both parties agree that the condition occurred, but they disagree as to the time of the vesting of the gift. The defendant argues that since the condition was fulfilled upon their marriage, vesting occurred on the wedding day and therefore the property is marital property. However, it is well settled that although a gift made in contemplation of marriage is conditional, it is absolute in form when given. The mere fact that a gift absolute in form may be defeated on the happening of a certain event does not invalidate the gift. Thus, it was absolute in form on the day it was given.

Id. at 159 (citations omitted).

Lipton was cited with approval in **Winer v. Winer**, 241 N.J. Super. 510, 575 A.2d 518, 528 (1990), where the New Jersey Superior Court, in support of its decision holding that the engagement ring in question was not subject to equitable distribution, quoted the following language from **Lipton** as explaining its holding:

The question of the conditional nature of the gift became moot upon the marriage when the ring unconditionally became the property of the [wife]. Therefore, the ring given prior to the marriage retains its character as separate property not subject to equitable distribution.

Winer, supra 575 A.2d at 528 (**quoting Lipton, supra**, 514 N.Y.S.2d at 159-60). The New Jersey statute providing for equitable distribution of marital property, similar to Pennsylvania's Divorce Code, has as its objective the "equitable distribution of property, both real and personal which was legally and beneficially acquired by [the parties] or either of them **during the marriage.**" **Winer, supra**, 575 A.2d at 526 (**quoting** N.J.S.A. 2A:34-23) (emphasis added). Other courts which also concluded that the status of an engagement ring, after marriage, is not a marital asset and remains the separate property of the wife, include the following: **Smith v. Smith**, 797 S.W.2d 879, 881 (Mo. Ct. App. 1990); **Frank v. Frank**, 429 S.E.2d 823, 825 (S.C. Ct. App. 1993); **Greenberg v. Greenberg**, 698 So. 2d

938 (Fla. 4th Dist. Ct. App. 1997); and **Neville v. Neville**, 734 So. 2d 352, 357 (Miss. 1999).

In accordance with the foregoing, we also find that the giving of an engagement ring, traditionally intended as a gift for the sole use of the recipient, upon marriage, retains its character on the day given as separate property of the donee, not subject to equitable distribution.

DIVISION OF ASSETS

“The process of equitable distribution is an exercise in marshallng, valuing and dividing the marital pot in a fair manner.”

Miller, supra at 835. In Pennsylvania, the division of marital assets requires a consideration of the factors enumerated in Section 3502 of the Divorce Code. 23 Pa. C.S.A. §3502. These factors support generally an equal division. The one exception is the division of the certificates of deposit Husband inherited from his mother (Wife’s Exception 11).

With respect to this asset, we believe the 70/30 division recommended by the Master in favor of the Husband is both fair and equitable. The funds for these certificates came entirely from Husband’s mother who, prior to her death, had the certificates titled jointly in Husband’s and her name, with a right of survivorship. Husband’s mother died on February 25, 2000, whereupon Husband became the sole owner of this property, at the time, a non-marital asset. Within six days of his mother’s death, on March 3, 2000, Husband placed Wife’s name on the certificates. One year later the parties separated.

Given the disparity in the parties’ ages and their relative health and stages in life—Wife was 35 years old at the time of separation and Husband was 58 years old, the source of the funds, the timing of the transfer into Wife’s name and the separation of the parties shortly thereafter, all factors favoring a greater distribution to Husband, and considering also that the proceeds of the marital home which was owned by Husband prior to marriage and was debt free, but which in 1999 was transferred by Husband into both parties’ names, are being equally divided, the unequal division of the certificates of deposit is appropriate. The resulting division of marital assets is as follows:

Marital Asset	Value of Marital Asset	To Husband	To Wife
Marital Home \$57,714.47 Kunkletown, PA	\$115,428.94 1247 Koch Road	\$57,714.47	
Four Certificates \$30,399.68	\$101,332.27 of Deposit	\$70,932.59	
Husband's United \$ 4,327.03 ⁵ Service Pension	\$ 8,654.06 States Postal	\$ 4,327.03	
Joint Checking \$ 1,606.18	\$ 3,212.35 Acct.	\$ 1,606.17	
Joint Savings \$11,189.76	\$ 22,379.53 Acct.	\$11,189.77	
Joint Savings \$ 1,289.13	\$ 2,578.25 Acct.	\$ 1,289.12	
Wife's Checking \$ 375.00	\$ 750.00 Acct.	\$ 375.00	
Mountain Laurel \$ 300.00	\$ 600.00 Miniatures	\$ 300.00	
Vehicles			
1998 Ford \$18,152.00	\$ 18,152.00 Explorer		
1998 Ford Taurus	\$ 9,475.00	\$ 9,475.00	

⁵ To avoid the necessity of distributing Husband's federal pension by way of a Court Order Approved for Processing drafted in accordance with the Code of Federal Regulations, this distribution to Wife will be made by an adjustment to the distribution of the proceeds from the sale of the marital home. A similar adjustment will be made to these proceeds to equalize the difference in the values of the vehicles received by each party.

Jewelry				
Van Scoy Diamond	\$ 5,944.00	In kind		
Mine Diamond		to Husband		
Wedding Band .49		per Wife's		
Ct.; Van Scoy		request ⁶		
Diamond Mine .62 tw				
Diamond Stud				
Earrings; Freeman				
Jewelers 1 Ct. 3				
Diamond DeBeers				
Anniversary Ring				
First Union	\$ 1,171.41	\$ 585.70	\$ 585.71	
Securities				

We also conclude that since, at the time of the hearing on remand, the Wife was temporarily unemployed, it is appropriate and equitable to hold that both parties are equally responsible for the payment of the Master's fee and costs prior to the remand hearing held on October 27, 2003, but that the Master's fee and costs for the proceedings thereafter be paid by the Husband (Wife's Exception 17). In all other respects, the Master's report and recommendations are accepted by this Court and have been incorporated in our final order of this same date.⁷

⁶ With respect to the value placed on the jewelry which the Husband gave to the Wife after marriage, \$5,944.00, we have accepted Wife's proposal that this jewelry be awarded to the Husband without any offsetting value to the Wife, and without the need for the Wife to make any payment to the Husband. In so finding, we can see no persuasive reason for the Husband to find fault in this allocation: this division accepts Husband's valuation of the jewelry and by negating any credit to the Wife, if anything, results in a windfall to the Husband.

⁷ The Wife's Exceptions 12, 13, 14 and 15 seek to litigate matters that were previously before the Court on the parties' first set of exceptions and were not the subject of remand. The Master's reference to these matters in the Supplemental Report is consistent with the Court's remand order. We find no merit, for equitable distribution purposes, in Wife's Exception 16, the Master's recommendation in this regard having no effect on the equitable distribution of marital assets. With respect to Wife's Exception 1 which argues that the Master was systematically biased against her, we find this exception to be without support and, therefore, will deny the exception.

**COMMONWEALTH OF PENNSYLVANIA vs.
KATHLEEN SEMMEL, Defendant.**

*Criminal Law—Enforcement of Municipal Ordinance—Void for
Vagueness—Equal Protection Challenge*

1. In examining a challenge to a municipal ordinance as being void for vagueness, the court may consider the purpose and object of the ordinance as well as the common and generally understood meaning of undefined words and phrases.
2. Given the context and common usage of what is meant by a sidewalk, the term sidewalk as used in Section 192-2(A)(1) of the Borough of Lehighton's Municipal Code refers to an improved pathway for walking.
3. An owner whose property abuts or contains traditional concrete sidewalks has no standing to complain that the Borough sidewalk ordinance is unconstitutionally vague when, as applied to her, it is beyond dispute that the ordinance regulates the removal of snow and ice from her sidewalk.
4. A municipal ordinance which classifies properties on whether they do or do not contain sidewalks, and which requires only those which have sidewalks to keep them free of snow and ice, bears a rational relationship to a legitimate government purpose and is therefore not violative of equal protection principles.

NO. 028 SA 04

DAVID W. ADDY, Esquire—Counsel for Borough of Lehighton.

WILLIAM G. SCHWAB, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—March 9, 2005

PROCEDURAL AND FACTUAL BACKGROUND

On February 27, 2004, the Defendant, Kathleen Semmel, was cited for violating the Borough of Lehighton's snow removal ordinance. Defendant had allegedly failed to remove snow and ice from the sidewalk in front of her property within 24 hours of when it stopped snowing. Section 192-2(A)(1) of the Borough's Municipal Code, provides as follows:

The owner, occupier or tenant of every property fronting upon or alongside of any of the streets in the Borough of Lehighton is hereby required to remove or cause to be removed from all of the sidewalks in front or alongside of such property all snow and/or ice thereon fallen or formed within twenty-four (24) hours after the same shall have ceased to fall or to form. All sidewalks shall be cleared of all snow and/or ice accumulation to a minimum cleared width of thirty-six (36) inches or any greater minimum width which may be required in the future by the Americans with Dis

abilities Act or any other federal or state statute or regulation relating to handicapped accessibility. This provision shall not apply to the removal of ice where such removal would cause damage to the sidewalk, in which case the owner, occupant or tenant shall provide for adequate traction upon such sidewalk instead.

(Lehighton Code, §192-2(A)(1)) Defendant's property fronts on 9th Street and contains along its front concrete sidewalks which run parallel to the public road.

Following her conviction before a district justice and appeal to this Court, Defendant filed an omnibus pretrial motion claiming that Section 192-2(A)(1) is void for vagueness and violates equal protection principles. Defendant first argues that the meaning of the term "sidewalk" is subject to various interpretations and since the ordinance contains no definition, both those who enforce the ordinance as well as those subject to its enforcement must guess as to its meaning. Alternatively, Defendant argues that even if the meaning of the word "sidewalk" is constitutionally adequate, requiring those property owners whose properties abut public roads and which contain sidewalks to maintain a clear path and not requiring the same of similarly situated property owners whose properties do not contain sidewalks is discriminatory.

DISCUSSION

A. Vagueness

A municipal ordinance carries with it a strong presumption of constitutionality. This presumption will not be overcome unless the ordinance clearly, palpably and plainly violates the constitution. **Baker v. Upper Southampton Township Zoning Hearing Board**, 830 A.2d 600, 604-605 (Pa. Commw. 2003), **appeal denied**, 578 Pa. 692, 849 A.2d 1206 (2004). Notwithstanding this presumption, "if a statute or an ordinance is so 'vague, indefinite or uncertain' that the courts are unable to determine, with any reasonable degree of certainty, the intent of the legislative body, such statute or ordinance is invalid." **Commonwealth ex rel. Hines v. Winfree**, 408 Pa. 128, 134, 182 A.2d 698, 702 (1962).

To be valid, a municipal ordinance must serve a legitimate governmental function authorized by the legislature and must

be reasonably related to the accomplishment of that function. Here, the authorization of the Borough to enact a sidewalk ordinance is undisputed. Additionally, the maintenance of sidewalks, including the removal of snow and ice, is, without question, a reasonable exercise of the police power. 53 P.S. §46801.

Defendant's claim that the term sidewalk is the equal of the words walkway or pathway and, therefore, includes improved, as well as unimproved pathways, is belied by the context of the ordinance. Not only does Section 192-2(A)(1) itself limit the removal of snow and ice where to do so would cause damage to the sidewalk, thereby suggesting an improved pathway, Sections 192-13 through 192-17 of the Borough's Municipal Code set forth the obligations of a property owner to construct and repair walkways and curbs, clearly referring to an improved pathway.

This context, combined with its common usage, persuades us that what is meant by a sidewalk as used in Section 192-2(A)(1) is not unconstitutionally vague.¹ Even if this were not the case, as applied to Defendant, there can be no question that the concrete pathway fronting her property and paralleling 9th Street is in every sense of the word a sidewalk. By asking us to measure the challenged statutory proscription, not against the specific conduct involved in this case, but against hypothetical conduct that the statutory language could arguably embrace, Defendant asks us to adjudicate the rights of parties not presently before the Court. **Commonwealth v. Heinbaugh**, 467 Pa. 1, 7, 354 A.2d 244, 247 (1976) ("It seems clear, then, that when an ascertainable standard is present in a statute, the violator whose conduct falls clearly within the scope of such standard has no standing to complain of vagueness.").

¹ In defining terms of general usage, the Statutory Construction Act of 1972 provides that undefined "words and phrases shall be construed according to rules of grammar and according to their common and approved usage. . ." 1 Pa. C.S.A. §1903(a). In this regard, it is not improper for courts to consider dictionary definitions. See e.g., **Bradley v. Township of South Londonderry**, 64 Pa. Commw. 395, 405, 440 A.2d 665, 670 (1982) (using dictionary to define the term "discarded"). For example, in Webster's New International Dictionary, a sidewalk is defined as "a walk for foot passengers of a street or road; a foot **pavement**." (2nd. Ed. 1961) (emphasis added). More recently, a sidewalk has been defined as "a path for pedestrians, usually paved, along the side of a street." Webster's New World Dictionary (Third College Edition 1994).

B. Equal Protection

Defendant next argues that Section 192-2(A)(1) is unconstitutional and in violation of the Equal Protection Clause by unreasonably differentiating between owners of properties that contain or abut sidewalks from those that do not. Under Section 192-2(A)(1) only the owners of properties which contain or abut a sidewalk are required to maintain a clear path for pedestrians.

In describing the meaning of equal protection, the Commonwealth Court stated:

The equal protection clause protects an individual from state action that selects him out for discriminatory treatment by subjecting him to a provision in the law not imposed on others of the same class. In **Curtis v. Kline**, 542 Pa. 249, 666 A.2d 265 (1995), our Supreme Court discussed the principle of equal protection as follows:

The essence of the constitutional principle of equal protection under the law is that like persons in like circumstances will be treated similarly. However, it does not require that all persons under all circumstances enjoy identical protection under the law. The right to equal protection under the law does not absolutely prohibit the Commonwealth from classifying individuals for the purpose of receiving different treatment, and does not require equal treatment of people having different needs.

Id. at 255, 666 A.2d at 267-68. (citations omitted). So long as a classification is reasonable and based upon some ground of difference having a fair and substantial relation to the objective of the classification so that similarly situated individuals are treated alike, it is permissible. **F.S. Royster Guano Co. v. Virginia**, 253 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed. 989 (1920); **Commonwealth v. Daniel**, 430 Pa. 642, 243 A.2d 400 (1968). Governmental classifications are subject to different levels of judicial scrutiny according to classification type. **Nicholson v. Combs**, 550 Pa. 23, 703 A.2d 407 (1997).

Correll v. Commonwealth Department of Transportation, 726 A.2d 427, 430 (Pa. Commw. 1999) (**en banc**), **aff'd**, 564 Pa. 470, 769 A.2d 442 (2001). In this context, the question Defendant raises is whether creating two classes of property

owners—those who do and those who do not have sidewalks—and requiring only those who do have sidewalks to provide a walkway free of snow and ice, impermissibly distinguishes between property owners on an invalid basis.

In the instant case, absent the regulation of a fundamental right or a classification which is inherently suspect, the appropriate standard of review is the “rational basis” test. Under this standard “the challenged classification must be sustained if it bears a rational relationship to a legitimate government interest, and any state of facts may reasonably be conceived to justify it.” **Commonwealth v. Tobin**, 828 A.2d 415, 425 (Pa. Commw. 2003), **appeal denied**, 576 Pa. 718, 841 A.2d 533 (2003) (**quoting Greenacres Apartments, Inc. v. Bristol Township**, 85 Pa. Commw. 572, 576, 482 A.2d 1356, 1359 (1984)).

[S]ocial and economic legislation is valid unless the ‘varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [a court] can only conclude that the legislature’s actions were irrational’ ... This is a heavy burden.

Paz v. Pennsylvania Housing Finance Agency, 722 A.2d 762, 766 (Pa. Commw. 1999) (**quoting Hodel v. Indiana**, 452 U.S. 314, 332, 101 S.Ct. 2376, 69 L.Ed. 2d 40 (1981)).²

At the hearing on Defendant’s motion, the evidence established that not all properties within the Borough have sidewalks. Additionally, in certain areas, Defendant’s block being one, sidewalks which exist in front of one property do not extend the entire length of the block across all properties fronting on the same street. In consequence, as depicted in one of Defendant’s photographs, a sidewalk at the front of one property ends abruptly at a neighboring adjoining property.

Whether the Borough’s enforcement of where a sidewalk must be constructed is arbitrary, capricious or discriminatory

² See **Lyons v. Workers’ Compensation Appeal Board (Pittsburgh Steelers Sports, Inc.)**, 803 A.2d 857, 861 (Pa. Commw. 2002), **appeal denied**, 573 Pa. 682, 823 A.2d 146 (2003) (“reviewing court is free to hypothesize reasons that the legislature might have had for the classification; the reviewing court cannot question the soundness or wisdom of the legislative distinction if any state of facts reasonably can be conceived to sustain that classification.”) (internal quotations omitted); see also, **Paz v. Pa. Hous. Fin. Agency**, 722 A.2d 762, 766 (Pa. Commw. 1999).

is not before us. Instead, Defendant argues that if the term “sidewalk” is defined to mean only paved improved pedestrian rights-of-way, then Section 192-2(A)(1) violates equal protection “because it unfairly burdens those owners with a duty to keep the right-of-way next to their property free from snow and ice, a duty not imposed on the class of owners of property which does not abut paved sidewalks.” (Defendant’s brief in support of her omnibus pretrial motion, pp. 6-7)

Applying a rational basis analysis, the inquiry is two-pronged: “1) whether there exists any legitimate state interest and 2) whether the statute is reasonably related to promoting a legitimate state interest.” **Paz v. Pa. Hous. Fin. Agency, supra** at 766. Here, the purpose of Section 192-2(A)(1) is clearly to assure that when sidewalks do exist, they are safely maintained for pedestrian use, unquestionably a legitimate governmental interest.

That the ordinance requires property owners having sidewalks to maintain them free of snow and ice promotes this interest. In imposing this duty on the owners of property containing or abutting sidewalks, and not on those whose properties have gravel pathways, or no pathways, the ordinance implicitly recognizes not only the relative ease of clearing a paved surface but also that the presence of sidewalks encourages pedestrian use. The Borough’s residents are safer with sidewalks cleared of ice and snow even if not all properties bear sidewalks.

That the Borough has not uniformly compelled the construction of sidewalks throughout the Borough and has not required all property owners abutting public streets to maintain a walkway clear of snow and ice is not the test.

Judicial investigation into the validity of the police power should not scrutinize the wisdom of the policy emanating from the legislative branch, or whether the **best means** of achieving the desired result have been selected. ... The court should examine only whether the statute has a recognized police purpose, and whether the purpose has a reasonable relation to the object to be attained.

Balent v. City of Wilkes-Barre, 542 Pa. 555, 566, 669 A.2d 309, 315 (1995) (emphasis added) (internal citations omitted).

CONCLUSION

In light of the forgoing we conclude that Section 192-2(A)(1) has as its objective a legitimate interest, that sidewalks are safely maintained, and that the means employed are rationally related to achieving this goal. For the forgoing reasons, Defendant's pretrial omnibus motion is denied.

COMMONWEALTH OF PENNSYLVANIA vs. JAMES KANE, Defendant

Criminal Law—Constitutionality of Traffic Stops Based Upon Erratic Driving—Driving Under the Influence

1. Erratic driving, in and of itself, will not justify a traffic stop.
2. For erratic driving to justify a traffic stop, the degree of erratic driving observed must establish probable cause to believe that the vehicle or the driver is in violation of some provision of the Vehicle Code.
3. Multiple crossings of both the center line and fog line of a two-lane highway, without a reasonable, neutral explanation for the crossings provides probable cause to believe that a violation of the Vehicle Code has or is taking place, sufficient to justify a traffic stop.
4. A driver who is observed by police crossing the center line three times by one-quarter to one-half the width of his vehicle, and the fog line twice, by a quarter of the car's width, over a distance of approximately two miles on a two-lane highway during the early morning hours, creates a reasonable, objective, and good faith basis to believe that one or more provisions of the Vehicle Code are being violated.

NO. 313 CR 04

WILLIAM E. McDONALD, Esquire, Assistant District Attorney—Counsel for the Commonwealth.

BRIAN J. COLLINS, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—March 17, 2005

James Kane ("Defendant") has filed a motion to suppress evidence and, in conjunction therewith, a petition for a writ of habeas corpus and a motion to quash the charges filed against him relative to a traffic stop which occurred during the early morning hours of February 22, 2004. In consequence of this stop, Defendant has been charged with violating five provisions of the Pennsylvania Motor Vehicle Code:

Count 1: Driving under the influence of alcohol;¹

Count 2: Driving on roadways laned for traffic;²

Count 3: Driving on right side of roadway;³

Count 4: Careless driving;⁴ and

Count 5: Registration and certificate of title required.⁵

Defendant argues that the stop was illegal, that all evidence obtained therefrom must be suppressed, and that, absent this evidence, there is insufficient evidence to sustain the charges filed.

FACTUAL BACKGROUND

On Sunday, February 22, 2004, at approximately 2:50 A.M., Officer Craig Strohl of the Nesquehoning Borough Police Department was on routine patrol within the Borough. At this time, in the vicinity of the intersection of State Routes 93 and 209, Officer Strohl observed a vehicle being driven by the Defendant swerve and cross the double yellow line. Defendant was driving northbound on Route 209 headed in the direction of the Borough of Jim Thorpe. State Route 209 is a two-lane highway, which connects the Boroughs of Nesquehoning and Jim Thorpe.

From this first observation, Officer Strohl began following Defendant's vehicle. During a distance of approximately two miles, Officer Strohl observed Defendant's vehicle cross the double yellow line three times and the white fog line twice.

Officer Strohl initially observed Defendant's vehicle cross the center double yellow line by one-fourth of the car's width for about three seconds. Approximately twenty seconds later, the Officer saw the car cross the yellow line, for a second time, by one-half of the car's width for three seconds. Ten seconds later, Defendant's vehicle crossed the double yellow line, a third time, by one-fourth of the car's width for three seconds. After another ten seconds, Officer Strohl observed the car cross the white fog line, by one-fourth of the car's width for two seconds.

¹ 75 Pa. C.S.A. §3802(A)(1).

² 75 Pa. C.S.A. §3309(1).

³ 75 Pa. C.S.A. §3301(a).

⁴ 75 Pa. C.S.A. §3714.

⁵ 75 Pa. C.S.A. §1301(a).

Immediately afterwards, the Officer once again saw Defendant's vehicle cross the fog line, for a second time, by one-fourth of the car's width for five seconds. Believing the driver might be impaired, it was at this point that Officer Strohl activated his overhead lights and siren and stopped Defendant's vehicle. Officer Strohl stated that the time intervals between the line crossings were his approximations.

No evidence was presented that Defendant exceeded the forty-five mile per hour speed limit while being followed by Officer Strohl. The Officer further testified that there were no other vehicles on the road while he followed the Defendant but that he was concerned that there would be an accident. All of Officer Strohl's observations which prompted his decision to stop Defendant's vehicle, as well as the initiation of the stop—the activation of Officer Strohl's overhead lights and siren—occurred within the Borough of Nesquehoning. The actual location at which Defendant's vehicle stopped, however, was within the borough limits for Jim Thorpe.⁶

DISCUSSION

Defendant argues that the police did not have reason to suspect a violation of the Vehicle Code at the time Defendant's vehicle was stopped and, therefore, any evidence obtained as a result of the stop must be suppressed. 75 Pa. C.S.A. §6308(b). Defendant relies principally on **Commonwealth v. Gleason**, 567 Pa. 111, 785 A.2d 983 (2001), and its underlying premise that erratic driving is not a *per se* violation of the Vehicle Code. See **Commonwealth v. Battaglia**, 802 A.2d 652, 657 (Pa. Super. 2002), *appeal denied*, 576 Pa. 718, 841 A.2d 528 (2003).

In **Gleason**, the defendant, while driving on a four-lane divided highway over a distance of approximately one quarter mile during the early morning hours, crossed the fog line twice, each time by six to eight inches for a period of one to two sec-

⁶ In his motion to suppress, Defendant originally challenged the stop as being beyond the Officer's primary jurisdiction and therefore invalid. This position was not pursued at the time of the suppression hearing and was clearly without merit. 42 Pa. C.S.A. §8953(a)(2); see also, **Kruth v. Commonwealth, Department of Transportation**, 856 A.2d 901, 906-907 (Pa. Commw. 2004) (officer's fresh pursuit and extraterritorial DUI arrest were proper where officer's observations of erratic driving occurred within officer's primary jurisdiction).

onds. In the context of an alleged violation of Section 3309(1) of the Vehicle Code (driving within single lane), where no other vehicles were on the road and absent any evidence that defendant's driving created a safety hazard, the Supreme Court held that the stop was not supported by probable cause to believe a violation of the Vehicle Code had occurred, or was occurring.

Since **Gleason**, the Superior Court has openly acknowledged its struggle to apply the **Gleason** holding to the myriad fact patterns before it. **Commonwealth v. Garcia**, 859 A.2d 820, 822 (Pa. Super. 2004). This point was illustrated graphically in **Garcia** by the court's recitation of the facts in **Commonwealth v. Lindblom**, 854 A.2d 604 (Pa. Super. 2004), **appeal denied**, 2005 WL 100691 (Pa. 2005), and those in **Commonwealth v. Chernosky**, 2004 Pa. Super 272 (reargument **en banc** granted September 21, 2004), in which the court arguably reached inconsistent and contradictory conclusions. **Id.** at 822-823. While recognizing the differing results reported by the Superior Court, we believe the facts of this case are sufficiently distinguishable from **Gleason** to justify a different result.

As already stated, the Defendant in this case was driving on a two-lane highway—one lane for each direction of travel—as opposed to a four-lane divided highway. And while Defendant, like Gleason, was followed over a distance of approximately one-quarter mile during the early morning hours, unlike **Gleason**, the Defendant here crossed the fog line twice, not by several inches, but by several feet. Of even greater significance, whereas in **Gleason** the defendant crossed only the fog line, the outermost portion of his lane furthest from oncoming traffic, here the Defendant crossed the double yellow line three times, each time entering the opposing lane of traffic by one-fourth to one-half of his car's width.

The facts of this case, we believe, are more analogous to those of **Lindblom, supra**. There, a citizen witness saw defendant's vehicle weave back and forth between the center yellow and outer white lines, cross the double yellow line four to five times by one and a half feet, at times straddling the double yellow line, and also cross the fog line four to five times. **Id.** at 606. In reversing the trial court's granting of defendant's suppression motion, these facts were expressly found sufficient to establish probable cause for a traffic stop. As to the need for

evidence that defendant's driving actually endangered public safety, the court stated: "[W]hile opposing traffic may not have been present during the entire time [the witness] observed [defendant] driving, we note that a motorist may be stopped for reckless driving even if the only concern is for the motorist's own safety." **Id.** at 608 (**citing Commonwealth v. Masters**, 737 A.2d 1229, 1232 (Pa. Super. 1999), **appeal denied**, 562 Pa. 667, 753 A.2d 816 (2000)). **See also, Commonwealth v. Cook**, 865 A.2d 869 (Pa. Super. 2004) (finding that a report of erratic driving followed by a trooper's independent observations of the defendant's vehicle crossing the right white fog line three times, to the extent of half the vehicle width, over a distance of one mile, each time rapidly jerking the vehicle back into its lane of traffic, justified the traffic stop); **Commonwealth v. Klopp**, 863 A.2d 1211 (Pa. Super. 2004) (holding officer's observations of a vehicle crossing the center double yellow line of a two-lane highway four times by less than one half of her car—once causing a vehicle in the oncoming lane of traffic to shift right within his lane, but without the need for drastic evasive action—and crossing the fog line four times over a distance of at least 1.6 miles, established probable cause for a traffic stop).

In summarizing whether a police officer has the authority to stop a motor vehicle suspected of being driven or being in violation of the Vehicle Code, the **Lindblom** court stated:

In order for a traffic stop to be justified, a police officer must have probable cause to believe that a violation of the Vehicle Code or regulations has taken place. **Commonwealth v. Battaglia**, 802 A.2d 652, 656 (Pa. Super. 2002). The officer must be able to articulate specific facts possessed by him at the time of the questioned stop, which would provide probable cause to believe that the vehicle or the driver was in some violation of some provision of the Vehicle Code. **Id.** Probable cause does not require certainty, but rather exists when criminality is one reasonable inference, not necessarily even the most likely inference. **Commonwealth v. Stroud**, 699 A.2d 1305, 1308 (Pa. Super. 1997). In considering when a traffic stop is justified, the Pennsylvania Supreme Court has stated that:

The Commonwealth has an interest in enacting and enforcing rules and regulations for the safety of those who travel

its highways and roads. The police should thus be permitted a sufficient degree of latitude to stop automobiles in order to meet this objective. On the other side, the privacy interest of the individual has been cogently articulated by the United States Supreme Court:

An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use is subject to government regulation. Automobile travel is a basic pervasive, and often necessary mode of transportation to and from one's home, workplace and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. **Delaware v. Prouse**, [440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed. 2d 660] (1979) (footnote omitted).

When previously faced with these two competing interests, we held 'that a stop of a single vehicle is unreasonable where there is no outward sign the vehicle or the operator are in violation of the Vehicle Code[.] [B]efore the government may single out one automobile to stop, there must be specific facts justifying this intrusion.' **Commonwealth v. Whitmyer**, 542 Pa. 545, 551-52, 668 A.2d 1113, 1116-7 (1995) (some citations omitted).

Lindblom, supra at 607-608 (quoting **Commonwealth v. Mickley**, 846 A.2d 686, 689-690 (Pa. Super. 2004), appeal denied, 860 A.2d 489 (Pa. 2004)).

In **Garcia**, the court derived from the **Gleason** decision what it identified as the "momentary and minor standard" for determining when erratic driving will justify a traffic stop: "[W]here a vehicle is driven outside the lane of traffic for just a momentary period of time and in a minor manner, a traffic stop is unwarranted." **Id.** at 823. This description, while undoubtedly correct, is incomplete and fails to account fully for the context of the suspected infraction. In **Gleason**, crossing the fog line by several inches on a four lane divided highway posed no danger and can easily be explained as being part of normal driving. In contrast, when a chance encounter places

police behind an unknown driver on a two-lane rural highway during the early morning hours—at a time when little, if any, other traffic can be expected to be present—and the police observe the driver cross both the center line and the fog line not once or twice but multiple times, without a reasonable neutral explanation—**e.g.**, a narrow road, a sequence of sharp curves, being blinded by the lights of oncoming traffic, or avoiding puddles, potholes or some other obstacle on the road—the officer reasonably, objectively and in good faith has a legitimate basis—one reaching the level of probable cause—to believe a violation of the Vehicle Code is occurring or has occurred. Such is the case here.

Given the tragic and often fatal consequences that might at any time otherwise result, to say that a police officer confronted with these circumstances must wait and continue to observe is not the answer and, we believe, is not the law expressed in **Gleason**.⁷ **Gleason** requires only that at the time of the stop probable cause exists to believe that the driver or his vehicle is in violation of some provision of the Vehicle Code; **Gleason** does not require that the evidence, at the time of the stop, will lead to a conviction.

In the present case, in addition to being charged with driving under the influence, Defendant has been charged not only with failing to drive within his lane of traffic and with failing to drive on the right half of the roadway, but also with careless driving. At a minimum, with respect to this latter offense, the degree of erratic driving observed by Officer Strohl reasonably raised an inference that this provision of the Vehicle Code was being violated, sufficient to justify a stop and an investigation

⁷ Notwithstanding this belief, given the difficulty in reconciling the Superior Court's various applications of the **Gleason** holding, and being cognizant of the need to properly balance the competing interests of government in enacting and enforcing rules and regulations for the safety of those who travel its highways and roads against the privacy interests of those traveling on such highways and roads to be free from unfounded and arbitrary governmental intrusions, the need for either our Supreme Court to clarify the principles enunciated in **Gleason** or our Legislature to re-examine the provisions of the Motor Vehicle Code, particularly Sections 3301(a), 3309(1) and 3714, is apparent.

by the officer to determine the cause of the erratic driving.⁸ **Commonwealth v. Barkley**, 234 Pa. Super. 503, 341 A.2d 192 (1975) (finding that officer's observations of defendant weaving four or five times over approximately two miles provided officer with probable cause to believe the driver was in violation of this section of the Vehicle Code); *cf. Commonwealth v. Whitmyer*, 542 Pa. 545, 668 A.2d 1113 (1995) (finding with respect to some offenses, Section 3361 of the Vehicle Code (driving at an unsafe speed) being one, that because further investigation following a stop could not lead to the discovery of further evidence in support of this violation, the evidence preceding the stop must be sufficient, in and of itself, to support the violation).

Here, prior to Officer Strohl's stop of Defendant's motor vehicle, the Officer's observations of Defendant's driving described a degree of erratic driving, without any corresponding benign explanation, far exceeding that described in Gleason. The extent to which Defendant's vehicle crossed over both the center and fog lines, and the duration and number of these crossings, exceed the "momentary and minor standard" of probable cause described in Garcia. Officer Strohl's observations support, even though they do not require, a reasonable inference that the Vehicle Code was being violated and that Defendant's continued operation of his vehicle posed a danger to himself, as well as to others.

⁸ The offense of careless driving has two elements: "an **actus reus**—driving a vehicle; and a **mens rea**—careless disregard. There is no causation or particular result required by the statute." **Commonwealth v. Wood**, 327 Pa. Super. 351, 355, 475 A.2d 834, 836 (1984) (emphasis in original). As the Superior Court has explained:

The only proof necessary to establish reckless driving is that the [driver] drove a vehicle in careless disregard for the safety and property of others. ... The **mens rea** of reckless driving, 'careless disregard,' implies 'less than willful or wanton conduct ... [but] ... more than ordinary negligence or the mere absence of care under the circumstances'"

Matter of Huff, 399 Pa. Super. 574, 582, 582 A.2d 1093, 1097 (1990), **aff'd**, 529 Pa. 442, 604 A.2d 1026 (1992) (emphasis in original). Reckless driving, as discussed in **Huff**, was essentially the same offense as careless driving under the current Section 3714 of the Vehicle Code.

CONCLUSION

In accordance with the foregoing, we conclude that Officer Strohl has credibly and reasonably articulated sufficient grounds to suspect a violation of the Vehicle Code prior to his stop of Defendant's vehicle and that Officer Strohl's actions were proper. Indeed, had Officer Strohl not stopped Defendant's vehicle, and had an accident occurred, Officer Strohl's failure to stop Defendant's vehicle might reasonably be questioned. Accordingly, Defendant's motion to suppress will be denied.⁹

⁹ The basis of Defendant's Petition for a Writ of Habeas Corpus and Motion to Quash the Information is his belief that because his stop was illegal, all observations made by the police thereafter and all information or other evidence acquired from the stop must be suppressed, thereby depriving the Commonwealth of sufficient evidence to sustain its charges. Although we have already determined Defendant's underlying premise to be in error, even if we had found otherwise, "the remedy for illegally obtained evidence is suppression of the evidence and its exclusion at trial, not dismissal of the case." **Commonwealth v. Keller**, 823 A.2d 1004, 1011-1012 (Pa. Super. 2003), **appeal denied**, 574 Pa. 764, 832 A.2d 435 (2003). As a matter of technical accuracy, we further note, that while "a petition for writ of habeas corpus is the proper means for testing a pre-trial finding that the Commonwealth has sufficient evidence to establish a **prima facie** case," a motion to quash "is neither a guilt determining procedure nor a pre-trial means for determining the sufficiency of the Commonwealth's evidence." **Commonwealth v. Keller**, 823 A.2d at 1010 (as to the first quotation) (emphasis in original); **Commonwealth v. Finley**, 860 A.2d 132, 135 (Pa. Super. 2004) (as to the second quotation). While "[n]either the adequacy nor competency of the Commonwealth's evidence can be tested by a motion to quash the information," a motion to quash is "an appropriate means for raising defects apparent on the face of the information or other defects which would prevent prosecution." **Commonwealth v. Finley**, 860 A.2d at 135. Accordingly, both Defendant's Petition for a Writ of Habeus Corpus and Motion to Quash the Information will likewise be denied.

COMMONWEALTH OF PENNSYLVANIA vs.

JOHN CLELAND, Defendant

COMMONWEALTH OF PENNSYLVANIA vs.

MICHAEL WHAH, Defendant

*Criminal Law—Adequacy of Jury Instructions—Chain of Custody
As a Prerequisite for the Admission of Physical Evidence—Rule 600
(Distinction Between Excludable Time and Excusable Delay)—*

*Standard for Recusal (As Consisting of Both a Subjective
and Objective Component)*

1. Jury instructions must be viewed in their entirety. When the instructions given fairly, fully and accurately state the law and advise the jury what they must decide, they will be upheld.

2. Proof of the chain of custody as a condition for the admissibility of physical evidence in a criminal proceeding requires proof that in all material respects the condition of the evidence has remained the same from when acquired by police to the time when offered in evidence. It is not a prerequisite to the admission of physical evidence that the evidence, once acquired, have been continuously viewed or that every hypothetical possibility of tampering be eliminated.
3. In determining compliance with Rule 600's requirements for a prompt trial, a distinction exists between excludable time under Rule 600(C) and excusable delay under Rule 600(G). Excludable time, as defined in Rule 600(C), is subtracted from the delay which exists between the filing of the complaint and the date of trial in determining whether the periods prescribed by Rule 600 have been exceeded. In contrast, only when the period between the filing of the complaint and the date of trial exceeds the time periods otherwise prescribed by Rule 600 must a determination be made whether the delay is excusable so as to save the charges from being dismissed. Excusable time requires an evaluation of whether the Commonwealth has exercised due diligence and whether the defendant has been prejudiced by a delay in the trial proceedings.
4. In deciding whether to recuse himself, the trial judge must consciously examine not only his own ability to fairly and impartially oversee the proceedings, but also, notwithstanding his personal objectivity, examine whether the circumstances, objectively viewed, create an appearance of impropriety which would tend to undermine public confidence in the judiciary.

NO. 208 CR 03

NO. 209 CR 03

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

STEPHEN P. VLOSSAK, SR., Esquire—Counsel for Michael
Whah.

CYNTHIA A. DYRDA-HATTON, Esquire—Counsel for John
Cleland.

MEMORANDUM OPINION

NANOVIC, P.J.—February 18, 2005

FACTUAL AND PROCEDURAL BACKGROUND

On February 25, 2003, at approximately 3:37 A.M., the surveillance cameras at Boyer's Supermarket in Lansford, Carbon County, Pennsylvania, captured a tall, thin, white male dressed in tight-fitting jeans and a gray-hooded jacket enter the store unnoticed, proceed through two doors into a front office and counting room reserved for employees, and leave carrying the store's safe. Outside, the Defendant, Michael Whah, and

Stacey Conrad were sitting in a vehicle driven by Whah waiting to pick up the Defendant, John Cleland, the person inside the store, when he exited (N.T. Vol. I, pp. 89-90).¹ Earlier that evening, Conrad, who was Cleland's girlfriend and also an employee of Boyer's Supermarket, had overheard Cleland and Whah planning to take money from Boyer's (N.T. Vol. I, pp. 88, 121, 167-168). Following the theft, the three returned to Whah's home in Drums, Pennsylvania, where all three resided, broke open the safe and divided the contents three ways (N.T. Vol. I, pp. 130-131, 143-144). Inside the safe was approximately \$15,000.00 (N.T. Vol. I, p. 167).

After viewing the videotape of the break-in, it is evident that the intruder knew before entering the store what he intended to take and where the safe was located. From this the police surmised that the thief either was familiar with the store beforehand, or had been told by someone who was, where to go. Consequently, as part of their investigation, the police reviewed not only the surveillance tape of February 25, 2003, but also tapes from earlier dates trying to find a clue as to the identity of the thief.

Among the tapes reviewed was one of February 10, 2003. This tape depicts Cleland in the store with Conrad. Although the facial features of the intruder are covered in the tape of February 25, 2003, in comparing the two tapes, the police noted a strong similarity between the intruder whose identity they were seeking to determine and Cleland: Cleland's size, movements and unusually thin long legs appeared to match those of the thief, and his dress was similar.

Two days after the burglary, when called to investigate another matter involving Conrad, Conrad was arrested for driving under the influence, and Cleland, who was also present, was arrested in connection with the Boyer break-in. At some point after her arrest, Conrad, while at the same time disclaiming her own involvement, informed the police that she had overheard Cleland and Whah plotting to burglarize Boyer's and that the night of the burglary the two left Whah's home together—Cleland dressed in jeans and a gray-hooded sweatshirt—and

¹ Unless otherwise indicated, the references to the note of testimony are to the testimony and record created at the trial held on November 2 and 3, 2004, Volumes I and II, respectively.

when they later returned, she heard Whah tell Cleland that the money was in his room. At a later point, Conrad admitted to the police that she in fact had accompanied Cleland and Whah to Boyer's and was present, waiting outside with Whah, when Cleland entered the store and afterwards left carrying the safe.

Based on Conrad's initial statement to the police, a search of Whah's home, pursuant to a warrant, resulted in the seizure of various items, including a black duffle bag located in the bedroom shared by Conrad and Cleland. This bag appears to have been taken primarily to carry other items which were also seized (N.T. Vol. I, p. 197). The bag was included in the inventory of items seized by Officer Soberick and left at Whah's home. **See** Pa. R.Crim.P. 208 and 209 (requiring preparation of inventory of items seized after execution of search warrant). Later, at the police station, the police discovered in an interior pocket of the bag a set of keys which were afterwards learned to have been kept by Boyer's inside the stolen safe (N.T. Vol. I, pp. 172, 188-189, 200). The keys, due to their subsequent discovery, were not listed in the inventory left at Whah's home (N.T. 9/3/04, pp. 27-28). At trial, Conrad testified that these keys were among the items she had removed from inside the safe while in Whah's home the night of the theft (N.T. Vol. I, p. 93).

Both the keys discovered in Conrad's bag and the surveillance tapes taken from Boyer's were kept by the police at the Lansford Borough Police Station in either the police department's evidence locker or evidence room: the evidence is unclear which (N.T. 9/3/04, pp. 6-7). While the keys and the surveillance tapes were kept under lock at the police station, Lansford Borough's Mayor, as well as several officers, had keys to these locks. Additionally, a key was kept hanging in an office of the police station occupied by the Borough's police chief, sergeant and mayor, and records of who entered, and placed or removed items stored in evidence were not routinely maintained (N.T. 9/3/04, pp. 6-7, 31-32; N.T. 9/10/04, pp. 4-9).

On February 28, 2003, and March 5, 2003, respectively, Cleland and Whah were each charged with burglary,² theft by unlawful taking,³ receiving stolen property,⁴ criminal conspiracy

² 18 Pa. C.S.A. §3502(a).

³ 18 Pa. C.S.A. §3921(a).

⁴ 18 Pa. C.S.A. §3925(a).

to commit burglary⁵ and criminal trespass⁶ arising from the burglary of Boyer's Supermarket on February 25, 2003. At the conclusion of a consolidated preliminary hearing held on April 4, 2003, a trial date of July 21, 2003 was scheduled. Pursuant to Pa. R.Crim.P. 582(B)(1), the charges against Cleland and Whah were consolidated for trial.

At trial, both Defendants were convicted of all charges filed against them. Both Defendants were sentenced on December 21, 2004, and both have filed an appeal from the final judgment of sentence and a Statement of Matters Complained of on Appeal (hereinafter referred to as the respective Statement of each Defendant). This opinion is filed in accordance with Pa. R.A.P. 1925(a).⁷

DISCUSSION

Sufficiency of the Evidence

Defendants claim generally, without focusing on any specific deficiency, that the evidence was insufficient to support their conviction of any of the offenses charged (Whah's Statement, Item 2; Cleland's Statement, Item 5). At trial, Defendants did not testify. Instead, the defense consisted primarily of challenging the credibility and motives of Conrad, the Commonwealth's chief witness, and demanding that the Commonwealth prove its case.

⁵ 18 Pa. C.S.A. §903(a).

⁶ 18 Pa. C.S.A. §3503(a)(1)(i).

⁷ The issues identified under Item 1 of Cleland and Whah's Statements (and Cleland's Statement, Items 3 and 4) were the subject of our Memorandum Opinion dated April 29, 2003, to which reference should be made for our resolution of these issues. Additionally, since the Rule 600 issue Whah raises in Item 3 of his Statement overlaps substantially with a similar motion filed by Cleland, and which was the subject of our opinion dated August 25, 2004, only brief additional discussion of this issue appears in this opinion.

It is also appropriate to note at this juncture that following his conviction and before sentencing, Whah, acting **pro se**, filed an appeal of his conviction which is presently pending before the Superior Court. Because we believe that appeal to be premature, we have recommended it be quashed (**See** Memorandum Opinion dated January 11, 2005). We also note that, because of that appeal, Whah's file is no longer available to us, having been forwarded to the Superior Court. While this impedes somewhat our discussion of the issues, particularly those regarding Rule 600 for which the reasons stated on the various applications for continuance filed by the parties are no longer available for our review, we believe the Rule 600 calculations we made in each case are further supported by the cases cited in this opinion.

As set forth in the facts already recited, the evidence was sufficient to sustain each of the requisite elements of each offense for which the Defendants were convicted. With respect to the crimes of burglary and criminal trespass, we add only that, although Boyer's was open for business at the time of the break-in, the counting room entered by Cleland was clearly demarcated as an area not open to the public and was restricted to use by employees (N.T. Vol. I, pp. 155, 170-171, 173), thereby presenting a separately secured or occupied portion of the premises within the meaning of the definition of these offenses. **Cf. Commonwealth v. White**, 371 Pa. Super. 578, 580, 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)).

Propriety of Supplemental Instructions

Defendants next claim that our supplemental instructions to the jury, in response to a jury question, were unfair and biased (Whah's Statement, Items 5 and 6; Cleland's Statement, Items 11 and 12). On this issue, during deliberations, the jury asked for further clarification on the law pertaining to criminal trespass, and the elements involved. In response, the Court restructured the jury as requested and, as part of those instructions, explained some of the differences between criminal trespass and burglary. Because the question posed by the jury specifically inquired as to the elements of criminal trespass **vis-à-vis** both Defendants, and because Whah's guilt or innocence of this offense depended on whether or not he was determined to be an accomplice, the Court inquired whether the jury was also asking for further instruction on the meaning of an accomplice. The foreperson asked that this additional instruction be given (N.T. Vol. I, pp. 125-126). During the course of defining and explaining what constitutes an accomplice, the Court referred to evidence which would support such a finding if, as we cautioned the jury, the jury accepted and found such evidence to be credible.

The instructions given on these two issues were virtually identical to the original instructions to which no objections were made (Compare N.T. Vol. II, pp. 90-93, 98-100 with N.T. Vol. II, pp. 121-129). When defense counsel objected to the supplemental instructions, claiming that the instructions were one-

sided, the Court further instructed the jury that it was the jury's province alone to determine what the facts are, that the Court did not intend to emphasize one piece of evidence over another, that the defense had challenged the credibility of the evidence—particularly the trustworthiness of Conrad—and that there was evidence to the contrary, and that if the jury did not find the elements of the offenses proven beyond a reasonable doubt, they should find the Defendants not guilty (N.T. Vol. II, pp. 132-134).

We do not believe a fair reading of the supplemental instructions to the jury shows these instructions to be either one-sided or prejudicial to the Defendants. To the contrary, the supplemental instructions must be read in the context in which they were given and with an understanding that the defense presented no witnesses of their own but relied solely on challenging the credibility of the Commonwealth's evidence. Additionally, the supplemental instructions were not intended to be all-encompassing and in no respect contradicted or excluded our previous instructions to the jury that inconsistencies in the testimony of a witness may cause the jury to disbelieve that witness (N.T. Vol. II, pp. 78, 84), that if the jury found Conrad to be an accomplice, her testimony was particularly suspect (N.T. Vol. II, pp. 100-104), and that evidence within the Commonwealth's control which was not produced—the gray-hooded jacket and Conrad's duffel bag—could be inferred to be against the Commonwealth (N.T. Vol. II, pp. 82-83). **Cf. Commonwealth v. Prosdocimo**, 525 Pa. 147, 150, 578 A.2d 1273, 1274 (1990) (requiring that jury instructions be read as a whole in determining whether they are fair or prejudicial, and whether they clearly, adequately and accurately state the law).

Chain of Custody

Prior to trial, the Defendants filed a motion in limine challenging the chain of custody for the keys found in Conrad's duffel bag and the surveillance tapes taken from Boyer's, arguing, in essence, that because an unbroken chain of custody free of any possibility of tampering was not established, these items were inadmissible. This issue, we believe, is the subject of Item 4 raised in Whah's Statement and Item 8 of Cleland's Statement.

In **Commonwealth v. Bruner**, 388 Pa. Super. 82, 564 A.2d 1277 (1989) (quoting **Commonwealth v. Hudson**, 489 Pa. 620, 631-32, 414 A.2d 1381, 1387 (1980) (citations omitted)), the Superior Court set forth the standard for establishing the chain of custody for the admission of physical evidence as follows:

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

Id. at 99, 564 A.2d at 1285 (emphasis in original).

In the present case, no evidence was presented that the items were not what they purported to be or that they in any manner had been altered or tampered with between the time they were first acquired by the police and the time they were presented at trial. Moreover, not only were these items of a type which ordinarily would remain unchanged, absent deliberate tampering, Officer Soberick, Chief Strauss and Detective Pampanin testified that the condition of the items remained the same (N.T. 9/3/04, pp. 8-9, 33-34, 41-42). Mr. Toth, the store manager for Boyer's, further testified that the labeling on the keys was in his handwriting and that the keys introduced in evidence were the same keys he had earlier placed in the safe which was taken on February 25, 2003 (N.T. Vol. I, pp. 165-166).

Rule 600

Defendants next contend that the trial which commenced with the swearing in of the jury on November 2, 2004, was untimely and in violation of the requirements of Rule 600. Previously, we ruled upon Defendants' respective motions to dismiss on the basis of Rule 600, and in our orders denying the motions, identified the dates for which Defendants were entitled to credit under Rule 600(C) (Whah Order dated October 21, 2004; Cleland Order dated April 30, 2004). Specifically, we

determined that Whah was entitled to have 233 days counted in determining his eligibility for dismissal of the charges for purposes of Rule 600, and Cleland 169 days.⁸ Defendants have not identified in their Statements how or why these computations were in error (Whah's Statement, Item 3; Cleland's Statement, Item 6).

Additionally, in our Memorandum Opinion dated August 25, 2004, filed in Cleland's case, and equally applicable to Whah's challenge, we extensively discussed, and will not repeat, why the delays in trial since May 10, 2004⁹ were attributable to the Defendants and, therefore, excludable from the Rule 600 calculation (Cleland's Statement, Item 7). Since that opinion, we further note that the delay after September 13, 2004, the date for which trial was scheduled at the time of our August 25, 2004 Opinion, was due to Defendants' continuance requests and for which both Defendants expressly waived their right to a speedy trial under Rule 600 (N.T. 9/10/04, pp. 44-45).

In addressing the Rule 600 issue, it is important to understand that a distinction must be drawn between excludable time and excusable delay. **Commonwealth v. Hunt**, 858 A.2d 1234, 1241 (Pa. Super. 2004) (*en banc*). Excludable time, under Rule 600(C), includes "any period of time for which the defendant **expressly waives** Rule 600; and/or 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 continu-

⁸ In making these computations, and in viewing the period during which Defendants' omnibus pretrial motions were pending, we attributed part of the delay—85 days—to the late filing of the Commonwealth's brief which delayed our consideration of Defendants' motions. See **Commonwealth v. Hill**, 558 Pa. 238, 736 A.2d 578, 587 (1999) (for the delay caused by the filing of a defense pretrial motion to be considered excludable, the Commonwealth must exercise due diligence in opposing or responding to the motion).

⁹ On April 29, 2004, our opinion ruling on Defendants' omnibus pretrial motions was filed. The case was listed for the next trial term scheduled to begin on May 10, 2004. On May 6, 2004, Defendants filed petitions challenging the jury array and requesting a stay of any jury trial pending the Court's decision. At Defendants' request, then President Judge Richard W. Webb, who at the time was a member of the three-member jury commission whose action was being challenged, recused himself and Senior Judge Albert A. Stallone was specially appointed by our Supreme Court to hear the petitions. Ultimately, because of this challenge, the earliest date on which trial could be held was August 9, 2004, as explained in our August 25, 2004 Opinion. This date was further continued, at the request of Defendants, to September 13, 2004.

ance granted at the request of the defendant or the defendant's attorney." **Id.** at 1241 (emphasis in original). Excludable time further includes continuances requested by the Commonwealth and concurred in by the defense, or requested jointly. **Id.** Only if the period between the filing of the complaint and trial, less excludable time, exceeds the time period prescribed by Rule 600, does a violation of Rule 600 occur. When this happens, the delay is considered excusable and a motion to dismiss should be denied if "the Commonwealth exercised due diligence and ... the circumstances occasioning the postponement were beyond the control of the Commonwealth." **Id. (quoting Commonwealth v. Hill**, 558 Pa. 238, 263, 736 A.2d 578, 591 (1999)). Finally, "judicial delay is a justifiable basis for an extension of time if the Commonwealth is ready to proceed." **Id. (quoting Commonwealth v. Wroten**, 305 Pa. Super. 340, 345, 451 A.2d 678, 681 (1982)).

Although the burden for establishing excusable delay is undoubtedly on the Commonwealth, we are not certain this is the case, in all instances, with respect to excludable time.¹⁰ In any event, all periods of excludable time resulting from continuances or express waivers of Rule 600 by the Defendants, or the unavailability of the Defendants or the Defendants' attorneys, are matters of record in this case upon which we may rely (N.T. 9/10/04, p. 38). Further, there can be no question that any delay resulting from the Defendants' petitions challenging the jury array and requesting that trial be delayed pending their disposition, if not excludable, is clearly excusable and not attributable to the Commonwealth: the challenge was presented by the Defendants; the basis for the challenge was the composition and selection process of the jury array as determined by the jury selection commission; the Commonwealth was not a member of nor did it participate in the decisions of the jury selection

¹⁰ See **Commonwealth v. Hunt**, 858 A.2d 1234, 1241 n.10 (Pa. Super. 2004) (*en banc*) (other than Rule 600(C)(1)'s requirement of "due diligence" with respect to the Commonwealth's efforts to apprehend a defendant, "the other aspects of Rule 600(C) defining 'excludable time' do not require a showing of due diligence by the Commonwealth."); **see also, Commonwealth v. Hill**, *supra* at 587 (the filing of a pretrial motion by defendant renders the defendant unavailable within the meaning of Rule 600(C)(3)(a) if the filing results in a delay in the commencement of trial and if the Commonwealth exercises due diligence in opposing or responding to the pretrial motion). In both instances, it is incumbent upon the Commonwealth to establish due diligence by a preponderance of the evidence.

commission; the Commonwealth properly responded to Defendants' petitions as directed by the Court and appropriately participated in those proceedings; and the Commonwealth was at all relevant times ready to proceed to trial.

Motion for Recusal

Finally, Whah argues that the Court erred in failing to recuse itself after becoming aware that Whah, acting **pro se**, had commenced a civil rights suit on or about October 12, 2004, against the undersigned and Assistant District Attorney, Michael Greek, in the United States District Court for the Middle District of Pennsylvania (Whah's Statement, Item 7).¹¹ Whah's motion seeking the Court's recusal was filed on Friday, October 29, 2004.

The first notice the Court received of Whah's intent to request the Court to recuse itself was a telephone call from Whah's counsel on the afternoon of Thursday, October 28, 2004, advising that he had been directed by Whah to file a recusal motion (N.T. 11/1/04, p. 4). Earlier that day, Whah's counsel had appeared in court for the call of the trial list of those cases for which jury selection was scheduled to take place on Monday, November 1, 2004. At that time, Whah's counsel reported that the case was ready for trial (N.T. 11/1/04, p. 4).

Upon the filing of Whah's motion, a hearing was promptly held on Monday, November 1, 2004, prior to the scheduled jury selection. At this hearing, Whah testified that the primary basis of his suit, as well as a complaint he had filed with the Judicial Conduct Board, is his disagreement with rulings of record and his belief that, by virtue of these rulings, the Court has conspired with the Commonwealth to permit the prosecution to go forward, thereby depriving him of his constitutional rights (N.T. 11/1/04, pp. 10-11).

Prior to being notified of the motion and being provided the copy of the complaint attached to the motion, the Court was unaware of Whah's suit and had never seen or been served with a copy of the federal complaint (N.T. 11/1/04, pp. 9, 18). Similarly, prior to the hearing on Whah's recusal motion, the Court had not been advised of nor was the Court familiar with the grounds for Whah's complaint to the Judicial Conduct Board

¹¹ Although Cleland has raised a similar issue in Item 13 of his Statement, we are unaware of any suit having been commenced by Cleland.

(N.T. 11/1/04, p. 19).¹² In denying the motion, we advised Whah that we harbored no prejudice against him; that all rulings of which he complained had been made of record and, if in error, were errors of law, not of motive, and could be appealed; and that we felt it would set a dangerous precedent for the court in a criminal proceeding to be forced to recuse itself whenever a defendant, on the eve of trial, files a suit (or, as here, first makes the court aware of such suit) ascribing improper motives to adverse pretrial rulings of the trial court (N.T. 11/1/04, pp. 21-23).

"The party who asserts that a trial judge must be disqualified bears the burden of producing evidence establishing bias, prejudice, or unfairness necessitating recusal." **Commonwealth v. Darush**, 501 Pa. 15, 21, 459 A.2d 727, 731 (1983). In determining whether a court should recuse itself, our Supreme Court has stated that:

It is the burden of the party requesting recusal to produce evidence establishing bias, prejudice or unfairness

¹² Whah also testified that he felt the Court acted improperly when, in response to a letter he forwarded to the Court **ex parte** complaining of the Commonwealth's tactics, copies were provided to counsel for both the Commonwealth and Whah. (N.T. 11/1/04, pp. 4-5, 13). Following receipt of this copy of Whah's letter, Whah's counsel appropriately filed separate motions on his behalf regarding Rule 600 and the chain of custody. It is perhaps telling that only after the hearings on these motions were held on September 3 and concluded on September 10, 2004, did Whah file his federal suit.

We believe the Court acted adequately, properly and appropriately after receipt of Whah's letter. The letter contained no incriminating statements. Moreover, the Court's conduct served to protect, not weaken, Whah's interests. For the Court to have independently investigated Whah's complaints or to have contacted Whah directly, as he suggests (N.T. 11/1/04, p. 13), would not only be inappropriate, but prohibited. Cf. Canons 3(A)(4) and 3(C)(1)(a) of the Code of Judicial Conduct (prohibiting judges from considering **ex parte** communications and requiring a judge's recusal in any case where the judge has knowledge of disputed facts from a source other than the evidentiary record).

In further response to Whah's complaint that disclosure of the contents of his letter to the Commonwealth was somehow inappropriate under the circumstances, we note that the letter, on its face, indicates that copies were forwarded by Whah to both **The Morning Call**, a newspaper of general circulation in Carbon County, and The Montel Williams Show. It should also be noted that effective July 1, 2004, Pa. R.Crim.P. 576(A)(5) requires that when a defendant submits a document **pro se** to a judge which can reasonably be construed as requesting some form of cognizable legal relief, the judge is obligated to file the document with the clerk of courts' office.

which raises a substantial doubt as to the jurist's ability to preside impartially. ... As a general rule, a motion for recusal is initially directed to and decided by the jurist whose impartiality is being challenged. ... In considering a recusal request, the jurist must first make a conscientious determination of his or her ability to assess the case in an impartial manner, free of personal bias or interest in the outcome. The jurist must then consider whether his or her continued involvement in the case creates an appearance of impropriety and/or would tend to undermine public confidence in the judiciary. This is a personal and unreviewable decision that only the jurist can make. ... Where a jurist rules that he or she can hear and dispose of a case fairly and without prejudice, that decision will not be overruled on appeal but for an abuse of discretion.

Commonwealth v. Abu-Jamal, 553 Pa. 485, 720 A.2d 79, 89 (1998) (internal citations omitted), **cert. denied**, 528 U.S. 810, 120 S.Ct. 41, 145 L.Ed. 2d 38 (1999).

In **Commonwealth v. Druce**, 796 A.2d 321 (Pa. Super. 2002), **aff'd**, 577 Pa. 581, 848 A.2d 104 (2004), the Superior Court further observed:

The inquiry is not whether a judge was in fact biased against the party moving for recusal, but whether, even if actual bias or prejudice is lacking, **the conduct or statement of the court** raises 'an appearance of impropriety.' **In the Interest of McFall**, 533 Pa. 24, 617 A.2d 707, 712 (1992). The rule is simply that 'disqualification of a judge is mandated whenever a significant minority of the lay community could reasonably question the court's impartiality.' **Commonwealth v. Bryant**, 328 Pa.Super. 1, 476 A.2d 422, 425 (1984) (**quoting Commonwealth v. Darush**, 501 Pa. 15, 24, 459 A.2d 727, 732 (1983)). See also Code of Judicial Conduct Canon 3(C) ('A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned').

Id. at 327 (emphasis added).

In accordance with the foregoing, the test for recusal is both subjective and objective. Not only must the Court be personally convinced that it can be fair and impartial, objectively the circumstances must be such that the conduct of the court

does not raise “an appearance of impropriety.” Inherent in this standard is that the defendant’s right to a fair trial before an impartial arbiter is protected; that the Commonwealth be permitted to effectively, expeditiously and fairly prosecute criminal conduct; and that the integrity of the judicial system be upheld. **Reilly by Reilly v. Southeastern Pennsylvania Transportation Authority**, 507 Pa. 204, 219-20, 489 A.2d 1291, 1299 (1985).

We believe we have not violated the required standard for recusal, and we know that we have not intentionally made any decision motivated by any ill will against the Defendants. To the extent some of our pretrial rulings were adverse to Whah, this fact alone is insufficient to establish bias warranting recusal. **Commonwealth v. Abu-Jamal, supra**, 720 A.2d at 90. Further, the mere filing of a lawsuit by a criminal defendant against the presiding judge is not, in and of itself, sufficient basis to mandate recusal. **Commonwealth v. Mercado**, 437 Pa. Super. 228, 256-57, 649 A.2d 946, 960 (1994).

To require the court to recuse itself, whenever a defendant, desperate to forestall prosecution, files suit against the court, would not only promote baseless litigation but would engender public frustration and disrespect for the ability of the courts to effectively function. Whah’s suit, while evidencing Whah’s attitude and conduct toward the Court, does not reciprocally reflect any attitude or conduct emanating from the Court exhibiting judicial bias or prejudice, or raising “an appearance of impropriety.” Moreover, were Whah’s filing suit against the Court determinative of the issue, the Defendant, by his conduct alone, would be permitted to delay or control the proceedings. It is of this danger of which our Supreme Court warned when it stated:

[C]auses may not be unfairly prejudiced, unduly delayed, or discontent created through unfounded charges of prejudice or unfairness made against the judge in the trial of a cause. It is of great importance to the administration of justice that such should not occur.

Reilly by Reilly v. SEPTA, supra at 221, 489 A.2d at 1299.

Of further significance is that Defendants were convicted by a jury. “[W]hen a defendant is tried by a jury, which exercised sole responsibility for evaluating the testimony and arriving at a verdict, the integrity of the fact-finding process is insulated

from any predispositions held by the trial judge.” **Commonwealth v. Mercado, supra** at 256, 649 A.2d at 960. Ultimately, if the Court erred in its rulings, the appropriate remedy is through the appellate process, not through litigation directed against the presiding judge.

CONCLUSION

In accordance with the foregoing, we respectfully request that Defendants’ convictions be upheld and the appeals denied.¹³

¹³ Cleland’s remaining issues are without merit. Cleland’s preliminary hearing, scheduled for April 2, 2003, was rescheduled by the District Justice for April 4, 2003, with notice to Cleland’s counsel (N.T. Vol. I, pp. 67-68). Cleland’s counsel stated that at the request of the District Justice, apparently for reasons of security, he did not advise Cleland of the new date, but that arrangements were made for Cleland’s attendance at the hearing, which he in fact attended, and that counsel was prepared to proceed. Cleland claims the failure to give him notice of the date, time and place of the preliminary hearing was in violation of Pa. R.Crim.P. 540(F)(2) (Cleland’s Statement, Item 2).

The first time the Court was made aware of this issue was at trial. The issue was never the subject of an omnibus pretrial motion nor did Cleland make a showing of any prejudice (N.T. Vol. I, p. 71). At the time of the preliminary hearing of which Cleland complains, a **prima facie** case was equally found against Whah, who was also present with counsel. In addition to being without merit, the issue, being untimely raised, has been waived.

Cleland’s challenge to the Commonwealth’s use of the February 10, 2003 surveillance tape as being prejudicial is also without merit (Cleland’s Statement, Item 9). No specific evidentiary basis for prejudice was identified by Cleland, the objection apparently being predicated on the belief that, because the tape was used by the Commonwealth as evidence to identify Cleland as the person committing the burglary, it is prejudicial (N.T. Vol. I, p. 8). This, of course, is no basis for objection. At a minimum, the tape was relevant in identifying Cleland as the person who entered Boyer’s on February 25, 2003, and also evidencing his relationship with Conrad and familiarity with the store.

Cleland’s final challenge, that he personally did not have an opportunity to view the original surveillance tapes of February 10, 2003 and February 25, 2003, from which the tape used at trial was copied, was made only after the tape was shown to the jury and has been waived (N.T. Vol. I, pp. 212-213 and Vol. II, p. 10) (Cleland’s Statement, Item 10). Moreover, as a foundation for use of the composite tape containing both dates, William Nemetz, a supervisory narcotics agent in the electronic surveillance unit for the Pennsylvania Office of Attorney General, testified that no enhancement, changes or editing of the original tape occurred (N.T. Vol. I, pp. 58, 62-63). Nor was there any indication that Cleland’s counsel did not view the original or in any manner was denied the opportunity to do so. Consequently, not only has Cleland failed to establish that a reasonable possibility exists that some error contributed to his conviction, that is, reversible error, he has failed to establish that any error in fact occurred. **Commonwealth v. Davis**, 452 Pa. 171, 177, 305 A.2d 715, 719 (1973).

**GERALD T. CALLAGHAN, JR., Appellant vs.
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF
TRANSPORTATION, Appellee**

Civil Law—Implied Consent Law—Appropriateness of Request by Police for Second Chemical Test—Notice to Driver of Reason for Request As a Prerequisite to the Suspension of Operating Privileges for Refusal To Submit to a Second Test

1. The Implied Consent Law, as interpreted by our courts, requires that prior to the suspension of a person's operating privileges for refusing a requested chemical test, the driver of a vehicle who is suspected of being under the influence be advised of the consequences of refusal.
2. A driver who has submitted to and been administered a chemical test of his breath is not required to submit to a second test of his blood unless the request for the second test is reasonable (e.g., the malfunctioning of the machine) and the driver is made aware of the reason for the second test.
3. Under the Implied Consent Law, when a second type of chemical test is requested, after the driver has been previously tested, the justification for the second chemical test need not be explicitly conveyed to the driver by the police when the reason for this request is apparent.
4. When the breathalyzer machine beside which a driver is seated for testing shuts down before the driver can provide a breath sample, the driver's refusal to submit to a blood test subsequently requested by the police is neither reasonable nor excusable and need not be preceded by an explanation of the reasons for the alternative test as a prerequisite to the suspension of the driver's operating privileges.

CYNTHIA S. RAY, ESQUIRE—Counsel for Appellant.

ROBERT KOPACZ, Esquire—Counsel for Appellee.

MEMORANDUM OPINION

NANOVIC, P.J.—April 21, 2005

By Order dated February 23, 2005, we denied Appellant's, Gerald T. Callaghan, Jr.'s, statutory appeal from the one-year suspension of his operating privileges pursuant to Section 1547(b) (1) of the Vehicle Code.¹ Appellant has filed an appeal from this decision thereby requiring the preparation of this opinion in accordance with Pa. R.A.P. 1925(a).

FACTUAL AND PROCEDURAL BACKGROUND

On June 1, 2004, at approximately 11:40 P.M., Appellant was stopped by Officer David Mason of the Kidder Township

¹ Pursuant to Section 1547(b)(1) of the Vehicle Code, referred to as the Implied Consent Law, the Department of Transportation is required to suspend for one year the operating privilege of any individual whom a police officer has reported to have refused chemical testing.

Police Department for suspicious driving. Following this stop, Officer Mason requested Officer Austin Bott of the same police department to take over the investigation of Appellant.

Officer Bott testified that both he and Officer Mason had arrived at the scene in separate cruisers to investigate a domestic dispute, that while leaving he observed Appellant's vehicle blocking the west-bound lane of traffic on Route 534 at which time Officer Mason activated the emergency lights of his patrol car, and that he observed Appellant fumble through his wallet trying to locate his driving license and also saw Appellant stagger as he exited his vehicle. It was at this point that Officer Bott continued with the investigation begun by Officer Mason (N.T., pp. 4-6).

Officer Bott administered three sobriety tests to Appellant—the horizontal gaze nystagmus test, walking a straight-line heel to toe, and the one-leg stand—all of which Appellant failed (N.T., pp. 7-10). Appellant was then advised by Officer Bott that he was under arrest for driving under the influence, that a chemical test of his blood was requested and that, if he refused, his driving privileges would be suspended for a period of one year (N.T., p. 10). En route to the Hazelton General Hospital where the blood was to be withdrawn, Appellant advised Officer Bott that he would not submit to a blood test but would agree to a breath test. Officer Bott then contacted the State Police barracks in Lehighton, and, when advised that an operator was available to conduct a breathalyzer test, as an accommodation to Appellant, changed route and drove the Appellant to the Lehighton barracks.

At the barracks, Appellant was sitting beside the breathalyzer test machine as the operator was readying the machine for testing. While the operator was in the process of setting up the machine, and before being requested to do so, Appellant grabbed the mouthpiece, at which point the machine shut down before Appellant provided, or even attempted to provide, any sample of his breath² (N.T., pp. 12-13, 16-19). After this shutdown, the machine would not accept a breath sample (N.T., p. 13).

Because of this malfunction, Officer Bott advised Appellant that a blood test would be required (N.T. p. 14). Appellant

² 67 Pa. Code §77.24(b)(1) provides in pertinent part that the procedure for alcohol breath testing shall include, at a minimum, two consecutive actual breath tests, without a required waiting period between the two tests.

again advised Officer Bott that because of his fear of needles, he would not submit to a blood test. At 12:38 A.M. on June 2, 2004, Officer Bott read PennDOT Form DL-26 verbatim to Appellant, the **O'Connell** warnings (N.T., pp. 13-15, 17; Commonwealth Exhibit No. 1, Document 2, "Chemical Testing Warnings"). Notwithstanding these warnings, Appellant remained steadfast in his refusal to submit to a chemical test of his blood which refusal forms the basis of the suspension of Appellant's operating privileges appealed by Appellant.

DISCUSSION

On appeal, Appellant argues that this case is controlled by **Karabinos v. Commonwealth, Department of Transportation, Bureau of Driver Licensing**, 739 A.2d 601 (Pa. Commw. 1999). In **Karabinos** the court recognized prior case law which held that the police have authority to request a driver to submit to a second chemical test when problems with the first test exist or under other special circumstances which make the second request reasonable. "Reasonability is a question of law for the court to decide based upon the unique facts of each case." **Commonwealth, Department of Transportation, Bureau of Driver Licensing v. Harbaugh**, 141 Pa. Commw. 288, 294-95 n.6, 595 A.2d 715, 718 n.6 (1991).³ As a matter of first impression, the court in **Karabinos** further held that when a driver is requested to take a different type of chemical test, other than the one originally chosen and previously administered, the driver must be advised of the reason for the second

³ In **Commonwealth, Department of Transportation, Bureau of Driver Licensing v. Harbaugh**, 141 Pa. Commw. 288, 595 A.2d 715 (1991), the Commonwealth Court stated:

In **Department of Transportation v. McFarren**, 514 Pa. 411, 417, 525 A.2d 1185, 1188 (1987), a plurality opinion, our Supreme Court stated the following regarding the propriety of administering a second chemical test:

In order to justify a second intrusion, the police officer must establish circumstances which support the reasonableness of a second search **A second test may be proper if the first test was inconclusive due to faulty equipment** or faulty performance by the individual. (Emphasis added.)

Thus, when a motorist has already submitted to and performed a valid chemical test, his failure to perform a second chemical test is not a refusal to submit to chemical testing within the meaning of Section 1547(b). **Department of Transportation, Bureau of Driver Licensing v. Fellmeth**, 108 Pa. Commonwealth Ct. 172, 528 A.2d 1090 (1987).

Id. at 293-94, 595 A.2d at 717-18.

test “in order to dispel the licensee’s possible, and reasonable, subjective belief that he fulfilled his obligation under the Implied Consent Law by complying with an initial chemical test.” **Id.** at 604.

The facts in **Karabinos** are easily distinguishable from those in the present case. In **Karabinos** a breathalyzer test was in fact conducted and two breath samples submitted, however, the results were determined by the breathalyzer operator to be invalid because the deviation in the readings between the two breath samples exceeded the statutory .020 deviation limit set forth in 67 Pa. Code §77.24(b)(2)(i). Karabinos’s subsequent refusal to submit to a chemical test of his blood was determined by the Commonwealth Court to be excusable since Karabinos, who had previously been administered a breathalyzer test, was not informed of the reason necessitating a second chemical test.

In contrast to **Karabinos**, in the present case, Appellant was never fully administered a breathalyzer test. Prior to any breath samples being provided by the Appellant, or Appellant even being requested to provide a breath sample, Appellant grabbed the mouthpiece and the machine shut down. Appellant was never requested to provide, and never did provide, a breath sample before the machine shut down. While the scientific basis or technical reason for why the machine shut down may well have required expert testimony, the fact that it shut down was an observation Officer Bott was capable of making and one which he in fact did make (N.T., pp. 12-13).

In this case, the malfunction which justified Officer Bott’s request that Appellant submit to blood testing was necessarily known to Appellant. Moreover, before declining a subsequent request for a blood test, Appellant never provided a breath sample capable of being tested, a fact of which Appellant was unquestionably aware. For Appellant to argue, on the basis of **Karabinos**, that he reasonably and subjectively believed that he fulfilled his obligation under the Implied Consent Law by agreeing to submit to a breath test for which no samples were taken and for which the machine malfunctioned is both implausible and incredulous.

Because a valid chemical test was never performed, Officer Bott’s subsequent request for Appellant to submit to a blood test was clearly justified, and Appellant’s failure to submit to

this testing constituted a refusal. **Commonwealth, Department of Transportation v. McFarren**, 514 Pa. 411, 417-18, 525 A.2d 1185, 1188 (1987). Because Appellant was aware that a breath test—although earlier agreed to by Officer Bott and for which preparatory steps were begun—was never actually performed, the reasonableness of Officer Bott's request was apparent and Appellant's refusal to submit to the blood test was not excusable. **Karabinos, supra** at 603. We hold, therefore, that where a driver agrees to submit to one type of chemical test which is unable to be completed for reasons apparent to the driver, a police officer—who has immediately preceding a request for a second chemical test reminded the driver of the **O'Connell** warning—is not required as a further precondition to the driver's informed consent to additionally advise the driver of the reasons for requesting the second chemical test.

CONCLUSION

Under the facts of this case, Appellant's refusal to submit to a blood test cannot be excused on the basis of **Karabinos** and the suspension of his operating license by PennDOT was proper. Accordingly, we respectfully request that our Order of February 24, 2005 denying Appellant's license suspension appeal be affirmed.⁴

⁴ Appellant's argument that the **O'Connell** warnings provided to him by Officer Bott prior to his refusal of the blood test were in some manner defective was neither raised at the time of the hearing on Appellant's statutory appeal, nor in Appellant's brief in support of his license suspension appeal, and has been waived. Moreover, the undisputed testimony at the time of hearing was that Officer Bott read the **O'Connell** warnings to Appellant verbatim from Form DL-26 (N.T., pp. 13-15; Commonwealth Exhibit No. 1, Document 2).

LORI GIBSON, Plaintiff vs. MASSIE C. GIBSON, III, Defendant and PENELOPE MANN, Additional Defendant

Civil Law—Custody—Third-Party Standing—Burden of Proof

1. In a child custody dispute between a natural or biological parent and a grandparent, the grandparent is considered a third party for whom standing must exist before the grandparent is entitled to participate in the proceedings.

2. A step-grandparent is not the equal of a biological grandparent for purposes of conferring automatic standing under Chapter 53 of the Domestic Relations Code, 23 Pa. C.S.A. §5311 *et seq.*

3. A step-grandparent who by assuming parental status and performing parental duties has acquired **in loco parentis** status has standing to seek full or partial custody of the child he has cared for.

4. Notwithstanding the presence of third-party standing, in determining the best interest of the child in a custody dispute between a biological parent and a grandparent, the burden of proof is not evenly balanced between the two parties. As between the two, the natural parent has a **prima facie** right to custody which will be forfeited only if convincing reasons appear that the child's best interest will be served by an award to the third party.

NO. 04-1854

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

MASSIE C. GIBSON, III—Pro se.

BARRY C. SHABBICK, ESQUIRE—Counsel for Additional Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—April 22, 2005

FACTUAL AND PROCEDURAL BACKGROUND

The subject of these custody proceedings, Amanda Gibson, is 12 years old. Amanda is the daughter of Lori Gibson, Plaintiff (hereinafter “Mother”), and Massie C. Gibson, III, Defendant (hereinafter “Father”). She has one sister, Brianne Mann, age 16, and one brother, Jayson Gibson, age 11.

Amanda’s parents separated on May 28, 1997 and have lived separate and apart since that time. For more than four years, Amanda’s father has not been active in her life. Although named as a Defendant and appearing at the initial conciliation conference, Amanda’s father did not participate further in these proceedings.

As of March, 2000, Amanda’s mother was unemployed and homeless, and had no place to go with her three children. Desperate to find a home for her children, she contacted her father, with whom she had a strained relationship, and asked for his help. Gerald Mann, the Mother’s father, and his wife, Penelope Mann, the Mother’s stepmother, agreed to permit the children to live with them on a temporary basis.

In accordance with this agreement, the children were brought to the Manns’ home in early March, 2000. The original arrangement was for the Manns to care for the children during the week and for the Mother to have the children on weekends. The Mother provided a handwritten note to the Manns granting them temporary custody of the children and authorizing

them to enroll the children in the Palmerton Area School District. The Mother was not to live in the Manns' home and did not do so.

The foregoing arrangement continued for approximately three weeks. On the third weekend, the Mother was late to pick up her children. By the time the Mother arrived, the Manns had already left their home with the children to attend a baseball game in which the Manns' son was playing and had left a note to the Mother asking her to contact them when she wanted to see her children. For almost four months, Mother made no contact.

Instead, in April, 2000, the Mother moved to Texas without telling the Manns that she was leaving or where she could be located. Not until July, 2000, during the course of support proceedings, did the Manns learn that the Mother was residing in Texas. On August 23, 2000, the Manns filed a custody action in Carbon County docketed to No. 00-1608. In or about August, 2000, the Manns also learned for the first time that Amanda was likely sexually abused by the Mother's older brother in February or March, 2000, while living temporarily in the home of the Mother's sister, Hanelora Mann.

A custody order granting primary custody of Amanda and Brianne to Gerald Mann and providing for custody/visitation with the Mother at such times as agreed upon between the parties was entered on October 16, 2000, however, with the exception of Amanda, by this date the other children were placed by the Manns with other family members.¹ For the next four years, the Manns took care of Amanda.

On June 28, 2004, three days after her father died, the Mother filed a custody complaint seeking primary custody of Amanda. Prior to that date, in August, 2001, the Mother had briefly returned from Texas (for three days) and asked to have Amanda returned; this request was denied. Mother later moved back to Pennsylvania from Texas on May 12, 2002. On May 20, 2002, after the Mother and the Manns were unable to agree on

¹ The record is silent as to whether the custody complaint docketed to No. 00-1608 was ever properly served on the Mother and she denies being aware of the custody proceedings until after an order was entered. It is also unclear from this record as to why primary custody was awarded to Gerald Mann only and not to both Gerald and Penelope Mann, the Plaintiffs in the Custody complaint.

a custody schedule, the Mother filed a contempt proceeding against the Manns claiming the Manns were in violation of the October 16, 2000 custody order; this request was also denied. Since October 5, 2004, pursuant to an interim order, the Mother has been provided partial physical custody of Amanda during the day on alternating weekends and every Wednesday.

At the present time, Mother appears to have turned her life around. While previously the Mother maintained a nomadic existence without any stable housing and had insufficient income to care for herself or her children, today the Mother rents an apartment from her mother where she has resided for three years. Since returning from Texas she has full-time employment, and lives with and supports her daughter, Brianne, and her son, Jayson. There is no evidence that the Mother is currently an unfit parent.

The Mother originally named her father's estate as the Defendant in these custody proceedings. Subsequently, Father was named as the Defendant. Following a custody conference before the custody hearing officer, Penelope Mann (hereinafter "Grandmother") was included as an additional Defendant in the proceedings. Initially, Mother challenges the standing of Grandmother to participate as a party.²

DISCUSSION

In Pennsylvania there are three distinct categories of parties involved in child custody disputes: those between parents, those between a parent and the state, and those between parents and a third party. **Ellerbe v. Hooks**, 490 Pa. 363, 366, 416 A.2d 512, 513 (1980). For these purposes, a third party is any person who is not a natural or biological parent. **McDonel v. Sohn**, 762 A.2d 1101, 1105 (Pa. Super. 2000), **appeal denied**, 566 Pa. 656, 782 A.2d 547 (2001). As between the Mother and

² Had service of the Manns' custody action filed in 2000 been properly perfected, there would be no issue of standing in this case. See **Campbell v. Campbell**, 448 Pa. Super. 640, 672 A.2d 835 (1996) (order awarding joint legal custody and partial physical custody to the paternal grandparents creates standing in the grandparents to seek primary physical custody).

In order to avoid a delay in hearing the merits of the Mother's custody complaint, a hearing on the Mother's challenge to Grandmother's standing was held concurrently with the hearing on the merits. This is consistent with the goal that custody actions be resolved as quickly as possible. See Pa.R.Civ.P. 1915.5(a); **Kellogg v. Kellogg**, 435 Pa. Super. 581, 589, 646 A.2d 1246, 1250 (1994).

Grandmother, it is with the third category with which we are concerned.

This classification is significant, bearing as it does on questions both of standing—whether the third party has an interest which the law recognizes as deserving of protection and therefore justiciable—and of the nature of the burden of proof faced by the third party. As to standing, absent a statute conferring automatic standing (*e.g.*, Chapter 53 of the Domestic Relations Code, 23 Pa. C.S.A. §§5311 *et seq.* (permitting grandparents and great-grandparents to seek visitation or custody of their grandchildren or great-grandchildren)),³ in the context of dependency proceedings, or where a third party has acted **in loco parentis**, third parties in a custody proceeding are generally without standing. This result is justified on two bases: “not only to protect the interest of the court system by assuring that actions are litigated by appropriate parties, but also to prevent intrusion into the protected domain of the family by those who are merely strangers, however well-meaning.” **J.A.L. v. E.P.H.**, 453 Pa. Super. 78, 86, 682 A.2d 1314, 1319 (1996); **see also, Troxel v. Granville**, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed. 2d 49 (2000) (plurality).⁴

In custody cases, a third party standing **in loco parentis** to the child has standing to seek full or partial custody of the child he has cared for. **D.N. v. V.B.**, 814 A.2d 750, 753 (Pa. Super. 2002).

The phrase ‘*in loco parentis*’ refers to a person who puts [her]self in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formality of a legal adoption. The status of ‘*in loco parentis*’ embodies two ideas; first, the assumption

³ In **Hill v. Divecchio**, 425 Pa. Super. 355, 365, 625 A.2d 642, 647-48 (1993), the Superior Court held that a step-grandparent is not the equivalent of a biological grandparent for purposes of this statute.

⁴ The Due Process Clause of the Fourteenth Amendment of the United States Constitution protects the interest of parents in the care, custody and control of their children. **Troxel v. Granville**, 530 U.S. 57, 65-66, 120 S.Ct. 2054, 147 L.Ed. 2d 49 (2000). Therefore, “so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.” **Id.** at 68-69.

of a parental status, and, second, the discharge of parental duties.

Bupp v. Bupp, 718 A.2d 1278, 1281 (Pa. Super. 1998) (quoting **Commonwealth ex rel. Morgan v. Smith**, 429 Pa. 561, 565, 241 A.2d 531, 533 (1968)). “The rights and liabilities arising out of an **in loco parentis** relationship are, as the words imply, exactly the same as between parent and child.” **T.B. v. L.R.M.**, 567 Pa. 222, 786 A.2d 913, 917 (2001) (emphasis in original).

In **J.A.L. v. E.P.H., supra**, the Superior Court stated:

The *in loco parentis* basis for standing recognizes that the need to guard the family from intrusions by third parties and to protect the rights of the natural parent must be tempered by the paramount need to protect the child’s best interest. Thus, while it is presumed that a child’s best interest is served by maintaining the family’s privacy and autonomy, that presumption must give way where the child has established strong psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture, and affection, assuming in the child’s eye a stature like that of a parent. Where such a relationship is shown, our courts recognize that the child’s best interest requires that the third party be granted standing so as to have the opportunity to litigate fully the issue of whether that relationship should be maintained even over a natural parent’s objections.

Id. at 88-89, 682 A.2d at 1319-20. In this case, Grandmother can be granted standing, if at all, only as a third party who has stood **in loco parentis** to Amanda. Moreover, **in loco parentis** status cannot be created in defiance of the natural parents’ wishes and the parent/child relationship. **Gradwell v. Strausser**, 416 Pa. Super. 118, 126, 610 A.2d 999, 1003 (1992).

In the present case, we are convinced that Grandmother has standing to participate as a party in these proceedings. For more than four years, Grandmother has assumed primary parental responsibility of Amanda in a family setting. Amanda has resided with Grandmother in her home and has been treated and raised as a daughter. During this time, Grandmother has provided Amanda with not only the basic necessities of life—food, shelter and clothing—but has also seen to her medical care, including braces and counseling for the abuse by Mother’s

brother, overseen her schooling, and, most importantly, stood in the shoes of the Mother. Grandmother's involvement in Amanda's life has been sustained, substantial and sincere.

Nor is the relationship which has developed one-sided: Amanda looks on Grandmother as a daughter does her mother, loves Grandmother as if she were her mother, and wants to remain with Grandmother. Over this same time-period, Amanda has developed stable and happy relationships not only with Grandmother, but also with her classmates at school, and participates in both school and extracurricular activities.

Grandmother, unquestionably, has played a special role in Amanda's life, sufficient, we believe, to grant Grandmother standing. We also find that this status was created first by the consent, and later by the acquiescence, of the Mother.

Notwithstanding our determination that Grandmother has standing to participate in these proceedings, Grandmother is a third party subject to the standards applicable to third parties in evaluating and weighing and comparing the competing factors relevant to deciding the merits of a custody claim. **See Campbell v. Campbell, *supra*** (natural mother confused principles of standing with standards to be applied in deciding custody dispute). Whereas standing is a prerequisite to the exercise of a court's jurisdiction to hear a case, in custody disputes between a parent and a non-parent, the biological parent's **prima facie** right to custody has the effect of increasing the evidentiary burden on the non-parent seeking custody. **J.A.L., *supra*** at 89, 682 A.2d at 1319. On this issue our Supreme Court stated:

It is axiomatic that in custody disputes, 'the fundamental issue is the best interest of the child.' ... In a custody contest between two biological parents, 'the burden of proof is shared equally by the contestants' ... Yet, where the custody dispute is between a biological parent and a third party, the burden of proof is not evenly balanced. In such instances, 'the parents have a "prima facie right to custody," which will be forfeited only if "convincing reasons" appear that the child's best interest will be served by an award to the third party. Thus, even before the proceedings start, the evidentiary scale is tipped, and tipped hard, to the [biological] parents' side.' ...

Charles v. Stehlík, 560 Pa. 334, 744 A.2d 1255, 1258 (2000) (citations omitted).

This standard does not preclude awarding custody to a non-parent, but rather “simply instruct[s] the hearing judge that the non-parent bears the burden of production and the burden of persuasion and that the non-parent’s burden is heavy.” **Ellerbe v. Hooks, supra** at 368, 416 A.2d at 514. Under this standard, special weight and deference must be accorded to the parent-child relationship. **B.A. v. E.E. ex rel. C.E.**, 559 Pa. 545, 741 A.2d 1227, 1229 n.1 (1999). At the same time, we note that a biological parent need not be proven to be unfit for a third party to prevail in a custody proceeding. **Charles v. Stehlík, supra**, 744 A.2d at 1259.

The difficult question that we have yet to decide is whether the best interests of Amanda will be better served by permitting her to continue to develop with Grandmother, with whom she has thrived and has been well cared for, or with her mother, who, while previously recognizing her inability to care for Amanda by placing her in the care of the Manns, has changed her life and is now capable of providing a home for Amanda, as well as for Amanda’s sister, Brianne, and her brother, Jayson. Whether compelling and convincing reasons exist for Grandmother to retain primary physical custody of Amanda is a question which we will address after the hearing on the merits has been concluded.

CONCLUSION

In accordance with the foregoing, Mother’s petition challenging Grandmother’s standing to participate as a party in these proceedings will be denied.

**ANTHONY B. MARKUNAS, SHARON L. MARKUNAS,
ANTHONY B. MARKUNAS, III and
MATTHEW G. MARKUNAS, Petitioners vs. CARBON COUNTY
BOARD OF ASSESSMENT APPEALS, Respondent and JIM
THORPE AREA SCHOOL DISTRICT, Intervenor**

Civil Law—Tax Assessment Appeal—Uniformity Challenge

1. In a tax assessment appeal, the Court is required by law to determine the fair market value of the property as of the appeal, and then apply the predetermined ratio for the taxing district to establish the assessed value of the property. 72 P.S. §5453.702(b)(1), (c).
2. As a taxing authority, school districts have the same right to appeal an assessment as does an individual property owner. 72 P.S. §5452.706. Absent a showing that the school district deliberately and purposefully discriminates

against the taxpayer in filing the appeal, the school district's exercise of its statutory right of appeal does not itself amount to deliberate, purposeful discrimination.

3. Absent a challenge and proof that the law authorizing the appeal or providing for the manner in which the appeal is processed is unconstitutional, the requirement of uniformity is satisfied so long as all property in a taxing district is assessed at the same percentage of its actual value.

4. To establish that an assessment is non-uniform, the taxpayer is required to prove a lack of uniformity in the entire taxing district, here Carbon County, by first establishing the common level ratio (*i.e.*, the average ratio of assessed to market value being applied generally throughout the taxing district). This burden is not met by comparing the assessed to market value for the subject property with a select group of properties within the immediate area or neighborhood of the subject property.

5. The common level ratio within the taxing district is the constitutional standard against which the county's applied, or predetermined ratio must be measured.

6. Under the statutory scheme now in effect in Pennsylvania, if a taxpayer contends that application of the predetermined ratio yields an assessed value that is out of proportion with the value assessed generally in the taxing district, the taxpayer's remedy is to seek to have the State Tax Equalization Board ratio applied.

7. Pursuant to the statutory scheme, where the common level ratio published by the State Tax Equalization Board varies by less than 15 percent from the established predetermined ratio set by the County, the appropriate ratio of assessed to market value is that determined by the County's predetermined ratio.

8. In the instant case where the common level ratio of assessed to fair market value established by the State Tax Equalization Board is within 15 percent of the County's predetermined ratio, the taxpayer has failed to establish that application of the predetermined ratio will result in an assessed value that is disparately high in comparison with the prevailing ratio in the County.

NO. 03-3617

JEFFREY APFELBAUM, Esquire—Counsel for Petitioners.

DANIEL A. MISCAVIGE, Esquire—Counsel for Respondent.

MICHELLE WOLFE, Esquire—Counsel for Intervenor.

MEMORANDUM OPINION

NANOVIC, P.J.—May 19, 2005

This matter having come before the Court on appeal by Anthony B. Markunas, Sharon L. Markunas, Anthony B. Markunas, III and Matthew G. Markunas (“Petitioners”), after consideration of the parties’ submissions thereto and a hearing thereon, we make the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Petitioners own two parcels of real estate located on Lake Drive, Kidder Township, Carbon County, Pennsylvania.
2. The two parcels more fully identified as Tax Parcel Nos. 33A-21-A50 and 33A-21-A68.18 are both located within the Jim Thorpe Area School District (“School District”).
3. Petitioners purchased the two properties in June 2003, for a total purchase price of Two Hundred Fifty Thousand Dollars (\$250,000.00). Parcel No. 33A-21-A50 was acquired by Deed dated June 4, 2003, for a stated purchase price of One Hundred Sixty Thousand Dollars (\$160,000.00); Parcel No. 33A-21-A68.18 was acquired by Deed dated June 11, 2003, for a stated purchase price of Ninety Thousand Dollars (\$90,000.00) (School District Exhibit Nos. 2 and 3).
4. The properties were purchased at the same time from the same seller¹ with the allocation of the purchase price determined by the seller. Parcel No. 33A-21-A50 was acquired as a building lot and Parcel No. 33A-21-A68.18, located on the opposite side of Lake Drive and fronting on Lake Harmony, for boating and docking purposes. At the time of purchase, both properties were unimproved tracts of vacant land.
5. On or about August 19, 2003, the School District appealed the assessed value of each of the properties to the Carbon County Board of Assessment Appeals (“Board of Assessment”), pursuant to The Fourth to Eighth Class County Assessment Law, 72 P.S. §§5453.101-5453.706 (“the Tax Assessment Law”), contesting the fair market value of each parcel for the tax year 2004.
6. After hearing the School District’s appeal, the Board of Assessment on November 12, 2003, rendered its decision establishing a fair market value for Parcel No. 33A-21-A50 at \$159,700.00 and Parcel No. 33A-21-A68.18 at \$90,000.00. Prior to the Board’s decision, the fair market value for these properties had been set by the Board at \$51,500.00 and \$2,900.00, respectively.
7. On December 4, 2003, Petitioners filed a timely appeal from the decision of the Board of Assessment. A **de novo** hearing on this appeal was held before the Court on January 7, 2005.

¹ Technically, the seller for Parcel No. 33A-21-A50 is identified in the deed as Florence M. Froio, widow, and the seller for Parcel No. 33A-21-A68.18 is Deborah M. Bartsch, Trustee of the Trust established under the Last Will and Testament of George A. Froio, for Florence M. Froio.

8. At the time of hearing, the Board of Assessment placed in evidence the assessment records for the two properties which are the subject of this appeal. These records establish the fair market value of Parcel No. 33A-21-A50 to be \$159,700.00 and Parcel No. 33A-21-A68.18 to be \$90,000.00.

9. Petitioners presented Lucille M. Richmond as an expert to testify as to the then current fair market values of the properties, and that the change in the assessed values of the properties as determined by the Board of Assessment would result in a disproportionate or non-uniform assessment of the properties in relation to other properties on Lake Drive near Lake Harmony.

10. Petitioners' expert, Lucille M. Richmond, an associate broker for Century 21 Select Group Realty of Lake Harmony, is not a certified appraiser. The "comparable market analysis" she prepared of other properties in the Lake Harmony area of Kidder Township contains the following disclaimer: "This Analysis has not been performed in accordance with the Uniform Standards of Professional Appraisal Practice which require the valuers to act as unbiased, disinterested third parties with impartiality, objectivity and independence and without accommodation of personal interest. It is not to be construed as an appraisal and may not be used as such for any purpose." (Petitioners' Exhibit No. 6) Moreover, Ms. Richmond acknowledged that the analysis was not an appraisal and testified that it was intended to be utilized as a listing price recommendation for the subject properties, rather than as a negotiated value determined in an arm's length transaction by a willing seller under no compulsion to sell and a willing buyer under no compulsion to buy. The analysis identifies the selling price of eight improved properties that sold within the previous year and the listing price for an additional three improved properties that were being marketed for sale; various adjustments were made to these figures to approximate more closely the value of these comparable properties with the value of the subject properties, as improved.

11. The opinion of value expressed by Ms. Richmond in her comparable market analysis values the properties which are the subject of this appeal as of the date of the **de novo** hearing, not as of the date of the appeal filed before the Board of Assessment; places a combined value on both properties of \$398,33

.00, without allocating this value between the separate parcels; and identifies the value as being a listing price recommendation determined by taking into account the listing prices of properties which have not closed as well as the recent sales prices of other properties. Additionally, the value for the subject properties expressed by Ms. Richmond included the value of a home constructed on Parcel No. 33A-21-A50 after Petitioners purchased the properties; this home did not exist and was not included in the assessed values appealed to the Board. Finally, Ms. Richmond's market analysis compares the subject properties only with other properties on which homes were constructed without any attempt to allocate the values between land and improvements, and does not consider the income or cost approaches for determining value.

12. The Court finds the recommended listing price expressed by Ms. Richmond for the two properties which are the subject of this appeal to be neither relevant nor helpful to the issues on appeal.

13. The evidence which Petitioners presented to establish their claim of non-uniformity was confined to comparing the assessed values of the subject properties with the assessed and estimated values of other properties—both improved and unimproved—in the general neighborhood of the subject properties. Petitioners did not organize or compute the ratio of assessed to market value or the ratio of assessed to recent sales prices for any of these properties, and did not provide a statistical analysis or comparison of such ratios with the ratios of assessed to market value for the subject properties.

14. The Jim Thorpe Area School District presented the testimony of Vincent F. Giglotti, a certified state appraiser, who provided an appraisal report. Mr. Giglotti valued both properties as improved real estate. In his report, Mr. Giglotti verified that he considered the income, costs and comparable sales approaches in determining the fair market value of the subject properties (School District Exhibit Nos. 1 and 4).

15. Mr. Giglotti credibly testified that the fair market value as of the date of the appeal for Parcel No. 33A-21-A50 was \$235,000.00 and that the fair market value of Parcel No. 33A-21-A68.18 as of this same date was \$44,500.00.

16. We find the fair market value of the property for the 2004 tax year to be as follows:

- a. As to Parcel 33A-21-A50: \$235,000.00;
- b. As to Parcel 33A-21-A68.18: \$44,500.00.

17. The predetermined ratio used to assess taxpayers in Carbon County for the tax year 2004 is fifty percent of the fair market value.

18. The common level ratio as determined by the State Tax Equalization Board for properties in Carbon County for the tax year 2004 is forty-five percent of the fair market value.

CONCLUSIONS OF LAW

1. Taxing authorities, including the Jim Thorpe Area School District, which feel aggrieved by a property tax assessment have the right to appeal therefrom, in the same manner, subject to the same procedure and effect, as if the appeal were pursued by an individual property owner. 72 P.S. §5453.706; **Vees v. Carbon County Bd. of Assessment Appeals**, 867 A.2d 742, 748 (Pa. Commw. 2005). Absent proof by the owner of property whose assessment has been appealed that the School District deliberately and purposely discriminated against the owner in taking the appeal, or that the enabling statute authorizing the appeal or providing for the manner in which the appeal is processed is unconstitutional or otherwise results in an intentional or systematic undervaluation of like or similar properties, none of which was presented here, the owner has failed to plead and prove a constitutional violation by the School District in the taking or handling of the appeal. **Id.** at 746.

2. Section 704(b)(1) of the Tax Assessment Law requires the court on an appeal of an assessment to make a finding as to the market value of the property as of the date the appeal was filed before the Board of Assessment. 72 P.S. §5453.704(b)(1). Section 704(c) of the Law requires the court to then apply the predetermined ratio established by the county to such value unless the corresponding common level ratio determined by the State Tax Equalization Board varies by more than fifteen percent from the established predetermined ratio. 72 P.S. §5453.704(c).

3. Once the Board of Assessment establishes the **prima facie** validity of its assessment by placing in evidence its assess

ment record, the burden of proof then shifts to the owner to produce sufficient competent, credible and relevant evidence to overcome the assessment's **prima facie** validity. **Deitch Co. v. Bd. of Property Assessment**, 417 Pa. 213, 221, 209 A.2d 397, 402 (1965).

4. Petitioners in this case have failed to produce sufficient competent, credible and relevant evidence to rebut the presumption of **prima facie** fair market value as established by the Board of Assessment's records.

5. Based on the competent, credible and relevant evidence presented by the School District, we conclude that the fair market value of the properties for the tax year 2004 is as follows:

- a. As to Parcel 33A-21-A50: \$235,000.00;
- b. As to Parcel 33A-21-A68.18: \$44,500.00.

6. The burden of proof in a uniformity case requires the property owner to present evidence to support the claim of lack of uniformity. The Board's assessment is presumptively valid. **Fosko v. Bd. of Assessment Appeals, Luzerne County**, 166 Pa. Commw. 393, 400, 646 A.2d 1275, 1279 (1994).

7. "Uniformity depends upon the ratio or percentage of assessed value to market value, and assessments are constitutionally required to be uniform." **Deitch, supra** at 229, 209 A.2d at 405 (dissenting opinion). The constitutional mandate requiring uniformity is met when the taxing authority assesses all property at the same percentage of its actual value; application of such uniform ratio assures each taxpayer will be held responsible for its pro rata share of the burden of local government. **Butler Area School District Appeal**, 100 Pa. Commw. 452, 458-59, 515 A.2d 326, 329 (1986), **appeal denied**, 516 Pa. 643, 533 A.2d 714 (1987); **Deitch, supra** at 220, 209 A.2d at 401.

8. Property tax uniformity requires that the ratio of assessed value to market value be applied equally and uniformly to all real estate in the taxing district. **McKnight Shopping Center, Inc. v. Bd. of Property Assessment**, 417 Pa. 234, 240, 209 A.2d 389, 392-93 (1965). Uniformity requires that when examining the ratio between one unit of assessed value with one unit of actual value of real estate within the taxing authority's jurisdiction there must be substantial equality. **Fosko v. Bd. of As-**

essment Appeals, supra at 399, 646 A.2d at 1278; **Deitch, supra** at 218, 209 A.2d at 401. Given the continuous fluctuations of property values, perfect uniformity is impossible. **Baechtold v. Monroe County Bd. of Assessment Appeals**, 804 A.2d 713, 718 n.5 (Pa. Commw. 2002), **appeal denied**, 572 Pa. 720, 814 A.2d 678 (2002); **Hromisin v. Bd. of Assessment Appeals of Luzerne County**, 719 A.2d 815, 818 (Pa. Commw. 1998), **appeal denied**, 558 Pa. 626, 737 A.2d 1227 (1999).

9. To establish that the assessment is non-uniform, the taxpayer can satisfy its burden by producing evidence establishing the ratios of assessed values to market values of comparable properties based upon actual sales of comparable properties in the taxing district for a reasonable time prior to the assessment date. **Fosko, supra** at 400, 646 A.2d at 1279. Alternatively, the taxpayer may meet its burden by offering evidence of assessments of comparable properties, so long as the taxpayer also presents evidence to show that the actual fair market value of the comparable properties is different than that found by the taxing authority. **Id.** Without current market value information regarding the comparable properties, the court has no basis upon which to determine the issue of uniformity. **Id.** at 401, 646 A.2d at 1279. Testimony with respect to the real estate listings of properties, as opposed to actual sales prices of neighboring properties, and speculation that some properties are of greater value than the subject properties (**e.g.**, Petitioners' testimony relative to the Corson and Pollick properties), is insufficient to rebut the presumption of the assessment's validity. **Id.** at 402, 646 A.2d at 1280.

10. In a uniformity challenge, the property owner is required to prove lack of uniformity in the whole taxing district; therefore, the common level ratio (referring to the average ratio of assessed to market value being applied generally throughout the taxing district) for the entire taxing district, not just a portion of the district, must be established. **Baechtold, supra** at 717-18. "The pertinent ratio is that which prevails in the entire taxing unit, not merely in a portion of the district." **Pittsburgh Miracle Mile Town & Country Shopping Center v. Bd. of Property Assessment**, 417 Pa. 243, 247, 209 A.2d 394, 396 (1965). "Thus we look to the 'common level' within the taxing district as the constitutional standard against which the county's

applied, or predetermined ratio must be measured.” **Hromisin, supra** at 818.

11. The controlling inquiry in a uniformity challenge is the common level ratio applied in the entire taxing district. “[A] taxpayer is not entitled to have his assessment reduced to the lowest ratio of assessed value to market value to which he [can] point in the taxing district if such lowest ratio does not reflect the common assessment level which prevails in the district as a whole.” **Deitch, supra** at 219, 209 A.2d at 401. Under the assessment laws, “[w]here ... property owners are paying less than the average tax burden within the county, they may obtain no relief under the uniformity doctrine by showing that some of their neighbors are paying an even lower proportion of their fair share than the appellants.” **Hromisin, supra** at 819. To do so and to have one property assessed at a rate comparable to what has been done in the instance of a few properties which the evidence shows are underassessed and not representative of the county as a whole, and where the taxpayer has not, in fact, been assessed at more than the common level ratio in the county, compounds the error of underassessment of a few properties and places an even greater burden on the thousands of other properties in the county. **Deitch, supra** at 220, 209 A.2d at 401. When applying this principle it is important to recognize that our function is to review the correctness of the assessment of Petitioners’ properties, not the correctness of their neighbors’ assessments.

12. The relevant taxing district in this case is the entirety of Carbon County. Because of this, Petitioners’ claim that a change in assessed value will result in a disproportionate or non-uniform assessment of the subject properties with respect to other properties in the County cannot be established by a comparison solely with a select group of properties within the immediate area or neighborhood of the subject properties. Instead, to reduce their assessment, Petitioners must establish that their properties are assessed at more than the generally applied ratio of assessed to market value currently prevailing in the County. A uniformity challenge must be premised on data obtained from the entire county, not from a single neighborhood within the county. **Hromisin, supra** at 819-20.

13. In 1982, the legislature amended the assessment laws and, through use of the county’s predetermined ratio and the

common level ratio calculated by the State Tax Equalization Board (STEB) for each taxing district, implemented a statutory scheme providing “an essentially complete mechanism of assuring uniformity within each county.” **Hromisin, supra** at 819. As a result, “there is a serious question whether the approach commonly used to mount a uniformity challenge prior to the 1982 amendments, that is to offer an expert to compute a common level ratio based upon tax records within the county, is any longer permissible in light of the current statutory mandate that the STEB common level ratio be used.” **Id.** at 819. When a “taxpayer contends that application of the predetermined ratio yields an assessed value that is out of proportion with the amounts paid generally in the district, the taxpayer’s remedy is to seek to have the STEB ratio applied.” **Baechtold, supra** at 717.

14. Petitioners have failed to meet their burden of establishing that the decision of the Board of Assessment in establishing the fair market value of the properties as of the date of the appeal resulted in a non-uniform application of the assessment of Petitioners’ property relative to the common level ratio which prevails in Carbon County. Petitioners have not established that applying the County’s established predetermined ratio of one-half to their properties results in an assessed value that is disparately high in comparison with the prevailing ratio in the County. Accordingly, having determined the fair market value of Petitioners’ properties and no challenge having been raised by Petitioners to the County’s established predetermined ratio, Section 704(c) of the Tax Assessment Law requires the Court to compute the properties’ assessment by applying the County’s established predetermined ratio to the properties’ market values.

15. The common level ratio published by the State Tax Equalization Board on or before July 1, 2003, varies by less than fifteen percent from the established predetermined ratio set by the Carbon County Commissioners for the year 2004.

16. 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 2004 is the County’s established predetermined ratio of one-half.

17. Applying the County’s established predetermined ratio to the market values we have determined for Petitioners’ prop-

erties, the assessed values of Petitioners' properties for the tax year 2004 and thereafter until legally changed are as follows:

- a. As to Parcel 33A-21-A50: \$117,500.00;
- b. As to Parcel 33A-21-A68.18: \$22,250.00.

18. The decision of the Court reflects the fair market value of the unimproved land for each parcel only and does not reflect the fair market value as may be determined for any improvements that have been made to the properties since the date of the filing of the appeal, no competent testimony having been presented on this issue.²

ORDER

AND NOW this 19th day of May, 2005, it is hereby

ORDERED and DECREED that the assessed value without improvements of the Petitioners', Anthony B. Markunas, Sharon L. Markunas, Anthony B. Markunas, III and Matthew G. Markunas', property, described as Tax Parcel 33A-21-A50, is \$117,500.00 for the tax years 2004 and 2005 and thereafter until legally changed.

It is further ORDERED and DECREED that the assessed value of the Petitioners' property, described as Tax Parcel 33A-21-A68.18, is \$22,250.00 for the tax years 2004 and 2005 and thereafter until legally changed.

² At the time of the hearing in this matter, evidence was presented that construction of a home had begun on Tax Parcel No. 33A-21-A50 and that this construction would result in a new determination of value. Because no evidence was presented at the hearing before us as to the value of this improvement, we have not valued this property as an improved property for the 2005 tax year although ordinarily required to do so. 72 P.S. §5453.704(f); **Chartiers Valley School District v. Bd. of Property Assessment, Appeals and Review**, 154 Pa. Commw. 81, 97-98, 622 A.2d 420, 429 (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 of Tax Parcel No. 33A-21-A50 for the 2005 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.

**SHANNON BOYLE, now SHANNON THORNTON,
Plaintiff/Appellee vs. ANGEL RAMIREZ & MARY RAMIREZ,
Defendants/Appellants and JASON RAMIREZ,
Defendant/Appellee**

*Family Law—Child Custody—Parent Versus Third-Party Disputes—
Contempt As a Factor in Custody Order—Appealability of Finding of
Contempt, Unaccompanied by Sanctions—Propriety of Appealing Two
Separate Orders by One Notice of Appeal*

1. Filing a single Notice of Appeal when appealing two judgments is unacceptable practice and is discouraged, and may result in quashal of the appeal.
2. Biological Parents enjoy a **prima facie** right to primary custody of children against non-parent parties; this preference is not insurmountable and can be overcome by clear evidence to the contrary as child's best interest remains the paramount goal.
3. Contempt of a court-sanctioned custody order is not sufficient grounds to warrant a change in primary custody but it is a factor to be considered in assessing the best interests of the child.
4. A party's past may be considered when considering the primary custody of a child when it is relevant to forecast the future continuity and stability of the child's emotional development. Conversely, a party's past may be disregarded where evidence shows it is not indicative of the future continuity and stability of the child's emotional development.
5. Expert testimony may be disregarded in child custody disputes where it is contradicted by other credible evidence.
6. The credibility of a witness is within the sole province of the fact-finder and is not a determination to be made by other witnesses.
7. A trial court may properly discount expert testimony when it is contradicted by other credible evidence.
8. A child's custodial preference is properly disregarded when it is not based on good reasons.
9. Pennsylvania law favors the joint rearing of siblings, including half-siblings, and courts should maintain siblings together absent compelling reasons to the contrary.
10. A belief that visitations are causing child psychological harm and are not in child's best interest, even if reasonable and honest, does not in and of itself justify a party's willful violation of a custody order.
11. Court orders which find the willful contempt of a custody order and provide an opportunity to purge but do not set forth sanctions are interlocutory and not appealable.

NO. 03-0929

NICHOLAS MASINGTON, III, Esquire—Counsel for Plaintiff.

JOSEPH P. MAHER, Esquire—Counsel for Defendants.

JASON RAMIREZ—Pro se.

MEMORANDUM OPINION

NANOVIC, P.J.—June 8, 2005

PROCEDURAL BACKGROUND

The current appeal stems from two orders of this Court, both dated April 13, 2005, concerning the custody of Carlene Ramirez (D.O.B. 3/28/1998). The first order awarded primary custody of Carlene to her mother, Shannon Thornton (“Mother”), and the second found the paternal grandparents, Angel and Mary Ramirez (“Grandparents”), to be in willful contempt of this Court’s Interim Custody Order dated September 27, 2004.

On July 30, 2004, Mother filed a complaint seeking primary custody of Carlene who was then in the primary custody of the Grandparents pursuant to a previous custody order. Following a conciliation conference, the Interim Custody Order of September 27, 2004, was issued. This order awarded Mother periods of partial physical custody every other weekend and every Tuesday from 4:30 P.M. to 7:00 P.M. On February 1, 2005, Mother filed a contempt proceeding against the Grandparents alleging that since October 1, 2004, she had been deprived of all weekend and Tuesday visits with her daughter under the September 2004 Interim Order.

A consolidated hearing on both the Mother’s modification and contempt actions was held on March 15, 2005, and April 7, 2005. Following the hearing and after consideration of the evidence, this Court entered two orders on April 13, 2005: in the first the Mother was awarded primary physical custody of Carlene; in the second the Grandparents were found in contempt of the September 27, 2004 order. No sanctions were imposed (See Orders dated April 13, 2005).

The Grandparents have appealed both orders. A Motion to Reconsider was filed on May 9, 2005, and denied on May 10, 2005. Thereafter, the Grandparents filed the current appeal, on May 12, 2005.¹ On May 13, 2005, we directed the Grand-

¹ We note that the Grandparents’ single Notice of Appeal appealed both of our orders entered on April 13, 2005. “The taking of one appeal from several judgments is not acceptable practice and is discouraged.” **Croft v. Unemployment Compensation Board of Review**, 662 A.2d 24, 27 (Pa. Commw. 1995) (*citing General Electric Credit Corp. v. Aetna Casualty and Surety Co.*, 437 Pa. 463, 263 A.2d 448 (1970)). Such action may result in quashal of the appeal. **Id.** at 27-28; *see also, K.H. v. J.R.*, 573 Pa. 481, 826 A.2d 863, 869-70 (2003).

parents to file a concise statement of matters complained of on appeal pursuant to Pa. R.A.P. 1925(b). This statement was timely filed on May 27, 2005.

FACTUAL BACKGROUND

Carlene Ramirez (“Carlene”) is the biological child of Shannon Thornton (“Mother”) and Jason Ramirez (“Father”).² The Mother was sixteen years old at the time of Carlene’s birth. Carlene was born premature, 28 weeks after conception. Evidence established that Carlene has respiratory problems and other developmental problems caused in part by her premature birth as well as from fetal alcohol syndrome.

At first, Mother and Father resided with the Father’s parents, Angel and Mary Ramirez (“Grandparents”). A year later, in the spring of 1999, at age seventeen, the Mother gave birth to another child, Nicholas, also fathered by Jason Ramirez. Meanwhile, the relationship between the parents and Grandparents deteriorated. Through the course of this deteriorating relationship, Nicholas was put up for adoption.

Mother admitted to having substance abuse problems during the early years of Carlene’s life. Father had similar problems. Sometime in the fall of 1999, after Nicholas was placed for adoption, Mother and Father moved out of the Grandparents’ home; at this time Carlene remained with the Grandparents who assumed responsibility for her primary care and custody.³ In the ensuing years, the Grandparents received a court-sanctioned custody order establishing them as the primary custodians of Carlene. Later, as Mother matured, she desired to re-

² During the course of her marriage to Jason Ramirez, Mother acquired his surname. After separation, she resumed her maiden surname, Boyle. Mother later acquired her present surname, Thornton, through her current marriage to Michael Thornton.

³ Angel Ramirez testified that Carlene’s parents moved out of his home in September 1999 and moved in with the Mother’s parents. At some point the Father and Mother separated. Father testified that the last time he saw the Mother was sometime in 2001. According to the Grandfather, for six months, between August 2003 and February 2004, the Grandparents did not know the whereabouts of their son. At the present time, Father visits Carlene approximately one time per week at his parents’ home.

Although the Father appeared at the custody/contempt hearings held on March 15 and April 7, 2005, his involvement in the hearings was minimal. Father has not requested that he be provided any separate period of custody of Carlene. To the contrary, at the April 7, 2005 hearing Father testified he would like to see Carlene remain with his parents.

gain an active role in Carlene's life and indicated at the hearing, over a five-year span, seven custody orders have been entered, each providing for increasing involvement by her in Carlene's life.

As the Mother's involvement with Carlene has increased, so has the opposition from the Grandparents. During the ongoing custody struggle between the Grandparents and Mother, accusations were made that the Mother had sexually abused Carlene and subjected her to medical neglect. In each instance, the accusations were purportedly made by Carlene to the Grandparents who advised Carlene to tell her medical providers that she had been abused by her Mother. These providers were obligated by law to make a report to the Pennsylvania Department of Public Welfare. 23 Pa. C.S.A. §6311. The Mother testified that each series of accusations resulted in the Grandparents' refusing to permit her to spend time with her daughter. Mother testified without contradiction that, notwithstanding the September 27, 2004 order, the Grandparents prevented her from seeing her daughter since September 21, 2004.

Caseworkers from the Monroe County Children and Youth Services Agency testified that each of their investigations concerning sexual abuse and medical neglect resulted in a finding that the complaints were unfounded. Specifically, Elisa Loncola-Hicks, a Monroe County CYS caseworker, found that allegations made in the fall of 2002 concerning improper touching that supposedly occurred in a public park by the Mother were unfounded. Her investigation included consulting with Carlene, the Mother, Mary Ramirez and law enforcement. Ms. Loncola-Hicks noted that, as her investigation moved towards finding the allegations unfounded, the Grandparents grew increasingly hostile towards her and the Monroe County CYS.

Ms. Loncola-Hicks testified that new allegations arose in February or March 2003 alleging medical neglect of Carlene by the Mother. This second investigation involved accusations that Carlene, who suffers from respiratory underdevelopment, asthma and severe allergies to animal hair and dander, had been allowed to come in contact with a pet at her maternal grandparents' home during visits with her Mother.⁴ The investigation

⁴ Accompanying the medical neglect accusations was a petition for contempt filed by the Grandfather with this Court on July 29, 2003, seeking to have the Mother sanctioned for exposing the Child to dog hair; Mother filed her own cross-petition for contempt on August 15, 2003. The two contempt petitions were denied on September 12, 2003.

found no evidence of an animal living at the Mother's parents' residence; again the allegations were determined to be unfounded.

The Grandparents grew hostile towards Ms. Loncola-Hicks for a second time and made ethical allegations of misconduct and threats. The Grandparents' conduct eventually led Ms. Hicks to request that she be recused from future involvement in matters concerning the parties. She testified that the Grandparents wanted to obstruct the Mother's access to Carlene. She also stated, based upon her investigations, that the Mother did not present a threat to Carlene.

Tara Surrago, also a caseworker with Monroe County CYS, corroborated Ms. Loncola-Hicks' testimony concerning the second CYS investigation. Ms. Surrago replaced Ms. Loncola-Hicks as the investigating caseworker for Carlene at the time Ms. Loncola-Hicks was promoted to supervisor.⁵ In approximately February of 2004, Ms. Surrago undertook a third investigation, this time concerning allegations that the Mother had improperly fondled Carlene's genitalia and breasts and had also improperly fondled an adolescent niece.

During the course of this third CYS investigation, the Grandmother provided Ms. Surrago with greater detail about the new accusations. Specifically, the Grandmother reported that Carlene had confided to her that the Mother had abused both Carlene and the Mother's niece at the same time and improperly touched the niece's genitalia. Ms. Surrago's investigation, which included a confidential meeting with Carlene and the niece, led to a determination that all allegations were unfounded; neither Carlene nor the niece made any statements supporting the Grandmother's allegations about the Mother.

Ms. Surrago commented that the Grandparents had instructed Carlene not to refer to Shannon Thornton as her "mother," and that they did not want Carlene to have future

⁵ Ms. Loncola-Hicks indicated that her promotion to supervisor occurred in April 2003, during the course of the medical neglect investigation.

Both Monroe County CYS caseworkers, Ms. Loncola-Hicks and Ms. Surrago, testified that when an investigation results in a finding that the complaint is unfounded, the records are expunged twelve to sixteen months from the date of the initial report for purposes of confidentiality; for this reason, records of the investigations by the Monroe County CYS office were not available, the only evidence being the testimony of the CYS caseworkers.

contact with the Mother. Like Ms. Hicks, who had now become a supervisor for Monroe County CYS, the Grandparents became hostile towards Ms. Surrago making ethical accusations and threats. Monroe County CYS requested Carbon County's CYS to open their own case to ensure that no conflict of interest or other ethical deficiency was influencing Monroe County CYS' investigation; Carbon County CYS also found the allegations to be unfounded.

Later in 2004, Carbon County CYS, assisted by Lackawanna County CYS, conducted a fourth investigation concerning alleged sexual abuse of Carlene.⁶ As part of this investigation a mental health/psychological evaluation was performed by John Seasock, who the Grandparents called as an expert in sexual victimization. The evaluation was conducted on September 1, 2004, at the request of Carbon County CYS to assess the causes of Carlene's anxiety and particularly to assess the possibility that she had been the victim of sexual abuse. In an unsigned and undated report, Seasock expressed his opinion that at some time in the past—the date being undeterminable—Carlene had been sexually abused. Seasock found Carlene to be a credible witness, and based upon this finding, further opined that the Mother may be the source of the abuse (Grandparents' Exhibit 2—Seasock's Report). At the time of hearing, Seasock testified consistent with his report.

Seasock testified that Carlene exhibits classic symptoms of Pervasive Developmental Disorder ("PDD"), and that as a result of this disorder she lacks the capacity to specify when the alleged incidents of abuse occurred—whether a week, a month, a year or years in the past. Seasock further testified that Carlene was unable to specify the locations where the alleged abuse occurred. Seasock noted that Carlene had, prior to meeting with him, received sexual abuse awareness training—"good touch, bad touch education"—to help her learn about proper and improper touching and that this training helped Carlene develop a sufficient vocabulary to describe the alleged abuse. Seasock indicated that his findings were based on a one-time meeting with Carlene and meetings with the Ramirez Grandparents and

⁶ Mother testified that it was reported she had taken inappropriate photographs of Carlene's body.

the Father; he never met with the Mother. Notwithstanding this omission, Seasock recommended that the Mother submit to psychological/psychiatric testing to determine her stability (Grandparents' Exhibit 2, p. 9). Seasock's conclusions, as previously stated, were contradicted by the results of various investigations conducted by Children and Youth Services, each of which found the claims against the Mother unfounded.⁷

Carlene testified during the March 15 hearing, her seventh birthday being within two weeks. In this testimony, Carlene stated that the Mother had touched her in her pee-pee and her bum, inserting a finger into both, but she also indicated that the Grandparents had instructed her on her answers. Carlene testified that she never had a problem with a dog or cat while in the presence of Shannon. She consistently referred to Mary Ramirez as her mother and to her Mother as "Shannon." Carlene testified that she believed Shannon was mean based upon what Mary Ramirez had told her, including that Shannon had burnt the Father with a cigarette⁸ and that Shannon had scratched Mary Ramirez. Despite her testimony that she did not wish to visit with Shannon, Carlene did state that she enjoyed meeting with Kira, Shannon's two-year old daughter, who is a half-sister to Carlene.

Angel Ramirez, the Grandfather, denied ever making a report to the CYS agencies concerning the Mother's alleged sexual abuse of Carlene. He testified that "Rick" was the informant to CYS on two separate occasions and John Seasock on a third occasion. Carlene, however, testified that the Grandparents told her to tell "Rick and Jen" that her Mother had subjected her to sexual abuse. "Rick" is Richard ("Rick") Nicolazzi, a licensed clinical social worker and certified addictions counselor for Carbon Lehigh Intermediate Unit #21 ("CLIU"), who has treated Carlene since November of 2000 as a behavioral specialist and testified concerning Carlene's anxiety and emotional problems⁹

⁷ Seasock acknowledged that he had not met with or interviewed the Mother, and emphasized that it was not his purpose to make a custody evaluation.

⁸ No effort was made by the Grandparents to corroborate this allegation through the testimony of Jason Ramirez.

⁹ Nicolazzi indicated that he has counseled Carlene through "Provider 50" services, which is a home-based service designed to take counseling and treatment services to their clients' homes.

(See Grandparents' Exhibit 3—CLIU Treatment Plan). Jen, not called to testify, is also an employee of CLIU and is supervised by Nicolazzi. Through Provider 50, Carlene receives behavioral and therapeutic staff support services weekly at home.¹⁰

The Grandfather initially stated that the failed visitations between the Mother and Carlene were attributed to Mother's failure to appear. He also indicated that several visitations were cancelled because of Carlene's various medical problems. On further examination, he acknowledged that Carlene's hospitalization since May of 2000 was minimal, mostly occurring on an outpatient basis.

The Grandfather admitted that, since the September 27, 2004 order, the Mother has been prevented from exercising her custodial rights as established in that order. With the exception of the first overnight weekend visit scheduled under the order and for which the Mother was deprived of custody when Carlene was unexpectedly admitted to the hospital—a fact of which the Mother was first notified three days later, the Grandfather justified the decision by him and his wife to thereafter unilaterally suspend unsupervised visits between the Mother and Carlene on the basis of Seasock's September 1, 2004 evaluation. No evidence was presented when Seasock's report was prepared or when, or how, the Grandparents learned of the results. The Grandfather also admitted that, since September 2004, neither he nor the Grandmother have tried to foster a relationship between the Mother and Carlene.

Attorney Masington, counsel for the Mother, presented his paralegal Sandra Lalicata to testify about the custodial dispute between the Mother and Grandparents. She corroborated Mother's testimony that, since September 2004, the Mother has been unable to exercise her custodial periods with Carlene and that the Grandparents were not responsive to her communication requests (See Mother's Exhibit 1, Lalicata's correspondence notes). Ms. Lalicata testified that even after the Grandparents obtained legal representation, her efforts to facilitate custodial exchanges through their counsel were unsuccessful. She testified that she conveyed Attorney Masington's advice to

¹⁰ Carlene's medical expenses are covered by ACCESS.

the Mother to appear at the custodial exchange point and that the Mother did so, but that the Grandparents failed to appear.

Mother, age 23 at the time of the March 15, 2005 hearing, is currently married and living with her spouse and their two-year-old daughter, Kira, in a three-bedroom apartment in Scranton, Pennsylvania. On October 20, 2004, Mother married Michael Thornton. She testified that there are no pets living in this home and the family is financially stable. Mother testified that she has overcome her prior drug and alcohol problems, being drug-free for almost five years as of the time of her testimony. Mother indicated that she is close to her parents, Carlene's maternal grandparents, and that they would play an active role in helping to raise Carlene. Betty Boyle, Mother's mother, corroborated this during her testimony. Ms. Boyle agreed that the Mother has overcome her unstable past and is now a good mother. There is no evidence to suggest that Shannon Thornton's present home would be an unsafe or unstable environment for the raising of Carlene.

DISCUSSION

We begin by noting that, when confronted with a custody dispute between a parent and a non-parent, the parent enjoys a **prima facie** right to custody; the parties do not stand on an equal footing. **Ellerbe v. Hooks**, 490 Pa. 363, 367, 416 A.2d 512, 513-14 (1980). Only convincing reasons can offset the weighty imbalance before a non-parent, such as a grandparent, can usurp custody from a parent. **Id.** at 367-68, 416 A.2d at 514; **see also, B.A. v. E.E. ex rel. C.E.**, 559 Pa. 545, 741 A.2d 1227, 1229 n.1 (1999) (noting that special weight and deference are given to the parent-child relationship); **E.A.L. v. L.J.W.**, 443 Pa. Super. 573, 580, 662 A.2d 1109, 1112 (1995) ("The natural parent's right may be forfeited if convincing reasons appear that the child's best interests will be served by awarding custody to someone else."). Still, the non-parent's burden is not insurmountable and the best interests of the child remain tantamount.¹¹ **Charles v. Stehlík**, 560 Pa. 334, 744 A.2d 1255,

¹¹ Though not raised by the parties to this proceeding, we note the Grandparents' standing under the **in loco parentis** doctrine to challenge the Mother for primary custody of Carlene. **See generally, Bupp v. Bupp**, 718 A.2d 1278 (Pa. Super. 1998).

1258 (2000), **cert. denied**, 530 U.S. 1243 (2000) (“It is axiomatic that in custody disputes, the fundamental issue is the best interest of the child.”). “A determination of the best interests of the child is based on consideration of all factors which legitimately have effect upon the child’s physical, intellectual, moral and spiritual well-being.” **E.A.L., supra** at 580, 662 A.2d at 1112 (**citing Wiskoski v. Wiskoski**, 427 Pa. Super. 531, 629 A.2d 996 (1993)); **see also**, 23 Pa. C.S.A. §5303(a)(1).

The present suit presents the story of a mother, age 16 when Carlene was born, who was at that time unfit to discharge parental duties but has since matured and seeks to regain an active role in her daughter’s life. Standing against the Mother are the paternal Grandparents who have willfully endeavored to obstruct the Mother’s access to her child and stifle the parent-daughter relationship. Courts cast an unpleasant eye upon contemptuous parties who seek to upend the custodial rights of another party, but custodial contempt is not a sufficient independent basis to award primary physical custody to the aggrieved party as a sanction for the contempt. **Guadagnino v. Montie**, 435 Pa. Super. 603, 608-11, 646 A.2d 1257, 1260-61 (1994). Nonetheless, obstruction weighs against the best interest of the child and is a factor to be considered, among others, which may warrant a change in the custodial scheme. **Id.** at 611, 646 A.2d at 1261; **cf. Kozlowski v. Kozlowski**, 362 Pa. Super. 516, 524 A.2d 995 (1987) (trial court improperly modified custody based upon finding of contempt without conducting a sufficient analysis of other facts to show change in custody was in child’s best interest).

The unfortunate hostility between the paternal Grandparents and Mother is obvious, with the Grandparents performing as the primary antagonists. The Grandparents have nothing but disdain for the Mother and belittle and demean her to Carlene. Carlene’s emotional instability is exacerbated by being at the epicenter of the ongoing custodial dispute between the parties. Meanwhile, the Grandparents have demonstrated a pervasive disrespect for the Mother’s parental rights relying on self-help and willful violations of a custodial scheme seeking to encourage and promote the development of a parental relationship between Carlene and her Mother: their blame on Carlene’s medical problems, the CYS investigations and Mother is unpersuasive.

We are convinced that the Grandparents want to exclude the Mother entirely from Carlene's life and raise Carlene as if she were their daughter; we are equally convinced that this is not in Carlene's best interest. Courts, when determining custody, must consider the likelihood that a party will "encourage, permit and allow frequent and continuing contact and physical access between the noncustodial parent and the child." 23 Pa. C.S.A. §5303(a)(2).

"[C]ontinuity and stability are important elements in a young child's emotional development." **Witmayer v. Witmayer**, 320 Pa. Super. 372, 382, 467 A.2d 371, 376 (1983) (**citing Commonwealth ex rel. Jordan v. Jordan**, 302 Pa. Super. 421, 448 A.2d 1113 (1982); **In Interest of Tremayne Quame Idress R.**, 286 Pa. Super. 480, 429 A.2d 40 (1981)). Though the past is not the primary concern when determining custody, it is relevant where it shows an ongoing negative forecast for the present and future. **Id.** at 382-83, 467 A.2d at 376. In this light, we believe Carlene's best interests are not served by awarding custody to the Grandparents. Conversely, the Mother's past would indicate instability as she struggled with her own personal problems, however, her past is properly discounted as she has demonstrated renewed stability and maturity. **Compare In re Leskovich**, 253 Pa. Super. 349, 357, 385 A.2d 373, 377 (1978) (finding that a party's past is properly ignored where evidence shows that instability has been overcome).

We are not persuaded that the Mother has abused Carlene. No physical evidence of abuse was presented. Seasock's belief that Carlene's report of being abused by her Mother was credible is contradicted by the findings of the Monroe and Carbon County Children and Youth Service Agencies. Seasock explained these contrary conclusions as being attributable to Children and Youth Services' failure to fully appreciate the nature and effect of PDD in evaluating the credibility of a person with this disorder.

This, of course, may be possible. However, whether a witness is credible is for the fact-finder to decide, not another witness. **Commonwealth v. Delbridge**, 771 A.2d 1, 5 (Pa. Super. 2001) ("[n]ot only is there no **need** for testimony about the reasons children may not come forward, but permitting it would infringe upon the jury's right to determine credibility.")

(quoting **Commonwealth v. Dunkle**, 529 Pa. 168, 183, 602 A.2d 830, 837 (1992)); **Commonwealth v. Seese**, 512 Pa. 439, 443, 517 A.2d 920, 922 (1986) (“Traditionally, we have recognized not only the jury’s ability to determine the credibility of the witnesses but also we have placed this determination within their sole province.”) (quoting **Commonwealth v. O’Searo**, 466 Pa. 224, 229, 352 A.2d 30, 32 (1976)). On this issue, we are not convinced that Seasock himself fully appreciated the extent to which the Grandparents have acted, not only to keep Carlene away from her Mother, but to actively denigrate the Mother in Carlene’s eyes and to inculcate in Carlene a fear of her Mother.

We do not share Seasock’s premise that Carlene was not prepped for her evaluation by him. Carlene’s own testimony revealed that the Grandparents influenced her answers concerning the alleged sexual abuse and that the Grandparents directed and coached her to inform third parties that she had been abused.

Nor do we accept Seasock’s explanation that his training and inability to shake Carlene’s version of what occurred makes him uniquely qualified to assess credibility. Seasock heard only one side of the story: he did not question the Children and Youth workers who independently evaluated the veracity of the accusations of abuse or interview the Mother who consistently denied abusing her daughter, all of whom testified in this case. His assessment of Carlene’s credibility does not account for Carlene’s professed statements to the Grandparents about the Mother on one occasion abusing a niece at the same time Carlene was abused, an allegation the niece herself denied when questioned by Children and Youth. Not only did we find Carlene’s testimony of abuse to be tainted and unreliable, in contrast, we found the Mother’s denial of ever sexually abusing her daughter to be credible. In custody disputes, it is not error for a trial court to disregard contradicted expert testimony. **Nomland v. Nomland**, 813 A.2d 850, 854 (Pa. Super. 2002).¹²

¹² Moreover, notwithstanding Seasock’s qualifications to express an opinion as to whether Carlene was sexually abused, he is not qualified to express an opinion as to the identity of the abuser, even if not objected to.

Carlene's best interests will be served by placing her with her Mother despite Carlene's stated preference for the Grandparents. We find that Carlene's apprehension about spending time with her Mother is a direct effect of the Grandparents' influence. A child's preference is a factor to be considered "as long as it is based on good reasons." **E.A.L., *supra*** at 590, 662 A.2d at 1118 (**citing Constant A. v. Paul C.A.**, 344 Pa. Super. 49, 496 A.2d 1 (1985); **Hugo v. Hugo**, 288 Pa. Super. 1, 430 A.2d 1183 (1981)). Carlene has been deprived of developing a secure mother-child bond as the Grandparents have interrupted Mother's custodial schedule. Carlene's testimony indicates that the Grandparents have fostered her fear of the Mother by indicating that the Mother is a mean person.

For these reasons we are convinced that Carlene's preference carries little weight and is properly rejected. **Compare Haller v. Haller**, 377 Pa. Super. 330, 338, 547 A.2d 393, 397 (1988) (weight to be afforded to child's preference is properly within the discretion of the trial court); **Witmayer, *supra*** (trial court properly discounts child's preference where father had influenced child's answers and father had recently purchased the child gifts);¹³ **cf. E.A.L., *supra*** (trial court was in error for failing to explain why it rejected the children's preference).

We are also cognizant that when a non-parent party, such as grandparents, have provided a child with a stable and good home, courts should be careful to break this relationship while being overly deferent to a natural parent's **prima facie** right to custody. **See E.A.L., *supra*** at 588, 662 A.2d at 1116. We believe, however, where grandparents have actively sought to exclude a mother from involvement with her daughter, have relied on unfounded CYS investigations to deny the mother access to her daughter in the face of a court order to the contrary and have caused the child to fear her own mother, primary custody is properly transferred to the mother. **Cf. Albright v. Commonwealth ex rel. Fetters**, 491 Pa. 320, 421 A.2d 157 (1980) (children properly left with grandparents despite evidence that father could provide a good home); **Ellerbe, *supra*** (same). Condoning Grandpar-

¹³ Carlene testified that she celebrated her birthday party the day before her testimony, despite the fact that her birthday was not until March 28, thirteen days after her testimony.

ents' conduct by awarding them primary physical custody will only result in Mother's continued exclusion from Carlene's life and a further rift between the Grandparents and Mother.

Granting primary physical custody of Carlene with her Mother will also join Carlene with her half-sibling, Kira; "absent compelling reasons to the contrary, siblings should be raised together." **In re Davis**, 502 Pa. 110, 124, 465 A.2d 614, 621 (1983). Pennsylvania law favors the unity of the family and therefore, whenever possible, courts should seek to keep siblings unified, without exception to half-siblings. **Johns v. Cioci**, 865 A.2d 931, 942 (Pa. Super. 2004). We are aware that this doctrine has less force when the siblings have not been previously raised together. **Id.** at 943. However, we find this exception inapplicable where the Grandparents' contempt of the Mother's parental rights has precluded Carlene and Kira from developing a sibling relationship.

Finally, we do not doubt that Carlene has serious psychological and developmental difficulties and requires ongoing counseling and therapy to overcome these difficulties. Finding this to be true, the custody order entered specifically conditions the transfer of primary custody to the Mother on the counseling and therapy required by Carlene's treatment plan being in place at the Mother's home at the time of transfer (Custody Order, Paragraph 5). Not only is this intended to address Carlene's current needs, it is also expected that the presence of these providers who see Carlene on a weekly basis will permit early detection and act as a safeguard against abuse should there be any truth to the Grandparents' claims.

While arguably the transfer of custody to the Mother might be more gradual than that provided in our order, previous orders seeking to achieve a more gradual transition have been thwarted by the Grandparents. Under these circumstances, we believe the timing of the transition provided for in the order is necessary and proper.

CONCLUSION

On the basis of the foregoing, we believe we did not abuse our discretion or commit an error of law in granting primary physical custody to the Mother. Our granting of primary custody to the Mother is not premised solely or even primarily

upon the fact we found Grandparents to be in contempt of our prior custody order; it is but one factor we considered in reaching our final determination.¹⁴ For these reasons we respectfully ask that our orders of April 13, 2005, be affirmed.

¹⁴ From the evidence presented, we believe it clear that the Grandparents willfully prevented the Mother from exercising her established custody rights under the September 27, 2004 Interim Order and were, therefore, properly held in contempt. The Grandparents unilaterally decided to exclude the Mother from Carlene's life as provided for in the September 27, 2004 order.

The Grandparents did not seek to modify the order. Instead, the Grandparents chose to ignore this Court's order and to impose significant restrictions on the Mother's exercise of her custodial rights on the basis of their claimed fears for Carlene's safety, fears which have been repeatedly investigated by neutral child protection agencies and determined to be unfounded.

Not only have the Grandparents refused to make Carlene available to the Mother pursuant to the order, they have engaged in conduct clearly designed to poison Carlene's mind against her Mother. The fact that the Grandparents did not believe that the order was in Carlene's best interest did not justify its violation. **Compare English v. English**, 322 Pa. Super. 234, 241-42, 469 A.2d 270, 273 (1983) (finding parent's belief that visits were causing child psychological harm, even if reasonably and honestly held, did not justify the deliberate violation of an order of court in the instant circumstances); **see also, Commonwealth ex rel. Ermel v. Ermel**, 322 Pa. Super. 400, 469 A.2d 682 (1983) (finding mother's claim that father physically and mentally abused child and that, in consequence, the child harbored a negative attitude toward her father and refused to go with him, did not obviate a finding of contempt when the child's "negative attitude" toward her father was a direct result of the mother's conduct over the past years).

Finally, we note that, notwithstanding our determination that the Grandparents willfully violated our order of September 27, 2004, the method we provided for the Grandparents to purge themselves of contempt was concomitant with enforcement of the order modifying custody and a desire to permit the Mother to develop a healthy relationship with Carlene. In this respect, we further note that the order of April 13, 2005, adjudicating the Grandparents in contempt did not impose sanctions and is therefore not properly appealable. **Glynn v. Glynn**, 789 A.2d 242 (Pa. Super. 2001).

**COMMONWEALTH OF PENNSYLVANIA vs.
PAMELA ANN HENDLEMAN, Defendant**

Criminal Law—Exercise of Prosecutorial Discretion—Policy-Based Criteria for ARD Admission—Presumption of Validity—Admissibility of BAC Testing in Absence of In-Court Testimony of Phlebotomist

1. Absent a showing of bad faith, fraud or unconstitutionality, the separation of powers doctrine demands that a court defer to the district attorney's exercise of prosecutorial discretion when formulating policy. Judicial discretion may not supplant executive discretion.
2. The District Attorney's decision to deny for ARD consideration, any defendant, charged with DUI, who has previously been convicted of, or received ARD treatment for, DUI is policy based. The Court properly refused to override the District Attorney's exercise of discretion in establishing this policy where the defendant failed to meet his burden of proving that the policy was patently discriminatory, arbitrary or pretextual and, therefore, not in the public interest.
3. As an evidentiary matter, the in-court testimony of the technician who, in the course of his duties and in the presence of a testifying officer, withdraws a sample of defendant's blood for chemical testing is not a prerequisite to the admissibility of the testimony of the chemist who actually tested the sample, and who appears in court and testifies as to the results of the tests he performed.

NO. 484 CR 03

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

PAUL J. LEVY, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—June 28, 2005

The Appellant, Pamela Ann Hendleman, has appealed her conviction of driving under the influence (“DUI”) returned by a jury on January 12, 2005. Specifically, Appellant, in her Amended Concise Statement of Matters Complained of on Appeal, has challenged the District Attorney’s refusal to consider her as a candidate for accelerated rehabilitative disposition (“ARD”) and this Court’s decision admitting into evidence the results of a blood alcohol test. For the reasons that follow, we ask the Superior Court to affirm our decision not to usurp or override the District Attorney’s exercise of its discretion in not recommending Appellant for ARD consideration by the Court and our ruling concerning the admissibility of the blood alcohol test result.

PROCEDURAL AND FACTUAL BACKGROUND

Appellant was involved in a one-vehicle accident on State Route 534 in Penn Forest Township, Carbon County, Pennsylvania, on May 10, 2003, at approximately 1:30 A.M. The accident was investigated by Pennsylvania State Troopers Butler and Dropinski of the Fern Ridge Barracks in Blakeslee, Monroe County, Pennsylvania.

At the scene, Appellant identified herself as the driver of the vehicle and admitted drinking prior to the accident. Appellant exhibited several classic symptoms of intoxication—slurred speech, glassy eyes, stumbling and an odor of alcohol—causing the Troopers to suspect that Appellant was under the influence of alcohol. After Appellant was administered and failed two field sobriety tests, Appellant was placed under arrest for driving under the influence and transported to the Pocono Medical Center (the “Center”) for a blood test to which she consented.

Appellant’s blood was drawn at the hospital at 3:20 A.M. by Leonard Sharum, a phlebotomist then on duty. Trooper Dropinski watched as Appellant’s arm was swabbed with iodine and a blood sample then collected, marked and placed in a lock box secured by a padlock. This sample was tested by Jason Perry, the chemistry technical supervisor at the Center, the following day. The qualifications of Mr. Perry to perform this test were established at trial. The blood alcohol content (“BAC”) of Appellant’s blood at the time drawn was determined to be 0.20 percent.

Mr. Perry wrote the Center’s policies concerning BAC testing. At trial, Mr. Perry described the procedures by which a person’s blood is tested for alcohol content. Mr. Perry testified that iodine is used to sterilize the area and that, once drawn, the sample is preserved by separate chemicals, potassium oxalate and sodium chloride, which act to inhibit further metabolism in the blood sample.¹

Mr. Perry identified Leonard Sharum as the lab technician who withdrew the blood in this case.² Mr. Perry also testified

¹ Mr. Perry indicated that these chemicals are pre-placed into the sampling kit by the manufacturer and that each kit carries a manufacturer’s certification of this fact.

² Mr. Sharum’s name and signature are similarly identified on a preprinted chain of custody form with the Center’s name and logo at the top (Commonwealth’s Exhibit 2).

that the day of testing he retrieved Appellant's specimen sample from the lock box. Both the seal on the specimen tube and the condition of the lock box were described by Mr. Perry as being intact and the condition of the specimen satisfactory (Commonwealth's Exhibit 2, Chain of Custody Form). Finally, Mr. Perry testified that he observed no irregularities in the chain of custody for the testing of Appellant's blood.

Appellant objected to Mr. Perry's testimony on the basis that because the phlebotomist who withdrew the blood was not present and did not testify, a proper foundation did not exist for the admission of Mr. Perry's testimony. This objection was overruled and is the subject of one of three issues raised by Appellant in her appeal.

On the basis of the evidence presented, Appellant was convicted of both counts of DUI with which she was charged: driving under the influence of alcohol to a degree which rendered her incapable of safe driving and driving with a BAC of 0.10 percent or greater.³ Appellant was also found guilty by the Court of the two summary offenses with which she was charged: driving on a roadway laned for traffic and careless driving.⁴

Prior to trial, Appellant applied for admission into the County's ARD program. This application was denied by the District Attorney's Office on the basis of Appellant's previous plea of nolo contendere in 1989 to a charge of DUI in Monroe County. As a matter of policy, the District Attorney in Carbon County will not approve for ARD consideration a DUI charge against a defendant who has previously been convicted of, or received ARD treatment for, DUI. Appellant's petition to the Court to override the District Attorney's refusal to move for Appellant's admission into the ARD program was denied by Order dated June 14, 2004. The District Attorney's denial of Appellant's application for ARD forms the basis of Appellant's two remaining issues raised on appeal.⁵

³ 75 Pa. C.S.A. §§3731(a)(1) and 3731(a)(4)(i).

⁴ 75 Pa. C.S.A. §§3209(1) and 3714, respectively.

⁵ In reviewing a decision of the District Attorney, it is critical to distinguish between those decisions of the District Attorney based upon a legal evaluation of the evidence or legal conclusions, and those based upon policy consideration. With respect to the former, the trial court's standard of review of the District Attorney's decision is **de novo**; with respect to the latter, the standard is one of abuse of discretion with the court deferring to the District Attorney's exercise of discretion in

On March 28, 2005, Appellant was sentenced to a period of not less than forty-eight hours nor more than one year in prison on the DUI charges and fined \$25.00 for each summary offense. Appellant's post-sentence motion filed on April 7, 2005, was denied by Court Order dated April 8, 2005. From this judgment of sentence, Appellant timely filed her appeal to the Superior Court on May 4, 2005.

DISCUSSION

In this case, unlike in **Commonwealth v. Carter**, 861 A.2d 957 (Pa. Super. 2004) (*en banc*), the laboratory supervisor who actually performed the test on Appellant's blood to determine its BAC was in court, subject to cross-examination. Consequently, the lab report does not constitute hearsay evidence and its admission, as well as the testimony of Jason Perry regarding the BAC of Appellant's blood, does not implicate con-

the absence of bad faith, fraud, or unconstitutionality. **In re Wilson**, ___ A.2d ___, 2005 WL 1324723, ¶¶22-23 (Pa. Super. June 6, 2005) (*en banc*) (holding that a trial court should not interfere with a prosecutor's policy-based decision to disapprove a private criminal complaint absent a showing of bad faith, fraud, or unconstitutionality).

This deferential standard recognizes the inherent limitations of judicial power to infringe upon the executive powers of the district attorney under the separation of powers doctrine: judicial discretion may not supplant executive discretion. Under this standard, the burden to prove that the district attorney abused his discretion is upon the defendant. The burden is a heavy one and requires the defendant to show that "the facts of the case lead only to the conclusion that the district attorney's decision was patently discriminatory, arbitrary or pretextual, and therefore not in the public interest." **Id.** at ¶24. The district attorney's decision not to approve a defendant for ARD for policy reasons carries a presumption of good faith and soundness. **Id.** at ¶26.

In the present case, the District Attorney's decision to deny Appellant ARD consideration was policy based. Appellant produced no evidence of bad faith, fraud or unconstitutionality in the institution of this policy by the District Attorney, or its application. Accordingly, we properly declined to overturn the District Attorney's exercise of prosecutorial discretion. See also, **Commonwealth v. Carlson**, No. 272 CR 02, 16 Carbon County L.J. 323 (2004).

In **Carlson**, similar issues were raised and addressed by this Court. Believing that the issues raised here are sufficiently analogous to those raised in **Carlson**, rather than repeating what was there stated, we have attached a copy of the opinion of **Carlson** to this opinion [not published herein]. Ultimately, in the present case we determined that the District Attorney did not abuse his discretion by refusing to approve for ARD consideration a defendant who had a previous conviction for DUI and who had a BAC equal to twice the legal limit.

frontation rights under the United States or the Pennsylvania Constitutions.

Instead, Appellant is of the opinion that the in-court testimony of the technician who withdrew Appellant's blood is a prerequisite and, therefore, a foundational requirement for the testimony of the chemist who actually prepared the lab report. This is not the law. **Commonwealth v. Zelinski**, 392 Pa. Super. 489, 497, 573 A.2d 569, 573 (1990), **appeal denied**, 527 Pa. 646, 593 A.2d 419 (1990); **Commonwealth v. Mahaney**, 373 Pa. Super. 129, 132-133, 540 A.2d 556, 559-560 (1988), **appeal denied**, 520 Pa. 587, 551 A.2d 214 (1988).

At the time of trial, judicial notice was taken, without opposition, that the Pocono Medical Center is licensed by the Department of Health to conduct blood alcohol testing. **See Pennsylvania Bulletin**, Vol. 33, No. 3, page 428, dated January 18, 2003. When testing of blood is performed by a clinical laboratory licensed and approved by the Department of Health, an inference exists that the tests were conducted by qualified persons using approved equipment and in accordance with procedures prescribed by the Department of Health. **Commonwealth v. Brown**, 428 Pa. Super. 587, 595, 631 A.2d 1014, 1018 (1993); **Commonwealth v. Cook**, 865 A.2d 869, 876-877 (2004).

In this case, the supervisor who set the procedure for BAC testing at the Center and who actually performed the test on Appellant's blood sample testified. Mr. Perry, a chemist with 13 years experience as the chemistry technical supervisor and with bachelor of science degrees in chemistry, biology and biological chemistry, as well as a master's degree in clinical chemistry, testified unequivocally as to the tests he performed, and that the condition of the blood tested was satisfactory. Mr. Perry further testified that he wrote the policy for drawing and testing blood and was familiar with Leonard Sharum, the phlebotomist who drew Appellant's blood. Mr. Sharum, who has since moved out of state, was employed by the Center at the time the blood was drawn and recorded his role in the chain of custody on a preprinted form with the Center's name and logo.

These facts were sufficient to create an inference that the phlebotomist, who was performing his duties when Appellant's blood was drawn, was qualified for his position by the Center. Under the rationale of **Zelinski** and **Mahaney**, where no doubt

appears from the record as to the qualifications of the phlebotomist or the integrity of the sample drawn, the prosecution is not required to produce at trial the phlebotomist who drew the blood.

As in **Zelinski** and **Mahaney**, the focus of Appellant's inquiry is more appropriately on the chain of custody and the qualifications of the person who performed the testing. As to the latter, these were presented at trial.

To the extent Appellant may be raising a chain of custody claim, this challenge is also without merit. When a chain of custody claim is raised, the standard to be applied is not one of absolute or unquestionable certainty.

There is no requirement that the Commonwealth establish the sanctity of its exhibits beyond all moral certainty. It is sufficient that the evidence, direct and circumstantial, establish a reasonable inference that the identity and condition of the exhibits remained unimpaired until they were surrendered to the court.

Commonwealth v. Miller, 234 Pa. Super. 146, 155, 339 A.2d 573, 578 (1975), **aff'd**, 469 Pa. 24, 364 A.2d 886 (1976); **see also**, **Commonwealth v. Allen**, 394 Pa. Super. 127, 575 A.2d 131 (1990), **appeal denied**, 526 Pa. 627, 584 A.2d 311 (1990).

Appellant has pointed to nothing in the evidence to suggest a "lack of trustworthiness" in the blood sample that was provided to Mr. Perry for testing. To the contrary, any suggestion that the evidence is deficient in this regard is purely speculative and contradicted by the evidence actually presented. Trooper Dropinski testified that he watched Leonard Sharum remove Appellant's blood and place the sample into a lock box; Mr. Perry testified that no chain of custody problems appeared when he removed the lock box from a secured refrigerator the following day. With respect to a challenge to the chain of custody, "when the police observe the technician withdraw the blood, the Commonwealth need not call the technician." **Zelinski, supra** at 497, 573 A.2d at 573; **see also**, **Mahaney, supra** at 136, 540 A.2d at 559-560.

CONCLUSION

For the foregoing reasons, the clinical laboratory report and testimony of the chemist who actually tested Appellant's

blood and explained the laboratory procedures and blood test results were properly admitted. Accordingly, we respectfully request that Appellant's conviction and judgment of sentence be affirmed on appeal.

**BOROUGH OF SUMMIT HILL, Plaintiff vs.
BRUCE J. MARKOVICH, Defendant vs. BOROUGH OF
SUMMIT HILL, Counterclaim Defendant**

*Civil Law—State and Federal Constitutional Law—Determination and Deprivation of Constitutionally Protected Property or Liberty Interests—Substantive and Procedural Due Process—Termination from Employment of Public Employee—Pre-Termination **Loudermill** Hearing—Post-Termination Name-Clearing Hearing—Settlement Agreement—Required Assent by Governing Body of Municipal Entity*

1. A settlement agreement is, in its essence, a contract and, as such, is governed by the principles of contract law. When a municipal corporation is a party to a settlement agreement, its assent, to be legally binding on the municipality, must be manifested by the approval of a majority of its governing body at a duly convened and publicly held meeting.

2. Only fundamental property or liberty interests are protected by the concept of substantive due process under the Fourteenth Amendment to the United States Constitution.

3. Public employment is not a fundamental property or liberty interest entitled to substantive due process protection under the Fourteenth Amendment.

4. Persons who establish the existence of a recognized property or liberty interest are entitled to procedural due process under the Fourteenth Amendment before such interest can be abridged by government.

5. An employee with a property right in employment is protected only by the procedural component of the Due Process Clause, not its substantive component.

6. Public employees who can be discharged only for cause have a constitutionally protected property interest in their tenure and cannot be fired without procedural due process. As a matter of procedural due process, prior to termination, a tenured public employee is entitled to an oral or written notice of the charges, an explanation of the employer's evidence and an opportunity for the employee to tell his side of the story.

7. Reputation alone is not an interest protected by the Due Process Clause of the Fourteenth Amendment. For a harm to reputation caused by government conduct to be actionable under 42 U.S.C. §1983, the plaintiff must show an injury to his reputation which occurs in the course of, or is accompanied by a change or extinguishment of, a right or status guaranteed by state law or the Constitution. In the employment context, this "stigma plus" test is generally met when an employee is defamed or stigmatized in the course of his dismissal from public employment.

8. When a public employee's liberty interest in his reputation is implicated by defamatory government conduct in connection with his termination from

employment, and in doing so, the employee has been deprived of procedural due process, the principal relief to which the employee is entitled is a hearing to clear his name.

9. Under the Pennsylvania Constitution, unlike the Federal Constitution, reputation is a fundamental right, in the same class as life, liberty and property. To be actionable under the State Constitution, injury to a person's reputation by government need not meet the "stigma plus" test.

10. The question of whether there exists a direct, private right of action for money damages against municipal entities for violation of Article I, Section 1 or 11 of the Pennsylvania Constitution is unclear.

11. In terminating its police chief on the basis of charges which impugned his integrity and ability as a police officer, and in publicly demanding the execution of a retraction letter by the police chief, the terms of which required the chief to acknowledge that his appeal to the Borough's civil service commission challenging his termination was frivolous and that he committed perjury during the course of the civil service proceedings, the Borough's conduct, at a minimum, implicated the police chief's liberty interest in reputation for which he was entitled, upon demand, to a full and fair name-clearing hearing, absent the finding of a valid, enforceable settlement agreement.

NO. 00-1213

JOSEPH J. MATIKA, Esquire and CHRISTOPHER P. GERBER, Esquire—Co-Counsel for Borough of Summit Hill.

PHILIP D. LAUER, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—August 4, 2005

PROCEDURAL AND FACTUAL BACKGROUND

On November 2, 1998, the Summit Hill Borough Council (hereinafter "Borough") voted to terminate Bruce J. Markovich (hereinafter "Markovich") as the Borough's Chief of Police. Markovich demanded and received a hearing before the Borough's Civil Service Commission pursuant to 53 P.S. section 46191. Hearings were held on May 4, May 25, and May 27, 1999.

During the course of the May 27, 1999 hearing, the parties came to an apparent agreement settling their differences. This agreement was read verbatim into the record. In material part the agreement provided, **inter alia**, that Markovich would withdraw his appeal challenging his termination and would release the Borough from any and all claims arising from his discharge; in return, Markovich was to be paid Fifteen Thousand Dollars (\$15,000.00) and his personnel file was to be redacted to re-

flect that he had voluntarily left employment with the Borough on November 1, 1998. At the conclusion of placing the settlement agreement on the record, the Borough's counsel noted that "in terms of being finalized" the agreement was subject to being signed by Markovich and his counsel, and then being approved and adopted at a duly authorized Borough Council meeting.

As part of the record proceedings before the Civil Service Commission, both Markovich and his counsel acknowledged that they understood and agreed to the terms of the settlement agreement; the Borough's Mayor, Richard P. Caffrey, and the President of Borough Council, Patrick Leonzi, did the same. Markovich's counsel further advised the Commission that once the agreement had been acted upon by the Borough Council and duly executed on behalf of the Borough, he would so advise the Commission through its solicitor and withdraw the appeal.

Following the parties' putative settlement, Markovich reported to the press that the reason he had agreed to withdraw his appeal was to protect a fellow police officer, who had sympathized with his plight, from retaliation and threatened disciplinary action. Upon learning of these statements, the Borough's counsel, by letter dated June 7, 1998, demanded that Markovich sign a retraction letter renouncing his publicly-professed reason for agreeing to the settlement. The retraction letter, a copy of which accompanied counsel's request, further stated that the basis for Markovich's decision to settle was his belief that he would not be successful in his appeal and that he had perjured himself in the Civil Service proceedings and wanted to avoid being further cross-examined about these lies. Counsel's letter strongly intimated that Markovich's acceptance of the retraction letter was necessary "in order for the settlement to be consummated" and that if he failed to do so, counsel believed the Borough would insist on the Civil Service hearings continuing. At a Council meeting held on June 7, 1998, the Borough's counsel read aloud the prepared retraction letter and circulated copies to the press.

By letter dated June 15, 1998, Markovich's counsel wrote that Markovich would not sign the retraction letter and that if the Borough did not follow through on the agreed-upon settlement, he would file a petition to compel settlement. Subse-

quently, on July 1, 1998, the Borough forwarded to Markovich a typewritten settlement agreement to be signed by him and then returned to the Borough for approval and execution. This written agreement, with the exception of several cosmetic changes and the proviso that the \$15,000.00 payment would be paid within thirty days of execution of the agreement, was identical to the agreement placed on the record before the Civil Service Commission.

The written agreement was never signed by Markovich or his counsel. Nor is there any evidence of record that the Borough Council has approved or executed the agreement. Markovich contends that no valid, enforceable agreement was reached and that, alternatively, the conditions of any purported agreement were never fulfilled. Neither party has requested the Commission to reconvene the hearings begun when Markovich appealed his termination.

On June 29, 2000, the Borough commenced suit by complaint, filed in equity, seeking to enforce the settlement agreement. On April 3, 2001, following the denial of Markovich's preliminary objections to the complaint, Markovich filed an answer, new matter and counterclaim containing seven counts. All but Count V of the counterclaim have previously been dismissed by various orders of this Court. Count V is filed pursuant to 42 U.S.C. §1983. In this count, Markovich asserts his substantive and procedural due process rights under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution were violated when his employment with the Borough was terminated.

On June 30, 2005, we denied the Borough's motion for summary judgment with respect to Count V of the counterclaim. In that motion, the Borough claimed that the record facts failed to demonstrate a cognizable due process interest sufficient to support a §1983 action and that, in any event, such claim was time-barred. The Borough further argued that the claims contained in Count V of the counterclaim were released pursuant to the settlement agreement.

On August 1, 2005, the Borough filed its motion for reconsideration or, in the alternative, motion to modify our order of June 30, 2005, to include the required language to certify this case for appeal pursuant to 42 Pa. C.S. §702(b). **See also**, Pa.

R.A.P. 1311. In denying that motion, we have prepared this opinion to further explain to counsel the reasoning underlying our previous denial of the Borough's motion for summary judgment.

LEGAL STANDARD

Summary judgment is proper when, viewing the record in the light most favorable to the nonmoving party, the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035.2. “[T]he mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for a trial.” **Ertel v. Patriot-News Co.**, 544 Pa. 93, 100, 674 A.2d 1038, 1042 (1996), **cert. denied**, 519 U.S. 1008, 117 S.Ct. 512, 136 L.Ed. 2d 401 (1996) (citations omitted).

“The moving party has the burden of proving that no genuine issue of material fact exists.” **Accu-Weather, Inc. v. Prospect Communications, Inc.**, 435 Pa. Super. 93, 99, 644 A.2d 1251, 1254 (1994) (**citing Overly v. Kass**, 382 Pa. Super. 108, 111, 554 A.2d 970, 972 (1989)). In opposing the motion, the non-moving party may not rest on the averments in its pleadings but must demonstrate affirmatively that there is a genuine issue for trial. **Id.** The trial court must resolve all doubts against the moving party and examine the record in the light most favorable to the non-moving party. **Id.** Summary judgment may only be granted in cases where it is clear and free from doubt that the moving party is entitled to judgment as a matter of law. **Id.**

Stated another way, to avoid the entry of summary judgment, a non-moving 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 that the moving party is entitled to judgment as a matter of law.

Ertel v. Patriot-News Co., supra at 101-102, 674 A.2d at 1042.

DISCUSSION

The Borough's defense to Count V of the counterclaim is two-fold: first, that a binding settlement agreement was reached between the parties at the May 27, 1999 hearing before the Civil Service Commission and that Markovich's claim is barred by the release provisions of that settlement agreement; and second, that the undisputed facts of record do not support this theory of liability.

A. Existence and Enforceability of Settlement Agreement

As to the Borough's first defense, while we agree with the Borough's position that execution of the agreement by Markovich and his counsel was a mere formality, and not a material bargained-for condition precedent to its enforceability,¹ the same is not true with respect to the Borough Council's required approval. Notwithstanding the apparent good faith of the Borough's Mayor and Council President in approving the proposed agreement, neither had the power to bind the Borough to such an agreement. The entry of a bilateral agreement by a municipal entity requires the formal approval of the appropriate corporate public body at a duly convened and publicly held meeting. **See In re Petition of Olshefski**, 692 A.2d 1168, 1175 (Pa. Commw. 1997) ("[A]n individual [on council] has no ability to act individually in the legislative function to bind the borough."). This did not occur at the May 27, 1999 Civil Service hearing. Nor can we determine from the record whether the Borough Council ever met and approved the terms of the settlement agreement.²

¹ See **Village Beer and Beverage, Inc. v. Vernon D. Cox and Co., Inc.**, 327 Pa. Super. 99, 107, 475 A.2d 117, 121 (1984) (holding that a term in a contract will not be considered a condition precedent to enforcement unless this is the clear intent of the parties); compare **Shovel Transfer and Storage, Inc. v. PLCB**, 559 Pa. 56, 739 A.2d 133 (1999) (stating that where the parties have agreed upon all essential and material terms and intend the execution of a written agreement to be a perfunctory task, enforceability of the agreement is not dependent on execution) with **Commonwealth v. On-Point Technology Systems, Inc.**, 821 A.2d 641 (Pa. Commw. 2003), aff'd, 870 A.2d 873 (Pa. 2005) (finding parties intended that subsequent manifestations of assent, i.e., signatures, would be necessary to finalize their agreement).

² The principles of contract law govern whether a settlement agreement is enforceable. **Wolf v. Consolidated Rail Corp.**, 840 A.2d 1004, 1006 (Pa. Super. 2003). Accordingly, if, as it appears from the record, the Borough demanded that Markovich sign the retraction letter before the tentative May 27 agreement was

B. Due Process

In Count V of his counterclaim, Markovich relies upon §1983 of the United States Code, 42 U.S.C. §1983.³ This section “is not itself a source of substantive rights, but [rather] a method for vindicating federal rights elsewhere conferred.” **Elmore v. Cleary**, 399 F.3d 279, 281 (3d Cir. 2005) (**quoting Baker v. McCollan**, 443 U.S. 137, 145 n.3, 99 S.Ct. 2689, 61 L.Ed. 2d 433 (1979)). “The purpose of §1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.” **Schlichter v. Limerick Tp.**, No. Civ.A.04-CV-4229, 2005 WL 984197 at *3 (E.D. Pa. April 26, 2005) (**citing Wyatt v. Cole**, 504 U.S. 158, 161, 112 S.Ct. 1827, 1830, 118 L.Ed. 2d 504 (1992)).

To establish a valid claim under §1983, a claimant must show: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. **Parratt v. Taylor**, 451 U.S. 527, 535, 101 S.Ct. 1908, 1912, 68 L.Ed. 2d

approved by Council, such demand could be construed as a new offer or counteroffer which was never accepted by Markovich. **See Temple University Hospital, Inc. v. Healthcare Management Alternatives, Inc.**, 764 A.2d 587, 593 (Pa. Super. 2000), **appeal denied**, 566 Pa. 632, 781 A.2d 147 (2001) (a reply to an offer which alters the original terms is a counter-offer, not an acceptance). On the other hand, if an enforceable agreement existed before this demand, subsequent attempts by the Borough to insert additional terms—the execution of a retraction letter to be signed by Markovich and a date for payment contrary to any implied by the agreement—do not constitute a re-opening of negotiations or provide justification to the other party to renounce the compromise. **Cobaugh v. Klick-Lewis, Inc.**, 385 Pa. Super. 587, 590, 561 A.2d 1248, 1249 (1989) (the power to revoke an offer expires upon acceptance).

³ Section 1983 provides in relevant part that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. ...

420 (1981), **overruled on other grounds, Daniels v. Williams**, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed. 2d 662 (1986). Markovich contends that he has been deprived of both property and liberty interests protected under the Fourteenth Amendment without due process of law.⁴

(1) Substantive Due Process

The Fourteenth Amendment to the United States Constitution prohibits state deprivations “of life, liberty, or property, without due process of law.” U.S. Const. Amend. XIV, Section 1. “Application of this prohibition requires a familiar two-stage analysis: we must first ask whether the asserted individual interests are encompassed within the [F]ourteenth [A]mendment’s protection of ‘life, liberty, or property’; if protected interests are implicated, we then must decide what procedures constitute ‘due process of law.’” **Robb v. City of Philadelphia**, 733 F.2d 286, 292 (3d Cir. 1984).

While the literal language of the Due Process Clause appears to implicate only procedural due process—that is, of “constitutionally adequate procedures”—substantive due process is likewise included within its promise of protection against abusive governmental action. **Nicholas v. Pennsylvania State Univ.**, 227 F.3d 133, 139-140 (3d Cir. 2000). “The categories of substance and procedure are distinct.” **Cleveland Bd. of Educ. v. Loudermill**, 470 U.S. 532, 541, 105 S.Ct. 1487, 1493, 84 L.Ed. 2d 494 (1985).

Substantive due process bars “certain government actions regardless of the fairness of the procedures used to implement them.” **County of Sacramento v. Lewis**, 523 U.S. 833, 840, 118 S.Ct. 1708, 1713, 140 L.Ed. 2d 1043 (1998) (internal citations omitted). Government conduct that “comports with procedural due process may still give rise to a substantive due process claim ‘upon allegations that the government deliberately

⁴ Markovich concedes and we agree that he has no claim under the Fourth or Fifth Amendments to the United States Constitution. Markovich has failed to present any evidence which shows he was the subject of an illegal search or seizure. **Wolfson v. Arkansas**, 514 U.S. 927, 115 S.Ct. 1914, 131 L.Ed. 2d 976 (1995). As to the Fifth Amendment, the due process clause contained therein applies only when federal action is at issue. **Garcia v. County of Bucks**, 155 F. Supp.2d 259, 265 (E.D. Pa. 2001) (*citing* **Bartkus v. Illinois**, 359 U.S. 121, 158-159, 79 S.Ct. 676, 3 L.Ed. 2d 684 (1959) (holding that the Fifth Amendment does not apply to state action)).

and arbitrarily abused its power'...." **Independent Enters. Inc. v. Pittsburgh Water & Sewer Auth.**, 103 F.3d 1165, 1179 (3d Cir. 1997) (**quoting Midnight Sessions, Ltd. v. City of Philadelphia**, 945 F.2d 667, 683 (3d Cir. 1991)).

Substantive due process examines the justification for government action and, in doing so, imposes limits on government's power to regulate; "a property interest that falls within the ambit of substantive due process may not be taken away by the state for reasons that are 'arbitrary, irrational, or tainted by improper motive,' or by means of government conduct so egregious that it 'shocks the conscience.'" **Nicholas v. Pennsylvania State Univ.**, 227 F.3d at 139 (internal citations omitted); **see also, Ersek v. Tp. of Springfield**, 102 F.3d 79, 83 n.4 (3d Cir. 1996) ("To support a claim of a substantive due process violation, a plaintiff must show irrational government action or government action that is motivated by bias, some improper purpose, or bad faith."). The measure of justification is circumscribed further by the level of judicial scrutiny used (**i.e.**, rational basis, intermediate scrutiny or strict scrutiny), a question of law.

"The first step in analyzing a due process claim is to determine whether the asserted individual interest ... [is] encompassed within the [F]ourteenth [A]mendment's protection of life, liberty, or property." **Elmore v. Cleary, supra** at 282 (internal citations and quotations omitted). Consequently, notwithstanding Markovich's claim that he was fired for an arbitrary, irrational or improper reason, the threshold question in determining whether this firing violated the substantive component of the Fourteenth Amendment's Due Process Clause is whether he possessed a constitutionally protected property or liberty interest in his employment. **Nicholas v. Pennsylvania State Univ., supra** at 139-140.

While a variety of interests are encompassed within the meaning of the terms "liberty" or "property" as used in the Due Process Clause, and are therefore entitled to constitutional protection—including state created property interests—"not all property interests worthy of procedural due process protection are protected by the concept of substantive due process." **Id.** at 140 (internal citations and quotations omitted); **see also, Paul v. Davis**, 424 U.S. 693, 710-711 n.5 and 722 n.10, 96 S.Ct. 1155, 1165 n.5 and 1170 n.10, 47 L.Ed. 2d 405 (1976).

Moreover, “[t]he Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.” **Bishop v. Wood**, 426 U.S. 341, 350, 96 S.Ct. 2074, 2080, 48 L.Ed. 2d 684 (1976). The substantive component of the Fourteenth Amendment applies only to **fundamental** property interests. **Nicholas v. Pennsylvania State Univ.**, 227 F.3d at 140-141. To meet this requirement and, therefore, to state a substantive due process claim, “a plaintiff must have been deprived of a **particular quality** of property interest.” **Id.** at 140 (internal citations and quotations omitted).

“While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, substantive due process rights are created only by the Constitution.” **Id.** at 140 (**quoting Regents of Univ. of Michigan v. Ewing**, 474 U.S. 214, 229-30, 106 S.Ct. 507, 515, 88 L.Ed. 2d 523 (1985) (Powell, J., concurring)). “Substantive due process refers to and protects federal rights.” **Id.** at 141 (**quoting Ransom v. Marrazzo**, 848 F.2d 398, 411 (3d Cir. 1988)). Therefore, “whether a certain property interest embodies this ‘particular quality’ is not determined by reference to state law, but rather depends on whether that interest is ‘fundamental’ under the United States Constitution.” **Id.** at 140 (internal citations and quotations omitted). If the interest is found to be constitutionally fundamental, then “substantive due process protects the plaintiff from arbitrary or irrational deprivation, regardless of the adequacy of procedures used.” **Id.** at 142.

At issue in **Nicholas** was whether tenured public employment is a fundamental property interest entitled to substantive due process protection. Finding it was not, the court stated that tenure is in essence a wholly state-created contract right bearing “little resemblance to other rights and property interests that have been deemed fundamental under the Constitution.” **Id.** at 143. Unlike cases involving zoning decisions, building permits, or other governmental permission required for some intended use of land, in which the **fundamental** property interest in the ownership of land has been traditionally afforded non-legislative substantive due process review, **id.** at 141, tenured public employment is not among those interests similarly tied to “respect for the teachings of history, solid recognition of the

basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.” **Id.** at 140 (quoting **Regents of Univ. of Michigan v. Ewing**, 474 U.S. at 229-30 (Powell, J., concurring)); see also, **Kahn v. State Bd. of Auctioneer Exam’rs**, 577 Pa. 166, 842 A.2d 936 (2004) (state licensed auctioneers do not have a fundamental interest in their employment worthy of substantive due process protection).

The property interest Markovich claims in his position as chief of police—the right as a civil service employee not to be terminated except for just cause—is a matter of legislative grace. This protection against summary dismissal is at odds with the common-law principle of at-will employment and **Lochner’s** espousal of freedom of contract as a fundamental right; the consequent creation of a qualified form of job security does not represent a property interest deeply rooted in the nation’s history and traditions and is not considered fundamental to American society. **Lochner v. New York**, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905); **Homar v. Gilbert**, 63 F. Supp.2d 559, 576 (M.D. Pa. 1999). “Nor does public employment approach the interests ‘implicit in the concept of ordered liberty like personal choice in matters of marriage and family.’” **Nicholas v. Pennsylvania State Univ.**, *supra* at 143 (internal citations omitted); see also, **Brobson v. Borough of New Hope**, No. Civ.A.00-0003, 2000 WL 1738669 at *4 (E.D. Pa. Nov. 22, 2000) (“Plaintiff does not have a fundamental interest worthy of substantive due process protection in his employment capacity as the chief of police.”). As such, Markovich’s civil service claim is not one protected by the substantive component of the Fourteenth Amendment.

(2) Procedural Due Process

Markovich’s claim that his right to procedural due process has been violated is more complicated. Under this claim, Markovich argues that his right to a meaningful pre-termination hearing under **Loudermill** was violated and that he was deprived of the liberty interest inherent in one’s good name when his reputation was attacked first with the filing of unfounded charges intended to malign and denigrate, and later with the publication of the retraction letter.

In analyzing a procedural due process claim, three questions must be asked:

- (1) has there been a deprivation;
- (2) of life, liberty, or property; and
- (3) without due process of law?

“The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property.” **Board of Regents v. Roth**, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed. 2d 548 (1972). As a threshold matter, entitlement to procedural due process requires a finding that the interest affected is within the Fourteenth Amendment’s protection of liberty or property. **Id.** at 571.

(a) Property interest in employment—pre-termination process (*Loudermill*)

That Markovich was fired and thereby deprived of his job is not in dispute. Nor do the parties dispute that Markovich possessed a property right in his continued employment of which he could not be deprived without due process. **Gilbert v. Homar**, 520 U.S. 924, 928-29, 117 S.Ct. 1807, 1811, 138 L.Ed. 2d 120 (1997) (“public employees who can be discharged only for cause have a constitutionally protected property interest in their tenure and cannot be fired without due process ...”).⁵ As a public employee with Civil Service status, Markovich was pro-

⁵ For our purposes, property interests attended by procedural due process are not created by the Constitution, “they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” **Board of Regents v. Roth**, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed. 2d 548 (1972). Notwithstanding that this “underlying substantive interest is created by ‘an independent source such as state law,’ **federal constitutional law** determines whether that interest rises to the level of a ‘legitimate claim of entitlement’ protected by the Due Process Clause.” **Memphis Light, Gas & Water Division v. Craft**, 436 U.S. 1, 9, 98 S.Ct. 1554, 1560, 56 L.Ed. 2d 30 (1978) (emphasis added) (**quoting Roth, supra** at 577). The “types of interests protected as ‘property’ are varied and, as often as not, intangible, ‘relating to the whole domain of social and economic fact.’” **Logan v. Zimmerman Brush Co.**, 455 U.S. 422, 430, 102 S.Ct. 1148, 1155, 71 L.Ed. 2d 265 (1982) (**quoting National Mut. Ins. Co. v. Tidewater Transfer Co.**, 337 U.S. 582, 646, 69 S.Ct. 1173, 1209, 93 L.Ed. 1556 (1949) (Frankfurter, J., dissenting)). Whether there is a protected interest sufficient to trigger constitutional protection is an issue of law. **Clark v. Tp. of Falls**, 890 F.2d 611, 617 (3d Cir. 1989).

tected from discharge, except for cause. The real question in dispute is whether Markovich was deprived of this right without due process.

In order to comport with procedural due process, the mechanism of adjudication must be fundamentally fair: at a minimum, notice and an opportunity to be heard appropriate to the nature of the case must be provided. **Cleveland Bd. of Educ. v. Loudermill, supra** at 542. “Once it is determined that due process applies, the question remains what process is due.” **Morrissey v. Brewer**, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed. 2d 484 (1972). Procedural due process is a flexible concept “and calls for such procedural protections as the particular situation demands.” **Gilbert v. Homar, supra** at 930 (**quoting Morrissey, supra** at 481). Therefore, the nature of the notice and hearing required will vary depending upon the competing interests at stake. **Mathews v. Eldridge**, 424 U.S. 319, 334-335, 96 S.Ct. 893, 902-903, 47 L.Ed. 2d 18 (1976) (setting forth a three-part balancing test for determining the requirements of due process in different contexts); **see also, Reynolds v. Wagner**, 128 F.3d 166, 179 (3d Cir. 1997) (“The procedural protections required by the Due Process Clause are determined with reference to the particular rights and interests at stake in the case.”).

In **Loudermill**, the court concluded that a public Civil Service employee is entitled to a very limited informal hearing prior to termination and then a subsequent, more comprehensive, post-termination hearing. The exact language of **Loudermill** is instructive:

The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. **See** Friendly, “Some Kind of Hearing,” 123 U.Pa.L.Rev. 1267, 1281 (1975). The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer’s evidence, and an opportunity to present his side of the story. **See Arnett v. Kennedy**, 416 U.S., at 170-171, 94 S. Ct., at 1652-1653 (opinion of POWELL, J.); **id.**, at 195-196, 94 S. Ct., at

1664-1665 (opinion of WHITE, J.); **see also, Goss v. Lopez**, 419 U.S., at 581, 95 S. Ct., at 740.

Cleveland Bd. of Educ. v. Loudermill, *supra* at 546. Under **Loudermill**, the pre-termination hearing need only include oral or written notice of the charges, an explanation of the employer's evidence and an opportunity for the employee to tell his side of the story. **Id.** at 546; **Gilbert v. Homar**, *supra* at 929.

Prior to the commencement of the Civil Service proceedings, on July 16, 1998, Mayor Caffrey notified Markovich that the Borough was conducting an investigation of several incidents that allegedly occurred during his tenure as police chief and that pending the results of this investigation he was suspended without pay. By letter dated July 21, 1998, the Mayor amended Markovich's status to that of suspension "with pay" until an investigation could be made to assess Markovich's conduct and potential disciplinary action.

On October 8, 1998, the Mayor wrote Markovich that the Borough had concluded its investigation and that disciplinary action, including possible discharge, was being considered with respect to the following:

- 1) 'Your material misstatements to Council regarding the purposes of the FBI's investigation of citizens' complaints at the Lansford housing project';
- 2) 'Your conduct during the arrest, transport and arraignment of William "Tiny" Kinney';
- 3) 'Your documentation and storage of evidence and other materials in the police department safe'; and
- 4) 'Your failure to properly investigate allegations that Joe Fittos, while off duty, used a firearm against his wife during a domestic dispute.'

The notice further advised that if Markovich had any information relevant to whether he should be disciplined, this should be provided to the Mayor within four days.

By letter dated October 12, 1998, Markovich's counsel responded that the Mayor's letter did not give adequate notice of the charges and failed to provide an explanation of the Borough's evidence sufficient to meet the requirements of due process as required by **Loudermill**. Additionally, Markovich's counsel's letter denied any misconduct by Markovich.

On October 19, 1998, the Mayor advised Markovich that, pursuant to his authority under Section 1124 of the Borough Code, 53 P.S. Section 46124, he was suspending him immediately without pay and was recommending to Borough Council that Markovich's employment as a police officer with the Borough be terminated. This letter further stated that the Mayor was requesting that the subject of Markovich's employment with the Borough be acted upon by the Borough Council at its meeting scheduled for November 2, 1998. At that meeting, as previously noted, Markovich's employment with the Borough was terminated.

By letter dated November 3, 1998, the President of Borough Council advised Markovich of Council's action. The letter identified the charges in the language of the statute, 53 P.S. Section 46190(2) and (4) (**i.e.**, neglect and/or violation of official duty and inefficiency, neglect, intemperance, immorality, disobedience of orders, and conduct unbecoming an officer); the factual basis for the charges was described in the same language used in the Mayor's letter of October 8, 1998.

Markovich contends that the October 8, 1998 letter from Mayor Caffrey did not provide adequate notice of the charges or an explanation of the Borough's evidence sufficient to provide him with a meaningful opportunity to deny and explain his version of what occurred. **Cf. Fuentes v. Shevin**, 407 U.S. 67, 81, 92 S.Ct. 1983, 1994, 32 L.Ed. 2d 556 (1972) ("[W]hen a person has an opportunity to speak up in his own defense, and **when the State must listen to what he has to say**, substantively unfair and simply mistaken deprivations of property interests can be prevented.") (emphasis added). As argued by Markovich, while this letter identified topically generic conduct or incidents in which Markovich was involved, it did not contain any specificity or description of the particular acts for which he was being faulted. The letter did not state what misstatements were made by him regarding complaints at the Lansford Housing Project, did not state how his conduct in dealing with a suspect was improper, did not identify in what manner his documentation and storage of evidence and other material was improper, and did not describe in what manner his investigation of a fellow police officer was deficient. Although the generality of this notice is arguably violative of **Loudermill's**

requirement that a tenured public employee against whom disciplinary action is to be taken be provided an explanation in advance of the employer's evidence,⁶ we believe the statute of limitations bars this claim.

In Pennsylvania, the two-year statute of limitations imposed on personal injury actions pursuant to 42 Pa. C.S.A. §5524(7) results in the same limitations period for Section 1983 suits. **See Owens v. Okure**, 488 U.S. 235, 249-50, 109 S.Ct. 573, 582, 102 L.Ed. 2d 594 (1989) (holding that claims brought under §1983 are subject to the forum state's statute of limitations governing personal injury actions); **Sameric Corp. of Del., Inc. v. City of Philadelphia**, 142 F.3d 582, 599 (3d Cir. 1998) (explaining federal rule requiring application to Section 1983 of Pennsylvania's two-year statute of limitations for personal injury claims).

However, while the statute of limitations period for §1983 suits is borrowed from the law of the forum state, federal law governs the accrual of such an action. **Rivera-Muriente v. Agosto-Alicea**, 959 F.2d 349, 353 (1st Cir. 1992). Under federal law, a Section 1983 cause of action begins to accrue when the plaintiff knows, or has reason to know, of the injury on which the action is based. **Montgomery v. De Simone, PTL.**, 159 F.3d 120, 126 (3d Cir. 1998) (“[T]he limitations period begins to run from the time when the plaintiff knows or has reason to know of the injury which is the basis of the Section 1983 action.”) (**quoting Genty v. Resolution Trust Corp.**, 937 F.2d 899, 919 (3d Cir. 1991)); **Rivera-Muriente, supra** at 353.

As is evident from Markovich's counsel's letter dated October 12, 1998, Markovich knew, or at a minimum had reason to know, that he was being deprived of his pre-termination rights under **Loudermill** as of this date. To the extent Markovich in Count V of his counterclaim challenges the process leading to his termination which culminated on November 2, 1998, the filing of this claim on April 3, 2001, is beyond the applicable statute of limitations.

⁶ **See Homar v. Gilbert**, 63 F. Supp.2d 559, 570 n.12 (M.D. Pa. 1999) (by failing to divulge the substance of damaging evidence and revealing only that the state police had provided evidence “very serious in nature,” the employer did not provide the employee with a meaningful opportunity to respond to the employer’s charges).

Nor are we persuaded by Markovich's argument that the entire process by which he was suspended and terminated, and then afforded hearings without decision, reaching a putative agreement to which additional conditions were later imposed, and which was never consummated, violated his procedural due process rights and constituted a continuing violation so as to bring his claim for procedural due process within the statute of limitations. Rather than finding that the various conduct of which Markovich complains coalesces into one continuing violation, we believe each separate and discrete act must be analyzed independently for statute of limitations purposes as a possible due process violation. **See Cleveland Bd. of Educ. v. Loudermill, supra** at 547 n.12. ("[T]he allegation of a distinct due process violation in the administrative delay is not an alternative theory supporting the same relief, but a separate claim altogether."); **cf. National R.R. Passenger Corp. v. Morgan**, 536 U.S. 101, 105, 122 S.Ct. 2061, 2068, 153 L.Ed. 2d 106 (2002) (holding that recovery for separate and discrete acts of employment 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).

Although an unreasonably delayed post-termination hearing may, under certain circumstances, constitute a distinct due process violation, this is not evident from the current record.⁷ In this case, after the Civil Service hearings began they were continued, but never concluded, when it appeared the parties had reached a settlement. Neither party has argued that the hearings were untimely when begun or were conducted in a manner so as to deprive Markovich of his due process rights. Nor has either party argued that a continuation or a reinstatement of the hearings would be impractical or prejudicial. Under these circumstances, should it ultimately be determined that

⁷ Whether Markovich was provided an adequately prompt post-termination hearing is a specific question that has not been explicitly alleged in Count V of the counterclaim but appears to be subsumed in Markovich's general allegations that his right to procedural due process was violated. **See Homar v. Gilbert**, 63 F. Supp.2d at 570 n.12; **see also, Barry v. Barchi**, 443 U.S. 55, 66, 99 S.Ct. 2642, 2650, 61 L.Ed. 2d 365 (1979) (finding a right to a prompt post-suspension hearing, even if there is no right to a pre-suspension opportunity to be heard); **FDIC v. Mallen**, 486 U.S. 230, 242, 108 S.Ct. 1780, 1788-1789, 100 L.Ed. 2d 265 (1988) (discussing the balancing required when deciding how long a delay is constitutionally justified).

Markovich has not settled and is not estopped from resuming his Civil Service appeal, a continuation, or reinstatement, of the Civil Service hearings may be required. Because the parties have not briefed or argued this point we will defer any further ruling.

(b) Procedural due process—liberty interest in reputation

Turning next to Markovich's claim alleging a violation of his Fourteenth Amendment due process liberty interest in reputation, we consider first the nature of the claim. In describing the nature of the liberty interest protected by the Fourteenth Amendment, the Third Circuit has stated:

The liberty interests protected by procedural due process are broad in scope. **See e.g., Stanley v. Illinois**, 405 U.S. 645, 647-49, 92 S. Ct. 1208, 1210-11, 31 L. Ed. 2d 551 (1972); **Bolling v. Sharpe**, 347 U.S. 497, 499-500, 74 S. Ct. 693, 694, 98 L. Ed. 2d 884 (1954). '[Liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized ... as essential to the orderly pursuit of happiness by free men.' **Meyer v. Nebraska**, 262 U.S. 390, 399, 43 S. Ct. 625, 626, 67 L. Ed. 2d 1042 (1923). An employment action implicates a [F]ourteenth [A]mendment liberty interest only if it (1) is based on a 'charge against [the individual] that might seriously damage his standing and associations in the community ..., for example, that he has been guilty of dishonesty, or immorality' or (2) 'impose[s] on him a stigma or other disability that forecloses his freedom to take advantage of other employment opportunities.' **Roth**, 408 U.S. at 573, 92 S. Ct. at 2707. Stigma to reputation alone, absent some accompanying deprivation of present or future employment, is not a liberty interest protected by the [F]ourteenth [A]mendment. **Id.** at 574, 92 S. Ct. at 2707; **Paul v. Davis**, 424 U.S. 693, 701-06, 96 S. Ct. 1155, 1160-63, 47 L. Ed. 2d 405 (1976).

Robb v. City of Philadelphia, supra at 293-294.

Under **Paul v. Davis** an individual's personal interest in his good name—in his reputation alone—is “neither ‘liberty’ nor ‘property’ guaranteed against state deprivation without due process of law.” **Id.** at 711-712. To be constitutionally protected, the injury to reputation must be coupled with or accompanied by the deprivation of “some more tangible” government benefit. **Id.** at 701. Therefore, in addition to a stigma to his reputation, a plaintiff must show some concomitant infringement of a right or status as previously held or recognized under state or federal law. **Id.** at 711-712. “Defamation, by itself, is a tort actionable under the laws of most States, but not a constitutional deprivation.” **Siegert v. Gilley**, 500 U.S. 226, 233, 111 S.Ct. 1789, 1794, 114 L.Ed. 2d 277 (1991). It is enough, however, if the injury to reputation causes the “loss of government employment.” **Paul v. Davis, supra** at 706.

In an employment situation, to be actionable under 42 U.S.C. §1983, the following elements must be proven:

- (1) statements which impugn the good name, reputation, honor, or integrity of the employee, **Wisconsin v. Constantineau**, 400 U.S. 433, 437, 91 S. Ct. 507, 510, 27 L. Ed. 2d 515 (1971);
- (2) the statements must be ‘substantially and materially’ false, **Ersek v. Tp. of Springfield**, 102 F.3d at 83-84;
- (3) the statements must be of a type that might ‘seriously damage [the employee’s] standing and associations in his community’ or which ‘impose[] a stigma or other disability [on the employee] that foreclose[s] his freedom to take advantage of other employment opportunities,’ **Board of Regents v. Roth**, 408 U.S. at 573;
- (4) the statements must be published or otherwise disseminated by the government employer to the public, **Chabal v. Reagan**, 841 F.2d 1216, 1223 (3d Cir. 1988); and
- (5) the resulting stigma to reputation, to work a deprivation, must be accompanied by ‘some concomitant infringement of a protected right or interest,’ the ‘plus’ element of what has been termed the ‘stigma plus’ or ‘reputation plus’ requirement, **Ersek v. Tp. of Springfield**, 102 F.3d at 83 n.5.^[8]

⁸ As here, the “plus” is generally termination of employment. It is, however, unclear whether something less than a property interest, independently protected by the Due Process Clause, satisfies this “plus” requirement. **Ersek v. Tp. of Springfield**, 102 F.3d 73, 83 n.5 (3d Cir. 1996).

These elements are not disjunctive, all must be satisfied to demonstrate deprivation of the liberty interest. **See also, Sandoval v. City of Boulder**, 388 F.3d 1312, 1329 (10th Cir. 2004) (citation omitted). There is no requirement that the statements be made maliciously. **Siegert v. Gilley, supra** at 234.⁹

“A government employee’s liberty interest is implicated when he has been terminated and the government has made ‘a charge against him that might seriously damage his standing and associations in the community’ or ‘imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.’” **Freeman v. McKellar**, 795 F. Supp. 733, 737 (E.D. Pa. 1992) (**quoting Board of Regents v. Roth, supra** at 573). In accordance with the foregoing,

[w]here one is defamed or stigmatized in the course of his dismissal from public employment, however, he does have a cognizable liberty interest. **See Codd v. Velger**, 429 U.S. 624, 628, 97 S. Ct. 882, 51 L. Ed. 2d 92 (1977); **Paul**, 424 U.S. at 709, 96 S. Ct. 1155; **Board of Regents of State Colleges v. Roth**, 408 U.S. 564, 573, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); **Brennan v. Hendrigan**, 888 F.2d 189, 196 (1st Cir.1989); **Doe v. Department of Justice**, 753 F.2d 1092, 1111 (D.C.Cir.1985). That interest, however, is not accorded substantive due process protection. **See In re Selcraig**, 705 F.2d 789, 796-97 (5th Cir.1983). Rather, the right accorded is that of procedural due process, specifically the right to an opportunity to refute the charges and clear one’s name. **See Codd**, 429 U.S. at 627, 97 S. Ct. 882; **Paul**, 424 U.S. at 710, 96 S. Ct. 1155; **Roth**, 408 U.S. at 573, 92 S. Ct. 2701; **Brennan**, 888 F.2d at 196; **Doe**, 753 F.2d at 1102-03.

⁹ Additionally, and not in dispute here, to make out a claim under Section 1983, the plaintiff must demonstrate that the conduct of which he is complaining has been committed under color of state or territorial law. To recover against a municipality, the plaintiff must demonstrate that he was injured by the “execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.” **Monell v. Dept. of Soc. Servs. of City of New York**, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037-38, 56 L.Ed. 2d 611 (1978). Nor is it a defense that the retraction letter was prepared, read publicly and circulated to the press by the Borough’s counsel rather than by a member of Council. **See Poteat v. Harrisburg Sch. Dist.**, 33 F. Supp.2d 384, 392 (M.D. Pa. 1999); **Owens v. City of Independence**, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed. 2d 673 (1980).

Thus, a federal constitutional claim arises not from the defamatory or stigmatization conduct *per se* but from the denial of a name-clearing hearing. **Selcraig**, 705 F.2d at 797 & n. 10. It follows that to sustain a §1983 stigmatization claim, an aggrieved employee must allege and prove that he timely requested a name-clearing hearing and that the request was denied. See **Howze v. City of Austin**, 917 F.2d 208 (5th Cir.1990); **Rosenstein**, 876 F.2d at 396.

Puchalski v. Sch. Dist. of Springfield, 161 F. Supp.2d 395 406-407 (E.D. Pa. 2001); see also, **Schlichter v. Limerick Tp.**, 2005 WL 984197 at *8.

Entitlement to a name-clearing hearing requires injury to reputation that “occur[ed] in the course of or [was] accompanied by a change or extinguishment of a right or status guaranteed by state law or the Constitution.” **Clark v. Tp. of Falls**, 890 F.2d 611, 619 (3d Cir. 1989). It is “the alteration of legal status, combined with the injury resulting from the defamation, which justifie[s] the invocation of procedural safeguards.” **Id.** Where due process has been denied, “the principal relief to which an individual is entitled ... is a hearing to clear his name.” **Ersek v. Tp. of Springfield**, *supra* at 84.

The purpose of the name-clearing hearing is to provide the employee with an opportunity to challenge the disputed accusations with the objective of clearing his name and reputation, not to contest the termination decision. **Codd v. Velger**, 429 U.S. 624, 627-28, 97 S.Ct. 882, 884, 51 L.Ed. 2d 92 (1977) (per curiam) (“[T]he hearing required where a non-tenured employee has been stigmatized in the course of a decision to terminate his employment is solely ‘to provide the person an opportunity to clear his name.’” ... “[T]he contemplated hearing does not embrace any determination analogous to the ‘second step’ of the parole revocation proceeding, which would in effect be a determination of whether or not, conceding that the report was true, the employee was properly refused re-employment.”); see also, **Wisconsin v. Constantineau**, *supra* at 437 (“Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented.”).

Markovich alleges an “impairment of his liberty interests in not having his good name and reputation besmirched.” (Coun-

terclaim, ¶104) Factually, Markovich contends that the Borough accused him publicly in its charges and during the Civil Service proceedings of making false, malicious and misleading statements in the performance of his job as police chief. The charges alleged that Markovich had made material misstatements, improperly dealt with a suspect, improperly handled evidence, and failed to properly investigate. Markovich contends that these charges were of a type to “seriously damage his standing and associations in his community,” and have done so. **Board of Regents v. Roth, supra** at 573. Markovich also asserts that, in addition to losing his job with the Borough, he has been unable to obtain future employment in law enforcement.¹⁰

¹⁰ As to this aspect of Markovich’s claim, we agree with the Borough that Markovich has not established “the kind of foreclosure of opportunities amounting to a deprivation of ‘liberty.’” **Board of Regents v. Roth, supra** at 574 n.13. In depositions, Markovich identified two positions in law enforcement, with the same prospective employer, which he applied for and was denied consideration because of the Borough’s charges against him. He also identified a second employer to whom he applied but received no response (Markovich Deposition, pp. 15-22).

Prior to the United States Supreme Court’s decision in **Sieger v. Gilley**, 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed. 2d 277 (1991), proof that an employee, who had been fired, had applied for, and been rejected from, jobs for which he was qualified because of defamatory statements of the government appeared to meet the “stigma plus” requirement of **Paul v. Davis** when foreclosure of employment opportunities was at issue.

In **Paul**, the Court determined that an individual is deprived of a protected liberty interest “where government action has operated to bestow a badge of disloyalty or infamy, with an attendant foreclosure from other employment opportunity.” **Paul**, 424 U.S. at 705, 96 S.Ct. 1155 (quoting **Cafeteria Workers v. McElroy**, 367 U.S. 886, 898, 81 S.Ct. 1743, 6 L. Ed. 2d 1230 (1961)) (emphasis supplied by **Paul** Court). Similarly, in **Board of Regents v. Roth**, 408 U.S. 564, 92 S.Ct. 2701, 33 L. Ed. 2d 548 (1972), the Court held that a liberty interest would be deprived where ‘the State ... imposed on [the plaintiff] a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.’ **Id.** at 573, 92 S.Ct. 2701 (emphasis added).

Stidham v. Peace Officer Standards and Training, 265 F.3d 1144, 1153-54 (10th Cir. 2001).

However, in **Sieger**, an employee, who resigned his federal service position under threat of termination, was subsequently terminated from one government position and turned down at another because of an allegedly defamatory letter of reference sent by his former supervisor to his prospective employers. As a further consequence of the letter, the employee suffered a general inability to find comparable work with the federal government in his field. The Court held that the employee had not stated a viable claim for the violation of a protected liberty interest. **Id.** at 233-34.

Finally, Markovich vehemently denies any wrongdoing and claims that the charges were trumped up by the Mayor, who himself was the focus of a criminal investigation by Markovich, to pre-empt the filing of criminal charges against him.¹¹

In this case, the four grounds that form the basis for Markovich's "for cause" termination question his character, honesty and professional competence and integrity, all of which are of a kind which would necessarily impair employment prospects for one seeking work as a police officer. If accepted by the fact-finder, these facts are sufficient to establish an infringement of Markovich's liberty interest. **McMath v. City of Gary**, 976 F.2d 1026, 1031 (7th Cir. 1992) ("when the government terminates a public employee and makes false or substantially inaccurate public charges or statements that stigmatize the employee, that employee's liberty interest is implicated"); **see also, Maier v. Maretti**, 448 Pa. Super. 276, 282, 671 A.2d 701,

Implicit in **Sieger**, is a narrow reading of what constitutes a "foreclosure from other employment opportunities." Although the employee need not prove that the statements categorically barred him from any employment, public or private, it may be necessary for the employee to prove that the government's statements or conduct did in fact shut him out of obtaining public employment of a certain type or pursuing a career in a certain field. **See Board of Regents v. Roth, supra** at 573-74. While the exact confines of the holding in **Sieger** are unclear, what is clear is that one or two instances of being denied future employment opportunities, even if attributable to defamatory statements of government officials, is insufficient to prove a claim for the violation of a constitutionally protected liberty interest caused by the foreclosure of employment opportunities.

¹¹ Between the years of 1995 and 1998, Markovich began an investigation involving Summit Hill Borough Mayor, Richard Caffrey. Markovich claims that Caffrey came to him with a fantastic and bizarre story of being stalked and harassed by an unknown individual who operated under the alias "Stealth." Markovich explains that Caffrey sought his help in ending Stealth's harassment. This harassment included, in part, such acts as breaking into Caffrey's home, kidnapping Caffrey, sending threatening e-mails, mailing Caffrey various sex toys and making allegations that Caffrey had engaged in felonious activities. Markovich's investigation soon became wrought with suspicion and eventually he concluded that it was Caffrey himself who was the ominous Stealth.

Markovich contends that soon after confronting Caffrey with the results of his investigation, and informing him of his intent to give his evidence to the State Police in order to pursue possible criminal charges against Caffrey, Caffrey sent him the letter of July 16, 1998, suspending him without pay for "actions which are serious in nature and constitute conduct unbecoming of a police officer." At that time, no further explanation of Markovich's misconduct was made, one inference being that Caffrey acted with malice and vindictiveness intending to intimidate and silence Markovich.

704 (1995), **appeal denied**, 548 Pa. 631, 694 A.2d 622 (1997).¹² (“A communication is also defamatory if it ascribes to another conduct, character or a condition that would adversely affect his fitness for the proper conduct of his proper business, trade or profession.”).

Although it might well be that the Civil Service proceedings, which Markovich began when he challenged his discharge, met the constitutional standard for a name-clearing hearing, these proceedings never concluded. Compare **Graham v. City of Philadelphia**, 402 F.3d 139 (3d Cir. 2005) (holding that a criminal trial which provided a terminated employee with ample opportunity to prove his innocence satisfied the city’s due process obligations and obviated any need for a name-clearing hear-

¹² Likewise, the content and circumstances surrounding the publication of the retraction letter draw into question Markovich’s good name, reputation, honor and integrity. In this letter, Markovich was asked to formally acknowledge that he had perjured himself before the Civil Service Commission and that his claimed basis for defending himself against the charges filed was frivolous. The cumulative effect of the charges and the requested retraction letter, read openly at a public meeting of Council, goes far beyond the normal publicity attending the filing of charges alone; Markovich asserts a concerted effort by the Borough officials to degrade and humiliate him without benefit of hearing.

In **Paul v. Davis**, the Supreme Court stated clearly that defamation by a public official, of itself, is insufficient “to invoke the guarantee of procedural due process absent an accompanying loss of government employment.” **Id.** at 706. Where, however, the defamation occurred in the course of, or in connection with, the termination of employment, the elements of stigma plus the deprivation of a right previously held under state law are met. **Id.** at 708-710. “A public employee who has been dismissed has a cognizable liberty interest under §1983 when the dismissal is based upon charges which stigmatize the employee and ‘the employer creates and disseminates a defamatory impression about the employee in connection with the termination.’” **Freeman v. McKellar**, 795 F. Supp. 733, 738 (E.D. Pa. 1992) (**quoting Codd v. Velger**, 429 U.S. 624, 628, 97 S.Ct. 882, 884, 51 L.Ed. 2d 92 (1978) (per curiam)).

The nexus between publication and termination need not be concurrent although the publication must occur in the context of termination. **Siegert v. Gilley, supra** at 233. Here, even though the request for the retraction letter occurred after Markovich was terminated on November 2, 1998, it was requested publicly, outside of the Civil Service proceedings, as a term the Borough was then seeking to make part of the agreement settling Markovich’s Civil Service appeal. Under these circumstances, the retraction letter was arguably demanded not only in the context of termination proceedings but, alternatively, in the context of depriving Markovich of his contractual rights which had already accrued under the settlement agreement ostensibly reached before the Civil Service Commission.

ing).¹³ This result which Markovich could not have predicted prior to the two-year period immediately preceding the filing of his counterclaim is what keeps this claim alive: if nothing else, viewing the facts in the light most favorable to Markovich, Markovich has set forth a colorable claim to being provided a full and complete name-clearing hearing, an event which has yet to occur.

CONCLUSION

In accordance with the foregoing, it is important to understand what we have not decided. First, Markovich has not filed a motion for summary judgment on the Borough's claim to enforce the settlement agreement purportedly reached between him and the Borough, and no finding has been made as to whether the Borough ever formally approved this putative agreement and, if so, when. We have decided only that because the record is silent as to such approval, it would be improper to find that the release provisions of any such agreement forecloses Markovich's counterclaim.

Although finding that Markovich's claims alleging a violation of his Fourteenth Amendment due process liberty interest in reputation will survive summary judgment, we have not determined what remedy exists for such violations, if proven. Assuming for the moment that no settlement agreement was reached with the Borough, it is unclear whether Markovich would be entitled to any damages in addition to, or in lieu of, a name-clearing hearing. **Ersek v. Tp. of Springfield, supra** at 84 n.6; cf. **Graham v. City of Philadelphia, supra** at 145-46 (noting that the Third Circuit has never detailed the procedures,

¹³ Frequently the hearing which occurs when an employee's termination is challenged provides simultaneously an opportunity for the terminated employee to clear his name. As stated in **Doe v. United States Dept. of Justice:**

Government employees who enjoy an independent property interest in continued employment, of course, must be afforded due process upon termination regardless of whether they are discharged in connection with stigmatizing allegations. That process will ordinarily afford those employees an opportunity to refute stigmatizing allegations. The liberty clause, by contrast, protects reputation, not job tenure, in the government employment context.

Id., 753 F.2d 1092, 1108 n.15 (D.C. Cir. 1985); also quoted in **Graham v. Johnson**, 249 F. Supp.2d 563, 567-568 (E.D. Pa. 2003).

burdens and standards of proof applicable in a name-clearing hearing).

Finally, although we have determined that any alleged violation of procedural due process predicated on **Loudermill** is time-barred, and that Markovich has failed to establish a fundamental property interest in his employment protected by substantive due process, we have not precluded Markovich from pursuing a claim that the administrative delay in adjudicating his post-termination appeal may have deprived him of procedural due process. For these reasons, we denied the Borough's motion for summary judgment.¹⁴

¹⁴ Markovich also alleges violation of the "due process guarantees" of the Pennsylvania Constitution (Counterclaim, ¶98). Other than this general averment, Markovich has not identified what provision of the Pennsylvania Constitution he relies upon^a or presented any **Edmunds**' analysis.^b Without either, and without the Borough having moved to foreclose Markovich's claim(s) under the Pennsylvania Constitution, we are not in a position to rule on the merits of this claim.

Having said this, and intending to focus further discussion of this issue, we note that while reputation, standing alone, is insufficient under **Paul v. Davis** to invoke the procedural protection of the Fourteenth Amendment's Due Process Clause, the same is not true under the Pennsylvania Constitution. **Pennsylvania Bar Association v. Commonwealth**, 147 Pa. Commw. 351, 362, 607 A.2d 850, 856 (1992) (holding that as a fundamental right under the Pennsylvania Constitution, an abridgment of reputation alone, even in the absence of a more "tangible" right, must be accompanied by the state constitutional safeguards of due process and equal protection).

"[I]n Pennsylvania, reputation is an interest that is recognized and protected by our highest state law: our Constitution. Sections 1 and 11 of Article I make explicit reference to 'reputation,' providing the basis for this Court to regard it as a fundamental interest which cannot be abridged without compliance with constitutional standards of due process and equal protection." **R. v. Dep't of Public Welfare**, 535 Pa. 440, 454, 636 A.2d 142, 149 (1994) (citation omitted). "[T]he Declaration of Rights [in the Pennsylvania Constitution] places reputation in the same class as life, liberty, and property." **Id.** at 462, 636 A.2d at 152 (citations and quotations omitted). Given the elevated status of reputation in Pennsylvania, should Markovich be able to establish that the charges leveled against him by the Borough Council had no legitimate basis, or that the public disclosure and circulation of the redaction letter was abusive and improperly motivated, a violation of substantive due process under the Pennsylvania Constitution may exist. **Pennsylvania Bar Assocation v. Commonwealth**, *supra* at 368, 607 A.2d at 858.

Notwithstanding the foregoing, we also believe a real question exists as to whether the Pennsylvania Constitution is self-executing and will support a direct cause of action for money damages. See **Schlichter v. Limerick Tp.**, 2005 WL 984197 at *12; **Robbins v. Cumberland Co.** CYS, 802 A.2d 1239, 1251 (Pa. Commw. 2002) (en banc); see also, **Erdman v. Mitchell**, 207 Pa. 79, 90-91, 56 A.

327, 331 (1903) (holding that there is a right of action for injunctive relief under the first Article of the Pennsylvania Constitution); *cf. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619 (1971) (recognizing action for damages directly under Fourth Amendment against federal officers acting under color of their authority who conducted illegal search and seizure; in this case a federal statute, 28 U.S.C. §1331(a), provided a general right to sue for such invasion); *Jones v. City of Philadelphia*, 68 D. & C. 4th 47, 68-75 (Phila. Com. Pl. 2004) (holding that Article I of the Pennsylvania Constitution is self-executing and permits private parties to seek civil remedies for constitutional violations). From what we have been able to determine, Pennsylvania has no counterpart to §1983, the federal statute authorizing private suit and the recovery of monetary damages against the government and its officials for violations of the federal constitution. *See Dooley v. City of Philadelphia*, 153 F. Supp.2d 628, 663 (E.D. Pa. 2001). Markovich cites no Pennsylvania case law which recognizes a private cause of action for money damages against the government arising under Article I Sections 1 or 11 of the Pennsylvania Constitution.

^a See *R. v. Dep't of Public Welfare, supra* at 460, 636 A.2d at 152 (stating that although the term “due process” appears nowhere in the state constitution, due process rights emanate from Sections 1, 9 and 11 of Article I). In this case, the court further observed that it has “never synthesized a procedure for assessing whether an interest protected by Article I, Section 1 has been deprived in violation of the provision’s due process guarantees,” but that it has “recognized how closely those guarantees resemble those provided by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.” *Id.; Robins v. Cumberland Co. CYS*, 802 A.2d 1239, 1252 (“[T]he requirements of Article I, Section 1 of the Pennsylvania Constitution are not distinguishable from those of the [Due Process Clause of the] 14th Amendment ... [thus] we may apply the same analysis to both claims.”). In *dicta*, and without discussing the difficult question of whether immunity conferred by state statute will protect against an award for monetary damages for a claim arising under the Pennsylvania Constitution, the court in *Robbins* made the following observation relevant to Markovich’s claim against the Borough: “Assuming, arguendo, that a direct cause of action would be cognizable under the State constitution, immunity under 42 Pa. C.S. §§8541-8546, would serve to bar any State constitution claims asserted against [the local agency].” *Id.* at 1252 n.15; contra *Jones v. City of Philadelphia, supra* at 78 (“Constitutional rights cannot be abrogated by a legislative majority of Pennsylvania.”).

^b In *Commonwealth v. Edmunds*, 526 Pa. 374, 390, 586 A.2d 887, 895 (1991), the court held that in distinguishing rights guaranteed by the Pennsylvania Constitution from those guaranteed by the United States Constitution the litigants should brief and analyze at least the following four factors: (1) the text of the Pennsylvania constitutional provision; (2) the history of the provision, including Pennsylvania case law; (3) related case law from other states; and (4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.

**STATEWIDE INVESTMENTS LTD. et al., Plaintiffs vs.
JON NIKOLIC et al., Defendants**

*Civil Law—Permissive Joinder—Action To Quiet Title—
Remedy for Misjoinder—Severance and Dismissal*

1. Multiple plaintiffs in an action to quiet title may not join in one complaint independent causes of action against unrelated defendants and involving separate and discrete parcels of real estate.
2. Where parties or causes of action are misjoined, the Court retains inherent judicial authority to sever and dismiss those parties and causes of action whose joinder is unauthorized and unnecessary with leave to plaintiffs to commence separate suits for each property for which plaintiffs desire to quiet title.

NO. 04-4149

KIM ROBERTI, Esquire—Counsel for Plaintiffs.

JON NIKOLIC—Pro se.

JEAN A. ENGLER, Esquire—Counsel for Fleet National Bank.

MEMORANDUM OPINION

NANOVIC, P.J.—September 7, 2005

PROCEDURAL BACKGROUND**STATEWIDE INVESTMENTS LTD. vs. NIKOLIC**

On December 22, 2004, the Plaintiffs in this matter filed a 37-count, 236-paragraph, 78-page complaint to quiet title. Each count of the complaint identifies a separate and distinct parcel of real estate and names a different Defendant. Named as Defendants are those parties whose property one or more of the Plaintiffs purchased at a tax claim upset sale held by the Carbon County Tax Claim Bureau on September 24, 2004, or parties alleged to possess liens with respect to such properties. The complaint is not specific as to what section of Pa.R.C.P. 1061(b) Plaintiffs are proceeding under.¹

¹ Pursuant to Pa.R.C.P. 1061(b), an action to quiet title may be brought:

- (1) to compel an adverse party to commence an action of ejectment;
- (2) where an action of ejectment will not lie, to determine any right, lien, title or interest in the land or determine the validity or discharge of any document, obligation or deed affecting any right lien, title or interest in land;
- (3) to compel an adverse party to file, record, cancel, surrender or satisfy of record, or admit the validity, invalidity or discharge of, any document, obligation or deed affecting any right, lien, title or interest in land; or
- (4) to obtain possession of land sold at a judicial or tax sale.

Though Plaintiffs' complaint does not allege who is in possession of any of the disputed properties, it is important to note that "a determination of possession is a jurisdictional prerequisite to a ruling on the merits pursuant to either (b)(1) or

At a management conference held on June 13, 2005, the Court directed Plaintiffs to provide the Court with legal authority to support Plaintiffs' joinder of independent causes of action against unrelated Defendants and involving separate and discrete parcels of real estate in a single action. In accordance with this request, Plaintiffs filed a brief on July 18, 2005.

DISCUSSION

In support of joinder, Plaintiffs cite to the permissive joinder rules contained in Rules 2229(b) and 2229(e)(2) of the Pennsylvania Rules of Civil Procedure. Rule 2229(b) reads as follows:

(b) A plaintiff may join as defendants persons against whom the plaintiff asserts any right to relief jointly, severally, separately or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences if any common question of law or fact affecting the liabilities of all such persons will arise in the action.

This Rule sets forth a two-part test for the permissive joinder of defendants in one lawsuit whenever the relief sought against each of the defendants (1) is dependent on the same transaction, occurrence, or series of transactions or occurrences and (2) involves common questions of law or fact affecting the rights or liabilities of all the parties. **Alpher v. Yellow Cab Co.**, 12 D. & C. 3d 355, 356 (Phila. Cty. 1979).

Rule 2229(e) provides:

- (e) In an action to adjudicate title to or an interest in real or personal property
 - (1) persons whose claims are not adverse to each other may join as plaintiffs;
 - (2) any person whose claim is adverse to that of the plaintiff may be joined as a defendant.

Rule 2229(e) is broader than Rule 2229(b): it permits joinder of all interested parties and causes of action with respect to the same subject matter notwithstanding that the causes of action

(b)(2)." **Siskos v. Britz**, 567 Pa. 689, 790 A.2d 1000, 1008 (2002). In addition, the purchaser at a judicial or tax sale, as is the case here, has the option under subsection (b)(4) of Pa. R.C.P. 1061 to obtain possession by either ejectment or quiet title. **Hoffman v. Bozitsko**, 198 Pa. Super. 553, 556, 182 A.2d 113, 115 (1962).

are unrelated and do not involve common questions of law or fact. Neither of these Rules, however, authorizes the joinder sought by Plaintiffs in this action.

The intent and object of the Rules of Civil Procedure is to fairly, justly, and efficiently adjudicate disputes between parties. Pa. R.C.P. 126. Permissive joinder in particular is predicated upon administrative convenience. **Meyer by Meyer v. Heilman**, 503 Pa. 472, 479, 469 A.2d 1037, 1041 (1983). Sought is the avoidance of duplicative pleading and proof, the needless waste of time and money, and the rendering of inconsistent verdicts. At all times, however, the right to join, when it exists, is permissive, not absolute. **Id.**

Misjoined parties are those who have been improperly joined because they were neither required nor permitted to be joined under the joinder rules. **Haber v. Monroe County Vocational-Technical School**, 296 Pa. Super. 54, 57, 442 A.2d 292, 294 (1982). A standard of materiality is implied in the requirement of common questions of law or fact. **Alpher v. Yellow Cab Co., supra** at 357. Additionally, parties whose claims require separate substantive consideration will not be permitted to be joined, even if those claims arise out of the same factual background. **Pittsburgh Parking Garages, Inc. v. Urban Redevelopment Authority of Pittsburgh**, 370 Pa. 578, 88 A.2d 780 (1952).

Plaintiffs' claim that the counts are connected by a "common source" of title—the Carbon County Tax Claim Bureau—and a "common legal question"—the validity of each tax sale—is superficial and misguided. To the contrary, the causes of action contained in Plaintiffs' complaint are multifarious, being related neither factually, legally or by subject matter. Plaintiffs have attempted to join in one complaint 37 separate and distinct causes of action against different defendants.

Under the Real Estate Tax Sale Law, the Carbon County Tax Claim Bureau is the statutory agent of all taxing districts within the County, authorized to impose liens and to collect delinquent taxes, and to sell and dispose of properties for these purposes. 72 P.S. §5860.208. The type and location of the properties involved, the number of owners and how organized (**e.g.**, individual, partnership, corporate), the form and nature of the ownership interest held, and the type, timing and manner of

service of notice actually provided, or the reasonableness of the efforts made to provide notice not received, are all diverse and case specific.

That the Tax Claim Bureau facilitates each sale does not constitute the “same transaction, occurrence, or series of transactions or occurrences” to which the Rules refer. Although held on one date, each sale made by the Tax Claim Bureau at its annual sale is a separate and unrelated transaction or occurrence whose subject matter—the premises sold—is not the same as other sales. **Cf. Boulton v. Starck**, 369 Pa. 45, 49, 85 A.2d 17, 19 (1951) (“Property separately assessed must necessarily be separately sold at tax sales for the tax lien on one property is not a lien on the other even if the ownership be the same.”). Nor is there a question of law or fact common to the various causes of action contained within Plaintiffs’ complaint which would potentially affect the rights or liabilities of all the parties.

To accept Plaintiffs’ contention that a common question of law is involved simply because all counts of the complaint involve the validity of a tax sale, fails to recognize and comprehend the distinction between cases of the same general nature or type from those having in common a specific, identifiable issue controlling the outcome of the decision. Were we to accept the logic of Plaintiffs’ position, there would be no limit to the number of parties and properties that could be joined in an action to quiet title to those properties sold by the Tax Claim Bureau at its annual tax sale.

“It is generally a prerequisite to joinder of causes of action when more than one party plaintiff or defendant is affected that all causes should affect all parties to the action, both parties defendant and parties plaintiff. Courts of law will not take cognizance of distinct and separate liabilities of several persons in one suit, even though standing in the same relative position. Nor should a person attempt to recover in one proceeding upon separate causes of action vested in different persons.” **Economy Bank of Ambridge v. Hickory Corral Enterprise, Inc.**, 55 D. & C. 2d 370, 377 (Beaver. Cty. 1972); **see also, Equitable Credit Co. v. Stephany et al.**, 155 Pa. Super. 261, 266, 38 A.2d 412, 413-414 (1944) (per curiam) (“A money lender who claims ownership or right of possession of two automobiles

belonging to two different persons by reason of separate and distinct loans made by him to each of them, cannot join them both in one action of replevin because both automobiles are held by the same garage owner under separate liens for service, repairs, etc.”).

Nor do the counts Plaintiffs seek to join under Rule 2229 (e)(2) aggregate adverse claims involving the same property. Instead, each sets forth a separate cause of action involving a distinct property and requiring separate and specific consideration. Any decision made with respect to any one count is unrelated to, and will have no effect with respect to, any other count.

Rather than promote administrative efficiency, Plaintiffs’ unauthorized and unnecessary joinder has and is creating administrative havoc. To date, there are 153 docket entries. Plaintiffs have filed 24 separate motions for default judgment of which seven have been granted and nine denied. Moreover, a party desiring to appeal a decision on any specific count may be prevented from doing so immediately: under Pa. R.A.P. 341 an appeal may not be taken from an order dismissing less than all claims or all parties from a case. **Keefer v. Keefer**, 741 A.2d 808, 812 (Pa. Super. 1999). Finally, and most recently, with respect to Count 4 we are now faced with a petition filed by Fleet National Bank on August 23, 2005 to open a default judgment.

CONCLUSION

Having determined that Plaintiffs have unquestionably abused and violated procedural rules intended to effect an orderly disposition of cases sharing a common or related factual or legal background or, in the case of actions to quiet title, involving the same property, we must next determine the appropriate remedy. With respect to those counts for which dispositive judgments have been entered, having already been separately considered and decided, it would serve no purpose to require their relitigation. With respect to the remaining open counts, although severance and the separate adjudication of each count in the case **sub judice** pursuant to Pa. R.C.P. 213(b) has been considered, we believe it appropriate that the true character of each count as an independent cause of action involving an unrelated property and requiring separate consideration, subject to its own appeal, be recognized. **See also, Meyer**

by Meyer v. Heilman, supra at 480, 469 A.2d at 1041 (the claim and liability of each plaintiff and defendant permissibly joined under Rule 2229 remains distinct and must be separately determined by the fact-finder).

For this reason, and there being no demonstrated prejudice to Plaintiffs, in the exercise of our inherent judicial authority to control and manage our dockets, excluding those counts for which judgment has previously been entered, and Count 4, for which Fleet National Bank's Petition to Open Judgment is pending, all other counts shall be severed with leave to the Plaintiffs to commence a separate suit for each property for which Plaintiffs desire to quiet title. If this does not occur within 30 days, such counts shall be dismissed. Pa. R.C.P. 2232(b)._____

**JOHN DILLOW, Plaintiff vs. ANNE MYERS, Personal
Representative of the Estate of
EDWARD JOHN MYERS, Deceased, and
FUNK WATER QUALITY COMPANY, Defendants**

*Civil Law—Punitive Damages—Vicarious Liability—Assessment
Against Principal—Amendment of Pleadings—Introduction of New
Cause of Action—Statute of Limitations—Future Medical Expenses—
Reasonable Basis for Calculation—Closing Argument—
Curative Instruction*

1. To establish liability for punitive damages, both the nature of defendant's conduct (**i.e.**, that the conduct created a substantial risk that injury would result) and the culpability of the defendant (**i.e.**, that defendant subjectively appreciated the risk of harm created) must be examined and proven.
2. Reckless or outrageous misconduct by an employee, sufficient to impose punitive damages, will subject an employer, who itself is innocent of any direct misconduct, to vicarious liability for punitive damages if (a) the employee's recklessness was clearly outrageous; (b) the employee was acting within the scope of his employment and in furtherance of the employer's business; and (c) the employee did not act with malicious intent.
3. In determining the amount of punitive damages to be awarded against an employer whose sole basis for liability is that imputed vicariously, the employer's conduct and wealth are proper factors to be considered.
4. An amendment to pleadings which introduces a new cause of action—one which 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—will not be permitted after the applicable statute of limitations has run.
5. A plaintiff who requests a jury charge on future medical expenses has the burden of establishing through competent evidence both the continuing need for future medical treatment and the estimated cost for such treatment. The

evidence must be sufficient to afford a reasonably fair basis for calculating the amount of future medical expenses; mere guess or speculation is not enough.

6. Closing argument which is based on the facts and evidence of record and which is legitimately responsive to opposing counsel's closing arguments, is appropriate and not the proper subject of objection. When misleading or inflammatory, a curative instruction advising the jury of such error and directing it to disregard counsel's argument on this point may be sufficient to avoid undue prejudice and the need for a mistrial.

NO. 00-2100

STEVEN J. MARGOLIS, Esquire—Counsel for Plaintiff.

MARK SIGMON, Esquire—Counsel for Defendants.

MEMORANDUM OPINION

NANOVIC, P.J.—November 22, 2005

FACTUAL BACKGROUND

On November 5, 1998, at approximately 10:30 A.M., a Culligan water truck owned by the Defendant, Funk Water Quality Company ("Funk"), and driven by its employee, the Defendant Edward John Myers ("Myers"), rear-ended a truck temporarily parked on the east berm of the Northeast Extension of the Pennsylvania Turnpike in which John Dillow, an employee of the Pennsylvania Turnpike Commission ("Commission") and the Plaintiff in these proceedings, was seated. At the time of the accident, Plaintiff was acting within the course of his employment as an equipment operator for the Commission; the truck in which he was seated had attached to the rear a directional arrow board for traffic control and was being used on that date for alerting and deflecting oncoming vehicular traffic away from Turnpike Commission employees further up the road.

Prior to the accident, Robert Tierney and Charles Supers, two witnesses to the accident, observed the Defendants' vehicle for a distance of almost twenty miles as it traveled northbound on the Turnpike. Both Tierney and Supers were in the same vehicle, Tierney driving and Supers a passenger. During this distance, the two vehicles passed one another several times: when going downhill Defendants' vehicle would gather speed and pass Tierney; when going uphill, Defendants' vehicle slowed and would be passed by Tierney. Tierney testified that he maintained a steady speed between 60 and 65 mph, the latter being the speed limit, and that when Myers passed him traveling down-

hill, Myers' speed was "a lot faster" than his. Both Tierney and Supers noted that Myers did not use turn signals when shifting lanes.

Significantly, both Tierney and Supers testified that Defendants' vehicle was "listing heavily to the passenger side"—according to Tierney, at an angle of twenty to thirty degrees off level. Myers died of unrelated causes after the accident, however, prior to his death he told an investigator that "the load was so heavy on the right-hand side of his truck that he had to hold the steering wheel to the left to stay in the right lane." In this same statement, Myers stated that "there was 8,000 pounds all on the right side."

After the accident Plaintiff learned not only that the truck was heavily loaded on one side—the passenger side—but that the loading racks for holding cylinders in place on the driver's side were broken.¹ The accident occurred when, after passing a tanker truck, Myers pulled into the right lane and continued going right, off the road, into the rear of Plaintiff's truck. Both Tierney and Supers, and a subsequent investigation by the Pennsylvania State Police, noted no evidence of any attempt by Myers to brake prior to the accident.

As a result of the accident, Plaintiff sustained injuries to his neck, head, ear, low back and coccyx. Following a six-day jury trial beginning on November 1, 2004, and ending on November 10, 2004, the jury awarded Plaintiff compensatory damages in the amount of \$271,000.00 against both Defendants, \$100.00 in punitive damages against Myers' estate, and \$155,000.00 in punitive damages against Funk. Both sides have filed motions for post-trial relief which we address in this opinion. An additional motion for delay damages by Plaintiff and a

¹ The cargo being transported consisted of 120 five-gallon bottles of water and approximately 30 cylinders of water softener. The cylinders of water softener were made of steel, weighing approximately 110 to 120 pounds each. Loading racks were used for holding the cylinders in place but the racks on the driver's side were either missing or broken, necessitating the placement of the water softener cylinders exclusively on the passenger's side and water bottles only on the driver's side. Kyle Gery, a former route driver and manager for Funk who now works in Funk's Eaglesville headquarters, stated that the truck would lean to the passenger's side when loaded in this manner (N.T., Vol. I, pp. 171-173, 188-189). Gery was a passenger in Myers' truck at the time of the accident to familiarize him with the delivery route.

motion to mold the verdict by Defendants will be addressed separately.

DISCUSSION

Punitive Damages

The Defendant, Funk Water Quality Company, first contends that because its liability is vicarious, it cannot be held responsible for punitive damages greater than those awarded against its agent, servant and employee, the decedent, Edward John Myers.² As previously stated, the jury returned a verdict of \$155,000.00 in punitive damages against Funk and \$100.00 in punitive damages against Myers.

In Pennsylvania, punitive damages can be imposed on an employer based entirely on an employee's conduct even without any direct evidence of misconduct by the employer. **Shiner v. Moriarty**, 706 A.2d 1228, 1240 (Pa. Super. 1998), **appeal denied**, 556 Pa. 701, 729 A.2d 1130 (1998); **Lake Shore &**

² Defendants' additional argument that Myers' conduct did not rise to the requisite level of recklessness or outrageousness, and will not support an award of punitive damages, is without merit. “[I]n Pennsylvania, a punitive damages claim must be supported by evidence sufficient to establish that (1) a defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed and that (2) he acted, or failed to act, as the case may be, in conscious disregard of that risk.” **Hutchison ex rel. Hutchison v. Luddy**, 582 Pa. 114, 870 A.2d 766, 772 (2005) (**citing** with approval Restatement (Second) of Torts, §500, cmt. a, **Types of Reckless Conduct**, (1965)). Comment a describes two types of reckless misconduct: the first is where the “actor knows, or has reason to know, ... of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk”; the second is where the “actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so.” **Martin v. Johns-Manville Corp.**, 508 Pa. 154, 171, 494 A.2d 1088, 1097 (1985) (plurality) (Although **Martin** was a plurality opinion, its discussion and analysis regarding punitive damages has been approved by our Supreme Court. **See Hutchison, supra**, 870 A.2d at 771 n.7.). “Under Pennsylvania law, only the first type of reckless conduct ... is sufficient to create a jury question on the issue of punitive damages.” **Id.**

This standard for awarding punitive damages has been met in this case: knowing that the truck was heavily loaded with a disproportionate weight on the passenger side because of the broken loading racks, that this load caused the truck to lean dangerously to the right, and that to compensate for this change in the truck's center of gravity it was necessary to keep the wheel turned to the left in order to drive in a straight line, Myers nevertheless deliberately drove the truck at a speed and in a manner which posed an unjustifiable and substantial risk to others of which he was aware.

M.S. Ry. Co. v. Rosenzweig, 113 Pa. 519, 6 A. 545, 553 (1886) (“the [employer] is liable for exemplary damages for the act of its servant, done within the scope of his authority, under circumstances which would give such right to the plaintiff as against the servant were the suit against him instead of the [employer].”).³ The imposition of punitive damages on the employer requires only that the employee’s actions must be clearly outrageous, occur within the scope of his employment, and not be done to satisfy a personal motive but in furtherance of the employer’s interests. **Delahanty v. First Pennsylvania Bank, N.A.**, 318 Pa. Super. 90, 132, 464 A.2d 1243, 1264-65 (1983). Consistent with this principle, we charged the jury that if it determined that the actions of Myers were reckless, it could award punitive damages against Funk if (a) the recklessness was clearly outrageous; (b) Myers was acting in the scope of his employment and in furtherance of Funk’s business; and (c) Myers did not act with malicious intent (N.T., Vol. V, p. 203).

The fundamental question in this case is not so much whether Myers’ conduct was “clearly outrageous” and therefore sufficient to impose vicarious liability on Funk for punitive damages by operation of law, but rather whether the amount of punitive damages awarded vicariously against Funk is necessarily circumscribed by the amount of punitive damages awarded against Myers, the party whose direct tortious misconduct was responsible for the accident. Specifically, in this case Funk claims it was error for the Court to admit into evidence and permit the jury to consider Funk’s conduct and financial status as relevant factors in setting the amount of punitive damages awarded.

Conceptually, the amount of punitive damages awarded in a case is rationally related to the underlying purpose for punitive damages. Punitive damages exist to punish and deter egregious behavior. **Martin v. Johns-Manville Corp.**, 508 Pa. 154, 169, 494 A.2d 1088, 1096 (1985). Once a basis for awarding punitive damages has been established, in determining the size

³ Perhaps, in part, because of the harshness of this rule, it is important to note that while public policy prohibits the purchase of insurance coverage to protect against punitive damages attributable to the direct wanton misconduct or recklessness of the employer, an employer can purchase insurance to indemnify itself against vicarious liability for punitive damages. **Butterfield v. Giuntoli**, 448 Pa. Super. 1, 18, 670 A.2d 646, 655 (1995), **appeal denied sub nom., Butterfield v. Mikuta**, 546 Pa. 635, 683 A.2d 875 (1996).

of the award, sufficient to serve this purpose, “the character of the defendant’s act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant” may properly be considered. **Dean Witter Reynolds, Inc. v. Genteel**, 346 Pa. Super. 336, 347, 499 A.2d 637, 642 (1985), **appeal denied**, 514 Pa. 635, 522 A.2d 1105 (1987), (quoting Restatement (Second) of Torts, Section 908, and noting that this section and the comments thereunder have been adopted in Pennsylvania).

Funk does not dispute these well-settled principles but argues that when punitive damages are vicariously imposed, the amount imposed vicariously must be confined to the amount awarded against the party primarily responsible. As argued by Funk, only when liability is premised upon the separate and independent misconduct of the employer, whether or not acting in conjunction with the employee’s misconduct, is it appropriate for the fact-finder to separately assess the employer’s conduct and wealth in determining the amount of punitive damages to be awarded against the employer. In effect, Funk argues that because the purpose of punitive damages is to punish the tort-feasor and to deter him or others like him from similar conduct, if the employer did nothing wrong, and its liability for punitive damages is only vicariously imposed, as a matter of law, the amount of punitive damages awarded against the employer must equal that awarded against the employee.⁴

When carefully considered, at the heart of Funk’s argument is a belief that the perceived harshness of Pennsylvania’s rule permitting a punitive award against a corporation for an employee’s tort in the absence of culpable misconduct by the employer must be tempered by a rule which either (1) restricts the imposition of liability to those situations where the corporation

⁴ At the time of trial, Defendants objected generally to any instruction on punitive damages on the basis that the evidence was insufficient to sustain a finding that Myers’ conduct was outrageous and would justify such an award against either Defendant. At that time, Defendants did not voice the further objection, now argued, that in assessing the amount of punitive damages against a vicariously liable employer, only the employee’s conduct is at issue and therefore any exemplary award must be based entirely upon the employee’s conduct and an assessment of the employee’s, not the employer’s, wealth. With this in mind, it may well be that the Defendants’ present argument has been waived. **Kelly v. St. Mary Hospital**, 778 A.2d 1224, 1227 (Pa. Super. 2001) (to preserve a claim for review, an appellant’s objection must be timely and precise).

sanctioned its employee's misconduct or was aware that the employee was unfit for his position, or (2) which otherwise limits the employer's liability for punitive damages to the amount awarded against the employee. To the extent Funk argues that any liability for punitive damages vicariously imposed on a principal must be limited as provided in Section 909 of the Restatement (Second) of Torts, this standard has never been adopted in Pennsylvania notwithstanding the recognized harshness of the traditional rule. **Dean Witter, supra** at 347, 499 A.2d at 643; **Delahanty, supra** at 131, 464 A.2d at 1264.⁵ To the extent Funk argues that the amount of punitive damages awarded on the basis of vicarious liability must be computed by application of the Section 908 factors to the employee, and not to the employer, this is not the law of this Commonwealth. In **Delahanty**, in upholding the amount of punitive damages vicariously imposed on an employer, the Superior Court specifically approved the fact-finder's taking into account in assessing the amount of damages, "not only the [employer's] wealth but also, the outrageous conduct of the [employer's] officials, their motive, the relationship between the parties, and the nature and extent of the harm to [plaintiff's] businesses." **Id.** at 136, 464 A.2d at 1266; see also, **Hannigan v. S. Klein's Department Store**, 1 D. & C. 3d 339 (Phila. Cty. 1976), **appeal denied**, 244 Pa. Super. 597, 371 A.2d 872 (1976) (holding that the financial status of a security guard's employer was relevant in assessing the amount of punitive damages vicariously imposed on the employer).

Whether to award punitive damages and the amount to be awarded are within the discretion of the fact-finder. **Dean Witter, supra** at 347, 499 A.2d at 642. This discretion should not

⁵ Section 909 of the Restatement (Second) of Torts provides:

Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,

- (a) the principal or a managerial agent authorized the doing and the manner of the act, or
- (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
- (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
- (d) the principal or a managerial agent of the principal ratified or approved the act.

be sacrificed for the sake of the symmetrical simplicity argued by Funk merely because the principal's liability for punitive damages is vicariously imposed. In those cases where the agent's misconduct was unexpected and unavoidable by the principal, the jury may well determine that the award of punitive damages assessed against both the agent and principal should be the same. In other cases where a management level official's misconduct—even though not independently outrageous—facilitated the employee's actions, the amount of punitive damages awarded against the employer might fairly exceed those awarded against the employee. There may also be situations in which the financial status of the employee exceeds that of the employer and where it would be contrary to the "plainest principles of justice" to automatically assess the same amount of punitive damages against the principal as against the agent. **Funk v. Kerbaugh**, 222 Pa. 18, 19, 70 A. 953, 954 (1908) (per curiam).

The variables inherent in determining what amount of punitive damages is appropriate are issues of fact, not of law, and for this reason are the proper subject of argument by counsel in their closing to the jury. The jury should be permitted to judge for itself based on the conduct and wealth of each defendant whether to separately assess punitive damages and in what amount. In this case, the jury properly exercised its discretion.

Clearly evident in the jury's award of \$100.00 in punitive damages against Myers' estate was its understanding that because of Myers' death, the penal aspect of punitive damages could serve no useful purpose against him or his estate.⁶ Additionally, beyond being advised of Myers' death, the jury had no information as to the financial status of his estate.⁷ As to Funk,

⁶ This fact alone does not preclude an award of punitive damages against an estate. In contrast to compensatory damages whose objective is to make a plaintiff whole, the objective of punitive damages is not to compensate the plaintiff, but to punish the defendant and to deter others from like conduct, "thereby serving a public as well as private interest." **G.J.D. by G.J.D. v. Johnson**, 447 Pa. Super. 340, 347, 669 A.2d 378, 382 (1995), *aff'd sub nom.*, **G.J.D. by G.J.D. v. Johnson**, 552 Pa. 169, 713 A.2d 1127 (1998) (upholding the award of punitive damages against an estate).

⁷ In chambers, the Court was advised that Myers' estate had no assets and was judgment-proof (N.T., Vol. III, p. 66). That the jury was not advised of this information was not critical to its award of punitive damages against Myers' estate. **Shiner v. Moriarty**, 706 A.2d 1228, 1242 (Pa. Super. 1998), **appeal denied**, 556 Pa. 701, 729 A.2d 1130 (1998) (rejecting the suggestion that evidence of net worth is mandatory to a valid award of punitive damages).

its conduct in failing to repair the broken racks for almost a year, making it virtually certain that when fully loaded the cargo weight would be unevenly distributed and would cause the truck to tilt to one side, and the conduct of its route manager, who was a passenger in the truck at the time of the accident, in permitting Myers to operate the truck in this condition on November 5, 1999, were proper factors for the jury to consider in assessing the amount of punitive damages against Funk. The jury was also provided relevant information regarding Funk's annual income and net worth. Its award of \$155,000.00 in punitive damages against Funk was neither confiscatory in relation to Funk's net worth and income, nor disproportionate to the amount of compensatory damages awarded.

Amendment of the Pleadings

Prior to trial, Defendants conceded negligence. The only question of liability presented to the jury was whether Myers' conduct rose to the level of recklessness and whether, if reckless, this conduct was attributable to Funk so as to form the basis of an award of punitive damages against the employer. Plaintiff claims that we unduly restricted him in this regard and that under the pleadings and the evidence he was entitled to pursue a direct claim of reckless misconduct against Funk. We disagree.

Plaintiff commenced his action by complaint on October 25, 2000. The complaint consists of one count, against both Defendants. In paragraph 9, an introductory paragraph which precedes the sole count of the complaint, Plaintiff asserted in conclusory fashion that Funk was legally liable as a result of its negligence, carelessness and recklessness, and that of its agent, and "for its **negligent** conduct and supervision of the operation of its vehicle." (emphasis added) Paragraph 9 is later incorporated by reference in count I which, in paragraph 12, significantly and specifically describes the alleged negligence, carelessness and recklessness of both Defendants (**i.e.**, Funk and Myers) as being limited to the manner in which Defendants' truck was operated.

None of the instances of misconduct outlined in paragraph 12 even remotely suggested that Funk was directly liable for failing to adequately determine whether Myers was fit for employment or to operate a motor vehicle, the factual basis for direct liability later claimed by Plaintiff in two amended com-

plaints, filed on December 23, 2003, and December 26, 2003, respectively,⁸ and also in a motion filed on November 1, 2004, for reconsideration of our decision granting Defendants' preliminary objections to both amended complaints.⁹

⁸ See paragraph 9 of Plaintiff's first and second amended complaints.

⁹ In this motion, Plaintiff argued that Funk's alleged recklessness consisted, in essence, of its failure to check Myers' driving record before and subsequent to his employment and, in consequence, allowing Myers to operate its truck without a valid driver's license (Motion, Paragraph 19). (Myers' license was apparently suspended on October 27, 1998, nine days before the motor vehicle accident which is the subject of this suit (N.T., Vol. I, p. 52)). Plaintiff also argued that Defendants were bound by a stipulation of counsel dated December 8, 2000, in which the parties agreed that "if at any time during the discovery portion of this case evidence is produced that either one or both of the Defendants have acted recklessly, the Plaintiff will be permitted to file an Amended Complaint and include allegations of recklessness and reckless conduct against both Defendants, without any opposition from the Defendants." (Stipulation of Counsel dated December 8, 2000, ¶2)

We found that in the context of the subject of the stipulation, the original complaint filed by the Plaintiff, the stipulation was ambiguous: that the stipulation could mean that any amendment at any time alleging any basis of recklessness by either of the Defendants would be permitted or, alternatively, that any amendment alleging reckless misconduct was to be confined by the structure of the original complaint in which the nature of the recklessness alleged was confined to the manner in which the vehicle was operated. When the terms of an agreement are not ambiguous on their face but become so in the context of extrinsic or collateral circumstances, parole evidence is admissible to resolve such latent ambiguity. **Yocca v. Pittsburgh Steelers Sports, Inc.**, 578 Pa. 479, 854 A.2d 425, 437 (2004).

Having found ambiguity, the only evidence offered to resolve this uncertainty was that provided by Defendants' counsel who testified that the intent of the stipulation was to bar any issue of recklessness from the case, unless evidence of recklessness with respect to the operation of the vehicle was subsequently discovered, and not with respect to any other issue (N.T., Vol. I, pp. 40-44). On the basis of this evidence, we concluded that it was the intent of the parties to confine any future amendment to the original cause of action stated in the complaint: the manner in which the vehicle was operated (N.T., Vol. I, pp. 61-62).

In discussing Plaintiff's requested amendment, it is important to note that the only evidence of recklessness Plaintiff sought to introduce at trial was that with respect to Funk's employment practices in the hiring and retaining of Myers which, as will be discussed above, did not rise to the level of recklessness (N.T., Vol. I, pp. 49-55). Only later, in his brief in support of his post-trial motion, did Plaintiff argue that Funk's recklessness also consisted of permitting Myers to operate a truck which it knew or should have known was unsafe because of broken water racks which required the water softener cylinders to be loaded on one side of the truck and, when so loaded, caused the truck to tilt to the passenger side. This additional basis for subjecting Funk to direct liability for punitive damages, we find, has been waived. **Spitzer v. Philadelphia Transportation Co.**, 348 Pa. 548, 36 A.2d 503 (1944) (holding that an offer of proof which fails to state what a witness would have said if permitted to testify, fails to protect the record or preserve for review claimed error).

At trial, Plaintiff's counsel further explained that it was his intent to prove that Funk's employment and retention of Myers went beyond mere negligence and instead evidenced a wanton disregard for the rights of other motorists. To do this, Plaintiff intended to prove that had Funk followed its own procedures in the hiring of new employees, it would have discovered that Myers had three previous motor vehicle violations—two, more than three years prior to the accident in question, for failing to stop at a red light, the other of an unknown date and basis—and that in July 1998, after he was employed, Myers had a pending license suspension (N.T., Vol. I, pp. 50-55, 58-59).

With the above in mind, we concluded that Plaintiff's request to amend his complaint and to establish a direct cause of action against Funk for alleged reckless misconduct after the statute of limitations had run was an attempt to improperly introduce a new cause of action into the case, prejudicial to Funk, and not simply an amplification of the original cause of action. **See 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) (finding that the structure of the complaint must be examined in ascertaining the true nature of the cause of action asserted and that “a new cause of action arises 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”). We further concluded, that even if we permitted Plaintiff's proffered evidence, the failure to check the driving record of a prospective employee or to conduct a driver background check does not create such a sufficiently high degree of risk of harm to others as to warrant punitive damages. **See A.T.S. v. Boy Scouts of America**, 13 D. & C. 4th 499, 506 (Montgomery Cty. 1992) (plaintiff, a child molestation victim, failed to adequately plead a claim for relief meriting punitive damages where plaintiff failed to assert that the failure to perform a criminal background check of a volunteer was guided by any evil motive or reckless indifference to the safety of others creating a substantial risk to him).¹⁰

¹⁰ Moreover, even if Plaintiff's evidence was accepted as true, the accident in question was not caused by Myers' failure to stop at an intersection or to have a valid driver's license. Consequently, any misconduct by Funk in its employment of Myers on this basis was irrelevant and would have been highly prejudicial if admitted.

Future Medical Expenses

At trial, Plaintiff presented the expert testimony of Dr. Keith Girton, an orthopedist, who testified that the cause of Plaintiff's lower back pain was a fractured or separated coccyx, accompanied by ligamentous injuries and scar tissue, and resulting in a condition known as coccydynia.¹¹ It is in the nature of this condition for the afflicted person to experience discomfort, particularly when sitting, and to occasionally experience an irritation or exacerbation of symptoms for which "some medical treatment" can be expected from time to time (Girton Deposition, p. 33). The condition is considered untreatable and, therefore, permanent.

While noting his belief that future medical treatment would at times be required, Dr. Girton further testified that Plaintiff's condition progressively improved when he was treating Plaintiff during the period between December 6, 2000 and September 20, 2001, and that when he last saw the Plaintiff on September 20, 2001, Plaintiff had no pain (Girton Deposition, pp. 26-30, 33, 57-58). As to future medical treatment, Dr. Girton testified only that the type of treatment Plaintiff received in the past for acute pain—**i.e.**, as needed chiropractic and emergency room treatment when symptoms flare up—would be appropriate for the future (Girton Deposition, pp. 42-44). Dr. Girton never testified to the expected frequency, duration or expense of future medical treatment. Nor did Dr. Mathew Kraynak, Plaintiff's family physician, who last examined Plaintiff on July 23, 2003, and although testifying that Plaintiff's back pain was chronic, meaning it was not expected to go away soon, also testified that as of January 27, 2003, Plaintiff was using pain medication on a very limited basis (Kraynak Deposition, pp. 52, 81, 83).

Prior to closing arguments, Plaintiff requested an instruction for future medical expenses. See Pa.SSJI (Civ) 6.01(B). As to the amount of future medical expenses, Plaintiff contended that it was appropriate to average the costs of Dr. Kraynak's treatment and the chiropractic and emergency room treatment over the two and a half year period between May 9, 2002 and the date of trial (**i.e.**, \$3,077.48) and then extrapolate this

¹¹ Literally, pain of the coccyx (Girton Deposition, p. 11).

figure for the balance of Plaintiff's life.¹² Plaintiff's counsel proposed making this calculation in his closing argument (N.T., Vol. IV, p. 181; Vol. V, p. 24). Plaintiff's requested instruction was denied and is the subject of a post-trial motion.

The burden of presenting sufficient evidence in support of damages is upon the plaintiff. In meeting this burden:

'[a] claim for damages must be supported by a reasonable basis for calculation; mere guess or speculation is not enough.' **Stevenson v. Economy Bank of Ambridge**, 413 Pa. 442, 453-54, 197 A.2d 721, 727 (1964). **See also, Small v. Flock**, 407 Pa. 148, 180 A.2d 59 (1962); **Getz v. Freed**, 377 Pa. 480, 105 A.2d 102 (1954). 'If the facts afford a

¹² This figure includes six visits to Dr. Kraynak's office by Plaintiff between May 9, 2002 and October 22, 2004, at a cost of \$480.00, chiropractic treatment for acute pain (six visits to Healing Hands in July and August 2003 and six visits in February 2004 at a cost of \$825.00, and eight visits to Cohen Chiropractic in August and September 2004, at a cost of \$850.00), as well as treatment he received at the emergency room of the Geisinger Wyoming Valley Hospital on July 21, 2003, at a cost of \$469.91, and on July 29, 2004, at a cost of \$452.57 (Plaintiff's Exhibit 51(j)).

Not only did the number of times Plaintiff received chiropractic and emergency room treatment for acute pain during these periods as evidenced by Plaintiff's billings differ from what Dr. Girton testified was appropriate (*i.e.*, three or four occasions in February 2004 and two times a week for two weeks in late July, early August 2004), the frequency, duration of visits, and cost of treatment varied on each occasion Plaintiff received medical care for acute pain. (Girton Deposition, pp. 41-42; **see also**, Plaintiff's Exhibit 51(j)). The evidence also indicated that between March 6, 2002 and January 27, 2003, a period of 10 1/2 months, Plaintiff did not have any visits with Dr. Kraynak and that all visits with Dr. Kraynak after February 2002 were not for treatment, but to refill prescriptions for medication (Kraynak Deposition, p. 80; N.T., Vol. II, pp. 150-151).

Neither Dr. Girton nor Dr. Kraynak testified that the frequency, duration or expense of treatment Plaintiff received in the past was the same or similar to that expected in the future. These are not matters of common knowledge nor was the information provided to the jury on past treatments sufficient for a layperson to reasonably make such inferences about future treatment. **Compare Pratt v. Stein**, 298 Pa. Super. 92, 137, 444 A.2d 674, 698 (1982) (finding evidence sufficient to award future medical expenses for chiropractic treatment for back spasms attributable to plaintiff's use of a cane where, because of permanent nature of injury, plaintiff's need to use a cane in the future would continue and plaintiff's past treatment consisted of more than 120 visits to the chiropractor over a four-year period at a fixed cost per visit: from this information "the jury could reasonably have inferred that [the plaintiff] would require chiropractic treatment with the same frequency as he had in the past"), **with Baccare v. Mennella**, 246 Pa. Super. 53, 369 A.2d 806 (1976) (finding that prognosis of future duration and treatment for plaintiff's lower back pain was too indefinite to allow jury to consider awarding future medical expenses).

reasonably fair basis for calculating how much plaintiff's entitled to, such evidence cannot be regarded as legally insufficient to support a claim for compensation.' **Western Show Co., Inc. v. Mix**, 308 Pa. 215, 162 A. 667 (1932).

Kaczkowski v. Bolubasz, 491 Pa. 561, 567, 421 A.2d 1027, 1030 (1980). More specifically, as to future medical expenses:

It is well-settled that '[a]n item of damage claimed by a plaintiff can properly be submitted to the jury only where the burden of establishing damages by proper testimony has been met.' **Cohen v. Albert Einstein Medical Center**, 405 Pa.Super. 392, 410, 592 A.2d 720, 729 (1991). In the context of a claim for future medical expenses, the movant must prove, **by expert testimony**, not only that future medical expenses will be incurred, but also the reasonable estimated cost of such services. **Id.** See also, **Berman v. Philadelphia Board of Education**, 310 Pa.Super. 153, 161-65, 456 A.2d 545, 550-51 (1983). Because the estimated cost of future medical services is not within the layperson's general knowledge, the requirement of such testimony eliminates the prospect that the jury's award will be speculative. **Cohen**, 405 Pa.Super. at 410-11, 592 A.2d at 729.

Mendralla v. Weaver Corp., 703 A.2d 480, 485 (Pa. Super. 1997) (**en banc**) (emphasis added).

In Pennsylvania, although damages need not be proven with mathematical certainty, they must be proven with reasonable certainty. It is incumbent upon Plaintiff to "present competent evidence from which the jury can reasonably determine the degree to which future consequences of a present injury are probable and, accordingly, what the amount of any damages award should be." **Martin, supra** at 165 n.5, 494 A.2d at 1094 n.5. The evidence must be sufficient to make an intelligent estimate, without conjecture.

While we agree that Plaintiff presented sufficient evidence to find that he would require occasional, and apparently sporadic, future medical treatment for acute back pain, and that because of the etiology of this pain it is not possible to predict with certainty when treatment will be required, Plaintiff failed to present any expert opinion about the estimated duration or frequency of future episodes of acute pain requiring treatment, that they would be the same or similar to that required in the

past, or that the level of care or costs of future medical expenses for this treatment would approximate those which had occurred in the past. Without this information, to have permitted Plaintiff's counsel to average and extrapolate past expenses incurred during an arbitrary time period into an estimate of future costs, would have permitted counsel to engage in self-serving speculation and conjecture, the antithesis of the requisite degree of probability on which damages must be fairly and intelligently based.

Closing Arguments

During closing argument, Defendants' counsel argued that the loading and tilting of Defendants' truck did not create an unsafe or unreasonably dangerous condition, and that notwithstanding the broken loading racks, the truck had previously been loaded in this same manner and been operated without mishap (N.T., Vol. V, pp. 48-49). In response, Plaintiff's counsel asserted that Defendants' logic—"we did it numerous times before without incident, therefore, it can't be reckless"—was flawed and compared the argument to that made by an intoxicated driver involved in a motor vehicle accident who claims his driving was not impaired as evidenced by previous occasions when he had driven in the same condition without incident (N.T., Vol. V, pp. 77-79). In making this analogy, Plaintiff's counsel clearly disclaimed any suggestion that Myers was intoxicated or that alcohol was involved in this litigation. On the issue of recklessness, at one point in his closing argument, Plaintiff's counsel implied that Funk routinely places on the road twenty-three other trucks in a similar condition to that driven by Myers, thus evidencing Funk's deliberate disregard for public safety (N.T., Vol. V, p. 79).

Defendants timely objected to Plaintiff's counsel's remarks. As to the first objection, counsel's analogy was in direct response to comments made by Defendants' counsel and not intended to mislead or inflame the jury. **Aiello v. Ed Saxe Real Estate, Inc.**, 327 Pa. Super. 429, 439-40, 476 A.2d 27, 33 (1984), **rev'd on other grounds**, 508 Pa. 553, 499 A.2d 282 (1985) (whether remarks made by trial counsel in closing arguments are objectionable requires a determination whether they are legitimately responsive to opposing counsel's closing arguments). As to Defendants' second objection, we immediately

issued a curative instruction advising the jury that counsel's argument on this point was not supported by the record and should not be given any consideration (N.T., Vol. V, pp. 88-89). Given this curative instruction, there was no undue prejudice to Defendants. **See Slappo v. J's Development Associates Inc.**, 791 A.2d 409, 414 (Pa. Super. 2002) (trial court's decision on whether or not to grant a new trial requires a two-part analysis: "(1) whether a mistake occurred at trial; and (2) whether the mistake was prejudicial to the moving party."). We find no merit to Defendants' post-trial motion on either of these two bases.

CONCLUSION

Having carefully reviewed and considered the issues which have been raised in the parties' respective post-trial motions and which have been briefed and argued, we are convinced that no legal error exists. We further believe the jury's verdict was fair and is amply supported by the evidence of record. Accordingly, both Plaintiff's and Defendants' post-trial motions will be denied.

THOMAS NUNEMACHER and ANGELINA NUNEMACHER,

Plaintiffs vs. MARCUS SENSINGER, Defendant vs.

THOMAS NUNEMACHER and ANGELINA NUNEMACHER,

Additional Defendants

*Civil Law—Expert Testimony—Qualifications/Factual Basis for
Opinion—Adequacy of Jury Verdict—Weight of the Evidence—
Defective Verdict Slip*

1. A witness who, by virtue of his training, experience and education, is qualified as an expert in the field of accident reconstruction and, in particular, in accidents involving motorcycles, and who is familiar with the braking system of motorcycles and its use, is competent to express opinions as to the speed and braking distance of a motorcycle involved in an accident.
2. The facts upon which an expert opinion is based, which are required to be disclosed to the jury (Pa. R.E. 705), may be in dispute. The factual predicate for an expert's opinion may be proven circumstantially from the physical evidence and be in direct conflict with the testimony of eyewitnesses.
3. A plaintiff in a personal injury action who has succeeded in establishing the elements of negligence and causation is entitled to be fully and fairly compensated for the injuries he sustained and which were caused by the accident. An award of medical expenses only, unaccompanied by an award for pain and suffering, may be justified where a reasonable basis exists for the jury to believe that (1) the plaintiff did not suffer any pain and suffering, or (2) a pre-existing condition or injury was the sole cause of the alleged pain and suffering. Where a plaintiff suffers from a pre-existing injury to her right arm for which

she is receiving medical treatment, is disabled and unemployed, and is experiencing pain at the time of the accident, and who claims to have sustained an additional injury to the same area of the same limb and for which the jury awarded medical expenses only, the jury's determination that plaintiff suffered no compensable pain was peculiarly within its province to decide and will not be disturbed by the court.

4. A claim challenging the weight of the evidence—here a jury's award of medical expenses only, unaccompanied by an award for pain and suffering—is a challenge invoking the inherent discretion of the court in extraordinary circumstances to set aside a jury's verdict. Because the error claimed is not one correctable at the time of trial, the failure to object before the jury is discharged does not waive the issue for purposes of post-trial relief or appellate review.

5. In response to a challenge to the verdict slip and the jury's failure to answer all questions before it, first raised after the jury has announced a verdict but before the jury has been discharged, it is not error for the court to advise the jury of the error and to direct the jury to resume its deliberations and to provide answers to all special interrogatories concerning the issues properly before them.

NO. 03-0448

MICHAEL S. BLOOM, Esquire—Counsel for Plaintiffs.

FRANK PROCYK, Esquire—Counsel for Defendants.

JASON BANONIS, Esquire—Counsel for Additional Defendants.

MEMORANDUM OPINION

NANOVIC, P.J.—December 15, 2005

INTRODUCTION

On October 13, 2001, the Plaintiffs, Thomas Nunemacher and Angelina Nunemacher (hereinafter “Husband” and “Wife”),¹ were injured in a motor vehicle accident that occurred when the Defendant, Marcus Sensinger (hereinafter “Sensinger”), turned onto West Mahoning Drive, a two-lane macadamized highway on which the Nunemachers were riding their motorcycle: Husband, as operator, and Wife, his passenger. The accident happened in this county, in Mahoning Township.

The Nunemachers commenced suit by complaint against Sensinger who, in turn, joined the Nunemachers as additional defendants asserting their sole liability for the injuries of one

¹ At the time of the accident, the Plaintiffs, Thomas Nunemacher and Angelina Nunemacher, were married to one another. The Nunemachers separated in May 2002, and have since divorced.

another and, alternatively, seeking contribution.² In their complaint, the Nunemachers claimed that Sensinger negligently pulled out in front of them causing the injuries they sustained in the accident. In his joinder complaint against the Husband, Sensinger alleged that the Husband negligently operated his motorcycle and was the real cause of Wife's injuries.

Following a two-day jury trial, the jury returned a verdict in favor of Sensinger and against the Nunemachers, finding Sensinger was not negligent. The jury further found in favor of Wife and against Husband on the issues of liability raised in the joinder complaint and returned a verdict awarding Wife medical expenses only.

In their motion for post-trial relief now before us, the Nunemachers claim that we erred in allowing Sensinger's liability expert, Joseph Tarris, to express opinions he was not qualified to give and which were not based on facts in evidence. Wife individually claims that the jury's verdict was against the weight of the evidence in not awarding any compensation for pain and suffering. Husband further claims that a miswording in the Wife's verdict slip confused the jury and influenced them to find against him on the joinder complaint.

I. FACTS AND PROCEDURAL HISTORY

On the day of the accident, Sensinger exited his driveway and made a left-hand turn onto the eastbound lane of West Mahoning Drive. While Sensinger was making his turn, Husband was traveling east on West Mahoning Drive, approaching Sensinger's driveway from the west. West Mahoning Drive is aligned generally in an east/west direction and is intersected on the north by Sensinger's driveway.

According to Husband, he was approximately 300 feet away from Sensinger when he first observed Sensinger's vehicle stopped at the end of the driveway (N.T., Vol. I, pp. 20-21). At trial, Husband was uncertain of his speed at the time he first noticed Sensinger's vehicle but believed he was traveling close to 45 miles per hour, the posted speed limit at the location of the accident. Husband also recalled that, as he approached Sensinger's driveway, there were two vehicles ahead of him driv-

² Sensinger's joinder complaint against Wife was withdrawn by stipulation shortly before trial.

ing in the same direction. Wife estimated these vehicles to be 100 to 200 feet in front of them (N.T., Vol. I, p. 67).

As soon as the two vehicles ahead passed Sensinger's driveway, Husband testified Sensinger slowly and unexpectedly pulled out in front of him. At this point, Husband estimated he was 100 to 150 feet from the intersection between West Mahoning Drive and Sensinger's driveway (N.T., Vol. I, p. 22).

The motorcycle Husband was operating had independent rear and front brakes for the rear and front tires respectively; the rear brake was operated by a foot pedal and the front brake by a lever on the handlebars (N.T., Vol. I, pp. 23-24, 143). When Husband first saw Sensinger pulling out he began to brake: he applied his rear brake fully and his front brake a little (N.T., Vol. I, pp. 23, 51-53, 57). As he did so, the rear wheel locked up, skidding, with the motorcycle continuing to move forward in a straight line (N.T., Vol. I, pp. 82-83). When Husband realized a collision with Sensinger's vehicle was imminent if he remained upright—at this point he was approximately 50 to 75 feet from Sensinger's car—he deliberately lowered his motorcycle to the ground onto its right side (N.T., Vol. I, pp. 24-25, 55-56, 59-60, 85). The motorcycle slid along the road for approximately 23 feet before coming to rest; neither vehicle came into contact with the other (N.T., Vol. I, pp. 168, 178).

Sensinger's account of the accident was as follows. From where he was stopped at the end of his driveway, he had a clear view of about 225 feet looking west along West Mahoning Drive. Before exiting his driveway, he looked in both directions several times, at least twice looking west, observed no oncoming traffic, and had already completed his turn and was heading east on West Mahoning Drive when he heard brakes screeching, looked in his rearview mirror, and observed the Nunemachers' motorcycle lying on the road behind him. Upon seeing this, Sensinger turned around and returned to his driveway where, for the first time, he saw Husband and Wife.³ Sensinger esti-

³ Husband was knocked unconscious in the accident. He was medevaced to the Lehigh Valley Hospital and did not regain consciousness until four days later. Husband sustained serious head injuries in the accident. Husband testified that after the accident he also experienced short-term memory loss, headaches and dizziness. Husband had no recollection of what occurred between the point when he began braking to avoid contact with Sensinger's vehicle and when he regained consciousness in the hospital (N.T., Vol. I, pp. 25, 56).

mated his speed at the time he heard the sound of brakes behind him to be 25 miles per hour (N.T., Vol. I, p. 135).

Wife testified that her right wrist and elbow were injured in the accident. The same day she was transported to the Gnaden Huetten Memorial Hospital and released after receiving a splint for her wrist. Two days later she visited an orthopedic doctor and a cast was placed on her wrist. This was followed by two weeks of physical therapy, after which the injuries she sustained to her wrist and elbow appeared to have healed.

When pain returned in her elbow, Wife went to see Dr. Jay Talsania, an orthopedic specialist, who first examined her in January 2002, three months after the accident. At this time, Wife was complaining of a "snapping" sensation on the inside part of her elbow, with increasing pain and a limited range of motion of the joint (Talsania Deposition, pp. 13-17). Several months of conservative treatment proved unsuccessful, at which time Dr. Talsania operated on Wife's right elbow.

The surgery consisted of excising a portion of the triceps muscle and connective tissue, and shaving four millimeters from the cortical bone. This surgery was followed by home therapy. Within two to three months of the surgery, Wife testified that her elbow had returned to its pre-accident condition. Dr. Talsania did not treat Wife for any injury to her right wrist, which Wife admitted had completely resolved by the end of 2001.

Prior to this accident, Wife had injured her right arm and been operated on twice: in 1997 and again in 1998. This injury was work-related, occurred in 1997, and included a detached ulnar nerve. Wife had not fully recovered from this injury prior to the accident, continued to experience pain in her wrist and elbow, and was still receiving medical treatment. She also had not returned to work and was unemployed.

At the time of the accident, the Nunemachers were accompanied by José Cruz who was riding behind them on his motorcycle at a distance of at least 50 feet (N.T., Vol. I, pp. 96, 98). Cruz' testimony as to how the accident happened, with Sensinger pulling out unexpectedly in front of them and with Husband braking and taking evasive action to avoid a collision, was similar to the Nunemachers' (N.T., Vol. I, p. 101). Cruz testified that he also braked and left a skid mark of approximately 20

feet in length behind (**i.e.**, to the west of) the skid mark left when Husband braked his motorcycle (N.T., Vol. I, pp. 101-103, 105).

Two sets of skid marks were observed by the police who investigated the accident as well as by Sensinger's expert, Joseph Tarris, however, whether the skid marks were caused by two motorcycles, as Cruz testified, or by one motorcycle, Husband's, as Tarris concluded, became a major issue at trial.⁴ Cruz was not injured in the accident and was able to stop without laying his motorcycle on the ground (N.T., Vol. I, p. 103).

Defendant's expert witness, Joseph Tarris, was a licensed civil engineer and an accredited accident reconstructionist. Tarris testified that he had investigated or reconstructed more than 1,000 accidents and that more than 100 of these dealt with motorcycles (N.T., Vol. I, p. 143). He further testified that, as part of his training and expertise, he was familiar with the independent braking systems of motorcycles and how they function in the operation of a motorcycle (N.T., Vol. I, pp. 143, 150). As part of his investigation, Tarris reviewed the police accident report, witness statements and photographs, and conducted a site visit on January 5, 2002, approximately 12 weeks after the accident, at which time he took measurements and determined the sight line from Sensinger's driveway looking west along West Mahoning Drive (N.T., Vol. I, pp. 156-157, 159). Tarris also performed a speed analysis of the Husband's motorcycle and an avoidance analysis (N.T., Vol. I, p. 162).

Tarris found the sight distance from the middle of Sensinger's driveway looking to the west along West Mahoning Drive to be 400 feet (N.T., Vol. I, p. 163). He also found that, from the point where Sensinger was stopped, West Mahoning Drive curves to the right up a slight incline with a grade of 6.6 percent (N.T., Vol. I, p. 161).

⁴ The Nunemachers' argument that the police independently determined Cruz' motorcycle was the cause of the western skid mark is misleading. The police initially thought both skid marks were attributable to Husband's motorcycle. Only after Cruz insisted that the western most mark was caused by his motorcycle did the police attribute this mark to Cruz (N.T., Vol. I, p. 103). Since the qualifications of the investigating police officer to render this opinion were never presented, at best, the police accident report served as a basis for impeaching Tarris on this issue, not as substantive evidence.

Critical to Tarris' speed analysis was his conclusion that the two skid marks he observed on West Mahoning Drive were caused by Husband's motorcycle (N.T., Vol. I, p. 182). The most distant skid mark from Sensinger's driveway, that which Tarris termed the western mark, began approximately 120 feet from the middle point of the driveway and was measured to be 41 feet in length (N.T., Vol. I, pp. 167-168). The second skid mark, which Tarris termed the eastern mark, was measured at 78 feet and began approximately 25 to 30 feet after the easternmost edge of the western mark (N.T., Vol. I, pp. 164, 168, 184).⁵

Tarris testified that, from his investigation and visual inspection of the site, he was convinced that both skid marks were caused by the same motorcycle, Husband's, and that both marks were perfectly aligned with one another (N.T., Vol. I, pp. 164-165, 169-170). When confronted on cross-examination with Cruz' testimony that the western mark was caused by Cruz' motorcycle, Tarris responded that he was aware of Cruz' testimony, that it did not affect the opinion he formed after his own investigation, and that he believed Cruz was mistaken (N.T., Vol. I, pp. 181-182, 207).

Tarris also testified that it is not uncommon when investigating motor vehicle accidents to find spaces or breaks in the skid marks caused by the same vehicle, and that various explanations can account for these gaps, including a momentary and partial release of pressure from the brake pedal, permitting the rear wheel to rotate, and then again applying the brake fully, causing the rear wheel to lock, and leaving an additional skid mark (N.T., Vol. I, pp. 185-187). According to Tarris, the distance he observed between the skid marks represented a half second in elapsed time (N.T., Vol. I, p. 187).

Based upon Tarris' investigation, including Husband's admission that he only partially applied the front brakes, Tarris

⁵The police report documented the length of the western mark to be 45 feet and that of the eastern mark to be 83 feet. While differing from Tarris' measurements, Tarris explained this difference to be attributable to time: Tarris did not visit the site and take his measurements until approximately 12 weeks after the accident and, as stated by Tarris, skid marks fade with time (N.T., Vol. I, p. 168). Tarris also testified that the police report did not identify the length of the gap between the two marks and although the space between these marks may have been less at the time of the accident, for purposes of his calculations he used the distance of 25 to 30 feet measured by him when he visited the site (N.T., Vol. I, pp. 184-185).

concluded that Husband's speed when he began braking—that point being represented by the western edge of the western skid mark—was 50 miles per hour and that had Husband made complete use of the braking system of his motorcycle, including applying the front brakes fully, it would have taken approximately 119 to 120 feet to stop (N.T., Vol. I, pp. 170-176). Under the same conditions—making complete use of the braking capacity of the motorcycle and applying the brakes at the same point—at a speed of 45 miles per hour (**i.e.**, the applicable speed limit), Tarris stated Husband would have been able to stop before reaching the driveway (N.T., Vol. I, p. 175). Tarris further testified that if Husband's speed was in fact 50 miles per hour, based upon the time it would ordinarily take for a stationary driver to pull out from the Sensinger driveway and accelerate to a speed of 25 miles per hour, Husband would not have been within Sensinger's view at the time he left his driveway (N.T., Vol. I, p. 177). Tarris ultimately opined that the cause of the accident was Husband's failure to control his motorcycle (N.T., Vol. I, p. 179).

At the conclusion of the testimony, the jury was instructed to answer two verdict slips, one for Husband and one for Wife. On both, the jury returned a verdict in favor of Sensinger on the question of negligence and against the Nunemachers. At the time the jury announced its verdict and before the jury was dismissed, it was brought to the Court's attention by counsel that an error existed on Wife's verdict slip. This verdict slip, which in format was identical to Husband's, incorrectly directed the jury not to answer any further questions if it found Sensinger was not negligent.⁶

Upon learning of this error, the jury was advised of the error in the verdict slip, instructed to continue their deliberations, and directed to determine whether or not Husband was negligent, whether such negligence, if any, was a substantial factor in causing Wife's injuries and, if so, to assess the amount of

⁶ The verdict slip for Husband was correct. Having found Sensinger to be non-negligent, the need to also evaluate whether or not Husband was negligent for purposes of comparative negligence was moot. In contrast, notwithstanding the jury's finding in favor of Sensinger on the issue of negligence, because of the issues raised in the joinder complaint against the Husband, it was still necessary on the Wife's verdict slip for the jury to determine whether the Husband was negligent and whether any negligence by him was a cause of Wife's injuries.

Wife's injuries (N.T., Vol. II, pp. 75-76). After further deliberations, the jury returned a verdict for Wife and against Husband on the issue of negligence, found Husband's negligence was a substantial factor in causing Wife's injuries, and, in answer to special interrogatories, awarded Wife her medical expenses of \$5,453.29 but made no award for pain and suffering. After announcing this verdict, no objection was raised by any of the parties and the jury was discharged.

II. DISCUSSION

A. Expert Testimony of Tarris

The Nunemachers question the competency of Tarris' expert witness testimony on two bases: first, that his qualifications as an accident reconstructionist did not qualify him to testify as to the operation of a motorcycle and second, that the factual basis for his opinions conflicted with the description of the facts provided by the Nunemachers and Cruz.

(1) Competency of Expert to Testify

As to the first issue, the Nunemachers do not dispute that Tarris has the necessary qualifications to testify as an accident reconstructionist—to render opinions as to how an accident happened (N.T., Vol. I, p. 137); **see also, Davis v. Steigerwalt**, 822 A.2d 22 (Pa. Super. 2003) (noting the liberal standard for testing the qualifications of an expert—whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation—and, if qualified, that the witness may testify and the weight to be given his testimony is for the trier of fact to determine). They challenge instead his competence to offer opinion testimony that “the cause of the accident was, in part, the manner in which [Husband] braked his motorcycle.” (Numemacher Brief in Support of their motion for post-trial relief, p. 6) Essentially, the Nunemachers argue that a distinction exists between how a motorcycle operates—its design and capabilities—and how the motorcycle was operated: as to the former, the Nunemachers appear to concede Tarris was competent to testify; as to the latter, in the Nunemachers’ opinion, he was not. While the distinction the Nunemachers seek to make may be a true one—certainly it would be if Tarris had been permitted to testify to Husband’s motives (**i.e.**, why he braked the way he did)—when fairly examined, the Nunemachers’ argument lacks support in the record.

In being able to reconstruct a motorcycle accident, Tarris testified that it is necessary for an accident reconstructionist to understand not only the principles of mathematics, physics, and engineering but also how a motorcycle operates mechanically, including an understanding of how the motorcycle braking system works (N.T., Vol. I, p. 150). Tarris testified specifically that he understood the functions of the braking system and how they relate to the operation of a motorcycle (N.T., Vol. I, pp. 142-143). Tarris further testified that part of the field of accident reconstruction is an understanding of accident avoidance—"what kind of opportunity [a driver] would have had to avoid impact." (N.T., Vol. I, pp. 147-148)

In this case, it was Husband who testified that he applied the rear brake fully, causing the wheel to lock and thereby leave skid marks, and intentionally applied the front brake only partially because of his belief that if he made full use of the front brake, the front wheel would lock, he would lose the ability to steer, and he risked having the motorcycle flip end over end (N.T., Vol. I, pp. 24, 59).⁷ In analyzing the physical data, Tarris took into account Husband's testimony and explained how it affected his calculations of Husband's speed—the more Husband actually applied the front brake the greater would be Husband's pre-braking speed—and how the stopping distance of Husband's motorcycle would have been affected had Husband fully utilized the entire braking system of his motorcycle (N.T., Vol. I, pp. 172-174, 177-178, 203).

Contrary to the Nunemachers' assumption, Tarris did not testify as to the manner in which Husband braked, Husband did. We see no error and believe Tarris was properly qualified to express the opinions he did and, in doing so, taking into account Husband's testimony.⁸

⁷ On cross-examination by the Nunemachers' counsel, Tarris testified that the belief that use of the front brake will cause the motorcycle to summersault is a myth, not supported by fact, and that in not using the front brake fully, a great percentage of the braking capacity of a motorcycle is lost (N.T., Vol. I, p. 198).

⁸ The Nunemachers rely heavily on Tarris' statement during **voir dire** on qualifications that "I do not consider myself an expert in the operation of a motorcycle, just as I don't consider myself an expert in the operation of a car." (N.T., Vol. I, p. 149) We believe the Nunemachers read more into this statement than was intended. Certainly in the context of the questions asked of Tarris on **voir dire**, it was clear that Tarris was qualified by education, training and experience to testify how this accident happened and how the manner in which Husband braked affected the happening of the accident.

(2) Factual Basis of Expert Testimony

The Nunemachers' second argument—the insufficiency of a factual basis to support Tarris' opinions—focuses entirely on the premise that "Tarris' testimony that both skid marks came from the Nunemacher motorcycle was unsupported by the evidence." (Nunemacher Brief in Support of their motion for post-trial relief, p. 7) The record, again, does not support this premise.

In concluding that both the western and eastern skid marks were left by Husband's motorcycle, Tarris stated that he personally visited the accident site, visually examined the skid marks, measured them, and that they were perfectly aligned. At the speed Tarris calculated Husband was traveling, the separation of the skid marks represented a split second in elapsed time and, according to Tarris, was easily explainable as a momentary relaxing of pressure on the rear brake. Tarris took photographs of the skid marks and their alignment; these photographs were admitted into evidence and were shown to the jury who could see for themselves what Tarris was describing.

Additionally, Husband testified that soon after the two vehicles ahead of him (a distance which Wife estimated to be 100 to 200 feet) passed Sensinger's driveway, Sensinger pulled out and that Husband was 100 to 150 feet from Sensinger's driveway when he first began braking. Consistent with this testimony, the western edge of the western skid mark was measured by Tarris at 120 feet from the middle of the driveway; in contrast, the western edge of the eastern mark started at approximately 49 to 54 feet from the middle of the driveway. Further, in Wife's testimony, she confirmed that when the Husband began braking, he continued in a straight line.

"In Pennsylvania, there are no legal restrictions on the information relied upon by an expert, save that the information is made known to the expert at or before the hearing and that the information itself is admissible or is of a type reasonably relied upon by experts in the field." **Readinger v. W.C.A.B. (Epler Masonry)**, 855 A.2d 952, 956 (Pa. Commw. 2004), **appeal denied**, 581 Pa. 709, 867 A.2d 525 (2005).

Traditionally, the opinion testimony of an expert must be narrowly limited to evidence of which he has personal

knowledge, which is uncontradicted on the record or which is proffered on an assumed state of facts reasonably shown by the record. **Houston v. Canon Bowl, Inc.**, 443 Pa. 383, 385, 278 A.2d 908, 910 (1971); **Battistone v. Benedetti**, 385 Pa. 163, 170, 122 A.2d 536, 539 (1956); **Jackson v. United States Pipe Line Co.**, 325 Pa. 436, 440, 191 A. 165, 166 (1937).

* * *

In Pennsylvania, experts have not been permitted to speak generally to the ultimate issue nor to give an opinion based on conflicting evidence without specifying which version they accept. These principles have been designed to permit the expert to enlighten the jury with his special skill and knowledge but leave the determination of the ultimate issue for the jury after it evaluates credibility.

Kozak v. Struth, 515 Pa. 554, 558-59, 531 A.2d 420, 422 (1987).

There is no question that Tarris' conclusion that the western skid mark was caused by Husband was critical to his opinions. The jury was told this directly by Tarris. In doing so, Tarris testified as to the facts upon which his opinion was based—including evidence that he gathered from personally visiting the scene—as he is required to do so under Pennsylvania law. See Pa. R.E. 705. Tarris was confronted by the contrary evidence on cross-examination and the jury heard his explanations. He openly acknowledged that his conclusion that both skid marks came from the Nunemachers' bike conflicted with the statements of the Nunemachers and Cruz. During our instructions to the jury, we explicitly highlighted the critical nature of this testimony and the need for the jury to resolve this material dispute of facts in determining what weight to give to Tarris' opinions (N.T., Vol. II, pp. 24-25).

Contrary to the Nunemachers' tacit assumption, there is no legal priority in the weight to be given direct or circumstantial evidence. The conflicting evidence as to the source of the skid marks was clearly an issue of fact and credibility for the jury. **Kozak**, **supra** at 559-60, 531 A.2d at 423.

B. Weight of the Evidence—Inadequacy in the Amount of the Verdict⁹

A new trial based upon a weight of the evidence claim shall be granted to a party:

only where the verdict is so contrary to the evidence as to shock one's sense of justice [and not] where the evidence is conflicting [or] where the trial judge would have reached a different conclusion on the same facts.

We have held that it is the duty of the trial court to control the amount of the verdict; it is in possession of all the facts as well as the atmosphere of the case, which will enable it to do more evenhanded justice between the parties than can an appellate court. Thus, a jury verdict is set aside for inadequacy when it appears to have been the product of passion, prejudice, partiality, or corruption, or where it clearly appears from uncontradicted evidence that the amount of the verdict bears no reasonable relation to the loss suffered by the plaintiff. Hence, a reversal on grounds of inadequacy of the verdict is appropriate only where the injustice of the verdict [stands] forth like a beacon.

Womack v. Crowley, 877 A.2d 1279, 1283 (Pa. Super. 2005) (**quoting Davis v. Mullen**, 565 Pa. 386, 390, 773 A.2d 764, 766 (2001) (quotations and citations omitted)).

⁹To the extent Sensinger argues this issue has been waived because no objection was made at the time the jury returned its verdict, Sensinger's legal premise is incorrect. Unlike a facially inconsistent verdict which requires the making of a timely, contemporaneous objection upon the rendering of the verdict to preserve the issue for post-trial relief and appellate review, **Straub v. Cherne Industries**, 880 A.2d 561, 567 (Pa. 2005), a challenge based on the weight of the evidence need not be made before the jury is discharged and the verdict recorded in order to preserve the issue for review. **Criswell v. King**, 575 Pa. 34, 834 A.2d 505, 506 (2003). While, conceptually, an inconsistent verdict is manifestly unreasonable and objectively discernible at the time of trial and, therefore, capable of being corrected before the jury is discharged, a claim challenging the weight of the evidence "is not premised upon trial court error or some discrete and correctable event at trial"; such a challenge does not allege any facial error in the verdict of the jury but instead is dependent on the court's independent review and evaluation of the verdict and its conclusion that "the verdict was so contrary to what it heard and observed that it will deem the jury's verdict such a miscarriage of justice as to trigger the court['s] time-honored and inherent power to take corrective action." **Id.**, 834 A.2d at 512. And, unlike an inconsistent verdict which the court can bring to the jury's attention and request be reconciled, "a trial judge cannot issue a corrective instruction to the jury suggesting that the weight of the evidence does not support its verdict without invading the province of the jury by essentially directing a verdict." **Id.**

A new trial is warranted on weight of the evidence grounds only “in truly extraordinary circumstances, **i.e.**, when the jury’s verdict is ‘**so contrary to the evidence that it** shocks one’s sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail.’” **Criswell v. King**, 575 Pa. 34, 834 A.2d 505, 512 (2003) (citations omitted) (emphasis in original). Because the power of a trial court to nullify a jury’s verdict on the basis of evidentiary weight overrides the primacy of the jury in determining questions of credibility and evidentiary weight, the remedy of overturning the jury’s verdict on this basis is extraordinary. To do so, “the judicial conscience [must] not merely [be] disappointed, or uncomfortable, but [must be] shocked.” **Id.**, 834 A.2d at 513.

In this case, Wife testified that she injured her right wrist and elbow in the accident. The same day she was taken to the emergency room of the Gnaden Huetten Memorial Hospital where a splint was placed on her wrist and she was released. Two days later her wrist was placed in a cast. For a “couple of weeks” she received physical therapy for strengthening, both her wrist and elbow improved, and the pain apparently subsided (N.T., Vol. I, pp. 70-71).

No evidence was presented as to the size of her cast, when the cast was removed, or of any discomfort associated with the cast. No evidence was presented as to the number or frequency of physical therapy sessions she attended. No evidence was presented as to any activities Wife was unable to perform or was restricted in performing. Other than stating that on the day of the accident she felt a “gnawing, stabbing pain” and that the pain she experienced in her wrist and elbow was worse and more frequent than before the accident, no evidence was presented as to the severity or frequency of the pain, or of any pain medication prescribed for, or taken by, Wife (N.T., Vol. I, p. 70).

In December 2001, according to Wife, the “gnawing, stabbing pain” in her right elbow returned, was “almost constant,” and wouldn’t go away. Wife first saw Dr. Talsania for this pain in January 2002. Tests performed by Dr. Talsania ruled out any fractures or nerve damage. On the basis of a differential diagnosis, Dr. Talsania determined that Wife’s problem was tennis elbow—the triceps of her right arm snapping over the bony ridge of her elbow—and that the problem was attributable to

the motorcycle accident (Talsania Deposition, pp. 39-40). In rendering his opinion on the cause of Wife's problem, Dr. Talsania explicitly acknowledged that the validity of this opinion was dependent on the truthfulness of Wife accurately reporting the onset of the snapping symptoms (Talsania Deposition, p. 40).

Dr. Talsania performed surgery on Wife's elbow on April 15, 2002. Wife received rehabilitative therapy at home and reported that all problems with her right elbow had returned to their pre-accident condition by June or July of 2002. Dr. Talsania did not treat Wife for any injury to her right wrist nor was any expert medical testimony presented with respect to the nature of this alleged injury. In fact, Wife acknowledged that any additional problems she had with her right wrist after the accident had resolved before she met with Dr. Talsania. (N.T., Vol. I, p. 77).

In this case, Sensinger challenged the cause of Wife's injuries. As to the cause, in awarding Wife all of her claimed medical expenses for the surgery performed by Dr. Talsania, the jury necessarily found that the difficulty Wife experienced with her triceps was caused by the accident. However, it is not insignificant that Wife's initial complaint of pain appears from the evidence to have resolved itself within the two-week period Wife first received physical therapy and was followed by a one- to two-month period before Wife sought treatment from Dr. Talsania.

"[A] jury is entitled to reject any and all evidence up until the point at which the verdict is so disproportionate to the uncontested evidence as to defy common sense and logic." **Neison v. Hines**, 539 Pa. 516, 521, 653 A.2d 634, 637 (1995). In those circumstances where medical expenses have been awarded without an award of pain and suffering, our courts have held that if the injuries sustained were "of the types that normally involve pain and suffering" the failure to compensate for pain and suffering results in a verdict which "bears no reasonable relation to the injuries suffered." **Burnhauser v. Bumberger**, 745 A.2d 1256, 1261 (Pa. Super. 2000); **Womack, supra** at 1284. Our Supreme Court has also stated that:

a jury's award of medical expenses without compensation for pain and suffering should not be disturbed where the

trial court had a reasonable basis to believe that: (1) the jury did not believe the plaintiff suffered any pain and suffering, or (2) that a preexisting condition or injury was the sole cause of the alleged pain and suffering.

Davis, supra, 773 A.2d at 767.

In this case, Sensinger also challenged the extent and duration of Wife's injuries. While Wife complained of increased pain in her right wrist and elbow after the accident, she acknowledged her pre-existing work-related injury to her right arm; that she had received medical treatment for this injury, including surgeries in 1997 and 1998, and was still receiving follow-up medical treatment at the time of the accident; and that she had not returned to work since the injury and was unemployed when the accident occurred.

It is undisputed that Wife met with the treating physician for her pre-existing injury, Dr. Mauthe, on October 1, 2001, less than two weeks before the accident at issue (Talsania Deposition, p. 48). At that time, Wife was taking medications and wearing a Dynasplint on her right elbow (Talsania Deposition, pp. 48-49). Additionally, based on Wife's own testimony, at the time of the accident she continued to experience "numbness and tingling" in the last three fingers of her right hand, had pain in her wrist, and felt some pain in her right elbow (N.T., Vol. I, p. 65). When asked at trial whether the problems she was having with her elbow after the accident were the same or different than those she was having before the accident, Wife initially responded, "Basically." (N.T., Vol. I, p. 74)

Under these circumstances, we believe the jury could rationally determine that Wife did not suffer a serious debilitating injury. In **Davis**, the court stated that whether a defendant caused the plaintiff's injuries and whether the plaintiff suffered compensable pain are issues peculiarly within the province of the jury to determine. **Id.**, 773 A.2d at 769. As to the jury's determination to award medical expenses only, "the existence of compensable pain is an issue of credibility and juries must believe that plaintiffs suffered pain before they compensate for that pain." **Id.**; cf. **McDermott v. Consolidated Rail Corp.**, 567 Pa. 561, 789 A.2d 203 (2001) (per curiam) (finding that notwithstanding an injury to the nerves requiring two surger-

ies, an award for lost wages with no accompanying award for pain and suffering is not **per se** invalid).

Nor, in the absence of an obvious injury with which pain is naturally associated, is the jury, when faced with complaints of subjective pain, “obliged to believe that every injury causes pain or the pain alleged.” **Boggavarapu v. Ponist**, 518 Pa. 162, 167, 542 A.2d 516, 518 (1988). Further, in **Majczyk v. Oesch**, 789 A.2d 717, 726 (Pa. Super. 2001) (**en banc**), the court noted that for some injuries, the jury may appropriately conclude that the plaintiff’s “discomfort was the sort of transient rub of life for which compensation is not warranted.” **See also, Andrews v. Jackson**, 800 A.2d 959, 965 (Pa. Super. 2002), **appeal denied**, 572 Pa. 694, 813 A.2d 835 (2002) (a jury may find negligence and causation based on the uncontradicted testimony of both parties’ medical experts but then “deny damages on the basis that the injury was not serious enough to warrant compensation”); **Kennedy v. Sell**, 816 A.2d 1153 (Pa. Super. 2003).

In this case, the jury may have believed that Wife’s subjective complaints of pain were not credible because the part of her body injured in the accident was the same part for which she was receiving treatment and experiencing pain immediately before the accident. In other words, the jury may have believed Wife suffered no additional pain for any injuries sustained in the accident above and beyond those problems which pre-existed and were unrelated to the accident. The jury may also have found that any pain caused by injuries Wife sustained in the accident was not only transient, but incrementally minor and virtually indistinguishable from the pain and discomfort attributable to her pre-existing injury and, therefore, noncompensable.

Clearly, we cannot presume to know what happened in the jury room or what was the basis of the jury’s reasoning. We are constrained, however, by what are reasonable possibilities explaining the jury’s verdict and whether the jury properly exercised its prerogative to believe all, some, or none of the evidence.

Ultimately, the determination of “what is a compensable injury is uniquely within the purview of the jury.” **Majczyk, su-**

pra at 726. With the foregoing in mind, the jury's decision not to award damages for pain and suffering is not inconsistent with its award of medical expenses only and does not offend our sense of overall justice in this case.¹⁰

III. CONCLUSION

In accordance with the foregoing, the Nunemachers' motion for post-trial relief will be denied in total and judgment entered on the jury's verdict.

¹⁰ Husband's argument that he was somehow prejudiced when the error in Wife's verdict slip was detected and the jury was directed to resume its deliberations is speculative and finds no support in the record.

Both Husband's and Wife's verdict slips were reviewed and approved by counsel prior to being distributed to the jury (N.T., Vol. I, pp. 239-242). At the conclusion of the Court's closing instructions and before the jury began its deliberations, counsel were provided with an opportunity to voice any objections they might have to the verdict slip or the Court's closing instructions: none did so (N.T., Vol. II, p. 68). Only after the jury announced its verdict as to the Nunemachers' claims against Sensinger, did it become apparent that the jury had not rendered a verdict with respect to the claims of the Wife against Husband raised in the joinder complaint.

In instructing the jury further on these issues and directing the jury to resume its deliberations, the Court did not suggest one way or another how the jury should decide the issue of Husband's liability to Wife or what amount of damages to find (N.T., Vol. II, pp. 76-78). What the jury had already decided, that Sensinger did not act negligently, was an issue separate and distinct from whether the Husband was negligent and whether such negligence, if any, caused damages to the Wife.

In directing the jury to answer these remaining questions, the Court did not introduce any issues into the case which counsel had not expected the jury to decide. Instead, the Court properly and appropriately corrected an error on the face of the Wife's verdict slip, which incorrectly instructed the jury not to decide the issues of Husband's liability to Wife in the event it found Sensinger was non-negligent, and explained that these issues still needed to be decided.

While we believe counsel's initial failure to timely object to the wording on Wife's verdict slip constituted a waiver of the issue, at the time we first became aware of the error the jury was still present and had not been discharged, and the error was then capable of being corrected without prejudice to any party. Counsel has not argued that our subsequent instructions to the jury were, in themselves, erroneous or prejudicial, but that our decision to correct an error which was capable of being corrected was itself error. **Cf. Dilliplaine v. Lehigh Valley Trust Co.**, 457 Pa. 255, 322 A.2d 114 (1974) (noting the policy considerations underlying the contemporaneous objection rule: that timely and specific objections advance judicial economy by allowing a trial court to immediately address errors which are subject to correction before the trial ends). Having failed to establish any basis for prejudice on this issue, Husband's motion for a new trial will be denied. **See Berger v. Schetman**, 883 A.2d 631, 636 (Pa. Super. 2005) (stating that the occurrence during trial of some irregularity does not in and of itself warrant the grant of a new trial in the absence of demonstrated prejudice resulting from the mistake).

**COMMONWEALTH OF PENNSYLVANIA vs.
JOSEPH DONALD EVANS, JR., Defendant**

*Criminal Law—Legality of Traffic Stop—Probable Cause—Consent
to Blood Test—Effect of Incomplete Implied Consent Warning—
Suppression—Right to Counsel*

1. A police officer who observes an automobile cross the centerline of a rural, two-lane highway three times, each time by one-half of the vehicle's width while on a straight stretch of road, over a distance of one mile, and during the early evening hours of a holiday weekend, with no obstructions or other visible basis to explain the weaving motion of the vehicle, possesses probable cause to believe that one or more provisions of the Vehicle Code has been, or is being, violated, namely section 3301(a) (driving on the right side of the roadway) or section 3309(1) (driving on roadways laned for traffic), and to suspect that the driver is under the influence of alcohol or some other substance. The foregoing observations by a police officer exceed the "momentary and minor" standard articulated in **Commonwealth v. Garcia** for determining whether the traffic stop of a vehicle driven outside its lane of traffic is justified.
2. A driver who the police have reasonable grounds to believe has been driving a motor vehicle while under the influence of alcohol, and who is given an accurate, but incomplete, implied consent warning—here, Defendant was accurately advised that his refusal would result in a suspension of his operating privileges but was not further advised, as required under the recent amendments to section 1547 of the Vehicle Code, that if convicted of violating section 3802(a), his refusal would also subject him to a mandatory jail term and fine—has been deprived of no constitutional safeguards necessitating the suppression of the blood alcohol results obtained from a blood sample he supplied. In the present case, Defendant has failed to establish that, had he been advised of the enhanced penalties, he would have refused a chemical test; that he was in any manner prejudiced in giving consent by the absence of this additional warning; or that his consent was other than knowing, voluntary and intelligent.
3. Inasmuch as the taking of a sample of a driver's blood constitutes a "search" rather than an "interrogation," a person suspected of driving under the influence from whom a blood sample is requested is not required to be advised that he has the right to counsel before consenting to having the sample drawn.

NO. 570 CR 04

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

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

MEMORANDUM OPINION

NANOVIC, P.J.—September 30, 2005

INTRODUCTION

The present case arises from a motor vehicle stop in which the Defendant, Joseph Donald Evans, Jr., was cited for driving

under the influence of alcohol, incapable of safe driving (75 Pa. C.S. §3802(a)(1)) and driving under the influence, having a high rate of alcohol (75 Pa. C.S. §3802(b)). The Defendant was also charged with two summary offenses, driving on the right side of the roadway and driving on roadways laned for traffic. 75 Pa. C.S. §§3301(a) and 3309(1), respectively.

Via an omnibus pretrial motion filed on February 7, 2005, and now before the Court for disposition, Defendant challenges the constitutionality of the initial vehicle stop and the sufficiency of the **O'Connell** warnings given. For the reasons that follow, we deny **in toto** Defendant's omnibus motion.

I. Facts

During the early morning hours of July 3, 2004, Corporal John Baker of the Pennsylvania State Police was on duty as part of a roving DUI patrol for the holiday weekend. While driving an unmarked police car, at 12:40 A.M., Corporal Baker came upon the Defendant's vehicle traveling west on Behrens Road, a rural, two-lane highway in Penn Forest Township, Carbon County, Pennsylvania (N.T., p. 7).¹ Over the course of a mile, Corporal Baker observed Defendant's vehicle cross the centerline of Behrens Road three times, each time by one-half of the vehicle's width (N.T., p. 8). Corporal Baker observed no obstructions on the roadway, neither the presence of deer or other wildlife, or any other visible basis to explain this behavior (N.T., p. 8). Each time the crossings occurred along a straight portion of the road (N.T., pp. 17-18). Each time Defendant crossed the centerline, his return to his lane was smooth, not abrupt (N.T., p. 8).

Corporal Baker testified that the speed limit was 35 m.p.h. and that he maintained a distance of three to four car lengths between vehicles (N.T., p. 16). There was no testimony that Defendant exceeded the speed limit, that Defendant's speed varied during the Corporal's observations, or what the distance or time intervals were between each of the Defendant's movements across the road's center.

¹ A hearing on Defendant's omnibus pretrial motion was held on March 28, 2005. At that time, the parties stipulated to incorporate the testimony adduced at the preliminary hearing held on September 22, 2004, a transcript of which was entered as an exhibit. References to the record in this Opinion are based on our review of the preliminary hearing transcript.

After Defendant's vehicle straddled the centerline the third time and turned onto a dirt road, Corporal Baker initiated his stop. As he approached Defendant's vehicle, the Corporal noticed a faint smell of alcohol notwithstanding that Defendant was smoking a cigar; he also observed that the Defendant was lethargic and had red glassy eyes (N.T., pp. 9, 14-15). When asked to produce his license, Defendant first handed the officer a permit to carry a firearm and was subsequently unable to produce his license after three attempts of searching through his wallet, finally causing Corporal Baker to point to the license for Defendant to locate it (N.T., p. 9).

Corporal Baker had the Defendant perform one field sobriety test, the one-leg stand, which he failed (N.T., p. 10). The Defendant was not requested to perform other field sobriety tests as the location where the Defendant stopped his vehicle was a lineless dirt road (N.T., p. 10). The Defendant was also asked to blow into a portable PBT device; however, no reading could be obtained (N.T., p. 10). Corporal Baker next placed the Defendant under arrest and transported him to the Lehighton State Police Barracks with the intention of administering a breathalyzer test (N.T., pp. 10-11). Defendant's attempt to breathe into the breathalyzer machine also failed to produce a useable sample; at this time the Defendant notified Corporal Baker that tuberculosis had scarred his lungs rendering him incapable of emitting sufficient air for a breath sample (N.T., p. 11). Corporal Baker then took the Defendant to the Palmerton Hospital for a blood test, the result being a BAC of 0.15%.

Prior to consenting to chemical testing, Defendant was provided **O'Connell** warnings. The warnings read to the Defendant advised him that refusal to submit to a chemical test would result in a 12-month suspension of his operating privileges. The warnings for a refusal did not advise the Defendant that if convicted of violating section 3802(a) of the Vehicle Code, he would also be subject to the penalties provided in section 3804(c).

Following Defendant's stop, he was charged with driving under the influence of alcohol to a degree rendering him incapable of safe driving,² driving under the influence with a high

² 75 Pa. C.S. §3802(a)(1).

rate of alcohol,³ driving on the right side of the roadway⁴ and driving on roadways laned for traffic.⁵

II. Discussion

A. The Traffic Stop

A traffic stop is a seizure implicating Fourth Amendment protections. **Commonwealth v. Gleason**, 567 Pa. 111, 785 A.2d 983, 987 (2001). With this in mind, a balance must be struck between the Commonwealth's interest "in ensuring that drivers are in full compliance with the Vehicle Code when operating an automobile, a dangerous instrumentality," and the competing interest of individuals to live free from government intrusion into their lives. **Id.** The focal point of this balance is the standard of probable cause—the presence of articulable, tangible facts evincing that the driver has probably violated some provision of the Vehicle Code. **Id.** The presence of such facts demonstrates that the officer has both an objective and a reasonable basis to believe that some provision of the Vehicle Code was being broken. **Id.**, 785 A.2d at 989; **see also**, **Commonwealth v. Whitmyer**, 542 Pa. 545, 668 A.2d 1113 (1995); **Commonwealth v. Swanger**, 453 Pa. 107, 307 A.2d 875 (1973).

Whether probable cause exists is not an overly harsh standard. "Probable cause does not require certainty, but rather exists when criminality is one reasonable inference, not necessarily even the most likely inference." **Commonwealth v. Mickley**, 846 A.2d 686, 689 (Pa. Super. 2004), **appeal denied**, 580 Pa. 703, 860 A.2d 489 (2004) (**citing Commonwealth v. Stroud**, 699 A.2d 1305, 1308 (Pa. Super. 1997)).

In **Gleason**, the Supreme Court of Pennsylvania found that an officer lacked probable cause to warrant a traffic stop where the officer observed a driver cross the fog line two times by six to eight inches over a quarter-mile stretch of a four-lane highway when no other cars were present. **Id.**, 785 A.2d at 983-985. The officer in **Gleason** premised his stop on a violation of Vehicle Code section 3309(1), titled "Driving on roadways laned for traffic." 75 Pa. C.S. §3309(1). One principle to be gleaned from **Gleason** and its progeny is that "there is no basis for 'profiling' a suspected drunk driver merely on the basis of observ-

³ 75 Pa. C.S. §3802(b).

⁴ 75 Pa. C.S. §3301(a).

⁵ 75 Pa. C.S. §3309(1).

ing undisciplined operation of a [motor] vehicle” **Commonwealth v. Battaglia**, 802 A.2d 652, 657 (Pa. Super. 2002), **appeal denied**, 576 Pa. 718, 841 A.2d 528 (2003). “Erratic driving is not **per se** a violation of the Vehicle Code.” **Id.** at 656 n.8; **see also**, **Commonwealth v. Klopp**, 863 A.2d 1211, 1213 (Pa. Super. 2004).

Applying **Gleason’s** holding to the panoply of scenarios which frequently occur is not an easy task, finding or not finding probable cause in this area being fraught with pitfalls. **See Commonwealth v. Garcia**, 859 A.2d 820, 822 (Pa. Super. 2004) (noting the difficulty in applying **Gleason** to the myriad of traffic stop fact patterns); **Commonwealth v. Kane**, 71 D. & C. 4th 371, 375 (Carbon Cty. 2005) (same). To aid in this analysis, in **Garcia**, while interpreting **Gleason**, the Superior Court of Pennsylvania articulated the “momentary and minor” standard meaning that when “a vehicle is driven outside the lane of traffic for just a momentary period of time and in a minor manner, a traffic stop is unwarranted.” **Garcia, supra** at 823.

Specifically, in **Garcia** the Superior Court found that there were insufficient grounds to warrant a traffic stop where the driver crossed over the fog line twice, once by half the car’s width, both in response to oncoming traffic, over a short stretch of highway. The **Garcia** court noted that the trial court called its case a “close call” and that although the driver’s handling of his vehicle would warrant continued police observation, it did not rise to the level of probable cause. **Id.** at 823. As applied, the “momentary and minor” standard is not a rigid, mathematical formula for determining probable cause devoid of the surrounding circumstances.

In this case, we are presented with a driver who, during the early morning hours of July 3rd, a holiday weekend, while on straight segments of a highway, crossed the centerline three times by half of his vehicle’s width, without explanation. This did not all occur at one location but over a distance of one mile, with curved areas lying between the straightaways. Compare **Mickley, supra** (finding probable cause to justify a stop based in part on evidence that the crossings occurred on relatively straight stretches of road). The evidence here also implies that the Defendant maintained a relatively steady speed and did not brake or accelerate, or immediately react, when entering into

the opposite lane or returning to his lane.⁶ After comparing factual situations faced by other courts in determining the propriety of a vehicle stop, we believe the articulated observations of Corporal Baker justified Defendant's traffic stop.⁷

⁶ In **Commonwealth v. Cook, infra**, the Superior Court found the driver's sharp, abrupt movements after drifting into the opposite lane of traffic to be corroborative of a legitimate stop:

Most importantly, after crossing the fog line by half of a car length, Appellant rapidly jerked his car back into his lane of travel. He did so on three different occasions. Appellant's actions exhibit that when he realized that he had inadvertently crossed the fog line, he sought to remedy his mistake in an overly anxious and unsafe manner by jerking his car back to his lane.

Id., 865 A.2d 869, 874 (Pa. Super. 2004), **appeal denied**, 880 A.2d 1236 (Pa. 2005). While this interpretation of the driver's movements is reasonable, we are not persuaded that smooth transitions must necessarily be discounted as less persuasive evidence that a driver is violating a provision of the Vehicle Code. As a practical matter, it is as plausible that the gradual movements of a vehicle across the centerline and back into its lane of travel, at an early hour of the morning on a holiday weekend, are caused by senses that have been dulled and slowed from alcohol as it is that they are the result of simple inattentiveness. We find such movements to be no less suggestive that a provision of the Vehicle Code is being violated than if the Defendant would have jerked his car back into its lane.

⁷ The facts of the case **sub judice** are similar to those presented in **Commonwealth v. Howard**, 762 A.2d 360 (Pa. Super. 2000), **appeal denied**, 565 Pa. 661, 775 A.2d 803 (2001). In **Howard**, an officer observed the driver twice cross the fog line by one-quarter to one-third of his vehicle onto the berm of the road, drive down the center of an unlined road and then, after turning, cross the centerline of a laned roadway. **Id.** at 361. On these facts, and relying on **Commonwealth v. Korenkievicz**, 743 A.2d 958 (Pa. Super. 1999), the court stated that an officer "may stop a vehicle when he has reasonable, articulable facts to suspect a violation of the Motor Vehicle Code." **Howard, supra** at 361.

Howard, however, was decided before **Gleason** in which the court required a finding of probable cause to justify a vehicle stop. See also, **Commonwealth v. Battaglia, supra** at 655 (noting the standard employed in **Korenkievicz** has been replaced by the standard set in **Gleason**); **Commonwealth v. Minnich**, 874 A.2d 1234, 1236 (Pa. Super. 2005). Notwithstanding that the legal standard set forth in **Howard** is less stringent than that of probable cause, we believe that the present case presents facts not only similar to those in **Howard**, but also more egregious, thus meeting the standard of probable cause set in **Gleason**.

In **Howard**, the officer's observations occurred at approximately 5:10 P.M. on April 5, 1999; here, Corporal Baker's observations occurred at 12:40 A.M. on a holiday weekend. Moreover, the crossings reported by Corporal Baker, though one less in number than those reported in **Howard**, all involved centerline crossings, in contrast to only one actual centerline crossing noted in **Howard**, each crossing being to a greater extent than those observed in **Howard**.

Editor's Note: On November 2, 2005, a panel of the Pennsylvania Superior Court upheld the constitutionality of section 6308(b) of the Vehicle Code, 75

The Defendant's three unexplained crossings of the centerline by half of his vehicle's width over a distance of one mile present more than just mere erratic driving. Each presented a serious risk of causing an accident to potential oncoming traffic as well as to the Defendant himself. **Compare Klopp, supra** (noting that interference with oncoming traffic occurred where the driver crossed the centerline by less than half the vehicle's width but made an oncoming motorist have to move right within its lane of travel); **Commonwealth v. Almodovar**, 70 D. & C. 4th 394, 400 (Lehigh Cty. 2005) (noting the lack of evidence that the vehicle crossed the centerline "completely or mostly" such as to create a risk of a head-on collision, probable cause not found).

Given the degree of the three centerline crossovers, we conclude the "momentary and minor" standard has been satisfied. Unlike the mere inches involved in **Gleason**, or the two innocently explainable fog line crossings in **Garcia**, both over distances substantially less than one mile, the centerline crossings here placed half of the Defendant's car into the lane used by opposing traffic. Even though Corporal Baker did not observe additional motorists, the Defendant's conduct posed a serious risk of danger to himself and others, Corporal Baker noting the possibility of deer along the road in question. **See Commonwealth v. Chernosky**, 874 A.2d 123, 128 (Pa. Super. 2005) (en banc) (noting that a stop was proper, in part, because driver's conduct created a public risk even though the officer could not recall seeing other vehicles on the roadway). Aware of the competing government interest in promoting highway safety and the personal interests in privacy, we do not believe that **Gleason** requires that an officer observing an erratic driver wait until another motorist approaches.

Additionally, Defendant's inability to maintain his vehicle within its lane of travel, as perceived by Corporal Baker, is impermissible in this Commonwealth. Accordingly, the Defendant was charged with two summary offenses: for failing to stay on

Pa.C.S.A. §6308(b), insofar as it authorizes a police officer to stop a motor vehicle based upon a reasonable suspicion to believe that the driver is operating the vehicle under the influence of alcohol. **Commonwealth v. Sands**, 2005 WL 2863123 (Pa. Super. filed Nov. 2, 2005). The amended version of subsection 6308(b) upon which the Superior Court relied in **Sands** became effective February 1, 2004, prior to the stop of Defendant's vehicle.

the right side of the roadway and failing to keep his vehicle within its lane on a roadway laned for traffic. 75 Pa. C.S. §§3301(a) and 3309(1), respectively. **Compare Chernosky, *supra*** at 127-128 (finding that the line crossings involved were more egregious than the mere inches involved in **Gleason** and constituted violations of sections 3301(a) and 3309(1); **Mickley, *supra*** at 687 (officer properly made traffic stop predicated on section 3309(1) after observing driver completely cross fog line and enter the berm and then do so three more times over a distance of three-quarters of a mile)).

B. The O'Connell Warnings

On and after September 30, 2003, the amendments to the Commonwealth's new DUI legislation came into effect. Prior to amendment, the Implied Consent Law, appearing in section 1547 of the Motor Vehicle Code, 75 Pa. C.S. §1547, required only that a police officer arresting a driver who refused to submit to chemical testing be advised that a refusal would result in the suspension of his operating privileges. Since amendment, in addition to informing the driver that a refusal will result in a license suspension, newly added section 1547(b)(2)(ii) requires the officer to also advise the driver that if he is convicted of violating section 3802(a), a refusal will subject him to the enhanced penalties provided for in section 3804(c) of the Vehicle Code. **Compare Garner v. Department of Transportation, Bureau of Driver Licensing**, 879 A.2d 327, 330 (Pa. Commw. 2005) (holding that section 1547(b)(2)(ii) requires only that the driver be advised that his conviction will result in additional penalties, not what those penalties will be).

This additional warning requirement was in effect at the time of Defendant's stop and was not given. Defendant contends that the failure to provide this additional warning and the further failure to advise him that he has a right to counsel invalidates his consent to the testing and requires suppression of the BAC results. We disagree.

In this case, Defendant was accurately told that a refusal would result in a suspension of his operating privileges. That he was not told that such refusal would further subject him to the increased penalties described in section 3804(c)—in the event of his conviction for violating section 3802(a)—has deprived Defendant of no criminal safeguards of which we are aware.

The warning at issue is part of the Implied Consent Law intended to inform a driver who has been arrested for DUI of the consequences of a refusal; it is not a prophylactic rule comparable to **Miranda** warnings having as its objective the leveling of the playing field between the State and the individual to secure criminal guarantees. **Commonwealth v. Mordan**, 419 Pa. Super. 214, 227, 615 A.2d 102, 108-109 (1992), **aff'd**, 534 Pa. 380, 633 A.2d 588 (1993) ("[The driver] has a right to a knowing and conscious refusal before his license is suspended, but not a right to a knowing and conscious submission to the breath test."), **see also, Witmer v. Department of Transportation, Bureau of Driver Licensing**, 880 A.2d 716 (Pa. Commw. 2005) (holding that the enhanced criminal penalties imposed by the General Assembly's 2003 amendments to section 3804(c) for conviction and refusal to submit to chemical tests do not require a change in the warnings under the Implied Consent Law whose sanctions are civil in nature).

In criminal prosecutions for driving under the influence, obtaining a sample of a driver's blood constitutes a "search" rather than an "interrogation" and is consequently not subject to the privilege against self-incrimination contained in the Fifth Amendment, the protections of **Miranda**, or the right to counsel. **Schmerber v. California**, 384 U.S. 757, 765, 86 S.Ct. 1826, 16 L.Ed. 2d 908 (1966); **Commonwealth, Department of Transportation v. McFarren**, 514 Pa. 411, 417, 525 A.2d 1185, 1188 (1987) (plurality decision). Moreover, at least as a matter of federal constitutional law, because of the evanescent nature of alcohol in the human body, the high probative value of a sample when withdrawn, and the relative safety with which a blood sample can be obtained, a blood sample may be forcefully withdrawn from a non-consenting individual without running afoul of the constitutional dictates of search and seizure. **Schmerber, supra**, 384 U.S. at 770-772.

Importantly, the Defendant did not refuse but consented to the chemical test requested. Defendant has presented no evidence as to how he was legally prejudiced by this consent. No evidence exists that had Defendant been advised that his refusal to submit to chemical testing, when coupled with a possible future conviction for violating section 3802(a), would result in criminal penalties equal to those imposed on individuals

driving with the highest rate of alcohol (**i.e.**, a BAC of 0.16% or greater), he would have refused the test. In short, Defendant has established neither a violation of his constitutional rights, nor a violation of state-imposed criminal protections by which he has been prejudiced.⁸

III. Conclusion

For the foregoing reasons we find that the contentions raised by the Defendant in his omnibus pretrial motion—that the stop was unconstitutional, that he was not warned of the criminal consequences of a refusal under the Implied Consent Law, and that he was deprived of a right to consult counsel prior to giving his consent to the chemical test—are without merit. We therefore deny the Defendant's present motion.

⁸ It should also be noted that not every violation of law requires suppression of evidence. Only if the violation implicates fundamental, constitutional concerns, was conducted in bad faith, or has substantially prejudiced the accused, none of which is applicable in the present case, is suppression of evidence an appropriate remedy. **Commonwealth v. Mason**, 507 Pa. 396, 407, 490 A.2d 421, 426 (1985).

COMMONWEALTH OF PENNSYLVANIA vs. STEPHANIE WEIRICH, Defendant

*Criminal—Conspiracy—Co-Conspirator Rule—Accomplice
Liability—Relationship Between Receiving Stolen Property and
Theft by Unlawful Taking*

1. Conspiracy is a crime separate and apart from the crime or crimes that were the object or means of the conspiracy. Therefore, as conspiracy requires proof only of an agreement and an overt act in furtherance of the conspiracy, a defendant may be found guilty of a conspiracy without being convicted of the underlying offense.

2. The co-conspirator rule and accomplice liability are separate and conceptually distinct theories of imposing criminal liability on a defendant for the underlying offense. The essence of a criminal conspiracy, which is what distinguishes this crime from accomplice liability, is the agreement made between the co-conspirators.

3. Under the co-conspirator rule, once a conspiracy to commit a crime has been proven, each co-conspirator is criminally responsible for all actions undertaken in furtherance of the conspiracy regardless of their individual knowledge of such actions and regardless of which member of the conspiracy undertook the action. Under this rule, the mental state of the principal is imputed to each individual member of the conspiracy.

4. For accomplice liability to arise, the defendant must have intended to aid or promote the underlying offense and must then have actively participated in the crime by soliciting, aiding, or agreeing to aid the principal. Under this

theory of liability, the accomplice in the commission of an offense must act with the same culpability, if any, as that required of the principal.

5. The crimes of theft by unlawful taking and receiving stolen property overlap. As defined, “receiving” includes “taking” and, therefore, receiving stolen property includes the crime of theft by unlawful taking.

6. Where two people team up for purposes of taking a third person’s money, and one of them breaks into the third person’s home, assaults him and distracts him while the other searches for and takes his money, such evidence, at the preliminary hearing stage, is sufficient to sustain charges of conspiracy to commit burglary, conspiracy to commit criminal trespass and conspiracy to commit robbery against the person taking the money, as well as the offenses of theft by unlawful taking and of receiving stolen property.

NO. 035 CR 05

MICHAEL S. GREEK, Esquire—Attorney for Commonwealth.

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

MEMORANDUM OPINION

NANOVIC, P.J.—December 28, 2005

Stephanie Weirich (“Defendant”) has filed a Motion to Dismiss certain charges against her. Specifically, Defendant contends that the evidence presented against her at a preliminary hearing held on January 19, 2005, was insufficient to sustain the charges of conspiracy to commit burglary (Count 1), conspiracy to commit criminal trespass (Count 2), and conspiracy to commit robbery (Count 3), as well as the offense of receiving stolen property (Count 5).¹ Defendant does not challenge the sufficiency of the evidence as to Count 4, theft by unlawful taking.² We summarize the relevant facts as follows:

I. FACTUAL BACKGROUND

The events in question occurred during a period covering Friday night, July 16, 2004, and the early morning hours of Saturday, July 17, 2004 (N.T., pp. 4-5).³ At approximately 10:00

¹ A writ for **habeas corpus** is the proper means to challenge the sufficiency of evidence produced at a preliminary hearing. **Commonwealth v. Nieves**, 876 A.2d 423, 424 n.1 (Pa. Super. 2005).

² 18 Pa. C.S. §3921(a).

³ A hearing on Defendant’s writ of **habeas corpus** was held before this Court on June 30, 2005. At that hearing, the parties submitted the transcript of the preliminary hearing, held on January 19, 2005, as a joint exhibit; no additional testimony was presented. Our references to the transcript are in relation to this preliminary hearing transcript, Joint Exhibit #1.

P.M. Friday night, Mark Mansky ("Mansky"), the alleged victim, was patronizing the Palace Restaurant in Lansford, Carbon County, Pennsylvania. At this time, he was approached by Defendant, an ex-girlfriend, who asked him for money in exchange for sexual favors, which he refused (N.T., pp. 4, 48-49). Mansky and Defendant had known each other for some time prior to the night in question (N.T., pp. 36-37). Defendant badgered Mansky for cash and he became noticeably agitated. At this point, a bouncer asked Defendant to leave, which she did sometime between 10:15 and 10:20 P.M. (N.T., pp. 5, 17). Later, at approximately 12:30 A.M., Mansky left the Palace Restaurant and walked home where he began preparing for bed (N.T., pp. 6, 22).

Within five to ten minutes after walking to his home, a distance of less than a block from the Palace Restaurant, Defendant knocked at his door, and Mansky allowed her to enter (N.T., pp. 6, 22-23, 38). Defendant and Mansky resumed their prior argument related to sex and money (N.T., pp. 7, 25-28). Beforehand, while preparing for bed, Mansky had taken fifty-seven dollars in cash and hid it in the closed drawer of a record cabinet (N.T., pp. 7, 14). During the course of his argument with Defendant, Mansky saw someone pass in front of a window and come to his door (N.T., pp. 7, 28). Mansky opened the main door but not the screen door. There he was confronted by John Filer ("Filer"), the Defendant's boyfriend, who, without permission, opened the unlocked screen door and pushed his way into Mansky's home (N.T., pp. 7-8, 40-41). Mansky knew Defendant and Filer were seeing each other but he had never met Filer prior to the night in question (N.T., pp. 36-37). Filer was not present with Defendant earlier that evening at the Palace Restaurant (N.T., pp. 18-21, 35-37, 46-47). Immediately upon entering, Filer pushed Mansky against a wall and started punching him while accusing him of being "after his girl." (N.T., 7-8)

After beating Mansky, Filer took him into the bathroom to clean him up and then placed him on a couch where he warned

The parties also stipulated that Count 2, conspiracy to commit criminal trespass, be graded as a felony of the second degree instead of a felony of the first degree. In place of filing an amendment to the criminal information, the parties were requested to present the Court with an order formalizing this stipulation. This was not done, however, this being the intent of the parties, we will execute an order reducing the grading of Count 2 to that of a felony of the second degree.

Mansky not to call the police or he would “f-ing kill him.” (N.T., pp. 9-10) Mansky was fearful for his life (N.T., pp. 43-44). Then Filer left.

While being accosted by Filer, Mansky could not see and was unaware of Defendant's actions (N.T., pp. 6, 30). Filer was visible to Mansky the entire time Filer was in Mansky's home (N.T., pp. 42-43). At some point prior to Filer leaving, the Defendant had departed (N.T., p. 30). Once he was alone, Mansky realized that he may have been robbed and he discovered the money he had placed in the record cabinet was missing. Mansky did not see Defendant or Filer take the cash (N.T., pp. 31-32, 43).

After Defendant and Filer left, Mansky left his home and sought aid from a nearby convenience store. Mansky suffered broken bones in his face and jaw, a bloodied nose, a black and blue eye, and his glasses were broken (N.T., pp. 7-11). For a month afterwards he was unable to eat solid foods (N.T., p. 11). As a result of these events, the Defendant and Filer were both charged with various crimes. As mentioned above, Defendant challenges the sufficiency of the evidence as to Counts 1, 2, 3 and 5.

II. DISCUSSION

To begin, we note the following:

The basic principles of law with respect to the purpose of a preliminary hearing are well established. The preliminary hearing is not a trial. The principal function of a preliminary hearing is to protect an individual's right against an unlawful arrest and detention. **Commonwealth v. Mullen**, 460 Pa. 336, 333 A.2d 755 (1975). At this hearing the Commonwealth bears the burden of establishing at least a **prima facie** case that a crime has been committed and that the accused is probably the one who committed it. Commonwealth v. Prado, 481 Pa. 485, 393 A.2d 8 (1978); Pa.R.Crim.P. 141(d). It is not necessary for the Commonwealth to establish at this stage the accused's guilt beyond a reasonable doubt. **Commonwealth v. Rick**, 244 Pa.Super. 33, 366 A.2d 302 (1976). In order to meet its burden at the preliminary hearing, the Commonwealth is required to present evidence with regard to each of the material elements of the charge and to establish sufficient probable

cause to warrant the belief that the accused committed the offense. **Commonwealth v. Wojdak**, 502 Pa. 359, 466 A.2d 991 (1983).

Commonwealth v. McBride, 528 Pa. 153, 157-158, 595 A.2d 589, 591 (1991). “The evidence need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to go to the jury.” **Commonwealth v. Huggins**, 575 Pa. 395, 836 A.2d 862, 866 (2003), *cert. denied sub nom.*, **Huggins v. Pennsylvania**, 541 U.S. 1012, 124 S.Ct. 2073, 158 L.Ed. 2d 624 (2004); *see also*, **Commonwealth v. Santos**, 876 A.2d 360, 363 (Pa. 2005).

It is therefore incumbent upon us to review the elements of the crimes of conspiracy and receiving stolen property, and to determine whether there exists a **prima facie** showing of each respective element. As three of Defendant’s charges stem from the crime of conspiracy, we begin by examining the elements of this crime.

A. Conspiracy

“The essence of a criminal conspiracy is a common understanding, no matter how it came into being, that a particular criminal objective be accomplished.” **Commonwealth v. Swerdlow**, 431 Pa. Super. 453, 459, 636 A.2d 1173, 1176-1177 (1994) (*quoting Commonwealth v. Keefer*, 338 Pa. Super. 184, 190, 487 A.2d 915, 918 (1985)).

To convict a defendant of conspiracy, the trier of fact must find that: (1) the defendant intended to commit or aid in the commission of the criminal act; (2) the defendant entered into an agreement with another (a ‘co-conspirator’) to engage in the crime; and (3) the defendant or one or more of the other co-conspirators committed an overt act in furtherance of the agreed upon crime.

Commonwealth v. Murphy, 577 Pa. 275, 844 A.2d 1228, 1238 (2004)⁴; *see also*, 18 Pa. C.S. §903.⁵ “Moreover, as conspiracy

⁴ In contrast, to convict a defendant as an “accomplice” the trier of fact must find that: (1) the defendant intended to aid or promote the underlying offense; and that (2) the defendant actively participated in the crime by soliciting, aiding, or agreeing to aid the principal. **Commonwealth v. Murphy**, 577 Pa. 275, 844 A.2d 1228, 1234 (2004). When comparing the two, “[t]he essence of a criminal conspiracy, which is what distinguishes this crime from accomplice liability, is the agreement made between the co-conspirators.” **Id.** at 1238.

requires proof only of an agreement and an overt act in furtherance of the conspiracy, a defendant may be found guilty of conspiracy without being convicted of the underlying offense.” **Commonwealth v. Riley**, 811 A.2d 610, 617 (Pa. Super. 2002).⁶

⁵ The crime of criminal conspiracy is defined by statute as follows:

- (a) Definition of conspiracy.—A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:
 - (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
 - (2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

* * *

(e) Overt Act.—No person may be convicted of conspiracy to commit a crime unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.

18 Pa.C.S.A. §903.

⁶ As charged, to convict Defendant of conspiracy to commit the crimes of burglary, criminal trespass and robbery, the Commonwealth must prove that Defendant and Filer shared the criminal intent to commit each of these crimes. Although Defendant has not been charged with the underlying crimes themselves, we note that once a conspiracy to commit a crime has been proven, under the co-conspirator rule, conspirators are equally liable for the criminal acts and crimes of co-conspirators committed in furtherance of the conspiracy.

The general rule of law pertaining to the culpability of conspirators is that each individual member of the conspiracy is criminally responsible for the acts of his co-conspirators committed in furtherance of the conspiracy. The co-conspirator rule assigns legal culpability equally to all members of the conspiracy. All co-conspirators are responsible for actions undertaken in furtherance of the conspiracy regardless of their individual knowledge of such actions and regardless of which member of the conspiracy undertook the action.

Commonwealth v. Galindes, 786 A.2d 1004, 1011 (Pa.Super.2001).

The premise of the rule is that the conspirators have formed together for an unlawful purpose, and thus, they share the intent to commit any acts undertaken in order to achieve that purpose, regardless of whether they actually intended any distinct act undertaken in furtherance of the object of the conspiracy. It is the existence of shared criminal intent that ‘is the **sine qua non** of a conspiracy.’ **Commonwealth v. Wayne**, 553 Pa. 614, 720 A.2d 456, 463-464 (1998), **cert. denied**, 528 U.S. 834, 120 S.Ct. 94, 145 L.Ed.2d 80 (1999) (citations omitted).

Commonwealth v. Lambert, 795 A.2d 1010, 1016-1017 (Pa. Super. 2002), **appeal denied**, 805 A.2d 521 (Pa. 2002). Consequently, under the co-conspirator rule, were the Commonwealth only able to establish a conspiracy to commit burglary, and in the course of committing the crime of burglary, Defendant’s co-

Defendant's primary challenge is to this second element, the agreement with a co-conspirator, and the lack of direct evidence suggesting a "shared intent" between herself and Filer.

As with accomplice liability, '[m]ere association with the perpetrators, mere presence at the scene, or mere knowledge of the crime is insufficient' to establish that a defendant was part of a conspiratorial agreement to commit the crime. **Lambert**, 795 A.2d at 1016. There needs to be some additional proof that the defendant intended to commit the crime along with his co-conspirator. **See id.; see also, Commonwealth v. Wayne**, 553 Pa. 614, 720 A.2d 456, 464 (1998). Direct evidence of the defendant's criminal intent or the conspiratorial agreement, however, is rarely available. **See Spotz**, 716 A.2d at 592. Consequently, the defendant's intent as well as the agreement is almost always proven through circumstantial evidence, such as by 'the relations, conduct or circumstances of the parties or overt acts on the part of the co-conspirators.' **Id.** Once the trier of fact finds that there was an agreement and the defendant intentionally entered into the agreement, that defendant may be liable for the overt acts committed in furtherance of the conspiracy regardless of which co-conspirator committed the act. **See Commonwealth v. Wayne**, 720 A.2d at 463-64.

Commonwealth v. Murphy, supra, 844 A.2d at 1238.

A conspiracy may be proven inferentially by showing relationship, conduct or circumstances of the parties and overt acts

conspirator assaulted and robbed Mansky, if so charged, Defendant would be equally guilty of the substantive crimes of assault and robbery even though she had not conspired to commit such crimes.

We further note, that with the exception of first-degree murder (**see Commonwealth v. Wayne**, 553 Pa. 614, 720 A.2d 456 (1998), **cert. denied sub nom., Wayne v. Pennsylvania**, 528 U.S. 834, 120 S.Ct. 94, 145 L.Ed. 2d 80 (1999)) for which each member of the conspiracy must individually possess a specific intent to kill, the general rule of law pertaining to the culpability of co-conspirators is that the mental state of the principal is imputed to each individual member of the conspiracy. **Commonwealth v. Galindes**, 786 A.2d 1004, 1012 (Pa. Super. 2001), **appeal denied**, 803 A.2d 733 (Pa. 2002). This also is in contrast to accomplice liability for which the accomplice in the commission of an offense must act with the same kind of culpability, if any, as that required of the principal. 18 Pa.C.S.A. §306(d).

of alleged co-conspirators are competent as proof that a corrupt confederation has, in fact, been formed. **Commonwealth v. Kennedy**, 499 Pa. 389, 453 A.2d 927 (1982); **see also, Commonwealth v. Wagaman**, 426 Pa. Super. 396, 408-409, 627 A.2d 735, 740 (1993), **appeal denied**, 536 Pa. 623, 637 A.2d 283 (1993) (a reasonable inference of guilt may be made where the facts and conditions proved establish that the inference is more likely than not). In **Swerdlow**, the Superior Court identified four circumstantial factors that are relevant, but not independently sufficient, to prove a corrupt confederation:

(1) an association between alleged conspirators; (2) knowledge of the commission of the crime; (3) presence at the scene of the crime; and (4) in some situations, participation in the object of the conspiracy. The presence of such circumstances may furnish a web of evidence linking an accused to an alleged conspiracy beyond a reasonable doubt when viewed in conjunction with each other and in the context in which they occurred. ...

‘To prove a criminal conspiracy the evidence must rise above mere suspicion or possibility of guilty collusion.’

Id. at 461, 636 A.2d at 1177 (internal citations omitted).

Bearing in mind that the standard of proof for the present **habeas corpus** action requires only a **prima facie** showing of the elements of conspiracy and not proof beyond a reasonable doubt, the evidence produced at the preliminary hearing shows the following in support of a conspiracy between Defendant and Filer to take Mansky’s money: Defendant was desperate for money; she nagged Mansky for money at the Palace Restaurant and again at Mansky’s home, pleading first for Mansky to give her \$45.00, then \$25.00; sometime after leaving the Palace Restaurant Defendant contacted her boyfriend, Filer; Mansky left the Palace Restaurant more than two hours after Defendant had and walked directly home, a distance of less than a block; within five to ten minutes of Mansky entering his home, Defendant was also there, followed shortly thereafter by Filer; Defendant was with Mansky inside his home when Filer forced his way into the home and began an immediate assault on Mansky, yet Defendant made no attempt to intervene or stop the attack; at some point while Mansky was being assaulted by Filer, Mansky’s money was taken from the record cabinet—

from a hidden location requiring a search to find and which Filer, who was preoccupied with and at all times visible to Mansky, did not have an opportunity to conduct; during the time Filer was hitting Mansky, Mansky did not see and does not know what Defendant was doing; Defendant disappeared, while Mansky was being assaulted and distracted by Filer; after Defendant left, Filer ceased his assault on Mansky and Mansky discovered his money was missing; and, lastly, before Filer left he warned Mansky not to contact the police.

Circumstantially, this evidence is sufficient to permit the inference that Filer and Defendant teamed up for purposes of stealing Mansky's money and that, as part of their plan, Filer broke into and entered Mansky's home without privilege or license to do so and physically confronted Mansky. The fact that Defendant and Filer arrived at Mansky's home in close proximity to one another late at night leads to a logical inference that their joint appearance was planned. While inside Mansky's home, Filer assaulted Mansky, drawing his attention away from Defendant, and Defendant simultaneously searched for, located and took Mansky's money. Only after Mansky's money was located and Defendant left, did Filer cease his attack and threaten Mansky that, if he contacted the police, he would kill him. That Defendant and Filer acted in concert with the common goal of getting Mansky's money and jointly took advantage of him may reasonably be inferred from the foregoing. That Defendant knew of, agreed to and participated in the object of this conspiracy is also a permissible inference.

The circumstances as set forth above are sufficient to establish, **prima facie**, a conspiracy between Defendant and Filer to commit the crimes of burglary, criminal trespass and robbery. A person is guilty of burglary if he enters a building or occupied structure with the intent to commit a crime therein, unless he is licensed or privileged to enter. 18 Pa.C.S.A. § 3502(a). A person is guilty of criminal trespass if he enters a building or occupied structure knowing he is not licensed or privileged to do so. 18 Pa. C.S.A. §3503(a)(1).⁷ A person is

⁷ As to the element of "breaking into" for criminal trespass to be graded as a felony of the second degree, **see supra** footnote 3, that Filer pushed his way into Mansky's home and immediately confronted and assaulted Mansky is a sufficient show of force to meet the "breaking" requirement. **See** 18 Pa.C.S.A. §3503(a)(3).

guilty of robbery if, in the course of committing a theft, he inflicts or threatens to inflict serious bodily injury upon another. 18 Pa. C.S.A. §3701(a)(1). That the plan contemplated the use of unlawful force is implied by the immediate use of force by Filer; Defendant being present, doing nothing to assist Mansky, instead searching for and taking Mansky's money during the attack; and, once the money was located and Defendant had left, termination of the attack. **Cf. Commonwealth v. Lambert**, 795 A.2d 1010, 1019 (Pa. Super. 2002) **appeal denied**, 805 A.2d 521 (Pa. 2002)⁸ (**en banc**) (finding the use of unlawful force was contemplated in a plan to commit burglary where, while one defendant forcefully broke into the victim's home and fatally shot one of the occupants, the second defendant, who remained outside and in close proximity, did nothing, waiting for the first defendant to return).

B. Theft

The elements of the crime of receiving stolen property, Count 5, require that a person intentionally receive, retain, or dispose of movable property of another knowing that it has been stolen, or believing that it has probably been stolen, unless the property is received, retained, or disposed with the intent to restore it to the owner. 18 Pa.C.S. §3925(a). Section 3925(b) further states that “[a] s used in this section the word “receiving” means acquiring possession, control or title, or lending on the security of the property.” 18 Pa. C.S. §3925(b). As defined, “receiving” includes “taking” and, therefore, receiving stolen property includes the crime of theft by unlawful taking. **Commonwealth v. Shaffer**, 279 Pa. Super. 18, 27 n.2, 420 A.2d 722, 727 n.2 (1980).

⁸ Although Defendant has been charged with conspiracy to commit several offenses—burglary, criminal trespass and robbery—18 Pa. C.S.A. §903(c) provides that “[i]f a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship.” In the instant case, absent proof of separate and distinct agreements to commit the crimes of burglary, criminal trespass and robbery, Defendant can properly be convicted of only one single count of criminal conspiracy. **Commonwealth v. Sattazahn**, 428 Pa. Super. 413, 423, 631 A.2d 597, 603 (1993), **appeal denied**, 539 Pa. 270, 652 A.2d 293 (1994), **aff'd sub nom., Sattazahn v. Pennsylvania**, 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed. 2d 588 (2003); **see also**, 18 Pa.C.S.A. §905(a) (stating that the grading of the crime of conspiracy shall be graded as the most serious offense which is the object of the conspiracy).

Under the facts as we have stated them, one reasonable inference is that while Filer attacked and distracted Mansky, Defendant searched for and took the money in Mansky's record cabinet. Even if this is proven to be inaccurate and Filer took the money, if convicted of conspiracy or as an accomplice, Defendant would be equally guilty of the crime of receiving stolen property.⁹ Based on the facts produced, we believe Defendant's conduct establishes by reasonable inference the possibility that she either solicited Filer to attack Mansky and steal the money, or that she aided him in doing so by distracting Mansky so that Filer could gain entry to the home.

III. CONCLUSION

For the aforementioned reasons, we find Defendant's present **habeas corpus** challenge to the charges against her to be without merit. Accordingly, we will deny Defendant's action.

⁹ We note that complicity and conspiracy envelope separate legal theories of liability; the former allowing liability for the underlying crime while the latter is a crime in and of itself, but does not by itself unlock liability for the object crime. Compare 18 Pa. C.S. §§903 **and** 306. Such liability may, however, occur if the object crime or some other crime is actually committed in furtherance of the conspiracy. **Commonwealth v. Lambert**, 795 A.2d at 1022; **see also, supra** footnote 6. In this respect, it should also be noted that, pursuant to 18 Pa.C.S.A. §3502(d), a person may not be convicted both for burglary and for the offense which it was his intent to commit after the burglarious entry, unless the additional offense constitutes a felony of the first or second degree.

JULIA L. LESKIN, Plaintiff vs. DAVID CHRISTMAN, Defendant

*Civil Law—Child Custody—Parent's Psychiatric and
Mental Health Records—Psychotherapist-Patient Privilege—
Mental Health Procedures Act—Constitutional Right to Privacy*

1. Potential evidence of a parent's mental health or emotional condition, while relevant to a child custody dispute, may not be compelled when protected from disclosure by either the psychotherapist-patient privilege found at 42 Pa. C.S.A. Section 5944, or the confidentiality provision of the Mental Health Procedures Act, 60 P.S. Section 7111.
2. Whether the right to privacy found in Article I, Section 1 of the Pennsylvania Constitution encompasses within its protections information already protected by the psychotherapist-patient privilege and the confidentiality provisions of the Mental Health Procedures Act is an open question.

BRIAN B. GAZO, Esquire—Counsel for Plaintiff.

JOSEPH V. SEBELIN, JR., Esquire—Counsel for Defendant.

NO. 04-3384

MEMORANDUM OPINION

NANOVIC, P.J.—January 20, 2006

FACTUAL BACKGROUND

On August 3, 2005, David Christman (hereinafter “Father”) instituted the present proceedings seeking to modify the terms of a stipulated custody order dated November 24, 2004, and asking that primary custody of the parties’ four-year-old daughter Mallory (hereinafter “Child”) be awarded to him. Five days prior to the scheduled custody hearing, Father filed a motion for special relief requesting, **inter alia**, that he be permitted to inspect Julia Leskin’s (hereinafter “Mother”) medical/mental health records for the previous five years or, in the alternative, that the Court conduct an **in camera** review of these records.

In accordance with Pa. R.C.P. 1915.5(a) the custody hearing was held as scheduled. At the time of this hearing, extensive testimony was taken regarding those factors which would legitimately affect Mallory’s physical, intellectual, moral, and spiritual well-being. The hearing also developed that the primary basis for Father’s motion for special relief was Mother’s hospitalization and treatment in a mental health facility in May 2005.

On May 9, 2005, a Monday, Mother became upset following an argument with her boyfriend. During the previous six months or more she had been treating with a psychiatrist and been prescribed medication for depression. As of May 9, 2005, she was also taking prescribed pain medication for injuries sustained in a motor vehicle accident. That evening, after taking her medication, she visited a local tavern with some friends, consumed alcohol, and awoke the following morning in a hospital.

Mother had no recollection of what occurred between the time she arrived at the tavern and when she awoke. Her boyfriend testified that he had found Mother asleep in bed when he returned home after their argument and that, when he was unable to awake her, he called 911.

Not knowing what had happened, and faced with the possibility of being involuntarily committed, Mother voluntarily admitted herself into the Mental Health Unit of the Gnaden Huetten Memorial Hospital on May 10, 2005, where she re-

mained until the following Monday, May 16, 2005. At the custody hearing, Mother was questioned both by her counsel and by Father's counsel about her existing and past mental health treatment, the circumstances leading to her hospitalization on May 9, and her present mental status. In this regard, Mother testified that she continues under the supervision of a psychiatrist and visits a therapist weekly.

At the conclusion of the hearing, we requested counsel to provide us with a legal memorandum in support of their respective positions regarding Father's request for the medical records from Mother's treatment at the Gnaden Huetten Memorial Hospital and the treatment records of her psychiatrist. For these purposes, and depending on our ruling, the hearing record was kept open for possible additional testimony. The memoranda requested by the Court have been provided and we now address the Father's request for Mother's medical records.

DISCUSSION

In a general sense, we have been asked to determine whether Mother's medical records must be disclosed as relevant information in deciding the best interest of the parties' daughter. In a more specific sense, we must determine whether Mother's mental health records are protected from disclosure by the confidentiality provision of Pennsylvania's Mental Health Procedures Act ("MHPA"), 50 P.S. section 7111, the psychotherapist-patient privilege found at 42 Pa. C.S. section 5944, or the constitutional right to privacy found in Article I, Section 1 of the Pennsylvania Constitution.

Psychotherapist-Patient Privilege

In Pennsylvania, the psychotherapist-patient privilege reads as follows:

§5944. Confidential communications to psychiatrists or licensed psychologists

No psychiatrist or person who has been licensed under the act of March 23, 1972 (P.L. 136, No. 52), to practice psychology shall be, without the written consent of his client, examined in any civil or criminal matter as to any information acquired in the course of his professional services in behalf of such client. The confidential relations and communications between a psychologist or psychiatrist and his

client shall be on the same basis as those provided or prescribed by law between an attorney and client.

42 Pa. C.S.A. §5944.

The term “information” as used in this statute has been narrowly defined and is restricted to communications made or information divulged by the patient to the psychotherapist. **Phillips’s Estate**, 295 Pa. 349, 145 A. 437 (1929) (distinguishing between information conveyed by communications made from the patient to a physician and that learned through physical examination or observation, and holding that the doctor-patient privilege, now found at 42 Pa. C.S.A. section 5929, applies only to patient’s communications); **Grimminger v. Maitra**, 887 A.2d 276, 279 (Pa. Super. 2005) (acknowledging that “our case law has drawn a distinction between information learned by a physician through communication to him by a patient and information acquired through examination and observation”).

Further underlying the exercise of the privilege is the requirement that a psychotherapist-patient relationship exists. “In the context of a psychotherapist, the client must be seeking treating, counseling or advice for a mental or emotional problem.” **M. v. State Board of Medicine**, 725 A.2d 1266, 1268, 1269 (Pa. Commw. 1999) (“A court-ordered examination does not invoke this privilege because treatment is not contemplated in conducting the examination.”); **Matter of Adoption of Embick**, 351 Pa. Super. 491, 506 A.2d 455 (1986), **appeal denied**, 513 Pa. 634, 520 A.2d 1385 (1987) (holding that a parent’s voluntary submission to examination at the request of a county children and youth agency for purposes of assessing the potential for family reunification and the best interests of a minor child did not constitute treatment, counseling or advice for any mental or emotional problems, nor create a doctor-patient or other privileged relationship contemplated by the statute and, therefore, did not bar relevant testimony by the psychologist at an involuntary termination proceeding); **see also, Commonwealth v. G.P.**, 765 A.2d 363, 365 (Pa. Super. 2000) (emphasizing that different standards apply in proceedings in criminal court and those in a civil proceeding when it relates to a court-directed examination and the results obtained therefrom).

Although worded as a testimonial privilege, this statute, as interpreted by our appellate courts, shields from disclosure all

confidential communications made and information given by a patient to a psychiatrist or licensed psychologist, or their agent, for purposes of obtaining or facilitating treatment. **Commonwealth v. Simmons**, 719 A.2d 336, 341 (Pa. Super. 1998) (finding confidential communications by alleged child victim to any member of a treatment team organized to treat the mentally ill and supervised by a licensed psychiatrist protected from disclosure to a criminal defendant).

Significantly, for purposes of this case, the privilege includes the psychotherapist's client files which might reveal confidential communications of the client. **Simmons, supra** at 341. The privilege, however, does not include the psychotherapist's observations, diagnoses, opinions, evaluations or treatment plans. **Id.; see also, Commonwealth v. Carter**, 821 A.2d 601, 608 (Pa. Super. 2003) ("[T]he [psychiatrist-patient] privilege is not designed to specifically protect the psychotherapist's own opinion, observations, [or] diagnosis. ...").

Critical to the exercise of the privilege, is an understanding of its rationale: "to encourage people to seek professional help for their mental or emotional problems, and that purpose is best accomplished when people in need of psychotherapeutic treatment know that what they tell their therapist during treatment will not be disclosed to anyone." **Embick, supra** at 499-500, 506 A.2d at 460. "By preventing the [therapist] from making public any information which would result in humiliation, embarrassment or disgrace to the client, the privilege is designed to promote effective treatment and to insulate the client's private thoughts from public disclosure." **Commonwealth v. Kyle**, 367 Pa. Super. 484, 500, 533 A.2d 120, 128 (1987), **appeal denied**, 518 Pa. 617, 541 A.2d 744 (1988).

Where the privilege applies, the privileged material may not be subjected to even **in camera** review by the trial court. **Simmons, supra** at 341; **Kyle, supra** at 505, 533 A.2d at 131 (refusing to compromise what it determined was an absolute privilege from disclosure of confidential communications made between a licensed psychologist and his client where, as the Court found applies to this privilege, a compelling public interest supports the privilege; finding the public interests supporting the privilege outweigh the accused's rights guaranteed by the Confrontation Clause of the Sixth Amendment of the United

States Constitution and the Due Process Clause of the Fourteenth Amendment to review arguably useful information protected by the privilege); **see also, Commonwealth v. Counterman**, 553 Pa. 370, 719 A.2d 284, 295 (1998), **cert. denied sub nom., Counterman v. Pennsylvania**, 528 U.S. 836, 120 S.Ct. 97, 145 L.Ed. 2d 82 (1999) (finding that the psychiatrist/psychologist-patient privilege outweighed a defendant's Sixth Amendment right to cross-examination, as well as his right to due process).

In asking us to override the privilege, Father argues that the interests at stake in these proceedings—the best interest and proper placement of the parties' daughter—are paramount to any benefit the Mother may derive from nondisclosure of her medical records and that, as part of our obligation to conduct a full and comprehensive hearing, we should not be deprived of material testimony concerning the mental or emotional condition of either parent necessary to a proper determination of the issues before the Court.¹ In reality, what the Father is asking is that we balance the importance of producing evidence relevant to assessing the best interest of a child against the value of a legislatively created privilege in favor of confidentiality, and find that the scales tip in favor of disclosure. To do what Father requests, to balance the merits of a statutory privilege against a party's claimed need for disclosure, presupposes that the court may unilaterally substitute its judgment for the presumptively valid judgment of the legislature and that to do so, on an **ad hoc** basis, is preferable to a rule of uniform application.

The flaw in this position is Father's belief that when important, personal rights are at stake, the privilege must yield in favor of potentially significant, reliable evidence. Conceptually, this belief is contrary to the legal premise on which a privilege is based: that some compelling interest, extrinsic to the truth-finding process, is of greater value.

'[E]xceptions to the demand for every man's evidence
are not lightly created nor expansively construed, for they

¹ Without question, psychiatric considerations are important in deciding upon a child's best interest, however, they are not determinative of the many factors the court must take into account. **In re Donna W.**, 325 Pa. Super. 39, 58, 472 A.2d 635, 644 (1984).

are in derogation of the search for truth.' **Hutchison v. Luddy**, 414 Pa.Super. 138, 146, 606 A.2d 905, 908 (1992) (quoting **Herbert v. Lando**, 441 U.S. 153, 175, 99 S.Ct. 1635, 1648, 60 L.Ed.2d 115 (1979)). Thus, courts should accept testimonial privileges 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.' **In re Grand Jury Investigation**, 918 F.2d 374, 383 (3d Cir. 1990) (quoting **Trammel v. United States**, 445 U.S. 40, 46, 100 S.Ct. 906, 910, 63 L.Ed.2d 186 (1980)).

In re Subpoena No. 22, 709 A.2d 385, 388 (Pa. Super. 1998) (**quoting Commonwealth v. Stewart**, 547 Pa. 277, 282, 690 A.2d 195, 197 (1997)); **see also, In re Estate of Wagner**, 880 A.2d 620, 625 (Pa. 2005) (finding that notwithstanding the important individual interests in vindicating the death of a 14 month old child from alleged abuse while in foster care, by requiring child death reviews to be kept confidential, the legislature had as its objective the fostering of an unreserved, comprehensive internal investigation and evaluation of actions taken and foregone by C&Y and DPW, which objective would be compromised if open to public scrutiny, thereby placing such reviews beyond the scope of discovery).

The legislature having predetermined the value of the psychotherapist-patient privilege by its enactment, here a codification of existing principles of common law,

[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. ... [I]f the purpose of the privilege is to be served, the participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.'

Jaffee v. Redmond, 518 U.S. 1, 17-18, 116 S.Ct. 1923, 1932, 135 L.Ed. 2d 337 (1996) (recognizing the psychotherapist-patient privilege for the first time) (**quoting Upjohn Co. v. United**

States, 449 U.S. 383, 393, 101 S.Ct. 677, 684, 66 L.Ed. 2d 584 (1981)).

Consequently, when a privilege is properly invoked, unless the purpose of the privilege would be frustrated by its enforcement or extraordinary circumstances exist, the privilege and the public policy underlying the privilege must not be unpredictably discarded. Even then, when the interests protected by the privilege are relaxed or outweighed, the exceptions engrafted on the privilege are confined to rare and exceptional circumstances, or the disclosure is narrowly limited to the exigencies presented (e.g., a duty to warn) rather than a wholesale disclosure of protected information. **See In re Subpoena No. 22, supra** at 391 (finding a narrow exception qualifying the privilege, after the client's death, when necessary as part of a criminal investigation into the client's death, enforcement of the privilege in this context being contrary to the client's interests); **Emerich v. Philadelphia Center for Human Development**, 554 Pa. 209, 720 A.2d 1032, 1043 (1999) ("[W]e find that in Pennsylvania, based upon the special relationship between a mental health professional and his patient, when the patient has communicated to the professional a specific and immediate threat of serious bodily injury against a specifically identified or readily identifiable third party and when the professional determines, or should determine under the standards of the mental health profession, that his patient presents a serious danger of violence to the third party, then the professional bears a duty to exercise reasonable care to protect by warning the third party against such danger"; exception applies equally to both patient-therapist confidentiality and that imposed by MHPA).

In **In re Subpoena No. 22**, the court further stated:

When interpreting the psychotherapist-client statutory privilege, we are guided by the same principles that apply to the attorney-client privilege. **Kalenevitch v. Finger**, 407 Pa.Super. 431, 438, 595 A.2d 1224, 1228 (1991). **See also** 42 Pa.C.S.A. § 5944 (confidential communications between psychologist or psychiatrist and client shall be on same basis as between attorney and client). Once the party asserting a privilege shows that the privilege is properly invoked, the burden shifts to the party seeking the disclosure to show that

disclosure of the information will not violate the accorded privilege. **In re Investigating Grand Jury**, 527 Pa. 432, 440, 593 A.2d 402, 406 (1991) (citations omitted). **See also Brennan v. Brennan**, 281 Pa.Super. 362, 372, 422 A.2d 510, 515 (1980) (**citing Cohen v. Jenkintown Cab Co.**, 238 Pa.Super. 456, 464, 357 A.2d 689, 693-94 (1976) **appeal denied** (1976)) (stating where privilege exists for specific purpose; party seeking disclosure has burden of establishing **prima facie** case that purpose of privilege would be frustrated by exercise of privilege).

Id. at 388.

Here, as in **Simmons**, the record does not contain a clear statement of what information is actually contained in the Mother's psychiatrist's file.² For this reason, as was the case in **Simmons**, we accept the movant's assertion that all information in the file consists of communications made and information given by Mother, or would reveal the substance of such communications and disclosures. Father has made no showing that Mother's assertion of the privilege as applied to this information is contrary to the public policy underlying the privilege. In fact, just the contrary is argued by Mother.

Comprehending both the need to promote effective treatment and to insulate the client's private thoughts from public disclosure, the psychotherapist-client privilege is "based upon a strong public policy that confidential communications made by a client to the psychotherapist should be protected from disclosure, absent consent or waiver." **In re Subpoena No. 22, supra** at 388.³ Given the importance of these policies, the privi-

² Because of this deficiency in the record, we have considered permitting further discovery of the remainder of the psychiatrist's file or a limited **in camera** review of any non-privileged, but confidential, material contained in the file. We find, however, that Father has made no distinction between privileged and non-privileged materials which may be contained in the psychiatrist's file, has failed to identify any potentially non-privileged materials and, therefore, has waived the issue. **Kraus v. Taylor**, 710 A.2d 1142, 1146-1147 (Pa. Super. 1998).

³ Both the psychotherapist-patient privilege and the statutory privilege set forth in section 7111 of the MHPA are subject to implicit waiver when a party places the confidential information at issue in a civil lawsuit. **Rost v. State Board of Psychology**, 659 A.2d 626, 629 (Pa. Commw. 1995) (discussing the psychiatrist/psychologist-patient privilege), **appeal denied**, 543 Pa. 699, 670 A.2d 145 (1995); **Nicholaides v. Weber**, 133 Pitts.Leg.J. 260, 261 (1985) (discussing section 7111 of the Mental Health Procedures Act). The rationale of the decisions finding implicit waiver is that our legislature could not have intended the miscarriage of justice that would otherwise result to civil defendants. **Kraus, supra** at 1145.

lege “must prevail under most circumstances.” **Id.** at 389 (listing numerous cases in which a criminal defendant’s constitutional rights to confrontation and compulsory process must yield to the privilege); **see also, M. v. State Bd. of Med., supra** at 1269 n.13 (stating in the context of a civil proceeding that “the type of case in which the psychotherapist-patient privilege is claimed is irrelevant as to whether the privilege does or does not exist”). As illustrated by the cases listed in **In re Subpoena No. 22**, notwithstanding the relevance and probative value of the information sought in each case, the reasons proffered were found insufficient to overcome the legislatively created privilege.

In this case, Father has failed to show that disclosure of the materials requested would not violate the privilege or would not be inconsistent with its purposes. Nor has Father presented any extenuating circumstances justifying a relaxation or giving way of the privilege.

Therefore, in accordance with the foregoing, to the extent the records requested contain confidential communications made by Mother to her psychiatrist, or make any reference to such communications, they are privileged. Further, accepting that the file contains protected communications, even an **in camera** review is prohibited. In short, the psychotherapist-patient privilege makes no exception of the type argued by Father for custody proceedings, and we find none.

Mental Health Procedures Act

Section 7111 of the Mental Health Procedures Act provides:

§7111. Confidentiality of Records

- (a) All documents concerning persons in treatment shall be kept confidential and, without the person’s written con-

In this case, Father claims Mother has waived the privilege merely by participating in the proceedings. We are not persuaded by this argument. First, it was Father, not Mother, who commenced the instant proceedings with his filing of a petition to modify custody on August 3, 2005. Second, and more importantly, it is not Mother who has placed her mental condition directly at issue, but the law which requires, in custody proceedings, that all factors concerning the best interest of a child be examined.

sent, may not be released or their contents disclosed to anyone except:

- (1) those engaged in providing treatment for the person;
- (2) the county administrator, pursuant to section 110 [regarding applications, petitions, statements and certifications required under the provisions of the Mental Health Procedures Act];
- (3) a court in the course of legal proceedings authorized by this act; and
- (4) pursuant to Federal rules, statutes and regulations governing disclosure of patient information where treatment is undertaken in a Federal agency.

In no event, however, shall privileged communications, whether written or oral, be disclosed to anyone without such written consent

(b) This section shall not restrict judges of the courts of common pleas, mental health review officers and county mental health and mental retardation administrators from disclosing information to the Pennsylvania State Police or the Pennsylvania State Police from disclosing information to any person, in accordance with the provisions of 18 Pa. C.S § 61059(c)(4) (relating to persons not to possess, use, manufacture, control, sell or transfer firearms).

50 P.S. §7111. The protection provided by this section is broader than that under the psychotherapist-patient privilege: it applies “to all documents regarding one’s treatment, not just medical records,” and its confidentiality directive is mandatory, not discretionary—it is a requirement.” **Zane v. Friends Hospital**, 575 Pa. 236, 836 A.2d 25, 32 (2003) (emphasis in original).

Of the enumerated exceptions, only the third exception, that pertaining to disclosure to a court in the course of legal proceedings authorized by the MHPA, arguably applies. When viewed closer, however, this exception does not assist Father. Under the precise language of section 7111(a)(3), “a patient’s inpatient mental health treatment records may be used by a court **only** when the legal proceedings being conducted are **within the framework** of the MHPA, that is, involuntary and voluntary mental health commitment proceedings.” **Commonwealth v. Moyer**, 407 Pa. Super. 336, 341, 595 A.2d 1177,

1179 (1991) (emphasis in original), **appeal denied**, 529 Pa. 656, 604 A.2d 248 (1992) (barring the Commonwealth's obtaining and use at trial of a criminal defendant's admission contained in hospital records regarding the defendant's psychiatric treatment; a criminal prosecution is not a legal proceeding authorized by the MHPA). In accordance with section 7103, the MHPA establishes the rights and procedures for all involuntary treatment of mentally ill persons, whether inpatient or outpatient, and for all voluntary inpatient treatment of mentally ill persons. **See e.g.**, 50 P.S. §7303 (involuntary emergency treatment); 50 P.S. §7304 and 7305 (court-ordered involuntary treatment); 50 P.S. §7306 (transfer of persons in involuntary treatment) and 50 P.S. §7204 and §7206 (voluntary mental health commitment determinations). The confidentiality protection of the Act does not apply to any voluntary outpatient treatment.

Section 7111 has as its clear objective that all documentation covering persons in treatment be kept confidential, the confidentiality of mental health records being the **sine qua non** of effective treatment. **Zane**, 836 A.2d at 33.

The importance of confidentiality cannot be overemphasized. To require the Hospital to disclose mental health records during discovery would not only violate [the patient's] statutory guarantee of confidentiality, but would have a chilling effect on mental health treatment in general. The purpose of the Mental Health Procedures Act of seeking 'to assure the availability of adequate treatment to persons who are mentally ill,' 50 P.S. § 7102, would be severely crippled if a patient's records could be the subject of discovery in a panoply of possible legal proceedings. Moreover, to release such documents for review during discovery, only to have an appellate court reverse such decision on appeal, would result in the confidential nature of the records being forever lost.

Id. at 34 (holding that section 7111 sets forth a bright line bar to the disclosure of mental health records, even to the court, thereby depriving the alleged victim of a brutal physical and sexual assault by a mental health patient from potentially relevant information in her personal injury claim against her assailant and the hospital where he was an inpatient).

Just as the MHPA forbids disclosure in a negligence action (*e.g.*, **Zane**) and in a criminal proceeding (*e.g.*, **Moyer**) of information made confidential by its provisions, it similarly broaches no exception for custody proceedings.

Constitutional Guarantee to Privacy

Having concluded that the psychotherapist-patient privilege and the MHPA bar, respectively, the psychiatric treatment and hospital records Father seeks, whether this information is further barred from disclosure by the patient's constitutional right to privacy found in Article I, Section 1, of the Pennsylvania Constitution, is an issue for which extended discussion is unnecessary and would be unwise. **See Wertz v. Chapman Township**, 559 Pa. 630, 741 A.2d 1272, 1274 (1999) ("It is axiomatic that if an issue can be resolved on a non-constitutional basis, that is the more jurisprudentially sound path to follow.").

We feel it appropriate, however, to note that this basis while having in common with the statutory protections the principle of confidentiality, has a constitutional foundation whose protections are far greater than those which reside in any specific statute. And while the sources and limits of the right to privacy under the Pennsylvania and United States Constitutions may be disputed—**see In re "B"**, 482 Pa. 471, 486, 394 A.2d 419, 425 (1978) (plurality)—two different kinds of privacy interests have been identified: the individual interest in avoiding disclosure of personal matters and the interest in independence in making certain kinds of important decisions. **Whalen v. Roe**, 429 U.S. 589, 599-600, 97 S.Ct. 869, 876, 51 L.Ed. 2d 64 (1976) (as to the federal constitution); **Stenger v. Lehigh Valley Hospital Center**, 530 Pa. 426, 434, 609 A.2d 796, 800 (1992) (as to the state constitution). Nor is the right absolute. **Id.** at 437, 609 A.2d at 802.

It is the first of these interests, the interest in avoiding disclosure of personal matters, which is implicated in this case. Within this interest, at its center, is the right to have one's thoughts and mental processes intrinsic to individuality excluded from others. The production of an entire psychiatric history, as requested by Father and in contrast to a more focused court-ordered examination, infringes upon the patient's "most intimate emotions, fears, and fantasies." **In re "B", supra** at 486

394 A.2d at 425-426 (holding that the mother's right of privacy precluded the release of psychiatric records ordered by the trial court to assist in the placement of a child in the context of a disposition hearing in a juvenile delinquency proceeding in which the court explicitly recognized that even though its "holding may, in some cases, make it more difficult for the court to obtain all the information it might desire regarding members of the juvenile's family, or about the juvenile's friends, neighbors, and associates, [t]he individual's right of privacy ... must prevail . . ."); **Commonwealth ex rel. Gorto v. Gorto**, 298 Pa. Super. 509, 516, 444 A.2d 1299, 1302 (1982) (acknowledging the relevance of **In re "B"** to a custody proceeding and stating that "delving into the private records of a custodial parent's psychiatric history is an impermissible invasion of privacy"); **see also, In the matter of T.R.**, 557 Pa. 99, 731 A.2d 1276 (1999) (concluding that a mother's state constitutional right to privacy precluded the trial court from compelling her to participate in a psychological evaluation intended to provide information important to a determination of the children's future well-being and familial reunification) (per three justices with one justice concurring in the result);⁴ **In the matter of K.D.**, 744 A.2d 760 (Pa. Super. 1999) (reviewing the propriety of order compelling parent to undergo psychiatric evaluation in proceedings under the Juvenile Act, 42 Pa. C.S. section 6301 *et seq.*, and concluding order violated parent's constitutional privacy rights).

We further note that, unlike the limited exceptions to the statutory privileges at issue in these proceedings, the hallmark of constitutional analysis is to balance competing interests, and that there may well be two separate constitutional interests at stake in these proceedings, each supporting a different human privacy concern and each at different ends of the issue whether the privilege should be upheld or set aside: the Mother's individual right of privacy and the Father's right to secure, foster and maintain a familial relationship with his daughter, as well the state interest in protecting the well-being of Child. **Troxel v. Granville**, 530 U.S. 57, 66, 120 S.Ct. 2054, 2060, 147 L.Ed.

⁴ In a concurring opinion, Justice Nigro noted that while no parent can be forced to submit to a psychological evaluation, a parent's refusal to submit to one permits the court to draw a "negative inference . . . when determining the appropriate placement of the child." **In the matter of T.R.**, 557 Pa. 99, 731 A.2d 1276, 1282 (1999) (Nigro, J., concurring).

2d 49 (2000) (noting that the liberty interest under the Fourteenth Amendment's Due Process Clause protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children). This contrasts with those cases where the court when faced with the abridgement of a fundamental constitutional right must determine whether a countervailing compelling state interest exists, and whether the burden imposed on the exercise of the right at stake has been implemented in a least restrictive fashion, narrowly tailored to the government's interest. **Commonwealth ex rel. Platt v. Platt**, 266 Pa. Super. 276, 292, 404 A.2d 410, 426 (1979) (Spaeth, J., dissenting).

As is evident from this brief discussion, the constitutional privacy rights at issue are significant, and complicated, but beyond what we must decide.

CONCLUSION

In accordance with the foregoing, we find that the psychiatric and mental health records Father seeks to obtain are both subject to, and protected by, the psychotherapist-patient privilege and the MHPA, respectively; that Mother, by participating in these proceedings, has not waived the protections provided by these statutes; and that the records are not subject to disclosure. On the basis of these conclusions, Father's motion for special relief will be denied.

JEAN BENNETT ROANE, Plaintiff vs. TIMOTHY A. BEERS and COBBLE RIDGE REALTY CORPORATION, Defendants

Civil Law—Requirements of an Appealable Order—

Quashing an Improper Appeal

1. To be appealable, an order must be (1) a final order or one certified by the trial court as final; (2) an interlocutory order appealable as of right; (3) an interlocutory order appealable by permission; or (4) a collateral order.
2. An appealable final order is one which disposes of all claims and all parties, has been defined as final by statute, or has been certified as final by the trial court. Pretrial orders which do not meet these criteria or otherwise "effectively throw the plaintiff out of court" are not appealable as final orders.
3. An order granting preliminary objections to a complaint and providing the plaintiff with an opportunity to amend the complaint is not a final order. Where, however, the plaintiff concludes that she is unable to amend the complaint to comply with the Court's directives, her remedy is to permit the period provided for making the amendment to lapse and then suffer a dismissal of the complaint, whereupon a valid right to appeal exists.

-
4. In contrast to an order refusing to open, vacate or strike off a judgment, an order opening, vacating or striking a judgment is interlocutory and not appealable as of right. Pa.R.A.P. 311(a)(1).
 5. The appellate court is without jurisdiction to review the propriety of an order which does not meet the requirements of an appealable order. Such an appeal is properly quashed.

NO. 02-2267

JEAN BENNETT ROANE, Pro se.

PAUL J. LEVY, Esquire—Counsel for Defendants.

MEMORANDUM OPINION

NANOVIC, P.J.—February 17, 2006

On February 6, 2006, the Plaintiff, Jean Bennett Roane, filed an appeal from five orders dated January 5, 2006, and entered on January 9, 2006. All of these orders are believed to be interlocutory and non-appealable. This opinion is being filed in accordance with Pa. R.A.P. 1925(a).

PROCEDURAL AND FACTUAL BACKGROUND

On October 9, 2002, the Plaintiff commenced her suit by complaint against Stern & Stercho and Richard F. Stern, Esquire (the “Law Firm” Defendants), Cobble Ridge Realty Corporation and Timothy A. Beers (the “Beers” Defendants, also referred to collectively as Beers) and Ocwen Federal Bank FSB (the “Bank”). As is relevant to the Beers Defendants, appellees on the appeal, the Plaintiff claimed generally in her complaint that the Beers Defendants acted in concert with the other Defendants to fraudulently foreclose upon and deprive Plaintiff of her home.

Numerous preliminary objections to the complaint were filed by the Law Firm and Bank Defendants and sustained by this Court by Order dated October 9, 2003, with leave on the Plaintiff to file an amended complaint within thirty days. When, after seventy-four days, Plaintiff had not filed an amended complaint, Plaintiff’s action against the Law Firm and the Bank Defendants was dismissed by Court Order dated December 22, 2003.

Almost eight months later, on August 19, 2004, Beers, who at the time was proceeding **pro se**, filed preliminary objections to the complaint. The complaint did not contain a twenty-day notice to defend. These preliminary objections paralleled closely those which had previously been filed by the other Defendants,

and consistent with our previous ruling, we sustained the preliminary objections and again gave the Plaintiff an opportunity to file an amended complaint within thirty days. Our Order of January 20, 2005, specifically identified seven Rules of Civil Procedure with which Plaintiff should familiarize herself before filing an amended complaint.

On February 22, 2005, Plaintiff filed an amended complaint. This “complaint” consists of a seven-page continuous narrative statement, incorporates by reference into the body of the complaint various briefs and other filings of Plaintiff, and concludes, **inter alia**, with a request that the Court enter a default judgment in her favor. No notice to defend was attached to this amended complaint.

On May 17, 2005, counsel entered his appearance for Beers and simultaneously filed preliminary objections to Plaintiff’s amended complaint. Subsequently, on June 6, 2005, Plaintiff filed objections to Beers’ preliminary objections. Rather than being true objections, this document in reality is a response and narrative argument against Beers’ preliminary objections.

Plaintiff next filed on October 21, 2005, a document entitled “Memorandum in Support of Motion for Leave of Court to Amend Pleadings” to which was attached as part of Exhibit “E” a document entitled “Amended Complaint to Plead Defendant’s Tortious Interference with Plaintiff’s Right to Enter into an Agreement with Fairbanks Capital Corporation and Retaliation for Pursuing Valid Claims.” Further attached to Plaintiff’s Memorandum as part of what appears to be Exhibit “F” is a document with the caption “Motion for Leave of Court to Amend Pleadings” which was never separately filed or docketed of record.

On December 14, 2005, Plaintiff filed a praecipe to enter a default judgment against Beers in the amount of \$126,700.00, purportedly on the basis of the amended complaint attached to Plaintiff’s “Memorandum in Support of Motion for Leave of Court to Amend Pleadings” to which complaint Plaintiff asserted Beers had not responded. Plaintiff never obtained leave of Court or agreement from Beers to file this complaint and, in fact, no separate or independent filing or docketing of the amended complaint attached to Plaintiff’s Memorandum ever occurred. Pa. R.C.P. 1033 (permitting amendment of a plead-

ing at any time with consent of the adverse party or with leave of court). Upon receipt of Plaintiff's praecipe, the Prothonotary on the same date entered a default judgment against Beers in the amount of \$126,700.00. On December 21, 2005, Beers filed what is entitled a "Petition to Strike and/or Open a Default Judgment" but what, in essence, is only a petition to strike the default judgment taken by the Plaintiff on December 15, 2005.

Finally, on January 3, 2006, Plaintiff filed a document entitled "Motion to Consolidate Two Causes of Action" in which Plaintiff appears to be stating that she has set forth separate causes of action in her amended complaint filed on February 22, 2005, and the additional amended complaint attached as an exhibit to her Memorandum filed on October 21, 2005, and that Plaintiff has no objection to the Court simultaneously and expeditiously reviewing any challenges being made by Beers.

Following argument held on January 4, 2006—which argument was previously scheduled to consider Beers' preliminary objections to the amended complaint and Beers' petition to strike the default judgment, and at which time all pending matters were reviewed with the parties—we entered five separate orders with the intent of clearing the procedural morass created by Plaintiff's various filings and of providing Plaintiff with one last opportunity to clearly and precisely set forth in a properly formatted complaint her claims against Beers. In this manner, the Beers Defendants would have fair notice of the material facts underlying Plaintiff's claims against them and would have an opportunity to fairly and intelligently respond.

The five orders, which are the subject of Plaintiff's appeal, respectively decided the following:

1. Granted in part and denied in part Beers' preliminary objections to Plaintiff's amended complaint filed on February 22, 2005, specifically identified various Rules of Civil Procedure with which Plaintiff must comply, and provided Plaintiff with a thirty day period within which to file an amended complaint;
2. Denied Plaintiff's ostensible preliminary objections to Beers' preliminary objections;
3. Denied what the Court termed was implicit in Plaintiff's memorandum filed on October 21, 2005—a motion to file an amended complaint—and ruled that this is-

sue was moot since the Court was already providing Plaintiff with an opportunity to file an amended complaint;

4. Denied Plaintiff's motion to consolidate two causes of action, finding that this request was also moot since the Court was permitting Plaintiff to file an amended complaint in which Plaintiff would have an opportunity to join causes of action which may be validly joined under the Rules of Civil Procedure; and

5. Struck the default judgment taken by Plaintiff on December 14, 2005, finding that this judgment had been taken on an amended complaint for which neither the consent of the adverse party nor leave of court had been obtained and for which no amended complaint was properly filed to which Beers was required to respond.

DISCUSSION

"In this Commonwealth, an appeal may only be taken from: (1) a final order or one certified by the trial court as final; (2) an interlocutory order as of right; (3) an interlocutory order by permission; or (4) a collateral order." **Mother's Restaurant, Inc. v. Krystkiewicz**, 861 A.2d 327, 331 (Pa. Super. 2004) (*en banc*). To constitute an appealable final order, the order must have disposed of all claims and of all parties, have been defined as final by statute, or have been certified as final by the trial court. **Id.** at 332.

None of the orders from which Plaintiff has filed her appeal is final nor ones which are interlocutory and appealable as of right. "It is well established that with very few exceptions, rulings on preliminary objections are normally interlocutory and not appealable unless a legitimate question of jurisdiction is involved." **Graybill v. Fricke**, 53 Pa. Commw. 8, 10, 416 A.2d 626, 627 (1980). Nor does a separate valid basis for appeal exist.

In most instances, and as applies here, whether an order is final depends on whether the order disposes of all claims and of all parties. Pa. R.A.P. 341(b)(1). The first four orders as listed above in no manner effect a final disposition of Plaintiff's claims. To the contrary, the orders affirmatively recognized that because Plaintiff might have a legitimate claim she should be provided with one further opportunity to amend her complaint to comply with the procedural requirements for a pleading. These

orders do not, in any real sense, “effectively throw the Plaintiff out of court.” **Graybill, supra.**

If Plaintiff sincerely believes she cannot amend her complaint to meet the directives of our orders, her remedy in such circumstances was to have permitted the thirty-day period for allowance of an amendment to lapse and then suffer a dismissal of the complaint, whereupon a valid right to appeal would exist. **Id.** Absent this preliminary step, the Superior Court is without jurisdiction to hear Plaintiff’s appeals and the appeals should be quashed. **Id.**

As to the order striking the default judgment, this order too is not a final one. Although prior to July 1, 1989, an order opening, vacating or striking a judgment was considered appealable as of right, even though interlocutory, this is no longer the case. Pa. R.A.P. 311(a)(1) Note; **see also, Cargitlada v. Binks Mfg. Co.,** 837 A.2d 547, 549 n.2 (Pa. Super. 2003).

Moreover, we believe it clear from the procedural posture of this case as recited above and the absence of any notice to defend attached to the complaint, that the judgment taken by the Plaintiff was void **ab initio** and was properly and necessarily stricken by this Court. **Aquilino v. Philadelphia Catholic Archdiocese,** 884 A.2d 1269, 1280 (Pa. Super. 2005). (“A petition to strike does not involve the discretion of the court.”) Here, the complaint upon which Plaintiff took her default judgment was never filed as a viable separate document requiring a responsive pleading and, even as an exhibit to Plaintiff’s Memorandum, did not contain a notice to defend. These defects, apparent on the face of this record, are obvious, substantial and fatal and, without question, deprived the Prothonotary of authority to enter a default judgment. **Mother’s Rest., supra** at 337-338; **see also,** Pa. R.C.P. 1037(b) (stating that, in actions at law, “[t]he prothonotary, on praecipe of the plaintiff, shall enter judgment against the defendant for failure to file within the required time a pleading to a complaint which contains a notice to defend ...”); **Phillips v. Evans,** 164 Pa. Super. 410, 412, 65 A.2d 423, 424 (1949) (stating that “the prothonotary acts in a ministerial and not a judicial capacity, and a judgment entered by [the prothonotary] upon default or admission, except as provided by [the Rules of Civil Procedure] is a nullity without legal effect”).

CONCLUSION

In accordance with the foregoing, we respectfully request that Plaintiff's appeal from our Orders dated January 5, 2006, be quashed or, in the alternative, that our Orders be affirmed.

DANNY RANKOVICH and DANKA RANKOVICH, Plaintiffs vs. MICHAEL SIGNORE and BETHANN SIGNORE, Defendants

Civil Law—Restrictive Covenants—Enforcement—Balancing the Equities—Requirement of Substantial Benefit

1. Restrictive covenants constituting part of a general plan or scheme and applicable to the individual lots in a residential subdivision are enforceable by both the developer as well as any other lot owner in the subdivision.
2. As restrictions on the use of land, restrictive covenants must be strictly and narrowly construed in favor of the owner and against the beneficiary of the covenant. Where, however, the language of the restrictive covenants is clear, unambiguous and self-sustaining, they are enforceable.
3. When evaluating whether equitable relief in the form of a mandatory injunction should be granted for breach of a restrictive covenant, the Court must consider whether the breach was innocent and unintentional, or whether the breach was deliberate and willful or a conscious assumption of the risk. In the former case, the Court must balance the equities before granting relief. In the latter case, the beneficiary of the covenant is entitled to a mandatory injunction notwithstanding the **de minimis** nature of the damages caused by the breach.
4. Before equity will enjoin even a willful violation of a restrictive covenant, there must exist a significant benefit to the beneficiary of the covenant. This benefit may consist of nothing more than the benefit that the covenant was originally intended to convey. In the case of an intentional violation, the party opposing enforcement has the burden of showing that there is no longer a significant benefit to the dominant estate.

NO.: 03-2851

CAROL J. WALBERT, Esquire—Counsel for Plaintiffs.

SUSAN E. ANTONIONI ROYSTER, Esquire—Counsel for Defendants.

DECISION

NANOVIC, P.J.—March 3, 2006

Snyders' Christmas Tree Hill Estates is a private rural residential development (hereinafter the "Development") located in Franklin Township, Carbon County, Pennsylvania in which both the Plaintiffs, Danny Rankovich and Danka Rankovich, and the Defendants, Michael Signore and Bethann Signore, own property. Phase one of this recorded subdivision—of which the

parties' properties are a part—consists of a total of eleven building lots, each encumbered by a common set of sixteen deed restrictions. In this action, the Rankoviches seek to enforce several restrictive covenants which they claim have been violated by the Signores. Based upon the record following a non-jury trial, we make the following:

FINDINGS OF FACT

In August, 1998, the Rankoviches purchased Lot No. 2B in the Development upon which they built the home where they now reside. In May, 2000, the Signores purchased Lot No. 3A in the Development. The Signores' property is a 2.77 acre tract located on the north side of Snyder Drive directly opposite the Rankoviches' property, Lot No. 2B, which is a 1.824 acre tract situate on the south side of Snyder Drive.

The deeds for both parties' properties are from the same grantor, the developer of Snyders' Christmas Tree Hill Estates. Both deeds set forth in full the same sixteen separate deed restrictions which encumber all properties in the Development. Relevant to these proceedings are the following five building and use restrictions as numbered in the parties' deeds.

1. The premises herein conveyed shall not be used for any other purpose than as a sign [sic] for a private residence and garage with such other outbuildings for the suitable use of the premises, such as a pool house to be used in connection with any swimming pool that may be erected upon the premises, tool sheds or child's play house.

* * *

4. No lot shall be used or maintained as a dumping ground for rubbish, trash, garbage or other wastes. All wastes shall be kept in a sanitary container.

* * *

6. Construction shall be 100% completed within one (1) year from beginning of construction. Lawns shall be properly graded and seeded within planting season after construction is completed.

* * *

8. No excavation shall be made on the premises except for the purpose of building thereon and only at the time when building operations are to commence. No earth or

sand shall be removed from the premises except as part of such excavation without written consent of the Grantors.

* * *

10. Grantee agrees to construct, maintain and repair the individual onlot retention facilities designed and detailed on Drawing No. 9414-04, E. & S. Control Details for Snyders' Christmas Tree Hill Estates for the lot herein conveyed.

On April 1, 2001, the Signores broke ground and began construction of a home on their property. Following its installation, the foundation was found to be structurally unsound whereupon a decision was made to remove and replace this foundation with a new one. In the process, the Signores terminated the services of their first contractor, and also lost time and money in the construction of their home.

The original foundation was removed in the Fall of 2001 and construction again started, with a new contractor, in the Spring of 2002. As the home was being framed, the Signores encountered a further setback when their second contractor walked off the job. The Signores then found and employed a third contractor who completed the home's basic construction. The home, as built, contains three stories: a basement, and a first and second floor.

On December 24, 2002, the Signores received a certificate of use and occupancy from the Franklin Township zoning officer. At the time, as will be discussed below, the home was visibly not complete, however, according to the zoning officer, the occupancy permit certified only that the home had hot and cold running water, a usable toilet, and a roof.

Soon after receiving the occupancy permit, the Defendant, Michael Signore, moved into the premises followed by his wife and two children in August, 2003. By this time, the Signores had overextended themselves financially and were unable to employ a contractor to complete their home, or to do so themselves. With no apparent progress taking place, on September 12, 2003, the Rankoviches initiated the instant matter by filing a complaint in equity. The focus of the Rankoviches' complaint is to have the Signores complete their home as required by the deed restrictions.

An inspection of the Signores' home by the Rankoviches' expert on February 10, 2005 revealed substantial work, both inside and outside the home, which had not been completed. Inside the home, walls and floors were unfinished, in some areas with only subflooring in place; casings and moldings around the windows were unfinished; interior doors needed to be finished and in other areas installed; the stairs and banister leading to the second floor were not completed; not all light and electrical fixtures had been installed and, in some cases, were hanging by wires; central heat existed for the basement and second floor, but had not been completed for the first floor where some areas had only portable heating units; and plumbing in the master bathroom was incomplete. Outside the home, gutters and downspouting, soffits and fasciae, front porch columns, and siding—including an area where the Signores intend to attach a garage at some future date—were missing or incomplete; decks, landings and balconies—some extending from the second and third floors—were either not built or unfinished; and grading in one area adjoining the foundation covered up and prevented the use of an exterior basement door. At the time of his inspection, the Rankoviches' expert, a building contractor and certified building inspector, estimated the home to be approximately seventy percent complete.

Additionally, throughout the lot on the outside, primarily on the rear of the property, are several inoperable cars without inspection stickers or license plates, rusted yard tractors and trailers, and various items partially covered by tarps which can- not be clearly identified. Many of these items, because of the contour of the Signores' property which slopes downward from front to back and are near a wooded area, are not visible from Snyder Drive or the Rankoviches' property.

Building and construction materials are stacked at various areas about the property, including on the front porch, along the side of the home, and in the rear yard. Also, spaced along the length of the front driveway are several piles of stacked bricks on pallets with which the Signores intend to resurface the driveway; the driveway currently is constructed of shale alone.

Most of the items described in the previous two paragraphs have been where they now are for years. The Rankoviches claim

that these items have no value, are unsightly, and constitute rubbish, trash, garbage or waste, the storage of which is prohibited by the deed restrictions.

DISCUSSION

A. Construction and Meaning of Restrictive Covenants

That the deed restrictions contained in the Signores' deed exist, apply to the Signores' property, and are enforceable by the Rankoviches are not in serious dispute. **See Price v. Anderson**, 358 Pa. 209, 215-16, 56 A.2d 215, 219 (1948) ("where there is a definite plan of a real estate development for residential purposes, as shown, for example, by the filing of a map, in pursuance of which numerous conveyances of lots are made containing uniform restrictions, there is presumably created thereby a neighborhood or community scheme that may give rise to an implied reciprocal covenant on the part of the grantor that he will not thereafter convey any part of the original tract without imposing thereon the same restrictions, and that he will not himself devote the remaining part of the property to the prohibited purposes"); **Fey v. Swick**, 308 Pa. Super. 311, 316, 454 A.2d 551, 554 (1982) (stating that where restrictive covenants constitute a part of a general plan or scheme, the restrictions are enforceable by both the developer as well as any other lot owner in the subdivision). What is in dispute—whether the Signores are in violation of the restrictions, and, if so, the appropriate remedy—requires an understanding of the nature and purpose of restrictive covenants, how they are to be construed, and under what circumstances they are enforceable.

Restrictive covenants are contractual in nature. **Vernon Township Volunteer Fire Department, Inc. v. Connor**, 579 Pa. 364, 855 A.2d 873, 875 n.2 (2004). As a contract, the general rule of interpretation is that the intention of the parties at the time the contract is entered into governs. **Baumgardner v. Stuckey**, 735 A.2d 1272, 1274 (Pa. Super. 1999), **appeal denied**, 751 A.2d 183 (Pa. 2000) (**quoting Great A. & P. Tea Co. v. Bailey**, 421 Pa. 540, 544, 220 A.2d 1, 2 (1966)).

However, in Pennsylvania, there is an important difference in the rule of interpretation as applied to restrictive covenants on the use of land. It is this. Land use restric-

tions are not favored in the law, are strictly construed, and nothing will be deemed a violation of such a restriction that is not in plain disregard of its express words.

Id.

In construing the intentions of the parties, “restrictive covenants must be construed in light of: (1) their language; (2) the nature of their subject matter; (3) the apparent object or purpose of the parties; and (4) the circumstances or conditions surrounding their execution.” **Vernon Township, *supra***, 855 A.2d at 879. This intent must be ascertained from the entire instrument. **Id.** “If restrictions are not ambiguous, the intent of the parties shall be gained from the writing itself.” **Richman v. Mosites**, 704 A.2d 655, 658 (Pa. Super. 1997).

It is because restrictive covenants are in derogation of an owner’s free and full enjoyment of his property that they must be strictly and narrowly construed in favor of the owner and against the beneficiary of the covenant. “[P]ublic policy dictates that land shall not be unnecessarily burdened with permanent or long-continued restrictions” **Price, *supra*** at 218, 56 A.2d at 220. For this same reason, restrictive covenants must be precise and specific for they will not be enlarged by implication. “[N]othing will be deemed a violation of a restriction that is not in plain disregard of its expressed words; [] there are no implied rights arising from a restriction which the courts will recognize” **Jones v. Park Lane for Convalescents, Inc.** 384 Pa. 268, 272, 120 A.2d 535, 537 (1956). “Courts should not attempt to remedy the omissions of those creating restrictive covenants and extend, by implication, a restraint on the use of land.” **Richman, *supra*** at 658 (**quoting Ratkovich v. Randell Homes, Inc.**, 403 Pa. 63, 71, 169 A.2d 65, 69 (1961)).

Nevertheless, “[a] landowner may limit his or her private use and enjoyment of real property by contract or agreement.” **Vernon Township, *supra***, 855 A.2d at 879. Absent a violation of law or public policy, such a limitation is lawful and enforceable. **Gey v. Beck**, 390 Pa. Super. 317, 324, 568 A.2d 672, 675 (1990). Therefore, where the language of a restrictive covenant

is clear, unambiguous and self-sustaining, the courts may not distort its meaning to avoid enforcement.¹

B. Determination of Breach

When measured against the foregoing legal standard, with the exception of a few broken and discarded wooden pallets and several pieces of scrap material, we do not believe the Rankoviches have proven that the cars, building materials, and other objects on the outside of the Signores' property of which they complain are in violation of Restriction 4. Intrinsic to the items proscribed by this restriction—rubbish, trash, garbage, waste—is that they have no value.²

Mrs. Signore testified that both cars belong to her husband and it is his intent to restore them. In this respect, it is also relevant that Mr. Signore teaches racing and safe driving for a living, and at least one of the cars is of a racing type. Although clearly inoperable, the Court does not have the ability from the pictures presented to determine whether the cars are beyond repair and the Rankoviches presented no competent expert testimony to this effect.

¹ In **Jones**, the court further recognized two general classes of restrictive covenants: building restrictions and use restrictions.

Restrictions limiting the right of the owner to deal with his land as he may desire fall naturally into two distinct classes, the one consisting of restrictions on the type and number of buildings to be erected thereon, and the other on the subsequent use of such buildings. The restrictions in the former class are concerned with the physical aspect or external appearance of the buildings, those in the latter class with the purposes for which the buildings are used, the nature of their occupancy, and the operations conducted therein as affecting the health, welfare and comfort of the neighbors.

Jones v. Park Lane for Convalescents, Inc., *supra* at 272-73, 120 A.2d at 538.

² We note the following definitions for these terms:

Rubbish: 'any material rejected or thrown away as worthless; trash; refuse'

Trash: 'broken, discarded, or worthless things; rubbish; refuse ... any worthless, unnecessary, or offensive matter'

Garbage: 'any worthless, unnecessary, or offensive matter'

Waste: 'useless, superfluous, or discarded material, as ashes, garbage, sewage, etc.'

Webster's New World Dictionary (3d ed. 1994).

Similarly, notwithstanding their rundown appearance, no evidence was presented that the tractors or trailers are inoperable or of no value. The photographs the Rankoviches introduced depict three trailers—a John Deere trailer with obvious surface rust, another trailer loaded with two tarp-covered snowmobiles, and a third trailer loaded with what appears to be building materials—and two yard tractors. The first tractor is connected to the trailer last mentioned, and the other tractor is partially covered with a tarp.

As to the unused building materials located on the Signores' property, to the extent they are to be used to complete construction of the Signores' home, their value is obvious. Only in those instances where the Rankoviches' expert testified that certain materials—these are identified in our order of this same date—had no value, a fact substantiated in the photographs presented in evidence, will we direct the removal of such items.

Had the developer intended to prohibit the parking of inoperable or unlicensed vehicles on the property, or the storage of building materials beyond a certain time period, this could easily and clearly have been done. An example of such a covenant appears in **Baumgardner v. Stuckey**:

5. TEMPORARY STRUCTURES, CONSTRUCTION
AND STORAGE: **No structure of temporary character, trailer, basement, tent, shack, garage or other building shall be used on any lot at any time as a residence either temporarily or permanently.** No lumber or building materials shall be stored on lots over ninety (90) days prior to actual beginning of construction, and **no machinery, tractors, trailers, or equipment shall be stored or maintained beyond a reasonable time** of its use in connection with actual residential construction. If construction of a home is started, such construction shall be completed within two (2) years. No junked car or cars for sale may be stored at any time. No unsightly matter or material of any kind shall be stored on any lot. Cars and other motor vehicles shall have current motor vehicle inspection stickers and registration tags.

Id. at 1273. That Restriction 4 does not bar the storage of these materials does not mean the Rankoviches are without recourse should the conditions complained of rise to the level of a nui-

sance. **Groff v. Borough of Sellersville**, 12 Pa. Commw. 315, 319, 314 A.2d 328, 330 (1974) (defining what constitutes a nuisance).

Unlike our decision regarding Restriction 4, the Signores are in clear violation of the sixth restriction. This restriction is unambiguous and unmistakable in its terms: the home's construction must be "100% completed within one year from beginning construction." To somehow find that this requirement means something other than that a home be fully completed—inside and out—within one year of when construction begins, would defy the plain and explicit meaning of the language used. Equally clear is that after almost five years, the Signores have yet to complete the construction of their home.³

C. Entitlement to Relief

Although equity as a form of action has been abolished in this Commonwealth, equitable principles have not. Consequently, our determination that the Signores have breached Restriction 6 is not a **per se** determination that the Rankoviches are entitled to relief.

“An injunction is not of right and the chancellor is not bound to make a decree which will do far more mischief and work greater injury than the loss he is asked to redress.” “A suitor must not only appear in a court of equity with clean hands, but he must come with reasonable promptness, in good faith, and with a just and equitable demand If an injunction is prayed for where upon consideration of the whole case it ought not in good conscience to issue, a

³The Rankovichs also claim that the Signores have not properly graded and seeded their property. The evidence on this is in dispute, Mrs. Signore having testified that the yard area immediately surrounding the home has been graded and seeded, and the Rankovichs claiming that although the Signores planted grass seed and grew a lawn, no grading or backfilling was done around the foundation of their home. Because we find the language of Restriction 6 upon which the Rankoviches rely—that “lawns should be **properly** graded or seeded” (emphasis added)—to be vague and subjective, under the principle of strict construction, we find no violation.

To the extent the Rankoviches contend that the Signores have failed to install an in-ground water retention system to control water run-off, Restriction 10, the evidence presented at the time of trial is to the contrary, an underground retention system having been installed. However, because all gutters and downspouting have not yet been completed and connected to the system, this deficiency will be addressed in our order.

mere legal right in the plaintiff will not move the chancellor": **Power's Appeal**, 125 Pa. 175, 186, 17 A. 254 [1889].'

Gey, supra at 328, 568 A.2d at 677 (**quoting Moyerman v. Glanzberg**, 391 Pa. 387, 393, 138 A.2d 681, 684-685 (1958)).

When a restrictive covenant has been breached, in considering whether to grant relief it is critical to decide whether the breach was innocent and unintentional, or whether the breach was deliberate and willful or a conscious assumption of the risk. In the former case, where the breach was inadvertent, before relief may be granted, the court must balance the harm that results from the violation against the harm that would result from enforcement and determine where the greater harm exists. **Id.** at 328, 568 A.2d at 677-678. In the latter case, where the breach is deliberate and willful, or where the court finds that the defendant intentionally took a chance, the court is not required to and should not balance the rights of the parties. **Id.** at 329, 568 A.2d at 678.

'Where a building restriction is still of substantial value to a dominant lot equity should restrain its wilful violation. [citing an authority] To restrict the plaintiff to damages is not an adequate remedy . . . Where a contract right has been invaded there is generally no question of the amount of damages but simply of the right. Clearly it would be "only by conjecture and not by any accurate standard" that a jury could measure the damages caused to the plaintiff. [citing an authority].' Judge (later Chief Justice) KEPHART in **Dodson v. Brown**, 70 Pa.Superior Ct. 359 (1918) aptly said: 'The aggrieved property owner's right is absolute. However hard his acts might be regarded, he asks the court for the enforcement of a legal right of a positive character with respect to land which it is conceded was wrongfully taken from him. He is entitled to a decree. The rule in such cases is founded on sound reason. If damages may be substituted for the land, it will amount to an open invitation to those so inclined to follow a similar course and thus secure valuable property rights. The amount of land involved does not change the situation.' ... If a property owner deliberately and intentionally violates a valid express restriction running with the

land or intentionally ‘takes a chance’, the appropriate remedy is a mandatory injunction to eradicate the violation.

Id. at 330, 568 A.2d at 678-679 (**quoting Peters v. Davis**, 426 Pa. 231, 238, 231 A.2d 748, 752 (1967)).

In this case we believe that while the Signores did not begin construction with the intention of violating Restriction 6, their failure to complete construction after almost five years is unjustified and that what began as construction delays beyond their control has evolved to a deliberate choice to wait and see. The Rankoviches commenced their suit against the Signores on September 12, 2003, and still, more than two years later, more than twice the time permitted under the deed restrictions to commence and complete construction, construction is incomplete.

Having determined that the Signores’ continuing delays are, at a minimum, the legal equivalent of “taking a chance,” we must still find that a substantial benefit will flow to the Rankoviches before enforcement can be ordered.

[E]nforcement [even in the case of an intentional violation of a covenant] may not be had unless it will result in a significant benefit to the beneficiary of the covenant. However, the benefit shown must only consist in the benefit that the covenant was originally intended to convey. The party opposing enforcement has the burden of showing that significant benefit no longer exists. Thus, enforcement will appropriately be denied if the party opposing enforcement can prove that, through a change of surrounding neighborhood or for other reasons, enforcement of the covenant will no longer result in the benefit it was originally intended to achieve. ... Further, as we have already indicated, the fact that the benefit to result from enforcement may be relatively small is irrelevant where the violation was intentional.

Id. at 332, 568 A.2d at 679. (footnote omitted) Two things are clear from this language: first that the substantial benefit referred to is the benefit that the restriction was originally intended to confer, and not something more, and second, that the burden of proving that a benefit no longer exists is on the person opposing enforcement of the restriction. **See also, Vernon Township, supra**, 855 A.2d at 880.

In this case, the Signores fall short on both accounts. Not only did the Signores fail to produce any evidence that no benefit will result from enforcement of this restriction, the continuing vitality of the benefit originally intended—that property values and the overall general residential quality of the Development will be maintained by completing construction within a reasonable period—appear evident from even a casual reading of the restriction.

CONCLUSION

In accordance with the foregoing, we find that the Signores have violated the sixth restriction contained in their deed and that the Rankoviches are entitled to relief. By order of this same date, we will direct that the Signores complete construction of the exterior of their home within ninety days of this date and that the home be fully completed, both inside and outside, within one hundred twenty days. Our order will also direct the removal of certain items of debris within thirty days.⁴

⁴ The Signores' original building plans did not include immediate construction of a garage nor do the restrictive covenants require the construction of a garage. For this reason, even though the Signores will not be required by our order to complete construction of a garage within ninety days, completion of the exterior of the home requires that they complete all siding and work on the exterior of their home, including that area where a garage may some day be attached, understanding that this decision will not foreclose the Signores from constructing a garage addition to their home at some time in the future. Similarly, because neither the restrictive covenants nor the Signores' building plans require that their driveway be constructed of a specific type material or be finished in a certain manner, our order will not require that construction of a brick driveway be completed within ninety days.

**COMMONWEALTH OF PENNSYLVANIA vs.
ALBERT E. BROOKE, Defendant**

*Criminal Law—Withdrawal of Plea—Assertion of Innocence
and Coercion*

1. The standard by which a request to withdraw a plea is measured varies depending upon whether the request is made before or after sentencing; when a motion to withdraw a plea is made prior to sentencing, the motion should be granted where the defendant has offered a “fair and just reason”; when the motion is made after sentencing, the Defendant must demonstrate that the Court’s denial of the motion would result in manifest injustice before the motion may be granted.
2. Where, after sentencing, the only unfinished sentencing issue concerns a non-punitive aspect of sentencing, here compliance with Megan’s Law, and the parties have expressly agreed to impose a sentence final in all other respects, which agreement and sentence has been accepted and implemented by the Court, a motion to withdraw a plea filed after the initial sentence, but prior to final sentencing, is judged by the post-sentence motion standard.
3. In order to assure that a defendant’s plea is knowingly, intelligently, voluntarily and understandably made, the court must inquire into the six critical areas identified in the comment to Pa.R.Crim.P. 590. After a valid plea has been taken, it is presumed that the Defendant was aware of what he was doing and the burden of proving otherwise is upon the defendant.
4. A defendant does not overcome the presumptive validity of his plea by a bald assertion of innocence during a plea withdrawal hearing nor are claims of coercion by or ineffectiveness of counsel cognizable where Defendant represents himself.
5. A defendant is bound by statements made by him during the plea hearing and he may not assert grounds for withdrawing the plea that contradict those statements.

NO. 128 CR 03

NO. 129 CR 03

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

DAVID W. SKUTNIK, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—March 17, 2006

PROCEDURAL AND FACTUAL BACKGROUND

On August 11, 2004, Defendant, Albert E. Brooke, entered a negotiated plea of **nolo contendere** to one count of aggravated indecent assault, two counts of corruption of minors, and two counts of endangering the welfare of a child involving his

stepdaughter when she was five and six years old,¹ and one count each of corruption of minors and endangering the welfare of a child involving his then four-year-old stepson.² Pursuant to the plea agreement, Defendant was immediately sentenced to an aggregate sentence of four to eight years in a state correctional facility followed by twenty years probation. Under the plea agreement, the remaining charges against the Defendant were to be dismissed.³

At the time Defendant entered his plea, trial had already commenced before a jury and the Commonwealth had begun to present its testimony. Upon learning of Defendant's intent to enter a plea, the Court engaged Defendant in a lengthy and detailed oral colloquy. Defendant also completed and signed a five-page written colloquy containing forty-five individual questions. Because aggravated indecent assault is a Megan's Law offense for which a statutorily mandated sexually violent predator evaluation is required prior to sentencing,⁴ with this as the only exception the plea agreement expressly provided that all other aspects of sentencing were final⁵ (N.T., 8/11/04, pp. 36-41). The Defendant also executed a written consent and waiver form acknowledging his awareness and agreement with this limited bifurcation of sentencing.⁶

¹ 18 Pa. C.S.A. §§3125(a)(1), 6301 and 4304, respectively.

² 18 Pa. C.S.A. §§6301 and 4304, respectively.

³ The criminal information relative to his stepson contained twenty-six separate counts, fourteen classified as felonies. That involving his stepdaughter listed nineteen counts of which eleven were felonies, eight of the first degree. With the exception of the charge of aggravated indecent assault, graded as a felony of the second degree, all other counts to which Defendant pled **nolo contendere** are misdemeanor offenses.

⁴ 42 Pa. C.S.A. §9795.4(a).

⁵ In this context, Defendant acknowledged at the time of sentencing that he was already under the lifetime registration requirements of Megan's Law (N.T., 8/11/04, pp. 31, 36-37).

⁶ Following his evaluation by the State Sexual Offenders Assessment Board and a subsequent hearing before the Court, Defendant was found to be a sexually violent predator (**See** Court Order dated October 20, 2005). Thereafter, an amended order of sentence in Defendant's presence was entered on November 18, 2005. Under this amended order, Defendant received the same sentence as that imposed on August 11, 2004, supplemented, however, to conform with the registration, notification and counseling requirements of Megan's Law applicable to a defendant adjudicated to be a sexually violent predator. These requirements of Megan's Law have previously been determined by our Supreme Court to be non-punitive in nature and are, in reality, a civil collateral consequence of Defendant's adjudication as a sexually violent predator. **Commonwealth v. Williams**, 574 Pa. 487, 832 A.2d 962 (2003).

Prior to Defendant's evaluation by the State Sexual Offenders Assessment Board and the entry of the contemplated amended order of sentence, Defendant filed a motion to withdraw his plea together with a request to be represented by private counsel.⁷ A hearing on Defendant's motion, which is now before us for disposition, was held on February 6, 2006.

DISCUSSION

Preliminarily, we must determine the correct legal standard by which to measure Defendant's request to withdraw his plea. "When a motion to withdraw a plea is made prior to sentencing, the motion [shall] be granted where the defendant has offered a 'fair and just reason.' " **Commonwealth v. Gunter**, 565 Pa. 79, 771 A.2d 767, 770 (2001) (**citing Commonwealth v. Forbes**, 450 Pa. 185, 299 A.2d 268 (1973)). In contrast, when a motion to withdraw a plea is made after sentencing, the defendant must demonstrate that the court's denial of the motion would result in manifest injustice. **Id.**, 771 A.2d at 771. "Such a manifest injustice occurs when a plea is not tendered knowingly, intelligently, voluntarily, and understandingly." **Id.** Under neither test does the defendant have an absolute right to withdraw his plea.

Although technically Defendant's sentence did not become final until the sentence was amended on November 18, 2005 to conform to the requirements of Megan's Law, for all intents and purposes all punitive aspects of Defendant's sentence were both fixed and accepted by the Court at the time of Defendant's plea on August 11, 2004. Given the procedural posture and circumstances surrounding the entry of Defendant's plea—the parties had previously prepared for and were in the process of trial (**i.e.**, jeopardy had attached), the existence of a plea agree-

⁷ Prior to trial Defendant was represented by three separate attorneys in the Public Defender's Office. Jury selection in this case occurred on August 9, 2004, at which time Defendant's counsel was William G. Schwab, Esquire. On this same date, defense counsel filed two separate motions **in limine** on Defendant's behalf. Following the Court's disposition of these motions prior to the commencement of trial, Defendant requested that his trial counsel be discharged and that he be permitted to represent himself. After an extensive colloquy regarding Defendant's request to waive counsel, Defendant's request was granted and Attorney Schwab was appointed as stand by counsel. At the time Defendant entered his plea, Defendant was acting **pro se** with Attorney Schwab as stand by counsel. Defendant's present counsel was appointed in response to the request contained in Defendant's motion to withdraw his plea. Present counsel also represented Defendant in the Megan's Law proceedings.

ment calling for Defendant's immediate sentencing, the Court's acceptance and implementation of the plea agreement, an understanding that the only unfinished sentencing issue (the registration, notification and counseling requirements of Megan's Law) was non-punitive in nature, and Defendant's express written consent and agreement to this procedure—there can be no question but that the parties believed and expected that they were then and there fixing a determinant term of sentence under conditions which each found acceptable, albeit for differing reasons.

This same desire for finality, when fairly and justly reached, explains and justifies our courts' willingness to accept and enforce a defendant's waiver of constitutional rights which accompany a plea unless challenged prior to sentencing. **Gunter, supra**, 771 A.2d at 771; **see also, Commonwealth v. Flick**, 802 A.2d 620, 623 (Pa. Super. 2002) ("post-sentence motions for withdrawal are subject to higher scrutiny since courts strive to discourage entry of guilty pleas as sentence-testing devices"). The timing of Defendant's plea here, under the circumstances indicated, persuade us that the appropriate standard for evaluating Defendant's motion is that applicable to post-sentence motions: whether, under the totality of the circumstances, a denial of the motion would result in manifest injustice. **Cf. Commonwealth v. Muntz**, 428 Pa. Super. 99, 630 A.2d 51 (1993) (holding that a defendant's request to withdraw his guilty plea, made subsequent to initial sentencing but prior to resentencing, is to be examined under the post-sentencing standard of "manifest injustice").

At the hearing on Defendant's motion to withdraw his plea, Defendant asserted two bases for his motion: that he is innocent and that he was pressured by counsel to enter a plea. Both implicate whether the plea is fundamentally sound. For both, we must determine whether denial of the motion would prejudice Defendant on the order of manifest injustice. In making this determination, the adequacy of the on-the-record colloquy is critical.

"The goal sought to be attained by the guilty plea colloquy is assurance that a defendant's guilty plea is tendered knowingly, intelligently, voluntarily and understandingly." **Commonwealth v. Persinger**, 532 Pa. 317, 323, 615 A.2d 1305, 1308

(1992); **see also**, Pa.R.Crim.P. 590(A)(3). In order to achieve this goal the trial court, at a minimum, must inquire into the following six areas:

- (1) Does the defendant understand the nature of the charges to which he or she is pleading guilty or **nolo contendere**?
- (2) Is there a factual basis for the plea?
- (3) Does the defendant understand that he or she has the right to trial by jury?
- (4) Does the defendant understand that he or she is presumed innocent until 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. Lewis, 791 A.2d 1227, 1231 (Pa. Super. 2002), **appeal denied**, 806 A.2d 859 (Pa. 2002).⁸ “Additionally, when a plea of **nolo contendere** includes a plea agreement, the judge must conduct a separate inquiry on the record to determine whether the defendant understands and accepts the terms of the plea agreement.” **Id.** (citations and quotation marks omitted).

At the plea hearing, Defendant was questioned as to each of the six critical areas described above. Defendant was further

⁸ Recent case law suggests strict adherence to such inquiry is relaxed when the plea, under the totality of the circumstances, is established to have been knowingly, voluntarily and intelligently made.

[W]hile the Court has admonished that a complete failure to inquire into any one of the six, mandatory subjects generally requires reversal, **see, e.g., Commonwealth v. Chumley**, 482 Pa. 626, 634, 394 A.2d 497, 501 (1978); ... **see generally, Commonwealth v. Ingram**, 455 Pa. 198, 203-205, 316 A.2d 77, 80-81 (1974) (holding that the character of a guilty plea is tested according to the adequacy of the on-the-record colloquy), as both parties acknowledge, in determining the availability of a remedy in the event of a deficient colloquy, it has in more recent cases moved to a more general assessment of the knowing, voluntary, and intelligent character of the plea, considered on the totality of the circumstances

Commonwealth v. Morrison, 878 A.2d 102, 108 (Pa. Super. 2005) (**en banc**), **appeal denied**, 887 A.2d 1245 (Pa. 2005) (**quoting Commonwealth v. Flanagan**, 578 Pa. 587, 854 A.2d 489, 500-501 (2004)).

questioned regarding his understanding and acceptance of the specific terms of the plea agreement.

Specifically, during the plea hearing Defendant was advised of the elements of each offense to which he was pleading (N.T., 8/11/04, pp. 16-22; **see also**, written colloquy, Nos. 14 and 16); the factual basis for his plea (N.T., 8/11/04, pp. 14-22); the maximum sentences and the fines for each of the offenses to which he was pleading and that the sentences could be consecutive and the fines cumulative (N.T., 8/11/04, pp. 27-28; **see also**, written colloquy, Nos. 28 through 32); that he is presumed innocent of all the charges filed against him and that the Commonwealth has the burden of proving its case against him beyond a reasonable doubt (N.T., 8/11/04, pp. 9, 12; **see also**, written colloquy, Nos. 19 and 20); that he has a right to a jury trial and that the jury must be unanimous in its verdict before any conviction can occur (N.T., 8/11/04, pp. 12-13; **see also**, written colloquy, Nos. 17 and 18); and that the Court was not a party to and was not bound by the terms of any plea agreement unless the Court accepted the agreement (N.T., 8/11/04, p. 42; **see also**, written colloquy, No. 27). That Defendant was advised of, understood and accepted the terms of the plea agreement is equally clear. (N.T., 8/11/04, pp. 6, 29-30, 42, 44-45).

Addressing further Defendant's claim that he is innocent, his bald assertion of innocence at the plea withdrawal hearing does not, in and of itself, render the plea of **nolo contendere**, involuntary and unknowing. **Lewis**, 791 A.2d at 1234. Defendant both acknowledged his understanding and had explained to him the meaning of a **nolo contendere** plea during the plea colloquy (N.T., 8/11/04, pp. 3, 10-13, 35). As stated in **Lewis**:

In the first place a plea of **nolo contendere** does not, by its very nature, require the pleading defendant to concede his or her guilt. As the United States Supreme Court has held, a plea of **nolo contendere** is 'a plea by which a defendant does not expressly admit his guilt, but nonetheless waives his right to a trial and authorizes the court for purposes of sentencing to treat him as if he were guilty.' **North Carolina v. Alford**, 400 U.S. 25, 36, 91 S.Ct. 160, 167, 27 L.Ed.2d 162, 170 (1970). The Supreme Court further noted in Alford that '[T]he Constitution does not bar imposition of a prison sentence upon an accused who is

unwilling expressly to admit his guilt but who, faced with grim alternatives, is willing to waive his trial and accept the sentence.' **Id.** at 36, 91 S.Ct. at 167, 27 L.Ed.2d at 171. **Accord Commonwealth v. Boyd**, 221 Pa.Super. 371, 292 A.2d 434 (1972).

Id., 791 A.2d at 1234.

Nor does the record support Defendant's claim that he was coerced into a plea by counsel. Defendant's claim that counsel threatened to abandon him if he didn't plea is disingenuous at best. As already stated, Defendant demanded to represent himself and was in fact representing himself at the time of his plea (N.T., 8/11/04, pp. 2-3; **see also**, written colloquy, No. 15). Cf. **Commonwealth v. Griffin**, 537 Pa. 447, 455, 644 A.2d 1167, 1171 (1994) ("The Superior Court has consistently held that claims of ineffective assistance of counsel are not cognizable during post-trial proceedings, including the PCHA, when the claimant has previously insisted on self-representation.").

Moreover, to the extent Defendant received legal assistance, Defendant indicated that he was satisfied with the representation of counsel and that he knew counsel was acting on a stand-by basis only (N.T., 8/11/04, pp. 2-3; **see also**, written colloquy, No. 43). In his written colloquy, Defendant further acknowledged that he was acting of his own free will; that no threats had been made to him to enter a plea; that other than the plea agreement, no promises had been made to induce his plea; and that no one could force him to enter a plea (Written colloquy, Nos. 36 through 39). As to these statements, Defendant "may not assert grounds for withdrawing the plea that contradict statements made when he pled guilty" and he is bound by them. **Commonwealth v. Lewis**, 708 A.2d 497, 502 (Pa. Super. 1998), **appeal denied**, 725 A.2d 1219 (Pa. 1998) (**quoting Commonwealth v. Barnes**, 455 Pa. Super. 267, 276, 687 A.2d 1163, 1167 (1996)).

Although in response to one question in the written colloquy, Defendant indicated he was forced to enter a plea (Written colloquy, No. 35), not only is this response contrary to the responses made by Defendant to the four immediately succeeding questions on this subject, it is also clear that Defendant knew what he was doing and what would happen when he en-

tered his plea, and that he was acting freely and voluntarily. **Commonwealth v. Stork**, 737 A.2d 789, 790 (Pa. Super. 1999) (“[O]nce a defendant has entered a plea of guilty, it is presumed that he was aware of what he was doing, and the burden of proving involuntariness is upon him.”), **appeal denied**, 564 Pa. 705, 764 A.2d 1068 (2000); **see also, Commonwealth v. Myers**, 434 Pa. Super. 221, 229, 642 A.2d 1103, 1107 (1994) (“The mere fact that a defendant was ‘under pressure’ at the time he entered a guilty plea will not invalidate the plea, absent proof that he was incompetent at the time the plea was entered.”).

In response to why he was entering his plea, Defendant was clearly aware that the jury might find him guilty of all offenses charged, some of which were more serious than those to which he was pleading (N.T., 8/11/04, pp. 9-10). On this point, Attorney Schwab credibly testified at the hearing on Defendant’s motion to withdraw his plea that Defendant was advised of the maximum sentence he could receive if convicted of all the charges pending against him. Attorney Schwab further testified that Defendant was an intelligent man, that Defendant knew what he was doing, and that he, as well, believed Defendant’s decision was in his best interests. In place of what might have been the practical equivalent of a life sentence, Defendant bargained for and received a favorable sentence which in and of itself is “a strong indicator of the voluntariness of the plea.” **Lewis**, 791 A.2d at 1235 (citations and quotation marks omitted).

CONCLUSION

After a thorough review of Defendant’s plea hearing, the hearing on Defendant’s motion to withdraw his plea, and the submissions of the parties, we are convinced that Defendant knowingly, voluntarily and intelligently entered his plea, fully cognizant of his rights, the nature of the charges and the consequences of his plea.

Defendant received the exact sentence which he bargained for and has failed to demonstrate that a denial of his motion will result in any miscarriage of justice, much less one rising to the level of manifest injustice. To the contrary, the history of this case suggests strongly a manipulation of the system by Defendant which would only be exacerbated by granting

Defendant's motion. In denying Defendant's motion we note also that

[t]he law does not require that [the defendant] be pleased with the outcome of his decision to enter a plea of guilty: 'All that is required is that [the defendant's] decision to plead guilty be knowingly, voluntarily, and intelligently made.'

Commonwealth v. Yager, 454 Pa. Super. 428, 437, 685 A.2d 1000, 1004 (1996) (*en banc*) (citations omitted), **appeal denied**, 549 Pa. 717, 701 A.2d 577 (1997). That this standard has been met, we have no doubt.⁹

⁹ Though we have not judged Defendant's motion under the standard for examining pre-sentence motions for withdrawal of a plea, it is by no means clear that Defendant can meet this less burdensome standard. Under this standard, "if the trial court finds 'any fair and just reason,' withdrawal of the plea before sentencing should be freely permitted, unless the prosecution proffered a showing that it had been 'substantially prejudiced.'" **Commonwealth v. Flick**, 802 A.2d 620, 623 (Pa.Super. 2002). However, similar to the post-sentence standard, "a defendant's bald assertion of innocence [does] not constitute fair and just reason for allowing withdrawal of a guilty plea." **Commonwealth v. Dicken**, No. 509 WDA 2005, 2006 WL 573863, at *2 (Pa.Super. March 10, 2006). Further, our highest Court has stated that "[w]hen a Defendant pleads guilty after the Commonwealth has commenced its case, we hold that the Commonwealth will be 'substantially prejudiced' if the defendant is allowed to withdraw his plea." **Commonwealth v. Whelan**, 481 Pa. 418, 422, 392 A.2d 1362, 1364 (1978) (Per Larsen, J., with one Justice concurring and four Justices concurring in result); **see also, Commonwealth v. Ross**, 498 Pa. 512, 447 A.2d 943 (1982) (request to withdraw guilty plea was properly denied when it had been made after the dismissal of key Commonwealth witnesses in reliance on the plea) and **Commonwealth v. Carelli**, 308 Pa. Super. 522, 454 A.2d 1020 (1982) (Commonwealth would be substantially prejudiced if pre-sentence motion to withdraw guilty plea were granted where Commonwealth witnesses were present in court on the day set for trial, and many of the witnesses have traveled great distances and have taken leave from their places of employment to be present at trial).

IN THE INTEREST OF C.W.M., a Juvenile

*Civil Law—Juvenile Act—Restitution—Co-Participant
Eligibility—Amount*

1. Under the Juvenile Act, both an innocent victim as well as a co-participant injured in the commission of a crime is eligible to receive restitution. However, in assessing and apportioning the amount of restitution, the injured party's status as a co-participant in the commission of the crime is a factor to be considered by the court.
2. Under the Juvenile Act, the decisions whether to award restitution, in what amount, and on what payment terms are all discretionary with the court, with the court's primary focus being to promote the rehabilitation of the juvenile. Before apportioning responsibility for damages or ordering any restitution, the court must consider the nature of the delinquent act and the juvenile's ability to pay in light of his earning capacity.

NO. 155 JV 2005

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

JOSEPH D. PERILLI, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—April 21, 2006

At issue in these proceedings is whether a juvenile court has the authority to order an adjudicated delinquent child to pay restitution to a co-participant in the underlying crimes, who was never charged with or convicted of any of the crimes involved. We state the relevant facts as follows:

FACTS AND PROCEDURAL BACKGROUND

During the evening of December 10 and the early morning hours of December 11, 2004, the juvenile who is the subject of these proceedings (hereinafter referred to as "C.W.M.") and three of his friends, all minors, attended a party in Lehigh Township, Carbon County, Pennsylvania, at which all four consumed alcohol. After leaving the party, C.W.M. and M.R., one of C.W.M.'s three friends, discussed going for a joy ride. They invited their two other friends to join them.

The four stole an automobile from a local garage belonging to an acquaintance of C.W.M.'s family. C.W.M. was the driver, with M.R. sitting in the front passenger seat and the two others in the rear seat. After traveling seven to eight miles, the vehicle was involved in a one-car accident in which M.R. sustained serious bodily injuries.

The police charged C.W.M. as a juvenile with the following nine offenses:

- Count 1: Driving Under the Influence of Alcohol
—75 Pa. C.S.A. §3802(e) (B.A.C. .07%)
(Misdemeanor)
- Count 2: Aggravated Assault by Vehicle While
Driving Under the Influence—75 Pa.
C.S.A. §3735 (Felony 2)
- Counts 3-5: Recklessly Endangering Another Person
—18 Pa. C.S.A. §2705 (one count for
each passenger) (Misdemeanor 2)
- Count 6: Accident Involving Death or Personal
Injury—75 Pa. C.S.A. §3742.1 (with
M.R. as the injured party) (Felony 3)
- Count 7: Reckless Driving—75 Pa. C.S.A. §3736
(Summary)
- Count 8: Careless Driving—75 Pa. C.S.A. §3714
(Summary)
- Count 9: Drivers Required to be Licensed—75
Pa. C.S.A. §1501(a) (Summary)

Pursuant to a plea agreement, C.W.M. admitted to committing the offenses described in Counts 1 and 6, with the remaining counts to be dismissed. As part of the plea agreement, C.W.M. agreed to pay restitution to the victims of the crimes (See stipulation dated 9/12/2005).

In addition to the foregoing offenses charged in these proceedings, in a separate case docketed to No. 124 JV 2005, C.W.M. was charged with the following three offenses related to the taking of the automobile:

- Count 1: 18 Pa. C.S.A. §3921(a)—Theft by Unlawful
Taking or Disposition
- Count 2: 18 Pa. C.S.A. §3925(a)—Receiving Stolen
Property
- Count 3: 18 Pa. C.S.A. §3928(a)—Unauthorized
Use of Automobile and Other Vehicles

C.W.M. has previously admitted to the crime of receiving stolen property, been adjudicated delinquent, and been directed to pay restitution in the amount of \$3,565.00 for property damage to the vehicle.

Because there was insufficient information to decide the issue of restitution at the time of adjudication in this matter, a subsequent hearing was scheduled for these purposes. At this hearing, the Commonwealth sought restitution on behalf of M.R. for the costs of his medical and hospital treatment, a sum totaling \$230,945.94. M.R.'s injuries which necessitated these expenses were a direct result of the motor vehicle accident on December 11, 2004. Neither M.R. nor either of the other two juveniles involved in the theft of the vehicle were charged criminally for any of their conduct surrounding the taking of the vehicle and subsequent accident.

C.W.M. is now eighteen years of age (D.O.B. 9/14/87), in twelfth grade, and in good health. He was seventeen at the time of the accident. His only assets of substance are approximately \$200.00 in a checking account and \$1,000.00 in a certificate of deposit that had been set aside for him by his family for college. He presently is unemployed but is seeking a job. In his last job, he made approximately \$8.50 an hour working ten to fifteen hours a week. Upon graduation he hopes to attend college.

DISCUSSION

A. Legality of Awarding Restitution to a Criminal Participant

The threshold question we must decide is whether M.R., as an uncharged criminal participant in the commission of a crime in which he was injured is legally eligible for restitution.¹ This first issue to a slightly different degree was raised in **In the Interest of J.E.D.**, 879 A.2d 288 (Pa. Super. 2005), **appeal denied**, 889 A.2d 1216 (Pa. 2005), but never decided, the appellate court finding that the issue had been waived. **Id.** at 293 n.7 (arguing that the trial court should have allocated a portion of the insurance paid for the victim's medical expenses to the victim because he was a co-participant). We are unaware of any other court in this Commonwealth that has addressed the issue in either a juvenile or adult proceeding.

Contained within this issue is the question of whether M.R. is a victim. That is, can there be restitution if there is no victim? Put another way, is only a victim entitled to restitution? And if so, who is a victim? More to the point, is a person injured dur-

¹ We refer to M.R. throughout this opinion as a "co-participant" rather than as an "accomplice" or "co-conspirator" in the alleged crimes, since M.R. has not been charged nor found guilty of any of the underlying crimes.

ing the commission of a crime definitionally a victim, even if he participated in the crime but was not charged. The question is peculiarly a legal one requiring an examination of the legal authority to award restitution. **In the Interest of M.W.**, 555 Pa. 505, 725 A.2d 729, 731 n.4 (1999) (explaining that a challenge to the trial court's authority to impose restitution concerns the legality of the sentence whereas a challenge that the amount of restitution ordered is excessive involves a discretionary aspect of sentencing).

"[A]n order of restitution must be based upon statutory authority." **Id.** at 731; **Commonwealth v. Harner**, 533 Pa. 14, 17, 617 A.2d 702, 704 (1992). In juvenile proceedings this authorization is found in 42 Pa. C.S.A. Section 6352(a)(5) of the Juvenile Act which provides:

§6352. Disposition of delinquent child

(a) General rule.—If the child is found to be a delinquent child the court may make any of the following orders of disposition determined to be consistent with the protection of the public interest and best suited to the child's treatment, supervision, rehabilitation, and welfare, which disposition shall, as appropriate to the individual circumstances of the child's case, provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the development of competencies to enable the child to become a responsible and productive member of the community:

* * *

(5) Ordering payment by the child of reasonable amounts of money as fines, costs, fees or **restitution** as deemed appropriate as part of the plan of rehabilitation considering the nature of the acts committed and the earning capacity of the child, including a contribution to a restitution fund. The president judge of the court of common pleas shall establish a restitution fund for the deposit of all contributions to the restitution fund which are received or collected. The president judge of the court of common pleas shall promulgate written guidelines for the administration of the fund. Disbursements from the fund shall be made, subject to the written guidelines and the limitations of this chapter, at the discretion of the president judge and used to

reimburse crime victims for financial losses resulting from delinquent acts. For an order made under this subsection, the court shall retain jurisdiction until there has been full compliance with the order or until the delinquent child attains 21 years of age. Any restitution order which remains unpaid at the time the child attains 21 years of age shall continue to be collectible under section 9728 (relating to collection of restitution, reparation, fees, costs, fines and penalties).

* * *

(emphasis added). This section, unfortunately, does not answer the question before us.

By contrast, in criminal proceedings the statutory authorization for imposing restitution defines several significant terms. Under this system

[t]he right to impose restitution is statutorily grounded in two provisions, 42 Pa.Con.Stat.Ann. §9721(c) and 18 Pa.Con.Stat. Ann. §1106(a). The Sentencing Code, 42 Pa.Con.Stat.Ann. §9721(c) provides that ‘the court shall order the defendant to compensate the victim of his criminal conduct for the damage or injury that he sustained.’ 42 Pa.C.S.A. §9721(c). The ordering of restitution is further defined by 18 Pa.Con.Stat. Ann. §1106(a). Section §1106(a) sets forth the general rule that ‘upon conviction for any crime ... wherein the victim suffered personal injury directly resulting from the crime, the offender shall be sentenced to make restitution in addition to the punishment prescribed therefore.’ 18 Pa.Con.Stat.Ann. §1106(a); **Commonwealth v. Opperman, supra**, 780 A.2d [714,] 718 [(Pa. Super. 2001)].

Commonwealth v. Keenan, 853 A.2d 381, 383 (Pa. Super. 2004). The term “restitution” is defined as:

The return of the property of the victim or payments in cash or the equivalent thereof pursuant to an order of the court.

18 Pa. C.S.A. §1106(h). An “offender” is:

Any person who has been found guilty of any crime.

18 Pa. C.S.A. §1106(h). The meaning of “victim” is the same

[a]s defined in section 479.1 of the act of April 9, 1929 (P.L. 177, No. 175), known as The Administrative Code of

1929. The term includes the Crime Victim's Compensation Fund if compensation has been paid by the Crime Victim's Compensation Fund to the victim and any insurance company that has compensated the victim for loss under an insurance contract.

18 Pa. C.S.A. §1106(h). Footnoted in this last definition is 71 P.S. §180-9.1 which has been repealed and in its place is the Crime Victims Act, 18 P.S. §§11.101 **et seq.**, which provides the following relevant definitions:

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

* * *

'Direct victim.' An individual against whom a crime has been committed or attempted and who as a direct result of the criminal act or attempt suffers physical or mental injury, death or the loss of earnings under this act. The term shall not include the alleged offender. The term includes a resident of this Commonwealth against whom an act has been committed or attempted which otherwise would constitute a crime as defined in this act but for its occurrence in a location other than this Commonwealth and for which the individual would otherwise be compensated by the crime victim compensation program of the location where the act occurred but for the ineligibility of such program under the provisions of the Victims of Crime Act of 1984 (Public Law 98-473, 42 U.S.C. §10601 **et seq.**).

* * *

'Victim' The term means the following:

(1) A direct victim.

(2) A parent or legal guardian of a child who is a direct victim, except when the parent or legal guardian of the child is the alleged offender.

(3) A minor child who is a material witness to any of the following crimes and offenses under 18 Pa. C.S. (relating to crimes and offenses) committed or attempted against a member of the child's family:

Chapter 25 (relating to criminal homicide).

Section 2702 (relating to aggravated assault).

Section 3121 (relating to rape).
18 P.S. §11.103.

While the standards by which a decision whether to award restitution, and in what amount, clearly differ in juvenile and criminal proceedings (**In the Interest of R.D.R.**, 876 A.2d 1009, 1016 (Pa. Super. 2005) (**quoting Commonwealth v. S.M.**, 769 A.2d 542, 544 (Pa. Super. 2001), **appeal denied**, 567 Pa. 741, 788 A.2d 375 (2001))), we can discern no substantial difference between what restitution consists of or its purpose under the two systems. This is especially true when comparing juvenile restitution with restitution imposed as a condition of probation or parole.

“In the context of a criminal case, restitution may be imposed either as a direct sentence, 18 Pa. C.S. §1106(a), or as a condition of probation, 42 Pa. C.S. §9754. When imposed as a sentence, the injury to property or person for which restitution is ordered must directly result from the crime. **See** 18 Pa. C.S.A. §1106(a); **Harner**, 533 Pa. at 21, 617 A.2d at 704.” **In the Interest of M.W.**, 725 A.2d at 732. “To determine the correct amount of restitution, a ‘but for’ test is used—damages which occur as a direct result of the crime are those which should not have occurred but for the defendant’s criminal conduct.” **Commonwealth v. Gerulis**, 420 Pa. Super. 266, 288, 616 A.2d 686, 697 (1992); **appeal denied**, 535 Pa. 645, 633 A.2d 150 (1993).

When imposed as a condition of probation or parole, the court has the authority and discretion to make the defendant account for all direct and indirect damages caused by his conduct. **Harner**, **supra** at 22-23 and n.3, 617 A.2d at 707 and n.3 (“the broader discretion granted to a sentencing court that chooses to impose restitution as a condition of parole, 42 Pa. C.S. §9754(c)(8) vests the court with an equally broad power to determine what the fruits of the crime are.”); **see also**, **Commonwealth v. Kelly**, 836 A.2d 931 (Pa. Super. 2003) (discussing the distinction between a direct and an indirect loss in the context of the crime of receiving stolen property (RSP): the value of the property received by the offender is a direct loss; when, however, there is no evidence that the recipient of the stolen property was the one who broke into a truck from which the property was taken, the damage to the truck is an indirect and not a direct loss of the crime of RSP); **see also**, **Harner**,

supra (holding that even though the costs of private investigators, legal fees and expenses for trips to Louisiana incurred by a father in trying to locate children taken by their mother who was convicted of interference with custody of children, 18 Pa. C.S.A. §2904, were not directly caused by the mother's conduct in violating Section 2904, being neither an essential element of the crime nor a loss that naturally flowed from the conduct forming the basis of the crime for which the mother was convicted, and were not properly imposed as restitution as part of a direct sentence, such costs were the proper subject of restitution as a condition of probation). "Thus, the requirement of a nexus between the damage and the offense is relaxed where restitution is ordered as a condition of probation."

In the Interest of M.W., 725 A.2d at 732.²

As between these two measures of restitution in the criminal system, the Pennsylvania Supreme Court concluded:

As is apparent from the face of Section 6352, the rehabilitative policy of the Juvenile Act's restitution provision corresponds to that which supports the imposition of restitution as a condition of probation in a criminal case. Section 6352, unlike the provision of the Crimes Code providing for restitution as a condition of sentence, does not contain language specifically requiring that the loss or injury be a direct result of the juvenile's wrongful conduct. Consistent with the protection of the public interest and the community, the rehabilitative purpose of the Juvenile Act is attained through accountability and the development of personal qualities that will enable the juvenile offender to become a responsible and productive member of the community. See 42 Pa. C.S. §6301(b)(2). Thus, the policies underlying the Juvenile Act and its restitution provision, as well as the plain language of Section 6352, serve to invest the juvenile court

² Even then, the connection cannot be speculative or overly tenuous. "[R]estitution is permissible only as to losses flowing from the conduct for which the defendant has been held criminally accountable." **Commonwealth v. Mourar**, 349 Pa. Super. 583, 608, 504 A.2d 197, 211 (1986) (Johnson, J., concurring and dissenting) (**quoting Commonwealth v. Cooper**, 319 Pa. Super. 351, 356, 466 A.2d 195, 197 (1983)), **vacated on other grounds**, 517 Pa. 83, 534 A.2d 1050 (1987). "This is based upon the rationale that due process of law is denied when the losses for which restitution has been imposed did not arise from the very offense for which the defendant was convicted." **Id.**

with a broad measure of discretion to apportion responsibility for damages based upon the nature of the delinquent act and the earning capacity of the juvenile.

In the Interest of M.W., 725 A.2d at 732-733.

Because of this similarity we believe it appropriate, as did the Supreme Court in **In the Interest of M.W.**, to consider the meaning of restitution in criminal proceedings as a guide to answering the threshold question before us. These statutes tell us what restitution is, that only a victim is eligible to receive restitution, that a victim is any person who suffers injury as the result of a crime, and that the only person injured by a crime who is ineligible to receive restitution is one who has been convicted of committing the crime. Absent from this exclusion is any reference to a co-participant. **Compare** 18 U.S.C.A. §3663 (a)(1)(A) (federal restitution statute preventing criminal participants from being defined as victims for certain offenses); Or. Rev.Stat. §137.103(5) (2006) (Oregon restitution statute stating “‘victim’ does not include any co-participant in the defendant’s criminal activities.”); Utah Code Annotated §76-3-201(e)(ii) (2005) (Utah restitution statute stating “‘Victim’ does not include any co-participant in the defendant’s criminal activities.”); **see also**, **State v. Clinton**, 890 P.2d 74, 75 (Ariz. 1995) (trial court improperly refused to order an adult offender to pay restitution to unindicted participant victim; state restitution statute is not limited to only **innocent** victims but benefits **all** victims).

In accordance with the foregoing, as to the first issue before us we find that an uncharged co-participant injured in the commission of a crime is eligible to receive restitution and that, therefore, the imposition of restitution in this case would be lawful.³ This conclusion holds only that restitution may be awarded to a co-participant, not that it must be, or should be, the decision on whether restitution will be awarded being one for the court in its exercise of discretion, having in mind the primary purpose of restitution: rehabilitation of the juvenile.

³ It is also not insignificant that C.W.M. agreed to the payment of restitution for M.R.’s injuries as part of a negotiated plea agreement. **See In the Interest of M.W.**, 555 Pa. 505, 725 A.2d 729, 733 (1999) (holding, in part, that a defendant’s voluntary decision to pay restitution as part of a negotiated plea agreement supported the propriety of the restitution order).

As a sentence, or a condition of sentence, imposed following a criminal conviction, an order of restitution is not an award of damages. ... While the order aids the victim, its true purpose, and the reason for its imposition, is the rehabilitative goal it serves by ‘impressing upon the offender the loss he has caused and his responsibility to repair that loss as far as it is possible to do so.’ **State v. Stalheim**, 275 Or. 683, 689, 552 P.2d 829, 832 (1976); **See State v. Mottola**, 84 N.M. 414, 504 P.2d 22 (1972). Thus a court’s concern that the victim be fully compensated should not overshadow its primary duty to promote rehabilitation of the defendant.

Commonwealth v. Galloway, 302 Pa. Super. 145, 161, 448 A.2d 568, 576 (1982) (**quoting Commonwealth v. Fuqua**, 267 Pa. Super. 504, 508, 407 A.2d 24, 26 (1979)); **see also, Commonwealth v. Mourar**, 349 Pa. Super. 583, 603, 504 A.2d 197, 208 (1986) (**en banc**) (explaining that restitution is not intended to be a substitute for a civil remedy, is not an award of damages—the two having different objectives, and that a sentence of restitution cannot be enforced by the victim but only by the district attorney in the criminal courts), **vacated on other grounds**, 517 Pa. 83, 534 A.2d 1050 (1987).

B. Propriety of Restitution

Having found that restitution may be awarded to M.R., we must now determine whether an order of restitution is appropriate in this case and, if so, in what amount. An award of restitution under the Juvenile Act, unlike under either the Crimes Code or Sentencing Code, is uniquely discretionary with the Court, both as to the decision to award restitution and as to the amount of restitution awarded.⁴ In exercising this discretion, the Court must consider four mandatory criteria:

- (1) The amount of loss suffered by the victim; (2) The fact that defendant’s action caused the injury; (3) The amount awarded does not exceed defendant’s ability to pay; [and] (4) The type of payment that will best serve the needs of the victim and the capabilities of the defendant.

In the Interest of Dublinski, 695 A.2d 827, 829 (Pa. Super. 1997) (**quoting Commonwealth v. Valent**, 317 Pa. Super. 145,

⁴ Restitution under Section 1106(c) of the Crimes Code, 18 Pa. C.S.A. §1106(c), and Section 9721(c) of the Sentencing Code, 42 Pa. C.S.A. §9721(c), is mandatory, without regard to the offender’s ability to pay. **Commonwealth v. Colon**, 708 A.2d 1279, 1280 (Pa. Super. 1998). “Only upon default is defendant’s ability to pay to be considered. 42 Pa. C.S.A. §9730.” **Id.** at 1284.

149, 463 A.2d 1127, 1128 (1983)). Ultimately, the decision rests on the court's assessment of whether a properly structured order of restitution will promote the development and rehabilitation of the juvenile into a responsible, law-abiding individual. To accomplish these ends, “[t]he policies underlying the Juvenile Act and the plain language of Section 6352 invest the juvenile court with a broad measure of discretion to apportion responsibility for damages based upon the nature of the delinquent act and the earning capacity of the juvenile.” **In the Interest of R.D.R.**, 876 A.2d at 1014.

As to C.W.M.’s earning capacity, taking into account his “mental ability, maturity and education; [his] work history … ; the likelihood of [his] future employment and extent to which [he] can reasonably meet a restitution obligation; the impact of a restitution award on [his] ability to acquire higher education and thus increase [his] earning capacity; and [his] present ability to make restitution” (**In the Interest of Dublinski**, 695 A.2d at 830), we believe that C.W.M. has the ability to earn money and to pay restitution and that an order requiring regular, fixed payments to compensate for M.R.’s loss is an important means of making C.W.M. understand and bear the consequences of his conduct, part of the process of rehabilitation. We further believe, after considering the circumstances of the accident and the extent of losses suffered by M.R.; that the injuries to M.R. were not intended; that C.W.M. did not act alone, M.R. and two other persons having also participated in the crimes which caused M.R.’s injuries; and that C.W.M. has already been ordered to pay restitution for property damage in the amounts of \$3,565.00 (in the related case docketed to No. 124 JV 2005) and \$1,352.50 (in an unrelated case docketed to No. 191 JV 2005),⁵ that an award of restitution in the amount of \$5,000.00, with minimum monthly payments of \$100.00, is both reasonable and appropriate, and within his means.

The periodic and continuing nature of these payments will remind C.W.M. that he will be held accountable for his conduct and its effects on M.R., and that one of these consequences is

⁵ In this case, C.W.M. was ordered to pay restitution for property damage caused under circumstances similar to those which occurred here—damage to a stolen vehicle taken for a joy ride on August 20, 2005. In that case, C.W.M. was adjudicated delinquent for criminally conspiring to commit theft by the unlawful taking of moveable property, 18 Pa. C.S.A. §3921(a).

financial. At the same time, we believe the amount of these payments will not threaten C.W.M.’s intent to attend college, a goal we hope C.W.M. will keep. By also holding C.W.M.’s parents potentially responsible, as we intend to do, for unpaid restitution in an amount not to exceed the statutory limit⁶ in the event C.W.M. fails to pay the amount of restitution ordered by age twenty-one, C.W.M.’s parents have an incentive to check on their son’s progress and to encourage his compliance.

In language relevant to the form and type of payments we intend to order, the court in **In the Interest of J.E.D.** quoted the trial court as follows:

[T]he \$19,377.95 ordered as restitution, although a substantial amount for a [seventeen]-year-old, may be paid off over a period of years. Pursuant to 42 Pa. C.S.A. §6352 (a)(5), the court has the authority to retain jurisdiction over the child until the restitution is paid in full or the child reaches the age of 21. If the child reaches the age of 21 prior to satisfying the restitution debt, the court may continue to collect any unpaid amount. 42 Pa. C.S.A. §9728. As long as the amount of restitution is related to the harm suffered by the victim, §§6352(a) (5) and 9728 permit the court to set a monetary amount that, although it may be currently [non]payable in a lump sum, may be paid off over time.

Id., 879 A.2d at 292 (also ordering that the juvenile’s parents would be held responsible for restitution in the event the juvenile failed to make the required payments). In **In the Interest of J.E.D.** the Superior Court further cited with approval the trial court’s recognition that the juvenile’s ability to pay would increase over time, an observation equally applicable here. **Id.** at 292.

CONCLUSION

The rehabilitative policies underlying the Juvenile Act—focusing first on restitution’s effect on the offender, and encompassing within its grasp all victims, not only innocent victims—combined with C.W.M.’s conduct being a direct cause of M.R.’s

⁶ 23 Pa. C.S.A. §§5503 and 5505.

injuries and C.W.M.'s agreement to make reparation,⁷ all justify an order of restitution. At the same time, M.R.'s participation in the criminal episode which caused his injuries, together with two other individuals, none of whom have been held legally accountable for their conduct; the unintended nature of M.R.'s injuries; the magnitude of the damages sustained by M.R.; C.W.M.'s limited resources and separately existing obligation to make restitution to others—including C.W.M. alone being held responsible for restitution for the property damage to the car in which M.R. was injured; and the possibility of compensation being paid by the Crime Victim's Compensation Fund,⁸ convince us that while C.W.M. has a responsibility for which he should be properly held accountable, ordering restitution for the full amount of actual damages sustained by M.R. would disproportionately saddle C.W.M. with a debt he cannot afford, the consequences of which would be punitive, not rehabilitative. Instead, restitution in the amount of \$5,000.00, subject to the terms previously stated, accounts not only for C.W.M.'s ability to pay, but also for the nature and circumstances of the crime, including the responsibility of others who have not been required to share in the payment of restitution.

⁷ Restitution and reparation mean different things. Restitution ordinarily refers to compensation for the wrongful taking of property, reparation, to compensation paid for injury or damage. Section 1106 of the Crimes Code uses the term restitution to describe both types of compensation. Section 1354(c)(8) of the Sentencing Code, however, specifically refers to restitution or reparation. In this opinion the term restitution refers to both restitution and reparation.

Commonwealth v. Fuqua, 267 Pa. Super. 504, 507 n.5, 407 A.2d 24, 26 n.5 (1979); **see also, Commonwealth v. Walton**, 483 Pa. 588, 595 n.10, 397 A.2d 1179, 1183 n.10 (1979) (to the same effect).

⁸ At the time of the restitution hearing, the Commonwealth indicated that application had been made on behalf of M.R. to the Crime Victim's Compensation Fund and that although some assistance was anticipated from this source, the exact amount was unknown.

**COMMONWEALTH OF PENNSYLVANIA vs.
RALPH WAYNE FISHER, Defendant**

*Criminal Law—Jury Selection—Presumed Prejudice—Distinction
Between Confidential Informants and Accomplices*

1. Prior to assuming office there is no bar to a prosecutor who has received the nominations of both political parties for election to the Court of Common Pleas from continuing his duties in the district attorney's office, including the trial of cases. Under such circumstances there is no presumption that a fair and impartial jury cannot be selected and the defendant has the burden of creating a factual record demonstrating actual prejudice in the empaneling of the jury.
2. A confidential informant acting on behalf of the police and feigning his complicity in the illegal purchase of controlled substances from the Defendant to secure incriminating evidence does not possess the requisite intent to commit a crime and is therefore not an accomplice with respect to whom the Defendant is entitled to a cautionary instruction regarding the suspect nature of accomplice testimony.

NOS: 532 CR 04

533 CR 04

534 CR 04

545 CR 04

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

BRIAN B. GAZO, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—March 23, 2006

I. FACTUAL BACKGROUND

At the conclusion of his trial held on September 15, 2005, Defendant, Ralph Wayne Fisher, was found guilty by a jury of various drug offenses stemming from the sale, on four separate dates, of marijuana to a confidential informant, Jason Shiffert (“Shiffert”). Each time, police observed the transaction. On the first two occasions, January 2 and 8, 2004, Defendant acted in concert with Frederick Theesfeld, III (“Theesfeld”), in selling the marijuana to the confidential informant. On the third and fourth occasions, January 30 and February 5, 2004, Defendant acted alone.

At trial, the Commonwealth, represented by Assistant District Attorney David W. Addy, presented testimony from Officer Brian Biechy of the Lehighton Borough Police Department, who observed all four drug transactions, as well as Shiffert

and Theesfeld. Shiffert testified that he initially became involved with the police after he had been charged with various offenses not related to the charges against Defendant (N.T., p. 87). Shiffert offered to work for the police by agreeing to purchase controlled substances from sellers in the area. Among the sellers Shiffert identified was the Defendant, who Shiffert knew and had a distant relationship with.¹

Theesfeld testified that he and Defendant collaborated in purchasing marijuana and selling it to Shiffert (N.T., pp. 71-79). Theesfeld was also arrested and charged for his involvement in the first two transactions. He acknowledged at trial that these charges were still pending against him and testified that though the Commonwealth had promised nothing in return for his cooperation, he was hoping to receive some break (N.T., pp. 80, 85).

Prior to commencing trial, Defendant, through his counsel, made a motion **in limine** seeking to recuse Assistant District Attorney Addy as the prosecuting attorney due to his status as judge-elect in Carbon County.² Specifically, Defendant argued that having a judge-elect prosecute the case would impair the integrity of the proceedings and deny him a fair and impartial trial under both the state and federal constitutions. The motion was denied by the Court, Senior Judge Richard W. Webb presiding (M.L., pp. 3-4).³

Defendant was convicted of four counts of possession with intent to deliver a controlled substance;⁴ four counts of unlaw-

¹ Officer Biechy testified that the Defendant was the intended target of the controlled buys and that Theesfeld, unexpectedly, was involved in the first two transactions.

² During the 2005 Spring primary election, Assistant District Attorney, David W. Addy, won both the Republican and Democratic nominations for the single vacancy on the Court of Common Pleas in Carbon County. By virtue of having won both parties' nominations, Attorney Addy's status as judge-elect was virtually assured.

³ Three transcripts were prepared for this case. One transcript, approximately eight pages, covers the in-chambers discussion concerning Defendant's motion **in limine**, which was held on September 12, 2005; we use "M.L." to refer to this transcript. Another transcript covers the trial proceedings held on September 15, 2005; we use the traditional "N.T." to refer to this transcript. The third transcript covers **voir dire** conducted on September 12, 2005; we use "**Voir Dire**" to refer to this transcript.

⁴ 35 Pa. C.S.A. §780-113(a)(30).

ful delivery of a controlled substance;⁵ four counts of possession of drug paraphernalia;⁶ four counts of unlawful possession of a controlled substance;⁷ and two counts of criminal conspiracy to deliver a controlled substance.⁸ He was also acquitted of four counts of possession of a small amount of marijuana.⁹

On February 15, 2006, Defendant filed a timely appeal from the judgment of sentence. In response to our request that Defendant file a concise statement of matters complained of on appeal, Defendant has identified the following two grounds as a basis for his appeal:

1. Whether the Defendant/Appellant was denied his right to a fair and impartial trial under both the United States and Pennsylvania Constitutions when the Trial Court denied his pre-trial Motion **in Limine** to recuse the prosecuting attorney who was also the judge-elect.
2. Whether the Trial Court erred in refusing to give an Accomplice jury instruction as to confidential informant Jason Shiffert, despite the Defendant-Appellant's request that it do so.

Based on the following discussion, we find both stated grounds without merit and ask the Superior Court to affirm our rulings concerning the conduct of the trial.

II. DISCUSSION

A. District Attorney as Judge-Elect

In our review of the Pennsylvania Rules of Professional Conduct and the Code of Judicial Conduct we are aware of no bar to a judge-elect practicing law prior to the commencement of his term of office. **See also, Crystal Forest Assocs., LP v. Buckingham Township Supervisors**, 872 A.2d 206, 213 (Pa. Commw. 2005) (noting, without comment, party's argument that judges-elect are not prohibited from practicing law under the Pennsylvania Constitution or the Code of Judicial Conduct). Neither the Defendant's (M.L., p. 4), nor our own research,

⁵ 35 Pa. C.S.A. §780-113(a)(30).

⁶ 35 P.S. 780-113(a)(31).

⁷ 35 Pa. C.S.A. §780-113(a)(16).

⁸ 18 Pa. C.S.A. §903(a)(1).

⁹ 35 Pa. C.S.A. §780-113(a)(31).

has uncovered any instance where a judge-elect district attorney recused himself, or was required to do so, as a matter of law in order to ensure the criminal defendant a fair and impartial trial.

With respect to pretrial publicity generally, “[n]ormally, one who claims that he has been denied a fair trial because of pretrial publicity must show actual prejudice in the empanelling of the jury.” **Commonwealth v. Drumheller**, 570 Pa. 117, 808 A.2d 893, 902 (2002) (quoting **Commonwealth v. Bridges**, 563 Pa. 1, 757 A.2d 859, 872 (2000)), cert. denied sub nom. **Drumheller v. Pennsylvania**, 539 U.S. 919, 123 S.Ct. 2284, 156 L.Ed. 2d 137 (2003). Only in extreme circumstances, when “(1) the publicity is sensational, inflammatory, and slanted toward conviction rather than factual and objective; (2) the publicity reveals the defendant’s prior criminal record, or if it refers to confessions, admissions or reenactments of the crime by the accused; and (3) the publicity is derived from police and prosecuting officer reports” is pretrial prejudice presumed. **Id.** Further, in reviewing the trial court’s decision on a defendant’s motions for change of venue/venire, the inquiry “must focus upon whether any juror formed a fixed opinion of the defendant’s guilt or innocence as a result of the pre-trial publicity.” **Id.** (quoting **Commonwealth v. Marinelli**, 547 Pa. 294, 314, 690 A.2d 203, 213 (1997)).

Though the nature of Defendant’s claim that the jury was improperly influenced by the status of Assistant District Attorney Addy as a judge-elect is obviously different from that in which a claim of pretrial publicity adverse to the defendant is made, both have in common the claim of possible juror prejudice rendering a fair and impartial jury impossible to obtain. Nevertheless, even in those cases involving pretrial publicity adverse to the defendant, cases in which the danger of juror prejudice and its impact on the jurors’ ability to hear the case fairly and without prejudice are more direct than that claimed by Defendant here, absent a showing of pervasive or inflammatory pretrial publicity, actual prejudice must be established. In this case, Defendant has made no attempt to establish that any member of the jury had formed a fixed opinion of his guilt or innocence as a result of the prosecutor’s status as a judge-elect.

Moreover, Defendant’s concern of juror prejudice or partiality is not supported by the record. During **voir dire** counsel

for both sides inquired whether any prospective member of the jury knew them, or a member of their office, such that they could not be fair and impartial (**Voir Dire**, pp. 5-6, 23-28). With one exception, a juror whose son was the subject of pending criminal charges and who was excused, no other potential jurors indicated any preconceived bias for or prejudice against either counsel, or their office. Nor do we believe it appropriate, as Defendant argues, for us to presume that such bias inheres in the prosecuting district attorney being a judge-elect, or that the jury ignored our instructions that Defendant is presumed innocent, that in making their decision they must consider only the evidence in the case, that counsels' arguments are not evidence, and that they must perform their duties without bias or prejudice to either party.¹⁰

We also note that defense counsel voluntarily chose not to address his concern during **voir dire** or to request a cautionary charge for fear of highlighting the issue (M.L., pp. 3-4). We do not criticize counsel for this decision, but feel compelled to observe that in making such decision, the issue has been waived. **Cf. Crystal Forest Assocs.**, 872 A.2d at 214 n.12 (“It is axiomatic that in order to preserve a trial objection for review, trial counsel is required to make a timely, specific objection during trial.”).

B. Confidential Informants as Accomplices

Defendant’s second issue on appeal questions our refusal to instruct the jury that Jason Shiffert, the confidential informant, could be found to be an accomplice. Implicit in Defendant’s argument is that had the jury been so instructed, then it should also have been charged that they should consider the informant’s testimony with suspicion. **See** Pa. SSJI (Crim) 4.01 (instructing jury that accomplice testimony be scrutinized be-

¹⁰ If accepted, Defendant’s position would require, at a minimum, that any trial attorney, civil or criminal, and whether presenting or defending a claim, not try cases in the county from which he was elected from the date of his election until the date he takes office. Such a rule, which Defendant argues is necessary to assure the selection of a fair and impartial jury, has as its underlying premise the belief that prospective jurors will not honestly and fairly respond to questions on **voir dire** and follow the instructions of the Court. This belief, if followed to its logical conclusion, questions not only the legitimacy of jury selection but, ultimately, the integrity of the jury system as a whole. Defendant’s premise is one contrary to the Court’s experience and which we do not accept.

cause of potential motive to falsely blame another or obtain favorable treatment from Commonwealth).

Defendant's argument begs the question of whether a confidential informant can be considered an accomplice to a crime. As a matter of definition, an accomplice must possess a minimum level of criminal intent. 18 Pa.C.S.A. §§306(c) and (d). Therefore, an undercover officer or third party feigning their complicity in the commission of a crime under the direction of law enforcement personnel are not considered accomplices to the underlying crime. **Smith v. U.S.**, 17 F.2d 723, 724 (8th Cir. 1927) ("The fact that an officer charged with the execution of law employs a decoy, and the decoy makes the purchase from the defendant, does not make [the decoy] an accomplice."); **cert. denied**, 274 U.S. 762, 47 S.Ct. 770, 71 L.Ed. 1339 (1927); **Commonwealth v. Earl**, 91 Pa. Super. 147 (1927) (a witness who joins the prosecution by associating himself with wrongdoers is not an accomplice); **Commonwealth v. Hollister**, 157 Pa. 13, 16-17, 27 A. 386, 396 (1893) ("one who joins a criminal organization for the purpose of exposing it [...] is not an accessory before the fact [...] and his testimony, therefore, is not to be treated as that of an infamous witness."); **see also**, M.L. Cross, Annotation, **Detective or other person participating in crime to obtain evidence as accomplice within rule requiring corroboration of, or cautionary instruction as to, testimony of accomplice**, 119 A.L.R. 689 (2005) ("It is the general rule, almost universally adopted, that one who participates in a crime merely for the purpose of securing evidence upon which to convict the other participants has no criminal intent and is not an accomplice within the rule requiring the corroboration of, or a cautionary instruction as to the weight to be given to, the testimony of an accomplice.").

The instruction Defendant requested as to Shiffert was given with respect to Theesfeld, because, unlike Shiffert, the evidence supported a finding of Theesfeld as an accomplice of Defendant by his participation in the first two sales (N.T., pp. 188-191); **see Commonwealth v. Coades**, 454 Pa. 448, 453-454, 311 A.2d 896, 898 (1973) ("The test for determining if a witness is an accomplice is whether the witness could be indicted for the crime for which the accused is charged."). In this light, both the Commonwealth, during direct examination (N.T. p.

80), and the defense, during cross-examination (N.T., pp. 85-86), questioned Theesfeld regarding his participation and motivation for testifying against Defendant. Defendant was entitled to have the jury know that Theesfeld was charged with the same crimes with which the Defendant was charged and that Theesfeld's testimony should be viewed with suspicion. **Id.** at 454, 311 A.2d at 898-899.

In contrast to Theesfeld, Shiffert merely acted as a decoy, under police direction, without the specific culpability necessary to make him an accomplice of Defendant and Theesfeld's scheme to sell drugs. Shiffert's intent was to expose the underlying transaction; he did not act with the kind of culpability necessary to establish complicity. **Compare Smith**, 17 F.2d 723; **Earl**, 91 Pa. Super. 447; **Hollister**, 27 A. 386. In short, Shiffert was not an accomplice to the crimes with which Defendant was charged and, therefore, it was not error to deny Defendant's request that a cautionary jury instruction be given as to his testimony.

Notwithstanding Defendant's inability to impeach Shiffert on the grounds of complicity, “[i]t is well established that a defense counsel may [otherwise] cross-examine a prosecution witness on possible favorable treatment received from the prosecution in exchange for the witness' testimony.” **Commonwealth v. Nolen**, 390 Pa. Super. 346, 356, 568 A.2d 686, 691 (1989), **aff'd**, 535 Pa. 77, 634 A.2d 192 (1993). On this subject, we in no manner restricted Defendant's right to a full and fair cross-examination of Shiffert as to the terms of any plea agreement he had reached with the Commonwealth, or his belief that by cooperating with the police he would receive favorable treatment (N.T., pp. 85, 112). We further instructed the jury that in judging Shiffert's credibility his motive for testifying should be considered, including the reason he became a confidential informant and his expectation of favorable treatment (N.T., p. 183).¹¹

¹¹ At the conclusion of our instructions, and prior to the jury beginning its deliberations, Defendant did not renew his request for an accomplice instruction regarding Shiffert's testimony. In **Commonwealth v. Pressley**, 887 A.2d 220 (Pa. 2005), the Court held prospectively (i.e., after 11/29/05) that notwithstanding a criminal defendant's timely submission of a proposed point for charge before closing arguments and its denial by the trial court, a specific objection following the jury charge is required to preserve the issue for review.

III. CONCLUSION

Defendant's claim that prosecution of the Commonwealth case by a judge-elect is inherently prejudicial is not supported by the law. There exists no presumption of prejudice arising from the identity or status of any particular prosecutor and, absent a factually developed record evidencing prejudice, there is no basis for Defendant's position. In asking us to find prejudice nonetheless, Defendant asks us to speculate and manufacture a fear unknown to the law. This we will not do.

Defendant's claim that a confidential informant who, while working undercover with the police, purchases illegal drugs from the Defendant is an accomplice misapprehends the distinguishing feature of an accomplice, the requisite **mens rea** of criminal culpability. Such a person, though often acting to curry favor with the police and for his own personal interests, does not act with the necessary criminal intent to justify a finding or instruction that he may be considered an accomplice and his testimony disbelieved on this basis. To the extent we permitted Defendant to question Shiffert's motives for becoming a confidential informant and testifying against Defendant, our instructions properly placed witness credibility in the hands of the jury.

In conclusion, we find Defendant was fairly tried under the law and upon the evidence. Accordingly, we respectfully ask the Superior Court to affirm our rulings regarding the conduct of Defendant's trial.

**GARY CHESLAK, Plaintiff vs.
THE HONORABLE BARRY FEUDALE, Defendant**

Civil Law—Judicial Immunity—Judicial Acts—Absence of Jurisdiction

1. In general, judicial officers are absolutely immune from civil liability from monetary damages for their conduct. Judicial immunity is overcome in only two circumstances: where the judge is acting outside the scope of his judicial capacity or if the judge is acting in a "clear absence of all jurisdiction."
2. The factors determining whether an act by a judge is a "judicial" one relate to the nature of the act itself (*i.e.*, whether it is a function normally performed by a judge) and to the expectations of the parties (*i.e.*, whether they dealt with the judge in his judicial capacity).
3. A distinction exists between a court acting in excess of its jurisdiction and a court acting in the clear absence of all jurisdiction. If the judge's conduct is in some manner connected to the subject matter jurisdiction of the court over which he presides, there exists no clear absence of all jurisdiction. In contrast,

a judge acts in excess of jurisdiction if the act complained of is within his general power of jurisdiction but is not authorized because of certain circumstances.

NO. 05-2218

GARY CHESLAK—Pro se.

A. TAYLOR WILLIAMS, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—April 4, 2006

In these proceedings, the Plaintiff, Gary Cheslak (“Cheslak”), has sued the trial judge who presided over two civil actions filed by him in Carbon County, claiming in one case that the judge, the Honorable Barry Feudale (“Judge Feudale”), had improper **ex parte** contact with counsel for an opposing party and, in the other, that Judge Feudale wrongly obtained and falsely reported the contents of Cheslak’s account statements at S.C.I. Albion, where Cheslak was an inmate, after Cheslak appealed the Court’s denial of his petition to proceed **in forma pauperis**. Judge Feudale has filed preliminary objections to the complaint in the nature of a demurrer, now before us for disposition, asserting that he is absolutely immune from the claims made by Cheslak and, therefore, that the complaint fails to state a claim upon which relief can be granted.¹

¹ The defense of judicial immunity is an affirmative one with the burden upon the defendant, as the proponent of the claim, to establish that immunity is warranted. **See Antoine v. Byers & Anderson, Inc.**, 508 U.S. 429, 432, 113 S.Ct. 2167, 2169-70, 124 L.Ed. 2d 391 (1993). Though ordinarily pled as new matter, Cheslak has not objected to the manner in which Judge Feudale has raised this defense and we see no prejudice to Cheslak by addressing the issue at this stage of the litigation. **Wurth by Wurth v. City of Philadelphia**, 136 Pa.Commw. 629, 632-633, 584 A.2d 403, 404-405 (1990); **see also, Logan v. Lillie**, 728 A.2d 995, 998 (Pa. Commw. 1999) (“[I]f it is clear from the face of the complaint that a suit is barred by the defense of immunity the case may be dismissed on preliminary objections.”).

In this respect, we also note that “judicial immunity is an immunity from suit, not just from ultimate assessment of damages.” **Mireles v. Waco**, 502 U.S. 9, 11, 112 S.Ct. 286, 288, 116 L.Ed. 2d 9 (1991). Moreover, “judicial immunity is not overcome by allegations of bad faith or malice, the existence of which ordinarily cannot be resolved without engaging in discovery and eventual trial.” **Id.** “One of the purposes of [the immunity doctrine] is to protect public officials from the ‘broad-ranging discovery’ that can be ‘peculiarly disruptive of effective government.’” **Anderson v. Creighton**, 483 U.S. 635, 646 n.6, 107 S.Ct. 3034, 3042 n.6, 97 L.Ed. 2d 523 (1987).

Although not explicitly identified in the complaint, the legal basis of Cheslak's claim appears to be that Judge Feudale violated his Fourteenth Amendment procedural and substantive due process rights and that he engaged in unethical conduct violative of various provisions of the Code of Judicial Conduct for which he is personally liable in damages to Cheslak. At issue in this case is the scope and nature of a judge's immunity from monetary liability. For the reasons stated below, we will dismiss Cheslak's claims against Judge Feudale.

STANDARD OF REVIEW

For present purposes, we must construe the complaint in the light most favorable to Cheslak accepting as true all well-pleaded, material factual allegations contained therein, including all inferences reasonably deducible therefrom. **Beam v. Dahl**, 767 A.2d 585, 586 (Pa. Super. 2001), **appeal denied**, 567 Pa. 719, 786 A.2d 984 (2001). Dismissal is not appropriate unless it appears beyond doubt that Cheslak can prove no set of facts in support of his claim that would entitle him to relief. **Id.** It is in this light that we examine the complaint.

FACTUAL BACKGROUND

Cheslak's claims arise out of two separate civil suits filed by him in Carbon County over which Judge Feudale, a Senior Judge, presided by assignment of the Pennsylvania Supreme Court. In the first action, that docketed to No. 00-2516, Cheslak sued his former criminal defense counsel claiming breach of contract and seeking a return of his retainer. This suit was dismissed by Judge Feudale, in part, according to Cheslak, because Judge Feudale conspired and had **ex parte** communications with Cheslak's former counsel which allegedly led to the presentation of perjured testimony and the introduction in evidence of a falsified record book. In the second action, that docketed to No. 02-0424, Cheslak filed a petition to be excused from the payment of court costs pursuant to Pennsylvania Rule of Civil Procedure 240. After an evidentiary hearing, this petition was denied by Judge Feudale, and the case appealed to the Pennsylvania Superior Court. Cheslak claims that while his appeal was pending Judge Feudale ordered the Director of the Bureau of Collections of Carbon County to obtain his financial records from S.C.I. Albion, and that when these records substantiated his claim that he could not afford the costs of litigation, Judge

Feudale misrepresented the true facts in a Rule 1925(a) opinion to the Superior Court.

DISCUSSION

In general, judicial officers are absolutely immune from civil liability for monetary damages for their conduct if they had jurisdiction over the subject matter of the dispute and if they acted in their judicial capacity. **Mireles v. Waco**, 502 U.S. 9, 112 S.Ct. 286, 287, 116 L.Ed. 2d 9 (1991); **Logan v. Lillie**, 728 A.2d 995, 998 (Pa. Commw. 1999).² The rationale for granting judicial officers absolute immunity when they act in their judicial capacities is the belief that “[d]espite the unfairness to litigants that sometimes results, the doctrine of judicial immunity is thought to be in the best interests of ‘the proper administration of justice ... [, for it allows] a judicial officer, in exercising the authority vested in him [to] be free to act upon his own convictions, without apprehension of personal consequences to himself.’” **Stump v. Sparkman**, 435 U.S. 349, 363, 98 S.Ct. 1099, 1108, 55 L.Ed. 2d 331 (1978) (**quoting Bradley v. Fisher**, 80 U.S. 335, 347, 13 Wall. 335, 347, 20 L.Ed. 646 (1872)). “If judges were personally liable for erroneous decisions, the resulting avalanche of suits, most of them frivolous but vexatious, would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits.” **Forrester v. White**, 484 U.S. 219, 226-227, 108 S.Ct. 538, 544, 98 L.Ed. 2d 555 (1988). “Besides protecting the finality of judgments or discouraging inappropriate collateral attacks, the **Bradley** court concluded, judicial immunity also protected judicial independence by insulating judges from vexatious actions prosecuted by disgruntled litigants.” **Forrester**, 484 U.S. at 225, 108 S.Ct. at 543. For this reason, “judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or

² Judicial immunity does not extend to claims for declaratory or injunctive relief. See **Pulliam v. Allen**, 466 U.S. 522, 542, 104 S.Ct. 1970, 1981, 80 L.Ed. 2d 565 (1984).

corruptly.” **Stump**, 435 U.S. at 355-356, 98 S.Ct. at 1104 (**quoting Bradley, supra** at 351).³

Absolute judicial immunity is overcome in only two sets of circumstances. “First, a judge is not immune from liability for nonjudicial actions, *i.e.*, actions not taken in the judge’s judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction.” **Mireles**, 502 U.S. at 11-12, 112 S.Ct. 286 (citations omitted). As further stated by the Supreme Court in **Stump**:

Because ‘some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction ... ,’ **Bradley, supra**, at 352, the scope of the judge’s jurisdiction must be construed broadly where the issue is the immunity of the judge. A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the “clear absence of all jurisdiction.”

Id., 435 U.S. at 356-357, 98 S.Ct. at 1105.⁴

³ Although at times innocent parties may be harmed by the bar of absolute judicial immunity, in **Butz v. Economou**, 438 U.S. 478, 512, 98 S.Ct. 2894, 2914, 57 L.Ed. 2d 895 (1978), the court noted the various alternate forums and methods for minimizing such harm:

[T]he safeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct. The insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error on appeal are just a few of the many checks on malicious action by judges.

Nor does the grant of absolute immunity insulate an official from the criminal process or professional discipline. **Imbler v. Pachtman**, 424 U.S. 409, 429, 96 S.Ct. 984, 994, 47 L.Ed. 2d 128 (1976); **but see Petition of McNair**, 324 Pa. 48, 55, 187 A. 498, 502 (1936) (holding that judicial officers are insulated from criminal prosecution for judicial acts so long as they act in good faith) and **In re Petition of Dwyer**, 486 Pa. 585, 597 n.6, 406 A.2d 1355, 1361 n.6 (1979) (noting qualifications to the exemption from criminal liability for judicial conduct).

⁴ In discussing the distinction between judicial acts “in excess of jurisdiction” and those “in the clear absence of all jurisdiction over the subject matter” the Supreme Court stated:

In holding that a judge was immune for his judicial acts, even when such acts were performed in excess of his jurisdiction, the Court in **Bradley** stated:

‘A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is

Judicial Capacity

Under the first qualification to absolute immunity, the scope of judicial immunity is limited to protecting a judge against liability for judicial acts. Whether the complained of conduct is a judicial act and was, therefore, taken in the judge's judicial capacity focuses on the "nature" and "function" of the act, and not the specific "act itself." **Mireles**, 502 U.S. at 13, 112 S.Ct. at 288.⁵ "[T]he factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." **Stump**, 435 U.S. at 362, 98 S.Ct. at 1107; **see also, Barrett v. Harrington**, 130 F.3d 246, 255 (6th Cir. 1997) ("The Supreme Court has established a two-prong test to determine whether an act is 'judicial.' First, the [c]ourt

clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend.' **Id.**, at 351-352.

Stump v. Sparkman, 435 U.S. 349, 356 n.6, 98 S.Ct. 1099, 1104 n.6, 55 L.Ed. 2d 331 (1978). The Court further stated:

In **Bradley**, the Court illustrated the distinction between lack of jurisdiction and excess of jurisdiction with the following examples: if a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune. **Id.**, at 352.

Id., 435 U.S. at 357 n.7, 98 S.Ct. at 1105 n.7.

⁵ In considering whether action by a judge is a judicial act

[we] do not examine the particular act at issue but the nature and function of the act; 'if only the particular act in question were to be scrutinized, then any mistake of a judge in excess of his authority would become a "non-judicial" act, because an improper or erroneous act cannot be said to be normally performed by a judge.' **Mireles**, 502 U.S. at 12, 112 S.Ct. 286.

Huminski v. Corsones, 396 F.3d 53, 75 (2d Cir. 2005). "If judicial immunity means anything, it means that a judge 'will not be deprived of immunity because the action he took was in error ... or was in excess of his authority.'" **Mireles**, 502 U.S. at 12-13, 112 S.Ct. at 288 (**quoting Stump**, 435 U.S. at 356, 98 S.Ct. at 1105).

must consider whether the function is normally performed by a judge. ... Second, the court must assess whether the parties dealt with the judge in his or her judicial capacity.” (citation and internal quotation marks omitted)), **cert. denied**, 523 U.S. 1075, 118 S.Ct. 1517, 140 L.Ed. 2d 670 (1998).

The Supreme Court’s approach to determining whether an official is entitled to absolute immunity requires a **functional** analysis. **Buckley v. Fitzsimmons**, 509 U.S. 259, 269, 113 S.Ct. 2606, 125 L.Ed. 2d 209 (1993). Immunities are extended to government officials only when “overriding considerations of public policy nonetheless deman[d] that the official be given a measure of protection from personal liability” to ensure his ability to **function** effectively. **Owen v. City of Independence**, 445 U.S. 622, 653, 100 S.Ct. 1398, 1416, 63 L.Ed. 2d 673 (1980). “Here, as in other contexts, immunity is justified and defined by the **functions** it protects and serves, not by the person to whom it attaches.” **Forrester**, 484 U.S. at 227, 108 S.Ct. at 544 (finding judges entitled to varying levels of immunity for judicial, legislative or administrative functions). On this basis “an intelligible distinction [exists, for purposes of immunity,] between judicial acts and the administrative, legislative or executive functions that judges may on occasion be assigned by law to perform.” **Id.** As to judicial acts, the law has consistently found as a matter of public policy that to ensure the court’s independence and impartiality, absolute immunity is required.

In both instances of which Cheslak complains, this Court’s jurisdiction was invoked by Cheslak commencing suit and, in both cases, Judge Feudale was assigned by our Supreme Court to be the presiding judge overseeing Cheslak’s claims.⁶ A judge acts most clearly in a judicial capacity when he is adjudicating matters, that is, when he is exercising discretionary decision-making authority in deciding cases before him. Resolution of “disputes between parties who have invoked the jurisdiction of a court” are “paradigmatic judicial acts.” **Forrester**, 484 U.S. at 227, 108 S.Ct. at 544.

⁶ The second prong of the exception to judicial immunity, Judge Feudale’s jurisdiction to hear Cheslak’s civil suits at the trial level, has not been challenged by Cheslak, nor should it be. Whatever the propriety of his decisions under the law, there is no question that Judge Feudale had the subject-matter authority to make the decisions he did as a trial judge in the court of common pleas. As will be discussed above, Cheslak does challenge Judge Feudale’s jurisdiction to act once an appeal was filed to the denial of his petition to proceed **in forma pauperis**.

Cheslak's claim that Judge Feudale conspired and engaged in **ex parte** communications in adjudicating his claim against his former defense counsel does not alter the character of such conduct as being a judicial act performed while acting in his judicial capacity. **See Stump**, 435 U.S. at 363 n.12, 98 S.Ct. at 1108 n.12 (finding that the informal and **ex parte** nature of a proceeding did not cause an act otherwise within a judge's lawful jurisdiction to be deprived of its judicial character); **see also, Ashelman v. Pope**, 793 F.2d 1072 (9th Cir. 1986) (extending absolute judicial immunity to a judge who allegedly conspired with a prosecutor to predetermine the outcome of a proceeding). That the court may have acted erroneously in the exercise of its jurisdiction, including the failure to comply with elementary principles of procedural and substantive due process, or have been motivated by malice or partiality, or have been corrupted, are irrelevant to deciding what is a judicial act: "however [they] may have affected the validity of the act, [they do] not make the act any less a judicial act." **Stump**, 435 U.S. at 359, 98 S.Ct. at 1106 (**quoting Bradley**, 80 U.S. at 357, 13 Wall., at 357). As to this claim, Cheslak asserts and accepts that Judge Feudale sought and used the information he received as an integral part of the decision-making process, a quintessential judicial function.

Similarly, Cheslak's claim that Judge Feudale ordered the Director of the Bureau of Collections of Carbon County to obtain financial information from the facility in which he was an inmate and falsified the information received in his 1925(a) opinion does not alter the fact that the purpose of such conduct and the use of the information obtained bears an intimate relationship with Judge Feudale's adjudication of Cheslak's case, the preparation of an opinion explaining that decision. Because Judge Feudale performed the type of act normally performed by judges (**i.e.**, the issuance of an order and the preparation of an opinion) and because he did so in a case over which he had the authority to preside, we find no merit to Cheslak's argument that Judge Feudale was acting extrajudicially or that his actions deprived him of judicial immunity. However viewed, the general nature and function of Judge Feudale's actions was substantially judicial. **See Mireles**, 502 U.S. at 12-13, 112 S.Ct. at 288-289 (finding that while a judge who allegedly **ordered** police officers "to forcibly and with excessive force seize and

bring plaintiff into his courtroom” would have been acting in excess of his authority, he was not acting extrajudicially since a judge’s direction to court officers to bring a person who is in the courthouse before him is a function normally performed by a judge); **Green v. Mariao**, 722 F.2d 1013 (2d Cir. 1983) (recognizing immunity where a judge instructed a court reporter to alter a trial transcript).

As to both causes of action asserted by Cheslak, there can be little question that Judge Feudale was acting in a judicial capacity, albeit improperly if Cheslak’s allegations are true. See Pennsylvania Code of Judicial Conduct, Canon 3(A)(4) (explaining that, except as authorized by law, a judge must not consider **ex parte** communications concerning a pending proceeding) and Canon 3(C)(1)(a) (requiring that a judge must disqualify himself from proceedings in which his impartiality might reasonably be questioned, including those where he has acquired personal knowledge of disputed evidentiary facts). It is also appropriate to observe at this juncture that, contrary to Cheslak’s belief, “the Code of Judicial Conduct does not have the force of substantive law.” **Commonwealth v. Druce**, 577 Pa. 581, 848 A.2d 104, 109 (2004) (**quoting Reilly v. SEPTA**, 507 Pa. 204, 219, 489 A.2d 1291, 1298 (1985)).

Jurisdiction

A judge acting in his judicial capacity is absolutely immune from personal liability for civil damages, unless he acts clearly without any colorable claim of jurisdiction. To the extent Cheslak argues that after his appeal of the decision denying his petition to proceed **in forma pauperis** Judge Feudale was without jurisdiction to act any further, Cheslak confuses the critical distinction between a court acting in excess of its jurisdiction and a court acting in the clear absence of all jurisdiction over the subject-matter.

In examining whether the conduct of a judge is within his authority, the test is not whether the act performed was manifestly or palpably beyond his authority, but rather whether it is in some manner connected to the subject matter of the court over which he presides. See **Commonwealth v. Cauffiel**, 79 Pa. Super. 596, 600 (1922) (“A judicial officer is not liable for acts done in his judicial capacity where there is not a clear absence of all jurisdiction over the subject matter and person,

even though such acts constitute an excessive exercise of jurisdiction or involve a decision that the official had jurisdiction over the particular case, where in fact he had none.”); **cf. In Re Orthopedic “Bone Screw” Prods. Liab. Litig.**, 132 F.3d 152, 155-156 (3d Cir. 1997) (discussing a court’s inherent authority over its docket and persons before it even where court ultimately lacks jurisdiction to decide the merits of the case). As already stated, “the scope of [a] judge’s jurisdiction must be construed broadly where the issue is the immunity of the judge.” **Stump**, 435 U.S. at 356, 98 S.Ct. at 1105. Where a court has even marginal subject matter jurisdiction, there is sufficient jurisdiction for immunity purposes. **Figeuora v. Blackburn**, 208 F.3d 435, 443-444 (3rd Cir. 2000).

For purposes of determining immunity, jurisdiction is not limited to jurisdiction over a single case, but to the jurisdictional parameters of the judge’s court, here, the general subject matter jurisdiction of the Courts of Common Pleas in Pennsylvania. “By constitution and by statute, the Court of Common Pleas has unlimited original jurisdiction in all cases, actions, and proceedings, and is thus empowered, subject to a few statutory exceptions, to decide any matter arising under the laws of this Commonwealth.” **Commonwealth v. McPhail**, 547 Pa. 519, 524, 692 A.2d 139, 141 (1997) (citing Pa. Const. Art. V, §5 and 42 Pa. C.S. §931). Given this broad grant of subject-matter jurisdiction, Cheslak does not claim that Judge Feudale lacked authority generally to decide claims of the type raised by him, but rather that Judge Feudale exceeded his jurisdiction when he continued to act after an appeal was filed.

In language relevant to these proceedings, the Eighth Circuit in **Billingsley v. Kyser**, 691 F.2d 388 (8th Cir. 1982) (**per curiam**) stated:

It is established that a judge is immune from liability for damages if he had jurisdiction over the subject matter and if he acted in his judicial capacity, **Birch v. Mazander**, 678 F.2d 754, 755 (8th Cir. 1982), and that prosecutors are similarly protected by a derivative form of immunity. **Duba v. McIntyre**, 501 F.2d 590, 592 (8th Cir. 1974), **cert. denied**, 424 U.S. 975, 96 S.Ct. 1480, 47 L.Ed.2d 745 (1976). Plaintiff contends that because jurisdiction was vested in the appellate court at the time of the purported sentence

amendment, the judge was acting without jurisdiction and therefore is not entitled to judicial immunity. However, as explained by the district court, there is a distinction between acts done in excess of jurisdiction, in which case judicial immunity still applies, and acts done in complete absence of subject-matter jurisdiction, in which case a judge may be deprived of judicial immunity. **See Stump v. Sparkman**, 435 U.S. 349, 356-57, 98 S.Ct. 1099, 1104, 55 L.Ed. 2d 331 (1978). A judge acts in excess of jurisdiction if the act complained of is within his general power of jurisdiction but is not authorized because of certain circumstances. **Id.**; **Duba v. McIntyre**, 501 F.2d at 592.

In the present case, plaintiff concedes that Judge Kyser was empowered to rule on criminal matters, including motions to amend sentence. Thus, even though Judge Kyser may have lacked authority to amend plaintiff's sentence because of the pending appeal, we agree with the district court that the judge, in ruling on plaintiff's motion to amend sentence, acted in his judicial capacity and within his general jurisdiction. **See Birch v. Mazander**, 678 F.2d at 756.

Id. at 389-390.

It is clear in this case first, that Judge Feudale was presiding over a court with original subject-matter jurisdiction over Cheslak's claims and second, that once Cheslak filed his appeal, Judge Feudale had the judicial responsibility to explain his decision. **See Pa. R.A.P. 1925(a)**. Also clear is that the taking of an appeal does not divest the trial court of subject-matter jurisdiction, although it does stay the power of the court to act with certain limited exceptions, one of which is to grant leave to appeal **in forma pauperis**. **Pa. R.A.P. 1701**. Under these circumstances, Judge Feudale's conduct after the appeal was taken amounts, at most, to an exercise of his authority in excess of that which he possessed prior to the appeal; it does not represent an exercise of authority in the clear absence of all jurisdiction.

CONCLUSION

Having found that the factual allegations of Cheslak's complaint describe a situation in which Judge Feudale was acting in his judicial capacity and within the scope of the court's original subject-matter jurisdiction, Judge Feudale is absolutely immune

from the claims brought against him by Cheslak. Accordingly, we will grant Judge Feudale's preliminary objections in the nature of a demurrer for failing to state a claim against him upon which relief can be granted.⁷

⁷ Judge Feudale has also raised an objection to jurisdiction, claiming that Cheslak's claim is absolutely barred by the doctrine of coordinate jurisdiction. Because Cheslak is not seeking to reopen judicial findings made by Judge Feudale in the underlying civil actions nor to overturn those decisions, we believe these objections are misplaced and they will be denied. **Commonwealth v. Starr**, 541 Pa. 564, 573, 664 A.2d 1326, 1331 (1995) (describing the "coordinate jurisdiction rule" as one which provides that "judges of coordinate jurisdiction sitting **in the same case** should not overrule each others' decisions" (emphasis added)).

COMMONWEALTH OF PENNSYLVANIA vs. FREDERICK JOSEPH BAKER, Defendant

*Criminal Law—Privilege Against Self-incrimination—Mental
Disability—Validity of **Miranda** Waiver*

1. A valid **Miranda** waiver of the privilege against compulsory self-incrimination requires that the waiver be uncoerced and that the Defendant have a full comprehension of both the nature of the right being abandoned and the consequences of his decision to abandon it.
2. Notwithstanding a police officer's compliance with the dictates of **Miranda**, a mental disability which deprives the Defendant of the ability to comprehend the nature of the rights he is surrendering and the consequences of that choice invalidates the waiver.
3. Statements given by an adult defendant who has been diagnosed as mentally retarded and whose level of mental functioning is that of a nine- or ten-year-old will be suppressed where the defendant does not fully appreciate the nature and consequences of a properly administered **Miranda** waiver.

NO: 627 CR 2005

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

DAVID W. SKUTNIK, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—June 1, 2006

On November 11, 2005, a witness reported to the Jim Thorpe Borough Police Department that he had observed the Defendant, Frederick J. Baker, and a six-year-old child engaged in sexual activity. The Defendant was questioned in the police station about the incident and admitted both in verbal and written statements that the incident had occurred. The Defendant further admitted to three prior occasions when similar contact had occurred between him and the minor victim.

Subsequently, the Defendant was charged with three counts of indecent assault¹ and one count of corruption of minors² for each of the four alleged incidents. Before us is Defendant's omnibus pretrial motion to suppress the incriminating statements given by him to the police during the interview. In this motion, Defendant claims primarily that he is learning disabled and did not fully understand or appreciate the consequences of being arrested or of giving a statement to the investigating officer.

FINDINGS OF FACT

On the date of the most recent incident Defendant was picked up and taken by Detective Joseph Schatz of the Jim Thorpe Borough Police Department to the police station for questioning. Prior to questioning, Defendant was verbally informed of his **Miranda**³ rights and was given written notice and a waiver of these rights which he reviewed and signed. The notice the Defendant received advised him that he had the right to counsel, the right to remain silent, and that anything he said could and would be used against him. Defendant, as previously stated, then provided the police with a verbal and written statement of what had happened. The written statement, which was prepared by Detective Schatz in the Officer's handwriting, was signed and initialed by the Defendant.

At the time of the interview, Defendant was eighteen years of age. Defendant's mother was present during the interview but was not permitted to participate or advise her son. According to the police report, Defendant's mother was permitted to be present because of Defendant's mental status.

The Defendant, who is now in twelfth grade, has the equivalent of a fourth to fifth grade education. In kindergarten he was diagnosed as being mentally retarded and has been in special education ever since. He is unable to read or write well, cannot read small print or cursive handwriting, and has difficulty with word concepts. He is also moderately to severely deaf.

The Defendant originally denied and only after repeated questioning admitted his conduct with the minor. The Defen-

¹ 18 Pa.C.S. §3126(a)(1), (7) and (8).

² 18 Pa.C.S. §6301(a)(1).

³ **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966).

dant could not read and did not understand the written **Miranda** warning and release form he was given by Detective Schatz. Nor could the Defendant read the handwritten statement taken by Detective Schatz.

Defendant testified at the suppression hearing. Although Defendant can communicate and appropriately respond to questions, it was also clear during the hearing that Defendant's memory is poor and he has difficulty with words which are not concrete in meaning.

DISCUSSION

At this stage of the proceedings the burden is upon the Commonwealth to establish by a preponderance of the evidence that Defendant's constitutional privilege against compulsory self-incrimination was not violated—that his confession was knowingly, intelligently, and voluntarily given. **Commonwealth v. Logan**, 519 Pa. 607, 619, 549 A.2d 531, 537 (1988).

The voluntariness standard of **Miranda** requires that the prosecution prove by a preponderance of the evidence that the waiver is knowing and intelligent. This requires a two-step analysis. First, the waiver must have been voluntary in the sense that it was an intentional choice made without any undue governmental pressure; and, second, that the waiver must have been made with a full comprehension of both the nature of the right being abandoned and the consequences of the choice. We employ a totality of the circumstances test in reviewing the waiver.

Id. at 619, 549 A.2d at 537.

More recently, our Supreme Court has stated:

Inculpatory statements stemming from a custodial interrogation may not be used unless the defendant was apprised of his right against self-incrimination and his right to counsel. See **DeJesus**, 567 Pa. at 428, 787 A.2d at 401. Thereafter, the defendant may waive his rights, so long as the waiver is the result of a free and deliberate choice rather than intimidation, coercion, or deception, and the choice is “made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it.” **Id.** at 430, 787 A.2d at 402 (**quoting Colo-**

rado v. Spring, 479 U.S. 564, 572, 107 S.Ct. 851, 857, 93 L.Ed.2d 954 (1987)).

Commonwealth v. Watkins, 577 Pa. 194, 843 A.2d 1203, 1213 (2003), **cert. denied**, 543 U.S. 960, 125 S.Ct. 450, 160 L.Ed. 2d 324 (2004). In this case, it is the quality and validity of Defendant's waiver, not the language of the waiver, which concerns us.

A disability which deprives a defendant of the ability to make a free and rational choice renders his waiver of Fifth Amendment rights constitutionally infirm.⁴ This is so regardless of the truth or falsity of the confession given or statements made. Underlying this conclusion is the "strong conviction that our system of law enforcement should not operate as to take advantage of a person in a weakened condition, whether it is a physical or mental condition." **Commonwealth v. Bracey**, 501 Pa. 356, 365, 461 A.2d 775, 779 (1983) (citations and quotation marks omitted).

Here, Defendant's mental capacity made him particularly susceptible to coercive influences. Defendant's mental capacity, low IQ and limited education clearly affected his perception, cognitive functioning, and his ability to reason and understand. His ability to comprehend the nature of the rights he was surrendering and the consequences of that choice was severely limited. To find, as the Commonwealth suggests, that Defendant waived his constitutional rights in a knowing, voluntary, and intelligent manner would require us to find that a person whose educational level after twelve years of schooling is that of a nine- or ten-year-old has this ability. This we cannot find.

⁴ Likewise, in **Miranda**, the Court held that custodial interrogation by police is presumptively coercive absent specific warnings. The warnings created by the Supreme Court in **Miranda** are procedural safeguards intended to prevent violations of the Fifth Amendment. They are prophylactic in nature and are "not themselves rights protected by the Constitution." **Dickerson v. United States**, 530 U.S. 428, 437-438, 120 S.Ct. 2326, 147 L.Ed. 2d 405 (2000) (citations and quotation marks omitted). Therefore, a violation of **Miranda** is not **per se** a violation of the Constitution.

The protection afforded an accused under **Miranda** is in some respects broader than that provided by the Fifth Amendment. **Oregon v. Elstad**, 470 U.S. 298, 306, 105 S.Ct. 1285, 84 L.Ed. 2d 222 (1985). Consequently, a failure to provide proper **Miranda** warnings to a suspect in custody prior to interrogation does not necessarily result in a compelled confession in violation of the Fifth Amendment. **Michigan v. Tucker**, 417 U.S. 433, 444, 94 S.Ct. 2357, 41 L.Ed. 2d 182 (1974). Conversely, compliance with **Miranda** does not, as here, guarantee the validity of a waiver as a matter of law. **Dickerson**, 530 U.S. at 444.

CONCLUSION

For the foregoing reasons, notwithstanding our belief that Defendant's **Miranda** rights were properly administered and that Detective Schatz acted in a proper and professional manner, we do not believe that Defendant was able to or did knowingly, voluntarily, and intelligently waive his constitutional rights. Accordingly, we will grant Defendant's omnibus pretrial motion and will suppress all statements made by him to Detective Schatz during his custodial interrogation.

BOROUGH OF LEHIGHTON, Petitioner vs. LEHIGHTON BOROUGH POLICE OFFICERS' ASSOCIATION, Respondent

*Civil Law—Statutory Appeal—Act 111—Award in Excess
of Arbitrator's Authority—Constitutional and
Statutory Limitations—Police Officer's Pension Benefits*

1. Pursuant to Act 600, a police officer's monthly pension or retirement benefits may, in general, not exceed one-half of the monthly average salary of the officer during that period which is no greater than the last sixty nor less than the last thirty-six months of employment. For purposes of this computation, the term "salary" denotes base salary and excludes other forms of compensation unless the parties through past practice or agreement have expanded this definition.
2. The use of lump-sum payments for accumulated, but unused leave not earned during the benefit computation period (*e.g.*, accrued but unused vacation time and sick leave) in the calculation of a police officer's monthly average salary for retirement purposes creates a benefit in excess of that permitted by statute and is, to this extent, presumptively illegal (*i.e.*, an excess benefit).
3. Excess benefits, those which are not authorized by law and which exceed statutory limits are illegal.
4. An Act 111 board of arbitrators exceeds its authority when entering an award which compels a public employer to take an action that is prohibited by either the state or federal constitution, or by statutory law. The arbitrators may not order a public employer to do that which it could not do voluntarily.
5. A public employer which has consented in a collective bargaining agreement to the payment of illegal benefits may not disavow its obligations under the agreement on the basis of the illegality. However, a public employer whose obligation to pay excess benefits was imposed by a contested Act 111 award is not estopped from later challenging the legality of the payments in a subsequent collective bargaining or arbitration proceedings. In the absence of proof to the contrary, the record will be construed adverse to the moving party.
6. Article I, Section 17 of Pennsylvania's Constitution prohibits any unilateral diminishment of existing pension benefits for any former or present municipal employee. Whether this constitutional restriction prohibits the reduction of excess payments which have not been consented to by a public employer to

current members of the employer's retirement system by an Act 111 board of arbitrators has not previously been decided by our courts.

7. An Act 111 arbitration award which provides for the prospective bar of pension benefits in excess of statutory authority to new hires, but which continues in place the public employers' obligation to pay excess pension benefits to current members of the retirement system does not require the employer to perform an illegal act and does not contravene the constitutional prohibition against the diminution of existing retirement benefits. As such, the award is valid and enforceable and will not be found to be in excess of the arbitrator's authority.

NO.: 05-2262

DAVID M. SPITKO, Esquire—Counsel for Petitioner.

SEAN T. WELBY, Esquire—Counsel for Respondent.

MEMORANDUM OPINION

NANOVIC, P.J.—June 29, 2006

The principal issue raised by the Borough of Lehighton ("Borough") in its petition to review an interest arbitration award under Act 111¹ now before us is whether Article I, Section 17 of the Pennsylvania Constitution imposes constitutional restrictions on the modification of existing retirement benefits for past and present members of the Borough's retirement system for police officers.

BACKGROUND

As relevant to these proceedings, by its award dated July 20, 2005, the Board of Arbitration in an Act 111 arbitration proceeding made the following determination with respect to the pension benefits of police officers of the Borough:

8. PENSION BENEFITS: The calculation of Final Average Salary for officers shall continue to include payment for accumulated, but unused leave balances. Provided, however, that for officers hired on or after the effective date of this award [i.e., January 1, 2005], the inclusion of such a payment shall be limited to sums earned over the calculation period (36 months for superannuation, early, and vested retirement, 12 months for disability retirement), in accordance with Pennsylvania Auditor General Bulletin 2001-01, as clarified, March, 2002.

¹ 43 P.S. §§217.1-217.10. Act 111 grants to police officers and firefighters the right to bargain collectively with their public employers over the terms and conditions of employment.

Should the Auditor General withhold any amount of State Aid as the result of the inclusion of said balances, the Borough shall have the right to return to this panel to address the question of the appropriate relief.

11. RETENTION OF JURISDICTION: The Panel shall retain jurisdiction in this matter for the limited purposes set forth in Paragraph 8 above.

The Borough asks us to vacate both these provisions of the arbitration award claiming that the Board acted outside its jurisdiction and exceeded its authority in so deciding.²

Under the Borough's previous collective bargaining agreement, the term "salary" for purposes of calculating Act 600 pension benefits³ was defined as including lump sum payments made upon retirement for accumulated, but unused leave. Because the use of lump sum payments in the computation of an officer's monthly average salary upon retirement is generally

² The scope of review in an appeal from an Act 111 interest arbitration award is in the nature of narrow **certiorari**. **Pennsylvania State Police v. Pennsylvania State Troopers' Association** (Betancourt), 540 Pa. 66, 71 n.3, 656 A.2d 83, 85 n.3 (1995) (citing **Washington Arbitration Case**, 436 Pa. 168, 174, 259 A.2d 437, 441 (1969)). Under this standard, the reviewing court is limited to determining: (1) whether the arbitrators acted outside their jurisdiction; (2) whether the proceedings were irregular; (3) whether the arbitrator exceeded his or her authority; and (4) whether the parties to the arbitration were deprived of constitutional rights. **Id.** at 71, 656 A.2d at 85. A board of arbitrators: (1) may not order the employer to perform an illegal act; (2) is limited to requiring that a public employer do that which it could do voluntarily; and (3) must craft an award that only encompasses the terms and conditions of employment. **Wilkes-Barre v. Police Benevolent Association**, 814 A.2d 285, 287 (Pa. Cmwlth. 2002), **appeal denied**, 823 A.2d 146 (Pa. 2003). The only question presented here is whether the Board of Arbitrators exceeded its powers in rendering its decision. A board exceeds its power when an award requires a municipality to take an action that is prohibited by statutory law. **Monroeville v. Monroeville Police Dept.**, 767 A.2d 596, 600-601 (Pa. Cmwlth. 2001) (**quoting Swatara Township v. Swatara Township Police Dept.**, 164 Pa. Cmwlth. 378, 383, 642 A.2d 660, 662 (1994)), **appeal denied**, 782 A.2d 551 (Pa. 2001).

³ 53 P.S. §§761-778. Act 600 authorizes and directs the establishment of pension plans for municipal police officers; governs the administration and management of such funds; requires municipalities to set aside certain funds for the programs; and fixes the percentage of their salary that officers must contribute. **Wilkes-Barre Township v. Pennsylvania Labor Relations Bd.**, 878 A.2d 977, 979 n.3 (Pa. Cmwlth. 2005).

prohibited by Section 5(c) of Act 600,⁴ and because the Commonwealth's Department of the Auditor General views the inclusion of lump sum payments earned outside of the benefit computation period as being unauthorized and in excess of those permitted by law,⁵ this provision of the parties' former collective bargaining agreement ostensibly allowed benefits in excess of those authorized by the enabling legislation (*i.e.*, excess benefits).

During the arbitration proceedings, the Borough advocated the position taken by the State's Auditor General and requested that the definition of "salary" for purposes of the police pension plan be modified to exclude lump sum leave payments for all future retirees. The collective bargaining representative for the police officers, the Lehighton Borough Police Officers' Association ("Association"), argued that inclusion of these payments did not violate Act 600 and that to exclude such payments with respect to existing members of the retirement system would violate Article I, Section 17 of the Pennsylvania Constitution.⁶ In resolving this dispute, the Arbitrators accepted the

⁴ Section 5(c) of Act 600 provides, in pertinent part, as follows:

Monthly pension or retirement benefits other than length of service increments shall be computed at one-half the monthly average salary of such member during not more than the last sixty nor less than the last thirty-six months of employment.

53 P.S. Section 771(c). On this issue, the Pennsylvania Supreme Court in **Nazareth v. Nazareth Borough Police Association**, 545 Pa. 85, 680 A.2d 830 (1996), stated:

[T]he term 'salary' as embodied in Act 600 denotes base salary and excludes other forms of compensation unless the parties through past practice or agreement have expanded this definition.

Id. at 92, 680 A.2d at 834.

⁵ Municipal Pension Bulletin No. 2001-01 entitled "Unauthorized, or Excess, Benefits," as modified, March 2002.

⁶ On the record before us, we have not been provided any information as to the parties' past practice or agreement regarding the computation of a police officer's monthly average salary for pension benefits. Nor do we know whether the provision of the parties' previous collective bargaining agreement taking into account lump sum leave payments was consensual or the product of an arbitration award. **Compare F.O.P. v. Hickey**, 499 Pa. 194, 452 A.2d 1005 (1982) (holding that the illegality of a provision in a collective bargaining agreement cannot be asserted as a basis for disavowal of the contract when such provision was consented to by both parties) with **Borough of Dormont v. Dormont Borough Police Dept.**, 654 A.2d 69 (Pa. Cmwlth. 1995) (declining to extend **Hickey** to cases where an issue is

Borough's position as to prospective hires only, but not as to current members of the retirement system.

DISCUSSION

Article I, Section 17 of the Pennsylvania Constitution provides:

No **ex post facto** law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed.

As applied to the pension benefits of public employees in Pennsylvania, this provision prohibits any unilateral diminishment of existing pension benefits for any former or present municipal employee. This prohibition applies to all current members of a retirement system, both vested and non-vested. **Association of Pennsylvania State College and Univ. Faculties v. State System**, 505 Pa. 369, 376, 479 A.2d 962, 965-966 (1984) (holding that an amendment to the retirement code increasing the maximum fixed rate of employees' contributions unconstitutionally impaired the contractual rights of all existing members of the retirement system). Because the benefit formula under the previous collective bargaining agreement included as part of the computation all payments for accumulated but unused leave (**e.g.**, accrued but unused vacation time and sick leave) received during the computation period, regardless of when earned, the Association claims that by limiting the benefit formula to that portion of compensation for accumulated but unused leave earned during the computation period, the value of the retirement benefits for those active-duty members of the police force who were hired prior to the implementation and effective date of the award will be retroactively and impermissibly diminished.

In seeking to distinguish this case from that in **Association of Pennsylvania State College and Univ. Faculties**, the Borough contends that because the method for computing an

resolved in a decision by arbitrators rather than by a consensually entered collective bargaining agreement), **appeal denied**, 541 Pa. 628, 661 A.2d 875 (1995). Consequently, we are unable to resolve this dispute on the basis of the language contained in Act 600 and the parties' past practice. Cf. **Police Officers v. Borough of Hatboro**, 126 Pa. Cmwlth. 247, 254 n.7, 559 A.2d 113, 116 n.7 (1989) (stating that "the onus is on the appealing party to make sure that the record is complete and that all relevant portions of the testimony are transcribed").

officer's monthly average salary under the prior collective bargaining agreement improperly inflated the true monthly pension or retirement benefits to which the officer was legitimately entitled, these excess benefits are illegal, as is their continuation through the auspices of an Act 111 arbitration award. In addressing an analogous situation, the Commonwealth Court held to the contrary.

Paragraph 7 of the award provides that '[a]ll officers hired after the issuance of this award shall be entitled to pension benefits not in excess of the Third Class City Code.' Thus, the award did not diminish retirement benefits for past or current police officers, but did require that benefits for future officers conform to the City Code. The trial court affirmed this portion of the award.

City seeks vacation of Paragraph 7 of the award arguing that it conflicts with retirement provisions of the City Code and requires City to perform an illegal act. Without contesting the assertion that some aspects of current retirement benefits are excessive under the City Code, Police contend that the award is enforceable in light of constitutional and statutory prohibitions against diminution of existing retirement rights.

...

In Ass'n of Pennsylvania State Coll. and Univ. Faculties v. State Sys. of Higher Educ., 505 Pa. 369, 479 A.2d 962 (1984), our Supreme Court determined that a public employer's unilateral reduction of retirement benefits was an unconstitutional impairment of the employment contracts of non-vested as well as vested employees. Accordingly, the Pennsylvania Constitution and interpretive Supreme Court decisions support Paragraph 7 of the arbitration award. ...

The Constitution of Pennsylvania and the [Home Rule Charter and Optional Plans Law] prohibit a home rule municipality, such as City, from unilaterally diminishing rights of any former or present municipal employee in his retirement system. There is no corresponding limitation on consensual modification of existing retirement benefits, nor is there authority limiting arbitrators' ability to modify retirement benefits as part of a statutory dispute resolution proc-

ess. Nevertheless, here the arbitrators did not require an illegal act by confining limitation on excessive retirement benefits to future, but not current, police officers. Also, the trial court correctly declined to modify this provision of the award.

Regarding City's contention that retirement benefits in excess of the City Code are unlawful and therefore unenforceable, we find guidance in **Restatement (Second) of Contracts**, § 178(1), which provides:

§ 178. When a Term is Unenforceable on Grounds of Public Policy

(1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.

Under the **Restatement** approach, unless the statute provides for the unenforceability of excessive retirement benefits, enforceability shall be determined by balancing of interests. 'Enforcement will be denied only if the factors that argue against enforcement clearly outweigh the law's traditional interest in protecting the expectations of the parties, its abhorrence of any unjust enrichment, and any public interest in the enforcement of the particular term.' **Restatement (Second) of Contracts**, § 178, Comment (b).

Here, the City Code does not address the enforceability of excessive retirement benefits. Therefore, a balancing of interests is appropriate to determine enforceability. This balancing has already been performed by our Supreme Court, which determined that existing retirement benefits for public employees shall be enforced. **In re Appeal of Upper Providence Police, Delaware County Lodge # 27**, 514 Pa. 501, 526 A.2d 315 (1987); **Ass'n of Pennsylvania State Coll. Faculties**. Thus, we find no error in the rejection of City's contention based on the claimed unenforceability of excessive retirement benefits.

Wilkes-Barre v. Police Benevolent Association, 814 A.2d 285, 288-289 (Pa. Cmwlth. 2002) (footnotes omitted), **appeal denied**, 823 A.2d 146 (Pa. 2003).

Whether or not the Board of Arbitrators could have, if they so desired, constitutionally eliminated the potential payment of excess retirement benefits to current police officers through the vehicle of a statutorily sanctioned adjudicatory process—as the Borough contends—is not the question. **But see Pittsburgh v. Fraternal Order of Police**, 584 Pa. 575, 886 A.2d 682 (2005) (vacating the Commonwealth Court's decision permitting the reduction of post-retirement healthcare benefits for active officers). The fact is, they did not, and they were not compelled to do so. Instead, by confining the limitation on excess retirement benefits to future, but not current, police officers, the Arbitrators, as was the case in **Wilkes-Barre**, did not require an illegal act. Further, the Borough has provided us with no statutory authority prohibiting the enforceability of excess retirement benefits for current police officers nor any compelling interest which would outweigh the law's traditional interest in protecting the expectations of the parties.

CONCLUSION

An Act 111 arbitration award which maintains in effect for the current members of a retirement system the same formula for calculating such members' retirement benefits, even if such computation is in excess of statutory limits, does not compel the public employer to carry out an illegal act. Under the circumstances of this case, given our scope of review and the record before us, we find that the Board of Arbitrators did not order an illegal act to be carried out.⁷

⁷ Act 111 requires that the arbitration panel reach a final, binding determination of the issues in dispute within thirty days after the appointment of the third arbitrator. 43 P.S. §§217.4, 217.7. By retaining jurisdiction for the purposes described in Paragraph 11 of its award, the Arbitrators left dormant the final resolution required by Act 111. Nevertheless, because we believe our decision will severely curtail the need to reopen the arbitration award, recognizing that the likelihood of this occurring may largely depend on the Auditor General's position with respect to state aid, and because Paragraph 11 as worded may only be invoked by the Borough and is clearly intended for its benefit, we will not strike this provision of the award. **See Police Officers v. Borough of Hatboro**, *supra* at 255, 559 A.2d at 117; **cf. Dunmore Police Association v. Borough of Dunmore**, 107 Pa. Cmwlth. 306, 312, 528 A.2d 299, 302 (1987) (holding that an arbitration award delegating potential issues to a future arbitration panel violates Act 111 and is void), **appeal denied**, 518 Pa. 651, 544 A.2d 963 (1988).

**JAMIE CHEESMAN, Plaintiff vs. JACK FROST MOUNTAIN
SKI AREA, JACK FROST-BIG BOULDER REAL ESTATE, BIG
BOULDER CORPORATION, BLUE RIDGE REAL ESTATE
COMPANY, Defendants**

*Civil Action—Requirements for the Validity and
Enforceability of a Release Agreement*

1. To be valid a release of personal injury claims for future liability must not contravene public policy. To be enforceable, the release must be specific and particular as to the party's intent and as to the type of claims being released.
2. A release of claims for personal injuries sustained while snowtubing given by a participant to the owner and operator of the snowtubing facilities affects only the private rights of the parties with respect to a recreational activity and is not against public policy.
3. A release of a snowtubing facility from "any and all liability" even if caused by the facility's own acts of negligence is sufficiently broad, precise and definite to exonerate the facility against negligence in the maintenance and design of the snowtubing facilities.

NO. 05-2044

MICHAEL O. PANSINI, Esquire—Counsel for Plaintiff.

HUGH M. EMORY, Esquire—Counsel for Defendants.

MEMORANDUM OPINION

NANOVIC, P.J.—June 20, 2006

On January 17, 2003, Jamie Cheesman ("Plaintiff") was injured in a snowtubing accident that occurred at the Jack Frost Mountain Ski Area in Kidder Township, Carbon County, Pennsylvania.¹ At issue is whether an indemnification and release agreement signed on behalf of Plaintiff bars Plaintiff's claims of negligence against Jack Frost.²

BACKGROUND

As a condition of snowtubing at Jack Frost, Jack Frost required that its patrons sign a release form entitled "Snowtubing Acknowledgment of Risk and Agreement Not to Sue" ("Release"). Pursuant to this agreement, Jack Frost argues that Plain-

¹ The Defendant Blue Ridge Real Estate Company owns the premises and the Defendant Jack Frost Mountain Company t/a Jack Frost Mountain Ski Area operates and maintains the property where the Ski Area is located. Collectively, all of the Defendants are hereinafter referred to as Jack Frost.

² At the time of argument, Plaintiff conceded that the Release was signed on her behalf by Marianne Yarson, a friend, with Plaintiff's knowledge and consent, and that the Release would bind Plaintiff to the same extent as if signed by her. The primary issue in dispute is whether the language of the Release is sufficiently broad and precise to defeat Plaintiff's claims of negligence against Jack Frost.

tiff has released Jack Frost from any and all liability and relinquished her right to sue for any injuries she may have sustained while using, or being on, the snowtubing facilities.

Plaintiff claims that after making several snowtubing runs without incident, she was injured when the snowtube she occupied traveled beyond the common runout area at the bottom of the slope and struck a fence. According to Plaintiff, on earlier runs hay covering the surface of the runout area slowed the snowtube down, but that, by the time of her final run the depth of this coverage had thinned because of the number of people snowtubing and, as a result, the snowtube failed to slow to the same extent it had previously. Plaintiff further claims that following her injuries she was advised by one of the employees of the Ski Area that they did not "re-stack the hay." In addition to her claim that Jack Frost was negligent in its inspection and maintenance of the runout area, Plaintiff claims Jack Frost was negligent in its design and construction of the snowtubing runs. On this issue, Plaintiff argues that the runout area was too short to permit snowtubes to safely stop before reaching the fencing.

The Release provides in significant part as follows:

SNOWTUBING

**ACKNOWLEDGMENT OF RISK AND AGREEMENT
NOT TO SUE**

THIS IS A CONTRACT *** READ IT!**

1. I understand and acknowledge that snowtubing is a dangerous, risk sport and that there are inherent and other risks associated with the sport and that all of these risks can cause serious and even fatal injuries.

2. I understand that part of the thrill, excitement and risk of snowtubing is that the snowtubes all end up in a common, runout area at various times and speeds and that it is my responsibility to try to avoid hitting another snowtuber and it is also my responsibility to try to avoid being hit by another snowtuber, but that notwithstanding these efforts by myself and other snowtubers, there is a risk of collisions.

3. I acknowledge and understand that some, but not necessarily all, of the risks of snowtubing are the following:

- variations in the steepness and configuration of the snowtubing chutes and runout areas;
- variations in the surface upon which snowtubing is conducted, which can vary from wet, slushy, conditions to hard packed, icy conditions and everything in between;
- fences and/or barriers at or along portions of the snowtubing area, the absence of such fences and/or barriers, and the inability of fences and/or barriers to prevent or reduce injury;
- changes in the speed at which snowtubes travel depending on surface conditions, the weight of snowtubers and the inter-linking of snowtubes together to go down the snowtube runs;
- the chance that a patron can fall out, be thrown out or otherwise leave the snowtube;
- the chance that a snowtube can go from one run into another run, regardless of whether or not there is a barrier between runs, and the chance that a snowtube can go up and over the runout hill;

* * *

- collisions in the runout area and other locations of the snowtubing facility, with such collisions happening between snowtubes, between a snowtube and another patron, between a snowtube and a snowtubing facility attendant, between snowtubing patrons who may or may not be in or on a snowtube at the time of the collision and other sorts of collisions; collisions with fixed objects, obstacles or structures located within or outside of the snowtubing facility;

* * *

4. I also acknowledge and understand that I am accepting AS IS the snowtube and any other equipment involved with the snowtubing activity, including lifts and tows, and further acknowledge and understand that NO WARRANTIES are being extended to me with respect to any aspect of the snowtubing facility.

5. I agree and understand that snowtubing is a purely voluntary, recreational activity and that if I am not willing to acknowledge the risks and agree not to sue, I should not go snowtubing.

* * *

7. IN CONSIDERATION OF THE ABOVE AND OF BEING ALLOWED TO PARTICIPATE IN THE SPORT OF SNOWTUBING, I AGREE THAT I WILL NOT SUE AND WILL RELEASE FROM ANY AND ALL LIABILITY JACK FROST MOUNTAIN SKI AREA, JACK FROST MOUNTAIN COMPANY, BLUE RIDGE REAL ESTATE COMPANY, BIG BOULDER SKI AREA, LAKE MOUNTAIN COMPANY, BIG BOULDER CORPORATION IF I OR ANY MEMBER OF MY FAMILY IS INJURED WHILE USING ANY OF THE SNOWTUBING FACILITIES OR WHILE BEING PRESENT AT THE FACILITIES, EVEN IF I CONTEND THAT SUCH INJURIES ARE THE RESULT OF NEGLIGENCE OR ANY OTHER IMPROPER CONDUCT ON THE PART OF THE SNOWTUBING FACILITY.

8. I further agree that I WILL INDEMNIFY AND HOLD HARMLESS JACK FROST MOUNTAIN SKI AREA, JACK FROST MOUNTAIN COMPANY, BLUE RIDGE REAL ESTATE COMPANY, BIG BOULDER SKI AREA, LAKE MOUNTAIN COMPANY, BIG BOULDER CORPORATION from any loss, liability, damage or cost of any kind that it may incur as the result of any injury to myself, to any member of my family or to any person for whom I am signing this Agreement, even if it is contended that any such injury was caused by the negligence or other improper conduct on the part of the snowtubing facility.

* * *

11. I have read and understand the foregoing Acknowledgement of Risks and Agreement Not to Sue and am voluntarily signing below, intending to be legally bound hereby. If I am signing on behalf of a minor child, I represent and warrant that I am doing so with the consent and approval of my spouse (if any) and I understand that I may be giving up the rights of my child and spouse to sue as well as giving up my own right to sue.

The full Release is contained on one page. The language of the Release which appears in larger print and in bold lettering above, appears in the same format in the original. Immediately

below paragraph eleven is what purports to be Plaintiff's signature and, to the right of that, the date of January 17, 2003.³

Before us is Jack Frost's motion for judgment on the pleadings or, in the alternative, motion for summary judgment, requesting that we enter judgment in its favor and dismiss Plaintiff's claim on the basis of the foregoing Release. Because both parties have submitted affidavits in support of their respective positions, the motion will be treated as one for summary judgment.

DISCUSSION

In **Zimmer v. Mitchell & Ness**, 253 Pa. Super. 474, 385 A.2d 437 (1978), **aff'd**, 490 Pa. 428, 416 A.2d 1010 (1980), the Court set forth the following test for determining the validity and enforceability of a release, also known as an exculpatory clause:

The test for determining the validity of exculpatory clauses, admittedly not favored in the law, is set out in **Employers Liability Assur. Corp. v. Greenville Business Men's Ass'n**, 423 Pa. 288, 224 A.2d 620 (1966). The contract must not contravene any policy of the law. It must be a contract between individuals relating to their private affairs. Each party must be a free bargaining agent, not simply one drawn into an adhesion contract, with no recourse but to reject the entire transaction. In the instant case the validity of the agreement is apparent. However, to be enforceable, several additional standards must be met. First, we must construe the agreement strictly and against the party asserting it. Finally, the agreement must spell out the intent of the parties with the utmost particularity.

Id. at 478, 385 A.2d at 439 (finding trial court properly dismissed suit against ski equipment rental shop in light of a disclaimer of liability in the ski equipment rental agreement; plaintiff fell and was injured when ski bindings failed to release).

Pursuant to the criteria in **Zimmer**, the validity of the Release is not in serious dispute. This is an agreement between

³ On the date of this incident, Plaintiff was accompanied to Jack Frost by her adult friend, Marianne Yarson. Plaintiff signed two separate releases, one for each of her minor children who were with her, in the same form described above. Plaintiff's friend, as previously stated, signed the Release on behalf of the Plaintiff.

private parties affecting only their private rights with respect to a recreational activity. The agreement does not implicate any basic necessities of life; nor was Plaintiff required to use the snowtubing facilities for her personal or economic well-being. Plaintiff was under no compulsion to go snowtubing; her participation was purely voluntary. The Release, on its face, is not against any public policy. **Cf. Kotovsky v. Ski Liberty Operating Corp.**, 412 Pa. Super. 442, 603 A.2d 663 (1992), **appeal denied**, 530 Pa. 660, 609 A.2d 168 (1992) (finding a similar waiver of liability agreement concerning downhill skiing valid and enforceable). The real issue over which the parties do not agree is whether the Release, as applied, is enforceable: Is it sufficiently clear and specific to evince an intent to release Jack Frost not only from those dangers inherent in snowtubing but also from liability for its own negligence.

The Release identifies various specific risks associated with snowtubing including variations in the surface upon which snowtubing is conducted, variations in the speed at which snowtubes will travel, the risk of a snowtube traveling up and over the runout hill regardless of whether there is a barrier, and collisions between a snowtube and fixed objects, obstacles or structures located within or outside of the snowtubing facility. Here, unlike the release in **Brown v. Racquetball Centers, Inc.**, 369 Pa. Super. 13, 534 A.2d 842 (1987), which the Court found failed to unambiguously absolve the releasee of liability for its own acts of negligence, in the Release before us the Plaintiff specifically agreed to assume the risk of injury and to release Jack Frost from “any and all liability,” “even if I contend that such injuries are the result of **negligence** or any other improper conduct on the part of the snowtubing facility.” (emphasis added).

Plaintiff’s agreement not to sue and to release Jack Frost “from any and all liability” is similar to the language used in **Zimmer**, where the Court held that an exculpatory clause releasing the rental shop from “any liability for damage and injury to myself or to any person or property resulting from the use of this equipment” was sufficiently broad, precise and definite to include within its ambit any damage or injury caused by negligence. “To say that negligent conduct is not included in

‘any liability’ is patently incorrect.” **Zimmer, supra** at 480, 385 A.2d at 440.

Significantly, the present release is not confined to use of the snowtube as a piece of equipment and is comprehensive in its scope: it releases Jack Frost from liability for any injuries sustained “while using any of the snowtubing facilities or while being present at the facilities.” This language in the Release is broad, unambiguous, and in conspicuous print. “Although we must construe the contract strictly, we must also use common sense in interpreting this agreement.” **Zimmer, supra** at 479, 385 A.2d at 439. The contract must be interpreted as a whole, not piecemeal. **Id.**

In accordance with the particular and specific language of the instant Release, Plaintiff has expressly agreed to release and not to sue Jack Frost for any injuries sustained while “using any of the snowtubing facilities” and for any injuries sustained while “present at the facilities,” even if caused by Jack Frost’s own negligence. In addition to this exculpatory language, Plaintiff has expressly disclaimed any liability against Jack Frost and agreed to assume all of the risks of snowtubing. The list of risks of snowtubing which do appear in the Release—including among these the presence or absence of fences, going up and over the runout hill, and collisions with objects and other obstacles—is not intended to be exhaustive and, while not necessary to make the Release enforceable, clearly add additional weight to its effect as they reflect on the manner in which Plaintiff claims to have been injured.⁴

Our agreement with Plaintiff that a ski facility’s negligence is not an inherent risk of snowtubing (**see Crews v. Seven Springs Mountain Resort**, 874 A.2d 100, 105 (Pa. Super. 2005), **appeal denied**, 890 A.2d 1059 (Pa. 2005)), does not mean that the release of such negligence may not be contemplated by the parties when such intention is clearly expressed. To claim, as Plaintiff does, that the Release does not encompass within its scope the relinquishment of claims of negligence,

⁴ While this listing may be useful to a defense of assumption of the risk in tort (**see Hughes v. Seven Springs Farm, Inc.**, 563 Pa. 501, 762 A.2d 339, 345 (2000)), in interpreting the Release our focus is on the law of contracts and what can fairly be said was within the contemplation of the parties when the Release was given. **Vaughn v. Didizian**, 436 Pa. Super. 436, 440, 648 A.2d 38, 40 (1994).

whether for Jack Frost's asserted failure to maintain a surface covering of hay on top of the runout area or for its dimensional design of the runout area, because such specific acts of negligence are not stated with particularity in the Release, would require us to obfuscate and pervert the plain meaning of the Release. **See *Checket v. The Tuthill Corp.***, No. 99-1891 (C.P. Carbon Co. 2001) (finding the release inclusive of injury resulting from use of the premises, as well as use of the equipment, with the plaintiff's release of liability caused by the ski area's negligence being sufficient to encompass a claim of negligent design and placement of a netting fence by the ski resort), **aff'd**, 797 A.2d 368 (Pa. Super. 2002), **allocatur denied**, 803 A.2d 732 (Pa. 2002); **see also, *Mazza v. Ski Shawnee Inc.***, 74 D. & C. 4th 416, 422 (Monroe Cty. 2005) (interpreting a release with virtually identical language to that used in this case to bar a snowtuber's claim for negligent design of the facility and the lift mechanism). The law does not require that the universe of facts on which liability is premised be recited with specificity for a release to be enforceable; it requires only that the parties' intent to release one from liability be set forth with particularity and that the language evidencing this intent be clear and unambiguous.

We believe the language of the Release expressing the parties' intent to protect Jack Frost against any liability arising from Plaintiff's use of the snowtubing facility while snowtubing is clear, concise and specific. The breadth of this language excludes as a basis of liability not simply injuries which are caused by one of the inherent risks of snowtubing, but also exonerates Jack Frost from liability for any injuries which Plaintiff claims occurred while snowtubing, even if due to Jack Frost's negligence in the maintenance or design of the snowtubing run. The Release is general and specific both as to the source of the injury—while snowtubing or while being present on the snowtubing facilities—and as to the extent to which Jack Frost will be absolved from liability—for any and all liability, including negligence.

CONCLUSION

In accordance with the foregoing, we find that the only fair and reasonable reading of the Release excludes Plaintiff's claims for injury because of the manner in which she was injured. Plain-

tiff is attempting to do now exactly what she agreed not to do: sue Jack Frost based on its negligence.

If such a release can be nullified or circumvented, then every written release and every written contract or agreement of any kind, no matter how clear and pertinent and all-inclusive, can be set aside whenever one of the parties has a change of mind or whenever there subsequently occurs a change of circumstances which were unforeseen, or there were after-discovered injuries, or the magnitude of a releasor's injuries was unexpectedly increased, or plaintiff made an inadequate settlement. It would make a mockery of the English language and of the Law to permit this release to be circumvented or held to be nugatory.

Emery v. Mackiewicz, 429 Pa. 322, 326, 240 A.2d 68, 70 (1968). For these reasons, we will grant Jack Frost's motion for summary judgment.⁵

⁵ Jack Frost has also raised in its motion the applicability of exculpatory language contained in the snowtubing ticket purportedly received by Plaintiff, as well as that allegedly appearing on various signs posted in the vicinity of where the ticket was purchased. Because Plaintiff did not retain her ticket and has no recollection of her ticket containing this language, she questions whether the language on the sample ticket Jack Frost relies upon in its motion was present on her ticket. She also denies that she was aware of or read any of the posted signs upon which Jack Frost seeks to bind her, or that such signs even existed. In consequence, issues of material fact preclude the grant of summary judgment on this basis. See **Nanty-Glo v. American Surety Co.**, 309 Pa. 236, 163 A. 523 (1932) (being the principal source for the rule that the self-serving testimony of a moving party's witnesses is insufficient to sustain a motion for summary judgment because the credibility of the witnesses is an issue of fact which is exclusively a matter for the jury).

**COMMONWEALTH OF PENNSYLVANIA vs.
KAQUWAN MILLIGAN, Defendant**

*Criminal Law—Post Conviction Relief Act (PCRA)—Time
Limitations—Jurisdictional Prerequisite*

1. Pursuant to the PCRA, to be timely, a collateral proceeding challenging a criminal conviction should be filed within one year of the date the judgment of sentence becomes final. If not filed within this time frame, the merits of a collateral challenge can only be considered by the court if the reason for the delay falls within one of three statutory exceptions and if the petition invoking the exception is filed within sixty days of the date the claim could have been presented.
2. The timely filing of a PCRA petition is a jurisdictional prerequisite to the court's consideration of the merits of the petition. The court has no power to address the substantive merits of an untimely petition.

3. The statutory language of the PCRA must be strictly adhered to. When a defendant claims that he fits within one or more of the three statutory exceptions to the one-year filing requirement, the burden is upon the defendant to plead and to prove the relevant exception.
4. Ineffectiveness of counsel in the filing or presentation of a known basis for PCRA relief, will not excuse or extend the time periods for filing a timely petition.
5. Compliance with the requirements of **Commonwealth v. Lawson** for a second or subsequent PCRA petition—the pleading and proof of a fundamental miscarriage of justice before the merits of the petition can be considered—is a separate and distinct requirement to that of timeliness. Therefore, the merits of an untimely petition, even if meeting the requirements of **Lawson**, cannot be considered.
6. A defendant's claim of **Brady** violations and coerced testimony by the Commonwealth made more than one year after the judgment of sentence became final and more than sixty days after becoming known by the defendant, are untimely, notwithstanding the defendant's claim of ineffectiveness of counsel in their presentation, and will be dismissed for lack of jurisdiction.

NO. 046 CR 1998

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

CHARLES F. SMITH, JR., Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—November 22, 2006

PROCEDURAL HISTORY

On April 21, 1999, Kaquwan Milligan, the Defendant in these proceedings, was convicted of second-degree murder, robbery, criminal conspiracy, and aggravated assault¹ for his role in the October 26, 1997 drug-related shooting and death of Tyrone Hill. Thereafter, the Defendant was sentenced to life imprisonment on the murder charge, followed by a sentence of not less than five nor more than ten years for criminal conspiracy; the convictions for robbery and aggravated assault merged for sentencing purposes. Defendant's conviction and sentence was upheld on direct appeal and became final when the United States Supreme Court denied his petition for **writ of certiorari** on November 26, 2001.

On March 26, 2002, Defendant filed his first petition pursuant to the Post Conviction Relief Act (PCRA), 42 Pa. C.S.A. §§9541-9546. Following the appointment of counsel and the filing of an amended petition on September 6, 2002, the peti-

¹ 18 Pa. C.S.A. §§2502(b), 3701(a)(1), 903(a)(1), and 2702(a)(1), respectively.

tion was denied on April 21, 2003, after a hearing held on January 24, 2003. The Pennsylvania Superior Court affirmed this denial on September 22, 2004. Subsequently, the Pennsylvania Supreme Court denied Defendant's petition for allowance of appeal on April 5, 2005.

Before us is Defendant's second PCRA Petition filed on August 5, 2005. Counsel was again appointed to represent the Defendant and an amended petition was filed on April 6, 2006. In this petition, Defendant raises two primary issues: (1) whether the Commonwealth failed to disclose exculpatory evidence in the nature of an alleged plea agreement with one of Defendant's co-conspirators, Verna Russman, in exchange for her cooperation and favorable testimony against the Defendant; and (2) whether the Commonwealth coerced perjured testimony from a Commonwealth witness, Kadias Murdaugh, to refute Defendant's alibi defense. A hearing on the amended petition was held on June 9, 2006.

FACTUAL BACKGROUND

At trial, Russman testified that she was present when Tyrone Hill was killed in his apartment. Also present were Miles Ramzee, Cetewayo Frails, Dennis Edward Boney, and the Defendant. According to Russman, as Frails guarded the entrance to the apartment, Ramzee went into another room, quickly returned and, without warning, shot Hill from behind in the back of the head. As Frails and Ramzee rummaged through Hill's pockets taking drugs, Defendant dragged a visibly shaken Russman from the room and ordered her to calm down. When she and Defendant returned to the room where Hill had been killed, Boney and Frails told Russman that if she told anyone about the killing her family would be harmed. In contrast to Russman's palpable distress and disbelief at seeing Hill killed, Ramzee, Frails, Boney, and Defendant appeared calm and collected.

Although Russman denied any prior knowledge of a plan to kill Hill, she admitted to knowing beforehand that Ramzee, Frails, Boney, and Defendant intended to rob Hill. Russman explained how Ramzee, Frails, Boney, and Defendant were all associated with one another in dealing drugs, as was Hill. In this connection, she acknowledged her own addiction to crack cocaine and her involvement with all five men, including Hill, in selling drugs to support herself and her addiction. She further described how

on Saturday, October 25, 1997, the day before the murder, she overheard Ramzee, Frails, Boney, and Defendant plot to rob Hill of his money and drugs to put him out of business. She testified also how later that day she was paged by Frails to drive him, Ramzee, and Boney to Hill's apartment, where Defendant was already located, to rob Hill as planned, and how the four of them arrived at the apartment in the early morning of October 26, 1997.

All participants, including Russman, were charged with criminal homicide, robbery, criminal conspiracy, and aggravated assault. Ramzee was tried before a jury in March 1999 and convicted of first-degree murder, robbery, criminal conspiracy, and aggravated assault. Defendant, along with Frails and Boney, were jointly tried before a jury in April 1999; all three were convicted of second-degree murder, robbery, criminal conspiracy, and aggravated assault. At both trials, Russman was a key prosecution witness.

Both in direct and in cross-examination, Russman repeatedly and consistently denied that she had been promised anything in exchange for her testimony. At Defendant's trial, defense counsel sought to impeach Russman on this point by reference to two continuance requests previously made by her counsel. In each request, the reason for the continuance was identified as pending negotiations. The trial court, the Honorable Richard W. Webb presiding, limited counsel's use of the applications for this purpose.

On June 3, 1999, Russman pled guilty to murder in the third degree with the remaining counts to be **nol prosed**. (Commonwealth's Exhibit No. 2). On June 28, 1999, she was sentenced to imprisonment in a state correctional facility for a term of not less than five nor more than ten years. In imposing this sentence, the Court recognized, as represented by the Commonwealth, that without Russman's cooperation and testimony the convictions of Defendant and his cohorts may never have been possible. In accepting the Commonwealth's recommendation for a mitigated sentence, the Court also noted that the evidence supported the Commonwealth's belief that Russman was the least culpable of the defendants, that while she was present when Hill was killed, she did not expect or plan his death.

During Defendant's trial, the Defendant and Frails each claimed that they were not present in this state when Hill was killed. Their evidence on this point was contradicted not only by the testimony of Russman, but also by that of five other witnesses, including Murdaugh who testified that Boney and Frails were at his home in Monroe County the day before Hill's death. In an affidavit dated January 19, 2005, Murdaugh stated that his trial testimony was false, that he did not see the Defendant or any of the other individuals charged with Hill's murder either before or after the homicide, and that he perjured himself because, if he didn't, the Commonwealth threatened to revoke his parole and send him to prison. (Defendant's Exhibit No. 2).²

At the hearing held on June 9, 2006, Murdaugh testified that at the time of Defendant's trial he was on probation and was subpoenaed as a witness for the prosecution. When the police arrived to escort him to court, Murdaugh stated he informed them he did not want to go. In response, the police purportedly asserted that if he failed to appear, his probation could be revoked and he could be placed in jail. Not wanting to press the issue, Murdaugh agreed to honor the subpoena.

When questioned about his January 19, 2005, affidavit, Murdaugh testified that the only correct fact in this statement was the reference to the police's intent to have his probation revoked if he failed to honor the subpoena (N.T., pp. 78-81). When asked if the Defendant and his co-defendants were in fact at his home on the day of the homicide, Murdaugh stated that he could no longer recall (N.T., pp. 72, 79, 81 and 83).

As to the veracity of Murdaugh's trial testimony, Erena Caliste, Defendant's mother, testified that on the date Murdaugh testified at trial, before he took the stand, he divulged to her that if he didn't testify against Defendant the District Attorney had threatened to send him to jail (N.T., pp. 23-26, 30). She further testified, with Defendant testifying similarly,

² This affidavit, according to Defendant, was the second he had received from Murdaugh, both providing the same information (N.T., p. 36). The date and whereabouts of the earlier affidavit were never identified at the hearing (N.T., p. 44). See **Commonwealth v. Vega**, 754 A.2d 714, 718 (Pa. Super. 2000) where the court held that the sixty-day requirement of 42 Pa. C.S.A. §9545(b)(2) is not met when the defendant fails to provide the date on which he learned of evidence giving rise to a claim for after-discovered evidence.

that sometime in 1999, after Defendant's conviction, she advised Defendant of what Murdaugh had told her (N.T., pp. 27-29, 35-36, 43). Although Defendant and his mother both claim to have brought the issue of Murdaugh's perjured testimony to the attention of Defendant's counsel prior to the hearing held on January 24, 2003, the issue was not pursued in those proceedings (N.T., pp. 24, 32-34, 36-37).

With respect to the purported plea agreement reached with Russman prior to her trial testimony, Defendant testified that he was aware of the issue having reviewed both the transcript of the trial testimony and that of Russman's sentencing proceedings prior to the January 24, 2003, hearing and that he advised his then counsel of the issue (N.T., pp. 49, 53-58, 61, 64-68). Because this issue also was not raised by his first PCRA counsel, Defendant claims his counsel was ineffective.

At the June 9, 2006, hearing, the District Attorney who tried Defendant's case testified that Russman was promised nothing prior to her trial testimony and that only after Russman had testified and Defendant was sentenced did he agree to a plea to third-degree murder and to make a sentencing recommendation (N.T., pp. 89-95; Commonwealth Exhibit Nos. 1 (Stipulated Plea Agreement) and 2 (Guilty Plea)). The District Attorney further testified that prior to the hearing on Defendant's first PCRA petition, PCRA counsel met with him regarding this issue and was advised that no promises were made to Russman prior to her testimony, nor had any plea negotiations taken place (N.T., pp. 96-98).

DISCUSSION

The first and, in this case, dispositive issue we must decide is the timeliness of Defendant's petition under the PCRA. There exists no constitutional right to collateral review of a criminal proceeding or to the appointment of PCRA counsel. **Commonwealth v. Haag**, 570 Pa. 289, 809 A.2d 271, 282-284 (2002), cert. denied, 539 U.S. 918, 123 S.Ct. 2277, 156 L.Ed. 2d 136 (2003).³ However, when a state provides for such review,

³ An indigent petitioner does, however, by way of procedural rule, have the right in this Commonwealth to representation by counsel for a first petition filed under the PCRA. Pa. R.Crim.P. 904(C); **Commonwealth v. White**, 871 A.2d 1291, 1293-1294 (Pa. Super. 2005). This procedural right to counsel, in addition, assures the defendant of the right to effective assistance of counsel. **Common-**

the statutory and procedural requirements promulgated by the state—including the limitations imposed on this review—must be complied with. **See id.** at 283-284.

By statute, for the merits of a PCRA petition to be addressed in this Commonwealth, the petition must be timely. In this respect, the PCRA defines what constitutes a timely-filed petition:

(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 raise the 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.A. §9545(b).

wealth v. Haag, 570 Pa. 289, 809 A.2d 271, 283 (2002), **cert. denied**, 539 U.S. 918, 123 S.Ct. 2277, 156 L.Ed. 2d 136 (2003).

Furthermore, the time limitations set forth in the PCRA are jurisdictional: “when a PCRA petition is not filed within one year of the expiration of direct review, or not eligible for one of the three limited exceptions, or entitled to one of the exceptions, but not filed within 60 days of the date that the claim could have been first brought, the trial court has no power to address the substantive merits of a petitioner’s PCRA claims.” **Commonwealth v. Gamboa-Taylor**, 562 Pa. 70, 753 A.2d 780, 783 (2000). “Because the PCRA’s timeliness requirements are mandatory and jurisdictional in nature, no court may properly disregard or alter them in order to reach the merits of the claims raised in a PCRA petition that is filed in an untimely manner.” **Commonwealth v. Howard**, 567 Pa. 481, 788 A.2d 351, 356 (2002) (citation and quotation marks omitted). Consequently, whether Defendant’s petition has been timely filed is a jurisdictional threshold question.

In this case, Defendant’s sentence became final on November 26, 2001, the date the United States Supreme Court denied his petition for a **writ of certiorari**. See 42 Pa. C.S.A. §9545 (b)(3). Pursuant to the PCRA, the one-year period within which to file a timely petition ended on November 26, 2002. The present petition, Defendant’s second, was filed on August 5, 2005, almost three years beyond this deadline. On its face, the petition is untimely.⁴

To avoid this bar, Defendant argues that both of his claims fall within two separate statutory exceptions—that for interference by government officials in the presentation of the claim, 42 Pa. C.S.A. §9545(b)(1)(i), and that for newly-discovered evidence, 42 Pa. C.S.A. §9545(b)(1)(ii)—and that his former PCRA counsel was ineffective in presenting these claims at the January 24, 2003, hearing. When a defendant claims that he fits within one or more of the three statutory exceptions to the one-year filing requirement, the burden is upon the defendant

⁴ The timeliness requirement is applicable to all PCRA petitions, including second and subsequent ones. **Commonwealth v. Greer**, 866 A.2d 433, 436 (Pa. Super. 2005). That the petition was filed within five months of the denial by the Pennsylvania Supreme Court of his first PCRA petition, and that Defendant was barred from filing a second petition until the appeal from his first was resolved, is of no consequence. **Commonwealth v. Davis**, 816 A.2d 1129, 1134 (Pa. Super. 2003), **appeal denied**, 839 A.2d 351 (Pa. 2003).

to plead and to prove the relevant exception. **Commonwealth v. Sattazahn**, 869 A.2d 529, 533 (Pa. Super. 2005). Defendant has failed to sustain this burden.

Defendant contends that the Commonwealth withheld exculpatory evidence by failing to disclose the terms of an alleged plea agreement with Russman and that his failure to raise the claim previously was the result of interference by government officials since the Commonwealth violated its on-going obligation to disclose exculpatory material pursuant to **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963). A **Brady** violation consists of three elements: (1) suppression by the prosecution; (2) of evidence, whether exculpatory or impeaching, favorable to the defendant; (3) to defendant's prejudice. **Commonwealth v. Paddy**, 569 Pa. 47, 800 A.2d 294, 305 (2002). Even if we were to conclude, contrary to Russman's trial testimony and the testimony of the District Attorney on June 9, 2006, that such an agreement existed, Defendant has failed to demonstrate his compliance with the timeliness requirements of 42 Pa. C.S.A. §9545(b)(2).

In asserting the existence of a plea agreement with Russman, Defendant relies on the reference at trial to two separate continuance applications signed by Russman's counsel identifying pending negotiations as the basis for the requests, and on Russman's sentencing transcript describing her cooperation with the Commonwealth and its effect on the sentence imposed by the Court. The facts of both were made available to and were known by Defendant prior to his first PCRA hearing on January 24, 2003. The only explanation Defendant offers as to why this information was not used at that time is the alleged ineffectiveness of his first PCRA counsel.

Similarly, with respect to the claim that Murdaugh was threatened with imprisonment unless he testified against Defendant and that the Commonwealth, in effect, suborned perjury, according to both Defendant and his mother, Murdaugh's admission of his intent to testify falsely and the reason for such testimony was known by Defendant in 1999 and brought to the attention of his then PCRA counsel prior to the hearing on January 24, 2003. Again, Defendant argues that the sole reason this evidence was not presented at that time was the ineffectiveness of his counsel.

As to both claims, it is clear that all of the facts upon which Defendant relies were known by him prior to his January 24, 2003 hearing and that Defendant failed to raise these claims within sixty days of the date they could have been presented.⁵ Defendant's claim that the ineffectiveness of his prior PCRA counsel explains and excuses the untimeliness of his petition seeks, in effect, "to carve out an exception to the jurisdictional timeliness requirements of the PCRA for ineffective assistance of counsel claims." **Commonwealth v. Wharton**, 584 Pa. 576, 886 A.2d 1120, 1127 (2005). This exception, however, has not been recognized by the Legislature as a discrete basis to excuse an otherwise untimely filing under the PCRA and it is not encompassed within the existing exceptions for interference by government officials or for after-discovered facts. **Commonwealth v. Pursell**, 561 Pa. 214, 749 A.2d 911, 916 (2000) (holding that claims relating to ineffectiveness of counsel for failure to raise certain issues do not qualify for the timeliness exception provided in 42 Pa. C.S.A. §9545(b)(1)(i) because the term "government officials" does not include defense counsel); **Commonwealth v. Gamboa-Taylor, supra**, 753 A.2d at 785 (holding that a subsequent discovery by latter counsel that previous counsel was ineffective in pursuing a claim is not a newly discovered fact entitling the defendant to the benefit of the exception for after-discovered evidence). Moreover, "the PCRA confers no authority upon [the court] to fashion **ad hoc** equitable exceptions to the PCRA time-bar in addition to those exceptions expressly delineated in the Act." **Commonwealth v. Cruz**, 578 Pa. 325, 852 A.2d 287, 292 (2004) (citation and quotation marks omitted).

CONCLUSION

In accordance with the foregoing, we conclude that Defendant's PCRA petition is untimely and does not meet any

⁵We recognize that Defendant's after-discovered evidence and **Brady** claims provide different grounds to be eligible for relief under the PCRA, 42 Pa. C.S.A. §9543(a)(2)(i) and (vi), and that Defendant is relying upon two separate exceptions to the one-year time limit, 42 Pa. C.S.A. §9545(b)(1)(i) and (ii), for each. Notwithstanding this multi-faceted approach, both exceptions to the one-year time bar must be raised within sixty days of the date the claim could have been presented. **Commonwealth v. Holmes**, 905 A.2d 507, 510 (Pa. Super. 2006).

of the exceptions to the PCRA's timeliness requirements. As the petition is time-barred, it will be dismissed.⁶

ORDER OF COURT

AND NOW, this 22nd day of November, 2006, upon consideration of Defendant's, Kaquwan Milligan's, Amended Petition for Post-Conviction Relief filed on April 6, 2006, and after hearing thereon, and in accordance with our Memorandum Opinion of this same date, it is hereby

ORDERED and DECREED that the petition is dismissed.

Notice to Petitioner

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).

⁶ Because this is Defendant's second PCRA petition, Defendant must also meet the requirements of **Commonwealth v. Lawson**, 519 Pa. 504, 514, 549 A.2d 107, 112 (1988), and its progeny before the merits of his petition can be considered. Pursuant to **Lawson**, the petitioner must make a strong **prima facie** showing that the error of which he complains constitutes a fundamental miscarriage of justice. This standard is met only if the petitioner can demonstrate either "(a) [that] the proceedings resulting in his conviction were so unfair that a miscarriage of justice occurred which no civilized society can tolerate; or (b) [that] he is innocent of the crimes charged." **Commonwealth v. Palmer**, 814 A.2d 700, 709 (Pa. Super. 2002) (citation and quotation marks omitted), **appeal denied**, 832 A.2d 436 (Pa. 2003).

These requirements, like those of timeliness, do not implicate the merits of the petition and, therefore, do not contravene what we have previously stated in the text, that we are deprived of jurisdiction to consider the merits of an untimely petition. Whether a second petition satisfies the **Lawson** standard must separately be decided before a PCRA court can entertain the merits of the petition. **Id.** at 709-10 n.18. Because Defendant has made no attempt to plead or prove the existence of a fundamental miscarriage of justice, the dismissal of Defendant's petition on this additional basis is equally justified.

JIM THORPE AREA SCHOOL DISTRICT, Petitioner vs. JIM THORPE AREA EDUCATION ASSOCIATION, Respondent

Civil Law—Pennsylvania Public Employee Relations Act (“Act 195”)—Review of Arbitrator’s Award—Standard of Review—Meaning of “Accreditation”—Estoppel

1. The standard of review of an arbitrator’s decision under Act 195 is the “essence test.” Under this test, the award will be upheld if (1) the dispute, as properly defined, is governed by the terms of the collective bargaining agreement and (2) the arbitrator’s decision is rationally derived from the collective bargaining agreement, viewed in light of its language, its context and any other indicia of the parties’ intentions.
2. The meaning ascribed by an arbitrator to the term “accredited,” as used in a collective bargaining agreement between a school district and its teachers which requires attendance at “an accredited college or university” in order for the costs incurred in obtaining educational credits to be reimbursable to the teacher and for degrees earned to be recognized by the school district, must logically flow from, or have a foundation in, the collective bargaining agreement for the arbitrator’s interpretation to be upheld.
3. The term “accreditation” by itself bears a latent ambiguity in that it does not identify the accrediting agency, what the standards of accreditation are, or who is to be the arbiter of whether they have been met. The term, on its face, is not limited to those institutions of higher learning recognized by the Pennsylvania Department of Education.
4. In deciding that two teachers who attended an on-line university licensed by the State of Wyoming to obtain their graduate degrees were entitled to be reimbursed their educational expenses and to have the doctorates they obtained recognized by the school district, the arbitrator—in construing the term “accredited”—was entitled to take into account the parties’ past practices; that the School District’s Superintendent, the school board’s primary agent, had pre-approved each of the graduate courses taken by the teachers for purposes of obtaining their graduate degrees; and that the school district had already reimbursed the teachers for the cost of obtaining these degrees and adjusted the teachers’ salaries on the basis of the degrees obtained.
5. Because an arbitrator is entitled to examine all circumstances surrounding the execution of a collective bargaining agreement, the full context of the agreement, the parties’ conduct in relation to the agreement, and any other indicia of the parties’ intention, the arbitrator does not exceed his authority in relying on principles of estoppel to support an Act 195 arbitration award.

NO. 06-0583

CARL P. BEARD, Esquire—Counsel for Petitioner.

A. MARTIN HERRING, Esquire—Counsel for Respondent.

MEMORANDUM OPINION

NANOVIC, P.J.—August 2, 2006

Before us is the Jim Thorpe Area School District’s (the “District” or “School District”) petition for review of an arbitration

award rendered pursuant to the Pennsylvania Public Employee Relations Act (“Act 195”).¹ In that award an arbitrator held that the School District must recognize doctoral degrees earned by two of its teachers from a non-accredited university and that the School District must pay the costs and expenses—for tuition, texts and books—incurred by the teachers in obtaining these degrees.

BACKGROUND

The two grievants, Jean Bickel (“Bickel”) and Jeffry Nietz (“Nietz”), are both professional employees of the School District: Bickel as a high school librarian and Nietz as a guidance counselor.² Beginning in 2001, both applied for and received approval from the School District’s Superintendent, Dr. Keith Boyer (“Boyer”), to take graduate courses at Kennedy-Western University, an on-line university, to obtain their doctorates.

In Bickel’s case, on five separate occasions between October 8, 2001, and September 23, 2002, she applied for and obtained course approval from Boyer, the last time for her dissertation. She received her doctorate with a major in education on January 21, 2003, and was placed on the doctoral step of the District’s salary schedule in January 2003.³ With respect to Nietz, he applied for and received approval from Boyer to take graduate courses at Kennedy-Western on three separate occasions between March 27, 2001, and August 15, 2002, the last for his dissertation. He received his doctorate with a major in education on December 26, 2003, and was placed in the doctoral category of the District’s salary schedule in January 2004. Both grievants received reimbursement from the School District for the cost of tuition and books following their completion of each course.

¹ 43 P.S. §§1101.101-1101.2301.

² The Jim Thorpe Area Education Association (“Association”) represents the grievants in these proceedings as the collective bargaining agent for the District’s professional employees.

³ The salary schedule for the 2002-2003 school year consisted of a grid with sixteen vertical steps—one for each year of service—and six horizontal columns or categories labeled “Bach., Master, M+15, M+30, M+45 & M+60/D” representing different steps or grades where a teacher would be placed according to educational achievement.

Sometime in 2004, after learning that Kennedy-Western was a non-accredited institution, the School Board began questioning the legitimacy of the degrees received by the grievants. The pertinent contract language provides as follows:

3. Credit and Textbook Reimbursement

a. The Jim Thorpe Area School District will reimburse every member of the bargaining unit for credits obtained at the rate of one hundred (100%) percent of the average state college/university rate or actual cost of the credits, whichever is lower, for a maximum of twelve (12) credits during each of the years of the contract Agreement [at an accredited college or university]. Proof of cost of all reimbursable credits must be submitted prior to reimbursement. Reimbursement shall be made within 30 days of proof of course completion.

Unless otherwise approved by the superintendent, all courses must be in the teacher's field of certification or in the teacher's current work assignment. Courses outside of the employee's certification area shall be accompanied with appropriate justification regarding its applicability in the teaching assignment. All courses must be pre-approved by the superintendent to qualify for reimbursement and to qualify the employee for movement across the salary columns.

At least one additional teaching year after receipt of the credits must be served with the Jim Thorpe Area School District; otherwise, reimbursement will be repaid to the Jim Thorpe Area School District.

Reimbursement for credits shall be made within 30 days of proof of course completion.

b. Reimbursement for texts and/or books required for courses, approved by the superintendent, will be made to each teacher in each of the contract years provided that proof of payment therefore has been made and such texts and/or books are in good condition when given to the professional section of the Jim Thorpe Area School District libraries.

c. Credits, if otherwise reimbursed, in any of the contract years, shall not be subject to reimbursement by the Jim Thorpe Area School District.

2002-2005 Collective Bargaining Agreement, Appendix E (Employee Benefits and Conditions), Paragraph 3 (Credit and Textbook Reimbursement).⁴

At a meeting held on July 19, 2004, the School Board passed several resolutions which cumulatively provided that the School District would only accept credits for reimbursement from an accredited institution as recognized by the Pennsylvania Department of Education, that credits earned from a non-accredited institution would not justify movement on the District's salary schedule, and that the District would seek reimbursement from the grievants for the costs and expenses of their attendance at Kennedy-Western previously paid by the District. By letter dated September 24, 2004, the District's solicitor advised the grievants of this action by the School Board, that their salary would be reduced in accordance with the District's salary schedule to reflect the Board's action (from an annual salary of \$66,250 to \$65,250 for Bickel, and from \$68,200 to \$67,100 for Nietz), and that they were requested to reimburse the School for the costs of their tuition at Kennedy-Western (\$4,367.49 for Bickel; \$6,658.91 for Nietz).

As a result of the Board's decision and request, the grievants jointly on September 30, 2004, filed a request for settlement of grievance whereupon the grievance procedure outlined in the collective bargaining agreement—a four-step process culminating in final and binding arbitration in accordance with Section 903 of Act 195 (43 P.S. §1101.903)—was invoked.⁵

⁴ The bracketed language “at an accredited college or university” appeared in each of the parties’ three prior collective bargaining agreements dating from 1990 (*i.e.*, 1990-1994; 1994-1997; 1997-2002). For reasons which are unclear, it did not appear in the collective bargaining agreement for the period from July 1, 2002 through June 30, 2005. In the arbitrator’s opinion which accompanied her award, she concluded that this omission was inadvertent, that both parties acted under a mutual mistake of fact—both believing this missing language was present—at the time the written agreement was executed, and that, in order to reflect the parties’ true intent, the 2002-2005 Collective Bargaining Agreement should be reformed to include this language. We have accepted and concur in the arbitrator’s finding in this regard.

⁵ The four-step grievance procedure found in Appendix D to the collective bargaining agreement provides for (1) a written presentation of the grievance to the building principal or administrator; (2) appeal to the superintendent; (3) appeal to the School Board; and (4) appeal to binding arbitration. Pursuant to this grievance procedure, if the grievance fails to meet the criteria in Section 903 of Act 195, the

When the parties were unable to resolve the grievance during the preliminary stages of the grievance process, the grievants proceeded to arbitration with the following issue submitted to the arbitrator:

Whether the School District violated Appendix A and Appendix E of the 2002-2005 Contract between the parties in failing to recognize the doctorate degrees of the Grievants, failing to provide columnar and step movement on the salary schedule, and refusing to grant tuition and book reimbursement?

The arbitrator, as previously noted, sustained the grievance. In doing so, the arbitrator found that “the School District violated the Appendix A and E of the Agreement by removing the Grievants from the doctorate column and demanding repayment of the costs of tuition and books that had been previously paid to them.” Arbitration Decision, p. 19.⁶

STANDARD OF REVIEW

Before reviewing the merits of the arbitrator’s award, it is appropriate to note that the standard for our review of an Act 195 grievance arbitration award is highly circumscribed. We may not reweigh the evidence presented to the arbitrator or substitute our judgment for hers. Our review does not judge the merits of the underlying controversy but rather the merits of the arbitrator’s decision under the essence test.

Pursuant to the essence test ..., a reviewing court will conduct a two-prong analysis. First, the court shall determine if the issue as properly defined is within the terms of the collective bargaining agreement. Second, if the issue is embraced by the agreement, and thus, appropriately before the arbitrator, the arbitrator’s award will be upheld if the arbitrator’s interpretation can rationally be derived from the collective bargaining agreement. That is to say, a court will only vacate an arbitrator’s award where the award

decision of the Board of Directors in step three shall be final. 2002-2005 Collective Bargaining Agreement, Appendix D (Grievance Procedures).

⁶ As relevant to these proceedings, Appendix A entitled “Technique of Payment” provides for the timing of columnar movement when a teacher qualifies for movement from one horizontal category to another.

indisputably and genuinely is without foundation in, or fails to logically flow from, the collective bargaining agreement.

State System of Higher Education (Cheyney Univ.) v. State College University Professional Association, 560 Pa. 135, 743 A.2d 405, 413 (1999).

The essence test as outlined by our Supreme Court is a test granting vast deference to the arbitrator's award. The inquiry is not whether the arbitrator's decision was reasonable or even manifestly unreasonable. **Danville Area School District v. Danville Area Education Association**, 562 Pa. 238, 754 A.2d 1255, 1259 (2000). Rather, "we are confined to a determination of whether the arbitrator's decision could rationally be derived from the collective bargaining agreement, viewed in light of its language, its context and any other indicia of the parties' intention." **Austin Area Education Association v. Austin Area School District**, 159 Pa. Commw. 640, 644-45, 634 A.2d 276, 278 (1993), **appeal denied**, 537 Pa. 653, 644 A.2d 738 (1994). Accordingly, in discerning the intent of the parties the arbitrator is not restricted to the express terms of the collective bargaining agreement. **Danville Area School District, supra**, 754 A.2d at 1260.

"[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. ... [I]n this very limited context, a review of the 'reasonableness' of an award is not the proper focus." **Cheyney, supra**, 743 A.2d at 413 n.8. "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." **Cheyney, 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)).⁷

⁷ The "essence test" is the equivalent of the judgment N.O.V. standard provided by Section 7302(d)(2) of the Uniform Arbitration Act, 42 Pa. C.S.A. § 7302(d)(2). **State System of Higher Educ. (Cheyney Univ.) v. State College Univ. Professional Ass'n.**, 560 Pa. 135, 743 A.2d 405, 411 (1999).

DISCUSSION

A. Collective Bargaining Agreement As Basis of Arbitrator's Decision

Whether the grievants are entitled to reimbursement for their educational costs at Kennedy-Western and recognition of their doctoral degrees and a consequent increase in their salaries under the District's salary schedule is dependent on the interpretation and application of Appendix E of the collective bargaining agreement and, to a lesser extent, Appendix A. As to the first prong of the essence test, the issue in dispute is clearly encompassed by the language of these two appendices and is, therefore, one within the terms of the collective bargaining agreement. From this, it necessarily follows that the first prong of the essence test has been met. It is with respect to the second prong of the test—whether the arbitrator's interpretation can in any rational way be derived from the agreement—that we must focus our attention.

In explaining her decision, the arbitrator reasoned first that the requirement of accreditation alone, without specifying the accrediting agency, is inherently equivocal. Quoting from another arbitration case discussing a similar issue, the arbitrator wrote:

It is certainly reasonable to assume that when the parties used the term 'accredited,' they intended that courses qualifying for tuition refund would be offered by institutions that meet recognized standards of educational quality, so both teachers and the District's students would derive benefit from them. However, the contract is silent as to what those standards are and who is the arbiter of whether they are met in particular cases.

Arbitration Decision, p. 16 (**quoting Southern Lehigh School District v. Southern Lehigh Education Ass'n.**, p. 13, Pa. Bureau of Mediation Case 5374). The latent ambiguity in Appendix E's requirement of accreditation was illustrated further by the District's own evidence which revealed numerous accrediting commissions or agencies—**e.g.**, the Council for Higher Education Accreditation, the United States Department of Education, and the Accrediting Commission of the Distance and Training Council—each with their own standards for educational quality. **See** Exhibit D-10.

The School District's claim that the phrase "at an accredited college or university" means accreditation by the Pennsylvania Department of Education, while plausible, was never proven. In this context, the arbitrator observed that while this may "very well have been the District's intention, it is not at all clear it was the parties' intention." Arbitration Decision, p. 16; **see also, Greater Nanticoke Area School District v. Greater Nanticoke Area Education Association**, 760 A.2d 1214, 1219 (Pa. Commw. 2000) ("The intent of the parties to a [collective bargaining agreement], like any other contract, is deemed to be embodied in 'what the agreement manifestly expressed, not what the parties have silently intended.'" (quoting **Delaware County v. Delaware County Prison Employees Independent Union**, 552 Pa. at 190, 713 A.2d at 1138)).

The District presented no evidence that the parties through past practices had defined this term to be only courses recognized by the Pennsylvania Department of Education, or that teachers who had attended non-accredited institutions were denied reimbursement.⁸ Nor was any evidence presented that

⁸ Four situations have been articulated in which evidence of past practice may be used to indicate the parties' intentions. They are:

- (1) to clarify ambiguous language;
- (2) to implement contract language which sets forth only a general rule;
- (3) to modify or amend apparently unambiguous language which has arguably been waived by the parties;
- (4) to create or prove a separate, enforceable condition of employment which cannot be derived from the express language of the agreement.

Police Officers of the Borough of Hatboro v. Borough of Hatboro, 126 Pa. Commw. 247, 253 n.6, 559 A.2d 113, 116 n.6 (1989) (**citing County of Allegheny v. Allegheny County Prison Employees Indep. Union**, 476 Pa. 27, 34, 381 A.2d 849, 852 (1977)).

The term "past practice" was further defined in **Allegheny County** as follows:

'A custom or practice is not something which arises simply because a given course of conduct has been pursued by Management or the employees on one or more occasions. A custom or a practice is a usage evolved by men as a normal reaction to a recurring type situation. It must be shown to be the **accepted** course of conduct characteristically repeated in response to the given set of underlying circumstances. This is not to say that the course of conduct must be **accepted** in the sense of both parties having agreed to it, but rather that it must be **accepted** in the sense of being regarded by the men involved as the **normal** and **proper** response to the underlying circumstances presented.' Sylvester Garrett, Chairman, Board of Arbitration, U. S.

the custom or practice among school districts in Pennsylvania was to only pay tuition and costs for teachers who attend courses at an accredited institution,⁹ or that the parties during negotiations or in some other manner acknowledged to one another that this was an understood term.¹⁰

While we agree with the arbitrator that the identity of the accrediting agency may not have been mutually understood (the evidence certainly supports this conclusion), the concept of assuring a quality education for accreditation should have been. Yet neither party, and in particular the Association on whom this burden appears to fall,¹¹ presented any evidence that Kennedy-Western was accredited by anyone. In the face of this record, the arbitrator heedlessly jumped from the observation that because there was no consensus on the identity of the accrediting agency and because the District's Superintendent overlooked this requirement in his approval of the grievants' attendance at Kennedy-Western, the term was meaningless. **Cf. Rochester Area School District v. Rochester Education Associa-**

Steel—Steelworkers, Grievance No. NL-453, Docket No. N-146, January 31, 1953. Reported at 2 **Steelworkers Arbitration Bulletin** 1187. (Emphasis in original.)

Id. at 34 n.12, 381 A.2d at 852 n.12.

⁹ In **Association of Pennsylvania State College and University Faculties v. Commonwealth**, 496 Pa. 239, 436 A.2d 987 (1981), the Pennsylvania Supreme Court noted that the practices of the industry are equally a part of the collective bargaining agreement although not expressed in it. **Id.** at 243, 436 A.2d at 989 (quoting **United Steelworkers of America v. Warrior & Gulf Navigation Co.**, 363 U.S. 574, 581-82, 80 S. Ct. 1347, 1352, 4 L. Ed. 2d 1409 (1960)).

¹⁰ See **Greater Nanticoke Area School District v. Greater Nanticoke Area Educ. Ass'n**, 760 A.2d 1214 (Pa. Commw. 2000) (holding that notwithstanding the common meaning of the term "furlough" as being an impermanent separation or layoff, a review of the negotiation history of the parties revealed that the parties intended this term to mean any action adversely affecting employment status, including a reduction in status from full to part-time, normally termed a demotion).

¹¹ In **Barrett v. Otis Elevator Co.**, 431 Pa. 446, 452-53, 246 A.2d 668, 672 (1968) the Court stated: "If the existence or non-existence of a fact can be demonstrated by one party to a controversy much more easily than by the other party, the burden of proof may be placed on that party who can discharge it most easily." Given the number and type of potential accrediting agencies, to impose on the School District the burden of disproving any accreditation appears particularly onerous in light of the relative ease of proving the contrary proposition: accreditation by any single agency.

tion, 747 A.2d 971 (Pa. Commw. 2000) (finding that an arbitrator's award which improperly singled out and interpreted one provision of a collective bargaining agreement to the exclusion of others, rendering the latter meaningless, did not draw its essence from the collective bargaining agreement particularly when viewed in the light of relevant provisions of the Public School Code and Act 195). Notwithstanding this lapse, given the broad deference afforded an arbitrator's award and the underlying presumption that the arbitrator is to judge the dispute, not the court (**Cheyney**, 743 A.2d at 413), we cannot say that the arbitrator's ultimate decision does not logically flow from, or has no foundation in, the collective bargaining agreement.

In **Danville**, at issue was the meaning of the phrase "years of service in public education" for determining eligibility for enhanced retirement benefits pursuant to a collective bargaining agreement. The school district argued that the phrase meant actual years of service, *i.e.*, time actually worked; the teacher argued that years of service should be calculated in accordance with the provisions of the Retirement Code (**e.g.**, 24 P.S. §8302), a computation which includes, **inter alia**, credited leaves of absence for military service and maternity leave. The arbitrator found the term to be ambiguous.

In resolving this ambiguity, the arbitrator looked to two previous computations of credited service made by the school district. Although both were argued by the district to have been neither typical nor authorized by the school board, they had been approved by its superintendent. In reversing the Commonwealth Court and upholding the arbitrator's decision, the Supreme Court found that because the superintendent of the school district, the school board's primary agent, authorized the increased retirement payments; because the school district presented no evidence of a situation where it refused to recognize years of service as computed by the Retirement Code and denied the teacher benefits; and because it was the decision of the arbitrator, not the court, whether or not to accept the district's argument, the arbitrator's award was rationally derived from the collective bargaining agreement and satisfied the essence test.

Similarly, in this case, (1) the District's Superintendent repeatedly approved without apparent question the grievants' attendance at Kennedy-Western over a one and a half year pe-

riod—even though the Superintendent knew, or should have known, from the information the grievants provided that Kennedy-Western was licensed by the State of Wyoming; (2) the record contains an oblique reference in a July 14, 2004 letter from the Board's Secretary to the Pennsylvania Department of Education that three members of the School's staff had recently received doctorates from Kennedy-Western, yet no further mention is made of who the third person was, when or how his approval to attend Kennedy-Western was obtained, and what steps had been taken, if any, by the School District with respect to his degree (see Exhibit D-12); (3) the District presented no evidence of past practices to the contrary; and (4) the arbitrator, while considering the District's contention that accreditation meant only accreditation as recognized by the Pennsylvania Department of Education, rejected this contention on the basis of the evidence received. Under these circumstances, we cannot find that the arbitrator did not have a rational basis to believe either that the District had waived the requirement for accreditation or was interpreting it broadly and inclusive of a university which was state licensed.¹²

B. Estoppel As Basis of Arbitrator's Decision

The second reason given by the arbitrator for her decision was estoppel, that the grievants acted reasonably and in good faith to their detriment in relying upon the Superintendent's approval of their attendance at Kennedy-Western.¹³ Factually

¹² In addition to the evidence cited in the text, the arbitrator was further entitled to consider the Superintendent's memo concerning graduate approvals and credit reimbursements addressed to the School's professional staff, dated August 30, 2004, in which the only requirement mentioned to receive reimbursement for graduate courses was prior approval by the Superintendent. See Exhibit J-2. This memo makes no mention of the requirement of accreditation and states that the requirement of receiving the Superintendent's approval has been the policy of the School District for years and has not changed.

The arbitrator was further entitled to take into account that the grievants had already received reimbursement for their educational costs and been placed in the doctoral category on the School's salary schedule for a protracted period—in the case of Bickel, for one and one half years, and in the case of Nietz, for six months—before the School Board took any action to reverse what its Superintendent had approved.

¹³ The arbitrator specifically found from the documentary evidence presented by the School District that the grievants complied fully with the requirements of both the 1997-2002 and 2002-2005 Collective Bargaining Agreements, that they hid nothing from the School District, and that no evidence of record existed to

and legally this conclusion by the arbitrator appears sound, with one caveat: does a finding of estoppel meet the second prong of the essence test.¹⁴

On its face, the answer appears to be no. Estoppel by its very nature relies on conduct outside of the contract. Moreover, an arbitrator's jurisdiction in an Act 195 grievance arbitration is confined to the interpretation and application of the collective bargaining agreement.

This in fact was the rationale applied by the Commonwealth Court in **Commonwealth v. Association of Pennsylvania State College and University Faculties**, 46 Pa. Commw. 608, 407 A.2d 89 (1979), in holding that the arbitrator exceeded his authority when his award was based on the common-law theory of promissory estoppel. "When an arbitrator relies not upon the collective bargaining agreement to support an award but upon

reasonably support a belief that they knew what accreditation standards were required, or that the accreditation of Kennedy-Western was even in question. According to the arbitrator's decision, while both the District's Superintendent and the grievants were present at the arbitration hearing, none of these individuals testified, much less was questioned, regarding their knowledge of the accreditation standards of the District, the accreditation status of Kennedy-Western, or how or why this institution was selected by the grievants to obtain their degrees.

¹⁴ Ordinarily, a reviewing court may not raise issues that were not raised by the parties and which have, in consequence, been waived. **Danville Area School District v. Danville Area Educ. Ass'n**, 562 Pa. 238, 754 A.2d 1255, 1259-1260 (2000). An exception exists, however, with respect to questions of subject matter jurisdiction which are never waived and which should be raised by the court **sua sponte** to vindicate the integrity of judicial and quasi-judicial processes in the Commonwealth. **Fayette County Board of Commissioners v. AFSCME Council**, 692 A.2d 274, 278 (Pa. Commw. 1997) (Flaherty, J., concurring and dissenting), **appeal denied**, 722 A.2d 1058 (Pa. 1998).

An arbitrator exceeds his authority when he decides a dispute over which he had no jurisdiction, or grants an award which is prohibited by law. **Commonwealth v. Ass'n of Pennsylvania State College and University Faculties, supra** at 613, 407 A.2d at 91 (DiSalle, J., dissenting). An arbitrator further exceeds his authority when he addresses an issue not submitted by the parties. **Philadelphia Housing Auth. v. Fraternal Order of Housing Police**, 811 A.2d 625, 630 n.10 (Pa. Commw. 2002), **appeal denied**, 839 A.2d 354 (Pa. 2003). Section 7314 (a)(1) of the Uniform Arbitration Act, 42 Pa. C.S.A. §7314(a)(1), further provides that a court shall vacate an award where "(iii) the arbitrators exceeded their powers . . .".

In accordance with the foregoing, as well as the Supreme Court's decision in **Cheyney** which requires that a reviewing court address both prongs of the essence test, 743 A.2d at 413, we believe it appropriate to address this issue.

the **Restatement of Contracts**, it is apparent that he has exceeded his authority.” ***Id.*** at 610, 407 A.2d at 90.

Significantly, **Association of Pennsylvania State College and University Faculties** was reversed on appeal by our Supreme Court, the Court stating that “[t]he Commonwealth Court majority erroneously assumed that a collective bargaining agreement consists of only the writing signed by the parties.” **Association of Pennsylvania State College and University Faculties v. Commonwealth**, 496 Pa. 239, 242, 436 A.2d 987, 988 (1981). The Court went on to explain that in addition to the express language of the collective bargaining agreement, the arbitrator may examine the circumstances surrounding its execution, the full context of the agreement, and any other indicia of the parties’ intentions.

In language relevant to these proceedings, the Supreme Court wrote:

Here, the arbitrator stated in his opinion that although he could not find a basis for the award in the express terms of a writing, he did find such support in the actions and promises of the college administration. Thus, the arbitrator simply determined that the promises fall well within the collective bargaining agreement and that the promises are properly enforceable. Therefore, the arbitrator’s award is derived from a reasonable interpretation of the collective bargaining agreement and must be sustained.

Id. at 243-44, 436 A.2d at 989 (citations and footnote omitted). Likewise, the arbitrator here appears to have found that because the Superintendent’s assurances and approvals were authorized by the collective bargaining agreement, that these assurances were properly enforceable and arose out of the collective bargaining agreement.

CONCLUSION

In accordance with the foregoing, although we might have found differently in the first instance, in light of the information properly considered by the arbitrator and that which appears of record, as well as the strong deference to which an arbitrator’s decision is entitled, we cannot say that the arbitrator acted irrationally. We are therefore constrained to affirm the arbitrator’s award.

ORDER OF COURT

AND NOW, this 2nd day of August, 2006, the Petition for Review and Application to Vacate Arbitrator's Award filed by the Jim Thorpe Area School District is denied and the decision of the arbitrator dated February 19, 2006, is hereby affirmed.

KEVIN B. ANDREW, Plaintiff vs. JODI J. ANDREW, Defendant

*Civil Law—Divorce—Master’s Report—Exceptions—Waiver—
Inherent Authority of Court to Modify Master’s Recommendations*

1. Pursuant to Pa. R.C.P. 1920.55-2(b), exceptions to a master's report must be filed within ten days of the mailing date of the report and the master's recommendations to the parties.
2. Exceptions filed more than ten days after the mailing of the master's report, but within ten days of an incorrectly stated future filing date for the report, are untimely.
3. Although alleged error, which is the subject of untimely exceptions, is waived, in reviewing the master's recommendations, the trial court has an independent responsibility to review the record of the proceedings before the master and to ensure a fair and just determination and settlement of the parties' property rights. With this responsibility is the concomitant power of the court to alter the master's recommendations, even though no exceptions have been filed by any of the parties.

NO. 00-2415

MICHAEL D. MUFFLEY, Esquire—Counsel for Plaintiff.

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

MEMORANDUM OPINION

NANOVIC, P.J.—August 17, 2006

BACKGROUND

In these divorce proceedings, the Defendant, Jodi J. Andrew (“Wife”), seeks to strike, as untimely, the Plaintiff's, Kevin B. Andrew's (“Husband's”), exceptions to the Master's Report and Recommendation (hereinafter the “Report”) in divorce. This Report was filed with the court on December 22, 2005, however, notice of the filing of the Report, accompanied by a copy of the Report and a proposed decree, was not mailed until December 30, 2005. In this notice addressed to the parties, the Master mistakenly advised that the Report would be filed on January 3, 2006. The notice separately advised that exceptions to the Report must be filed within ten days of the mailing date

of the notice. This date was disclosed and certified in the notice as being on December 30, 2005.

Husband filed exceptions to the Report on January 12, 2006, more than ten days after the mailing of the Report but within ten days of the filing date incorrectly recited in the Master's notice. A hearing on Wife's Petition to Strike the exceptions was held on March 23, 2006. At this time, Husband testified that the Master's Report was received by him on January 4, 2006, together with the Master's notice of filing and a proposed divorce decree, and that the Master's Report bore the Prothonotary's time stamp of January 3, 2006.

At the time of the hearing, Husband also testified that after he received the Master's Report he telephoned the Prothonotary's office and was advised that the ten-day period to file exceptions began with the date of filing. Husband further testified that the person he spoke with confirmed that the Report was in fact filed on January 3, 2006.

Husband did not identify whom he spoke with in the Prothonotary's office, however, to further investigate Husband's claim, at Wife's request, the hearing record was kept open. On May 26, 2006, the parties filed a stipulation in which it was agreed that with the exception of one clerk in the Prothonotary's office who could not recall whether she had spoken with Husband, none of the others had.

DISCUSSION

Rule 1920.55-2(a) provides, in pertinent part, that in contested actions the master shall file the record and his report within thirty days after his receipt of the hearing transcript and shall

immediately serve upon counsel for each party, or, if unrepresented, upon the party, a copy of the report and recommendation and written notice of the right to file exceptions.

Pa. R.C.P. 1920.55-2(a)(2). Rule 1920.55-2(b) further provides that

within ten days of the mailing of the master's report and recommendation, any party may file exceptions to the report or any part thereof. ... Matters not covered by exceptions are deemed waived unless, prior to entry of the final

decree, leave is granted to file exceptions raising those matters.

Pa. R.C.P. 1920.55-2(b).

On the basis of the foregoing, we must determine whether cause exists to justify the late filing of Husband's exceptions more than ten days after the mailing of the Report. As a general rule, an appeal **nunc pro tunc** will be granted in civil matters only where the appeal was untimely filed due to "fraud or some breakdown in the court's operation through a default of its officers," **Nagy v. Best Home Services, Inc.**, 829 A.2d 1166, 1167 (Pa. Super. 2003), or as the result of non-negligent circumstances as they relate to either the appellant or his counsel. **McKeown v. Bailey**, 731 A.2d 628, 630 (Pa. Super. 1999).

While the Master's Report was not promptly served on the parties following its actual filing on December 22, 2005, as required by Rule 1920.55-2(a)(2), this delay caused no prejudice to either party. Nor did the incorrect statement of the prospective filing date contained in the Master's notice. That notice correctly advised Husband that exceptions must be filed within ten days of the mailing date of the notice, not within ten days of the filing date of the Report.

However, the purported representations of the Prothonotary's office is another matter. These representations, if made and if reasonably relied upon by Husband, would clearly excuse the late filing of Husband's exceptions. Cf. **Monroe County Board of Assessment Appeals v. Miller**, 131 Pa. Commw. 538, 570 A.2d 1386 (1990) (holding that a taxpayer who was unintentionally misled by county assessment board's erroneous advice should be permitted to file a **nunc pro tunc** tax assessment appeal). In this context it is appropriate to note that the late filing of exceptions, though often resulting in waiver, is qualitatively different from an untimely appeal which implicates a jurisdictional appeal period.

On this critical aspect of Husband's argument—the veracity of the representations Husband attributes to the Prothonotary's office—we do not find Husband to be credible. The docket entries which were placed into evidence at the hearing on Wife's Petition evidence no separate mailings of the Master's Report or the Master's notice to the parties by the Prothonotary's office. From this it rationally follows that the copies of the Master's

Report, Master's notice and proposed decree received by the Husband on January 4, 2006, were those mailed by the Master on December 30, 2005. Consequently, contrary to the Husband's testimony, none of the documents Husband received on January 4, 2006, could have contained a January 3, 2006, time stamp from the Prothonotary's office. Instead, assuming the Prothonotary's time stamp existed on any of the documents sent by the Master, the only logical date which would appear would be that of December 22, 2005, the filing date of the Master's Report, a date even further removed from the filing date of Husband's exceptions.

Significantly, Husband never produced a copy of the time-stamped report he allegedly received nor explained why he couldn't. Nor did Husband verify or substantiate his claim of the January 3, 2006 filing date of the Report with the testimony of any personnel from the Prothonotary's office, testimony which appears unlikely given that the only document filed on January 3, 2006, as reflected in the Prothonotary's records, was the filing of the Master's notice of the filing of his Report.

In contrast to Husband's claimed confusion as to when his exceptions were due, the written notice Husband acknowledges having received from the Master clearly states, in bold print, that exceptions must be filed within ten days from the date of mailing of the notice. Although we recognize that Husband was acting **pro se** at the time he received this notice, "any layperson choosing to represent himself in a legal proceeding must, to some reasonable extent, assume the risk that his lack of expertise and legal training will prove his undoing." **Branch Banking and Trust v. Gesiorski**, 904 A.2d 939, 942 (Pa. Super. 2006) (**quoting Commonwealth v. Rivera**, 454 Pa. Super. 451, 455-56, 685 A.2d 1011, 1013 (1996)).

CONCLUSION

In accordance with the foregoing, Husband's exceptions will be dismissed as untimely. This decision, however, should not be construed to imply that the Master's recommendation will automatically be accepted without change. Although, having heard and observed the testimony and demeanor of the witnesses, the Master's credibility determinations are entitled to considerable weight, as the trial court, we have an independent responsibility to review the record of the proceedings before the Master

and to ensure “a fair and just determination and settlement of [the parties’] property rights.” 23 Pa. C.S.A. §3102(a)(6). With this responsibility is the concomitant power to alter the Master’s recommendations even though no exceptions have been filed by any of the parties. **Morschhauser v. Morschhauser**, 357 Pa. Super. 339, 349, 516 A.2d 10, 15 (1986). Ultimately, it is our decision, not that of the Master, which directs the making of equitable distribution. **Id.**

ORDER

AND NOW, this day of August, 2006, upon consideration of the Defendant’s Petition to Strike the Plaintiff’s exceptions to the Master’s Report, review of the Plaintiff’s answer thereto, and after hearing thereon, and in accordance with our Memorandum Opinion of this same date, it is hereby

ORDERED and DECREED that the Plaintiff’s exceptions to the Master’s Report filed on January 12, 2006 are hereby dismissed as untimely.

COMMONWEALTH OF PENNSYLVANIA vs. NESTOR ECHEVARRIA, Defendant

*Criminal Law—Sentencing—Restitution—Plea Agreement—Waiver—
Requisite Nexus—Effect on Sentencing Scheme*

1. A challenge to the amount of restitution ordered, in contrast to a challenge to the court’s authority to award any restitution, is a challenge involving a discretionary aspect of sentencing. As such, because a guilty plea 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 defendant who both in a negotiated plea agreement and during sentencing pursuant to that agreement agrees to the payment of restitution—both of which are relied upon by the court in its sentence—waives the right to challenge the amount of restitution ordered.
2. Restitution, when awarded as part of a direct sentence, is limited to damages which are a direct result of the crime committed by the defendant, that is, to damages which would not have resulted “but-for” the defendant’s criminal conduct.
3. A defendant convicted of the theft of a motor vehicle is responsible to make restitution for the value of those contents of the vehicle which are discovered missing when the vehicle is recovered.
4. When restitution is an integral part of sentence, a determination that restitution was improperly ordered requires a remand for resentencing, rather than simply vacating that portion of the sentence pertaining to restitution and permitting the remainder of the sentence to stand.

NO. 066 CR 2006

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

BRIAN B. GAZO, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—August 3, 2006

BACKGROUND

On November 9, 2005, the Defendant, Nestor Echevarria, and his girlfriend, Tori Fisher, stole a sport utility vehicle owned by Shawn Boger. In consequence, the Defendant was charged with various offenses including theft by unlawful taking graded as a felony of the third degree.¹

Pursuant to a stipulated plea agreement reached on March 7, 2006, the Defendant agreed to plead guilty to this theft charge and to make restitution on a pro rata basis with his co-defendant, Tori Fisher. The matter came before the Court on May 16, 2006. Following his plea and during sentencing on the same date, an issue arose regarding whether any restitution was in fact owed and, if so, the amount. Specifically, a victim impact statement was presented in which it was claimed that contents of the vehicle having a value of \$3,900.00 were taken.² No damage was done to the vehicle itself.

The Defendant denied that he had taken any of the missing items and argued that none of the criminal charges filed against him included a reference to these items. The Commonwealth countered that the recommendation of a minimum range sentence was premised on the Defendant making restitution and, if he did not agree to restitution, the recommendation would be withdrawn (N.T., pp. 25-26). At this point, the Defendant through his counsel, advised the Court that rather than have the Commonwealth's recommendation withdrawn, the Defendant was "willing to pay whatever restitution your Honor feels

¹ 18 Pa. C.S.A. §3921(a).

² The victim impact statement was presented to the District Attorney who in turn recommended restitution in this amount to the Court. See 18 Pa. C.S.A. §1106(c)(4)(i) (providing that the district attorney, based upon information received from the victim, shall make a recommendation of restitution to the Court at or prior to the time of sentencing). The items claimed missing were a male wedding ring, \$500.00 in cash located in an envelope in the glove compartment, twenty CDs, a suitcase of clothes, and cologne in the center console (N.T., p. 23).

is necessary." (N.T., p. 26) On this basis, the Court proceeded with sentencing and sentenced the Defendant to a sentence of not less than eight months nor more than one day less two years in prison and ordered restitution in the amount of \$1,950.00, one-half of the \$3,900.00 figure claimed.³

Subsequently, on May 23, 2006, the Defendant filed a timely motion for reconsideration arguing that he did not want the Court to reconsider the length of his sentence, but that he disagreed with the amount of restitution awarded (Motion to Reconsider, ¶3). By Order dated May 24, 2006, the Court denied the motion since "part of the reason for the length of sentence was Defendant's agreement at the time of sentencing to accept responsibility for restitution which Defendant now wants to challenge."

Defendant filed his appeal from the May 16, 2006 judgment of sentence and the denial of his post-sentence motion to the Superior Court on June 16, 2006. In response to the Court's Rule 1925(b) Order, the Defendant has identified the following two issues for appeal:

1. Whether the Trial Court erred in refusing to reconsider the restitution amount ordered after the Defendant/Appellant asserted at the time of sentencing that he was disputing the amount which the Commonwealth calculated based upon the victim's assertion that several valuable items were removed from the vehicle during its theft, despite the fact that Defendant/Appellant was not charged with nor was the removal of any such items ever mentioned in either the affidavit of probable cause or criminal information.

2. Whether the Defendant/Appellant's reluctant agreement to accept the restitution figure made only upon the Commonwealth's threat to withdraw its plea offer if Defendant/Appellant did not agree to the amount of restitution presented at the sentencing proceeding amounted to a waiver of Defendant/Appellant's right to request a hearing on the restitution amount.

This opinion, in accordance with Pa. R.A.P. 1925(a), explains the reasons for the sentence.

³ The standard range indicated under the Sentencing Guidelines was six to sixteen months.

DISCUSSION

Initially, we believe the two issues Defendant has identified for appeal have been waived. “It 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.” **Commonwealth v. Dalberto**, 436 Pa. Super. 391, 395, 648 A.2d 16, 18 (1994), **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) (citations omitted) (emphasis in original). Moreover, where a defendant enters into a negotiated guilty plea that is accepted by the sentencing court, he waives any challenge to the discretionary aspects of his sentence, as opposed to its legality. **Commonwealth v. Reichle**, 404 Pa. Super. 1, 589 A.2d 1140 (1991). Here, as evidenced by Defendant’s 1925(b) Statement, the only issue Defendant intends to present on appeal is the amount of restitution claimed due by the Commonwealth, a matter clearly within the Court’s discretion. **In the Interest of M.W.**, 555 Pa. 505, 725 A.2d 729, 731 n.4 (1999) (distinguishing between challenges to the trial court’s authority to impose restitution, a challenge addressed to the legality of the sentence, and those claiming that the restitution order is excessive, a challenge involving a discretionary aspect of sentencing).

Prior to advising the Court that he was willing to pay whatever restitution the Court felt was appropriate rather than risk having a greater period of imprisonment imposed, the Defendant was advised of the basis and the amount of restitution claimed—missing contents from the stolen vehicle having a value of \$3,900.00, that the Court believed the Defendant could be held responsible for restitution for these items even though he had not been charged directly with their theft, that it would be appropriate for restitution to be awarded pro rata, and that the Commonwealth would be withdrawing its recommendation for leniency if he did not accept responsibility for the restitution claimed. Only after the Defendant advised the Court that he was willing to proceed with sentencing and to accept responsibility for restitution did the Court, acting in reliance upon Defendant’s representations, impose a sentence in accordance with the parties’ plea agreement.

As importantly, notwithstanding Defendant's assertion that he should not be held responsible for restitution for contents removed from the victim's vehicle since he was never charged with theft of such items, nor were such items mentioned in the affidavit of probable cause or criminal information, the fact remains that the negotiated plea agreement entered by Defendant and the Commonwealth provided for the Defendant to make restitution. Further, to be valid, restitution as part of a direct sentence under Section 1106(a) of the Crimes Code, 18 Pa. C.S.A. §1106(a), requires only that "a victim's loss be caused directly by a defendant's criminal conduct rather than a loss consequential to such conduct," **Commonwealth v. Langston**, 2006 WL 1977505 ¶16 (Pa. Super. 2006), not that he be specifically charged with theft of each separate item taken.⁴

In determining Defendant's responsibility for restitution, the test is not necessarily what charges were brought against the Defendant but whether "but-for" Defendant's criminal conduct with which he was charged and convicted the damages would have occurred. "To determine the correct amount of restitution, a 'but-for' test is used—damages which occur as a direct result of the crime are those which should not have occurred but for the defendant's criminal conduct." **Commonwealth v. Gerulis**, 420 Pa. Super. 266, 288, 616 A.2d 686, 697 (1992), **appeal denied**, 535 Pa. 645, 633 A.2d 150 (1993).

A defendant is criminally responsible for losses causally connected to the crime he commits. The loss must flow "from the conduct which forms the basis of the crime for which a defendant is held criminally accountable." **Commonwealth v. Harner**, 533 Pa. 14, 21, 617 A.2d 702, 706 (1992). In this case, defendant stole the victim's car and it was the contents of that car which were missing upon its return. Under these circumstances, we believe it accurate to state that "but-for"

⁴ Section 1106(a) provides:

Restitution for injuries to person or property

(a) General rule.—Upon conviction for any crime wherein property has been stolen, converted or otherwise unlawfully obtained, or its value substantially decreased as a direct result of the crime, or wherein the victim suffered personal injury directly resulting from the crime, the offender shall be sentenced to make restitution in addition to the punishment prescribed therefor.

18 Pa. C.S.A. §1106(a).

Defendant's theft of the car, the contents would not have been removed. **Cf. In the Interest of Dublinski**, 695 A.2d 827, 830 (Pa. Super. 1997) (stating that where a defendant convicted of burglary and criminal trespass assists others in gaining unauthorized entry into a home where theft and vandalism occur, notwithstanding the apparent inability of the Court to attribute specific damages to the conduct of each separate participant involved, by assisting the others in gaining entry the defendant may well bear the entire responsibility for all damages sustained by the victim).

Finally, it should be noted that in the event Defendant is successful in his challenge, it would be inappropriate to simply vacate that portion of the sentence pertaining to restitution and permit the remainder of the sentence to stand. We believe it clear from the record that the Commonwealth's recommendation for leniency was premised upon restitution being made and that the Court's abiding by that recommendation was similarly made on the basis that restitution be imposed as a constructive alternative to further imprisonment.⁵ Ultimately, if the Defendant is correct in his assertion that an illegal direct sentence of restitution was ordered, the entire sentencing scheme would be affected by the relief Defendant requests which necessarily would open the entire sentence for review. **Commonwealth v. Deshong**, 850 A.2d 712, 714 (Pa. Super. 2004) ("When a disposition by an appellate court alters the sentencing scheme, the entire sentence should be vacated and the matter remanded for resentencing.").

CONCLUSION

In accordance with the foregoing, it is respectfully requested that the judgment of sentence be affirmed and Defendant's appeal denied.

⁵ An award of restitution "should be encouraged as both an aid in assisting the defendant's rehabilitation and as an aid in compensating the victim." **Commonwealth v. Balisteri**, 329 Pa. Super. 148, 155, 478 A.2d 5, 9 (1984).

**COMMONWEALTH OF PENNSYLVANIA vs.
DEWEY BOYD POWELL, Defendant**

*Criminal Law—Notice of Appeal—Quashed for Untimeliness As
Distinguished From a PCRA Petition*

1. A notice of appeal filed more than thirty days after the entry of judgment of sentence, when no written post-sentence motion has been filed, is untimely and should be quashed.
2. All issues, except those pertaining to the legality of sentence, the court's jurisdiction or the validity of the plea, are waived by the entry of a guilty plea, including those asserting a violation of Rule 600 or the Sixth Amendment guarantee of a fair and speedy trial.
3. An untimely notice of appeal which requests direct review of criminal proceedings is not the equivalent of a petition for post-conviction relief under the Post-Conviction Relief Act ("PCRA").
4. Moreover, the PCRA does not provide relief to a criminal defendant who has, or will have, fully served his sentence prior to any final adjudication in a post-conviction collateral proceeding.

NO. 136 CR 04

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

DEWEY BOYD POWELL—Pro se.

MEMORANDUM OPINION

NANOVIC, P.J.—September 7, 2006

On October 3, 2005, the above-named Defendant filed a motion to dismiss pursuant to Pa. R.Crim.P. 600. This motion was denied by Order dated October 4, 2005, from which Defendant filed an appeal to the Superior Court on July 31, 2006. That appeal has, in turn, necessitated this opinion. **See** Pa. R.A.P. 1925(a).

Although we believe the decision denying Defendant's Rule 600 Motion, for reasons which were then stated of record, was appropriate, we further believe, for the reasons which follow, that Defendant's **pro se** direct appeal is untimely and frivolous and does not warrant a discussion of the merits or a further diversion of valuable judicial time.¹

On the same date that we denied Defendant's motion to dismiss, Defendant, who was then represented by counsel, en-

¹ The record reflects Defendant's past conduct in filing dilatory, non-meritorious interlocutory appellate proceedings. **See e.g.**, Superior Court Memorandum Opinion dated January 6, 2005, p.2 ("Moreover, to the extent that Appellant seeks to assert a double jeopardy claim, it is frivolous since there has never been a trial in this matter.").

tered a **nolo contendere** plea to simple assault and was immediately sentenced to a county term of imprisonment for a period of not less than one year less one day nor more than two years less one day from the date of October 4, 2005, with credit for 385 days previously served. Defendant's appeal which is now before the Superior Court was filed almost ten months after his final judgment of sentence and will, as appears from the record, have been fully served in less than ten days.

We are unaware of any circumstances, and Defendant has asserted none, which would excuse Defendant's failure to file a timely notice of appeal within thirty days after the entry of his judgment of sentence where, as here, no written post-sentence motion was filed. **Commonwealth v. Green**, 862 A.2d 613, 618 (Pa. Super. 2004), **appeal denied**, 882 A.2d 477 (Pa. 2005). Moreover, by entering a plea, the Defendant waived the right to raise the issues he now seeks to have reviewed on appeal.² **Commonwealth v. Alexander**, 811 A.2d 1064, 1065 (Pa. Super. 2002), **appeal denied**, 822 A.2d 703 (Pa. 2003).

In accordance with the foregoing, we respectfully request that Defendant's appeal be quashed as untimely or, in the alternative, that the appeal be denied, the issues Defendant seeks to raise having been waived.³

² In Defendant's Notice of Appeal he identifies four numbered issues which he seeks to have reviewed. See Notice of Appeal, p.2. Each of the issues Defendant raises focus on the timeliness of prosecution, whether as being in violation of Rule 600 or the Sixth Amendment guarantee of a fair and speedy trial. At no point does the Defendant assert his innocence or allege a basis for non-waiver.

³ Although, as a direct appeal, Defendant's appeal is clearly untimely, we do not believe this delay merits consideration of Defendant's Notice of Appeal as a post-conviction petition subject to the Post Conviction Relief Act. The Post Conviction Relief Act (PCRA), 42 Pa. C.S.A. §§9541-9546, requires post-conviction collateral proceedings which request relief available under the Act to proceed in accordance with that statute. **Commonwealth v. Deaner**, 779 A.2d 578, 580 (Pa. Super. 2001). We are also aware that claims of ineffectiveness of counsel for failure to protect the record regarding a defendant's rights under the Rules of Criminal Procedure, including Rule 600, and for failing to file a direct appeal, when requested to do so by the defendant, are cognizable under the Act. **Commonwealth v. Prout**, 814 A.2d 693 (Pa. Super. 2002) (holding that a defendant's Rule 600 claim is cognizable under the PCRA); **Commonwealth v. Grosella**, 902 A.2d 1290, 1293 (Pa. Super. 2006) (discussing that an attorney's failure to file a requested direct appeal denies the accused the effective assistance of counsel and entitles him to reinstatement of his direct appellate rights).

This notwithstanding, Defendant's challenge to his conviction in these proceedings is in the form and nature of a direct appeal. Unlike the filing of a PCRA

petition, the filing of a notice of appeal does not authorize the trial court to take testimony or to set aside a fundamentally unfair conviction or an illegal sentence. Instead, as the quintessential mechanism for direct review, the filing of a notice of appeal triggers our responsibility to explain the propriety of a defendant's conviction for further review at the appellate level. *Cf. Commonwealth v. Hutchins*, 760 A.2d 50 (Pa. Super. 2000) (treating the time period within which to file a timely PCRA petition as unaffected by the untimely filing of a *pro se* petition for allowance of appeal seeking direct review with the Pennsylvania Supreme Court). Here, the Superior Court has in fact assumed review of Defendant's appeal and directed the transmittal of the original record to that Court.

Also, in contrast to a direct appeal from a conviction, the defendant in a PCRA proceeding "bears the burden of proving, by a preponderance of the evidence, that his conviction or sentence resulted from one or more of the PCRA's specifically enumerated errors and that the error has not been waived or previously litigated." *Commonwealth v. Haag*, 570 Pa. 289, 809 A.2d 271, 284 (2002), *cert. denied*, 539 U.S. 918, 123 S.Ct. 2277, 156 L.Ed. 2d 136 (2003). Defendant has not claimed his counsel was ineffective and has failed to identify any of the other bases for error enumerated in the PCRA. Nor does it appear that Defendant would be eligible for relief under the PCRA since Defendant will have completed his sentence prior to any final adjudication in a post-conviction collateral proceeding. 42 Pa. C.S.A. §9543 (a)(1); *see also, Commonwealth v. Ahlborn*, 548 Pa. 544, 699 A.2d 718 (1997).

COMMONWEALTH OF PENNSYLVANIA vs. WILLIAM B. EICHELE, Defendant

*Criminal Law—Post Conviction Relief Act (PCRA)—Timely Petition—
Jurisdictional Prerequisite—Exceptions—Constitutional Change*

1. Under the PCRA, a petition invoking the trial court's jurisdiction must be filed within one year of the date the judgment of sentence becomes final.
2. Absent the applicability of at least one of three statutory exceptions, if a PCRA petition is untimely filed, the court lacks jurisdiction to address the claims contained therein.
3. The constitutional change exception to the PCRA's one-year filing deadline requires a petition for collateral relief to plead and prove the existence of a "new" constitutional right that "has been held" by either the United States or the Pennsylvania Supreme Court to apply retroactively.
4. Defendant is not entitled to post-conviction review of an untimely petition based on the United States Supreme Court's holding in *Holmes v. South Carolina*, ___ U.S. ___, 126 S.Ct. 1727, 164 L.Ed. 2d 503 (2006). The Court in *Holmes* did not announce a new constitutional right nor did the Court hold its decision to be applicable retroactively to cases on collateral review.

NO. 331 CR 1993

WILLIAM E. McDONALD, Esquire, Assistant District Attorney—Counsel for Commonwealth.

WILLIAM B. EICHELE—Pro se.

MEMORANDUM OPINION

NANOVIC, P.J.—December 4, 2006

PROCEDURAL HISTORY

Before us is Defendant's, William B. Eichele's, third petition under the Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. §§9541-9546.

On January 20, 1994, Defendant was convicted by a jury of third-degree murder, aggravated assault and reckless endangerment.¹ His sentence of ten to twenty years on the murder charge, consecutive to an existing sentence in New Jersey, with the remaining charges merging, was upheld on direct appeal. The Pennsylvania Supreme Court denied Defendant's petition for allowance of appeal on October 3, 1995.

Defendant's first PCRA petition, filed on December 24, 2001, was dismissed on December 31, 2002. That dismissal was affirmed by the Pennsylvania Superior Court on September 25, 2003. Defendant's second PCRA petition, filed on May 17, 2004, was dismissed on November 15, 2004. No appeal was taken. This, Defendant's third PCRA petition, was filed on June 30, 2006.²

FACTUAL BACKGROUND

On May 2, 1990, the bound and beaten body of Judith Dashev was discovered lying in a ditch along a rural road in Broome County, New York.³ Ms. Dashev had been killed sometime within the previous forty-eight hours by asphyxiation—her head was wrapped in duct tape and vomit clogged her mouth, trachea, and the airways leading into her lungs—at the home of

¹ 18 Pa. C.S.A. §§2502(c), 2702(a)(1) and 2705, respectively. Defendant was also acquitted of one count of murder of the first degree, 18 Pa. C.S.A. §2502(a).

² Defendant's petition, though replete with allegations of erroneous evidentiary rulings by the trial court, raises no issues of material fact germane to the time requirement for filing a PCRA petition. Absent any genuine issues of material fact on this point, and it being otherwise clear that the petition is patently untimely, there is no need for a hearing. **Commonwealth v. Holmes**, 905 A.2d 507, 509 (Pa. Super. 2006). Further, since counsel was appointed to represent Defendant on his first petition and there is no need for a hearing on the instant proceeding, Defendant's request for the appointment of counsel is denied. Pa. R.Crim.P. 904(C) and (D).

³ Dashev's feet were bound with fourteen-gauge wire and a leather belt. Her hands and arms were bound behind her with a bathrobe-type sash and a black belt having no buckle.

Richard A. Haag, Jr. in Lake Harmony, Kidder Township, Carbon County, Pennsylvania.

On the basis of circumstantial evidence, Defendant was determined to be the killer. Defendant, while at first denying he was with Dashev, arrived at Haag's home with Dashev at approximately 10:00 P.M. on April 29, 1990, and stayed with her until the morning of May 1. Also present that weekend were Haag and his girlfriend, Deborah L. Otterson.

The police investigation revealed that at approximately 11:00 P.M. on the evening of Monday, April 30, 1990, Defendant and Dashev went downstairs together to play pool in the basement of Haag's home. At this same time, Haag and Otterson went upstairs to the master bedroom on the second floor. The following morning at approximately 9:00 A.M., Haag discovered Dashev's body lying on the floor of the bedroom Defendant and Dashev were sharing. This bedroom was one of two located at the end of a hallway on the first floor of the home. Dashev's wrists and ankles were bound together, and her head was enveloped with duct tape. Earlier that morning, Haag had asked Defendant to leave at Otterson's request. Otterson testified that Defendant and Dashev gave her an eerie feeling, that they kept to themselves in the bedroom, had little contact with her and Haag, and seldom left the bedroom to eat or drink.

At trial, Defendant maintained his innocence and asserted that Haag was the killer. Defendant testified that on the morning of May 1, 1990, he was confronted by Haag who sought Defendant's assistance to dispose of Dashev's body. According to Defendant, not knowing what to do and afraid Haag was capable of further violence, he feigned cooperation and, under the pretense of getting his car to transport Dashev's body, went outside and drove away.

It was after Defendant had already left that, according to Defendant, Haag, with the intent of shifting the blame to Defendant and as part of an elaborate charade put on for Otterson's benefit, pretended to discover Dashev's body. Rather than report Dashev's death to the police, Haag placed Dashev's body and her personal belongs in Otterson's car. When questioned about this by the defense, Otterson testified, without objection, that this was done because Haag told her he had been in trouble as a youth and was afraid the police would blame him (N.T., pp.

153-155). This latter statement Defendant now claims in his current petition was inadmissible hearsay. It is also not disputed that Haag was the one who disposed of Dashev's body in New York.

As to Haag's motive for killing Dashev, Defendant testified that Haag was operating a methamphetamine lab in his home and that he was paranoid that Dashev had learned of the lab and would report it to the police. A search warrant executed at the premises on June 1, 1990, found no evidence of murder but did uncover evidence of a drug lab. This latter evidence, Defendant contends, was improperly kept from the jury, as was evidence that several members of the New York State Police who investigated Dashev's homicide planted fingerprint evidence implicating the Defendant and purportedly destroyed footprint evidence favorable to the defense. Both rulings are also the subject of Defendant's present petition.⁴

Haag did not appear and could not be located for trial. However, Otterson testified that once Haag came to their bedroom on the evening of April 30, 1990, with the exception of a few minutes during the middle of the night, he remained there the entire evening and he did not leave. The exception occurred when Otterson heard a commotion in the kitchen and woke Haag to investigate. Otterson testified that she heard Haag go partway down the stairs and speak to Defendant, and that Haag then returned directly to their bedroom.

Otterson also testified that the morning of May 1, 1990, she was with Haag when he awoke, and that she saw him get out of bed and dress. Soon after, she overheard Haag outside telling Defendant that they wanted Defendant and Dashev to leave. It was shortly after this, when Haag was checking to see if Defendant and Dashev had left, that Otterson witnessed Haag's

⁴ In this regard, none of the officers who were implicated in falsifying evidence testified and none of the evidence which had been tainted was introduced by the prosecution. The defense admitted that it was unable to prove otherwise but sought to present this evidence to raise a cloud of doubt regarding the integrity of the entire investigation (N.T., pp. 447-453). This evidence was found by the trial court to have no bearing on the credibility of the Commonwealth's witnesses who actually testified and, therefore, was improper impeachment testimony (N.T., pp. 453-454). Likewise, the court, the Honorable John P. Lavelle presiding, found the defense's proffered evidence of a drug lab to be collateral and irrelevant to the proceedings (N.T., p. 473).

surprise when he opened the door to the bedroom Defendant had been sharing with Dashev and found Dashev's dead body: Haag was visibly shaken and began crying. Otterson further testified that soon after the body was discovered, several telephone calls were made to Haag's home by Defendant, and that the Defendant requested that both she and Haag leave the home for two hours. They did so, and when they returned, the home had been rummaged through; Defendant's clothes had been taken from the bedroom, but Dashev's remained; and Dashev's body had been placed in the bedroom closet.

DISCUSSION

The PCRA imposes specific time limitations on the filing of a petition. These limitations, unlike a statute of limitations, are a precondition to the court's jurisdiction to consider the merits of the petition. If the petition is untimely, the court lacks jurisdiction to address the claims contained therein. **Commonwealth v. Gamboa-Taylor**, 562 Pa. 70, 753 A.2d 780, 783 (2000).

As a starting point, petitions filed within one year of the date a defendant's judgment of sentence becomes final are timely. 42 Pa. C.S.A. §9545(b)(1). A judgment of sentence "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." 42 Pa. C.S.A. §9545(b)(3). For the merits of a petition filed beyond this date to be considered, the reasons for the delay in filing must fall within one of three statutory exceptions—for governmental misconduct, after-discovered evidence, or constitutional changes—and the petition must be filed within sixty days of the date the underlying claim could have been presented. **Commonwealth v. Gamboa-Taylor, supra**.

In this case, Defendant's 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. Sup. Ct. R. 13 (petition for **writ of certiorari** to review a judgment of sentence is deemed timely when filed within ninety days after discretionary review has been denied by the Pennsylvania Supreme Court). Therefore, since this was not Defendant's first petition, he had until January 2, 1997 to file a second or subsequent PCRA petition. **Commonwealth v. Wilson**, 2006 WL

3258579 n.3 (Pa. Super. 2006) (noting that with respect to judgments of sentence which became final prior to January 16, 1996, the effective date of the 1995 amendments to the PCRA, the PCRA provides, for first petitions only, a grace period of until January 16, 1997, to file the petition). The petition before us was filed more than nine years beyond this deadline, on June 30, 2006. On its face, the petition is untimely.

To invoke one of the PCRA's three statutory exceptions, the petitioner must allege and prove facts sufficient to meet the requirements of the exception. Here, Defendant relies upon the exception for newly recognized constitutional rights and claims that the rights which were violated were rights recently recognized by the United States Supreme Court in **Holmes v. South Carolina**, ___ U.S. ___, 126 S.Ct. 1727, 164 L.Ed. 2d 503 (2006), decided on May 1, 2006. The exception upon which Defendant relies provides:

§9545. Jurisdiction and proceedings

(b) Time for filing petition.—

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(i)

(ii)

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa. C.S.A. §9545(b)(1)(iii). Under this exception, an untimely petition may be considered when the petitioner asserts a retroactively applicable constitutional right that either the United States or the Pennsylvania Supreme Court recognized more than one year after the judgment of sentence became final.⁵

⁵ Since Defendant's present PCRA petition was filed within sixty days of the Supreme Court's decision, Defendant has satisfied the threshold for considering whether the after-recognized constitutional right exception to the PCRA time-bar applies. See 42 Pa. C.S.A. §9545(b)(2).

As is apparent from the foregoing statutory language, this exception requires either a change in the court's interpretation of an existing constitutional right or recognition of a new constitutional right. **Commonwealth v. Davis**, 816 A.2d 1129, 1135 (Pa. Super. 2003) (holding that the PCRA's time limitations are mandatory and to be interpreted literally), **appeal denied**, 839 A.2d 351 (Pa. 2003). **Holmes** represents neither. Instead, in **Holmes** the United States Supreme Court determined that the state courts' evidentiary rulings violated existing constitutional rights.

In **Holmes**, a criminal defendant was accused, *inter alia*, of the murder of an eighty-six-year-old woman in her home. In addition to eyewitness testimony placing the defendant near the home of the victim within an hour of the attack, the state's forensic evidence, if believed, was overwhelming: (1) the defendant's palm print was found inside the victim's home; (2) fibers consistent with a black sweatshirt owned by the defendant were found on the victim's bed sheets; (3) matching blue fibers were found on the victim's nightgown and on the defendant's blue jeans; (4) microscopically consistent fibers were found on the victim's nightgown and on the defendant's underwear; (5) defendant's underwear contained a mixture of DNA from two individuals, and 99.99% of the population other than the defendant and the victim were excluded as contributors to the mixtures; and (6) defendant's tank top was found to contain a mixture of defendant's blood and that of the victim. **Holmes, supra**, 126 S.Ct. at 1730.

In his defense, Holmes questioned the validity of the state's forensic evidence, claimed certain law enforcement officers were out to frame him, and throughout, maintained his innocence. Additionally, Holmes identified a specific third party as the perpetrator and sought to introduce evidence that this other person was in the victim's neighborhood on the morning of the assault. Holmes' evidence included testimony from four other witnesses that this third party either admitted to committing the crime himself or acknowledged that defendant was innocent. Holmes further professed testimony by one witness to prove that the state was soliciting perjured testimony against him and, by another, to refute the third party's alibi.

In examining the admissibility of evidence offered to prove third party guilt, the trial court in **Holmes** recited the traditional rule that such evidence is admissible if it “raises a reasonable inference or presumption as to the defendant’s own innocence but is not admissible if it merely casts a bare suspicion upon another or raises a conjectural inference as to the commission of the crime by another.” **Holmes, supra**, 126 S.Ct. at 1731 (quotation marks and brackets omitted). The South Carolina Supreme Court then expanded on this principle, holding that “where there is strong evidence of [a defendant’s] guilt, especially where there is strong forensic evidence, the proffered evidence about a third party’s alleged guilt does not raise a reasonable inference as to the [defendant’s] own innocence.” **Id.** Applying this standard, the state supreme court held that the trial court properly excluded Holmes’ evidence of third party guilt since he could not “overcome the forensic evidence against him to raise a reasonable inference of his own innocence.” **Id.**

Preliminarily, the United States Supreme Court noted that under the federal Constitution the States maintain broad discretion in formulating rules governing the admission of evidence in criminal trials and that “well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.” **Holmes, supra**, 126 S.Ct. at 1731-1732. This discretion, however, is not without limits and cannot impede a criminal defendant’s constitutional guarantee to “a meaningful opportunity to present a complete defense.” **Id.**, 126 S.Ct. at 1731 (citations and quotation marks omitted). Such right is abridged by evidentiary rules that “infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve.” **Id.** (citations and quotation marks omitted).⁶

Under this standard, the United States Supreme Court tacitly acknowledged that the traditional evidentiary proposition cited by the trial court was an appropriate exercise of the court’s discretion in controlling the admission of evidence, but that its

⁶ The term “arbitrary rules” as used in **Holmes** refers to those which exclude important defense evidence but do not serve any legitimate interests. 126 S.Ct. at 1731.

extension as set forth by the South Carolina Supreme Court intruded into the legitimate function of the fact-finder, withholding from the trier of fact the right to weigh evidence and to decide credibility, without any rational justification and, in doing so, deprived Holmes of “a meaningful opportunity to present a complete defense.” Specifically, the Court stated:

Under this rule, the trial judge does not focus on the probative value or the potential adverse effects of admitting the defense evidence of third-party guilt. Instead, the critical inquiry concerns the strength of the prosecution’s case: If the prosecution’s case is strong enough, the evidence of third-party guilt is excluded even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues.

Holmes, supra, 126 S.Ct. at 1734. Finding the rule of evidence stated by the South Carolina Supreme Court to be without any rational basis, and therefore arbitrary, the Court reversed Holmes’ conviction and remanded for further proceedings not inconsistent with its opinion.

Contrary to Defendant’s belief, **Holmes** does not announce a new rule of constitutional law. Rather, **Holmes** applied an existing constitutional right and found it was violated by a specific state rule of evidence which was arbitrary. Defendant has identified no comparable evidentiary principle which exists in this Commonwealth and which was applied in his case. At best, Defendant has presented a claim that this court erred in its application of various well-established legitimate rules of evidence, not that an over-riding evidentiary principle which contravened constitutional precepts dominated the court’s thinking.⁷

⁷ See also, **Commonwealth v. Abdul-Salaam**, 571 Pa. 219, 812 A.2d 497, 501 (2002), holding that a petitioner who relies on the exception found in 42 Pa. C.S.A. §9545(b)(1)(iii) “must prove that there is a ‘new’ constitutional right and that the right ‘has been held’ by [the Supreme Court of the United States or the Supreme Court of this Commonwealth] to apply retroactively,” meaning that “the ruling on retroactivity of the new constitutional law must have been made prior to the filing of the petition for collateral review.” Since the United States Supreme Court in **Holmes** did not hold that its decision was to be retroactive to cases on collateral review, this additional requirement has also not been met.

CONCLUSION

The time limitations of the PCRA are not intended to stifle legitimate challenges to a criminal defendant's conviction and sentence, but rather, in the context of the countervailing societal interest of finality, to impose reasonable restrictions on the raising of such claims. **Commonwealth v. Peterkin**, 554 Pa. 547, 722 A.2d 638, 642-643 (1998). Being cognizant of these limitations and their effect on our jurisdiction, and having fully reviewed Defendant's contentions, we do not believe Defendant was unfairly prosecuted or denied a fair trial.⁸ As significantly, we are convinced that Defendant's current petition, filed more than nine years after his judgment of sentence became final, is untimely and that we have no jurisdiction to consider its merits. Accordingly, the petition will be dismissed.

ORDER OF COURT

Notice of Proposed Dismissal of Petition Under Post Conviction Relief Act

AND NOW, this 4th day of December, 2006, upon consideration of Defendant's Petition under the Post Conviction Relief Act ("PCRA"), and it appearing that there are no genuine

Having determined that Defendant's petition is untimely, a discussion of the merits of the specific evidentiary rulings challenged by Defendant would be inappropriate. As a general proposition, however, we believe it is appropriate to note that even relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Pa.R.E. 403. "Unfair prejudice, confusion of the issues, or misleading the jury identify reversible errors in the conduct of a trial because they are likely to lead to a verdict on an impermissible basis." **Bernstein**, 2006 Pa. Rules of Evidence, Comment 1 to Pa.R.E. 403 (Gann). Further, an out-of-court statement offered for a reason other than the truth of the matter asserted is not hearsay. "An out-of-court statement offered to explain a course of conduct is not hearsay." **Commonwealth v. Dent**, 837 A.2d 571, 577 (Pa. Super. 2003), (citations and quotation marks omitted), **appeal denied**, 863 A.2d 1143 (Pa. 2004).

⁸ Without intending to be exhaustive, in addition to the evidence already referred to in the text, approximately two weeks after Dashev was killed, Defendant admitted to a friend who was inquiring about Dashev's whereabouts that he may have killed her. Defendant asked this same person to lie about his whereabouts on April 30, 1990, the evening Dashev was last seen alive. This witness further testified that Defendant came to her home on Tuesday, May 1, 1990, and at that time he did not have a belt and needed to borrow one. Additionally, at the time Defendant was apprehended by the police on May 24, 1990, he pulled a gun in an effort to avoid being arrested and attempted to shoot one of the arresting officers.

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 raised on direct appeal and are therefore waived.

2. Petitioner's Petition is untimely being time barred by the one-year period of limitations provided for in Paragraph 1 of Section 9545(b) of the PCRA.

3. The United States Supreme Court decision on which Petitioner relies to prove an exception to the PCRA's one-year time bar, **Holmes v. South Carolina**, does not create a new constitutional right and does not meet the requirements of the statutory exception found in 42 Pa. C.S.A. §9545(b)(1)(iii), the sole basis cited by Petitioner to excuse the otherwise untimely filing of his petition.

4. Defendant is entitled to file a response to this Order of Dismissal notifying of our intent to dismiss the petition within twenty (20) days from the date of this notice.

For the same 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 and DISMISSED. Defendant's request to proceed **in forma pauperis** is granted.

**GLEN ONOKO ESTATES, Plaintiff vs. HARALD NEIDERT
and DIXIE NEIDERT, H/W, Defendants**

**GLEN ONOKO ESTATES, Plaintiff vs.
LISA SMULLIGAN, Defendant**

*Civil Law—Easement by Necessity—Cost of Maintaining Easement—
Allocation of Costs Between Servient and Dominant Estate Holders—
Assessment of Association Fees to Maintain Roads*

1. Lot owners in a subdivision who as a matter of necessity utilize the private roadways in an adjacent development as a means of access to their properties have an obligation to pay a proportionate share of the costs for the repair, upkeep and maintenance of the roadways in the burdened subdivision.

-
2. The obligation of the property owners in a dominant subdivision to pay a proportionate share of the costs for the repair, upkeep and maintenance of the roadways in a servient subdivision arises out of fundamental principles of equity and fairness: those who enjoy the use of an easement are the ones who must bear the cost of maintenance.
 3. Where private roads in a subdivision are used for ingress and egress by the residents and property owners of that subdivision, as well as by the residents and property owners of an adjacent subdivision who otherwise have no access to a public road, the costs for the repair, upkeep and maintenance of the roads expended by a non-profit corporation formed for the purpose of owning and maintaining the roads—and which does in fact own and maintain the roads and has been assigned the right to assess and collect dues or fees for road maintenance from the development's former property owners' association—will be allocated among all users according to the equities and expediencies involved.

NO. 03-3817

NO. 03-3818

JAMES NANOVIC, Esquire—Counsel for Plaintiff.

ROBERT YURCHAK, Esquire—Counsel for Defendants.

OPINION

BIESTER, S.J.—March 28, 2006

Glen Onoko Estates filed a Complaint in the nature of a Debt Collection action. After a Bench Trial was held on October 20, 2005, and upon consideration of the submissions of the parties, we make the following:

FINDINGS OF FACT

1. Plaintiff is Glen Onoko Estates, a Pennsylvania Non-Profit Corporation with its principal office at 1001 Glen Onoko Drive, Jim Thorpe, PA 18229.

2. Defendants, Harald and Dixie Lee Neidert, are married, and are adult individuals with an address of 246 Glen View Drive, Jim Thorpe, PA 18229.

3. Defendant is Lisa Smulligan, an adult individual with an address of P.O. Box 23, Jim Thorpe, PA 18229.

4. Defendants, Harald Neidert and Dixie Lee Neidert, are currently the owners of two lots¹ (N.T. 10/20/05 page 83).

¹ The Neiderts were originally the owners of three lots (Lots No. 198, 199 and 246) (See N.T. 10/20/05 page 83).

5. Defendant Lisa Smulligan is the owner of Lots 205, 206, 207, 208, 209, 210 and 214 Summit Drive, Jim Thorpe, PA 18229.²

6. Glen Onoko was formed as a Domestic Non-Profit Corporation by filing Articles of Incorporation on June 13, 2001 (Exhibit P-1).

7. Glen Onoko Estates acquired all the roads within the development known as Glen Onoko Estates from Pocono County Side Properties Owners Association by deed dated August 21, 2002 and recorded in the Office for the Recorder of Deeds in Carbon County in Book 1047, Page 221 (Exhibit P-3).

8. The deed of August 21, 2002 includes an assignment from the prior owner to Glen Onoko Estates of all present and future rights and privileges to collect dues or fees for road maintenance and maintenance of common areas (Exhibit P-3).

9. Prior to the formation of Glen Onoko Estates in June of 2001 Pocono County Side Property Owners Association was the party which maintained the roads within the development (N.T. page 13).

10. Prior to Glen Onoko Estates incorporating the owners within what was then known as Leisureland and now Glen Onoko Estates were notified that Pocono County Side would no longer be plowing the roads within the development or maintaining the roads within the development (N.T. page 13).

11. Glen Onoko Estates was created because the prior developer was failing to maintain the roads and notified the owners within Glen Onoko Estates/Leisureland that they were not going to maintain the roads any longer (N.T. pages 13, 14).

12. Glen Onoko Estates was formed so that the roads would be maintained and that the people within the development, and those who necessarily need to use the roads, can get to their properties (N.T. page 15).

13. The condition of the roads in the year 2000 was very poor. The only maintenance was the plowing of roads and even

² This averment was alleged in the Complaint and the same was admitted. That being said Defendant's, Lisa Smulligan's, Findings of Facts and Conclusions of Law suggest that these lot numbers are not accurate. We have decided to go with the numbers that were originally admitted at the start of this action.

that was occasional. In fact, there was so little maintenance, when there was a snowstorm there was a possibility that the homeowners who needed to use the roads would not be able to do so. There would be delays in exiting the development of Glen Onoko Estates and the surrounding developments because of high snow and individuals would not be able to get to work. Nor, obviously, could emergency vehicles have access to the residents (N.T. pages 15, 16).

14. The maintenance of the roads by the Plaintiff within Glen Onoko Estates began in the winter of 2001 into 2002 (N.T. page 16).

15. The roads to and in Glen Onoko Estates are described in the deed of August 22, 2002. Further, the roads are accurately depicted on the map that had been submitted as Exhibit P-4. As shown on Exhibit P-4, Onoko Lane is a public road. Onoko Lane connects to Woodside Drive which is a road within the Development of Glen Onoko Estates. Woodside Drive is approximately 3/10ths of a mile in length and eventually meets the development known as "Top of the Gorge." (N.T. page 19) (Exhibit P-4)

16. Woodside Drive then connects with Broadview Drive. Broadview Drive travels through the development of Glen Onoko Estates and eventually meets with State Route 903 (N.T. page 19) (Exhibit P-4).

17. Lisa Smulligan and the Neiderts own lots within the "Top of the Gorge" development. The ownership of these lots was admitted in the pleadings. Further, the deeds for Lisa Smulligan were admitted as Exhibit P-5. The deeds for the Neiderts were admitted as Exhibit P-6.

18. The Defendants Lisa Smulligan and the Neiderts cannot leave their property directly upon a public road. In order to access their property they must cross over and upon roads within and maintained by Glen Onoko Estates. Obviously this includes access by emergency vehicles (N.T. pages 21, 22) (Exhibit P-4).

19. The maintenance of the roads by Glen Onoko Estates includes snow plowing, installing guard rails, installing drainage, tar and chipping portions of roadway, repairing potholes, erecting stop signs, and widening roadways so that more than one car can travel on them at a time (N.T. pages 23, 24).

20. Exhibit P-7 shows the number of lots within Glen Onoko Estates which need to use the roads and the number of lots within the satellite developments which need to use the roads (N.T. pages 24, 25).

21. As of 2002 there were 162 member lots who used the roads and there were 98 ingress and egress lots which used the roads. Therefore, the percentage of members who used the roads was 63% and the percentage of nonmembers who used the roads was 37% (N.T. pages 25, 26).

22. The amount billed to each lot owner within Glen Onoko Estates and in the satellite development is \$250.00. However, prior to 2003 the ingress/egress lot owners were billed only \$150.00/lot (N.T. page 26).

23. The fee is based upon lots owned and not on membership within the Property Owners' Association.

24. None of the Defendants is a member of the Property Owners' Association/Plaintiff, and none of the Defendants participates in the process of setting fees.

25. Plaintiff has no direct or formal contractual relationship with Defendants to provide road maintenance.

26. Defendants' lots are one-half acre in size (N.T. pages 65, 84).

27. Glen Onoko Estates' sole use of the money it collects is road maintenance. Glen Onoko Estates does not operate a clubhouse, pool, or any other amenities in which it spends money. This is also shown by the reports that were submitted for the years 2002-2004 as Exhibits P-8, P-9, and P-10.

28. Defendants have no input into the budget of Plaintiff.

29. The total length of the roadway in Glen Onoko Estates is approximately six (6) miles. One of the roads owned by Glen Onoko Estates is Woodside Drive. Glen Onoko Estates had only recently learned that it owns a portion of Woodside near the Top of the Gorge Development. Glen Onoko discovered this by a recent survey (N.T. pages 33, 39).

30. The work done on the roads in Glen Onoko Estates has not been extravagant. The amount that has been collected is enough to plow the roads and perform some maintenance. No roads are macadam. At best they are tar and chip and in fact some of them are still dirt roads (N.T. pages 41, 47).

31. The Officers and Board Members of Glen Onoko Estates are not compensated for their duties (N.T. page 52).

32. The Assistant Treasurer testified regarding some of the major improvements that had been done to the roads within Glen Onoko Estates. One of those improvements was for water drainage and run-off on the road. This improvement was reflected by a bill for \$18, 611.11, admitted as Exhibit P-11 (N.T. pages 53, 54).

33. Some of the tar and chipping and pothole repair occurred on Broadview in the area of Woodside Drive (N.T. page 59).

34. Lisa Smulligan uses the roads in Glen Onoko Estates, in particular Woodside Drive. Additionally, Lisa Smulligan uses the other roads, but only very rarely, for bike riding or out of curiosity (N.T. pages 63, 67, 70).

35. Lisa Smulligan prefers dirt roads because she is a pedestrian and bicyclist and cannot stand the danger that a tar and chip road presents (N.T. page 68).

36. Despite the fact that Lisa Smulligan does not wish to pay for maintenance, she presented testimony in which she complained of the poor condition of Woodside Drive. She further testified that there is a sign on the road of Woodside Drive that said "Private Road, No Outlet." (N.T. pages 71, 72, 77)

37. Lisa Smulligan admits that she does pay for some maintenance of the roads within her own development, Top of the Gorge, on an informal ad hoc basis. (N.T. page 75).

38. Lisa Smulligan admitted that she and visitors who may come to her house must necessarily use some portion of Glen Onoko Estates' roads (N.T. page 81).

39. Lisa Smulligan stated that she does not want to become part of the Association because of the Association problems. She described these problems as difficulties that the Glen Onoko Estates' residents have getting out if no one plows the roads. When asked if she had any problems getting in and out due to no one plowing she responded "I don't go out much." (N.T. page 82)

40. Harald Neidert admitted that he uses the roads in Glen Onoko Estates in particularly Woodside Drive (N.T. pages 85, 86, 89).

41. Harald Neidert testified that some of the problems on Woodside Drive and Broadview stem from water run-off (N.T. page 91).

42. Dixie Neidert testified that she and her visitors use Woodside Drive and that she would like the potholes repaired. (N.T. pages 97, 98).

CONCLUSIONS OF LAW

1. Glen Onoko Estates is the owner of the roads within the development known as Glen Onoko Estates.

2. Defendants, Lisa Smulligan, Harald Neidert and Dixie Lee Neidert, must and do use some portion of the roads within Glen Onoko Estates.

3. \$250.00 per lot, which is the amount currently billed by Glen Onoko Estates for the maintenance of the roads, is a reasonable fee.

4. The Defendants have failed to pay any amount for the maintenance of the roads within Glen Onoko Estates.

5. The Defendants are legally obligated to pay a fair share of the expense of maintaining the roads within Glen Onoko Estates.

6. We find that the amount of \$150.00 per lot in 2002, and \$250.00 each year thereafter are fair assessments for the maintenance of the roads.

DISCUSSION

There does not seem to exist a Pennsylvania case exactly on point regarding the assessment of association fees against residents whose property is located outside of the association's development. That being said it is clear that Pennsylvania Courts have allowed associations to charge fees in situations comparable to the instant action.

For instance, in **Meadow Run and Mountain Lake Park Association v. Berkel**, 409 Pa. Super. 637, 598 A.2d 1024 (1991), the court held that a home owner's association had the authority to impose fees for the maintenance of common areas even in the absence of a specific covenant in the property owners' deeds. The **Meadow Run** Court went on further to note that this authority is received by the mere mention of an association in the chain of title. A few years later the Common-

wealth Court in **Spinnler Point Colony Association, Inc. v. Nash**, 689 A.2d 1026 (Pa. Commw. 1997), took the holding in **Meadow Run** one step further and held that even if the chain of title lacks mention of an association one may be formed and impose certain fees on the property owners. The **Spinnler** Court noted:

Residential communities are analogous to mini-governments and as such are dependent on the collection of assessments to maintain and provide essential and recreational facilities. When ownership of property within a residential community allows the owners to utilize the roads and other common areas of the development, there is an implied agreement to accept the proportionate costs for maintaining and repairing these facilities.

Id. at 1028-1029.

More recently the Commonwealth Court in **Hess v. Barton Glen Club, Inc.**, 718 A.2d 908 (Pa. Commw. 1998) explained:

[T]he owners are the beneficial users of the common areas of the development and ... are responsible for the cost of repair, maintenance and upkeep of the common areas. If we were to find to the contrary, lot owners would be able to avoid their duty to pay assessments, and because associations would be powerless to operate, the facilities of a development would fall into disrepair. Thus, we hold that a property owner who purchases property in a private residential development who has the right to travel the development roads ... is obligated to pay a proportionate share for repair, upkeep and maintenance of the development's roads, facilities and amenities.

Id. at 912.

What is most indicative of the current law in this county can be found in the case of **Holiday Pocono Civic Association, Inc. v. Benick**, 7 D. & C. 3rd 378 (Carbon County 1978). In **Holiday** the defendants insisted that because they were not technically members of the association, they were not liable to pay the fees assessed against them. Our Court was somewhat progressive in addressing this concern by stating: “[W]e ... find that the obligation to pay dues and assessments exists independently of membership in the association.” **Id.** at 384. In **Holi-**

day Judge John P. Lavelle went on to adopt the language of a New York case that held:

[A]ll of the cited decisions establish the principle that membership in the Association bears no relationship to the rights of the property owners in so far as their enjoyment of the easements running with their property is concerned. The right of the Association to exercise the control of the easements and to maintain them in condition so that they can be mutually used and enjoyed by all property owners has long been settled by the courts. Inherent in its right of management is the right to maintain. Maintenance costs money. Those who are entitled to enjoy the easements are the ones who must pay the cost of maintenance. Membership in the corporation is not that which gives the right to the property owners to enjoy the easements and services provided by the Association. It is the ownership of the property which effects that result.

Id. at 384-385, (**quoting, Sea Gate Association v. Fleischer**, 211 N.Y.S. 2d 767, 778-779 (1960)).

Given Judge Lavelle's opinion in **Holiday**, we are confident that our decision in this matter is based upon law that is firmly rooted in this county, and consistent with other Pennsylvania cases. Moreover, only Sixty-Three percent (63%) of the users of the roads reside within the Glen Onoko Estates Development. If only the residents of Glen Onoko Estates were obligated to pay for the maintenance of all of the roadways, including those that are regularly used by the residents of the satellite developments, the quality of the roadways would rapidly deteriorate. Additionally, we feel that a fee of \$250.00 per lot is reasonable inasmuch as the portion of the road in which the Defendants and other nonresidents utilize is a vital and heavily traveled section of road for both residents of Glen Onoko Estates and nonresidents alike. This portion of the roadway requires maintenance and that maintenance must be paid by all persons who use the road to access their property. The non-residents should not be afforded a free ride simply because they are not technically members of the Association assessing the fees. It would be inequitable to allow the Defendants to continue to use the roads that are maintained by the Plaintiff without sharing the costs. To hold otherwise would promote a considerable inequity.

The Defendants challenge the fairness of the fee in that they use only a brief portion of the road. However, as we noted, that location is perhaps the most heavily traveled. It would stretch common sense to allocate the burden as to other owners on the rest of the roads based on proximity or distance from the basic feeder road.

CONCLUSION

In consideration of the above discussion we conclude that a fee can be assessed against, and collected from, the Defendants, and all other nonmember lot owners.

Accordingly we enter the following:

SUPPLEMENTAL OPINION

The Court has received and reviewed Plaintiff's Statement of Issues Complained of on Appeal, pursuant to Pa. Rule of Civil Procedure 1925(b). After thorough review, it is clear that all of the issues raised by Plaintiff have been covered in the Court's opinion of March 31, 2006, incorporated herein by reference.

A short discussion of the common law pertaining to easements that burden real property will serve to clarify further the Court's decision in this dispute.

In the instant case, each Defendant has admitted that they and their visitors must, by necessity, use a portion of Plaintiff's roadway for ingress and egress to their property. They have been doing so since 1986. This required use by Defendants of Plaintiff's land creates an easement by necessity. **See PARC Holdings, Inc. v. Killian**, 785 A.2d 106 (Pa. Super. 2001).

An easement by necessity establishes both rights and responsibilities between the parties. The holder of an easement over the land of another obtains the right to enter and use a portion of that land and thereby becomes the dominant estate; the land so burdened becomes the servient estate. The holder of the dominant estate may enter and use the servient estate according to the rights afforded it by the easement. Common law provides that the holder of the servient estate may not interfere with the enjoyment of the rights granted to the dominant estate by the terms of the easement. **Kao v. Haldeman**, 556 Pa. 279, 728 A.2d 345 (1999).

However, the holder of the servient estate is not generally responsible for maintenance of the easement, and is not required to sustain any expense in keeping the easement in proper condition, those expenses are the responsibility of the holder of the dominant estate. **Phillips et al. v. Smelka et ux.**, 34 Erie C.L.J. 117, 76 D. & C. 287 (1951). Accordingly, owners of dominant estates have both rights and obligations with respect to the easement.

As noted above, Defendants in the instant case have a right to use the Plaintiff's roadway through an easement by necessity. But significantly, as holders of a dominant estate, they have also taken on a responsibility to effect repairs on the easement, and to pay for the same.

In situations such as the instant one, where the easement is used by both the servient and the dominant estate holders, courts have seen fit to distribute the responsibility for the costs associated with maintaining the easement among the parties, allocating the costs according to the equities and expediencies involved. **Borgel v. Hoffman**, 219 Pa. Super. 260, 280 A.2d 608 (1971); **see also, Bina v. Bina**, 213 Iowa 432, 239 N.W. 68 (1931) and **Barnard v. Gaumer**, 146 Colo. 409, 361 P.2d 778.

Because, in the instant case, the road is used both by Defendants (as they must), as well as by Plaintiffs, Defendants here have a duty to share in the costs of maintenance.

Therefore, as held in the aforementioned opinion in this matter, we find a legal obligation inures to Defendants to pay Plaintiff's assessment for maintaining the roadway, and further find that the amount of \$250.00 per year per lot is reasonable and proper.

Editor's Note: Appeal filed to Superior Court at No. 1139 EDA 2006 quashed June 26, 2006.

KEVIN B. ANDREW, Plaintiff vs. JODI J. ANDREW, Defendant

*Civil Law—Divorce—Master’s Report—Exceptions—Waiver—
Inherent Authority of Court to Modify Master’s Recommendations*

1. Pursuant to Pa. R.C.P. 1920.55-2(b), exceptions to a master’s report must be filed within ten days of the mailing date of the report and the master’s recommendations to the parties.
2. Exceptions filed more than ten days after the mailing of the master’s report, but within ten days of an incorrectly stated future filing date for the report, are untimely.
3. Although alleged error, which is the subject of untimely exceptions, is waived, in reviewing the master’s recommendations, the trial court has an independent responsibility to review the record of the proceedings before the master and to ensure a fair and just determination and settlement of the parties’ property rights. With this responsibility is the concomitant power of the court to alter the master’s recommendations, even though no exceptions have been filed by any of the parties.

NO. 00-2415

MICHAEL D. MUFFLEY, Esquire—Counsel for Plaintiff.

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

MEMORANDUM OPINION

NANOVIC, P.J.—August 17, 2006

BACKGROUND

In these divorce proceedings, the Defendant, Jodi J. Andrew (“Wife”), seeks to strike, as untimely, the Plaintiff’s, Kevin B. Andrew’s (“Husband’s”), exceptions to the Master’s Report and Recommendation (hereinafter the “Report”) in divorce. This Report was filed with the court on December 22, 2005, however, notice of the filing of the Report, accompanied by a copy of the Report and a proposed decree, was not mailed until December 30, 2005. In this notice addressed to the parties, the Master mistakenly advised that the Report would be filed on January 3, 2006. The notice separately advised that exceptions to the Report must be filed within ten days of the mailing date of the notice. This date was disclosed and certified in the notice as being on December 30, 2005.

Husband filed exceptions to the Report on January 12, 2006, more than ten days after the mailing of the Report but within ten days of the filing date incorrectly recited in the Master’s notice. A hearing on Wife’s Petition to Strike the exceptions was held on March 23, 2006. At this time, Husband testified that the Master’s Report was received by him on January 4,

2006, together with the Master's notice of filing and a proposed divorce decree, and that the Master's Report bore the Prothonotary's time stamp of January 3, 2006.

At the time of the hearing, Husband also testified that after he received the Master's Report he telephoned the Prothonotary's office and was advised that the ten-day period to file exceptions began with the date of filing. Husband further testified that the person he spoke with confirmed that the Report was in fact filed on January 3, 2006.

Husband did not identify whom he spoke with in the Prothonotary's office, however, to further investigate Husband's claim, at Wife's request, the hearing record was kept open. On May 26, 2006, the parties filed a stipulation in which it was agreed that with the exception of one clerk in the Prothonotary's office who could not recall whether she had spoken with Husband, none of the others had.

DISCUSSION

Rule 1920.55-2(a) provides, in pertinent part, that in contested actions the master shall file the record and his report within thirty days after his receipt of the hearing transcript and shall

immediately serve upon counsel for each party, or, if unrepresented, upon the party, a copy of the report and recommendation and written notice of the right to file exceptions.

Pa. R.C.P. 1920.55-2(a)(2). Rule 1920.55-2(b) further provides that

within ten days of the mailing of the master's report and recommendation, any party may file exceptions to the report or any part thereof.... Matters not covered by exceptions are deemed waived unless, prior to entry of the final decree, leave is granted to file exceptions raising those matters.

Pa. R.C.P. 1920.55-2(b).

On the basis of the foregoing, we must determine whether cause exists to justify the late filing of Husband's exceptions more than ten days after the mailing of the Report. As a general rule, an appeal **nunc pro tunc** will be granted in civil matters only where the appeal was untimely filed due to "fraud or

some breakdown in the court’s operations through a default of its officers,” **Nagy v. Best Home Services, Inc.**, 829 A.2d 1166, 1167 (Pa. Super. 2003), or as the result of non-negligent circumstances as they relate to either the appellant or his counsel. **McKeown v. Bailey**, 731 A.2d 628, 630 (Pa Super. 1999).

While the Master’s Report was not promptly served on the parties following its actual filing on December 22, 2005, as required by Rule 1920.55-2(a)(2), this delay caused no prejudice to either party. Nor did the incorrect statement of the prospective filing date contained in the Master’s notice. That notice correctly advised Husband that exceptions must be filed within ten days of the mailing date of the notice, not within ten days of the filing date of the Report.

However, the purported representations of the Prothonotary’s office is another matter. These representations, if made and if reasonably relied upon by Husband, would clearly excuse the late filing of Husband’s exceptions. Cf. **Monroe County Board of Assessment Appeals v. Miller**, 131 Pa. Commw. 538, 570 A.2d 1386 (1990) (holding that a taxpayer who was unintentionally misled by county assessment board’s erroneous advice should be permitted to file a **nunc pro tunc** tax assessment appeal). In this context it is appropriate to note that the late filing of exceptions, though often resulting in waiver, is qualitatively different from an untimely appeal which implicates a jurisdictional appeal period.

On this critical aspect of Husband’s argument—the veracity of the representations Husband attributes to the Prothonotary’s office—we do not find Husband to be credible. The docket entries which were placed into evidence at the hearing on Wife’s Petition evidence no separate mailings of the Master’s Report or the Master’s notice to the parties by the Prothonotary’s office. From this it rationally follows that the copies of the Master’s Report, Master’s notice and proposed decree received by the Husband on January 4, 2006, were those mailed by the Master on December 30, 2005. Consequently, contrary to the Husband’s testimony, none of the documents Husband received on January 4, 2006, could have contained a January 3, 2006, time stamp from the Prothonotary’s office. Instead, assuming the Prothonotary’s time stamp existed on any of the documents sent by the Master, the only logical date which would appear

would be that of December 22, 2005, the filing date of the Master's Report, a date even further removed from the filing date of Husband's exceptions.

Significantly, Husband never produced a copy of the time-stamped report he allegedly received nor explained why he couldn't. Nor did Husband verify or substantiate his claim of the January 3, 2006 filing date of the Report with the testimony of any personnel from the Prothonotary's office, testimony which appears unlikely given that the only document filed on January 3, 2006, as reflected in the Prothonotary's records, was the filing of the Master's notice of the filing of his Report.

In contrast to Husband's claimed confusion as to when his exceptions were due, the written notice Husband acknowledges having received from the Master clearly states, in bold print, that exceptions must be filed within ten days from the date of mailing of the notice. Although we recognize that Husband was acting **pro se** at the time he received this notice, "any layperson choosing to represent himself in a legal proceeding must, to some reasonable extent, assume the risk that his lack of expertise and legal training will prove his undoing." **Branch Banking and Trust v. Gesiorski**, 904 A.2d 939, 942 (Pa. Super. 2006) (**quoting Commonwealth v. Rivera**, 454 Pa. Super. 451, 685 A.2d 1011 (1996)).

CONCLUSION

In accordance with the foregoing, Husband's exceptions will be dismissed as untimely. This decision, however, should not be construed to imply that the Master's recommendation will automatically be accepted without change. Although, having heard and observed the testimony and demeanor of the witnesses, the Master's credibility determinations are entitled to considerable weight, as the trial court, we have an independent responsibility to review the record of the proceedings before the Master and to ensure "a fair and just determination and settlement of [the parties'] property rights." 23 Pa. C.S.A. §3102(a)(6). With this responsibility is the concomitant power to alter the Master's recommendations even though no exceptions have been filed by any of the parties. **Morschhauser v. Morschhauser**, 357 Pa. Super. 339, 350, 516 A.2d 10, 15 (1986). Ultimately, it is our decision, not that of the Master, which directs the making of equitable distribution. **Id.**

ORDER OF COURT

AND NOW, this 17th day of August, 2006, upon consideration of the Defendant's Petition to Strike the Plaintiff's exceptions to the Master's Report, review of the Plaintiff's answer thereto, and after hearing thereon, and in accordance with our Memorandum Opinion of this same date, it is hereby

ORDERED and DECREED that the Plaintiff's exceptions to the Master's Report filed on January 12, 2006 are hereby dismissed as untimely.

**JEAN BENNETT ROANE, Plaintiff vs. TIMOTHY A. BEERS
and COBBLE RIDGE REALTY CORPORATION, Defendants**

*Civil Law—Preliminary Objections—Timeliness—Effect of
Notice to Defend—Entry of Default Judgment While
Preliminary Objections Are Pending—Striking Judgment*

1. Preliminary objections filed more than twenty (20) days after the filing of the complaint to which they are responsive, which complaint does not contain a notice to defend, are not untimely and should be considered by the court.
2. The filing of preliminary objections acts to stay the proceedings until the objections are disposed of. Consequently, a default judgment entered while preliminary objections are pending and prior to their disposition is defective.
3. A complaint which violates multiple rules of civil procedure and, accordingly, is difficult, if not impossible, to fairly answer and defend against is properly stricken under Pa.R.C.P. 1028(a)(2).
4. The right of the proponent of preliminary objections which are overruled or dismissed to plead over is absolute.
5. When a fatal defect in the entry of a judgment appears on the face of the record, the court has no discretion but to strike the judgment when requested to do so.
6. Plaintiff's judgment taken by default on the basis of a proposed complaint for which neither court authorization nor the consent of the opposing party was ever obtained, which complaint did not contain a notice to defend and which judgment was entered while Defendant's preliminary objections to a prior complaint were pending, was a nullity and was properly stricken by the court.

NO. 02-2267

JEAN BENNETT ROANE—Pro se.

PAUL J. LEVY, Esquire—Counsel for Defendants.

MEMORANDUM OPINION

NANOVIC, P.J.—December 27, 2006

On October 10, 2006, the above-captioned suit was dismissed after Plaintiff failed to file an amended complaint for more than nine months from the date she was authorized to do

so. In consequence, our order of January 5, 2006, granting Defendants' preliminary objections to Plaintiff's first amended complaint and allowing Plaintiff to file an amended complaint, has become final, as have four other orders of the same date. On November 9, 2006, Plaintiff filed an appeal to the Superior Court from each of these orders.

To correctly identify the issues Plaintiff intends to raise on appeal, we directed Plaintiff to file a concise statement of the matters being appealed. Plaintiff's statement, consisting of four pages and various attachments, was timely filed on November 28, 2006. A review of this statement reveals two primary issues in dispute:

- (1) whether preliminary objections filed by the Defendants to Plaintiff's first amended complaint were untimely and, therefore, should not have been considered by the Court; and
- (2) whether a default judgment taken by the Plaintiff on December 14, 2005—at a time when Defendants' preliminary objections to the first amended complaint were pending before the Court—on the basis of a complaint which Plaintiff was then seeking leave of Court to file, but which authorization had not yet been obtained, was properly stricken.

To better understand these issues and our resulting decisions, a detailed procedural history is required.¹

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

On October 9, 2002, the Plaintiff, Jean Bennett Roane, filed a **pro se** complaint naming five defendants: Richard F. Stern, Esquire and the law firm of which he is a member, Stern & Stercho (collectively, the "Law Firm"), Ocwen Federal Bank FSB (the "Bank"), and Timothy A. Beers and the real estate agency of which he is an officer, Cobble Ridge Realty Corporation (collectively "Beers"). In general, in this complaint Plaintiff alleged that the Law Firm, acting as counsel for the Bank, knowingly misrepresented that a scheduled sheriff's sale of her

¹ The documents filed by Plaintiff in these proceedings are voluminous, disjointed, and difficult to follow. We have attempted in the succeeding procedural history to simplify and accurately distill what is necessary to fairly evaluate Plaintiff's appeal.

property had been cancelled, when it had not; that, in reliance on these representations, she was deceived into not taking appropriate action to challenge the sale and, in consequence, her property was improperly sold to the Bank on October 12, 2001, at a nominal figure; and that Beers conspired with the Bank and Law Firm to deprive Plaintiff of her property at a distressed value with the intent of reselling the property at a significant profit. On October 17, 2001, Plaintiff filed a petition to vacate the sheriff's sale.

Beers' role in the alleged conspiracy apparently consisted of the Defendant, Timothy A. Beers, visiting the property about a week after Plaintiff had filed her petition to vacate the sheriff's sale, at which time he falsely advised Plaintiff that eviction proceedings had been filed, and offered Plaintiff \$1,000.00 if she would peaceably vacate the property and remove her belongings within thirty days. This face-to-face meeting was followed, approximately a week later, with a letter from Mr. Beers to Plaintiff to the same effect.

In her complaint, Plaintiff acknowledges that she was successful in her efforts to vacate the sheriff's sale and that she was also able to reach agreement on the repayment terms of her debt to the Bank with the assignee of that debt.² However, after this agreement was reached verbally, Plaintiff asserts that the Law Firm unsuccessfully attempted to have language inserted in the ensuing written agreement releasing it and the Bank—Beers is not specifically mentioned by name in the complaint—from all liability to the Plaintiff. Plaintiff also alleges that because of the unresolved question of title caused by the sheriff's sale, she was unable to use her property as collateral for a second loan in the amount of \$35,000.00 which she was applying for at the time and, therefore, was unable to secure this loan.

Based primarily on these facts, Plaintiff contends that the Law Firm fraudulently attempted to deprive her of her property and to tortiously interfere with the refinancing agreement she later entered with the Bank's assignee; also that the Bank, the Law Firm and Beers all conspired with one another to di-

² According to the documents submitted by Plaintiff, the assignment of her debt to Fairbanks Capital Corporation was effective October 3, 2001, that is, prior to the October 12, 2001, sheriff's sale.

vest Plaintiff of her property. In conclusory language, the complaint demands damages for unspecified economic injuries which allegedly were caused by Plaintiff's inability to use her property as collateral for the \$35,000.00 loan and for emotional humiliation. Plaintiff also claimed punitive damages in the amount of \$50,000.00.

Both the Bank and Law Firm filed preliminary objections to the complaint. By order dated October 9, 2003, we identified the following defects in the complaint and directed that they be corrected within thirty days:

1. that a notice to defend (Pa. R.C.P. 1018.1) and a verification (Pa. R.C.P. 1024) be attached to the complaint;
2. that a copy of any writing upon which Plaintiff bases her claim (**e.g.**, the purported refinancing agreement relieving the Bank and the Law Firm from liability and the alleged written eviction proposal from Beers) be attached to the complaint or its absence explained (Pa. R.C.P. 1019(i));
3. that the complaint be divided into consecutively numbered paragraphs, each containing one material allegation (Pa. R.C.P. 1022) (the nine page complaint filed by Plaintiff contained three and a half pages of unnumbered background text);
4. that the complaint list each cause of action against the same defendant in a separate count and identify each by its material facts (Pa. R.C.P. 1020(a)); and
5. that Plaintiff itemize and state with specificity any amount of economic damages claimed (Pa. R.C.P. 1019(f)).

Plaintiff did not file an amended complaint within thirty days, however, on November 3, 2003, she did request an extension until December 26, 2003, to amend her complaint. The Court granted an extension until December 9, 2003, the net effect being that Plaintiff was permitted a total of sixty days to file an amended complaint, three times the normal time. Pa. R.C.P. 1028(e). When Plaintiff did not file an amended complaint by December 22, 2003, by order dated the same date, her claims against the Bank and the Law Firm were dismissed.

With the intent of reviewing the status of the case, the matter was scheduled for a management conference on March 1, 2004. At that time, an order was issued directing Beers to file a responsive pleading within forty-five days. When no action was

again taken by either party, the matter was scheduled for another conference on July 2, 2004. By order of the same date, Plaintiff was directed to take action within thirty days to move the case forward.

On August 9, 2004, apparently in response to our order of July 2, 2004, Plaintiff filed a ten-day notice of intent to take a default judgment against Beers. On August 19, 2004, Beers filed preliminary objections to Plaintiff's complaint—the same complaint which had not been amended since our order of October 9, 2003. Beers' preliminary objections were virtually identical to those previously filed by the Bank and the Law Firm, and our order of January 20, 2005, granting the preliminary objections was substantially the same as the October 9, 2003, order.

On February 22, 2005, Plaintiff filed her first amended complaint. This seven page document is one continuous narrative statement, purports to incorporate by reference various briefs and other filings of Plaintiff, and concludes, *inter alia*, with a request that the Court enter a default judgment in her favor. This complaint does not contain a notice to defend.

Thereafter, on May 17, 2005, preliminary objections were filed by Beers to the amended complaint, Beers, for the first time, now being represented by counsel. Plaintiff countered, on June 6, 2005, with a document entitled "Objection to 'Preliminary Objections of Timothy A. Beers d/b/a Cobble Ridge Realty, Inc. to Plaintiff's Complaint,'" later accompanied, on June 8, 2005, by an addendum to which sixteen exhibits were attached. Rather than being true preliminary objections, Plaintiff's objection can more accurately be described as a narrative argument against Beers' preliminary objections.

The next document filed by either party was that entitled "Memorandum in Support of Motion for Leave of Court to Amend Pleadings" filed by the Plaintiff on October 21, 2005 (the "Memorandum"). Attached to the end of this document as part of what appears to be Exhibit "F" is a document with the caption "Motion for Leave of Court to Amend Pleadings." Also attached to the Memorandum as part of Exhibit "E" is an unsigned document entitled "Amended Complaint to Plead Defendant's [sic] Tortious Interference with Plaintiff's Right to Enter into an Agreement with Fairbanks Capital Corporation and Retaliation for Pursuing Valid Claims." In this proposed

complaint Plaintiff states that her property was again sold at sheriff's sale on August 12, 2005—this time by the Bank's assignee—and that Beers tortiously interfered with an offer of \$1,700.00 to assist Plaintiff in relocating. This complaint is dated October 21, 2005. Because they were attached as exhibits to Plaintiff's Memorandum, neither the motion to amend the pleadings nor the amended complaint were separately filed or docketed of record.

On November 18, 2005, Plaintiff filed a ten-day notice of her intent to take a default judgment. Attached to this notice is a copy of the proposed complaint which was attached to her Memorandum filed on October 21, 2005.³ Plaintiff next requested, on December 14, 2005, that default judgment be entered against Beers in the amount of \$126,700.00 allocated as follows: \$1,700 for compensatory damages; \$100,000.00 for punitive damages; and \$25,000.00 for emotional distress. Judgment in fact was entered by the Prothonotary against Beers in this amount on December 14, 2005.

On December 21, 2005, Beers filed what is entitled "Petition to Strike and/or Open a Default Judgment" but what, in actuality, is limited to a petition to strike the default judgment taken by the Plaintiff on December 14, 2005. Finally, on January 3, 2006, Plaintiff filed a document entitled "Motion to Consolidate Two Causes of Action" in which Plaintiff identifies the litigation arising out of the sale of her property on October 12, 2001, as her first cause of action (*i.e.*, the subject of her original complaint) and the litigation arising out of Beers' alleged misconduct following the sale of her property on August 12, 2005, as her second cause of action (*i.e.*, the subject of the purported amended complaint dated October 21, 2005). In this motion, Plaintiff asserts that she has no objection to the Court simultaneously and expeditiously reviewing all outstanding issues.

³The complaint which is attached to this notice begins with a copy of a notice to defend on which appears a photocopied lodging date of October 21, 2005, crossed out, and a filing date of October 21, 2005. The original of this notice to defend appears to have been that attached to the front of the Memorandum filed on October 21, 2005. The notice also has attached to it an unsolicited letter from Plaintiff to the Court dated September 11, 2005.

At oral argument held on January 4, 2006, we considered the following five pending matters:

- (1) Beers' preliminary objections filed on May 17, 2005, to Plaintiff's first amended complaint;
- (2) Plaintiff's objection filed on June 6, 2005, to Beers' preliminary objections;
- (3) Plaintiff's motion to amend, attached as an exhibit to Plaintiff's Memorandum filed on October 21, 2005;
- (4) Beers' petition filed on December 21, 2005, to strike the default judgment; and
- (5) Plaintiff's motion to consolidate filed on January 3, 2006.

The following day we issued five separate orders, each dated January 5, 2006, disposing of these matters, in the sequence listed above, as follows:

- (1) Granting, in part, and denying, in part, Beers' preliminary objections for failure of Plaintiff to conform her complaint to various rules of court. The order ruling on these objections specifically identified various rules of civil procedure with which Plaintiff must comply and provided Plaintiff with a thirty day period in which to file an amended complaint, failing which Beers was authorized to file a praecipe dismissing Plaintiff's suit;
- (2) Denying Plaintiff's objection to Beers' preliminary objections;
- (3) Denying Plaintiff's motion to amend as moot since we were already providing Plaintiff with an opportunity to file an amended complaint;
- (4) Striking the default judgment taken by Plaintiff since neither the consent of the adverse party nor leave of court had been obtained as required by Pa. R.C.P. 1033 to file the complaint dated October 21, 2005, and since no amended complaint had been properly filed to which Beers was required to respond; and
- (5) Denying Plaintiff's motion to consolidate two causes of action as moot since our order permitting Plaintiff to file an amended complaint would provide Plaintiff with an opportunity to join causes of action which may validly be joined under the Rules of Civil Procedure.

On February 6, 2006, Plaintiff filed an appeal from these five orders. In accordance with Pa. R.A.P. 1925(a), we prepared an opinion in which we opined that the orders were all interlocutory and nonappealable, and that the appeal should be quashed. By order dated March 16, 2006, the Superior Court quashed this appeal.

When no action was again taken by the parties, a management conference was scheduled for October 10, 2006. On October 10, 2006, we were advised by Beers' counsel that he had filed earlier that day a praecipe to have the action dismissed for Plaintiff's failure to file an amended complaint. Plaintiff, as previously stated, has appealed each of the five orders dated January 5, 2006.

DISCUSSION

Pivotal to Plaintiff's appeal is her belief that because Beers' preliminary objections were filed eighty-four days after the amended complaint to which they relate, they were late and may not be considered by the Court. As Plaintiff sees it, these preliminary objections are a legal nullity and she was entitled to ignore them. Proceeding further, Plaintiff argues that she had every right to unilaterally file an amended complaint on October 21, 2005, and that when Beers failed to respond, she acted properly in taking a default judgment. Unfortunately for Plaintiff, the two basic tenets on which she bases her appeal are fundamentally flawed.

Timeliness of Preliminary Objections

First, the necessity of filing a responsive pleading within twenty days after service of the preceding pleading is conditioned upon the preceding pleading containing either a notice to defend or a notice to plead. Pa. R.C.P. 1026(a); **Mother's Restaurant, Inc. v. Krystkiewicz**, 861 A.2d 327, 338 (Pa. Super. 2004). Plaintiff's complaint filed on February 22, 2005, as previously described, did not contain a notice to defend. The Beers defendants, therefore, were within their right to file objections to the complaint beyond twenty days.

That Beers' preliminary objections were justified is clear from even a cursory review of the amended complaint. Pleadings in this Commonwealth are generally limited to a complaint, an answer, a reply if the answer contains new matter or a counter-claim, a counter-reply if the reply to a counterclaim contains

new matter, a preliminary objection and an answer thereto. Pa. R.C.P. 1017(a).

As the initial pleading, the complaint is a seminal document. Critical to this function is that the complaint fairly advise the defendant of the material facts upon which plaintiff bases his causes of action in order that the defendant knows what he is accused of having done and in order that he can prepare and properly plead any defense he may have. **Smith v. Wagner**, 403 Pa. Super. 316, 319, 588 A.2d 1308, 1310 (1991). The complaint in large measure defines and delineates the substantive issues to be litigated, and correspondingly restricts the proof at trial to those issues. **Reynolds v. Thomas Jefferson University Hosp.**, 450 Pa. Super. 327, 336, 676 A.2d 1205, 1209-1211 (1996), **appeal denied**, 700 A.2d 442 (Pa. 1997).

The amended complaint which Plaintiff filed on February 22, 2005, is a pleading nightmare. It consists of seven pages of narrative text with no numbered paragraphs. It requests that various documents be incorporated by reference, including two briefs previously filed by the Plaintiff, one of which had fourteen exhibits attached to it, and an addendum—to which fourteen exhibits were attached—which Plaintiff had previously prepared in response to earlier objections of Beers.⁴ It includes extended arguments and quotations from reported federal cases. It contains no coherent explanation of the damages claimed, stating only that the damages referred to in the original complaint have now increased. It contains neither a notice to defend nor a verification. In short, the complaint contains basic and fundamental defects, the same defects which appeared in the original complaint, but worse. Had we not granted Beers' objection to this complaint, the errors and irregularities in this pleading would only have been magnified at later stages of the litigation.⁵

⁴ In ruling upon preliminary objections, our Superior Court has held that in deciding the sufficiency of a pleading we are not required to wade through a plethora of extraneous materials and check every exhibit referred to in a pleading to determine the factual basis of a plaintiff's cause of action. **Philadelphia Factors, Inc. v. The Working Data Group, Inc.**, 849 A.2d 1261, 1264 (Pa. Super. 2004). Instead, we may properly rely on the core pleadings. **Id.** However, if a litigant fails to do so, he proceeds at his own peril.

⁵ As we read Plaintiff's concise statement of matters complained of on appeal, Plaintiff argues only that we erred in considering the objections since they were

Propriety of Default Judgment

Plaintiff's further position that she was entitled unilaterally to amend her pleadings at any time represents a gross misreading of Pa. R.C.P. 1033. That rule permits an amendment only by leave of court or if consented to by the adverse party. **Mackey v. Adamski**, 286 Pa. Super. 456, 467, 429 A.2d 28, 33 (1981); cf. **Vetenshtein v. City of Philadelphia**, 755 A.2d 62, 67 (Pa. Commw. 2000) (finding that the filing of an amended complaint without obtaining leave of court or obtaining the filed consent of the defendant is not a question of jurisdiction and, hence, may be waived by failure of the opposing party to file preliminary objections for failure of the complaint to conform to the rules of court), **appeal denied**, 764 A.2d 1071 (Pa. 2000). Neither was obtained here.

While the filing of Plaintiff's October 21, 2005, Memorandum reflects Plaintiff's understanding of the need to obtain court permission to file an amended complaint, absent the filing of a petition or motion we were unaware of Plaintiff's request. Further, neither a petition nor a motion, and certainly not a memorandum, is a pleading on which a default judgment can be taken. Plaintiff's belief that she is somehow entitled to take a default judgment on the basis of a proposed complaint which had yet to be authorized or even filed, and which did not contain a twenty day notice to defend, is unsupportable.

The only operative complaint at the time Plaintiff took her default judgment was the first amended complaint to which Beers' preliminary objections were then outstanding. These objections, even if late, legally stayed the proceedings and barred the subsequent taking of a default judgment before disposition of the objections. **Vision Service v. Pa. AFSCME Health and Welfare Fund**, 326 Pa. Super. 474, 478, 474 A.2d 339, 341-342 (1984). Additionally, the right to plead over when preliminary objections are overruled or dismissed is absolute. **International Lands, Inc. v. Fineman**, 285 Pa. Super. 548, 550,

untimely, not that the errors we identified in the January 5, 2006, order were not present. To the extent Plaintiff seeks to raise additional issues on appeal which have not been adequately identified in Plaintiff's concise statement, they have been waived. **Commonwealth v. Schofield**, 585 Pa. 389, 888 A.2d 771 (2005); **Commonwealth v. Castillo**, 585 Pa. 395, 888 A.2d 775 (2005). In any event, the defects and irregularities in Plaintiff's amended complaint are glaring.

428 A.2d 181, 182 (1981). Further, the complaint upon which Plaintiff took her default judgment was never filed as a viable separate document requiring a responsive pleading and, even as an exhibit to Plaintiff's Memorandum, did not contain a notice to defend.

A petition to strike a judgment acts as a demurrer to the record; it examines whether a fatal defect in the judgment appears on the face of the record. **Aequilino v. Philadelphia Catholic Archdiocese**, 884 A.2d 1269, 1280 (Pa. Super. 2005). The foregoing defects, apparent on the face of this record, are obvious, substantial and fatal and, without question, deprived the Prothonotary of authority to enter a default judgment. **Mother's Restaurant**, 861 A.2d at 337-338; **see also**, Pa. R.C.P. 1037(b) (providing that “[t]he prothonotary, on praecipe of the plaintiff, shall enter judgment against the defendant for failure to file within the required time a pleading to a complaint which contains a notice to defend ...”); **Phillips v. Evans**, 164 Pa. Super. 410, 412, 65 A.2d 423, 424 (1949) (stating that “the prothonotary acts in a ministerial and not a judicial capacity, and a judgment entered by [the prothonotary] upon default or admission, except as provided by [the Rules of Civil Procedure] is a nullity without legal effect”).⁶ Given the procedural posture of this case at the time Plaintiff took her default judgment, and the absence of any notice to defend attached to the complaint, the judgment taken by Plaintiff was void **ab initio**, and was properly and necessarily stricken by this Court. **Aquilino**, 884 A.2d at 1280 (“A petition to strike does not involve the discretion of the court.”).

General Considerations

“Procedural rules are not ends in themselves but means whereby justice, as expressed in the legal principles, is adminis-

⁶ Moreover, given the paucity of material facts alleged from which to quantify any economic damages claimed by the Plaintiff, as well as the unliquidated nature of compensation for emotional humiliation and punitive damages, the Prothonotary erred in entering judgment against Beers in any specific amount. Pa. R.C.P. 1037(b)(1); **see also**, **Hooker v. State Farm**, 880 A.2d 70, 77 (Pa. Commw. 2005) (discussing the different pleading requirements for general and special damages) and **Commonwealth, Dept. of Transp. v. Shipley Humble Oil Co.**, 29 Pa. Commw. 171, 175, 370 A.2d 438, 441 (1977) (noting that while Rule 1019(f) applies only to special damages, “[a]verments of damage may also be scrutinized under the specificity requirements of Rule 1019(a)”).

tered. They are not to be exalted to the status of substantive objectives.” **Fisher v. Hill**, 368 Pa. 53, 56, 81 A.2d 860, 863 (1951) (citations and quotations omitted). Nevertheless, “[t]he rules are essential in order to insure the orderly and equal administration of justice and it is within the discretion of a trial court to require compliance.” **Paden v. Baker Concrete Construction, Inc.**, 540 Pa. 409, 414, 658 A.2d 341, 344 (1995). “[A] lower court will not be reversed either for waiving or refusing to waive non-compliance with procedural rules in the absence of a showing of an abuse of discretion which has caused manifest and palpable injury to the complaining party.” **Gagliardi v. Lynn**, 446 Pa. 144, 151, 285 A.2d 109, 112 (1971) (citations and quotations omitted). It is in this light that the January 5, 2006, orders must be viewed.

As a whole, these orders were intended to clear the procedural morass created by Plaintiff’s deficient and ill-timed filings and to give Plaintiff a fresh start—not to harm her. The preliminary objections granted were for Plaintiff’s failure to conform to multiple rules involving elementary pleading practice of which Plaintiff had been placed on notice more than a year earlier, by our order of October 9, 2003. At the same time, to have required Beers to respond to Plaintiff’s first amended complaint—with its scattering of facts, opinions, arguments and law, compounded with similar documents incorporated by reference—would have imposed an undue, if not impossible, burden on Beers to fully answer and defend against the complaint. If anything, our January 5, 2006, orders erred in Plaintiff’s favor by giving her another chance to plead, rather than dismissing her complaint outright. See **Gorshin v. West**, 30 Pa. D.&C. 4th 525, 530 (C.P. 1996) (“In general, it can be grossly unfair and an imposition on the court to allow parties repeated attempts to accomplish elementary pleading goals. In this case, it would be a clear abuse of this court’s discretion to subject defendants to any more drafting attempts by plaintiff.”).

CONCLUSION

Beginning with our order of October 9, 2003, and ending with those on January 5, 2006, Plaintiff was offered three different opportunities over a two-year span to conform her complaint to the requisite procedural rules. Each order described and cited the applicable rules with which Plaintiff was to comply. Notwithstanding these opportunities, as Plaintiff herself

admits in her concise statement, she deliberately and consciously chose not to amend her complaint, adamant in her position that the default judgment taken was procedurally sound.

Plaintiff has exhibited throughout these proceedings a rudimentary lack of understanding of fundamental principles of procedure, and her decision to reject the opportunity to amend the complaint was ill-advised. In consequence, her action has been dismissed. For this, she has no one but herself to blame. **Cf. Branch Banking and Trust v. Gesiorski**, 904 A.2d 939, 942 (Pa. Super. 2006)(“[A]ny layperson choosing to represent herself in a legal proceeding must, to some reasonable extent, assume the risk that her lack of expertise and legal training will prove her undoing.”) (**quoting Commonwealth v. Rivera**, 454 Pa. Super. 451, 685 A.2d 1011 (1996)).

Given the gross defects in Plaintiff’s complaint, her repeated failure to correct them when given the opportunity to do so, and her conscious decision to risk dismissal, we respectfully request that our orders be affirmed and Plaintiff’s appeal denied.⁷

⁷ In her concise statement, Plaintiff has questioned the integrity of this Court and claimed we were prejudiced against her and acted with improper motives. These claims are baseless and, given Plaintiff’s education at a prestigious law school, inexcusable. The record in this case will demonstrate that Plaintiff has at all times been dealt with fairly, and with respect and patience. This issue merits no further comment.

**BOROUGH OF LANSFORD, Plaintiff vs.
RUSSELL HEFFELINGER, Defendant**

*Civil Law—Abatement of Nuisance—Dilapidated
Structure—Remedy—Demolition*

1. A property whose structural and interior condition threatens the health, safety, and welfare of the surrounding community by threatening collapse, harboring vermin and rodents, and being a fire hazard results in an unreasonable, unwarrantable use of property which infringes upon the lawful rights and expectations of the public and, by transgressing upon such rights and expectations, constitutes a public nuisance which may rightfully be abated by government authority.
2. In abating a public nuisance, the remedy selected should be reasonably related to the nature and extent of the nuisance, with the means selected being that which is necessary and appropriate to accomplish abatement.
3. Demolition of a structure is a drastic remedy and should be resorted to only when necessary for the protection of the public health, safety, and welfare.

4. Where the owner of a decaying, dilapidated, deteriorated structure has been provided repeated opportunities to make repairs over a three-year period, and during this time, has demonstrated an unwillingness or inability to make repairs notwithstanding having been warned, cited, fined and imprisoned for the building being unsafe and unfit for human habitation, demolition may be the only practical alternative left.
5. Pursuant to the Municipal Claims and Tax Liens Act, a borough is entitled to file a municipal claim for those costs incurred to demolish a building and abate a public nuisance.

NO. 06-1123

ROBERT T. YURCHAK, Esquire—Counsel for Plaintiff.

RUSSELL HEFFELFINGER—Pro se.

MEMORANDUM OPINION

NANOVIC, P.J.—January 11, 2007

In this litigation, the Borough of Lansford (“Borough”) seeks to have property located within the Borough at 201 West Patterson Street (the “property”)¹ declared a public nuisance, to have this nuisance abated by permitting the Borough to demolish the building presently on the property, and to have the cost of demolition secured by a municipal lien.²

PROCEDURAL HISTORY

The Borough commenced this action by complaint filed on May 26, 2006. Previously, for almost three years, the Borough sought unsuccessfully to have the property’s owner, the defendant Russell Heffelfinger, repair the property and make it suitable for human habitation. Heffelfinger became the owner of the property by deed dated April 3, 1987. He resides there with his son and girlfriend.

Located on the property is a large two and one-half story wooden frame structure having the general appearance of a hotel dating from the 1800s. The building is located on the northwest corner of Patterson (S.R. 209) and Center Streets, two principal thoroughfares within the Borough. For more than twenty years the building has been dilapidated and in disrepair, its con-

¹ While the property also has a mailing address of 12-14 Center Street, for ease of reference we have chosen the street address by which the property is commonly known to be inclusive of both addresses.

² Pursuant to Section 1205(5) of the Borough Code, the Borough has specific statutory authority to abate public nuisances. 53 P.S. §46202(5); **see also, Groff v. Borough of Sellersville**, 12 Pa. Commw. 315, 319, 314 A.2d 328, 330-331 (1974) (*en banc*).

dition continuously worsening. Immediately adjacent to this building, to the north, is an apartment building.

In 1998 the Borough adopted the Building Officials and Code Administrators National Property Maintenance Code, Fifth Edition (the "Code"). By letter dated October 1, 2003, the Borough's Code Enforcement Officer notified Heffelfinger that the structure was unsafe and unfit for human habitation. Heffelfinger was given thirty days to take corrective action. When he failed to do so, he was cited for violations of the Code, Sections 108.1.1 ("Unsafe Structure") and 108.1.3 ("Structure Unfit for Human Occupancy").³ Heffelfinger pled guilty before a district justice and was fined. The condition of the building, however, did not improve.

On September 15, 2005, following a thorough inspection of the interior and exterior of the premises by the Code Enforcement Officer on September 7, 2005, Heffelfinger was notified in writing of twenty-three separate violations of the Code. This notice constituted a repair or demolition order under Section 110.1 of the Code.⁴ The notice was personally served on

³ An "Unsafe Structure" is defined in Section 108.1.1 of the Code as one that is "found to be dangerous to the life, health, property or safety of the public or the occupants of the structure by not providing minimum safeguards to protect or warn occupants in the event of fire, or because such structure contains unsafe equipment or is so damaged, decayed, dilapidated, structurally unsafe, or of such faulty construction or unstable foundation, that partial or complete collapse is likely." A "Structure Unfit for Human Occupancy" is one which is "unfit for human occupancy whenever the code official finds that such structure is unsafe, unlawful or, because of the degree to which the structure is in disrepair or lacks maintenance, is unsanitary, vermin or rat infested, contains filth and contamination, or lacks ventilation, illumination, sanitary or heating facilities or other essential equipment required by [the Code], or because the location of the structure constitutes a hazard to the occupants of the structure or to the public." Section 108.1.3. The Code contains specific standards and it is against these standards which the structural soundness of Heffelfinger's building must be measured.

⁴ Section 110.1 of the Code provides:

The code official shall order the owner of any premises upon which is located any structure, which in the code official's judgment is so old, dilapidated or has become so out of repair as to be dangerous, unsafe, unsanitary or otherwise unfit for human habitation or occupancy, and such that it is unreasonable to repair the structure, to raze and remove such structure; or if **the structure is capable of being made safe by repairs, to repair and make safe and sanitary or to raze and remove at the owner's option;** or where there has been a cessation of normal construction of any structure for a period of more than two years, to raze and remove the structure.

(emphasis added).

Heffelfinger by the Code Enforcement Officer who suggested various agencies to be contacted and offered his assistance in remedying the code violations. When Heffelfinger again failed to take any corrective action within the directed thirty days,⁵ he was separately cited on December 30, 2005, for violating the following sections of the Code: Section 108.1.1 (“Unsafe Structure”), Section 108.1.3 (“Structure Unfit for Human Occupancy”), Section 305.1 (“Interior of Structure to be Maintained in Good Repair, Structurally Sound and in a Sanitary Condition”), Section 306.1 (“Accumulation of Rubbish or Garbage Prohibited”), and Section 304.2 (“Exterior Painting of Wood Surfaces to be Maintained in Good Condition”).

In early April 2006, a hearing on the citations was held before a district justice. The district justice gave Heffelfinger until April 28, 2006, to comply with the Code requirements and make repairs, or face jail and fines. Heffelfinger failed to meet this deadline and was in fact jailed for four days, from May 1 through May 4, 2006, at which time he was released from prison and given an additional thirty days to make repairs. After again failing to make any repairs, on June 8, 2006, Heffelfinger was fined \$2,500.00 by the district justice, \$500.00 for each of the five citations issued. Additionally, on April 28, 2006, the property was posted as unsafe for human occupancy or use, and the Code Enforcement Officer declared it unlawful for any person to enter or occupy the building after this date.

Heffelfinger has also failed to respond to the instant action, for which personal service was made on May 30, 2006. Thereafter, a default judgment was taken on July 11, 2006. A hearing pursuant to Pa. R.C.P. 1037.1(d) was held on October 5, 2006, to determine an appropriate order following this judgment of default. Heffelfinger did not appear for this hearing.

FACTUAL BACKGROUND

The problems with the building are widespread, long-standing, and expensive to correct. They include openings in the foundation and bearing walls extending from the outside to the inside of the structure and which affect the structural integrity of

⁵ A reinspection of the property on October 18, 2005, revealed limited repairs were made. These consisted primarily of exterior painting of dilapidated siding and the placement of one sheet of plywood. No further repairs have been made since the September 15, 2005 order.

the entire building; a decayed, dilapidated front porch in danger of collapsing at any time;⁶ and a leaking roof which, combined with missing and boarded-up windows and exposed openings, permits moisture to enter the building causing further deterioration and damage to the roof, ceilings, and structural members of the building. At times, two to three foot sections of lumber have fallen from the outside of the building endangering pedestrians and traffic along Patterson Street, a heavily traveled state highway.

Inside the building, ceilings have fallen down and mildew and rotting cross-beams are visible. In several rooms, exterior walls are exposed to the studs, without wiring, insulation, or plaster. The electrical wiring is archaic, bare in places, and substandard. Certain areas of the home have no power at all.

The building has no functional heating system. An oil burner which once heated the building is rusted, inoperable, and beyond repair. The exhaust pipe for this burner is deteriorated and not connected to a chimney. Debris and trash surround the burner. What heat there is, is supplied by portable kerosene heaters.

The property is littered with combustible material inside and out. Rubbish and debris—in many areas six to seven feet in height, and in some areas extending to the ceiling—block stairways, passageways, doors, and windows within the building, and prevent safe movement. As an admitted admission from the pleadings, “the premises is infested with rats and other rodents which are then going into neighboring properties.” (Complaint, Paragraph 9(c)).

The home in its present condition is structurally unsafe, unsound, unstable, and in danger of collapse. As such, it poses a danger to both the occupants of the home and to surrounding buildings and passersby. It is a fire hazard to the occupants and threatens the health, safety and welfare of the surrounding community, as well as to firemen who might be required to enter the premises in the event of a fire. Given these dangers, and the lack of heat and basic living accommodations, the building is unsuitable for human habitation.

⁶ One of the vertical columns on this porch which help support the second story is also missing.

DISCUSSION

The Court in **Groff v. Borough of Sellersville**, 12 Pa. Comw. 315, 314 A.2d 328 (1974) (*en banc*) discussed what constitutes a nuisance generally, as well as what is a public nuisance.

A ‘nuisance’ is ‘such a use of property or such a course of conduct as, irrespective of actual trespass against others or of malicious or actual criminal intent, transgresses the just restrictions upon use or conduct which the proximity of other persons or property in civilized communities imposes upon what would otherwise be rightful freedom. In legal phraseology, the term “nuisance” is applied to that class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal, or from his own improper, indecent, or unlawful personal conduct, working on obstruction or injury to a right of another, or of the public, and producing such material annoyance, inconvenience, discomfort or hurt that the law will presume a consequent damage. ...’ **Kramer v. Pittsburgh Coal Company**, 341 Pa. 379, 380-381, 19 A.2d 362, 363 (1941). ‘A public nuisance is an inconvenience or troublesome offense that annoys the whole community in general, and not merely some particular person, and produces no greater injury to one person than to another—acts that are against the well-being of the particular community—and is not dependent upon covenants. The difference between a public and a private nuisance does not depend upon the nature of the thing done but upon the question whether it affects the general public or merely some private individual or individuals. ...’ **Phillips v. Donaldson**, 269 Pa. 244, 246, 112 A. 236, 238 (1920).

Id. at 318, 314 A.2d at 330.

Given this definition, we have no difficulty in finding that Heffelfinger’s property is a public danger and constitutes a public nuisance. The building is unsafe structurally and unfit for human habitation. Although a default judgment has previously been taken, given the overlap between that evidence which establishes the existence of a nuisance and that which informs what relief is appropriate, the foregoing is necessary to what follows.

See also, King v. Township of Leacock, 122 Pa. Commw. 532, 537, 552 A.2d 741, 743 (1989) (explaining that the purpose of a hearing once a default judgment has been entered in a nuisance action is **solely** to assist the court in framing its decree).

Having so found, we are well aware that the demolition of a building is a drastic remedy and that a court “should not devise a remedy harsher than the minimum necessary to properly abate the nuisance.” **City of Erie v. Stelmack**, 780 A.2d 824, 827 (Pa. Commw. 2001). This point was effectively illustrated in **King**, where the Court stated:

There are a variety of remedies to which the Township may resort in abating the nuisance at issue without actually demolishing appellants’ uninhabited property. For example, if the electrical wiring in the structure is substandard, the Township can turn off the flow of electricity from its source until the wiring is satisfactory; if the building is open, the Township can close it at the appellants’ expense; if the floors are unsound, the Township can forbid tenancy until the floors are sound. In addition, more traditional remedies such as contempt and damages are available to the Township which will likewise assure abatement of the nuisance. The radical remedy of demolition should be used only when there exists no other practical alternative.

122 Pa. Commw. at 538-539, 552 A.2d at 744. We also understand that even though the cost of repairs for this property may exceed the value of the property (**i.e.**, that repairs are cost prohibitive), this alone is not determinative as to whether the owner should be given an opportunity to make repairs. **Herrit v. Code Management Appeal Board of Butler**, 704 A.2d 186, 189 (Pa. Commw. 1997).

Where, however, the owner has been given the opportunity to repair and the municipality has attempted alternative remedies, without success, demolition may be the only practical alternative left. **Stelmack**, 780 A.2d at 827. This is in keeping with the principle that “the remedy selected to abate the nuisance should not be punitive; rather, it should be shaped to correspond to the nature and extent of the nuisance.” **Id.** at 827. Being an exercise of the police power to promote the health, safety and general welfare of the public, once it has been deter-

mined that the interests of the public require government involvement to abate a public nuisance, the remedy effected must be “reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.” **King**, 122 Pa. Commw. at 538, 552 A.2d at 744 (internal quotation marks and citations omitted), **cf. Estate of Blose ex rel. Blose v. Borough of Punxsutawney**, 889 A.2d 653, 657-658 (Pa. Commw. 2005) (distinguishing between a taking pursuant to the police power, for which no compensation is paid, and property taken pursuant to the power of eminent domain for which compensation is due) (**quoting** extensively from **Balent v. City of Wilkes-Barre**, 542 Pa. 555, 565-566, 669 A.2d 309, 314 (1995)).

In this case, Heffelfinger has been warned, cited, fined and imprisoned to no avail. Directives to maintain and repair have been issued and ignored, notwithstanding that Heffelfinger has been fully informed of the repairs necessary to bring his building into compliance with the Code.⁷ More than three years has now elapsed since the first written notice to Heffelfinger and, despite being provided ample opportunity to make repairs, and to bring the property up to code, he has failed to make required repairs, to satisfy the requirements of the Code or of the law, or to make the property safe. Heffelfinger either cannot or will not abate the nuisance on his own. Absent the Borough being permitted to do so, it will not happen.

CONCLUSION

In light of Heffelfinger’s blatant disregard of the citations, fines and warnings issued by the Borough, we conclude that the Borough is entitled to the relief requested and should be permitted to demolish Heffelfinger’s building.⁸

⁷ At the time of hearing, it appeared that Heffelfinger does not have steady employment. For this reason, we realize that he may not have the financial resources to make required repairs, however, because Heffelfinger failed to appear for the hearing, this is unclear.

⁸ As already stated, the Borough will be authorized to tear down the building located at 201 West Patterson Street. With respect to the Borough’s request to place a lien on the property, the assessment of costs to remove a nuisance, challenges thereto, and the manner of collection are provided for in the Municipal Claims and Tax Liens Act, 53 P.S. §§7101-7505; **see also**, 53 P.S. §46202(5). Compliance with the provisions of this Act will assure that the interests of both the Borough and Heffelfinger are protected and that the costs of demolition are fairly and reasonably allocated.

ORDER

AND NOW, this 11th day of January, 2007, after hearing held and in accordance with our Memorandum Opinion of this same date, it is hereby ORDERED and DECREED as follows:

1) The property located at 201 West Patterson Street and 12-14 Center Street, Lansford, Carbon County, Pennsylvania is hereby declared to be a public nuisance;

2) The Borough of Lansford is hereby permitted to tear down and demolish the structure on the property located at 201 West Patterson Street and 12-14 Center Street, Lansford, Pennsylvania, owned by the Defendant, Russell Heffelfinger, with the Defendant to be assessed the costs of said demolition and a municipal lien to be placed against the property for the costs of demolition and removal of debris from the property.

3) The Defendant, Russell Heffelfinger, is directed to vacate the property within thirty days of the date of this order, together with his family, and shall be permitted during this same time period to remove all personal items he desires to retain. Thereafter, the Borough is hereby authorized to board and padlock the building located on the property in order to prohibit any occupancy or use of this structure.

4) 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 days after notice of filing of this decision.

**RICHARD M. SMITH f/d/b/a SERVPRO OF CARBON
COUNTY, WHITE HAVEN, Plaintiff vs. GREGG TIRPAK and
BRIAN TIRPAK, Defendants**

*Civil Law—Express and Implied Contracts—**Quantum Meruit**—
Prejudgment Interest—Award of Attorney Fees—Unfair Trade
Practices and Consumer Protection Law*

1. Claims for breach of an express contract and those pursuant to the quasi-contractual doctrine of unjust enrichment (**quantum meruit**) are distinct in nature and cannot simultaneously exist against the same party under the same set of facts. A cause of action for **quantum meruit** can only occur in the absence of an agreement, whether express or implied, when one person receives unjust enrichment at the expense of another.

2. In a contract action, whether pursuant to an express contract or one for **quantum meruit**, an award of prejudgment interest is a legal right which

accrues from the time payment is due on a definite sum of money, or on an amount which is sufficiently ascertainable.

3. Claims for attorney fees are in derogation of the common law of this Commonwealth and require, for their award, express statutory authorization, a clear agreement of the parties, or some other established exception.

4. The Unfair Trade Practices and Consumer Protection Law while intended to provide broader protection to consumers than protections afforded through common-law trespass or assumpsit actions requires, when a private cause of action for damages is sought, that the plaintiff allege and prove his reliance on the misrepresentation or other wrongful conduct complained of and that a resulting injury be proximately caused by such reliance.

NO. 04-2829

LAWRENCE A. DURKIN, Esquire—Counsel for Plaintiff.

JOSEPH V. SEBELIN, JR., Esquire—Counsel for Defendants.

MEMORANDUM OPINION

NANOVIC, P.J.—February 15, 2007

FACTUAL AND PROCEDURAL BACKGROUND

On March 9, 2004, the Defendant Gregg Tirpak signed an agreement authorizing Servpro of Carbon County, the Plaintiff, to repair and restore his property at 72 East Railroad Street in Nesquehoning, Carbon County, Pennsylvania. Both the dwelling and contents at this location were damaged during the course of a fire which originated in an adjoining structure on January 28, 2004. At the time of the fire, the Defendant Gregg Tirpak was a tenant in the row home located at 72 East Railroad Street; his brother, the Defendant Brian Tirpak, was the owner of the home.

The agreement Gregg Tirpak signed on March 9, 2004, is a standardized one-page boilerplate form agreement prepared by the Servpro franchiser with the names of the customer and property location to be filled in on the face side, and with eleven numbered pre-printed terms and conditions on the reverse side. The agreement identifies the property to be cleaned and restored as the “Customer’s property at 72 East Railroad Street.” It does not state whether the property referred to is limited to the contents, owned by Gregg Tirpak, or includes the structure, owned by Brian Tirpak. The agreement, however, specifically identifies Gregg Tirpak as the person who is meant when using the term “Customer.”

The agreement directs that Windsor-Mount Joy Mutual Insurance Company (Windsor), the carrier for the homeowner’s

policy on the property, make payments directly to Servpro for its work. Both Gregg Tirpak and Brian Tirpak were insureds under this policy: Gregg as the named insured and Brian as an additional insured, as their interests may appear.

In order to expedite insurance payments, the agreement designates Servpro as Gregg Tirpak's attorney-in-fact authorized to endorse his name and to deposit insurance company checks or drafts for its services. The agreement further provides that charges not paid by the insurance company are the responsibility of Gregg Tirpak and are to be paid upon completion of the work. Interest under the agreement accrues at the rate of 1.5 percent per month on accounts more than thirty days past due. On the reverse side, the agreement contains the following provision:

Should legal action be brought under the terms of this Contract or arise out of the performance of the Services, or should the matter be turned over for collection, Provider shall be entitled, to the fullest extent permitted under law, to reasonable legal fees and costs of collection, in addition to any other amounts owed by Customer.

(Agreement, Terms and Conditions of Service, ¶5)

Prior to Gregg Tirpak signing this agreement, Brian Tirpak first contacted Servpro on January 29, 2004—the day after the fire—to arrange a meeting on site to evaluate and assess the damage from the fire. Servpro is in the business of cleaning and remedying fire-damaged properties. At the time Brian Tirpak contacted Servpro he was not only the record owner of the property at 72 East Railroad Street, but also the procuring insurance agent for the homeowner's policy on this property. Acting in both these capacities, on the same date (*i.e.*, January 29, 2004), Brian Tirpak faxed to Servpro a form entitled "Property Loss Notice"; this form listed the Tirpak Insurance Agency as the producing agent and also described Brian Tirpak as the legal owner of the home.

Also on January 29, 2004, both Brian and Gregg Tirpak met with representatives of Servpro at the property to examine the damage. Damages from fire, smoke, water, and firefighting activities were observed throughout the home. To repair this damage, walls and ceilings needed to be torn down and replaced, other walls and surfaces needed to be washed down and coated

with Kilz—a blocking agent for smoke, carpeting needed to be removed and replaced, and the home needed to be completely repainted. With respect to contents, the parties discussed what was salvageable and what was not.

At the conclusion of this meeting, both brothers were in agreement to have Servpro clean the premises. Although Brian Tirpak testified that it was his initial intent to limit Servpro's services to those preparatory to repainting the home, he acknowledged that later he was also in agreement to have Servpro do the repainting. The express terms of an agreement, however, were never reached between Brian Tirpak and Servpro, nor does Servpro contend otherwise in its pleadings. Nonetheless, it is also clear that Gregg Tirpak had his brother's authority to arrange for repairs to the home and did so with Brian's knowledge.

The majority of the contents were removed from the home on March 9 and 10, 2004: some for disposal and those which were salvageable for cleaning and repair. Between approximately March 9 through April 30, 2004, Servpro worked on the home. Brian Tirpak was aware of this work and relied on his brother to check on its progress. When decisions related to the work had to be made, Brian permitted Gregg to make these for him.

After Servpro started repainting the home, the Tirpaks became upset with the quality of this work—the paint was rough in many areas and contained foreign particles, was sloppy and uneven along the edges of walls and ceilings, and was splattered on adjacent floors, tiles and surrounding surfaces and fixtures—and complained to Servpro. This occurred on or about April 22, 2004. By April 30, 2004, the date Gregg Tirpak's personal property was returned to the home—some damaged, some missing, some uncleansed—the situation had not improved. In consequence, Brian Tirpak informed Servpro that it was finished working at the home and would not be permitted to return. Servpro did not perform any additional work after this date.

On June 2, 2004, Servpro submitted a complete bill in the amount of \$24,665.74 to Windsor for all work performed by it. In payment of this bill, Windsor issued a check on September 28, 2004, in the amount of \$25,093.48 made payable to Gregg S. Tirpak, Brian Tirpak and Servpro.¹ This check was sent to

¹ The \$427.74 difference between the amount of Servpro's bill and Windsor's check has never been explained.

Brian and Gregg Tirpak, who refused to endorse the check or forward it to Servpro because of their disagreement with the quality of Servpro's work. Later, on February 15, 2006, a representative of Servpro contacted Windsor directly and misrepresented that the previous check had been lost, and that the Court had issued an order directing that Windsor's earlier check be reissued and made payable to Servpro alone. Based on these representations, Windsor issued a second check on February 22, 2006, again in the amount of \$25,093.48, and forwarded this to Servpro, who was the sole payee on the check. This check was cashed by Servpro and the amount credited to the Tirpaks.

Servpro commenced its suit against the Tirpaks by complaint filed on August 30, 2004. In this complaint, Servpro asserts a claim for breach of contract against Gregg Tirpak on the basis of the agreement signed by him and a claim for **quantum meruit** or unjust enrichment against Brian Tirpak for the value of the work performed on his home.² In their counterclaim to the complaint, the Tirpaks likewise make a claim for breach of contract and also assert claims for negligence in the perform-

² Servpro does not allege in its complaint that Brian Tirpak is bound by the agreement signed by Gregg Tirpak or claim that Brian is responsible for any damages as a result of this agreement. The written agreement signed by Gregg Tirpak on March 9, 2004, by its literal terms was for Gregg's property only and, therefore, did not make Gregg personally responsible for work on Brian's home, nor bind Brian, through principles of agency, for such work. "It is elementary law that no person can be sued for breach of contract who has not contracted either in person or by an agent; or in other words who was not a party to the contract." **Roman Mosaic and Tile Co., Inc. v. Vollrath**, 226 Pa. Super. 215, 218, 313 A.2d 305, 307 (1973) (**quoting Wolff v. Wilson**, 28 Pa. Super. 511, 515 (1905)). Here, Brian Tirpak never signed an agreement with Servpro for repairs to his home nor, as just indicated, did Gregg Tirpak do so on his behalf.

Moreover, neither party claims that the language of the written agreement was in error. "The issues to be addressed at trial must be framed in the parties' pleadings." **Morris v. Benson & Benson, Inc.**, 321 Pa. Super. 15, 17, 467 A.2d 870, 871 (1983). "Thus, a court may not **sua sponte** instruct the jury on issues or theories not raised by the parties." **Schaefer v. Stewartstown Development Company**, 436 Pa. Super. 354, 360, 647 A.2d 945, 947 (1994). It is therefore significant that Servpro does not allege anywhere in its pleadings that the parties to the March 9, 2004, agreement were acting under a mutual or unilateral mistake of fact in describing the property which is the subject of their agreement as being that owned by Gregg Tirpak. "Where parties, without any fraud or mistake, have deliberately put their [agreement] in writing, the law declares the writing to be not only the best, but the only, evidence of their agreement." **Keyser v. Margolis**, 422 Pa. 553, 559, 223 A.2d 13, 17 (1966) (quotation marks and citations omitted).

ance of the contract and for violation of the Unfair Trade Practices and Consumer Protection Law.³ Both parties seek prejudgment interest and attorney fees on their respective claims.

DISCUSSION

Determination of Principal Amounts Owed

That Servpro has a valid claim against Brian Tirpak for **quantum meruit** is not in serious dispute. No express contract existed between Servpro and Brian Tirpak, and the evidence, while indicative of a consensual arrangement pursuant to which Servpro was performing work on Brian Tirpak's home, did not establish the essential terms of an agreement, particularly with respect to Servpro's charges. As far as we can determine, the costs of Servpro's services were never discussed with Brian Tirpak, much less agreed upon.

Under these circumstances,

[a] quasi-contract imposes a duty, not as a result of any agreement, whether express or implied, but in spite of the absence of an agreement, when one party receives unjust enrichment at the expense of another. In determining if the doctrine applies, we focus not on the intention of the parties, but rather on whether the defendant has been unjustly enriched. The elements of unjust enrichment are benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value. The most significant element of the doctrine is whether the enrichment of the defendant is unjust; the doctrine does not apply simply because the defendant may have benefited as a result of the actions of the plaintiff. Where unjust enrichment is found, the law implies a quasi-contract which requires the defendant to pay to plaintiff the value of the benefit conferred. In other words, the de-

³ The Tirpaks' claim for negligence was withdrawn at the time of trial.

fendant makes restitution to the plaintiff in **quantum meruit**.

Temple University Hospital, Inc. v. Healthcare Management Alternatives, Inc., 832 A.2d 501, 507 (Pa. Super. 2003) (**quoting AmeriPro Search Inc. v. Fleming Steel Co.**, 787 A.2d 988, 991 (Pa. Super. 2001), **appeal denied**, 847 A.2d 1288 (Pa. 2004)). “Unjust enrichment is an equitable doctrine, and when unjust enrichment is present, the law implies the existence of a contract requiring the defendant to pay to the plaintiff the reasonable value of the benefit conferred.” **Id.** at 508.

With the exception of a dry cleaning bill in the amount of \$764.85 paid by Gregg Tirpak, not Servpro, the charges for the type of work described in Servpro’s bill, if properly performed, have not been challenged. The amounts were reviewed and approved by an insurance adjustor employed by Windsor, and paid in full after this review. We also find the figures to be fair and reasonable and what people would in fact pay for such services.

The Court finds, however, that Servpro’s work was not performed in a good and workmanlike manner and that the estimate of the Tirpaks’ contractor, Shawn Gilbert, to correct Servpro’s work at the home is accurate. On December 26, 2004, Mr. Gilbert visited the property, itemized deficiencies in this work, and estimated the amount to correct these deficiencies to be \$14,160.00.

We have also accepted Gregg Tirpak’s evidence that Servpro is responsible for damages to his property totaling \$1,217.00.⁴ With these adjustments, the correct amount owed to Servpro is \$8,523.89.⁵

Prejudgment Interest

As to Servpro’s claim for interest on the amount to which it is owed, a plaintiff is entitled to prejudgment interest on money owing for work done and services performed, whether pursuant to an express contract or on a claim for **quantum meruit**.

⁴ This figure is comprised of a missing computer desk—\$159.00, a missing dresser—\$70.00, and damages to the following items: master bedroom mirror and headboard—\$250.00, vanity—\$88.00, electric waterfall light—\$50.00, wall cabinet—\$170.00, cherry desk—\$300.00, and a side desk—\$130.00.

⁵ This figure represents the amount of Servpro’s bill, \$24,665.74, less \$764.85 for the cost of dry-cleaning, \$14,160.00 for Mr. Gilbert’s estimate, and \$1,217.00 for the damage to Gregg Tirpak’s personal property.

Burkholder v. Cherry, 414 Pa. Super. 432, 435-437, 607 A.2d 745, 746-748 (1992). This claim is a legal right which accrues from the time payment is due on a definite sum of money, or on an amount which is sufficiently ascertainable. **Id.** at 436-437, 607 A.2d at 747-748. The amount of the claim is not rendered unascertainable simply because it is in dispute, even if the breaching party is entitled to a reduction in the claim because plaintiff did not properly perform under the contract. **Id.** at 438, 607 A.2d at 748.

In this case, the agreement with Gregg Tirpak was for Servpro to bill the insurance company directly. Those amounts not covered by insurance were to be paid by him. Believing its arrangement with Brian Tirpak was to the same effect, a belief which has not been questioned by the Tirpaks, Servpro submitted all of its billing to Windsor. In payment of this bill, Windsor issued its original check in the amount of \$25,093.48 on September 28, 2004, however, the Tirpaks refused to endorse the check or make any payment to Servpro. Not until February 22, 2006, when the insurance company reissued its check, did Servpro receive payment for its work.

Of Servpro's total bill, \$1,601.60 is attributable to the disposal, cleaning and restoration of contents owned by Gregg Tirpak. This amount, when offset by the damages Servpro caused Gregg Tirpak, entitles Servpro to interest at the contract rate of 1.5 percent per month on \$384.60. For the period involved—September 28, 2004, through February 22, 2006—the interest payment owed by Gregg Tirpak is \$97.11.

With respect to the balance of the monies owed to Servpro during this same period of nonpayment—\$6,922.29—and which amount is attributable to work on the property owned by Brian Tirpak, the rate at which Servpro is entitled to interest on this unpaid sum is the legal rate of six percent per annum. 41 P.S. §202 (setting legal rate of interest at six percent per annum). When computed at this rate for the applicable period, the total unpaid interest owed by Brian Tirpak is \$582.61. We further find that Brian Tirpak is entitled to interest at the rate of six percent per annum for the cost to correct Servpro's work (**i.e.**, \$14,160.00) from February 22, 2006, the date Servpro received payment for this work from the insurance carrier, until the date on which payment is made.

Attorney Fees

1) Pursuant to Contract

Finally, we have determined that neither party is entitled to the payment of attorney fees. In this Commonwealth, attorney fees are recoverable from an adverse party only where “there is express statutory authorization, a clear agreement of parties, or some other established exception” supporting the payment. **Snyder v. Snyder**, 533 Pa. 203, 212, 620 A.2d 1133, 1138 (1993). Although the contract signed by Gregg Tirpak entitles Servpro “to reasonable legal fees and costs of collection, in addition to any other amounts owed by [the customer],” we have determined the amount actually owed by Gregg Tirpak to Servpro to be \$384.60. Given this amount, and since Servpro has not allocated its bill for attorney fees between the amount attributable to its claim against Gregg Tirpak and that attributable to its claim against Brian Tirpak, Servpro has not met its burden of proving an amount of attorney fees which is reasonably owed by Gregg Tirpak.⁶

In denying this aspect of Servpro’s claim, it is appropriate to mention that even when an award of attorney fees is authorized, whether attorney fees should be awarded and in what amount—whether they are reasonable—implies a sense of proportionality between the amount of damages and the award of attorney fees and requires us, in this case, to recognize that Servpro was paid all principal amounts owed to it almost eight months prior to the date of trial, and that Servpro has been found liable to Brian Tirpak for more than \$14,000.00 in payments it received and to which it was not entitled. Attorney fees are not recoverable on Servpro’s claim against Brian Tirpak for **quantum meruit**.

2) Pursuant to Statute

The Tirpaks’ claim for attorney fees is premised on their claim pursuant to the Unfair Trade Practices and Consumer Protection Law (UTPCPL), 73 P.S. §§201-1—201-9.3. Although attorney fees are authorized under this Act, 73 P.S. §201-

⁶ Servpro’s bill for attorney fees placed in evidence states an aggregate number of hours (**i.e.**, sixty-seven, plus additional time for trial), an hourly rate (**i.e.**, \$95.00) and a lump-sum amount (**i.e.**, \$7,548.00). This bill does not contain any description of the services provided, for whom, or when provided.

9.2(a), we find that the Tirpaks have failed to present a viable claim of unfair or deceptive acts or practices.⁷

For the most part, the Tirpaks' claims against Servpro are claims for breach of the implied covenant that contracts be performed in a good and workmanlike manner. Such claims, based upon breach of an implied condition, rather than an express one, are not sufficient to support a claim under the UTPCPL. **Burkholder v. Cherry, supra** at 440, 607 A.2d at 749 ("[I]t is not enough to establish a violation of the statute that [the contractor] failed to fulfill the [consumer's] expectations regarding the quality of his work"). Nonfeasance, in contrast to malfeasance or misfeasance, is insufficient to establish a claim under the UTPCPL. **Leo v. State Farm Mut. Auto. Ins. Co.**, 939 F. Supp. 1186, 1193 (E.D. Pa. 1996), **aff'd**, 116 F.3d 468 (3rd Cir. 1997).

To the extent the Tirpaks claim that Servpro billed for work which was not performed or for work which was improperly performed, this billing was directed to Windsor and paid in full. Had Windsor not made this payment, Gregg Tirpak's residual obligation to pay that portion of the bill not covered by insurance would have subjected him to liability for the unpaid amount and, as a result, possibly raised a claim under the UTPCPL. As it stands, the Tirpaks do not have standing to pursue a claim

⁷ In addition to that conduct declared unlawful in the UTPCPL, other consumer protection statutes, among which is the Plain Language Consumer Contract Act (73 P.S. §§2201-2212), provide that a violation of their terms is also a violation of the UTPCPL. **See e.g.**, 73 P.S. §2207(b). The Tirpaks assert that the agreement between Servpro and Gregg Tirpak violates the Plain Language Consumer Contract Act in two respects: that the terms and conditions on the reverse side of the agreement are in a smaller font size than on the face side; and that three of the provisions in the terms and conditions contain sentences of three or more lines in length—the first sentence of Paragraph 3 is four lines in length and Paragraphs 4 and 9 each have sentences of three lines in length. We disagree.

The Plain Language Consumer Contract Act imposes a test of readability and understandability in consumer contracts. 73 P.S. §2205. The font size and spacing used in the terms and conditions segment of the subject agreement does not conceal or create any ambiguity, or impair the readability of this language in the agreement. The lettering contained in the three paragraphs which the Tirpaks question is capitalized and, in two of the paragraphs, in bold print. None of these paragraphs has been relied upon by any of the parties in support of their respective positions in this litigation and the Tirpaks have failed to explain how they have in any manner been prejudiced by the format of these paragraphs.

for Servpro's alleged fraudulent or deceptive billing practices (conduct encompassed within the catch-all provision of the UTPCPL, Section 201-2(4)(xxi)) which were directed at a third party and not relied upon by them. **Yocca v. Pittsburgh Steelers Sports, Inc.**, 578 Pa. 479, 854 A.2d 425, 438 (2004) ("To bring a private cause of action under the UTPCPL, a plaintiff must show that he justifiably relied on the defendant's wrongful conduct or representation and that he suffered harm as a result of that reliance.");⁸ cf. **eToll, Inc. v. Elias/Savion Advertising, Inc.**, 811 A.2d 10, 20-21 (Pa. Super. 2002) (holding that a fraud-based claim arising out of the performance of contractual duties is subsumed within a claim for breach of contract, and cannot be brought as a separate and distinct claim in tort); **Bash v. Bell Telephone Co.**, 411 Pa. Super. 347, 356, 601 A.2d 825,

⁸ "The purpose of the UTPCPL is to protect the public from fraud and unfair or deceptive business practices and the statute is the principal means for doing so in the Commonwealth." **Pirozzi v. Penske Olds-Cadillac-GMC, Inc.**, 413 Pa. Super. 308, 313, 605 A.2d 373, 375 (1992), appeal denied, 532 Pa. 665, 616 A.2d 985 (1992). Consistent with this purpose, it is important to understand that:

Not all 'unfair or deceptive' business practices under the statute are in the nature of fraud. 73 P.S. §201-2(4). The UTPCPL is of a **sui generis** nature and 'encompasses an array of practices which might be analogized to passing off, misappropriation, trademark infringement, disparagement, false advertising, fraud, breach of contract, and breach of warranty.' **Gabriel v. O'Hara**, 368 Pa. Super. 383, 394, 534 A.2d 488, 494 (1987) (citing individual subsections of §201-2(4)) (footnotes omitted).

Weinberg v. Sun Company, Inc., 740 A.2d 1152, 1166 (Pa. Super. 1999), aff'd in part and reversed in part, 565 Pa. 612, 777 A.2d 442 (2001).

It is also important to differentiate between enforcement actions brought in the public interest by the Attorney General or a county district attorney in the name of the Commonwealth under the UTPCPL, see 73 P.S. §201-4, and one brought by a private citizen. See 73 P.S. §201-9.2. The object of the former is to protect the public interest by enjoining prohibited conduct. The latter, while having an indirect benefit on the public, has as its primary and immediate object the protection of the individual through compensation. Recognizing this distinction, the Pennsylvania Supreme Court in **Weinberg v. Sun Company, Inc.**, 565 Pa. 612, 777 A.2d 442 (2001) held that, unlike an enforcement action by a high public official under Section 201-4, under Section 201-9.2 a private plaintiff seeking monetary damages must prove his reliance on the misrepresentation or other wrongful conduct alleged and a resulting injury proximately caused by that reliance. The necessity to establish the elements of reliance and causation for a private cause of action is a direct consequence of that language in Section 201-9.2 which requires that the plaintiff "suffer an ascertainable loss as a result of the defendant's prohibited action." **Id.**, 777 A.2d at 446.

829 (1992) (“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.”) (**quoting Iron Mountain Security Storage Corp. v. American Specialty Foods, Inc.**, 457 F. Supp. 1158, 1165 (E.D. Pa. 1978)), superseded by rule for other reasons, **Keefer v. Keefer**, 741 A.2d 808 (Pa. Super. 1999).

CONCLUSION

In accordance with the foregoing, Servpro’s claim against the Tirpaks and the Tirpaks’ claims against Servpro for breach of contract will be granted. In doing so, we have distinguished between claims for breach of an express contract, where attorney fees and interest at other than the legal rate may be awarded when provided for, and breach of an implied-at-law contract where such items are not recoverable. Likewise, in considering the Tirpaks’ claim for attorney fees under the UTPCPL, we have distinguished between enforcement actions brought on behalf of the Commonwealth and actions for money damages brought by a private party, the latter requiring proof of individual reliance and a resulting ascertainable loss before attorney fees can be awarded.

**COMMONWEALTH OF PENNSYLVANIA vs.
JOSHUA GERHART, Defendant
COMMONWEALTH OF PENNSYLVANIA vs.
STEPHANIE GERHART, Defendant**

*Criminal Law—Motion To Dismiss—Habeas Corpus—**Prima Facie**
Case—Conspiracy—Recklessly Endangering the Welfare of a Child*

Where there is no evidence of an agreement, either express or tacit, between the alleged co-conspirators and there is no evidence that the alleged co-conspirators acted in concert, the Commonwealth fails to establish a **prima facie** case of Conspiracy.

Where there is no evidence that the Defendant knowingly endangered the welfare of a child, the Commonwealth fails to establish a **prima facie** case of Recklessly Endangering the Welfare of a Child.

No. 441-CR-06

No. 440-CR-06

JOSEPH J. MATIKA, Esquire, Assistant District Attorney—
Counsel for the Commonwealth.

PAUL J. LEVY, ESQUIRE—Counsel for the Defendants.

OPINION

ADDY, J.—March 8, 2007

On December 4, 2006, the Defendants filed Motions to Dismiss the Criminal Informations in these cases, which are in the nature of a writ of habeas corpus, challenging the finding of a **prima facie** case at the Preliminary Hearing by the Magisterial District Judge. After a hearing held on January 12, 2007, we grant the Motions to Dismiss.

FACTS

The Commonwealth relies on the Transcript of the Preliminary Hearing held before Magisterial District Judge Bruce F. Appleton on July 26, 2006 to establish a **prima facie** case against the Defendants. The Commonwealth's evidence, as contained in the Transcript, is summarized below.

On July 29, 2004, Joshua Gerhart (hereinafter referred to as "Joshua"), who was one (1) year old, was picked up by his Father, Joshua Gerhart (hereinafter referred to as "Mr. Gerhart"), for a Court ordered period of partial physical custody to last until August 1, 2004. During this period of partial physical custody, Joshua was staying at Mr. Gerhart's house along with his Stepmother, Stephanie Gerhart (hereinafter referred to as "Mrs. Gerhart"), and two (2) other children. On August 1, 2004, Joshua's Mother, Amanda Lang (hereinafter referred to as "Ms. Lang"), picked Joshua up at Mr. Gerhart's house. At the time that Ms. Lang picked Joshua up, Mrs. Gerhart was presumably watching Joshua, as she was the person who delivered Joshua to Ms. Lang. Mrs. Gerhart told Ms. Lang that Joshua's diaper had just been changed and that he should be fine until he got his bath later in the evening. At this point, Ms. Lang took Joshua home.

Once home, Joshua played outside with his Grandfather for a few minutes and then came inside to get his evening bath. When Ms. Lang undressed Joshua for his bath, she discovered bruising and swelling of his genitalia area that was not there when Joshua was sent to Mr. Gerhart's house on July 29th. At this point, Ms. Lang screamed for her Mother to come and her Mother then took pictures of the affected area. Ms. Lang then took Joshua to the emergency room at Gnaden Huetten Hospital. From there, they were transferred to Lehigh Valley Hospital for more tests. Finally, Joshua was taken to see Andrea Taroli,

M.D., at Pegasus Child Advocacy Center in Carbondale, Pennsylvania. Dr. Taroli specializes in the evaluation of children who are alleged to be abused or neglected.

After examining Joshua, Dr. Taroli concluded, within a reasonable degree of medical certainty, that the swelling and bruising of Joshua's genitalia resulted from the genitalia being "grabbed as a whole, forcibly, and twisted. And essentially crushed ... within the adult's hand". (Transcript of Preliminary Hearing, pp. 68-69.) Dr. Taroli further concluded that this bruising and swelling occurred a day or two prior to being discovered on August 1st. This would place the date that the injury occurred on July 30th and/or July 31st, which is during Mr. Gerhart's period of partial physical custody.

Subsequently, Mr. Gerhart and Mrs. Gerhart were both charged with Conspiracy, 18 Pa. C.S.A. §903(a)(1), and Recklessly Endangering the Welfare of a Child, 18 Pa. C.S.A. §4304(a).

DISCUSSION

The Defendants' Motions to Dismiss challenge the finding by the Magisterial District Judge that a **prima facie** case was established against the Defendants. Essentially, the Defendants' Motions are in the nature of a pretrial writ of habeas corpus.

In **Commonwealth v. Jackson**, 809 A.2d 411 (Pa. Super. 2002), the Superior Court reviewed the standard for reviewing a pretrial writ of habeas corpus as follows:

We begin with **Commonwealth v. Morman**, 373 Pa. Super. 360, 541 A.2d 356 (1988), wherein it is written in relevant part:

... As a starting point, we must recognize the importance and history of the writ of habeas corpus in our system of government. 'The writ of habeas corpus has been called the "great writ." It is an ancient writ, inherited from the English common law, and lies to secure the immediate release of one who is detained unlawfully.'

...

The writ of habeas corpus exists to vindicate the right of personal liberty in the face of unlawful government deprivation.

... The purpose of a preliminary hearing is much the same as the purpose of the pretrial petition for habeas corpus relief. As has often been stated:

The primary reason for the preliminary hearing is to protect an individual's right against unlawful arrest and detention. It seeks to prevent a person from being imprisoned or required to enter bail for a crime which was never committed, or for a crime with which there is no evidence of his connection....

...

... We find that the scope of evidence which a trial court may consider in determining whether to grant a pretrial writ of habeas corpus is **not** limited to the evidence as presented at the preliminary hearing. On the contrary, we find that the Commonwealth may present additional evidence at the habeas corpus stage in its effort to establish at least **prima facie** that a crime has been committed and that the accused is the person who committed it.

...

... In the pretrial setting, the focus of the habeas corpus hearing is to determine whether sufficient Commonwealth evidence exists to require a defendant to be held in government 'custody' until he may be brought to trial. To make this determination, the trial court should accept into evidence the record from the preliminary hearing as well as any additional evidence which the Commonwealth may have available to further prove its **prima facie** case.

Morman, 541 A.2d at 358-360 (Citations omitted; emphasis in original).

Further, at a habeas corpus hearing, the Commonwealth need not produce evidence of such character and quantum of proof as to require a finding by a jury of the accused's guilt beyond a reasonable doubt. But it should be such as to present 'sufficient probable cause to believe, that the person charged has committed the offense stated[.]' **Commonwealth ex rel. Scolio v. Hess**, 149 Pa. Super. 371, 374, 27 A.2d 705, 707 (1942) (Citations omitted).

Jackson, supra at 416-417.

The Commonwealth's burden at a Preliminary Hearing is aptly summarized in 26 Standard Pennsylvania Practice 2d §132:357 as follows:

At a preliminary hearing, the Commonwealth bears the burden of establishing at least a **prima facie** case that a crime has been committed and that the accused is probably one who committed it. **Commonwealth vs. Phillips**, 700 A.2d 1281 (Pa. Super. Ct. 1997), reargument denied, (Oct. 29, 1997) and appeal denied, 555 Pa. 718, 724 A.2d 934 (1988). The Commonwealth establishes a **prima facie** case of the defendant's guilt at a preliminary hearing when the Commonwealth produces evidence that, if accepted as true, would warrant a trial judge to allow case to go to jury. **Commonwealth vs. Martin**, 1999 Pa.Super. 29, 727 A.2d 1136 (Pa. Super. Ct. 1999), reargument denied, (April 23, 1999) and appeal denied, 1999 WL 791129 (Pa. 1999). At the preliminary hearing, the Commonwealth need not prove the elements of a crime beyond a reasonable doubt; rather, the **prima facie** standard requires evidence of the existence of each and every element of the crime charged. **Commonwealth vs. Martin**, 1999 Pa. Super. 29, 727 A.2d 1136 (Pa. Super. Ct. 1999), reargument denied, (April 23, 1999) and appeal denied, 1999 WL 791129 (Pa. 1999); **Commonwealth vs. Allbeck**, 715 A.2d 1213 (Pa. Super. Ct. 1998), appeal granted (Pa. October 22, 1999).

To meet its burden at the preliminary hearing, the Commonwealth is required to present evidence with regard to each of the material elements of the charge and to establish sufficient probable cause to warrant belief that the accused committed the offense. **Commonwealth vs. Phillips**, 700 A.2d 1281 (Pa. Super. Ct. 1997), reargument denied, (Oct. 29, 1997) and appeal denied, 555 Pa. 718, 724 A.2d 934 (1998).

In the present case, the Defendants have each been charged with Conspiracy and Recklessly Endangering the Welfare of a Child. We shall review whether the Commonwealth has established a **prima facie** case on each charge, separately, below.

A. **Conspiracy**

Section 903(a) of the Pennsylvania Crimes Code, 18 Pa. C.S.A. §903(a), provides as follows:

A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:

- (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
- (2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

18 Pa. C.S.A. §903(a).

A conspiracy can be established by circumstantial evidence; and conspiracies can be either express or tacit. **See Commonwealth v. Reed**, 276 Pa. Super. 467, 419 A.2d 552 (1980) (Commonwealth is not required to prove explicit or formal agreement in order to establish existence of conspiracy, which may be proven by circumstantial evidence); **Commonwealth v. Tumminello**, 292 Pa. Super. 381, 437 A.2d 435 (1981) (Commonwealth is not required to establish existence of conspiracy by direct proof or explicit or formal agreement); **Commonwealth v. Davalos**, 779 A.2d 1190 (Pa. Super. 2001), **appeal denied**, 567 Pa. 756, 790 A.2d 1013 (2001) (a conspiracy can be proven inferentially by showing the relation, conduct, or circumstances of the parties).

In the present case, there was simply no testimony or evidence presented at the Preliminary Hearing that would establish a **prima facie** case of Conspiracy. Specifically, the Transcript contains no evidence of an agreement, either express or tacit, between the Defendants. Moreover, the Transcript contains no evidence, either direct or circumstantial, that the Defendants acted in concert. Consequently, the Conspiracy Count against each Defendant must be dismissed.

B. Recklessly Endangering the Welfare of a Child

Section 4304 of the Pennsylvania Crimes Code, 18 Pa. C.S.A. §4304, provides that:

A parent, guardian, or other person supervising the welfare of a child under 18 years of age commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, protection or support.

18 Pa. C.S.A. §4304.

To support a conviction for Endangering the Welfare of a Child, the Commonwealth must establish that the accused acted knowingly by demonstrating that each of the following elements are met:

- 1) the accused is aware of his/her duty to protect the child;
- 2) the accused is aware that the child is in circumstances that could threaten the child's physical or psychological welfare; and
- 3) the accused has either failed to act or has taken action so lame or meager that such actions cannot reasonably be expected to protect the child's welfare.

See **Commonwealth v. Retkofsky**, 860 A.2d 1098 (Pa. Super. 2004); **Commonwealth v. Wallace**, 817 A.2d 485 (Pa. Super. 2002), **reargument denied, appeal denied**, 574 Pa. 774, 833 A.2d 134 (2003), **certiorari denied**, 124 S.Ct. 1610, 158 L.Ed.2d 251, 2004 WL 414109.

In **Commonwealth v. Miller**, 411 Pa. Super. 33, 600 A.2d 988 (1992), a case involving a charge of Endangering the Welfare of a Child, the Superior Court addressed the elements for this charge as follows:

Appellant has challenged, in particular, that the evidence presented at trial was insufficient to prove the intent element of the crime with which she [is] charged. 18 Pa.C.S.A. §4304 does, indeed, require proof of a specific intent element:

§4304. Endangering welfare of children

A parent, guardian, or other person supervising the welfare of a child under 18 years of age commits a misdemeanor of the first degree if he **knowingly** [emphasis added] endangers the welfare of the child by violating a duty of care, protection or support.

18 Pa.C.S.A. §4304. The criminal code further defines knowingly: (2) A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves the result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

18 Pa.C.S.A. §302(b)(2). Moreover, it is clear that §4304 contemplates endangerment either by act or by omission to act. **See Commonwealth v. Cardwell**, 357 Pa. Super. 38, 515 A.2d 311, at 314 (1986), allocatur denied, 515 Pa. 573, 527 A.2d 535 (1987).

In **Cardwell, supra**, this court established a three-prong standard for testing the sufficiency of evidence of the intent element under §4304:

We hold that evidence is sufficient to prove the intent element of the offense of endangering the welfare of a child, 18 Pa.C.S.A. §4304, when the accused is aware of his or her duty to protect the child; is aware that the child is in circumstances that threaten the child's physical or psychological welfare; and has either failed to act or has taken actions so lame or meager that such actions cannot reasonably be expected to be effective to protect the child's physical or psychological welfare.

Cardwell, 515 A.2d 311, at 315. If proof fails on any one of these prongs, the evidence must be found insufficient.

Miller, supra at 37-38, 600 A.2d at 990.

In the present situation, in attempting to establish a **prima facie** case, the Commonwealth apparently relies upon the invocation of the exclusive custody doctrine. This doctrine provides that when an adult is given sole custody of a child of tender years for a period of time and, during that time, the child sustains injuries which may have been caused by a criminal agency, the fact-finder may examine any explanation offered and if they find that explanation insufficient, they may reject it and find the person having custody responsible for the wounds. **Commonwealth v. Meredith**, 490 Pa. 303, 416 A.2d 481 (1980).

To invoke the exclusive custody doctrine however, the Commonwealth must show (1) serious injury or death; (2) that the injury was neither accidental nor self-inflicted; (3) that the injury was inflicted within a specific time period; and (4) that the defendant had exclusive custody of the victim during the time of the injury.

In the present case, although there is clearly **prima facie** evidence contained in the Transcript of the Preliminary Hearing to establish that this young child was physically abused, the

Transcript does not contain sufficient evidence to establish, on a **prima facie** basis, which Defendant, if either, committed the abuse. The Transcript indeed contains **prima facie** evidence of the first three prongs of the exclusive custody doctrine, but the Transcript does not contain any evidence as to which Defendant, if either, had exclusive custody and care of Joshua during the relevant time period. Further, there is no evidence contained in the Transcript that either Defendant made any admissions or engaged in any conduct that reveals a consciousness of guilt. Moreover, there is no evidence in the Transcript from which a fact-finder could reasonably infer that either Defendant was aware of the abuse or the subsequent visible manifestation of the physical injuries sustained by Joshua (the bruising and swelling). Therefore, the requisite element of "knowingly" in the charge of Recklessly Endangering the Welfare of a Child is lacking. Accordingly, the charge of Recklessly Endangering the Welfare of a Child against each Defendant must also be dismissed.

CONCLUSION

Based upon the evidence presented at the Preliminary Hearing, we are constrained to grant the Defendants' Motions to Dismiss.

ORDER

AND NOW, this 8th day of March, 2007, upon consideration of the Defendants' Motions to Dismiss, and after a hearing thereon, in accordance with the foregoing Opinion, it is hereby ORDERED and DECREED that the Defendants' Motions to Dismiss are GRANTED and, accordingly, the Criminal Informations in the above captioned cases are DISMISSED.

JP MORGAN CHASE BANK, AS TRUSTEE, Plaintiff vs. STANLEY J. ZELLIN, JAMES MURPHY, RACHAEL KELLER, AND DAVID KELLER, Defendants

Civil Law—Municipal Claims and Tax Liens Act— Upset Sale—Preservation of Liens

1. At common law, a sheriff's sale of real estate automatically divests all liens, whether or not the liens are perfected before or after the lien upon which the sheriff's sale is held. In some cases, this common-law rule has been changed by statute to preserve certain liens.

2. Local real estate taxes, including those imposed by a school district, constitute a first lien on real estate as of the latter of the first day of the fiscal year for

which the taxes are imposed or the date of levy. This lien arises by operation of law and does not require the filing of a tax claim to be effective.

3. With certain exceptions, Section 8152(a) of the Judicial Code provides that a mortgage lien on real estate which is prior to all other liens on the same property is unaffected by a judicial sale of the property. Among these exceptions are tax liens which, notwithstanding their existence by operation of law, have not been filed in the office of the clerk of the court of common pleas.

4. The validity and the effect of a judicial sale for unpaid taxes is determined under the statute pursuant to which the sale is conducted, without regard to any other legislation.

5. The Municipal Claims and Tax Liens Act (MCTLA), 53 P.S. §§7101-7505, provides that mortgages recorded before a tax becomes a lien, other than taxes for the current year, will not be divested by a judicial sale for delinquent taxes unless a prior lien is also discharged thereby.

6. Pursuant to the plain language of the MCTLA, a judicial sale held under the provisions of the MCTLA for delinquent real estate taxes which accrue prior to the recording of a mortgage recorded in the same year as the taxes being foreclosed upon will divest the mortgage notwithstanding the provisions of Section 8152(a) of the Judicial Code.

7. The provisions of the MCTLA and the Real Estate Tax Sale Law, 72 P.S. §§5860.101-5860.803, though similar and parallel in many respects, are nevertheless separate and independent acts of legislation whose effect on other liens must be analyzed under their own provisions. While both provide for upset sales, an upset sale under the MCTLA is a form of judicial sale pursuant to which certain liens subordinate to the taxes being foreclosed upon are divested, whereas an upset sale under the RETSL does not provide for divestiture of any liens other than those included in the upset price.

NO. 05-3469

SHEETAL R. SHAH-JANI, Esquire—Counsel for Plaintiff.

STANLEY J. ZELLIN—Pro se.

KIM ROBERTI, Esquire—Counsel for James Murphy, Rachael Keller & David Keller.

MEMORANDUM OPINION

NANOVIC, P.J.—March 1, 2007

FACTUAL AND PROCEDURAL BACKGROUND

The above-named Plaintiff, JP Morgan Chase Bank (“Bank”), as trustee, is the assignee and current holder of a mortgage in the face amount of \$89,000.00, dated June 11, 2003, and recorded on July 22, 2003. The property bound by the mortgage is that located at 344 East Ludlow Street, Summit Hill, Carbon County, Pennsylvania. This property was purchased by the Defendants, James Murphy, Rachael Keller and David Keller (collectively, the “Buyers”), at a sheriff’s sale held on August 12, 2005, at the behest of the Panther Valley School District

(“School District”) for unpaid school taxes due for the fiscal year 2003-2004. The Defendant, Stanley J. Zellin, was the original mortgagor with Bank’s predecessor mortgagee, Wilmington Finance, Inc., and was the owner of the property at the time of the tax sale.

Bank commenced the instant proceedings for mortgage foreclosure by complaint filed on December 29, 2005. A default judgment in the amount of \$94,019.43 was entered against Zellin on November 20, 2006, for failure to file an answer to the complaint. The Buyers, in their defense to the Bank’s action, contend, **inter alia**, that the Bank’s mortgage was divested in the execution proceedings wherein they acquired title to the property.

Whether Bank’s mortgage was divested by the sheriff’s sale held on August 12, 2005, is the deciding issue in this litigation. The facts material to this issue are not in dispute, however, the parties disagree on the relevant law and its application. As a result, we have before us a pure question of law. Both parties have filed motions for summary judgment on this issue which we will now address.

DISCUSSION

For the reasons which follow, we conclude that the mortgage was divested. In reaching this conclusion the importance of promptly recording a mortgage to preserve its priority and of correctly identifying the underlying statute pursuant to which a tax sale is held cannot be overemphasized.

With the exception of a purchase money mortgage, for which a ten-day grace period exists, the lien of a mortgage attaches when the mortgage is left for recording. 42 Pa. C.S.A. §8141(2). Accordingly, Bank’s mortgage attained lien status on July 22, 2003, the date the mortgage was recorded.

A tax levy resolution establishing the millage for the School District’s 2003-2004 real estate taxes was adopted on June 26, 2003. 24 P.S. §6-672. As a result, in accordance with the governing law discussed below, these taxes became a lien on affected real estate as of July 1, 2003, the first day of the District’s fiscal year for which the tax was imposed. 24 P.S. §6-671. As a further result, the school taxes, though levied after the date of the mortgage, have a prior lien status because of the delay in filing the mortgage.

"As a general rule, a sheriff's sale of real estate discharges all liens [prior as well as subsequent liens] on the property sold unless the sale is expressly made subject to a prior lien or liens, or unless it is otherwise provided by statute, as in the case of certain mortgages, and in the case of tax and municipal liens." **Liss v. Medary Homes, Inc.**, 388 Pa. 139, 143, 130 A.2d 137, 139 (1957) (alteration in original) (citations and statutory authority omitted). By statute, with certain exceptions, a mortgage lien on real estate which is prior to all other liens upon the same property is unaffected by a judicial sale of the property. 42 Pa. C.S.A. §8152(a). These exceptions include:

- 1) taxes, municipal claims and assessments, not at the date of the mortgage duly entered as a lien in the office of the clerk of the court of common pleas; and
 - 2) taxes, municipal claims and assessments whose liens though afterwards accruing have by law priority given them.
- 42 Pa. C.S.A. §8152(a)(2), (3).

On its face, this first exception appears to protect the Bank's mortgage from discharge: the lien of the School District's taxes, though accruing earlier in time had not, as of the date of the mortgage, been "duly entered as a lien in the office of the clerk of the court of common pleas." The statute does not, however, explicitly state that a mortgage lien will survive a judicial tax sale for delinquent taxes whose lien on the premises precedes the recording of the mortgage. **See In re City of Pittsburgh**, 243 Pa. 392, 90 A. 329 (1914) (statutory provision in derogation of the common law will be applied only if expressly stated or fairly implied from statute's language). Moreover, Section 8152(c) provides:

- (c) Sale on prior lien.—A judicial or other sale of real estate in proceedings under a prior judgment or a prior ground rent, or in foreclosure of a prior mortgage, shall discharge a mortgage later in lien.

42 Pa. C.S.A. §8152(c).

It is at this point that the statutory basis for the sheriff's sale at which the Buyers purchased the property must be examined. Our Supreme Court has held that when a tax sale is commenced under a particular act of the General Assembly,

the procedure therein prescribed must be followed and **under that act alone** must the validity and effect of the

sale be tested. Other legislation providing a different procedure or result cannot be used either to sustain such sale or secure additional rights or results. The act under which the proceeding is had must show the authority and the effect of such sale.

Gordon v. City of Harrisburg, 314 Pa. 70, 73, 171 A. 277, 278 (1934) (emphasis added). The validity and effect of the School District's judicial sale must therefore be tested under the enabling legislation pursuant to which the sale was conducted, **without regard to any other legislation**. **City of Allentown v. Kauth**, 874 A.2d 164, 168 (Pa. Commw. 2005), **appeal denied**, 912 A.2d 839 (Pa. 2006).

In this case, the School District proceeded under the Municipal Claims and Tax Liens Act ("MCTLA"), 53 P.S. §§7101-7505. Pursuant to that Act, the School District recorded a tax claim against the property on June 24, 2004.¹ On September 16, 2004, the District praecipit for the issuance of a writ of **scire facias sur** tax claim and thereby commenced an action under the MCTLA to obtain a judgment on its claim. 53 P.S. §7185;² **see also, Baden Borough v. Koodrich**, 54 D. & C. 2d 497, 498 (1972) (suit to recover upon a tax or municipal claim commences with the issuance of a writ of **scire facias**,

¹ Under the MCTLA, the definition of taxes includes school taxes "together with and including all penalties, interest, costs, charges, expenses and fees, including reasonable attorney fees, as allowed by [the MCTLA] and all other applicable laws." A "tax claim" is a claim filed to recover taxes. 53 P.S. §§7101, 7200(a) and 7231. Taxes on real property are a first lien on such real property (but subordinate to the lien of taxes imposed by the Commonwealth) with every such lien dating "from the day on which the millage or tax rate is fixed by the proper authority of any such political subdivision, except where such taxes are imposed and assessed prior to the commencement of the fiscal year for which the same are imposed or assessed, in which case the lien of such taxes shall date from the first day of the fiscal year for which such taxes are imposed or assessed." 53 P.S. §7102. In order to preserve their lien status, tax claims must be filed on or before the last day of the third calendar year after that in which the taxes are first payable. 53 P.S. §7143. The School District's claim stated the amount of taxes due on the property to be \$1,276.37.

² **Scire facias** is a "judicial writ, founded upon some matter of record, such as a judgment or recognizance and requiring the person against whom it is brought to show cause why the party bringing it should not have advantage of such record." The Latin term is used to designate both the writ and the whole proceeding. Black's Law Dictionary 1208 (5th ed. 1979). **City of McKeesport v. Delmar Leasing Corp.**, 656 A.2d 180, 181 n.2 (Pa. Commw. 1995), **appeal denied**, 542 Pa. 636, 665 A.2d 470 (1995).

not upon the filing of a municipal claim). A writ of **scire facias** was duly issued and served, and a default judgment for want of an answer was taken on October 29, 2004, in the amount of \$1,761.84.³

Thereafter, on April 18, 2005, execution proceedings were commenced when the School District filed a praecipe for writ of execution pursuant to the Rules of Civil Procedure.⁴ Notice of the sheriff's sale was given to all parties having an interest in the property in accordance with Pa. R.C.P. Nos. 3129.1, 3129.2, and 3129.3. This notice included written notice of the intended sale to the Bank by first class mail, postage pre-paid, addressed to the Bank at "4 New York Plaza, 6th Fl., New York, NY 10004."⁵

The property proceeded to sheriff's sale on August 12, 2005, as scheduled, with the Buyers being the successful bidders for a bid of \$6,245.00. Title to the property was subsequently transferred to the Buyers by sheriff's deed dated September 2, 2005, and recorded on September 6, 2005, in the Office of the Recorder of Deeds in and for Carbon County in Record Book Volume 1367, Page 46. The grantees in this deed are designated

³ The difference between the amount of this judgment and the tax claim entered on June 24, 2004, is attributable to attorney fees, interest, and costs which were added to the claim.

⁴ Pa. R.C.P. No. 3190 states that a judgment **in rem** in an action or proceeding upon, **inter alia**, a municipal tax claim shall be enforced against the real property subject to the claim in accordance with Rules 3180 to 3183 governing the enforcement of judgments in mortgage foreclosure. Pa. R.C.P. No. 3181 provides that the procedure for the enforcement of a judgment shall be in accordance with the rules governing the enforcement of judgments for the payment of money with respect to (a) Commencement and Issuance of Writ:—Rules 3103(a), 3103(e) and 3105 ... (f) Notice of Sale, Stay, Continuance:—Rule 3129.1 through .3. **City of McKeesport**, 656 A.2d at 181-182 n.5.

⁵ The Bank, in its supplemental brief filed on February 9, 2007, opposing the Buyers' motion for summary judgment, raises, for the first time, the sufficiency of this notice, contending that its address given in the assignment of mortgage from Wilmington Finance, Inc. contained the following additional language which was not included in the address used by the School District in providing it notice of the sheriff's sale: "Attn: Institutional Trust Svcs./Structured Finance Svcs., SURF Series 2003-BC3." From this, the Bank concludes that the address was incomplete and the notice defective. Notwithstanding this argument, the Bank does not contend it did not receive notice of the sheriff's sale or that it has been prejudiced by the address used. To the contrary, in response to the Buyers' Motion for Summary Judgment filed on January 4, 2007, the Bank admitted having received this notice. (**See** Buyers' Motion for Summary Judgment and Bank's Response, paragraph 25.)

as "James Murphy 50% Interest, Rachael Keller 25% Interest, and David Keller 25% Interest."

The foregoing makes clear that the sheriff's sale held on August 12, 2005, for unpaid school taxes was conducted under the authority of the MCTLA. In accordance with **City of Allentown v. Kauth**, we must next determine what the effect of the sheriff's sale was under that Act on the Bank's mortgage. The issue is controlled by Section 31 of the MCTLA. 53 P.S. §7281.

Under the MCTLA, all taxes imposed on real property by a municipality are a first lien on such property, subordinate only to tax liens imposed by the Commonwealth. 53 P.S. §§7102, 7103. Section 31 posits two classes of judicial sale when executing upon a tax or municipal claim: an initial upset sale, whether or not the upset price is bid, and a subsequent judicial sale, free and clear of all liens and encumbrances, whether accruing before or after the tax or municipal claim upon which the sale is based.⁶

For an upset sale, the upset price is the amount sufficient to pay all taxes and municipal claims, and all accrued but unfiled taxes and claims, in full. 53 P.S. §7279. In the event the proceeds at an upset sale are insufficient to pay the taxes and municipal claims in full, other than the tax or municipal claim upon which the sale is based (which claim will be discharged by the sale), the lien for those taxes and municipal claims which have not been paid in full, to the extent of nonpayment, will not be divested from the property sold. 53 P.S. §7281.

Alternatively, if the upset price is not bid at the upset sale, the plaintiff on the claim may petition the court to issue a rule upon all interested parties (as evidenced by a search or title insurance policy produced by the plaintiff showing the state of the record and the ownership of the property) to show cause

⁶ At this point, we are limiting our discussion solely to judicial sales in which the underlying lien being foreclosed upon is a tax or a municipal claim. With respect to judicial sales upon other than tax or municipal claims, taxes are a first lien entitled to priority in payment out of the proceeds of any judicial sale and, to the extent the sale's proceeds are insufficient to pay the tax or municipal claim in full, the lien of these claims will not be divested, whether or not such lien accrued prior in time to the lien being executed upon. 53 P.S. §§7103, 7104, 7106(a), and 7281; **In re: Commonwealth, Dept. of Transp.**, 36 Pa. Commw. 346, 350, 388 A.2d 344, 346 (1978).

why the property should not “be sold, freed, and cleared of their respective claims, mortgages, charges, and estates.” **Id.** Once the court is satisfied that the facts averred in the petition are true and that all interested parties have received proper notice, “it shall order and decree that said property be sold at a subsequent sheriff’s sale day, to be fixed by the court without further advertisement ... clear of all claims, liens, mortgages, charges, and estates, to the highest bidder at such sale.” **Id.** This sale “divests all liens levied against the affected property [including prior mortgages] without exception.” **City of Allentown v. Kauth**, 874 A.2d at 166; **Pittsburgh v. Fort Pitt Chemical Co.**, 345 Pa. 471, 472, 29 A.2d 41, 42 (1942).

The sheriff’s sale in the sale **sub judice** was of the first type: an upset sale.⁷ No petition was filed with the court to sell the property free and clear. As to the effect of such a sale on the Bank’s mortgage, Section 31 provides:

Mortgages ... which were recorded ... before any tax other than for the current year accrue ... shall not be disturbed by [any judicial] sale unless a prior lien is also discharged thereby.

53 P.S. §7281. Under this section, mortgages recorded before any tax becomes a lien, other than taxes for the current tax year, will not be divested provided no lien prior to the mortgage is also discharged.⁸

⁷ Although designated as an upset sale, as a sale under the MCTLA, it is also a judicial sale. **City of Uniontown v. McGibbons**, 115 Pa. Super. 132, 174 A. 912, 914-915 (1934). By definition, a judicial sale is “a sale under the judgment, order, or decree of the court; a sale under judicial authority, by an officer legally authorized for the purpose, such as a sheriff’s sale, an administrator’s sale, etc.” **Id.** at 915 (quotation marks and citations omitted).

⁸ As to any inconsistency between 42 Pa. C.S.A. §8152 and 53 P.S. §7281, if indeed inconsistency exists, the latter, being part of a full and complete statutory system for levying, preserving and collecting tax and municipal claims, and providing for the effect of judicial sales on liened property, controls over more general legislation dealing with the preservation of liens. 1 Pa. C.S.A. §1933 (providing that when a general provision in a statute is in conflict with a special provision in another statute and the two provisions cannot be reconciled, the special provision prevails, unless the general provision is enacted later and is intended by the General Assembly to control); **see also, Pittsburgh v. Fort Pitt Chemical Co.**, 345 Pa. 471, 473, 29 A.2d 41, 43 (1942).

In **Household Consumer Discount Co. v. Extended Care Center, Inc.**, 299 Pa. Super. 74, 445 A.2d 154 (1982), the Court held that a tax sale for unpaid taxes accruing in the same year as that in which the mortgage was recorded divested

As applied to the Bank's mortgage, other than taxes which were accruing for the then current year (**i.e.**, the 2003-2004 school fiscal year), the record is devoid of any other tax lien having temporal priority to the mortgage. This notwithstanding, the August 2005 sheriff's sale on the unpaid 2003-2004 school taxes discharged the lien of those taxes, a lien predating the recording of the Bank's mortgage, and, by the plain language of Section 31, also discharged the mortgage. Stated differently, because the lien of the Bank's mortgage did not predate the lien of the unpaid school taxes on which judgment was

the mortgage because the mortgage "was filed **subsequent** to the tax lien that led to the sale of the property." **Id.** at 77, 445 A.2d at 155. In reaching its decision, the Court expressly considered the applicability of Section 8152 and found this section to be of no assistance to the mortgage holder. Of relevance, the Court stated:

At common law the rule was that a Sheriff's sale automatically divested all liens, and statutes have therefore been necessary to change the common law and preserve the lien of a mortgage where it is **prior** to the lien under which a tax sale is made.

We cannot conclude therefore that a statute must contain wording as to the effect of a sale for delinquent taxes in order to divest a mortgage; on the contrary, wording which **preserves** the lien of a prior mortgage would be necessary to provide the right.

Id. at 76, 445 A.2d at 155 (citation omitted). Thus, in the context of a mortgage filed in the same year as current taxes accrue, but after the tax lien date, the Court held that the language of Section 8152 alone was insufficient to protect the mortgage. This latter scenario is this case.

In **Household Consumer Discount Co.**, the effect of Section 8152 **vis-à-vis** 53 P.S. §37541 was at issue. Unlike 53 P.S. §37541, the language of 53 P.S. §7281 itself provides for divestiture of the Bank's mortgage. In doing so, the conclusion we reach is strengthened even further from that reached in **Household Consumer Discount Co.**

We are aware of two cases which discuss the relationship between 21 P.S. §651, the predecessor to 42 Pa. C.S.A. §8152, and 53 P.S. §7281, however, in both, the Court was faced with the issue of whether a prior mortgage could validly be divested by a judicial sale on a tax lien later in time when the Section 31 procedure for a rule to show cause was invoked, given the language of what is now Section 8152. **Erie v. Piece of Land**, 339 Pa. 321, 328 n.1, 14 A.2d 428, 431 n.1 (1940); **Pittsburgh v. Fort Pitt Chemical Co., supra** at 473, 29 A.2d at 43. Both cases are therefore distinguishable from the present situation where the Bank's mortgage is subordinate in lien position to the taxes being executed upon, and no petition was presented to the court for a sale free and clear of all liens and encumbrances. Consequently, in neither case did the Court discuss the meaning or effect of the language in Section 31 which we have identified in the text as it relates to the discharge of a mortgage in an upset sale.

taken and execution held, the mortgage was divested at the sheriff's sale held pursuant to Section 31 of the MCTLA.⁹

CONCLUSION

In accordance with the foregoing, the Buyers' motion for summary judgment will be granted and that of the Bank denied.

⁹ The Bank's argument that an upset sale under the MCTLA is the equivalent of an upset sale under the Real Estate Tax Sale Law ("RETS'L"), 72 P.S. §§5860.101-5860.803, and should have the same effect, misconceives the discrete and independent nature of these two acts. The Bank's argument, in essence, is that, with respect to real estate taxes, both statutes have similar objectives—the preservation and collection of delinquent tax claims—and both employ similar mechanisms to effect collection: preferential lien status of the claim (compare 72 P.S. §5860.301 with 53 P.S. §7102); an initial upset sale (compare 72 P.S. §§5860.601 and 5860.605 with 53 P.S. §§7279 and 7281); and, in the absence of receipt of the upset price, provision for a "free and clear" judicial sale upon petition to the court (compare 72 P.S. §§5860.610 and 5860.612 with 53 P.S. §7281). These comparisons notwithstanding, the structural similarity of two statutes each of which deals with the subject of *in rem* tax collection does not compel, legally or logically, identical outcomes. "There is nothing inherently inconsistent in the existence of two distinct statutory procedures for the resolution of the same disputes, even though the result may be a lack of symmetry in the area." **City of Allentown v. Kauth**, 874 A.2d 164, 168 (Pa. Commw. 2005) (**quoting Pennsylvania Turnpike Commission v. Sanders & Thomas, Inc.**, 461 Pa. 420, 429, 336 A.2d 609, 614 (1975)).

In **City of Allentown**, the Commonwealth Court held that the MCTLA and RETSL work concurrent to one another and provide alternative, not exclusive, means for the collection of delinquent tax claims. **Id.** at 169. The benefit of having this choice is well-illustrated by the present case where the two statutes, which have different notice requirements, act differently with respect to the effect of an upset sale on subordinate encumbrances. The RETSL does not require notice of an upset sale to third party lienholders and, consequently, does not divest any claims not included in the upset price. 72 P.S. §§5860.602 and 5860.609; **see also, First Pennsylvania Bank, N.A. v. Lancaster County Tax Claim Bureau**, 504 Pa. 179, 470 A.2d 938 (1983) (holding notice provision in former 72 P.S. §5860.602, which did not require either personal service or service by mail of an impending tax sale to a record mortgagee, violated the mortgagee's constitutional due process rights). In contrast, an upset sale under the MCTLA is held under the auspices of the sheriff's office and is a judicial sale requiring notice to all parties in interest prior to the sale. As a consequence, loss of lien status is constitutionally permissible.

**JOSEPH R. SEEMILLER, Plaintiff vs. CARMINE S. AMATO,
HELEN A. AMATO and BENNETT FAMILY TRUST,
Defendants**

*Civil Law—Real Estate Tax Sale Law—Constitutionality—
Sale from Repository—Notice to Owner*

1. As part of an integrated statutory system to collect and secure delinquent real estate taxes, the Real Estate Tax Sale Law (RETS), 72 P.S. §§5860.101-5860.803, provides sequentially for (1) the filing of a tax claim against tax delinquent property, (2) sale of the property at an upset tax sale under and subject to various liens and encumbrances, and (3) sale of the property at a judicial sale free and clear of all liens and encumbrances. Property which remains unsold after being offered for sale at a judicial sale is placed in the Tax Claim Bureau's "repository for unsold properties" from which it can be sold directly by the Bureau to prospective purchasers without further notice to the owner.
2. Prior to placing property in the Tax Claim Bureau's "repository for unsold properties," the RETS requires the Bureau to exercise reasonable efforts to identify, locate and notify the owner of the property and to provide notice of the delinquency and its consequences to the owner directly, and by posting and publication.
3. The notice requirements of the RETS comport with the fundamental demands of due process: notice reasonably calculated under all the circumstances to apprise the owner of the delinquency and its effect on his property interest, and an opportunity to be heard before that interest is adversely affected.
4. By the time property is placed in the Bureau's repository, the owner's interest in the property has been terminated, his only remaining interest being that as the last owner of record in the recorder of deeds office.
5. Under the RETS, the sale of property by the Tax Claim Bureau from repository does not deprive the owner of a protected property interest and does not require additional notice to the owner to satisfy the fundamental requirements of due process.

NO. 05-2874

WILLIAM B. QUINN, Esquire—Counsel for Plaintiff.

CARMINE S. AMATO—Pro se.

HELEN A. AMATO—Pro se.

ANTHONY ROBERTI, Esquire—Counsel for Bennett Family Trust.

MEMORANDUM OPINION

NANOVIC, P.J.—March 15, 2007

"Before a State may take property and sell it for unpaid taxes, the Due Process Clause of the Fourteenth Amendment requires the government to provide the owner 'notice and opportunity for hearing appropriate to the nature of the case.'"

So begins the decision by the United States Supreme Court in **Jones v. Flowers**, ___ U.S. ___, 126 S.Ct. 1708, 1712, 164 L.Ed. 2d 415 (2006) (**quoting Mullane v. Central Hanover Bank & Trust Co.**, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950)). It is also, as we shall see, the answer to the issue presented by the Bennett Family Trust (“Trust”) in its motion for judgment on the pleadings now before us.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On May 7, 2004, the Plaintiff, Joseph R. Seemiller (“Seemiller”), purchased from the Carbon County Tax Claim Bureau (the “Tax Claim Bureau” or “Bureau”) the property which is the subject of these proceedings to quiet title. Prior to this purchase, the property was exposed twice to public sale by the Tax Claim Bureau—once at upset sale and once at judicial sale—in accordance with the provisions of the Real Estate Tax Sale Law (“RETSOL”), 72 P.S. §§5860.101-5860.803. The property was sold to Seemiller from the Bureau’s “repository for unsold properties” maintained in accordance with Section 626 of the RETSL, 72 P.S. §5860.626. At the time of this sale, the Trust was the owner of the property as that term is defined in the RETSL.¹

As a pure legal question, the Trust argues that the statutory authorization found in Section 627(a) of the RETSL, 72 P.S. §5860.627(a), for the sale to Seemiller from the Bureau’s repository is unconstitutional on its face and deprived it, as owner, of a proprietary interest without notice or an opportunity to be

¹ The RETSL defines “owner” as

the person in whose name the property is last registered, if registered according to law, or, if not registered according to law, the person whose name last appears as an owner of record on any deed or instrument of conveyance recorded in the county office designated for recording and in all other cases means any person in open, peaceable and notorious possession of the property, as apparent owner or owners thereof, or the reputed owner or owners thereof, in the neighborhood of such property; as to property having been turned over to the bureau under Article VII by any county, ‘owner’ shall mean the county.

72 P.S. §5860.102 (footnote omitted). Under this definition, as the most recent grantee appearing in a deed or other instrument of conveyance recorded in the Carbon County Recorder of Deeds Office, the Trust was the owner of the property at the time of the sale to Seemiller.

heard.² In deciding this issue, the question is not what was in fact done, but what does the RETSL require to be done before property can be sold from the repository, and does it violate an owner's constitutional rights.³

DISCUSSION

In essence, the Trust contends that it has been denied its constitutional right to due process of law because the RETSL allows for the sale of property out of the Bureau's repository without providing additional notice to the owner of that property. When narrowly viewed, the argument has colorable merit. The argument, however, fails to take into account the type and number of notices required by the RETSL before property is placed in the repository, or the quality of title possessed by the owner of property held in repository.

The RETSL provides, sequentially, for the entry of claims by the Bureau on unpaid taxes, the sale of property at an upset tax sale on tax claims which have become absolute, and exposing to judicial sale those properties not sold at the upset sale, before property is placed in the Bureau's repository. As to notice of these events, the RETSL requires one consolidated notice, by registered or certified mail, return receipt requested, of the annual return of unpaid taxes made to the Tax Claim Bureau by the tax collector of each taxing district and of the entry of claims thereon in the records of the Tax Claim Bureau to the owners of each affected property at the address provided by the tax collector and, if such notice is not delivered at this address, by posting of the property, 72 P.S. §5860.308; notice by publication, by posting of the affected property, and by cer-

² Section 627(a) of the RETSL provides:

The bureau may, with the written consent of all the taxing districts where the property is located, accept an offer of any price for property placed in the 'repository for unsold properties' without court approval and published notice of sale. Any taxing district may not unreasonably withhold its consent to the sale of the property.

72 P.S. §5860.627(a). Ironically, the Trust itself purchased the property from repository, the then current owners of the property being the Defendants, Carmine S. Amato and Helen A. Amato.

³ Notice of the Trust's challenge to the constitutionality of the RETSL in this respect has been given by the Trust to the Attorney General of Pennsylvania in accordance with Pa. R.C.P. 235. The Attorney General has not participated in these proceedings.

tified mail, restricted delivery, return receipt requested, to each owner of the property and, with respect to this mailing, to those owners from whom a return receipt is not received, notice by first class mail to the owner's last known address as it appears from the records of the Tax Claim Bureau, the tax collector for the taxing district making the return, and the county assessment office, of the date, time and location of the upset tax sale scheduled for the property, 72 P.S. §5860.602; and personal service, if within this Commonwealth, and by registered mail, return receipt requested, postage pre-paid, for service made outside of the Commonwealth, upon all interested parties, including the owner, of a rule to show cause why the property should not be sold at a judicial sale free and clear of all taxes and encumbrances, with absolute title conveyed to the purchaser. 72 P.S. §§5860.610 and 5860.611. Additionally, when any notice of an upset or judicial sale mailed to an owner

is either returned without the required receipted personal signature of the addressee or under other circumstances raising a significant doubt as to the actual receipt of such notification by the named addressee or is not returned or acknowledged at all, 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, 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.

72 P.S. §5860.607a(a); **In re Sale No. 10**, 801 A.2d 1280, 1283 (Pa. Commw. 2002). To ensure against the deprivation of property without due process, strict compliance with these requirements is compulsory, the absence of which will invalidate the sale. **Tracy v. County of Chester, Tax Claim Bureau**, 507 Pa. 288, 297, 489 A.2d 1334, 1339 (1985).

The RETSL is an integrated statutory system providing for the escalating security and collection of delinquent real estate taxes. At the same time, the notice requirements of the RETSL

provide for increasing efforts to identify, locate and notify a property owner as the threat to his property interest and personal liability for debt expands. From initially according taxes a first lien position on levy as a matter of law (72 P.S. §5860.301), to making tax claims entered on the records of the Tax Claim Bureau absolute and secure against challenges to their amount and validity (72 P.S. §5860.314), the RETSL progressively provides for an upset tax sale at which the minimum bid must be sufficient to pay all unpaid and accrued taxes in full, but at which the property remains under and subject to all mortgages, liens and other encumbrances for which payment has not been received (72 P.S. §5860.609), to a judicial sale at which the property is sold freed and cleared of “all tax and municipal claims, mortgages, liens, charges and estates of whatsoever kind, except ground rents separately taxed,” regardless of the price paid (72 P.S. §5860.612). **Bell v. Berks County Tax Claim Bureau**, 832 A.2d 587, 593 (Pa. Commw. 2003) (“At an upset sale, all recorded obligations not included in the upset price survive the sale, but at a judicial sale no liens or claims survive the sale.”).

By design, only after repeated and multiple notices have been given to the owner, and the property has been exposed to successive upset and judicial sales and remains unsold, is property placed in the Bureau’s “repository for unsold properties.” 72 P.S. §§5860.610 and 5860.626. From this repository, the Bureau is authorized to sell directly to prospective buyers—without further notice to the owner, notice by publication, or court approval—and to convey title “free and clear of all tax and municipal claims, mortgages, liens, and charges and estates of whatsoever kind, except ground rents separately taxed.” 72 P.S. §5860.627(b).

Due process does not require actual notice. **Jones, supra**, 126 S. Ct. at 1713 (**citing Dusenberry v. United States**, 534 U.S. 161, 170, 122 S.Ct. 694, 151 L.Ed. 2d 597 (2002) (discussing the form of notice required by due process when advising a federal inmate of the government’s intention to forfeit property in which the inmate appears to have an interest; holding that attempting to provide notice by certified mail satisfied due process in the circumstances present)). It does, however, require the government to provide “notice reasonably calculated, under all the circumstances, to apprise interested parties

of the pendency of the action and afford them an opportunity to present their objections.” **Id.** at 1713-1714 (**quoting Mullane**, 339 U.S. at 314); **see also**, **Tracy, supra** at 297, 489 A.2d at 1339. To meet this standard, “[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.” **Jones, supra** at 1715 (**quoting Mullane**, 339 U.S. at 315). “[A] party’s ability to take steps to safeguard its own interests does not relieve the State of its constitutional obligation.” **Id.** at 1717 (citation and quotation marks omitted); **see also**, **Smith v. Tax Claim Bureau of Pike County**, 834 A.2d 1247, 1251 (Pa. Commw. 2003). Finally, in assessing the adequacy of a particular form of notice, the “interest of the State” must be balanced against “the individual interest sought to be protected by the Fourteenth Amendment.” **Jones, supra** at 1715 (**quoting Mullane**, 339 U.S. at 314).

In weighing these interests, the interest of the taxing districts to collect unpaid taxes is definite and clear:

In authorizing the proceedings to enforce the payment of the taxes upon lands sold to a purchaser at tax sale, the State is in exercise of its sovereign power to raise revenue essential to carry on the affairs of state and the due administration of the laws . . . The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain.

Leigh v. Green, 193 U.S. 79, 89, 24 S.Ct. 390, 392, 48 L.Ed. 623 (1904) (citation and quotation marks omitted). By comparison, the Trust’s interest in property assigned to the Bureau’s repository in compliance with the provisions of the RETSL is in name only. For all intents and purposes, by the time property has been exposed to judicial sale and placed in repository, all interest of the owner in the property itself has been terminated.

Once a rule to sell property at a judicial sale has been properly served on the owner and a decision authorizing such sale has been approved by the court, the balance between the government’s interest in being paid its taxes and the private interest sought to be protected by the Fourteenth Amendment is tipped, and tipped heavily, in favor of the government: the Tax Claim Bureau has been authorized to sell the property without

any reserve, the paramount object being the collection of unpaid taxes, and the owner's right to purchase has been extinguished. 72 P.S. §5860.618(a).⁴ At this point, if not before, the owner no longer holds a legally protected property interest in the property. **See Rivera v. Carbon County Tax Claim Bureau**, 857 A.2d 208, 215-216 (Pa. Commw. 2004) (holding that once property has been exposed to an upset sale, provided the notice provisions of the RETSL have been met, legal title to the property passes to the Tax Claim Bureau, as trustee, by operation of law, regardless of whether an offer to purchase has been made or accepted), **appeal denied**, 878 A.2d 866 (Pa. 2005); **see also, DiMaio v. Tax Claim Bureau of Monroe County**, 50 D. & C. 3d 25, 27 (1988) (holding that once the rule to sell at judicial sale is made absolute, the owner has lost all legal right to the property and is not entitled to any further notices). At most, the owner holds a remote and amorphous interest in any excess purchase monies above and beyond those necessary to pay all costs and expenses, taxes and municipal claims, and mortgages, liens, and encumbrances against the property. 72 P.S. §§5860.205 and 5860.630.

In judging whether this statutory scheme comports with the requirements of due process, “[t]he criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.” **Mullane**, 339 U.S. at 315 (**quoting American Land Co. v. Zeiss**, 219 U.S. 47, 67, 31 S.Ct. 200, 207, 55 L.Ed. 82 (1911)). In other words, the words of the Due Process Clause, while “cryptic and abstract,” must be applied reasonably and fairly under the circumstances. **Id.** at 313. The “practicalities and peculiarities of the case” must be taken into account. **Id.** at 314-315.

We believe that the means employed by the RETSL are justly and reasonably calculated under all the circumstances to

⁴ Section 618(a) of the RETSL provides:

The owner shall have no right to purchase his own property at a judicial sale, a private sale or from the bureau's repository for unsold property under the provisions of this act.

72 P.S. §5860.618(a). For purposes of this limitation, the term “owner” means, **inter alia**, any individual or trust “who **had** any ownership interest or rights in the property.” 72 P.S. §5860.618(c) (emphasis added).

notify the owner of a tax delinquency and the effect of this delinquency on his property interest if the taxes are not paid. They provide the owner with an opportunity to challenge the regularity or legality of the proceedings employed by the Bureau in placing property for sale, as well as the amount and validity of the claim on which a sale is held, and give the owner an opportunity to "choose for himself whether to appear or default, acquiesce or contest." **Mullane, supra**, 339 U.S. at 314. They balance the vital interest of government to collect taxes, without which government would be unable to function, with the fundamental right of an owner not to be deprived of property without cause and without an opportunity to respond and be heard at a meaningful time and in a meaningful manner, the **sine qua non** of due process. When account is taken of the statutory scheme as a whole which precedes placement of property in the repository, and giving appropriate deference to the subject with which the statute deals, we conclude that no further steps to notify the owner are constitutionally required before property is sold from the repository by the Tax Claim Bureau.⁵

CONCLUSION

For the reasons stated, the Trust's motion for judgment on the pleadings on the basis of unconstitutionality of the RETSL as it pertains to the sale of property from the repository without additional notice to the property owner will be denied.

⁵ This decision assumes that the statutory requirements of the RETSL have been met prior to the property being placed in repository. **Rivera v. Carbon County Tax Claim Bureau**, 857 A.2d 208, 216 (Pa. Commw. 2004) ("Legal title to a property can only pass to the Bureau when the statutory requirements of the [RETSL] have been met."). Where, however, notice is defective, and the sale is invalidated, the owner is not precluded from discharging a tax claim by payment. **Id.** at 217. To the extent the Trust disputes compliance with these requirements, the dispute raises a factual issue not appropriate for resolution at this stage of the proceedings.

EARL W. BEERS and SUSAN A. BEERS By P/O/A GLENN BEERS, Appellants vs. ZONING HEARING BOARD OF TOWAMENSING TOWNSHIP, Appellee and BOARD OF SUPERVISORS OF TOWAMENSING TOWNSHIP, Intervenor

*Zoning—Appeal of Enforcement Notice—
Interpretation of Zoning Ordinance*

Restrictions imposed by a zoning ordinance must be strictly construed and zoning ordinances may not be construed so as to restrict the use of land by implication.

In interpreting the language of a zoning ordinance to determine the extent of the restriction upon the use of the property, the language shall be interpreted, where doubt exists as to the intended meaning of the language written and enacted by the governing body, in favor of the property owner and against any implied extension of the restriction.

Where one section of a zoning ordinance does not permit extraction activities in a residential zoning district, but the ordinance provides in another section that “extraction for construction-related or development purposes shall be permitted in any district,” and there is no language anywhere in the ordinance requiring that the extraction activity and the construction-related or development activity occur on the same property, the zoning ordinance will not be interpreted, in the absence of any evidence concerning the intended meaning of that ordinance language, to require that the extraction activity and the construction-related or development activity occur on the same property.

NO. 06-1347

MICHAEL B. KASPSZYK, Esquire—Counsel for Appellants.

GEORGE T. DYDYN SKY, Esquire—Counsel for Appellee.

THOMAS S. NANOVIC, Esquire—Counsel for Intervenor.

OPINION

ADDY, J.—March 26, 2007

The Appellants, Earl W. Beers and Susan A. Beers, by P/O/A Glenn Beers (hereinafter referred to as “the Beers”), have filed an appeal of the Decision of the Towamensing Township Zoning Hearing Board (hereinafter referred to as “the Zoning Board”) dated May 30, 2006. After reviewing the record created before the Zoning Board and after considering the Briefs and arguments of counsel, we sustain the Beers’ appeal and we reverse the Decision of the Zoning Board.

FACTS AND PROCEDURAL HISTORY

The Beers are the owners of two (2) tracts of land located in Towamensing Township, Carbon County, Pennsylvania. One tract of land is located along Stable Road. The Stable Road property is a vacant tract of land which is approximately seven (7) acres in size and it is located in a residential Zoning District.

The other tract of land is located along Strohl's Valley Road. The Strohl's Valley Road property is approximately one hundred and twenty-eight (128) acres in size, is not zoned residential, and is the site of the Old Homestead Tree Farm.

In March of 2006, the Township became aware that the Beers were excavating and removing shale from the Stable Road property. The mining was being done by heavy equipment, including a front-end loader and dump trucks. First, the topsoil was stripped, and then the shale was extracted. The shale was then hauled over Stable Road and Strohl's Valley Road to the Strohl's Valley Road property. The shale was being used at the Strohl's Valley Road property as fill in conjunction with the construction of a building on that property.

On March 24, 2006, the Zoning Officer of Towamensing Township (hereinafter referred to as "the Zoning Officer") issued two Enforcement Notices to the Beers. The first Enforcement Notice alleged that the Beers' Zoning Permit, which was issued on April 28, 2004, for the construction of an agricultural building on the Strohl's Valley Road property, had expired due to a lack of commencement of construction within one (1) year after the issuance of the Zoning Permit for that construction. The second Enforcement Notice alleged that the Beers were extracting soils from the Stable Road property without a required Zoning Permit for an extractive operation.

On April 20, 2006, the Beers filed timely appeals of both Enforcement Notices to the Zoning Board. The appeal filed by the Beers requested an interpretation of the applicable Zoning Ordinance provision(s). When counsel for the Beers hand delivered the appeal documents to the Zoning Officer on that date, he was provided a letter dated April 19, 2006, rescinding the Enforcement Notice regarding the extraction of soils from the Beers' property on Stable Road. Thereafter, the Zoning Officer issued a new Enforcement Notice, dated April 25, 2006, which reinstated the Enforcement Notice regarding the extraction of soil from the Stable Road property. The April 25, 2006 Enforcement Notice provided, in relevant part, as follows:

You are hereby formally notified pursuant to Section 616.1 of the Municipalities Planning Code[,] 53 P.S. 10616.1, that you are in violation of Section 405(G9) and 406(G9) of the Towamensing Township Zoning Ordinance

of 1991, as amended ('Zoning Ordinance'). The reasons for your violation of Sections 405(G9) and 406(G9) are as follows:

1. Section 405(G9)—The above-referenced property is zoned Residential under the Zoning Ordinance. Extractive Operations are not permitted in a Residential area.
2. Section 406(G9)—This section provides extraction for construction related or development purposes of that property. A zoning permit is required for that purpose.

This matter proceeded before the Zoning Board as an appeal from both the March 24, 2006 Enforcement Notice, relating to the expiration of the Zoning Permit for construction on the Strohl's Valley Road property, and the April 25, 2006 Enforcement Notice, relating to extraction of soil from the Stable Road property.

On May 11, 2006, a hearing was held before the Zoning Board on the appeal of both Enforcement Notices. During the hearing, the testimony established that soil was being removed from the Stable Road property for development on the Strohl's Valley Road property. The testimony also established that the soil was not being bartered, sold, or used for any purpose other than to create a foundation for a storage facility that was to be built on the Strohl's Valley Road property.

At the conclusion of the hearing, the Zoning Board voted to grant the Beers' appeal relating to the expired Zoning Permit and the Zoning Permit was extended for two (2) years. The Zoning Board also voted to deny the Beers' appeal relating to the extraction activity on the Stable Road property, concluding that the Ordinance, although permitting extraction in any Zoning District in conjunction with construction or development purposes, limits such permission to engage in extraction activity to instances where the extraction and utilization of the extracted material occur on the same property.

ISSUE

Whether the Zoning Board abused its discretion or committed an error of law in interpreting Section 406(G9) of the Zoning Ordinance to mean that the extraction activity must be located on the same property as the construction-related or development activity.

DISCUSSION

At the outset, we note that the facts in this case are not in dispute. The issue before us is purely a question of law, specifically involving the interpretation of certain language contained in the Zoning Ordinance. Moreover, this appeal is limited to the Enforcement Notice issued on April 25, 2006, relating to the extraction activity on the Stable Road property.

The standard of review for trial and appellate courts when reviewing zoning appeals is well settled.

[W]here ... the ... court has not taken any additional evidence, [the court] is limited to a determination of whether the zoning hearing board committed an error of law or abused its discretion. An abuse of discretion will only be found where the zoning board's findings are not supported by substantial evidence.

Cardamone v. Whitpain Township Zoning Hearing Bd., 771 A.2d 103, 104 (Pa. Commw. 2001) (citations omitted).

In the present case, the Decision of the Zoning Board provided, in relevant part, as follows:

With reference to the enforcement notice against you, it in essence indicated that you had neither right nor permit to remove soil from your property located on Stable Road, which is zoned residential. The prohibition, according to the township, is supported by Section 406(g)(9) which governs extractive operations such as borrow pits, meaning excavations for removing material for filling operations and therefore is part and parcel of a permit process. When this section is read in tandem with Section 405(g), it appears your extractive operation would be prohibited in a residential area unless vouchsafed by permit issued for your Stable Road property.

Your argument to the Board that because this extraction from Stable Road was used solely for the purpose of filling the Strohl Valley construction, and thus was permitted because the ordinance indicates in Section 406(G)(9) that 'extraction for construction-related or development purposes shall be permitted in any district' was rejected by the Board. The logical extension would permit extraction in a residential area to produce fill for any construction whatsoever whether in the township or outside the township or

even outside the state. This would be an illogical interpretation of the intent of the ordinance.

Because you have not obtained a permit which would give you the ability to extract soil in a residential area, and because your operation does not comply with Section 405(g) of the ordinance, the Board voted 3-0 to reject your appeal of the township's enforcement notice.

We begin our analysis of this appeal with a review of the relevant Sections of the Zoning Ordinance.

Under the "Table of Use Regulations" contained in Section 405 of the Towamensing Township Zoning Ordinance, an "extractive operation", which is listed under the heading "Industrial Uses", is not a permitted use in the Residential Zoning District. However, Section 406(G9) of the Zoning Ordinance provides, in relevant part, as follows:

(G9) Extractive Operation

Sand, clay, shale, gravel, topsoil, or similar extractive operations including borrow pits (excavations for removing material for filling operations). Extraction for construction-related or development purposes shall be permitted in any district.

The Beers interpret Section 406(G9) of the Zoning Ordinance to mean that, notwithstanding that Section 405 lists extractive operations as a non-permitted use in a Residential Zoning District, extractive operations are permitted anywhere in the Township if such extractive operations are related to a construction or development purpose, wherever located.

The Beers' Brief summarizes their position as follows:

There is no language in Section 406(G9) that can be interpreted to require that the extraction for construction related purposes is limited to extraction operations on the same lot or site that the construction or the land development is occurring. If such were the intention of the governing body, they could have simply inserted the words 'on the same lot' between the words 'purposes' and 'shall' of Section 406(G9). Alternatively, they could have used language similar to that used in exceptions (1) or (5) to 'Surface Mining' set forth in 52 P.S. 3303. However, since no 'on lot' limitations on construction or development related extraction exists in Section 406(G9) of the Zoning Ordinance, the

rules of construction set forth **supra**, compels the interpretation that no such limitation exists [sic].

Beers' Brief, p. 7.

The Beers' Brief also aptly cites the law regarding the interpretation of Zoning Ordinances as follows:

The law of interpreting Zoning Ordinances in Pennsylvania is well settled. 'In interpreting the language of zoning ordinances to determine the extent of the restriction upon the use of the property, the language shall be interpreted, where doubt exists as to the intended meaning of the language written and enacted by the governing body, in favor of the property owner and against any implied extension of the restriction.' 53 P.S. §10603.1. **See Isaacs v. Wilkes-Barre City Zoning Hearing Board**, 148 Pa. Cmwlth. 578, 612 A.2d 559 (1992). Zoning ordinances are to be liberally construed to allow broadest possible use of land. **Upper Salford Tp. v. Collins**, 542 Pa. 608, 669 A.2d 335 (1995). While the legislative intent of the governing body that enacted the ordinance is of primary concern when interpreting a zoning ordinance, the letter of the ordinance is not to be disregarded under the pretext of pursuing its spirit. **See Tobin v. Radnor Tp. Bd. Of Com'rs**, 142 Pa. Cmwlth. 567, 597 A.2d 1258 (1991). Absent express limitation, permissive phrases in zoning ordinances are given their broadest meaning, and any ambiguities are resolved in favor of the landowner. **Gilbert v. Montgomery Tp. Zoning Hearing Bd.**, 58 Pa. Cmwlth. 296, 427 A.2d 776 (1981). Restrictions imposed by zoning ordinances must be strictly construed; they may not be construed so as to restrict the use of land by implication. **Reed v. ZHB of West Deer Township**, 31 Pa. Cmwlth. 605, 377 A.2d 1020 (1977).

Beers' Brief, p. 6.

The Zoning Board, on the other hand, interpreted Section 406(G9) of the Zoning Ordinance to mean that extractive operations are permitted in any Zoning District provided that the extractive operation is related to construction or development activity on the same property. Alternatively stated, the Zoning Board construed the language contained in Section 406(G9) to require that both the extraction activity and the development and/or construction activity must take place on the same parcel of land.

In considering the interpretational issue presented in this case, we recognize that the law regarding the interpretation of Zoning Ordinances in Pennsylvania is statutorily circumscribed as follows:

In interpreting the language of zoning ordinances to determine the extent of the restriction upon the use of the property, the language shall be interpreted, where doubt exists as to the intended meaning of the language written and enacted by the governing body, in favor of the property owner and against any implied extension of the restriction.

53 P.S. §10603.1.

We shall address the various interwoven aspects of the issue regarding the interpretation of the Zoning Ordinance at issue below.

A. **Language of Section 406(G9)**

As the Commonwealth Court has stated, “absent express limitation, permissive phrases in zoning ordinances are given their broadest meaning, and any ambiguities are resolved in favor of the landowner.” **Gilbert v. Montgomery Tp. Zoning Hearing Bd.**, 58 Pa. Commw. 296, 303-304, 427 A.2d 776 (1981).

In the present case, the permissive language of Section 406(G9) of the Zoning Ordinance seems clear in stating that “[e]xtraction for construction-related or development purposes shall be permitted in any district.” On its face, there is no requirement in Section 406(G9) that the extraction activity must be located on the same property as the construction or development activity. A literal reading of the permissive language in Section 406(G9) allows excavation on one property where the excavated material is deposited on another property since there is no mention of a “same property” restriction in the unambiguous language of that Section. Therefore, we conclude that the language of Section 406(G9), standing alone, would permit the Beers’ extraction activity, regardless of whether the extraction activity is located on the same property as the construction-related or development activity.

B. **Section 406(G9) Read in Conjunction With Section 405**

The Township argues, however, that the permissive language of Section 406(G9) must be read in conjunction with Section 405 of the Zoning Ordinance (the “Table of Use Regulations”),

which provides that extractive operations are not a permitted use in a Residential Zoning District. The Township makes the following argument in its Brief:

... an ordinance must be construed, if possible, to give effect to all of its provisions. **Mann v. Lower Makefield Township**, 160 Pa. Commw. 208, 634 A.2d 768 (1993). Beers' interpretation of Section 406(G9) of the Zoning Ordinance renders Section 405(G9) of the Zoning Ordinance meaningless. Because it is hard to imagine why anyone would mine shale, gravel or topsoil for any purpose other than a purpose related to construction or development, under Beers' interpretation, Section 405(G9) should list extractive operations as being permitted in every zoning district [footnote omitted]. Stated another way, Beers' interpretation causes the exception (**i.e.**, Section 406(G9)) to swallow the rule (**i.e.**, Section 405(G9)).

Township's Brief. p. 7.

We do not believe that, if we were to accept the Beers' position, it would result in the exception (Section 406(G9)) swallowing the rule (Section 405). We conclude that Section 406(G9) and Section 405 are neither inconsistent nor conflicting. Instead, we conclude that Section 406(G9) merely provides a logically consistent exception (limited to instances of construction-related or development activity) to the rule contained in Section 405 that extraction activity is not permitted in a Residential Zoning District.

Even if there were some basis for doubt as to whether the allowance of extraction for construction-related or development purposes in any Zoning District was intended to be limited to instances where the extracted material is being utilized or deposited on the same property from which it is being extracted, that doubt must be resolved in favor of the Beers. As mandated by 53 P.S. §10603.1, the language shall be interpreted, where doubt exists as to the intended meaning of the language, in favor of the property owner and against any implied extension of the restriction. **See Isaacs v. Wilkes-Barre City Zoning Hearing Board**, 148 Pa. Commw. 578, 612 A.2d 559 (1992) ("In interpreting the language of zoning ordinances to determine the extent of the restriction upon the use of the property, the language shall be interpreted, where doubt exists as to the in-

tended meaning of the language written and enacted by the governing body, in favor of the property owner and against any implied extension of the restriction"). Accordingly, even if there were some doubt as to the intended meaning of the Zoning Ordinance language at issue, we would interpret that language in favor of the Beers. Accordingly, in the present case, reading the purportedly conflicting Sections of the Zoning Ordinance in the least restrictive manner, we hold that the extraction activity by the Beers is allowed pursuant to Section 406(G9), even though it is within a Residential Zoning District, because it is being done in connection with construction or development.

C. Township's Intent in Enacting the Ordinance

The Township contends that where there is doubt about the meaning of a provision in a zoning ordinance, it is the intent of the Township in enacting the Zoning Ordinance that should govern. Citing Ryan on Zoning, the Township argues as follows:

If the intent of the governing body can be ascertained from the language of the provision, with the aid, if necessary, of the usual interpretational tools, then that intent governs. It is only where there is genuine doubt as to the legislative intent that a board or a court should accept the reading that gives the ordinance its least restrictive effect. Ryan, Pennsylvania Zoning Law and Practice, §4.2.4.

In this case, there is nothing in the Zoning Ordinance which provides any guidance as to the intent of the Township in enacting the language at issue. Moreover, there was no evidence or testimony presented as to the Township's intent regarding the disputed language of the Zoning Ordinance. In fact, the only testimony presented by the Township at the hearing before the Zoning Board was the testimony of the Township Zoning Officer. During the direct examination of the Zoning Officer, there was no testimony concerning the intent of the Township Supervisors in enacting the language of the Zoning Ordinance at issue here. The cross-examination of the Zoning Officer reveals the following:

Q ... Now, is it fair—am I reading this correctly? Because I'm going to read this for the record just so you and I are reading the same page.

(g)(9), extractive operations, sand, clay, shale, gravel, topsoil or similar extractive operations, including borrow

pits, parenthesis, excavations for removing material for fill operations, closed parenthesis, period.

Extraction for construction hyphen related or development purposes shall be permitted in any district, period.

Did I read those two sentences, correctly?

A Yes.

Q Now, how do you interpret extraction for construction-related for development purposes shall be permitted in any district?

A How do I—

Q You are saying that they are in violation of 406(g)(9), correct? The section I just read, correct?

A Uh-huh.

Q Does it not say that extraction for construction-related for [sic] development purposes shall be permitted in any district?

A That's what it says, yes.

Q Does it say anywhere under (g)(9) that that only applies when the construction is being performed on the same identical lot as where the extraction is to be performed?

A It does not say that it's not for a same lot, no.

Q In your notice of violation letter—if you can go back to that for a second, your April 25, 2006 letter. Do you have that handy?

You write under No. 2, addressing 406(g)(9), this section provides extraction for construction-related or development purposes of that property, correct?

A That is correct.

Q It doesn't say anywhere under Section 406(g)(9), though, that the extraction for construction purposes is limited to that property, is it?

A It doesn't state that, no.

Q So you added that language on your own volition? Is that your own interpretation? Where did you get that language?

A This section does not provide extraction for construction-related or development purposes of that property.

Q But I'm asking you, specific, about the—

A If you want my interpretation—if that's what you're asking—

Q Yes.

A —in a roundabout way. It says extraction for construction-related, developmental purposes shall be permitted in any district.

There was no zoning permit issued on that property and none was requested.

Q So whenever there's extraction, you're saying that even if it's for construction-related purposes, you actually need an extraction permit? Is that what you are saying?

A That is correct.

N.T. 5/11/06, pp. 26-28.

Q So you are saying then the distinction is that, in this case, since the construction is not occurring on the particular lot, that's why that exception doesn't apply? Is that your interpretation?

A Yes.

Q Even though you agree that it does not say that anywhere in that section of the ordinance, correct?

A That is correct.

N.T., 5/11/06, pp. 29-30.

The testimony of the Zoning Officer did not address the Township's intent in enacting the Zoning Ordinance. The testimony of the Zoning Officer merely reflects the Zoning Officer's own personal interpretation of the language of the Zoning Ordinance at issue. Therefore, the testimony of the Zoning Officer does not establish that the Township's intent in enacting the language at issue was that the extraction activity and the construction-related or development activity must occur on the same property.

In requesting that we read into the Zoning Ordinance a requirement that the extraction activity take place on the same property as the construction or development activity, the Township contends that it is unlikely that the Township Supervisors intended "such an absurd or unreasonable result" as to allow excavation in any district so long as the activity is done for construction and/or development "somewhere in the world." In its

written Decision, the Zoning Board concurred with the Township's position as follows:

[The Beers'] argument to the Board that because this extraction from Stable Road was used solely for the purpose of filling the Strohl Valley construction, and thus was permitted because the ordinance indicates in Section 406(G)(9) that 'extraction for construction-related or development purposes shall be permitted in any district' was rejected by the Board. The logical extension would permit extraction in a residential area to produce fill for any construction whatsoever whether in the township or outside the township or even outside the state. This would be an illogical interpretation of the intent of the ordinance.

The Township's Brief outlines its argument as follows:

The interpretation suggested by the Beers is both absurd and unreasonable. According to Beer's interpretation, extractive operations are permitted in any zoning district provided they are related to construction or development, wherever located. This means mining is permitted in the middle of a residential neighborhood, next to a church or medical center, or in any other location in the Township so long as the shale is used somewhere in the world for a construction-related or development purpose. Obviously, the Board of Supervisors did not intend such an absurd or unreasonable result. Just as obvious is that what is meant is that the extractive operation must be for construction-related or development purposes located on the same lot.

Township's Brief, p. 7.

Simply stated, we do not believe that a result, such as in the present case, where the extractive activity and the construction or development activity are located on different properties is absurd or unreasonable or illogical.

It may well be that the Township Supervisors intended, in enacting the language of the Zoning Ordinance at issue, that the extraction activity must occur on the same property as the construction or development activity. After all, it seems intuitively obvious that, in order to engage in construction or development activity on a particular property, it would be necessary to engage in extraction activity in connection with that construction or development activity. However, neither a read-

ing of Section 406(G9), standing alone, nor a reading of Section 406(G9) read in conjunction with Section 405, nor any other interpretational analysis leads us to a conclusion that it was the intent of the Township Supervisors to limit the permissive language in Section 406(G9) to a "same property" situation. As noted by the Beers in their Brief, if it was indeed the intention of the Township Supervisors to limit the permissive language contained in Section 406(G9) to a "same property" situation, such intention could have been easily and clearly codified by adding language to Section 406(G9) limiting the permission granted by that Section to situations where the extraction activity and the construction or development activity occur on the same property.

CONCLUSION

Based upon the foregoing, we hold that the extraction activity by the Beers on the Stable Road property is allowed pursuant to Section 406(G9) of the Towamensing Township Zoning Ordinance. Accordingly, we grant the Beers' appeal and we reverse the Decision of the Towamensing Township Zoning Hearing Board.

ORDER

AND NOW, this 26th day of March, 2007, upon consideration of the Land Use Appeal of the Appellants, Earl W. Beers and Susan A. Beers, by P/O/A Glenn Beers, and in accordance with the foregoing Opinion, it is ORDERED and DECREED that the Land Use Appeal is SUSTAINED and the Decision of the Towamensing Township Zoning Hearing Board is REVERSED.

**BEAVER DAM OUTDOORS CLUB, Plaintiff vs.
HAZLETON CITY AUTHORITY, Defendant**

*Declaratory Relief—Contract Formation—Meeting of the Minds—
Municipal Authorities—Ultra Vires Acts by “Lame Duck” Boards—
Authority To Bind Subsequent Boards to Contracts—
Governmental / Proprietary Functions*

Pursuant to the Declaratory Judgments Act, 42 Pa. C.S.A. §7531, et seq., the court has the authority to determine contract validity upon request of a party to the contract.

Where there is a meeting of the minds between a majority of the members of the Board of Directors of a Municipal Authority, and another contracting party, a contract is formed.

A Municipal Authority performs an “ultra vires” act if it performs the act without any authority to do so on a particular subject or if it has authority to do so, but exercises it irregularly.

An outgoing Board that attempts to create long-term obligations is commonly referred to as a “lame duck board”. The common law imposes a limitation on the duration of contracts that Boards of Municipal Authorities may enter into when engaging in “governmental functions.” Contracts entered by “lame duck” boards that involve a “governmental function”, rather than a “proprietary function”, may not extend beyond the term of office of that Board.

When the Hazleton City Authority entered into the Lease Agreement with Beaver Dam Outdoor Club to provide land for recreational use, it engaged in a “proprietary function”, not a “governmental function” because, inter alia, it was under no statutory obligation to do so, and, therefore, the Hazleton City Authority did not act ultra vires.

NO. 04-2030

THOMAS L. KENNEDY, Esquire—Counsel for Plaintiff.

PETER O’DONNELL, Esquire—Counsel for Defendant.

OPINION

ADDY, J.—April 13, 2007

Before the Court is a Complaint for declaratory relief arising from an alleged breach of contract filed by the Plaintiff, Beaver Dam Outdoors Club, against the Defendant, Hazleton City Authority. Based upon the evidence taken at a two-day non jury trial held before the Court on September 22, 2006 and October 4, 2006, we make the following

FINDINGS OF FACT

1. The Plaintiff, Beaver Dam Outdoors Club (hereinafter referred to as “BDOC”), is a Pennsylvania non-profit corporation, having a registered office at 41 South Cleveland Street, McAdoo, Schuylkill County, Pennsylvania.

2. The Defendant, Hazleton City Authority (hereinafter referred to as "HCA"), is a Pennsylvania Municipal Authority, with a principal place of business located at 400 East Arthur Gardner Parkway, Hazleton, Luzerne County, Pennsylvania, 18201.

3. At some point prior to December 11, 2001, Mr. Andrew Sherkness and Mr. Joe Zoba, a member of the Board of Directors of HCA (hereinafter referred to as the "Board"), began negotiating for a lease agreement of some parcels of land (415.188 acres) owned by HCA.

4. It was the intent of Mr. Sherkness, and other individuals, to lease the land for the purpose of preserving the property for those who had grown up using the land. Additionally, Mr. Sherkness and the other individuals intended to restrict the use of the land to outdoor activities such as hunting, fishing, and walking, and to prevent damaging activities such as the unauthorized use of motor vehicles, drinking parties, and random target shooting.

5. As a result of these negotiations, Mr. Zoba informed Mr. Sherkness that he would be willing to present a motion to the Board to approve a lease of the property, provided that Mr. Sherkness formed a non-profit corporation and obtained liability insurance for the land.

6. BDOC was incorporated on December 11, 2001 for the express purpose of complying with Mr. Zoba's request. Mr. Sherkness was named President of BDOC. Mr. Carlo Collevechio was named Secretary/Treasurer of BDOC.

7. In August of 2003, BDOC obtained liability insurance, which provided coverage for the lands BDOC desired to lease, and the insurance policy named HCA as an additional insured. The annual premium paid on the insurance policy is between \$700.00 and \$710.00, and BDOC had maintained that insurance coverage as of the time of trial.

8. A proposed Lease Agreement was subsequently prepared. With the exception of the metes and bounds description, the terms contained in the Lease Agreement were identical to four (4) other Lease Agreements in place at the time between HCA and other organizations similar to BDOC.

9. On December 8, 2003, during a meeting of the HCA Board, Mr. Zoba made a motion before the Board to approve

Resolution 123. Resolution 123 was to approve the proposed Lease Agreement between BDOC and HCA. Mr. William Fay seconded the motion. Mr. Fay, Mr. Zoba, and Mr. Deandrea all voted in favor of the motion.¹

10. At the time that the majority of the HCA Board voted to approve the Lease Agreement, it was understood by the contracting parties at BDOC and the majority of the Board that there were no additional conditions precedent to formation of the contract.

11. All of the contracting parties at BDOC, as well as those Board members that voted in favor of approving the Lease Agreement understood that an Engineering Certificate was not a precondition to contract formation and was not a hurdle to contract formation.

12. On December 8, 2003, after the meeting of the Board, Mr. Deandrea, the Chairman of the Board, signed the Lease Agreement on behalf of HCA.²

13. BDOC is not a party to the Trust Indenture that exists between J.P. Morgan and HCA.

14. Prior to Mr. Zoba proposing Resolution 123, Mr. Deandrea asked for a motion to suspend the rules, which was approved. It was the standard practice of the Board to have any items on the agenda placed there at a “work session.” In the case of Resolution 123, the motion to suspend the rules was made for the purpose of allowing it on the agenda without having it placed there at a “work session.”

15. Mr. Deandrea’s term of office as a member of the Board expired at the end of December of 2003, and he was thereafter replaced by a new Board member.

16. After the Lease Agreement was entered into, Randy Cahalan, a manager of HCA, sent correspondence to BDOC indicating that the Lease Agreement was invalid, and he returned to BDOC both the notice of insurance coverage and the lease payment check.

¹ The Board of Directors consisted of five members, with Mr. Ammon voting against the motion and Mr. Andras abstaining from voting on the motion.

² Additionally, we find that any discussion during the meeting of the Board regarding the need to finalize the Lease Agreement referred only to having Mr. Deandrea, as Chairman of the HCA Board, sign the Lease Agreement.

DISCUSSION

1. Declaratory Relief

Under the Declaratory Judgments Act, 42 Pa. C.S.A. §7531, **et seq.**, any person interested under a written contract, or other writings constituting a contract, may have determined any question of construction or validity arising under the contract, and obtain a declaration of rights, status, or other legal relations thereunder.³ 42 Pa. C.S.A. §7533. “A contract may be construed either before or after there has been a breach thereof.” 42 Pa. C.S.A. §7532.

2. Contract Formation

“It is black letter law that in order to form an enforceable contract, there must be an offer, acceptance, consideration or mutual meeting of the minds.” **Jenkins v. County of Schuylkill**, 441 Pa. Super. 642, 648, 658 A.2d 380, 383 (1995). “An agreement is a valid and binding contract if: the parties have manifested an intent to be bound by the agreement’s terms; the terms are sufficiently definite; and there was consideration.” **In re Estate of Hall**, 731 A.2d 617, 621 (Pa. Super. 1999) (citations and quotations omitted). “The law of this Commonwealth makes clear that a contract is created where there is mutual assent to the terms of a contract by the parties with the capacity to contract.” **Shovel Transfer and Storage, Inc. v. Pennsylvania Liquor Control Board**, 559 Pa. 56, 739 A.2d 133, 136 (1999).

Here, there is no question that there was a meeting of the minds between both the majority of the members of the Board and the contracting parties from BDOC. It is also clear that, at the time the Board held the vote to approve the Lease Agreement, both parties intended to be bound by the Lease Agreement.

3. Ultra Vires Acts

HCA contends that, when an outgoing board, commonly referred to as a “lame duck” board, creates long-term obligations that bind a new board, it performs **ultra vires** acts. According to HCA, allowing a “lame duck” board to act in such a

³ “Courts of record, within their respective jurisdictions, shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.” 42 Pa. C.S.A. §7532.

fashion creates an egregious violation of public policy and serves to invalidate the Lease Agreement.

HCA also claims that by failing to place the matter on agenda for proper review, not having the lease document in front of the entire board for comment, and by executing a document that the Chairman had no authority to execute, the Board acted **ultra vires**. Presumably, HCA believes all of these acts to be **ultra vires**, and that their effect is to make the Board's action in approving the Lease Agreement not "binding upon HCA in any manner," and it seeks a declaration "that the Lease Agreement ... does not exist." (HCA's Pre-Trial Memorandum at page 7). In support of this position, HCA cites the case of **State Street Bank & Trust Co. v. Commonwealth Treasury Dept.**, 712 A.2d 811 (Pa. Commw. 1998).

The Court in **State Street Bank** does not define the phrase "lame duck board". **State Street Bank**, 712 A.2d 811. However, the Commonwealth Court of Pennsylvania subsequently held that "[a]n organization performs an '**ultra vires**' act if it performs the act without any authority to do so on a particular subject or if it has authority to do so but exercises it irregularly. An outgoing board that attempts to create these types of long-term obligations and perform these '**ultra vires**' acts is commonly referred to as a 'lame duck' board." **Chichester School District v. Chichester Education Association**, 750 A.2d 400, 403 (Pa. Commw. 2000) (internal citations and quotations omitted).

Failure to place the matter on agenda for proper review does not constitute an **ultra vires** action. In fact, it was the testimony of Mr. Deandrea that, when the Board wished to consider a matter that wasn't ready at the prior work session, it was the standard practice of the board to "suspend the rules." The general rules of operation followed by the Board at HCA are powers that the Board clearly had authority to exercise, and presumably, a standard practice is hardly a power exercised irregularly.

It is clear from the evidence, and already a finding of this Court, that there was a meeting of the minds of all parties as to terms of the Lease Agreement, and the Lease Agreement is a valid contract. It is also clear from a reading of the statutory powers granted to a Municipal Authority that HCA has the

authority to enter a Lease Agreement. 53 Pa. C.S.A. §5607. Moreover, we note that the Lease Agreement with BDOC is the fifth such identical agreement (except for metes and bounds) that was entered into by HCA that year. Engaging in contracts generally, and this Lease Agreement specifically, is hardly a power that the Board could not exercise, nor one exercised irregularly.

As to the allegation that entering the Lease Agreement was an **ultra vires** act by a “lame duck board”, we conclude that entering the Lease Agreement with BDOC was not an **ultra vires** act.

State Street Bank is among a line of cases creating a limitation on the duration of contracts by Municipal Authorities such as HCA when performing their governmental functions (as opposed to proprietary functions). **State Street Bank, supra.** The Commonwealth Court, reviewing the progeny of **State Street Bank**, has held “that in the performance of governmental functions, discretionary public commitments cannot be made by officials in office where those commitments will unduly bind their successors in office or if such commitments are made ‘ultra vires’.” **Chichester, supra** at 403.

The Supreme Court of Pennsylvania has held that, when determining if an action comprised a governmental function or a proprietary function, it is essential to look to the driving force of the action. **Lobolito, Inc. v. North Pocono School District**, 562 Pa. 380, 755 A.2d 1287 (2000). In deciding if an action is undertaken as a proprietary function or a governmental function, the Supreme Court of Pennsylvania looks to whether there is express statutory authority requiring that action. **Lobolito, supra.** This inquiry comports with the first element of the test applied by the Commonwealth Court in their more recent decision of **Program Administration Services, Inc. v. Dauphin County General Authority**, 874 A.2d 722 (Pa. Commw. 2005). Specifically, in that case, the Commonwealth Court held that “[i]n determining whether activity is governmental or proprietary the Court will consider whether it: (1) is one that government is not statutorily required to perform; (2) also may be carried on by private enterprise; and (3) is used as a means of raising revenue.” **Id.** at 726.

There has been no evidence presented, nor any allegation in the pleadings, that when entering into the present Lease

Agreement with BDOC, HCA was performing a governmental function.

Here, the purpose of this Lease Agreement is preserving land for recreational, outdoor use, and we are unaware of any such express or implied statutory requirement imposed on HCA. Additionally, because BDOC is a private, non-profit corporation, our decision satisfies the additional conditions imposed by the Commonwealth Court. Therefore, we find that the actions of HCA in entering this Lease Agreement constitute a proprietary function, not a governmental function. Accordingly, the HCA Board did not engage in an **ultra vires** act in entering the Lease Agreement.

CONCLUSIONS OF LAW

1. The Court has the power to grant declaratory relief regarding the validity of a contract upon request by a party to the contract. 42 Pa. C.S.A. §7532; 42 Pa. C.S.A. §7533; **Program Administration Services, Inc. v. Dauphin County General Authority**, 874 A.2d 722 (Pa. Commw. 2005).

2. Declaratory relief is appropriate when a Court is asked to consider the validity of a contract or lease agreement. 42 Pa. C.S.A. §7533.

3. BDOC made an offer to enter into a contract to lease the parcels of land owned by HCA.

4. The vote of the majority of the HCA Board to approve the Lease Agreement with BDOC constituted acceptance of BDOC's offer to contract.

5. Because it was the intent of all the parties involved to be bound by the Lease Agreement once it was approved, voting to adopt the Lease Agreement constituted formation of a contract.

6. Because all the parties were in agreement as to the essential terms of the Lease Agreement, there was a clear meeting of the minds of all the parties.

7. The Lease Agreement entered into between BDOC and HCA is a valid and enforceable contract.

8. The power to enter lease agreements and contracts is granted to HCA by statute. 53 Pa. C.S.A. §5607.

9. HCA acted appropriately, and within their authority, when they suspended the rules to entertain Resolution 123, and when

the majority of the Board voted to enter into the Lease Agreement with BDOC, and, therefore, the HCA Board did not commit any **ultra vires** acts in this regard.

10. HCA performed a proprietary function, not a governmental function, when they entered into the Lease Agreement with BDOC for the purpose of preserving land for recreational use, and therefore, entering into the Lease Agreement with BDOC was not an **ultra vires** act by the HCA Board.

CONCLUSION

Based upon the foregoing, we conclude that on December 8, 2003, once the majority of the HCA Board voted to adopt the Lease Agreement, a meeting of the minds occurred and a valid contract was formed. We further conclude that failure to obtain an engineering certificate was not a bar, nor was it a pre-condition to contract formation. Lastly, we conclude that, in entering into the Lease Agreement with BDOC, the HCA was performing a proprietary function, not a governmental function, and, therefore, the HCA Board did not act **ultra vires**. Accordingly, we enter the attached Order granting declaratory relief.

ORDER OF COURT

AND NOW, this 13th day of April, 2007, after a non jury trial held on the Plaintiff's Complaint for Declaratory Relief, it is hereby ORDERED and DECREED that the Lease Agreement executed on December 8, 2003, between the Plaintiff, Beaver Dam Outdoors Club, and the Defendant, Hazleton City Authority, is hereby declared to be a valid and binding contract. It is further ORDERED and DECREED that the Defendant, Hazleton City Authority, is bound by the terms and conditions of the Lease Agreement entered into with the Plaintiff, Beaver Dam Outdoors Club.

JOHN McMAHON, Plaintiff vs. LEE CONKLIN, SUSAN CONKLIN, PLEASANT VALLEY WEST ASSOCIATION a/k/a PLEASANT VALLEY WEST CLUB, Defendants

Civil Law—Uniform Planned Community Act—Dog Bite—Tort Liability—Homeowners Association—Necessity of Notice and Control

1. The Uniform Planned Community Act permits a homeowners association to regulate, within reason, both the conduct of its members and the use of common areas for the common good of the community. This authority is not limited to regulating the maintenance and use of the common areas only.
2. The duties and liabilities in tort owed by a homeowners association to its members, and those persons lawfully in the community, are a new and developing area of law given the special and distinct relations which exist by and between the residents of the planned community and the homeowners association. These relations are based, in part, on a recognition that title to the common areas is held in the name of the association in which the unit owners are members, and that the association has the right to establish and enforce rules and regulations governing the owners' conduct and the use of their property as it affects the other members of the community.
3. Under general principles of tort law, for a possessor or owner of property to be liable for the conduct of others which occurs on property owned or possessed by him, he must know or have reason to know of the dangerous condition and have the ability and authority to take corrective action. Under these general principles, several courts which have considered the question have determined that with respect to the common areas in a private community a homeowners association is akin to a landlord and is subject to liability if it knows or has reason to know of the dangerous condition and has the right to control or eliminate this danger.
4. In the context of an injury caused by a dangerous animal owned by a third party and which occurs on a common area, a homeowners association's liability to the injured party is dependent upon a finding that the association had actual knowledge of the dog's dangerous propensities and the right to either take possession of the premises or to remove the dog. Under these circumstances, it is the association's actual knowledge of the dog's dangerous propensities and its right to control the dog's presence which creates a legal duty in the association to exercise reasonable care to protect those individuals lawfully present on the common area.
5. In contrast to an attack which occurs on a common area, as between property owners in a private residential community, where one owner's dog attacks another owner on property owned by the injured party, notwithstanding a homeowners association's knowledge of the dangerous propensities of the owner's dog, the association's inability to remove the dog or to take possession of the premises maintained by the dog's owner, precludes a finding of liability against the association.

NO. 05-2568

ANDREW R. SPIRT, Esquire—Counsel for Plaintiff.

PETER A. DUNN, Esquire—Counsel for Pleasant Valley West Association a/k/a Pleasant Valley West Club.

LEE and SUSAN CONKLIN—Pro se.

MEMORANDUM OPINION

NANOVIC, P.J.—May 11, 2007

The issue presented in this case is whether a homeowners association for a private residential community owes a duty to protect its members, who at the time are on privately owned property within the community, from an attack by a dog owned and possessed by another member of the same community.

FACTUAL AND PROCEDURAL BACKGROUND

On October 13, 2004, two dogs (Misty and Ash) owned by the Defendants, Lee Conklin and Susan Conklin, allegedly attacked and injured the Plaintiff, John McMahon.¹ The attack occurred within the Pleasant Valley West subdivision, a private residential community governed and managed by the Defendant Pleasant Valley West Association (the “Association”). Both McMahon and the Conklins own property and have homes within this subdivision, and are subject to rules and regulations promulgated by the Association.

At the time of the attack, McMahon was standing in the driveway of his residence at 18 Cheyenne Circle loading his car. The Conklins’ property is located at 20 Cheyenne Circle, adjacent to McMahon’s. The Conklins’ dogs were unleashed and ran directly from the Conklin property onto McMahon’s property where the attack occurred. Prior to this incident, the dogs, according to McMahon’s complaint, were reputed to roam throughout the development, unrestrained and unsupervised, threatening and intimidating other property owners and persons lawfully in the development.

More than two years before the attack, McMahon’s roommate, Steven Liptak, attended a meeting of the Association’s board of directors on July 28, 2002, to complain about the Conklins’ dogs. At this meeting, Mr. Liptak reported that the dogs’ aggressive behavior was “terrorizing” the community. By letter dated the following day, July 29, 2002, the Association notified Mr. Conklin of this complaint and requested that he confine his dogs to his property and otherwise keep them on a leash and under his control as required by the Association’s

¹ The breed of the dogs is in dispute. The Conklins claim both dogs were American Staffordshire Terriers. McMahon claims both were pit bulls.

then existing rules and regulations.² This notice was sent to the wrong address and, according to Mr. Conklin, never received by him.

McMahon contends that the Association was negligent in failing to establish and enforce rules and regulations requiring property owners to maintain, control and confine their animals on their property. He further contends that because the Association was aware of the vicious nature of the Conklins' dogs before the attack occurred, it had a duty to exercise reasonable care to prevent the dogs from running loose and attacking residents of the community. In response, the Association argues that the Uniform Planned Community Act (the "UPCA"), 68 Pa. C.S.A. §§5101-5414, enacted on December 19, 1996, prohibits a homeowners association from regulating a property owner's conduct other than with respect to the use of roads, recreational facilities and other common areas, and that it has no legal duty to implement or enforce restrictions concerning the behavior of an owner's dog while on private property. As to these two issues, on the facts stated, the Association moves for summary judgment.³

² At the time of this complaint, the Conklins were not married and Mrs. Conklin had yet to move to the property at 20 Cheyenne Circle. Mr. Conklin purchased this property in his name alone by deed dated October 29, 1999, prior to his marriage to Susan Conklin which occurred on August 23, 2003.

³ In **Swords v. Harleysville Insurance Companies**, 584 Pa. 382, 883 A.2d 562 (2005), the Pennsylvania Supreme Court set forth the relevant legal standards for reviewing a motion for summary judgment as follows:

The standards which govern summary judgment are well settled. When a party seeks summary judgment, a court shall enter judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery. A motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law. In considering the merits of a motion for summary judgment, a court reviews the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Finally, the court may grant summary judgment only when the right to such a judgment is clear and free from doubt. An appellate court may reverse the granting of a motion for summary judgment if there has been an error of law or an abuse of discretion.

Id., 883 A.2d at 566-567 (citations omitted). We have stated the facts and will review the Association's motion with this standard in mind.

DISCUSSION

Authority of a Homeowners Association To Regulate the Maintenance of Dogs by a Member of the Community

Private residential planned communities—subdivisions bound by a common set of restrictive covenants and governed by a homeowners association organized either as a profit or nonprofit corporation or as an unincorporated association⁴—while quasi-municipal in nature,⁵ are subject, *inter alia*, to principles of contract and real estate law. Prior to the enactment of the UPCA, associations in a planned development derived their powers primarily from a recorded declaration of restrictions and relied upon the common law governing covenants which “run with the land” to explain their authority, and the enforcement of rules and regulations promulgated by them to conduct, manage and control the affairs of the community.

Under the common law, absent a regulation which exceeded the Association’s express or implied authority, or which contravened fundamental constitutional rights or public policy, the Association was free to adopt and enforce regulations reasonably related to the protection, preservation, operation and general welfare of the community and its common areas. **See Shelley v. Kraemer**, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948) (prohibiting use of the state’s judicial process to enforce a racially restrictive covenant); **MidLake on Big Boulder Lake Condominium Association v. Cappuccio**, 449 Pa. Super. 124, 673 A.2d 340 (1996) (holding that a property owner may contractually relinquish even constitutional rights—exclusive of those involving racial discrimination or bias—by way of restrictive covenants enforceable between private parties), **appeal denied**, 544 Pa. 684, 679 A.2d 230 (1996). The UPCA does not prohibit or supplant this well-established source of authority in the association to control and decide what is in a private community’s best interests; 68 Pa. C.S.A. §5108 (relating to supplemental general principles of law applicable) and §5302

⁴ The Pleasant Valley West Association is a Pennsylvania nonprofit corporation.

⁵ In **Hess v. Barton Glen Club, Inc.**, 718 A.2d 908, 912 (Pa. Commw. 1998), **appeal denied**, 737 A.2d 745 (Pa. 1999), the Commonwealth Court aptly compared a homeowners association to a miniature government, charged with managing the common areas and facilities of a residential development.

(power of unit owners' association). If anything, the UPCA expands these powers and requires that discretionary decisions of the association's board be reviewed to determine if the board acted "in good faith; in a manner they reasonably believe to be in the best interests of the association; and with care, including reasonable inquiry, skill and diligence as a person of ordinary prudence would use under similar circumstances." 68 Pa. C.S.A. §5303; **see also, Burgoyne v. Pinecrest Community Ass'n**, 2007 WL 1346663, *6 (Pa. Super. 2007).

The power and authority of a developer to regulate animals within a private community does not by itself contravene public policy (**see e.g., Buck Hill Falls Co. v. Press**, 791 A.2d 392 (Pa. Super. 2002), **appeal denied**, 573 Pa. 688, 825 A.2d 637 (2003)) and, to our knowledge, has never been previously questioned. Nowhere does the UPCA suggest that such authority has been eliminated nor will we imply such a fundamental change absent statutory language expressing this intent. **See e.g.**, 68 Pa. C.S.A. §5302(a)(1), (6), (16) (authorizing an association to adopt and amend bylaws, as well as rules and regulations; to regulate the use of common areas; and to exercise "other powers necessary and proper for the governance and operation of the association"); §5306(b) (authorizing the adoption of bylaws which provide for any other matters the association deems necessary and appropriate). Consequently, we find the Association's argument that it no longer has the authority under the UPCA to regulate animals as they affect the overall use and enjoyment of the community to be unpersuasive.

Duty to Regulate

That the Association has this power to regulate, however, does not necessarily mean it has a duty to exercise it. In this case, the Association has done both. At an earlier date, it regulated to some extent the maintenance of animals by property owners. It was during this time that the Association sent the July 29, 2002 notice to Mr. Conklin. Since then the Association's rules and regulations have been revised, the most recent amendment occurring in or about July 2003. At the time McMahon was attacked, there existed no rules or regulations requiring that a property owner confine his animals to his property, or leash, muzzle, or otherwise secure or restrain them when no longer on the owner's property.

The precise question then becomes under what circumstances, if any, does a homeowners association which has the power to regulate animals within its community, but chooses not to do so, nevertheless have a duty to protect residents within the community against a dangerous dog owned by another property owner. While some jurisdictions which have addressed this issue have found that a qualified duty exists, the issue has not been previously decided by the appellate courts of this Commonwealth.⁶

⁶ Because both the organization and governance of planned communities and condominiums parallel one another, we have considered and referred to cases dealing with the tort liability of condominium associations for guidance. Unfortunately, as observed by the Superior Court in **Smith v. King's Grant Condominium**, 418 Pa. Super. 260, 265-266, 614 A.2d 261, 263-264 (1992), **aff'd**, 537 Pa. 51, 640 A.2d 1276 (1994), this area of the law is relatively new in developing and is not settled with respect to the legal relationships which exist between condominiums and planned communities on the one hand, and their members and third parties on the other. For this reason, it has also been necessary that we look to the law of other jurisdictions.

With respect to both condominiums and planned communities, the difficulty faced is the innate duality contained in both forms of ownership; in some respects the relationship which exists in a condominium and planned community between the community association and its unit owners is "akin to that of adjacent owners, in others, it is like that of lessor and lessee." **Id.** at 264. Because the owners in each have "a continuing right, independent of [the community association's] consent, to make use of the common areas by reason of their ownership of [units] in the [condominium or planned community respectively]," the relationship is distinct from that which exists between a landowner and other third parties (*i.e.*, trespassers, licensees or invitees) who have no such right. **Trailside Townhome Association, Inc. v. Acierno**, 880 P.2d 1197, 1202 (Colo. 1994); **see also**, 68 Pa. C.S.A. §3105(a) (pertaining to condominiums) and 68 Pa. C.S.A. §5105(a) (pertaining to planned communities). For this reason, "[t]he determinations of the nature and extent of duties of care owed by property owner associations, whether condominium associations or [homeowners associations], to owners of property within a development, and the consequences flowing from such determinations, are complex and difficult, and have far reaching consequences." **Id.**

Further, the nature of neither form of ownership was contemplated precisely by the Restatement (Second) of Torts. **Kings Grant Condominium**, *supra* at 266, 614 A.2d at 264. To fill this void, the court in **Kings Grant Condominium** suggested the applicability of common-law principles governing the duties of possessors of land as one solution. **Id.** at 272, 614 A.2d at 267. Additionally, under both forms of ownership, a member of the condominium or homeowners association may recover in tort from the association. 68 Pa. C.S.A. §3311(a)(4) (pertaining to condominiums); 68 Pa. C.S.A. §5311(a)(4) (pertaining to planned communities). Accordingly, the principle previously announced in **De Villars v. Hessler**, 363 Pa. 498, 70 A.2d 333 (1950), that a member of an unincorporated association cannot recover in tort from the association, has been abrogated by statute.

The determination of whether a duty exists is a question of law. **R.W. v. Manzek**, 585 Pa. 335, 888 A.2d 740, 746 (2005). “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[.]” **Id.** at 746 (internal quotation marks omitted). Critical factors in determining the existence of a duty include the relationship between the parties; the utility of the defendant’s conduct; the nature and foreseeability of the risk in question; the consequences of imposing a duty; and the overall public interest in the proposed solution. **Id.** at 747.

In the context of a condominium association’s liability in tort generally, several jurisdictions which have considered the question impose upon the association a “duty to exercise due care for the residents’ safety in those areas under [the association’s] control.” **Centeq Realty, Inc. v. Siegler**, 899 S.W.2d 195, 198 (Tex. 1995) (*citing Frances T. v. Village Green Owners Ass’n*, 723 P.2d 573, 576-577 (Cal. 1986) (comparing the role of a condominium association to a landlord and holding that an association which retains control over the security and safety of the condominium owes a duty to its residents to provide reasonable security in common areas)). In **Frances T.**, the California Supreme Court stated that “traditional tort principles impose on landlords, no less than on homeowner associations that function as a landlord in maintaining the common areas of a large condominium complex, a duty to exercise due care for the residents’ safety in those areas under their control.” 723 P.2d at 576-577; *see also, Martinez v. Woodmar IV Condominiums Homeowners Association, Inc.*, 941 P.2d 218, 221 (Ariz. 1997) (“with respect to common areas under its exclusive control, a condominium association has the same duties as a landlord”).

Under this theory of premises liability, the duty to keep the common areas of the property reasonably safe is one to exercise reasonable care in relation to unit owners and those lawfully upon the property. Consistent with this duty, if a person lawfully on the premises is injured as a result of the association’s negligence in maintaining the premises, he is entitled to recover from the association. Under general principles of negligence, the legal standard for determining if a duty of care exists is

whether the actor knows or should know that the situation creates a foreseeable risk of harm. **See e.g., Blackman v. Federal Realty Investment Trust**, 444 Pa. Super. 411, 415, 664 A.2d 139, 142 (1995) (“A party is subject to liability for physical harm caused to an invitee if: he knows of or reasonably should have known of the condition and the condition involves an unreasonable risk of harm, he should expect that the invitees will not realize it or will fail to protect themselves against it, and the party fails to exercise reasonable care to protect the invitees against the danger.”). Issues such as notice of a defect, and its duration, obviousness and location, are relevant only insofar as they bear on whether the possessor of land was negligent (**i.e.**, did the possessor in fact exercise ordinary care in the maintenance of the premises under all the circumstances).

The duty of a homeowners association to use reasonable care and diligence with respect to common areas, like that of a landlord’s, emanates, at least in part, from the association’s status as the owner or possessor of land and its legal right and power to control the common areas. **Smith v. King’s Grant Condominium**, 418 Pa. Super. 260, 268-269, 614 A.2d 261, 265 (1992) (**citing** Keeton, W. Page, Prosser & Keeton on the Law of Torts, 1984 West Publishing Co., page 386), **aff’d**, 537 Pa. 51, 640 A.2d 1276 (1994). The association’s liability extends to those parts of the premises over which it has retained the right of control and which are responsible for the injury. **Martinez, supra**, 941 P.2d at 221 (citation omitted). Additionally, the association’s duty to safeguard these common areas extends not only to physical conditions on the land but also to dangerous activities on the land. **Id.** at 222 (holding that a condominium association has a duty to protect a unit owner’s tenant’s guest from being attacked in the condominium’s parking lot when the attack was reasonably foreseeable and preventable); **cf.** Restatement (Second) of Torts §360 (1965).⁷

⁷ The Restatement (Second) of Torts §360 (1965) provides:

A possessor of land who leases a part thereof and retains in his own control any other part which the lessee is entitled to use as appurtenant to the part leased to him, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee or a sublessee for physical harm caused by a dangerous condition upon that part of the land retained in the lessor’s control, if the lessor by the exercise of reasonable care could have discovered the condition and the unreasonable risk involved therein and could have made the condition safe.

Some jurisdictions have also held that a dangerous condition on the premises includes the presence of a vicious dog for which a homeowners association may be held responsible if the association has knowledge of the dog's dangerous propensities and a concomitant right or duty to control the dog's presence. **Sanzare v. Varesi**, 681 So.2d 785 (Fla. 4th DCA 1996) (holding that a homeowners association may be found liable for injuries caused by a tenant's dog in a "common area" owned by the association if the association knows of the presence of the animal and its vicious propensity, and has the ability to control its presence); **see also, Andrews v. DeStefano**, 71 D. & C. 4th 497 (2005) (adopting the standard of care owed by a landlord out of possession to third parties for injuries caused by his tenant's animals to a homeowners association against which liability is claimed for injuries caused in an attack by a dog owned by a property owner; whether the attack occurred in common area or on private property is not disclosed in the opinion).⁸

These cases appear to also support the proposition that for a homeowners association to be liable if a property owner's dog escapes and attacks someone beyond the boundaries of the owner's property, and on property owned or possessed by the association, the association must have actual knowledge, and not mere constructive knowledge, of the dog's dangerous prop-

⁸ As a general rule "a landlord out of possession is not responsible for attacks by animals kept by his tenant on leased premises where the tenant has exclusive control over such premises." **Palermo v. Nails**, 334 Pa. Super. 544, 547, 483 A.2d 871, 873 (1984). "However, a landlord out of possession may be held liable for injuries by animals owned and maintained by his tenant when the landlord has knowledge of the presence of the dangerous animal and where he has the right to control or remove the animal by retaking possession of the premises." **Id.** (*citing Uccello v. Laudenslayer*, 44 Cal.App.3d 504, 118 Cal. Rptr. 741 (1975)). **See also, Gallick v. Barto**, 828 F. Supp. 1168, 1175 (M.D. Pa. 1993) (concluding that a "No Pets" clause in lease gave landlord control over premises and thus landlord "stepped into the shoes" of the tenants concerning liability" for injuries sustained as a result of an attack by a pet ferret kept by tenant); Annotation, **Landlord's Liability to Third Person for Injury Resulting from Attack on Leased Premises by Dangerous or Vicious Animal Kept by Tenant**, 87 A.L.R.4th 1004, 1012 (1991) ("The general rule regarding the liability of a landlord to a third person for an attack by a tenant's animal on the leased premises appears to be that the landlord is not liable unless the landlord had knowledge of the animal's presence and its dangerous tendencies, and had control of the premises or otherwise had the ability to eliminate the danger by having the animal removed or confined").

pensities. In **Uccello v. Laudenslayer**, 44 Cal.App.3d 504, 118 Cal.Rptr. 741 (1975), the case relied upon by our Superior Court in **Palermo v. Nails**, 334 Pa. Super. 544, 547, 483 A.2d 871, 873 (1984), to establish the legal duty owed by an out-of-possession landlord for injuries caused on the leased premises by his tenant's animals, the same standard adopted by the court in **Andrews**, the court emphasized that "[b]ecause the harboring of pets is such an important part of our way of life and because the exclusive possession of rented premises normally is vested in the tenant, we believe that actual knowledge and not mere constructive knowledge is required." **See also, Edwards v. North Country Village Homeowners Association**, 2001 WL 1528893 *9 (refusing to reconsider **Uccello**'s requirement of actual knowledge as outdated in evaluating the liability of a condominium association from whose complex a pit bull escaped and bit an eight-year-old girl). This requirement of actual knowledge is particularly justified when the transitory presence and individual propensities of any specific dog is considered. The standard of care which emerges from these cases is that for liability to attach to a homeowners association for harm caused by an animal owned by a third party property owner the association must have (1) actual knowledge of the dog and its dangerous propensities (**i.e.**, foreseeability), and (2) the right to either take possession of the property where the attack occurred or the ability to remove or confine the animal (**i.e.**, control).

Assuming, **arguendo**, that a homeowners association is analogous to a landlord with respect to property privately owned in a development over which it has the authority to impose reasonable restrictions and that a duty of care exists only if the association (1) has actual knowledge that one of its members is keeping or harboring a dog on his property whose presence creates a clear and present danger to others and (2) has the opportunity and ability to eliminate the danger and prevent injury, the facts of record do not establish a breach of this duty. McMahon has not proven that the Association had the right to confine or remove the Conklins' dogs directly or indirectly by evicting the Conklins and taking possession of their property. Before reaching this point, a brief discussion of the evidence which does exist to support a finding of actual knowledge is instructive.

a) Knowledge

In this Commonwealth, the existence of a duty hinges on foreseeability; unless an individual knows or has reason to know that his conduct may endanger someone, he cannot be found negligent. **Huddleston v. Infertility Center of America, Inc.**, 700 A.2d 453, 457 (Pa. Super. 1997). Consequently, for a duty to exist, there must be some degree of knowledge by the actor that his conduct may cause harm to another. Under the cases already discussed, when the danger in question is that created by a domestic pet under the care, custody and control of a property owner, a homeowners association must have actual knowledge of the dangerous propensities of the animal before it can be held liable for injuries caused if the animal attacks.

Here, evidence that the dogs were left unattended, were not confined to the Conklins' property, and at times ran loose, sometimes barking and howling at residents, does not, by itself, support an inference that the dogs harbored dangerous propensities or posed a threat of bodily injury. This behavior is consistent with that of a normal dog. Cf. **Yuzon v. Collins**, 116 Cal.App. 4th 149, 166, 10 Cal.Rptr. 3d 18, 32 (2004) (noting that evidence that a dog "ran out the door and scared the neighbors ... does not, as a matter of law, support an inference that [the dog] was a dangerous dog. If that were the case, then all dogs would be deemed dangerous"); **Govan v. Philadelphia Housing Authority**, 848 A.2d 193, 199 (Pa. Commw. 2004) (observing in dictum that reports that a dog smelled, snapped, barked, annoyed, and jumped at people does not, by itself, evidence that the dog has violent tendencies).

No evidence was presented that either of the Conklins' dogs had attacked or bit another person, or even jumped or lunged at anyone, prior to October 13, 2004, or that the Association had any knowledge of such conduct. Nor does a dog's breed, by itself, evidence an inherently aggressive or dangerous predisposition of any specific dog for which liability attaches. See **Chee v. Amanda Goldt Property Management**, 143 Cal.App.4th 1360, 1371-1372, 50 Cal.Rptr. 3d 40 (2007) (refusing to notice judicially that the breed of a dog will support an inference of actual knowledge of a specific dog's dangerous propensities).

Against this lack of specific incidents of violence, stands Liptak's vague complaint to the Association more than two years prior to the attack on McMahon that the dogs were aggressive and terrorized the community. This description is obviously conclusory and says nothing about the facts on which it is based, or whether what was observed was misunderstood or a true threat of danger. At best, the evidence is tenuous and shaky, and the question is a close one. However, given the deferential standard applicable to a motion for summary judgment, we believe it is sufficient to support a finding that the Association knew the dogs were dangerous and predisposed to attack.⁹

b) Control

More importantly, the Association did not own, control or manage the dogs, the property where they were kept, or the premises where the alleged attack occurred. The law does not impose a duty in the absence of a defendant's ability to control the premises or the conduct involved. As a corollary, the nature of any duty imposed must be rationally related to the degree of control which exists, whether by virtue of a possessory interest or otherwise. **Uccello**, 118 Cal.Rptr. at 746 (holding that an out-of-possession landlord's liability is premised upon the landlord retaining "a recognizable degree of control over the dangerous condition with a concomitant right and power to obviate the condition and prevent the injury").

McMahon has not proven that the Association had the right to remove the Conklins' animals or to evict the Conklins and their dogs from their property. Cf. **Palermo, supra** at 547, 483 A.2d at 873; **Uccello, supra**, 118 Cal.Rptr. at 746 ("public policy

⁹ To the extent McMahon contends the Association had an affirmative obligation to investigate and discover any dangerous or violent propensities of the dogs, the Association's duty does not extend this far. "[A] landlord is under no duty to inspect the premises for the purposes of discovering the existence of a tenant's dangerous animal; only when the landlord has actual knowledge of the animal, coupled with the right to have it removed from the premises, does the duty of care arise." **Uccello v. Laudenslayer**, 44 Cal.App.3d 504, 514, 118 Cal.Rptr. 741 (1975). Nor is the Association a law enforcement agency charged with the authority or responsibility for enforcing the Dog Law, 3 P.S. §§459-101 through 459-901, specifically, §459-901. **Lerro ex rel. Lerro v. Upper Darby Township**, 798 A.2d 817, 820-822 (Pa. Commw. 2002) (holding that the Dog Law does not give rise to a private cause of action).

requires that a landlord who has knowledge of a dangerous animal should be held to owe a duty of care only when he has the right to prevent the presence of the animal on the premises. Simply put, a landlord should not be held liable for injuries from conditions over which he has no control.”). For such a right to exist would require a radical transformation of the allocation of private property rights which exist between a unit owner and the community association in a planned community unit. At most, McMahon has shown that the Association had the authority, through its declaration and the UPCA, to regulate the Conklins’ behavior in maintaining their dogs and to enforce such regulations through, for example, written warnings, fines, or restrictions on the use of common facilities, assuming such was provided for in the Association’s rules and regulations. 68 Pa. C.S.A. §5302(a)(ii); **Hess v. Barton Glen Club, Inc.**, 718 A.2d 908, 914 (Pa. Commw. 1998), **appeal denied**, 737 A.2d 745 (Pa. 1999).

Part of the problem with McMahon’s claim against the Association is that he confuses the power—that is the authority and ability—to impose rules or regulations with a duty to adopt regulations, or to enforce those regulations that have been adopted. As already stated, at the time of the attack on McMahon no rules or regulations of the Association existed which required a property owner to keep his animals confined to his property or otherwise under his control, and McMahon has not proven that the Association had any regulation in place which it failed to enforce and which failure might otherwise provide a basis for liability. Cf. **Braun v. York Properties, Inc.**, 583 N.W.2d 503 (Mich. App. 1998) (holding that the failure of the owners of a mobile-home park to enforce rules and regulations concerning the presence of household pets on property does not impose liability for damage caused by an animal in the absence of evidence of knowledge of the animal’s vicious propensities); **Ramirez v. M.L. Management Co., Inc.**, 920 So.2d 36, 39 (Fla. 4th DCA 2006) (holding that a landlord who recognizes and assumes a duty by adopting rules and regulations which protect co-tenants from the dangerous propensities of a tenant’s pet is required to undertake reasonable precautions to protect co-tenants from reasonably foreseeable injury occasioned thereby). Even when such rules exist, “evidence that the undertaking is for the plaintiff’s benefit is a prerequisite to liability

... ." **Alaskan Village, Inc. v. Smalley**, 720 P.2d 945, 947 (Alaska 1986); **see also**, Restatement (Second) of Torts §323 (1965).¹⁰

To the extent McMahon claims that a special relationship exists between the Association and its homeowners—that is between him as a property owner in Pleasant Valley West and the Association, as well as between the Association and the Conklins—and that this relationship imposes upon the Association a duty to protect him from injuries caused by another homeowner's animal, McMahon goes too far. "[A]s a general rule, there is no duty to control the conduct of a third party to protect another from harm." **Emerich v. Philadelphia Center for Human Development, Inc.**, 554 Pa. 209, 720 A.2d 1032, 1036 (1998). "However a judicial exception to the general rule has been recognized where a defendant stands in some special relationship with either the person whose conduct needs to be controlled or in a relationship with the intended victim of the conduct, which gives to the intended victim a right to protection." **Id.**, 720 A.2d at 1036; **see also**, Restatement (Second) of Torts §315 (1965).¹¹ In those situations where a special

¹⁰ The Restatement (Second) of Torts §323 (1965) provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or
(b) the harm is suffered because of the other's reliance upon the undertaking.

¹¹ Restatement (Second) of Torts §315 (1965) provides:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
(b) a special relation exists between the actor and the other which gives to the other a right to protection.

The special relationships identified in the Restatement (Second) of Torts are: the duty of a parent to control the conduct of a child (Section 316), the duty of a master to control the conduct of a servant (Section 317), the duty of a possessor of land or chattel to control the conduct of a licensee (Section 318), the duty of one who takes charge of a third person known to be likely to cause bodily harm to control the third person (Section 319), and the duty of a person having custody of another to control the conduct of that third person (Section 320).

relationship is recognized, “the duty [is] measured in terms of that special relationship and not based on the mere physical location of the injury.” **Ramirez v. M.L. Management Co., Inc.**, 920 So.2d at 38.

Notwithstanding this exception to the general rule, we know of no case imposing liability for injuries caused by a tenant’s/owner’s dog on property not owned or possessed by the landlord/association, or under their control. To the contrary, the opposite is true. **Tran v. Bancroft**, 648 So.2d 314 (Fla. 4th DCA 1995) (holding that a landlord has no duty to prevent injuries to third parties caused by a tenant’s dog away from leased premises); **Feister v. Bosack**, 497 N.W.2d 522 (Mich. App. 1993) (to the same effect).

Were we to accept McMahon’s position that the Association has a common-law duty to regulate and enforce the conduct of property owners within Pleasant Valley West in order to protect one homeowner from another, the financial consequences to the Association and its members would be devastating. See 68 Pa. C.S.A. §5311(b) (providing that the lien of a judgment against the association is also a lien against each unit in the community for a pro rata share of the amount of the judgment). At the same time, the effect on the residents in the community would be dramatic and destructive: regulations by the Association would proliferate, intrusive investigations and monitoring for enforcement purposes would be inevitable, greater tension and suspicions between neighbors would develop, and the benefits of privacy, security and autonomy inherent in a planned community would be destroyed.

CONCLUSION

In accordance with the foregoing, the evidence presented by McMahon does not establish the existence of a duty owed by the Association to protect him against an attack from Conklins’ dogs while on his own property. Because McMahon has not proven that the Association had the ultimate right to remove or confine the Conklins’ dogs, or to take possession of the Conklins’ property, McMahon has not proven that the Association can be held legally responsible for his injuries.

**JOHN E. DONCSES, Petitioner vs.
COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION, Respondent**

*Appeal of Drivers License Suspension—Knowing and Conscious
Refusal of Chemical Test—Alleged Physical Disability—Requirement
of Competent Medical Evidence—Fear of Needles—Malfunction of
Breathalyzer—Request for Additional Test*

In order to support a suspension of operating privileges imposed as a consequence of a chemical test refusal related to an arrest for driving under the influence, the Bureau of Driver Licensing must establish that: 1) the licensee was arrested for driving under the influence; 2) by a police officer who had reasonable grounds to believe that the licensee was driving under the influence; 3) that the licensee was requested to submit to a chemical test; 4) that the licensee refused to do so; and 5) that the police officer advised the licensee that his operating privileges would be suspended if he refused to submit to chemical testing and that, in event the licensee pleaded guilty or nolo contendere to driving under the influence or was found guilty after refusing testing, the licensee would be subject to penalties.

Where the legal requirements to support a suspension of operating privileges upon refusal of a chemical test have been met, the burden shifts to the motorist to show through competent medical evidence that his condition prevented him from making a knowing and conscious refusal.

In a license suspension case, a refusal to take a chemical test is anything less than an unqualified, unequivocal assent to take the test.

The fear of needles is no justification for refusal to take a required blood test.

A breathalyzer malfunctions when there is a deviation in the samples outside of the acceptable range of deviation set by 67 Pa. Code 77.24(b)(2)(I), and when such deviation occurs, the test results are invalid and the breathalyzer must be taken out of service.

When a breathalyzer machine malfunctions, there is, in effect, no breath test at that point and an officer is justified to require the provision of another sample of breath, blood or urine.

NO. 06-3159

JEFFREY G. VELANDER, Esquire—Counsel for Petitioner.

JOHN V. ROVINSKY, Esquire—Counsel for Respondent.

MEMORANDUM OPINION

ADDY, J.—May 24, 2007

The Petitioner, John E. Doncses, has filed an appeal¹ of our Order dated February 20, 2007, which denied the Petitioner's license suspension appeal. We respectfully submit this Memo-

¹ The Notice of Appeal erroneously indicated that the appeal was to the Superior Court as opposed to the Commonwealth Court. By virtue of an Order dated May 8, 2007, the appeal has been transferred by the Superior Court to the Commonwealth Court.

random Opinion in accordance with Pennsylvania Rule of Appellate Procedure 1925, Pa. R.A.P. 1925.

FACTUAL AND PROCEDURAL BACKGROUND

The Petitioner received a Notice of Suspension dated and mailed August 31, 2006 from the Department of Transportation advising the Petitioner that his operating privileges were being suspended for a period of one (1) year, effective October 5, 2006, as a result of a chemical test refusal on August 19, 2006 (See Respondent's Exhibit No. 1). The Petitioner filed his appeal of that suspension to the Court of Common Pleas of Carbon County on September 27, 2006.

We held a hearing on the Petitioner's appeal on January 29, 2007 and February 20, 2007. The testimony and the evidence at the hearing revealed the following.

On August 19, 2006, shortly before 11:00 p.m., Officer Austin J. Bott, Jr. of the Kidder Township Police Department was in his private vehicle on his way to work. As Officer Bott was approaching the intersection of State Route 903 and State Route 534 and was approximately two-tenths (2/10) of a mile south of the intersection, he observed a vehicle "shoot across" the intersection and he observed another vehicle's lights spin around. The weather conditions at that time included rain and some fog and visibility was poor. When Officer Bott got to the intersection, he observed that there had been an accident. One of the vehicles was at rest in the intersection and was damaged. When Officer Bott got out of his vehicle, the operator of the vehicle in the intersection, the Petitioner, was getting out of the vehicle. At that time, Officer Bott observed the Petitioner holding his head and staggering, but Officer Bott did not observe any visible injuries. Officer Bott asked the Petitioner if he was okay and the Petitioner said he was fine. Officer Bott observed that the other vehicle which had been involved in the accident was at rest in the parking lot of a mini-mart located adjacent to the intersection. Officer Bott was informed that someone in the mini-mart had already called 911.

Officer David Mason, also of the Kidder Township Police Department, arrived at the scene. Officer Mason observed the Petitioner's vehicle and the other vehicle in the parking lot. Officer Bott informed Officer Mason concerning his observations. Officer Mason smelled alcohol on the Petitioner's breath. Of-

ficer Mason then had the Petitioner perform three (3) field sobriety tests, which the Petitioner failed. Officer Mason, who believed that the Petitioner was under the influence of alcohol, then placed the Petitioner under arrest for driving under the influence.

The Petitioner agreed to submit to a breath test. He was then taken to the Kidder Township Police Station for the breath test. Officer Bott, who was now at the Police Station and who is a certified breath test instrument operator for the RBT4 breath test instrument, was going to perform the test.

Officer Bott ran a simulation test on the instrument. As indicated on Respondent's Exhibit No. 2, which was the print-out from the instrument, the first "check sample" reading was .094. The Petitioner then supplied two breath samples. Then, the second "check sample" on the instrument was .086. Because of the amount of the deviation between the two "check samples", the test of the Petitioner's breath sample was invalidated and the instrument disabled itself.²

At this point, Officer Mason asked the Petitioner if he was willing to go to the Pennsylvania State Police Barracks at Fern Ridge to complete the breath test because the machine at the Kidder Township Police Department was now out of service. The Petitioner agreed and he was transported to the Fern Ridge Barracks. Once at the Fern Ridge Barracks, it became evident to Officer Mason that there would be a long wait to use the breathalyzer there because the operator of the machine was out on a call, and would likely not be back within the two (2) hour time limit.

Officer Mason then asked the Petitioner if he would submit to a blood test at a local hospital. The Petitioner refused to submit to the blood test stating that he had "some sort of disease" and had a fear of needles. Officer Mason then read the Petitioner the DL-26 refusal warning multiple times prior to the Petitioner signing the DL-26 Form. Officer Mason once again read the Petitioner the DL-26 refusal warning to the Petitioner after the Petitioner signed the DL-26 Form. Officer Mason testified that the Petitioner indicated that he understood the warnings.

² The instrument would need to be recalibrated prior to further use.

The Petitioner testified that he had been at Murphy's Loft, a local restaurant, about two (2) hours before the accident because he went out for something to eat and he had two drinks. The Petitioner testified that he does not remember the accident or the field sobriety tests. The Petitioner testified that, as a result of being in the accident, he hit his head and does not remember anything for a period of approximately forty (40) minutes following the accident. The Petitioner submitted a photograph of the Petitioner's face showing black eyes and a swollen forehead a day and a half after the accident.³

The Petitioner also testified that he has been diagnosed with severe Post Traumatic Stress Disorder (hereinafter "PTSD") from combat duty in Vietnam. The Petitioner testified that, during the time following the accident, he thought that he was being taken prisoner of war. Although the Petitioner testified that he does not recall having any conversation with any police officer, he does recall being asked to take a breathalyzer test. The Petitioner testified that he does not recall being read the DL-26 Form, only that the Police Officers were doing a lot of talking.

Following the hearing on January 29, 2007 and February 20, 2007, we entered an Order on February 20, 2007 denying the Petitioner's license suspension appeal. The Petitioner has appealed that Order.

ISSUES

The Petitioner raises the following issues in his Concise Statement:

1. [We] erred in concluding that the Appellant was required to provide an additional chemical test of his blood, breath and urine pursuant to Section 1547 when the testimony of Officer Mason, the breathalyzer operator,^[4] clearly testified that the first test of the breathalyzer had a reasonable sample check.
2. [We] abused [our] discretion in concluding that the Appellant understood the instructions as to suspension concerning a refusal to test blood, breath and urine mandated by the **Department of Transportation, Bureau of Traf-**

³ The photograph was admitted as Petitioner's Exhibit No. 1.

⁴ We would note that, although Officer Mason was the arresting Officer, the breathalyzer operator was Officer Austin J. Bott, Jr.

fic Safety v. O'Connell, [521 Pa. 242,] 555 A.2d 873 (1989), when it was clear from the evidence that the Appellant had suffered a head injury, was involved in a motor vehicle accident, and was behaving strangely at the time.

3. [We] abused [our] discretion in completely disregarding the testimony of Tina M. Roemersma, Ph.D., a psychologist employed by the Veterans Administration, who testified that the Appellant had suffered from Post Traumatic Stress Disorder since his service in the United States Army during the Vietnam War, and that his disorder is of such a serious nature that he is receiving full disability from the Veterans Administration.

4. Tina M. Roemersma, Ph.D., furthermore, testified that the Appellant's symptoms include the inability to understand instructions such as the **O'Connell** warnings when he is under stress because he typically reverts to combat flashbacks, and he is incapable of listening to or understanding what is being explained to him.

DISCUSSION

At the outset, we note that the standard for reviewing a license suspension appeal is well-settled. In order to support a suspension of operating privileges imposed as a consequence of a chemical test refusal related to an arrest for driving under the influence, the Bureau of Driver Licensing must establish that:

- 1) the licensee was arrested for driving under the influence;
- 2) by a police officer who had reasonable grounds to believe that the licensee was driving under the influence;
- 3) that the licensee was requested to submit to a chemical test;
- 4) that the licensee refused to do so; and
- 5) that the police officer advised the licensee that his operating privileges would be suspended if he refused to submit to chemical testing and that, in event the licensee pleaded guilty or nolo contendere to driving under the influence or was found guilty after refusing testing, the licensee would be subject to penalties.

Quick v. Commonwealth, Department of Transportation, Bureau of Driver Licensing, 915 A.2d 1268, 1271 (Pa. Commw. 2007).

In the present case, the evidence at the hearing established that all of the aforementioned elements are met. Specifically, the testimony and the evidence established that: 1) the Petitioner was arrested for driving under the influence; 2) by a police officer who had reasonable grounds to believe that the Petitioner was driving under the influence; 3) that the Petitioner was requested to submit to a chemical test; 4) that the Petitioner refused⁵ to do so; and 5) that the police officer advised the Petitioner that his operating privileges would be suspended if he refused to submit to chemical testing and that, in event the Petitioner pleaded guilty or nolo contendere to driving under the influence or was found guilty after refusing testing, the Petitioner would be subject to penalties.

We will now address the issues raised by the Petitioner in his Concise Statement.

1. Request for Additional Test

The Petitioner contends that we “erred in concluding that the Appellant was required to provide an additional chemical test of his blood, breath and urine pursuant to Section 1547 when the testimony of Officer Mason, the breathalyzer operator, clearly testified that the first test of the breathalyzer had a reasonable sample check.”

It is well settled that, in a license suspension case, a refusal to take a chemical test is anything less than an unqualified, unequivocal assent to take the test. **King v. Commonwealth, Department of Transportation**, 828 A.2d 1 (Pa. Commw. 2002); **Cunningham v. Commonwealth, Department of Transportation**, 105 Pa. Commw. 501, 525 A.2d 9 (1987); see also, **Lemon v. Commonwealth, Department of Transportation, Bureau of Driver Licensing**, 763 A.2d 534 (Pa. Commw. 2000) (anything less than a motorist’s unqualified cooperation in completing a chemical test constitutes a refusal for license suspension purposes); **Warner v. Commonwealth, Department of Transportation, Bureau of Driver Licensing**, 723 A.2d 755 (Pa. Commw. 1999) (anything substantially short of unqualified and unequivocal assent to request to sub-

⁵ Issues regarding the Petitioner’s refusal are raised in issue Number 1 and issue Number 2 in the Petitioner’s Concise Statement. Those issues are addressed subsequently in this Memorandum Opinion.

mit to chemical testing is “refusal” warranting suspension of motorist’s operating privileges).

In the present case, the Petitioner initially agreed to submit to a breath test. The Petitioner was then taken to the Kidder Township Police Station where he was to submit to the test. However, the breathalyzer instrument malfunctioned as there was an unacceptable deviation between the numbers from the simulation test (the “check sample”) taken prior to the Petitioner’s breath sample and the simulation test (the “check sample”) taken after the Petitioner’s breath sample. At this point, Officer Mason asked the Petitioner if he was willing to go to the Pennsylvania State Police Barracks at Fern Ridge to complete the breath test as the machine at Kidder Township was now out of service. The Petitioner agreed and was transported to the Fern Ridge Barracks. Once at the Fern Ridge Barracks, it became evident that there would be a long wait to use the breathalyzer there as the operator of the machine was out on a call, and would likely not be back within the two (2) hour time limit.

Officer Mason then asked the Petitioner if he would submit to a blood test at a local hospital. The Petitioner refused stating that he had “some sort of disease” and had a fear of needles. Officer Mason then read the Petitioner the DL-26 refusal warning multiple times prior to the Petitioner’s signing the form and once again after the Petitioner signed the form.

The Commonwealth Court has held that when a breathalyzer machine malfunctions, there is, in effect, no breath test at that point and an officer is justified to require the provision of another sample of breath, blood or urine. **Lamond v. Commonwealth, Department of Transportation, Bureau of Driver Licensing**, 716 A.2d 1290 (Pa. Commw. 1998) (*citing Bonise v. Commonwealth, Department of Transportation*, 102 Pa. Commw. 6, 517 A.2d 219 (1986) and *Department of Transportation v. McFarren*, 514 Pa. 411, 525 A.2d 1185 (1987)); **Commonwealth, Department of Transportation v. Harbaugh**, 141 Pa. Commw. 288, 595 A.2d 715 (1991).

In **Lamond, supra**, the Commonwealth Court addressed a similar factual situation involving a malfunctioning breathalyzer. The **Lamond** court specifically opined as follows:

The trial court ruled that under **McFarren**, police may only require a licensee who has provided the necessary suf-

ficient breath samples for a breath test, to submit to another chemical test where the police establish that the breathalyzer was in fact broken or malfunctioning. Here, the trial court specifically found that there was no evidence to support a conclusion that the breathalyzer was in fact broken, but only that the machine was sent to the manufacturer for recalibration. DOT argues that it did present evidence of malfunction. DOT contends that where a breathalyzer yields BAC results that deviate by more than 0.02 percent and is taken out of service, such circumstances demonstrate malfunction of the unit and provide sufficient justification under **McFarren**, for police to require the licensee to submit to additional testing. We must agree.

The breathalyzer itself realizes when it malfunctions, by noting a deviation by more than 0.02 percent. This fact, recognized in 67 Pa. Code §§77.25(b)(2)(i) and 77.25(b)(4), requires that when such deviation occurs, the breathalyzer must be taken out of service. In **Bonise v. Department of Transportation**, 102 Pa. Cmwlth. 6, 517 A.2d 219 (1986), this Court upheld the suspension of a licensee's operating privilege under circumstances quite similar to those present here. There, the licensee supplied two breath samples that yielded BAC readings of 0.153 and 0.133, respectively. The officer administering the breath test concluded that the results were invalid and asked the licensee to submit to another test at another police station or a blood test at a hospital.

In rejecting the licensee's claim to have completed the breath test, this Court held that:

To constitute a breath test under the regulations, two elements must be present, namely, two consecutive breath tests without a required waiting period between the two tests, and a reading wherein the difference between the two tests is less than .02. Unless both elements are present, there is no test. Here, the second element was missing, so that in effect no test was given. Thus, when appellant did not consent to go to another station, it could reasonably be inferred as an unqualified refusal.

Id. 517 A.2d at 220.

Lamond claims that this case is controlled by **Light v. Department of Transportation, Bureau of Driver Li-**

censing, 692 A.2d 652 (Pa. Cmwlth. 1997). **Light** is instructive but does not require this Court to affirm the trial court. In **Light**, this Court remanded to the trial court for a finding of whether the breathalyzer had malfunctioned, and thus, would permit the arresting officer's request that the licensee submit to a second chemical test. While the trial court in **Light** did not make a finding regarding the breathalyzer's status, the trial court here found that the breathalyzer did not malfunction. As stated previously, this finding is not supported by the evidence. Officer Williams, a certified breathalyzer operator, testified to the test results, which deviated beyond the norm, requiring him to remove the breathalyzer from service. Requiring the machine to be removed from service cannot be considered anything but a malfunction, as the Code describes.

While requesting a licensee to submit to additional testing may at first blush seem invasive, because of the purpose of the Implied Consent Law, to protect the public, see **Occhibone v. Department of Transportation, Bureau of Driver Licensing**, 542 Pa. 588, 669 A.2d 326 (1995), such invasion is secondary to the purpose of the law. The Code's protection of removing the breathalyzer from service protects all parties. If Lamond would have permitted additional testing, it is possible that the test would have demonstrated that he was not intoxicated.

In view of the fact that the BAC readings on Lamond's two breath samples deviated by 0.021%, outside of the acceptable range of deviation set by 67 Pa. Code 77.24(b)(2)(I), the test results were invalid and, under **Bonise**, there was in effect no breath test. At that point, Lamond had not satisfied the obligation placed upon him by 75 Pa.C.S. §1547 and Officer Williams was justified to require him to provide another sample of breath, blood or urine for testing. **Bonise**. Because the trial court found that Lamond failed to consent to provide that additional sample, (58a-59a), Lamond's failure to consent to an additional breath test or blood test constituted an unqualified refusal.

Because there is evidence that the machine malfunctioned, under **McFarren**, and because Officer Williams had reasonable justification for requesting that Lamond submit

to additional chemical testing under **Bonise**, we hold that the trial court erred in sustaining Lamond's appeal.

Lamond, supra at 1292-93.

In the present case, the evidence, specifically the testimony of Officer Bott and the print-out from the breathalyzer instrument which was admitted as Respondent's Exhibit No. 2, clearly established that the breathalyzer malfunctioned. Based upon the malfunction of the breathalyzer, Officer Mason was justified in requesting that the Petitioner submit to another test. Therefore, the Petitioner's contention that we erred in concluding that the Appellant was required to provide an additional test is without merit.

Parenthetically, although the issue of the reason for the Petitioner's refusal to submit to the blood test, specifically including the Petitioner's stated fear of needles, was not directly raised in the Petitioner's Concise Statement, we shall briefly address that issue. The Commonwealth Court has consistently held that "the fear of needles is no justification for refusal to take a required blood test."

Jacobs v. Commonwealth, Department of Transportation, Bureau of Driver Licensing, 695 A.2d 956, 958 (Pa. Commw. 1997) (quoting **Department of Transportation, Bureau of Driver Licensing v. Mease**, 148 Pa. Commw. 14, 610 A.2d 76 (1991)). The Commonwealth Court elaborated on this point in **Leberfinger v. Department of Transportation, Bureau of Traffic Safety**, 137 Pa. Commw. 605, 607, 587 A.2d 46, 47 (1991) stating, "fear of needles is not of such legal significance that it negates the implied consent of a licensee to submit to the blood test for driving under the influence." Further, in **Jacobs v. Commonwealth, Department of Transportation, Bureau of Driver Licensing**, 695 A.2d 956 (Pa. Commw. 1997), the Commonwealth Court held that the motorist's fear of invasive medical procedures, including injections and tests using needles, and concern about risk of contracting HIV (human immunodeficiency virus) did not justify refusal to submit to blood alcohol test. Therefore, the Petitioner's stated fear of needles does not justify a refusal to submit to a blood alcohol test.

2. Injury Sustained by the Petitioner in the Accident

The Petitioner contends that we abused our discretion in concluding that he understood the instructions concerning a

refusal, when it was clear from the evidence that he had suffered a head injury, was involved in a motor vehicle accident, and was behaving strangely at the time. Essentially, the Petitioner contends that he suffered from a physical condition resulting from the accident which prevented him from making a knowing and conscious refusal.

As stated previously in the Factual Background of this Memorandum Opinion, **supra**, the Petitioner testified that, as a result of being in the accident, he hit his head and does not remember anything for a period of approximately forty (40) minutes following the accident.

With regard to the issue of the physical disability, the Commonwealth Court has stated:

To prove that a driver has a physical disability which prevents him or her from making a knowing and conscious refusal, the driver must introduce competent and unequivocal medical evidence to support this claim.

Commonwealth, Department of Transportation, Bureau of Traffic Safety v. Humphrey, 136 Pa. Commw. 515, 519, 583 A.2d 868, 870 (1990).

It is the burden of the Petitioner to show, through competent medical evidence, that his condition prevented him from making a knowing and conscious refusal. **Commonwealth, Department of Transportation, Bureau of Driver Licensing v. Peck**, 132 Pa. Commw. 509, 573 A.2d 645 (1990).

In the present case, the Petitioner submitted absolutely no competent medical evidence to support his claim that he was unable to make a knowing and conscious refusal as a result of the injury he sustained in the accident. Therefore, we submit that we did not err in concluding that the Petitioner failed to meet his burden of establishing his claim that he was unable to make a knowing and conscious refusal based upon the injury he suffered in the accident.

3. Petitioner's Ability To Understand Instructions and the Testimony of Dr. Roemersma

In issue number three (3) and issue number four (4) of his Concise Statement, the Petitioner contends that he was unable to make a knowing and conscious refusal because he suffers from Post Traumatic Stress Disorder (hereinafter referred to

as “PTSD”). In his Concise Statement, the Petitioner specifically contends that:

3. [We] abused [our] discretion in completely disregarding the testimony of Tina M. Roemersma, Ph.D., a psychologist employed by the Veterans Administration, who testified that the Appellant had suffered from Post Traumatic Stress Disorder since his service in the United States Army during the Vietnam War, and that his disorder is of such a serious nature that he is receiving full disability from the Veterans Administration.

4. Tina M. Roemersma, Ph.D., furthermore, testified that the Appellant’s symptoms include the inability to understand instructions such as the **O’Connell** warnings when he is under stress because he typically reverts to combat flashbacks, and he is incapable of listening to or understanding what is being explained to him.

Since these two contentions involve the same issue of the Petitioner’s PTSD, we shall address these two issues together.

Where the legal requirements to support a suspension of operating privileges upon refusal of a chemical test have been met, the burden shifts to the motorist to show “through competent medical evidence that his condition prevented him from making a knowing and conscious refusal.” **Commonwealth, Department of Transportation, Bureau of Driver Licensing v. Peck**, 132 Pa. Commw. 509, 513, 573 A.2d 645, 647 (1990); *see also, Yoon v. Commonwealth, Department of Transportation, Bureau of Driver Licensing*, 718 A.2d 386 (Pa. Commw. 1998) (it is licensee’s responsibility to show that his refusal was not knowing or conscious or that he was physically unable to take the test). The Commonwealth Court has stated:

To prove that a driver has a physical disability which prevents him or her from making a knowing and conscious refusal, the driver must introduce competent and unequivocal medical evidence to support this claim.

Commonwealth, Department of Transportation, Bureau of Traffic Safety v. Humphrey, 136 Pa. Commw. 515, 519, 583 A.2d 868, 870 (1990).

In this case, the Petitioner testified that he has been diagnosed with severe PTSD from combat duty in Vietnam. The Petitioner also testified that, during the time that he was with the

Police Officers, he thought that he was being taken as a prisoner of war. Although the Petitioner testified that he does not recall having any conversation with the Police Officers, he does recall being asked to take a breathalyzer test. The Petitioner further testified that he does not recall being read the DL-26 Form, only that the Police Officers were doing a lot of talking.

The Petitioner contends that he was incapable of making a knowing and conscious refusal as a result of the PTSD. The Petitioner also contends that a symptom of his PTSD is an inability to understand instructions such as the **O'Connell** warnings when he is under stress. In these situations, the Petitioner submits that he reverts back to combat flashbacks and is incapable of listening to or understanding what is being explained to him.

In an attempt to sustain his burden of showing that the PTSD prevented the Petitioner from being able to give a knowing and conscious refusal, the Petitioner presented the testimony of Tina M. Roemersma, Ph.D. (hereinafter referred to as "Dr. Roemersma"). Dr. Roemersma is a licensed clinical psychologist who works at the Veterans' Administration in Allentown. Dr. Roemersma has worked with the Petitioner since August of 2006. Dr. Roemersma testified that the Petitioner is diagnosed with chronic PTSD.

Dr. Roemersma was not questioned about whether the Petitioner was capable of making a knowing and conscious refusal. Instead, the questioning of Dr. Roemersma focused on whether the Petitioner was able to understand his diagnosis and follow instructions generally.

On direct examination, Dr. Roemersma testified that the Petitioner does not have trouble understanding. A sample of that testimony on direct examination is as follows:

Attorney Velander: Have you ever had problems explaining his condition or some fact of his condition to Mr. Donces?

Dr. Roemersma: I'm sorry, did I ever have trouble explaining it?

Attorney Velander: Problems explaining, explaining where he didn't appear to understand you. Have you ever had a problem like that?

Dr. Roemersma: No. No.

Dr. Roemersma's testimony on cross-examination was similar:

Attorney Rovinsky: You indicated that he has understood your explanation of things you explain to him regarding complicated things such as diagnosis or what he is suffering from?

Dr. Roemersma: Yeah, he understands that.

Attorney Rovinsky: Okay. So how about simple instructions, have you tested him for anything?

Dr. Roemersma: Simple instructions in terms of can he follow them?

Attorney Rovinsky: Yes.

Dr. Roemersma: Yes, he can follow ... He shows an understanding of things.

Again, on redirect examination, Dr. Roemersma testified, "I think what you are asking, he—can he understand what is going on at that time (when the Petitioner is in an agitated state)? Yes. Does he care? No [he] doesn't particularly care about the consequences at those times."

Although the Petitioner indicated in his Concise Statement that Dr. Roemersma "testified that the Appellant's symptoms include the inability to understand instructions such as the **O'Connell** warnings when he is under stress ... and he is incapable of listening to or understanding what is being explained to him", Dr. Roemersma's testimony did not establish this proposition in any manner. Instead, Dr. Roemersma's testimony established that the Petitioner has the ability to understand instructions and that the Petitioner is capable of listening to and understanding what is being explained to him.

Contrary to the statement of the Petitioner in his Concise Statement that we "completely disregarded the testimony" of Dr. Roemersma, we did not disregard that testimony. In fact, we found that Dr. Roemersma's testimony was consistent with the conclusion that, notwithstanding the PTSD, the Petitioner is indeed capable of understanding directions.

Based on the foregoing, we submit that we properly concluded that the Petitioner failed to establish that he was not capable of making a knowing and conscious refusal of the chemical testing as a result of his PTSD.

CONCLUSION

Based upon the foregoing, we respectfully submit that the appeal of John E. Donceses should be denied.

**LAKE HARMONY ESTATES PROPERTY OWNERS'
ASSOCIATION, Plaintiff vs. MICHAEL J. DOUGHERTY
and JOSEPHA D. DOUGHERTY, Defendants**

*Request for Injunction—Powers of Property Owners'
Association—Uniform Planned Community Act—Declaration—
Deed Covenants—Rules and Regulations—Regulation of
Fences—Constructive Notice of Filed Documents—Attorney's
Fees—Slander of Title—Re-Sale Certificate*

1. Under Section 5103 of the Uniform Planned Community Act, 68 Pa. C.S.A. §5103, a “Declaration” is “any instrument, however denominated, that creates a planned community and any amendment to that instrument.” Therefore, the Covenants and Restrictions, as well as the plot plans and subdivision plans, applicable to a planned community recorded in the Recorder of Deeds Office qualify as a Declaration.
2. Pursuant to 42 Pa. C.S.A. §4302(a), except as otherwise provided by statute or prescribed by general rule, every document affecting title to or any other interest in real property which is filed and indexed in the Recorder of Deeds Office of the County in which the property is located shall be constructive notice to all persons of the filing and full contents of such document.
3. Where the duly adopted Rules and Regulations of a property owners’ association require that a property owner obtain a permit from the Association prior to the construction of a fence, the construction of a fence without requesting and obtaining a permit for the fence is a violation of the Association’s Rules and Regulations and the Association may seek injunctive relief to have the fence removed.
4. Under Section 5315(g) of the Uniform Planned Community Act, 68 Pa. C.S.A. §5315(g), a property owners’ association may recover reasonable attorney’s fees when it receives a judgment or decree in any action or suit brought under that Section.
5. Slander of title is the false and malicious representation of the title or quality of another’s interest in property. In order to prevail in an action for slander of title, a plaintiff must show malice by the defendant.
6. Under Section 5407 of the Uniform Planned Community Act, 68 Pa. C.S.A. §5407, a property owners’ association is required to include, in a Re-Sale Certificate regarding a unit, information about any outstanding fines and litigation regarding that unit to protect prospective purchasers of that unit.

NO. 05-0113

DAVID L. HORVATH, Esquire and AARON M. DEANGELO,
Esquire—Co-counsel for the Plaintiff.

JOHN PHILIP DIEFENDERFER, Esquire—Counsel for the
Defendants.

OPINION

ADDY, J.—June 29, 2007

This case involves a dispute over the Plaintiff’s right, as a Property Owners’ Association, to regulate fence use and construction

on a unit owners' private property by Deed Covenant and the Association's Rules and Regulations. This case also involves the issue of whether the Plaintiff has wrongfully obstructed the unit owners' conveyance of their property by "slander of title." Following a non-jury trial held on February 16, 2007, we make the following Findings of Fact.

FINDINGS OF FACT

Our Findings of Fact are presented in narrative form as follows:

The Plaintiff, the Lake Harmony Estates Property Owners' Association (hereinafter referred to as "the Association"), is a non-profit corporation which operates and manages the planned unit development known as Lake Harmony Estates, which is located in Kidder Township, Carbon County, Pennsylvania.

The Defendants, Michael J. Dougherty and Joseph D. Dougherty, are the owners of the parcels known as Lots 601 and 602 located within the Lake Harmony Estates development. The Defendants' ownership of the aforementioned parcels results from the following chain of title:¹

A. Lot 601 was conveyed to Patricia I. Day by Yamulla Trucking and Excavating Company, Inc., through its Deed dated June 25, 1965 and recorded in Book 250, Page 167 in the Carbon County Recorder of Deeds Office. This Deed includes Covenants and Restrictions.²

B. Lot 602 was conveyed to Roger L. Day and Patricia I. Day by Yamulla Trucking and Excavating Company, Inc., by its Deed dated January 20, 1964 and recorded in the Carbon County Recorder of Deeds Office in Book 236, Page 522. This Deed includes Covenants and Restrictions.³

C. Lot 602 was further conveyed to Patricia I. Day by Roger L. Day and Patricia I. Day by their Deed dated February 13, 1964 and recorded in the Carbon County Recorder of Deeds Office in Book 237, Page 144. This Deed included the following language: "Subject to all restrictions, covenants

¹ The Deeds in the chain of title were collectively admitted into evidence as Plaintiff's Exhibit No. 1.

² These Covenants and Restrictions are discussed subsequently in this Opinion.

³ These Covenants and Restrictions are discussed subsequently in this Opinion.

and conditions set forth in the Deed from Yamulla Trucking and Excavating Company, Inc., to the Grantors herein named, dated January 20, 1964 and recorded in Carbon County Deed Book 236, Page 522."

D. Both parcels (Lot 601 and Lot 602) were further conveyed to Bertram R. Silver and Mildred (Shirley) Silver, by a Deed of Roger L. Day and Patricia I. Day, his wife, dated July 23, 1971 and recorded in the Carbon County Recorder of Deeds Office in Book 318, Page 839. This Deed includes the following language: "This conveyance is made under and subject to the conditions and restrictions together with all rights and privileges set forth in the chain of title."

E. Both parcels (Lot 601 and Lot 602) were subsequently conveyed to Michael J. Dougherty and Josephine D. Dougherty, his wife, by Bertram R. Silver and Mildred (Shirley) Silver, his wife, by their Deed dated September 2, 1976 and recorded in Book 370, Page 610 in the Carbon County Recorder of Deeds Office. This Deed includes the following language: "This conveyance is made under and subject to the conditions and restrictions and together with all rights and privileges set forth in the chain of title."

The Defendants' two (2) Lots (Lot 601 and Lot 602) were subsequently combined, via a reverse subdivision, into one (1) Lot, which is known as 602 Estates Drive.

Both the Deed which conveyed Lot 601 to Patricia I. Day from Yamulla Trucking and Excavating Company, Inc., which was dated June 25, 1965 and recorded in the Carbon County Recorder of Deeds Office in Book 250, Page 167, and the Deed which conveyed Lot 602 to Roger L. Day and Patricia I. Day from Yamulla Trucking and Excavating Company, Inc., which was dated January 20, 1964 and recorded in the Carbon County Recorder of Deeds Office in Book 236, Page 522, included the following Covenant:

13. An association of property owners is to be formed and designated by such name as may be deemed appropriate, and when formed, the Grantee covenants and agrees that he, his executors, and assigns, shall be subject to the payment of annual fees and assessments, and restrictions in compliance with by-laws, rules, and regulations to be promulgated by aforesaid association.

Therefore, the above identified Deed Covenant is clearly contained in the Defendants' chain of title for both Lot 601 and Lot 602.⁴

Consistent with the above identified Deed Covenant, the Association has promulgated By-Laws that set forth the powers of the Association's Board of Directors and the rights and obligations of the members of the Association.⁵

Article XII of the Association's By-Laws provides for a standing architecture, construction and maintenance committee, which is responsible for issuing construction permits within the Development. Article VII, Paragraph 13 of the Association's By-Laws empowers the Association's Board of Directors to adopt and amend Rules and Regulations, including a fine structure for violations of the Rules and Regulations within the Development.

Effective January 1, 1997, the Association adopted Construction Regulations.⁶ Article VI of the Construction Regulations specifically addresses fencing as follows:

VI Fencing

- A. Fencing is discouraged, but, if a need occurs, a permit is required from LHEPOA.
- B. Submit fencing requests to LHEPOA Board and Construction Committee.

⁴ Although Mr. Dougherty testified that he had no idea of the existence of such Covenants, the Covenants were filed of record at the Recorder of Deeds Office and were contained in the Defendants' own chain of title. Therefore, the Defendants had constructive notice of the Covenants. In this regard, we note that 42 Pa. C.S.A. §4302(a) specifically provides as follows:

§4302. Effect of records as notice

- (a) **Real property.**—Except as otherwise provided by statute or prescribed by general rule adopted pursuant to section 1722(b) (relating to enforcement and effect of orders and process), every document affecting title to or any other interest in real property which is filed and indexed in the office of the clerk of the court of common pleas of the county where the real property is situated, or in the office of the clerk of the branch of the court of common pleas embracing such county in the manner required by the laws, procedures or standards in effect at the date of such filing shall be constructive notice to all persons of the filing and full contents of such document.

⁵ The By-Laws of the Association were admitted into evidence as Plaintiff's Exhibit No. 2.

⁶ The Construction Regulations were admitted into evidence as Plaintiff's Exhibit No. 3.

Subsequently, in 2003, the Association supplemented its Construction Regulations relating to fences.⁷ Those supplemental Regulations specifically provide as follows:

FENCING:

I. General Rule—No fences may be erected in Lake Harmony Estates without full compliance with the herein Rules and Regulations. Failure of a property owner to comply with the herein Rules and Regulations shall subject the owner to such fines which shall be established by the Board, in addition to the removal of such structures which may be in violation. The property owner shall be responsible for all costs, fees and expenses including, but not limited to, attorneys fees, which may be incurred by the Association in enforcing these Rules and Regulations.

II. The following standards shall apply to fences within Lake Harmony Estates:

A. Chain link and similar fencing is prohibited, with the exception of approved dog runs no more than 6 feet in height and no greater than 200 square feet in area. Dog runs must be located in the rear of the home and must not be visible from any street which adjoins the property upon which the dog run is located.

B. With the exception of approved dog runs as set forth above, all fencing shall be wood, or composite plastic designed to resemble wood, and shall be in approved earth tones.

C. All fencing shall be open in nature, such as post and beam, split rail, or open picket. Stockade, board on board, and other solid or near solid fencing is prohibited. An exception shall be fencing surrounding swimming pools, which may be solid in nature but which must be no more than 15 feet from the edge of the swimming pool and must otherwise comply with these Rules and Regulations.

D. Fencing shall not be more than 4 feet in height, with the exception of approved dog runs as set forth in subparagraph A, above. Stone walls of no more than 4 feet in height are permitted.

E. Fencing shall be installed no closer than one (1) foot from rear and side yard boundaries and no closer than twenty (20)

⁷ The supplemental Regulations were admitted into evidence as part of Plaintiff's Exhibit No. 3.

feet from the center line of all adjoining streets and roadways.

F. Fencing and dog runs which are in existence as of December 1, 2002 are grandfathered and may remain unless they become in a state of disrepair or non-use for a period exceeding twelve (12) months.

Pursuant to Paragraph I of the "Fencing" supplemental Regulations quoted above, a violation of the Rules and Regulations regarding fences shall subject a property owner to such fines that shall be established by the Association's Board of Directors in addition to the property owner being responsible for all costs, fees and expenses, including, but not limited to, attorney's fees resulting from the enforcement of the Association's Rules and Regulations.

In accordance with the By-Laws, in May of 2003, the Association's Board of Directors promulgated a Fine Schedule for violations of the Association's Rules and Regulations.⁸ Pursuant to item 12 of the Fine Schedule, the Association is empowered to fine a property owner from \$50.00 to \$1,000.00 for each occurrence of a violation of the Construction Regulations and/or for working without the required Association permit.

When the Defendants purchased the property in 1976, the property was partially enclosed on the two (2) street sides (it is a corner lot property) by a fence, with openings for the driveway. The fence was old at the time, and was replaced in 1976. The replacement fence, which was a wooden split rail fence,⁹ existed until 2004, when Mr. Dougherty decided to replace it because it was in a state of disrepair.

On June 15, 2004, Mr. Dougherty obtained a permit from Kidder Township, and he commenced replacing the fence. The new fence,¹⁰ which is the fence at issue in this case, is made from either a plastic composite or vinyl and it is tan in color.

Once the Defendants began construction of the new fence, Brad Jones, the Association's Property Manager,¹¹ verbally notified

⁸ The Fine Schedule was admitted into evidence as Plaintiff's Exhibit No. 7.

⁹ This fence is depicted in the photograph admitted into evidence as Defendants' Exhibit No. 12e.

¹⁰ The current fence is depicted in the photographs admitted into evidence as Defendants' Exhibits Nos. 13A, 13B and 13C.

¹¹ Mr. Jones is a Property Manager with Appletree Management Group and has served as a Property Manager for Lake Harmony Estates since 2002.

the Defendants that any work involving the construction of a new fence would require an Association permit.

Following the verbal notice by Mr. Jones, on May 25, 2004, at a time when the new fence was partially constructed, Mr. Jones sent the Defendants a letter notifying the Defendants that the new fence was in violation of the Association's Rules and Regulations.¹² That May 25, 2004 letter attached a "Building and Improvement Permit Application" for the Defendants' use. Subsequently, Mr. Jones sent the Defendants another letter dated July 26, 2004, demanding that the Defendants cease and desist construction of the fence and notifying the Defendants that the Association's Board of Directors had assessed a \$200.00 fine for the violation of the Rules and Regulations.¹³ In addition to the letters, Mr. Jones also spoke to Mr. Dougherty on the telephone several times concerning the fence. Mr. Jones even faxed Mr. Dougherty an application for a permit twice and went to the Defendants' home to drop off a permit application, but no one came to the door, though the television was on.

The Defendants having failed to comply with the Association Rules and Regulations as well as the Association's notices to comply therewith, the Association subsequently filed this action seeking an injunction to have the fence removed and to collect the amount of the outstanding fines and to recoup its attorney fees in this matter.

According to the Association's By-Laws, and the Association's Rules and Regulations, both of which were duly adopted by the Association, the Defendants had an obligation to request and obtain a permit from the Association prior to the construction of the new fence. However, as of the date of the non-jury trial, the Defendants had never applied for a permit, or otherwise attempted to obtain a permit, for the fence from the Association. We conclude, therefore, that the Defendants' failure to request and obtain a permit for the fence is indeed in violation of Article VI of the Association's Construction Regulations, which specifically mandate that: 1) a request for a fence be submitted to the Association's Board of Directors and the Association's Construction Committee (see Article VI(B)); and 2) a permit is required for a fence (see Article VI(A)). Alternately

¹² The May 25, 2004 letter was admitted into evidence as part of Plaintiff's Exhibit No. 4.

¹³ The July 26, 2004 letter was admitted into evidence as part of Plaintiff's Exhibit No. 4.

stated, we find that the Defendants' construction of the fence is in violation of the Association's Rules and Regulations because the Defendants constructed the fence without requesting and obtaining a required permit from the Association.¹⁴

As of the date of the non-jury trial, the total fine imposed by the Association upon the Defendants for failure to request and obtain a permit for the new fence was \$2,800.00.¹⁵ This amount has not been paid by the Defendants.

As of the date of the non-jury trial, as reflected on a compilation prepared by counsel for the Plaintiff of the legal work he has performed in this matter,¹⁶ the Association had incurred attorney fees in the total amount of \$6,104.50.¹⁷ As to the hourly rate for the Plaintiff's counsel, counsel for the Defendants stipulated at the outset of the non-jury trial that the amount of \$145.00 per hour is reasonable.

¹⁴ Parenthetically, we note that Mr. Jones testified during the non-jury trial that, even if the Defendants had applied for a permit for the fence, the fence would not have been approved by the Association because it does not meet the guidelines for fences as contained in the supplemental Rules and Regulations regarding fences. Mr. Jones testified that the fence would not have been approved because "the materials don't match". Specifically, Mr. Jones testified that the supplemental Rules and Regulations require that fence materials must be wood and the fence at issue is plastic composite material and has a sheen. However, we note that Article IIB of the supplemental Rules and Regulations regarding fences provides that "all fencing shall be wood, or composite plastic designed to resemble wood, and shall be in approved earth tones". We believe that there is a question whether or not the fence would meet the Association's guidelines regarding materials which may be used for fencing. However, since the violation of the Association's Rules and Regulations at issue is the failure of the Defendants to request and obtain a permit for the fence, the issue of whether or not the fence would meet the Association's guidelines if an application for a permit was made is not before us at this time. Therefore, we will not decide herein whether or not the fence meets the Association's guidelines.

¹⁵ The cumulative amount of the fines was testified to by Mr. Jones, who explained that an initial fine of \$200.00 was imposed upon the Defendants and additional fines are periodically imposed by the Association upon the Defendants during the continuation of the violation.

¹⁶ The compilation of legal work performed by the Plaintiff's counsel in this matter was admitted into evidence as Plaintiff's Exhibit No. 6.

¹⁷ We note that when we multiplied forty-eight (48) hours by \$145.00 per hour, we arrived at a figure of \$6,960.00, rather than the amount of \$6,140.00 shown as the total on the compilation. However, because the testimony of Mr. Jones was that the total amount of attorney fees was \$6,140.00, we are going to utilize the amount of \$6,140.00, rather than the amount of \$6,960.00, as the amount of attorney fees.

We have reviewed the description of the nature and amount of legal work performed, which amounted to a total of forty-eight (48) hours, by the Plaintiff's counsel in this matter and we find that both the nature and amount of legal work performed is appropriate and reasonable. Therefore, in our disposition of this case, we shall award the Plaintiff the amount of \$6,104.50 in attorney fees.

The Defendants have included in their Counterclaim a claim seeking, **inter alia**, monetary damages and attorney fees against the Plaintiff for slander or disparagement of title. Although the Counterclaim does not specify the factual basis of this claim, counsel for the Defendants advised us during the non-jury trial that the claim is premised upon the Association's issuance of a "Re-Sale Certificate"¹⁸ regarding the Defendants' property on October 30, 2006. That Re-Sale Certificate reflected outstanding fines on the property of \$2,800.00 and contained the following information:

Notice of Violation(s) of record on property—List outstanding violations:

THE CURRENT LAWSUIT REGARDING LOTS 601/602 WILL BE CARRIED OVER TO NEW OWNERS.

We find that the Re-Sale Certificate was issued by the Association in good faith and that the Defendants failed to establish any malice on behalf of the Association in issuing the Re-Sale Certificate.¹⁹

ISSUES

1. Whether the Association is required to file a Declaration under the terms of the Uniform Planned Community Act when the Association had been in existence at the time of the enactment of the UPCA.

2. Whether the Defendants have violated the Association's Rules and Regulations regarding fences and, if so, whether the Defendants should be ordered to remove the fence.

3. Whether the Association should be awarded attorney's fees.

4. Whether the Defendants have established their claim against the Association for slander of title.

¹⁸ The Re-Sale Certificate was admitted into evidence as Defendants' Exhibit No. 1.

¹⁹ This issue is addressed in more detail in the Discussion Section of this Opinion, **infra**.

DISCUSSION

As recently stated by our Carbon County President Judge, the Honorable Roger N. Nanovic, II, in his Opinion in the case of **John McMahon v. Lee Conklin, Susan Conklin and Pleasant Valley West Association**, docketed at No. 05-2568:

Private residential planned communities—subdivisions bound by a common set of restrictive covenants and governed by a homeowners association organized either as a profit or non-profit corporation or as an unincorporated association—while quasi-municipal in nature, are subject, *inter alia*, to principles of contract and real estate law. Prior to the enactment of the UPCA, associations in a planned development derived their powers primarily from a recorded declaration of restrictions and relied upon the common law governing covenants which ‘run with the land’ to explain their authority, and the enforcement of rules and regulations promulgated by them to conduct, manage and control the affairs of the community.

Under the common law, absent a regulation which exceeded the association’s express or implied authority, or which contravened fundamental constitutional rights or public policy, the association was free to adopt and enforce regulations reasonably related to the protection, preservation, operation and general welfare of the community and its common areas. See **Shelley v. Kraemer**, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948) (prohibiting use of the state’s judicial process to enforce a racially restrictive covenant); **Midlake on Big Boulder Lake Condominium Association v. Cappuccio**, 449 Pa. Super. 124, 673 A.2d 340 (1996) (holding that a property owner may contractually relinquish even constitutional rights—exclusive of those involving racial discrimination or bias—by way of restrictive covenants enforceable between private parties), **appeal denied**, 544 Pa. 684, 679 A.2d 230 (1996). The UPCA does not prohibit or supplant this well-established source of authority in the association to control and decide what is in a private community’s best interests; 68 Pa.C.S.A. §5108 (relating to supplemental general principles of law applicable) and §5302 (power of unit owners’ association). If anything, the UPCA expands these powers and requires that discretionary decisions of the association’s board be reviewed to determine if the board acted ‘in good faith; in a manner they reasonably believe to be

in the best interests of the association; and with care, including reasonable inquiry, skill and diligence as a person of ordinary prudence would use under similar circumstances.' 68 Pa.C.S.A. §5303; **see also, Burgoyne v. Pinecrest Community Ass'n, 2007 WL 1346663 (Pa.Super. 2007).**

In the present case, the Association is the governing body charged with maintaining Lake Harmony Estates and the common properties and facilities within its borders. The creation of the Association was authorized by the Deed Covenants contained in the chain of title of all the members of the Association, including, but not limited to, the Defendants in this case.

1. Necessity of a “Declaration”

An issue was raised by counsel for the Defendants at the conclusion of the non-jury trial whether the Association is required to file a “Declaration” under the terms of the Uniform Planned Community Act. We will take this opportunity to address that issue.

At the outset, we note that the Association had been in existence at the time of the enactment of the UPCA.

Section 5201 of the UPCA specifically provides as follows:

A planned community may be created pursuant to this subpart only by recording a declaration executed in the same manner as a deed by all persons whose interests in the real estate will be conveyed to unit owners and by every lessor of a lease, the expiration or termination of which will terminate the planned community or reduce its size. If the lessor is the Commonwealth, a municipal government or any agency of either, the lessor need not execute the declaration if it has previously given written notice of its filing and agreed to be bound by the provisions of this subpart, in which case the declaration shall be executed by the lessee in possession of the subject property. The declaration must be recorded in every county in which any portion of the planned community is located, must be indexed in the same records as are notarized for the recording of a deed and shall identify each declarant as the grantor and the name of the planned community as grantee.

68 Pa. C.S.A. §5201.

This Section, however, does not apply to the Plaintiff in this action, as Section 5201 of the UPCA is not listed in Section 5102 of the UPCA, which delineates those Sections of the UPCA which are retroactive. In pertinent part, Section 5102 of the UPCA states:

(b) Retroactivity.—

Except as provided in subsection (c), sections 5105, 5106, 5107, 5203 (relating to construction and validity of declaration and by-laws), 5204 (relating to description of units), 5218, 5219 (relating to amendment of declaration), 5223 (relating to merger or consolidation of planned community), 5302(a) (1) through (6) and (11) through (15) (relating to power of unit owners' association), 5311 (relating to tort and contract liability), 5315 (relating to lien for assessments), 5316 (relating to association records), 5407 (relating to re-sales of units) and 5412 (relating to effect of violations on rights of action) and section 5103 (relating to definitions), to the extent necessary in construing any of those sections, apply to all planned communities created in this Commonwealth before the effective date of this subpart; but those sections apply only with respect to events and circumstances occurring after the effective date of this subpart and do not invalidate specific provisions contained in existing provisions of the declaration, by-laws or plats and plans of those planned communities.

(b.1) Retroactivity.—

(1) Sections 5103, 5108, 5113, 5220(i) (relating to termination of planned community), 5222 (relating to master associations), 5302(a)(8)(i), (16) and (17) (relating to power of unit owners' association), 5303(a) and (b) (relating to executive board members and officers), 5307 (relating to upkeep of planned community), 5314 (relating to assessments for common expenses) and 5319 (relating to other liens affecting planned community), to the extent necessary in construing any of those sections, apply to all planned communities created in this Commonwealth before the effective date of this subpart, but those sections apply only with respect to events and circumstances occurring after the effective date of this subsection and do not invalidate specific provisions contained in existing provisions of the declaration, by-laws or plats and plans of those planned communities.

(2) Section 5303(c) and (d), to the extent necessary in construing any of those subsections, apply to all planned communities created in this Commonwealth before the effective date of this subpart, but those subsections apply only with respect to events and circumstances occurring 180 days after the effective

date of this subsection and do not invalidate specific provisions contained in existing provisions of the declaration, by-laws or plats and plans of those planned communities.

68 Pa. C.S.A. §5102.

It appears that Section 5201 does not apply to the Association at issue here because the Association had been in existence at the time of the enactment of the UPCA.

Moreover, it appears that the Association does indeed have a "Declaration" in any event. The definition of "Declaration" contained in Section 5103 of the UPCA provides that a declaration is, "any instrument, however denominated, that creates a planned community and any amendment to that instrument." 68 Pa. C.S.A. §5103.

The Association contends, and we agree, that the Covenants and Restrictions, as well as the plot plans and subdivision plans recorded in the Carbon County Recorder of Deeds Office would qualify under this very loose definition as a Declaration.

2. Violation of the Association's Rules and Regulations

The primary issue in this case is whether the Defendants have violated the Rules and Regulations of the Association.

At the outset, we note that since the facts underlying this issue have already been extensively addressed in our Findings of Fact, *supra*, we will not reiterate those facts here.

According to the Association's By-Laws, and the Association's Rules and Regulations, both of which were duly adopted by the Association, the Defendants had an obligation to request and obtain a permit from the Association prior to the construction of the new fence. However, as of the date of the non-jury trial, the Defendants had never applied for a permit, or otherwise attempted to obtain a permit, for the fence from the Association. We conclude, therefore, that the Defendants' failure to request and obtain a permit for the fence is indeed in violation of Article VI of the Association's Construction Regulations, which specifically mandate that: 1) a request for a fence be submitted to the Association's Board of Directors and the Association's Construction Committee (see Article VI(B)); and 2) a permit is required for a fence (see Article VI(A)).

The Association has the authority to enforce the Association's Rules and Regulations by reason of the covenants and restrictions set forth in the Defendants' chain of title. In our view, the Association would even have the authority, based upon case law, to

enforce its Rules and Regulations even if there had not been any formal deed covenants. **See Hess v. Barton Glen Club, Inc.**, 718 A.2d 908 (Pa. Commw. 1998). Moreover, the Association has been provided statutory authority pursuant to the UPCA to regulate and review architectural, aesthetic or landscaping schemes. 68 Pa. C.S.A. §5108; 68 Pa. C.S.A. §5106. The Association has also been given the right to fine. 68 Pa. C.S.A. §5302.

As former Carbon County President Judge John P. Lavelle has aptly opined, “Privately developed residential communities ... are in many respects analogous to mini-governments.” **Holiday Pocono Civic Association, Inc. v. Benick**, 7 D. & C. 3d 378, 385 (1978). The Commonwealth Court has agreed with this analysis in **Hess v. Barton Glen Club, Inc.**, 718 A.2d 908 (Pa. Commw. 1998), **appeal denied**, 737 A.2d 745 (Pa. 1999), where the Commonwealth Court compared a homeowners association to a miniature government, charged with managing the common areas and facilities of a residential development. As mini-governments with the authority to promulgate rules and regulations, an Association must have the authority to enforce these rules and regulations.

In our view, in the present case, the Association’s authority to enforce its Rules and Regulations includes the authority to impose fines and seek an injunction to have the offending fence removed. The Association’s supplemental Regulations regarding fences specifically provide as follows:

FENCING:

I. General Rule—No fences may be erected in Lake Harmony Estates without full compliance with the herein Rules and Regulations. **Failure of a property owner to comply with the herein Rules and Regulations shall subject the owner to such fines which shall be established by the Board, in addition to the removal of such structures which may be in violation.** The property owner shall be responsible for all costs, fees and expenses including, but not limited to, attorneys fees, which may be incurred by the Association in enforcing these Rules and Regulations. (emphasis added)

Having found that the Defendants have indeed violated the Association’s Rules and Regulations, we conclude that the Plaintiffs are within their authority in imposing a fine upon the Defendants and in seeking injunctive relief to have the fence removed. Accordingly, in our disposition of this matter, we shall require the

Defendants to pay the fines imposed by the Association and require the Defendants to remove the fence.

3. Attorney's Fees

The Plaintiff is also seeking an award of attorney's fees in this matter.

The purpose of an award of counsel fees is to reimburse an innocent litigant for expenses made necessary by the conduct of his or her opponent. **Westmoreland County Industrial Development Authority v. Allegheny County Board of Property Assessment, Appeals and Review**, 723 A.2d 1084 (Pa. Commw. 1999).

As stated in Standard Pennsylvania Practice:

Generally, litigants are responsible for their own counsel fees unless otherwise permitted by statutory authority, a clear agreement of the parties, or some other established exception. Therefore, each party to a case is responsible for his or her own legal fees unless a statute, agreement, or exception provides to the contrary. Moreover, the governing authority may not consider attorney's fees as an item of taxable costs in prescribing rules governing the imposition and taxation of costs, except to the extent authorized by statute.

25A Standard Pennsylvania Practice 2d §127:45.

Attorney's fees may only be awarded in cases where they are specifically authorized. In this case, there are two specific authorizations, one in the Association's Rules and Regulations and the second in the UPCA. Both allow the Association to recover attorney's fees in this case.

The Association's Construction Regulations, Article VI, and more specifically, the 2003 supplement to the Construction Regulations relating to fences, states:

No fences shall be erected in Lake Harmony Estates without full compliance with the herein Rules and Regulations. Failure of the property owner to comply with the herein Rules and Regulations shall subject the owner to such fines which shall be established by the Board, in addition to the removal of such structures which may be in violation. **The property owner shall be responsible for all costs, fees and expenses including, but not limited to, attorney fees, which may be incurred by the Association in enforcing these Rules and Regulations.** (emphasis added)

The UPCA also provides for the recoupment by an Association of attorney's fees. Specifically, Section 5315(g) of the UPCA states:

Costs and attorney fees.—A judgment or decree in any action or suit brought under this section shall include costs and reasonable attorney fees for the prevailing party.

Accordingly, under both the UPCA and the Association's Rules and Regulations, the Association is entitled to recover reasonable attorney fees, as the Association is the prevailing party in this action.

As to the amount of attorney fees to be awarded to the Association, for the reasons already delineated in our Findings of Fact, **supra**, we shall award the Association the amount of \$6,104.50 in attorney fees.

4. Defendants' claim for slander of title

The Defendants have filed, in their Counterclaim, a claim against the Association for slander or disparagement of title seeking, **inter alia**, monetary damages.

Slander of title is described in Summary of Pennsylvania Jurisprudence as follows:

Disparagement of title, variously labeled slander of title, defamation of title, or, in other contexts, slander of goods, trade libel, or injurious falsehood is the false and malicious representation of the title or quality of another's interest in goods or property. **Forman v. Cheltenham Nat. Bank**, 348 Pa. Super. 559, 502 A.2d 686 (1985). Although the action for defamation is designed to protect the reputation of the plaintiff, disparagement of title is intended to protect the owner's saleable interest in the property. **Triester v. 191 Tenants Ass'n**, 272 Pa. Super. 271, 415 A.2d 698 (1979). Thus, one who, without a privilege to do so, publishes matter that is untrue and disparaging to another's property in land, chattels, or intangible things under such circumstances as would lead a reasonable person to foresee that the conduct of a third person as purchaser or lessee of the property might be deterred thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused. **Menefee v. Columbia Broadcasting System, Inc.**, 458 Pa. 46, 329 A.2d 216, 74 A.L.R.3d 290 (1974), citing Restatement Second, Torts §624.

In order to prevail in an action for slander of title, a plaintiff must show malice by the defendant. **Forman v. Cheltenham Nat. Bank**, 348 Pa. Super. 559, 502 A.2d 686 (1985).

2 Summ. Pa. Jur. 2d Torts §18:58.

Although the Defendants' Counterclaim does not specify the factual basis of this claim for slander of title, counsel for the Plaintiff advised us during the non-jury trial that the claim is premised upon the Association's issuance of a "Re-Sale Certificate"²⁰ regarding the Defendants' property on October 30, 2006. That Re-Sale Certificate reflected outstanding fines on the property of \$2,800.00 and contained the following information:

Notice of Violation(s) of record on property—List outstanding violations:

THE CURRENT LAWSUIT REGARDING LOTS 601/602 WILL BE CARRIED OVER TO NEW OWNERS.

During the non-jury trial, Mr. Dougherty testified that the present litigation is preventing the sale of the property. L. Matthew Fidler testified that he had sought to purchase the Defendants' property, but he did not purchase it because of the outstanding title problem.

The Plaintiff contends that the case currently before us is analogous to *Forman v. Cheltenham National Bank*, 348 Pa. Super. 559, 502 A.2d 686 (1985). In that case, the Superior Court stated:

Disparagement of title is the false and malicious representation of the title or quality of another's interest in the goods or property. In order to prevail in an action slander of title, a plaintiff must show malice by the defendant. Malice may be understood as the lack of good faith belief in the right to publish the allegedly slanderous utterance. A person is conditionally privileged to disparage another's property in land, chattels or intangible things by an assertion of an inconsistent legally protected interest in himself.

Id. at 562, 502 A.2d at 688 (citations omitted).

The Association also contends that it was legally required to identify the information contained in the Re-Sale Certificate pursuant to Section 5407 of the UPCA. Section 5407 of the UPCA provides, in relevant part, as follows:

²⁰ The Re-Sale Certificate was admitted into evidence as Defendants' Exhibit No. 1.

§5407. Re-sales of units

(a) Information supplied by unit owner.—In the event of a re-sale of a unit by a unit owner other than a declarant, the unit owner shall furnish to a purchaser before execution of any contract for sale of a unit or otherwise before conveyance a copy of the declaration other than the plats and plans, the bylaws, the rules or regulations of the association and a certificate containing:

(1) A statement disclosing the effect on the proposed disposition of any right of first refusal or other restraint on the free alienability of the unit.

(2) A statement setting forth the amount of the monthly common expense assessment and any unpaid common expense or special assessment currently due and payable from the selling unit owner and any surplus fund credits to be applied with regard to the unit pursuant to section 5313 (relating to surplus funds).

(3) A statement of any other fees payable by unit owners.

...

(8) A statement of any judgments against the association and the status of any pending suits to which the association is a party.

...

(10) A statement as to whether the executive board has knowledge that any alterations or improvements to the unit or to the limited common elements assigned thereto violate any provision of the declaration.

...

We concur with the Association that it was required under Section 5407 of the UPCA to include information about the outstanding fines and the litigation in a Re-Sale Certificate regarding the Defendants' property to protect prospective purchasers of the property. Further, the information identified by the Association in the Re-Sale Certificate is not false. Therefore, we find that the Re-Sale Certificate was issued by the Association in good faith and that the Defendants have failed to establish that the Association made any false statement or acted with malice in issuing the Re-Sale Certificate. Accordingly, we find in favor of the Association on the Defendants' claim for slander of title.

CONCLUSIONS OF LAW

1. The Defendants violated the Rules and Regulations of the Association by constructing the fence without requesting and obtaining a required permit for the fence from the Association.
2. As a result of the Defendants' violation of the Rules and Regulations of the Association, the Association has the authority to seek an injunction requiring the Defendants to remove the fence from their property.
3. As a result of the Defendants' violation of the Rules and Regulations of the Association, the Defendants are liable to the Association for the fines imposed by the Association.
4. As a result of the Defendants' violation of the Rules and Regulations of the Association, the Association is entitled to recover the reasonable attorney's fees which were incurred by the Association in enforcing its Rules and Regulations.
5. The Defendants have failed to establish the necessary elements to prove their claim for slander of title as contained in the Defendants' Counterclaim. Specifically, the Defendants have failed to establish that the Association either made any false statements or acted with malice in issuing the Re-Sale Certificate.

DECREE/VERDICT

AND NOW, this 29th day of June, 2007, following a non-jury trial held on February 16, 2007, for the reasons set forth in the foregoing Opinion, it is ORDERED and DECREED as follows:

1. On the Plaintiff's request for an injunction, said request is GRANTED. Accordingly, the Defendants shall entirely remove the fence located on the property identified as Lot 601 and Lot 602 in Lake Harmony Estates within ninety (90) days of the date of this Decree.
2. On the Plaintiff's request for a Verdict in its favor for the amount of the fines imposed by the Plaintiff upon the Defendants and the Plaintiff's request for reimbursement of its attorney fees, said requests are GRANTED. Accordingly, a Verdict is entered in favor of the Plaintiff and against the Defendants in the amount of \$8,904.50, representing fines in the amount of \$2,800.00 and attorney fees in the amount of \$6,104.50.
3. On the Defendants' claim for slander of title, as contained in the Defendants' Counterclaim, a Verdict is entered in favor of the Plaintiff and against the Defendants.

Pursuant to Pa. R.C.P. 227.4, the Prothonotary shall, upon praecipe, enter Judgment on the Verdict if no motion for post-trial relief has been filed under Pa. R.C.P. 227.1 within ten (10) days following the filing of this Verdict.

**TOWAMENSING TRAILS PROPERTY OWNERS
ASSOCIATION, Plaintiff vs. KENNETH B. KNIBIEHLY,
WILLIAM G. KNIBIEHLY and DOREEN S.
KNIBIEHLY, Defendants**

*Civil Law—Real Estate—Planned Residential Community—
Restrictions on the Use of Privately Owned Property—Regulation
of Common Properties—Award of Attorney Fees*

1. Restrictive covenants on the use of real estate to be valid and enforceable must be clear and unambiguous. Because such restrictions impose an interference with an owner's otherwise free and full enjoyment of his property, they are viewed with suspicion and will be strictly and narrowly construed in favor of the owner's desired use of his property.
2. Restrictive covenants which express as their intent the creation of a private residential community, and which do not restrict the use of privately owned property within the development solely and exclusively to residential purposes, will not be construed to prohibit commercial uses which are secondary and compatible to a primary residential use. Such restrictions will not prevent a property owner from parking commercial vehicles on his property or prohibit the use of a telephone for commercial purposes where the property is the owner's principal residence and is used primarily for residential purposes.
3. A property owners' association formed by the original developer of a planned residential community to manage the common properties and facilities in the development and to enforce its restrictive covenants cannot impose and enforce restrictions on the use of private property which are greater than those imposed by the recorded restrictive covenants pursuant to which the community was created without the consent of all affected property owners. In accordance with the foregoing, a restriction contained in the bylaws of the association which limits the use of privately owned properties exclusively and solely to residential purposes imposes greater restrictions on the use of such property than a restrictive covenant which provides that the property is to be part of a "residential community." To the extent the bylaws impose a greater burden on the use of property than that imposed by the restrictive covenants, they are unenforceable against the owners of property who have not consented to their imposition.
4. Although the Uniform Planned Community Act applies generally to planned communities created after February 2, 1997, it contains various provisions which apply retroactively to existing planned communities. Among these are amendments made to restrictions previously imposed on the use of privately owned units within the development which occur after the effective

date of the Act and which the Act requires must be unanimously approved by all unit owners affected to be valid and enforceable.

5. In contrast to an association's limited authority to impose new and additional restrictions on the use of privately owned property within the development, the association retains the right under both common-law principles and under the Uniform Planned Community Act to reasonably regulate the use of roads and common facilities owned by the association for the common benefit of all lot owners within the subdivision.

6. Whether to award attorney fees incurred in the enforcement of the covenants and restrictions of a planned community is, to an extent, discretionary with the court. In deciding whether to award attorney fees the court may properly consider whether the party requesting the payment of its attorney fees is a prevailing party, in whole or in part, and whether the amount of attorney fees sought is reasonable and necessary.

NO. 05-2917

DAVID J. WILLIAMSON, Esquire—Counsel for Plaintiff.

JEFFREY G. VELANDER, Esquire—Counsel for Defendants.

MEMORANDUM OPINION

NANOVIC, P.J.—May 1, 2008

The source and limits of a property owners' association's authority to regulate the use of private property within a planned residential community is at the heart of this litigation. Ultimately, the question we must decide is the validity of land use regulations contained in the association's bylaws which are more stringent than those described in the recorded restrictive covenants for the development. For the reasons set forth below, we conclude that to the extent such regulations impose a greater burden on the use of privately owned land than that imposed by the covenants of record, and of which the owner had neither actual nor constructive knowledge, they are unenforceable.

PROCEDURAL AND FACTUAL BACKGROUND

Towamensing Trails is a private residential development located in Penn Forest Township, Carbon County, Pennsylvania. It consists of over 3,800 lots and more than fifty-two miles of private road. There are approximately 2,200 homeowners.

The development occurred in stages. The subdivision plan for Section III, together with a Declaration of Protective Covenants for this section of the development ("Declaration"), were filed in the Carbon County Recorder of Deeds Office on July 13, 1973. In order to own and maintain the common properties and facilities, as well

as to administer and enforce the covenants and restrictions imposed on the development by the original developer (Broadscope, Inc.), the developer formed the Towamensing Trails Property Owners Association (“Association”).

The Defendant, Kenneth B. Knibiehly, owns two adjacent lots in Section III of Towamensing Trails. This property was acquired by him subject to the restrictions described in the Declaration. Lot No. 1067 was acquired by Defendant’s parents from the developer by deed dated August 13, 1974. Title to this property was later transferred into Defendant’s name and that of his parents—as tenants by the entireties as between his mother and father, and as joint tenants with right of survivorship as between him and his parents—by deed dated October 19, 2004. The house in which Defendant resides is located on this property.¹ Lot No. 1066 is titled in Defendant’s name alone, and was acquired by him by deed dated January 5, 2004. The deed into his predecessor in title for this property, Shaddai Land Corporation, is dated November 21, 1994. This property is an unimproved lot.

Defendant owns and operates a trucking business for hauling landscaping materials. This business has been in operation for more than twenty years. In the past, Defendant parked trucks and other heavy equipment used in this business in his driveway and also on the private right-of-way in front of his home. This right-of-way terminates in a dead-end approximately one hundred feet from Defendant’s property. Additionally, Defendant owns a backhoe which he keeps on his property and uses to make improvements to this property, as well as during the winter months to plow snow for a fee from private driveways within the development.

From time to time, Defendant performs maintenance and repair work on his vehicles and equipment at his home. These vehicles bear his business logo, “Knibiehly Trucking.” Defendant does not maintain a separate office for his business; instead, he

¹ Due to their ownership interest in Lot No. 1067, Defendant’s parents, William G. Knibiehly and Doreen S. Knibiehly, have also been named as Defendants in these proceedings. It is unclear from the evidence whether William G. Knibiehly and Doreen S. Knibiehly use this home any longer; the principal residence of William G. Knibiehly and his wife is currently in Virginia. Since the conduct of which the Association complains is directed to that of the Defendant, Kenneth B. Knibiehly, our use of the term Defendant throughout this opinion refers to the Defendant, Kenneth B. Knibiehly, unless otherwise specified.

takes and makes business-related calls from his home. Defendant does not, however, have business customers or other contractors visit his home for business purposes.

Over the years, the Association has received complaints about Defendant parking commercial vehicles at his home, and about excessive noise associated with these vehicles. The Association has written to Defendant asking him to stop these activities, but without success. Recently, however, the Defendant has limited the number of commercial vehicles and equipment which he parks at his home to a truck-tractor, together with a trailer he uses in hauling equipment and materials from site to site;² a pickup truck; and the backhoe. Defendant has made arrangements to park other trailers and equipment used in his business at another site, but continues to park the vehicles previously mentioned at his home for security purposes, to avoid damage from vandalism.

The Association commenced this action, by complaint, on November 3, 2005. In seeking to enjoin Defendant from parking any commercial vehicles or equipment on his property, as well as on the development road which fronts his property, and to prohibit the use of his home for business purposes, the Association relies on the following provisions of its Protective Covenants filed on July 13, 1973, revised Bylaws dated March 30, 2001, and Rules of Conduct dated May 7, 2004.

16. Nuisances. No obnoxious or offensive activity shall be carried on upon any Lot or Parcel of Land of The Properties.^[3]

20. Vehicles. No vehicles, trailers or campers shall be abandoned or stored on any Lot or Parcel of Land of The Properties, nor shall any vehicles over ten tons in gross weight be

² The truck-tractor weighs approximately 17,000 pounds and the trailer, when empty, approximately 16,000 pounds.

³ At the time of trial, the Association's evidence as to whether Defendant's conduct creates a nuisance was limited to unidentified complaints it received from Defendant's neighbors. No eyewitness testimony was offered, nor competent evidence submitted, that Defendant's actions are in fact "obnoxious" or "offensive" and therefore prohibited by either the Association's covenants or rules of conduct, or under the common law. Accordingly, the Association has not sustained its burden of proving the existence of a nuisance. See **Dumm v. Dahl**, 913 A.2d 863, 867 (Pa. Super. 2006) (noting that for an invasion of another's interest in the use and enjoyment of his property to be actionable, the invasion must cause significant harm).

driven over the public streets or private pathways. All vehicles, trailers and campers belonging to Owners of Single-Family Detached dwellings are to be garaged and the garage doors are to be kept in a closed position except for ingress and egress.^[4]

Declaration, Article XIII, Protective Covenants, Nos. 16 and 20 (words in capital letters refer to defined terms in the Association's Declaration of Protective Covenants).

Section G. Single-Family Occupancy. The lots in the Towamensing Trails planned community are restricted exclusively to residential use, and no lot may be occupied by more than a single family. ...

Section H. Residential Use. Except as otherwise provided in the community's legal documents, each property shall be used for residential purposes only, and no trade or business of any kind may be conducted in or from a property.

Bylaws, Article I, Sections G and H.

Section X-A—Motorized Vehicles

7. No ROADSIDE PARKING IS PERMITTED unless authorized by Security.

12. Parking is allowed only in designated areas. There is NO parking at any place where signs prohibit such parking.

13. No vehicles with a GVW of 20,000 lbs. are to be driven on our roads except by special permits. Thaw restrictions are

⁴ The language in this provision which requires that all vehicles be garaged and that the garage doors be kept closed is not limited to commercial vehicles. This may explain why notwithstanding its value for aesthetic purposes, it has not been enforced by the Association and we believe is not sought to be enforced in these proceedings. Accordingly, we have not made any findings as to whether the Association may have abandoned or waived enforcement of this restriction. See **Rieck v. Virginia Manor Co.**, 251 Pa. Super. 59, 64-65, 380 A.2d 375, 378 (1977) ("In order to effect a release or discharge of the real covenants the burden of proof is upon the owners of the servient tenements to show that the original purpose and intent of the restrictions have been materially altered or destroyed by changed conditions and that substantial benefit and advantage may not inure to the owners of the dominant tenement by the enforcement of the restrictions.").

With respect to the limitation on weight, Defendant's testimony that neither the truck-tractor nor trailer parked at his home exceed the ten-ton weight limitation of the covenants or rules of conduct was not disputed by the Association, nor was Defendant's testimony that the trailer remains unloaded when at his property. On the record before us, the Association's evidence was insufficient to establish a violation of the weight limitations which exist on the use of the Association's roads.

in effect from January 1—April 15. Violators will be subject to a fine of \$1000. + costs.

Section XI—Nuisance

1. No person(s) may conduct themselves in such a manner as to prohibit the use and enjoyment of others, as for example, but not limited to producing loud noise, engaging in boisterous conduct, late-hour parties, raucous behavior, using recreational vehicles to excess, and the like. Persistence in such conduct will cause a suspension of privileges and/or removal from the properties and a fine of up to \$100.00 plus costs.

Rules of Conduct, Sections X-A(7), (12) and (13) and Section XI (1). In its complaint, the Association requests not only injunctive relief, but also attorney's fees and costs pursuant to its bylaws and Section 5315 of the Uniform Planned Community Act.⁵

DISCUSSION

Background

The law governing private residential developments in this Commonwealth is relatively new, and evolving. Until recently, these developments have relied primarily upon the recording of a common set of restrictive covenants which “run with the land” and contractually bind, as part of a common scheme, each of the lots within a recorded subdivision plan. **See Price v. Anderson**, 358 Pa. 209, 56 A.2d 215 (1948). These restrictions frequently provide for the creation of a homeowners’ association in which each lot owner is a voting member. The association is assigned the right to assess its members the costs of maintaining the development’s roads and common facilities and to enforce the recorded restrictive covenants for the overall benefit of the development and its members. Central to the formation of these developments is “the principle that each owner, in exchange for the benefits of association with other owners, must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property.” **Noble v. Murphy**, 612 N.E.2d 266, 269 (Mass. App.Ct. 1993) (quotation marks and citation omitted).⁶

⁵ See 68 Pa. C.S.A. §5315.

⁶ Although referring to condominium ownership, we find the principle expressed in **Noble** to be equally applicable to planned communities.

Towamensing Trails follows this general model. The subdivision plan and protective covenants for Section III were both filed on July 13, 1973. The recorded Declaration, of which the Article entitled "Protective Covenants" is a part, recites at the outset that it is the intent of the developer to create a "residential community" known as Towamensing Trails; to subject the property forming the community to the "covenants, restrictions, easements, charges and liens" set forth therein "for the benefit of said property and each owner thereof"; and to delegate and assign to the Towamensing Trails Property Owners Association, Inc., a Pennsylvania nonprofit corporation, the power and authority to maintain and administer the community properties and facilities, to administer and enforce the covenants and restrictions, and to assess and collect charges for these purposes. **See** Declaration, Article XIII, Section 1, p. 17 (delegating authority to the Association to enforce the covenants and restrictions contained in the Declaration).

The covenants and restrictions for Towamensing Trails are not subject to amendment except after thirty years from the date the Declaration is recorded and upon the written agreement of at least two-thirds of the members of the Association, provided such agreement is made and recorded at least three years in advance of the effective date of any change. **See** Declaration, Article XIII, Section 1, p. 17. All lot owners are members of the Association by virtue of their lot ownership, it being further provided that each lot shall have no more than one vote attributed to it. As a member of the Association, a lot owner is further subject to the Association's lawful bylaws.

Restrictive Covenants

Historically, restrictive covenants as to the use of land are disfavored by the law because "they are an interference with an owner's free and full enjoyment of his property." **Hoffman v. Could**, 714 A.2d 1071, 1073 (Pa. Super. 1998), **appeal denied**, 739 A.2d 1057 (Pa. 1999); **see also, Sandyford Park Civic Association v. Lunnemann**, 396 Pa. 537, 539, 152 A.2d 898, 900 (1959) ("A man has a right to use his own home or property in any way he desires provided he does not (1) violate any provision of the Federal or State Constitutions; or (2) violate any covenant, restriction or ease-

ment in his deed; or (3) create a nuisance; or (4) violate any laws or zoning or police regulations which are both constitutional and valid.”). For this reason, they are “strictly construed, and nothing will be deemed a violation of such a restriction that is not in plain disregard of its express words.” **Baumgardner v. Stuckey**, 735 A.2d 1272, 1274 (Pa. Super. 1999) (**quoting Great A. & P. Tea Co. v. Bailey**, 421 Pa. 540, 544, 220 A.2d 1, 3 (1966) (citations omitted)), **appeal denied**, 561 Pa. 684, 751 A.2d 183 (2000). “[A] restriction is not to be extended or enlarged by implication ... and every doubt and ambiguity in its language [is to be] resolved in favor of the owner.” **Parker v. Hough**, 420 Pa. 7, 11-12, 215 A.2d 667, 670 (1966). “There is no equitable extension of their terms, and the court cannot read into them an intention which does not plainly appear from the words of the restrictions.” **Jones v. Park Lane for Convalescents, Inc.**, 384 Pa. 268, 275, 120 A.2d 535, 539 (1956) (quotation marks and citation omitted). Nevertheless, restrictive covenants which are neither illegal nor against public policy are valid and enforceable. **See Vernon Township Volunteer Fire Department, Inc. v. Connor**, 579 Pa. 364, 855 A.2d 873, 879 (2004).

Restrictive covenants originate out of principles of contract law and, in accordance with those principles, the interpretation of restrictive covenants is governed by the intention of the parties at the time of their creation with one important difference: the language must at all times be strictly construed in favor of the free alienability of property. **See Baumgardner, supra** at 1274. If clear and unambiguous, this intent will be found in the writing itself. **See Richman v. Mosites**, 704 A.2d 655, 658 (Pa. Super. 1997). If the language of the restriction is unclear, “[i]n construing a restrictive covenant, we must ascertain the intentions of the parties by examining the language of the covenant in light of the subject matter thereof, the apparent purpose of the parties and the conditions surrounding execution of the covenant.” **Gey v. Beck**, 390 Pa. Super. 317, 324, 568 A.2d 672, 675 (1990).

In keeping with these principles, the recorded restrictive covenants applicable to Defendant’s property do not regulate the type or use of motor vehicles on private property, other than to impose weight limitations and to require that all vehicles be parked in

garages. They do not prohibit the ordinary parking of commercial vehicles and equipment used and owned by Defendant on his property, as distinguished from the storage of vehicles which is prohibited. While the covenants clearly contemplate the creation of a residential community, they do not expressly state that the property must be used exclusively for residential purposes or bar uses which are compatible with, or customary or incidental to, a primarily residential use. **Cf. Baumgardner, supra** at 1275 (holding that a restrictive covenant which provided that a subdivision lot was to be used solely for “residential purposes” prohibited the parking of a truck-tractor and trailers used for commercial purposes on the property); **see also, Galliford v. Commonwealth**, 60 Pa. Commw. 175, 179, 430 A.2d 1222, 1224 (1981) (holding that the parking of a seven and one-half ton truck-tractor used commercially as an integral part of the owner’s business on property zoned for residential purposes was a commercial usage prohibited by the zoning ordinance).

It is undisputed that Defendant lives in his home and that this is the primary use of his property in contrast to a use for business or commercial purposes. The evidence presented indicated that it is not unusual for a business contractor or truck driver who lives in the development to occasionally park a vehicle at his or her home overnight. Yet such use is certainly commercial and distinguishable from Defendant’s use only in degree, not in kind.⁷ Contrary to the Association’s position, Defendant’s use of his property does

⁷ Although not the basis for our decision, given this fact, we have serious reservations whether the Association’s position regarding commercial usage, if taken to its logical conclusion and uniformly enforced against all commercial usage in Towamensing Trails, would not work greater harm than good.

An injunction is not of right and the chancellor is not bound to make a decree which will do far more mischief and work greater injury than the loss he is asked to redress. A suitor must not only appear in a court of equity with clean hands, but he must come with reasonable promptness, in good faith, and with a just and equitable demand. ... If an injunction is prayed for where upon consideration of the whole case it ought not in good conscience to issue, a mere legal right in the plaintiff will not move the chancellor.

Gey v. Beck, 390 Pa. Super. 317, 328, 568 A.2d 672, 677 (1990) (**quoting** **Moverman v. Glanzberg**, 391 Pa. 387, 393, 138 A.2d 681, 684-85 (1958)). Additionally, “[e]nforcement may also be denied where, for example, the party seeking enforcement has himself violated a similar restriction or has acquiesced in similar violations.” **Id.** at 332 n.2, 568 A.2d at 679 n.2 (**citing** Restatement,

not violate the restrictive covenants sought to be enforced by the Association, when strictly and properly construed.

Bylaws

The Association further argues, however, that Defendant's use of his property violates the Association's bylaws which clearly and unambiguously prohibit any commercial use of the property. While we agree that Defendant's use of his property for parking eight and nine ton tractor-trailers and heavy equipment used in his excavating business is unquestionably commercial in nature, as is the use of his home for business purposes, and is therefore in violation of the language of the bylaws restricting the use of Defendant's property exclusively to residential purposes, the critical question is whether such restrictions appearing in the bylaws are enforceable against Defendant.

The bylaws are not restrictive covenants, they are not recorded, and there is no evidence that Defendant or his predecessors in title ever agreed to this restriction on the use of their property.⁸ There is no provision, authorization or statement in the Declaration, which

Property §560-61). "As a general rule, a restrictive covenant may be discharged if there has been acquiescence in its breach by others, or an abandonment of the restriction." **Vernon Township Volunteer Fire Department, Inc. v. Connor**, 855 A.2d 873, 880 (2004) (citation omitted).

⁸ The relevant bylaws for these proceedings, as previously stated, are those dated March 30, 2001. Title for both lots which Defendant now owns was conveyed by the developer prior to March 30, 2001. There is no evidence of record to establish what bylaws, if any, were in existence prior to these conveyances and, if so, what the provisions were. Nor can we determine from the evidence presented what revisions have been included in the 2001 bylaws which did not previously exist or when the language at issue in these proceedings was first inserted.

Pursuant to the Recording Act, 21 P.S. §351, a property owner must have actual or constructive knowledge of an encumbrance upon his property in order for that encumbrance to be enforced against him. **See Wolter v. Board of Supervisors of Tredyffrin Township**, 828 A.2d 1160, 1162-63 (Pa. Commw. 2003), **appeal denied**, 577 Pa. 683, 843 A.2d 1240 (2004). "[A] grantee is chargeable with notice of everything affecting his title which could be discovered by an examination of the records of the deeds or other muniments of title of his grantor." **Locust Lake Village Property Owners Association v. Wengerd**, 899 A.2d 1193, 1199 (Pa. Commw. 2006) (citations and quotation marks omitted). Because "a property owner has the duty to become aware of recorded restrictions in the chain of title," he "will be bound to such restrictions even absent actual notice." **Vernon Tp. Volunteer Fire Dept., supra** at 880.

was recorded prior to the original conveyances by the developer of what is now Defendant's property, confining the use of individually owned lots within Towamensing Trails solely and exclusively to a residential purpose. Nor does the Declaration give authority to the Association to make and enforce additional restrictions on the use of privately owned lots within the subdivision or provide notice to prospective buyers that the restrictions on the use of the property they purchase are subject to change without their consent at a date earlier than thirty years from the date the Declaration was recorded.⁹ To the contrary, the Declaration expressly states that the contracts, restrictions, easements, charges and liens to which the real property is subject and which are to be enforced by the Association, are those set forth in the Declaration. **See** Declaration, Recitals, p. 1.

In a planned community which is not subject to the Uniform Planned Community Act (the "Act"), 68 Pa. C.S.A. §§5101-5414, we know of no legal authority which allows a property owners' association to unilaterally more severely restrict or limit a property owner's use of his property than that permitted in the restrictive covenants which encumber the property.¹⁰ **Cf. Schaad v. Hotel Easton Co.**, 369 Pa. 486, 492, 87 A.2d 227, 230 (1952) ("[A] gen-

⁹ As previously noted in the text, Article XIII of the Declaration provides for an amendment process for changes to the covenants and restrictions in the Declaration. With respect to the scope of such amendments, other jurisdictions which have considered the issue impose a reasonableness standard. **See e.g., Armstrong v. Ledges Homeowners Ass'n, Inc.**, 633 S.E.2d 78, 87 (N.C. 2006) (holding that "a provision authorizing a homeowners' association to amend a declaration of covenants does not permit amendments of unlimited scope; rather, every amendment must be reasonable in light of the contracting parties' original intent") (collecting cases on issue). Moreover, "certain contractual rights between a corporation and its members cannot be destroyed by a simple amendment to the bylaws without the consent of all those concerned even where there is provision for amendment." **McCaffrey v. Pittsburgh Athletic Association**, 448 Pa. 151, 160, 293 A.2d 51, 56 (1972) (summarizing part of the holding in **Schaad v. Hotel Easton Co.**, 369 Pa. 486, 87 A.2d 227 (1952)).

¹⁰ To date, the Uniform Planned Community Act has been adopted by only two jurisdictions, Pennsylvania in 1996 and North Carolina in 1999. In pertinent part, Section 5103 of the Act, 68 Pa. C.S.A. §5103, defines a "planned community" as "[r]eal estate with respect to which a person, by virtue of ownership of an interest in any portion of the real estate, is or may become obligated by covenant, easement or agreement imposed on the owner's interest to pay any amount for real property taxes, insurance, maintenance, repair, improvement, management,

eral reservation of the power to amend the by-laws of a corporation cannot be construed as permitting the abrogation of substantial rights of property of the shareholders or the alteration of their contractual relations **inter se**, but only the changing of regulations governing the administration and conduct of the corporation's internal affairs; provisions affecting property or contractual rights cannot be repealed or altered without the consent of the parties whose interests are thereby impaired.") (emphasis added); **see also, Moosic Lakes Club v. Gorski**, 402 Pa. 640, 645, 168 A.2d 343, 346 (1961) (applying **Schaad** to the property rights, as opposed to the membership rights, of non-profit organization members). With respect to individual lots in a private residential subdivision whose use is limited by a recorded set of restrictive covenants and whose owners, by virtue of their ownership interest, automatically become members in a property owners' association clothed with the authority to enforce the covenants, the relationship between the property owners and the association is contractual. As such, the powers of the association to enforce the restrictions may not exceed the authority granted to it by the covenants. Cf. **Armstrong v. Ledges Homeowners Association, Inc.**, 633 S.E.2d 78, 86 (N.C. 2006) ("In a community that is not subject to the North Carolina Planned Community Act, the powers of a homeowners' association are contractual and are limited to those powers granted to it by the declaration.").¹¹

administration or regulation of any part of the real estate other than the portion or interest owned solely by the person." Under the Act, "common facilities" are defined as "[a]ny real estate within a planned community which is owned by the association or leased to the association. The term does not include a unit." The term "unit" is further defined in this same section of the Act as "[a] physical portion of the planned community designated for separate ownership or occupancy, the boundaries of which are described [in the declaration]." As defined by the Act, Towamensing Trails is a "planned community."

¹¹ We note here for emphasis the narrowness of this holding limited as it is to the use of privately owned lots in the development. Restrictive covenants include those which limit land use and establish set back and side yard requirements. **See Jones v. Park Lane for Convalescents, Inc.**, 384 Pa. 268, 272, 120 A.2d 535, 538 (1956) ("Restrictions limiting the right of the owner to deal with his land as he may desire fall naturally into two distinct classes, the one consisting of restrictions on the type and number of buildings to be erected thereon, and the other on the subsequent use of such buildings.").

This limitation on the Association's authority is not circumvented because the Association is organized as a nonprofit corporation whose members are bound by its bylaws, duly enacted, including amendments lawfully made from time to time, and those administrative rules and regulations adopted pursuant thereto, 15 Pa. C.S.A. §5505; as a nonprofit corporation, the bylaws of the Association are required to be consistent with the law, which, under the circumstances of this case, requires that the bylaws be consistent with the Declaration. **Cf. Armstrong, supra** at 82.¹² We turn next to the applicability of the Uniform Planned Community Act.

Uniform Planned Community Act

The Uniform Planned Community Act was enacted in this Commonwealth on December 19, 1996, with an effective date of February 2, 1997. **See** 68 Pa. C.S.A. §5102. The Act contemplates the creation of planned communities pursuant to its terms which include that any restriction on the use or enjoyment of a privately owned unit within the development, if not already appearing in another recorded document, must be disclosed in a written declaration which is required to be acknowledged and recorded with the same formality as a deed. **See** 68 Pa. C.S.A. §§5201 and 5205(10). The Act further recognizes that except to the extent inconsistent with its provisions, the law of real property supplements its provisions. **See** 68 Pa. C.S.A. §5108.

They are to be distinguished from affirmative covenants, such as those providing for the payment of dues and assessments, which impose affirmative duties and may also run with the land. **See Birchwood Lakes Community Association, Inc. v. Comis**, 296 Pa. Super. 77, 83, 442 A.2d 304, 307 (1982).

A further distinction exists between restrictions limiting an owner's conduct on his own property and that on property owned by the Association. At this point, we are not addressing the use of roads and common facilities owned by the Association for the benefit of all lot owners and whose usage we find is subject to reasonable regulation by the Association consistent with the property rights of lot owners. **See infra** note 13.

¹² As a nonprofit corporation, the Association is governed by the Pennsylvania Nonprofit Corporation Law, 15 Pa. C.S.A. §§5101-6162. Section 5504(a) of the Nonprofit Corporation Law permits the bylaws to contain "any provisions for managing the business and regulating the affairs of the corporation" provided they are not "**inconsistent with law** or the articles." 15 Pa. C.S.A. §5504(a) (emphasis added).

Although the Act does not apply generally to planned communities created prior to its effective date, Towamensing Trails being within this category, amendments to restrictions previously imposed on the use of privately owned units within the development which occur after the effective date of the Act—regardless of when the development was formed—must be unanimously approved by all unit owners affected. See 68 Pa. C.S.A. §§5102(b) (relating to retroactivity) and 5219(d) (relating to amendment of declaration); see also, **Shorewood West Condominium Ass'n v. Sadri**, 992 P.2d 1008, 1009 (Wash. 2000) (holding that “because the property rights of individual condominium unit owners are creations of a condominium statute and are subject to that statute, restrictions on leasing adopted after the owners purchased their unit may be applied to such owners if the restrictions are in accordance with the statute” and also that “a restriction on use which appears in a condominium apartment owners association’s bylaws but not in its declaration is not in accordance with the [enabling statute]” and is therefore not enforceable). These provisions for changing the use to which privately owned property can be placed reinforce not only the fundamental common law principle that vested property rights in real estate cannot be privately altered without the consent of the property owner or its equivalent—that the change be made in accordance with some term, condition or covenant under which the property was acquired—but, as applied to this case, mandate that to the extent the Association’s 2001 bylaws impose new restrictions on the use of subdivision lots which did not previously exist and which arose since the effective date of the Act, they are invalid absent proof that the Defendant or his predecessors in title consented to their implementation.¹³

¹³ The right of a property owners’ association, as the fee owner of common properties and facilities, including roads, to control the use of these facilities and to maintain them for the mutual use and benefit of all property owners is not in dispute. See **Meadow Run and Mountain Lake Park Association v. Berkel**, 409 Pa. Super. 637, 640, 598 A.2d 1024, 1026 (1991) (quoting **Sea Gate Association v. Fleischer**, 211 N.Y.S.2d 767, 778-79 (1960)), appeal denied, 530 Pa. 666, 610 A.2d 46 (1992). Under Pennsylvania law, “the owner of land, who grants a right of way over it, conveys nothing but the right of passage, and reserves all incidents of ownership not granted.” **Mercantile Library Co. of Philadelphia v. Fidelity Trust Co.**, 235 Pa. 5, 15, 83 A. 592, 595 (1912). As

CONCLUSION

Central to the common law of private communities, as well as those governed by the Uniform Planned Community Act, is the primacy of the underlying documents on which the community is founded: the mutual and reciprocally beneficial restrictive covenants in the one case, and in the other, the statutory declaration. Under neither can the powers of the community association exceed those established by the founding documents; under neither can the association impose greater restrictions on the use of private units within the development than that authorized by these governing instruments. In accordance with this central tenet, to the extent the bylaws of Towamensing Trails impose greater restrictions on the use of private property within the development than that provided or permitted by the restrictive covenants of record, they are invalid and unenforceable. As applied to this case, we have determined that the bylaw provisions restricting the use of privately owned property within Towamensing Trails exclusively and solely to residential purposes is greater than that appearing in the protective covenants for the development.

We have also determined that this limitation on the ability to regulate privately owned property does not extend to common properties and facilities owned by the Association for the benefit of the community as a whole and in which the property owners for Towamensing Trails hold easements and access rights. As to these properties and, in particular, as to the use of the develop-

the fee owner for this property, the Association clearly retained the right under both common-law principles of real estate and under its declaration, bylaws, and rules and regulations to enjoin the Defendant from parking his vehicles within the right-of-way on which his property fronts, and thereby impeding ingress and egress on this private road. **See Adams v. Ward**, 3 D. & C. 3d 194, 195 (1977) and 68 Pa. C.S.A. §5302(a)(6); **see also, Billig v. Skvarla**, 853 A.2d 1042, 1051 (Pa. Super. 2004) (noting the propriety of equitable proceedings to enjoin the owner of an easement from parking vehicles on a private road which impede the use of the easement for ingress and egress). Here, the evidence produced at the time of hearing convinces us that Defendant does in fact, at times, park his vehicles on the Association's roads in violation of Sections X-A(7) and (12) of the Association's Rules of Conduct for the location of parking motorized vehicles on the Association's property. We further conclude that the Association's rules and regulations with respect to parking are reasonable and do not unduly interfere with Defendant's use of his easement rights in the development's roads.

ment roads, the Association has the legal right and power to set and enforce reasonable regulations regarding parking and weight limitations. We further find nothing in the evidence presented in this case to warrant a finding that the parking and weight limitations imposed by the Association are other than a proper exercise of its powers, enforceable in accordance with their terms, against the Defendant, as well as the other lot owners within the Towamensing Trails subdivision.¹⁴

¹⁴ As a final matter, we address the Association's claim for attorney fees. In general, "the parties to litigation are responsible for their own counsel fees and costs unless otherwise provided by statutory authority, agreement of the parties, or some other recognized exception." **Wrenfield Homeowners Association, Inc. v. DeYoung**, 410 Pa. Super. 621, 626, 600 A.2d 960, 962 (1991) (quotation marks and citation omitted). Because the Association's Declaration does not authorize an award of attorney fees to enforce restrictive covenants regarding the use of an owner's property and because we believe it would be inappropriate under the circumstances of this case to make an award of attorney fees under the Act, the Association's claim for attorney fees will be denied.

The Declaration expressly authorizes the Association to levy and collect from its members assessments and charges devoted to the use and enjoyment of the common properties, and further subjects delinquent members to the payment of attorney fees incurred by the Association to enforce the collection of these assessments and charges. **See** Declaration, Article VI, Sections 1 and 10. This authority, however, does not extend to the enforcement of other covenants and restrictions contained in the Declaration, in particular to those governing the use of an owner's property, the subject of these proceedings.

In contrast to the Declaration, under the caption "Collection of Charges," the bylaws authorize an award of attorney fees in any legal action commenced by the Association to enforce "other obligations of members under the subdivision legal documents." **See** Bylaws, Article VII, Section D. Whether this language is intended to encompass restrictions on use imposed by the bylaws themselves is unclear. Even if this were the case, to the extent we have determined that the restrictions on the use of private property created by the bylaws exceeds that permitted by law, it would be inequitable to award attorney fees.

Under Section 5315 of the Act, reasonable costs and expenses of the Association, including legal fees, incurred to enforce the provisions of the Declaration, bylaws, and rules and regulations are enforceable as an assessment against the property unit and are to be included in any judgment or decree in favor of the prevailing party. **See** 68 Pa. C.S.A. §5315(a), (g). This section applies retroactively to those planned communities created before the effective date of the Act and is therefore inclusive of Towamensing Trails. **See** 68 Pa. C.S.A. §5102(b). However, given our disposition of the competing claims of each party in which neither has fully prevailed, no separate award of attorney fees will be made.

**IN RE: TERMINATION OF PARENTAL RIGHTS
of G.J.S. in and to A.J.M., a Minor**

Civil Law—Parental Rights—Involuntary Termination—Incarceration

1. The right of natural parents to decide how their children should be raised is protected by the Fourteenth Amendment. This right, as with any constitutional right, is subject to limitations and will yield to the child's right to have proper parenting and to be raised in a permanent, healthy, safe environment if the parents are found by clear and convincing evidence to have failed to fulfill their fundamental duties as parents.
2. In Pennsylvania the following two questions must be answered in the affirmative before parental rights can be terminated: (1) has the petitioner proven one or more grounds for termination as set forth in Section 2511(a) of the Adoption Act; and (2) is the termination of parental rights in the best interest of the child.
3. Section 2511(a) of the Adoption Act sets forth certain minimum standards of care which must be provided for a child's physical, mental, and emotional well-being before parental rights can be terminated. Section 2511(a)(1) examines directly the parent's conduct; Section 2511(a)(2) measures the effect of the parent's conduct on the child; Section 2511(a)(5) requires for termination that the child have been removed from the parent's care for a period of at least six months with no reasonable likelihood of remedying the conditions which led to removal within a reasonable time period.
4. Parents have an affirmative obligation to act in good faith to fulfill their parental duties. They must utilize all available resources and must exercise reasonable firmness to provide for the needs of their child and to maintain a positive parent/child relationship. Parental duties are defined by the circumstances and needs of the child.
5. Whether a parent's actions are sufficient to meet his parental responsibilities is measured against what would be expected of an individual in circumstances which the parent under examination finds himself. A parent is not relieved of parental duties simply because he is incarcerated. In order to avoid termination of his parental rights, a parent in prison who fails to perform parental duties has the burden of producing evidence that he used all available resources to the best of his ability to maintain a parental relationship.
6. The best interest and welfare of a child who has been removed from his family requires that positive family relationships be developed as early as possible. To accomplish this objective, the Adoption and Safe Families Act requires concurrent permanency planning: exerting reasonable efforts over a reasonable time period (fifteen of the most recent twenty-two months) to reunify the child with his natural family, as well as planning to terminate parental rights and for adoption into a new family in the event reunification cannot be timely effected.

7. Termination of a father's parental rights in his son is justified and will be granted where a twelve-year-old child has been in foster care for more than half his life; where the father has not provided for his son's material and emotional needs, has not maintained a real presence in his son's life, and has never been actively involved on a consistent, meaningful basis with his son; where the father's failure to provide for the child's basic needs has resulted in such needs having to be met, by necessity, by social services; where the goal in dependency proceedings has been changed from reunification to adoption; where a close, positive relationship has never existed between the child and his father and there is no reasonable likelihood that such a relationship will ever exist; and where the child has developed a stable, secure and beneficial relationship with his foster father who desires to adopt him.

NO. 06-9428

CAROLE J. WALBERT, Esquire—Counsel for Carbon County Children & Youth Services.

MICHAEL P. GOUGH, Esquire—Counsel for G.S.

MARK E. COMBI, Esquire—Counsel for A.J.M.

MEMORANDUM OPINION

NANOVIC, P.J.—October 31, 2007

PROCEDURAL AND FACTUAL BACKGROUND

Before us is Carbon County Children & Youth Services' ("Children & Youth") petition to terminate the parental rights of G.J.S. ("Father") in his son, A.J.M. A.J.M. was born on July 4, 1995. He is currently in the sixth grade and is, by all accounts, an intelligent child. A.J.M. has been in placement through Children & Youth since June 14, 2001.

At the time A.J.M. entered placement, he was five years old and his natural parents, Father and T.L.M. ("Mother"), were either unable or unwilling to care or provide for him. Father was in prison at the time of A.J.M.'s initial placement and had little, if any, prior involvement in A.J.M.'s life. Mother, due to difficulties with alcohol and drugs, was equally unable to supervise and care for her son. She died from drug and alcohol-related causes on July 20, 2001, at the age of twenty-five.

For most of the time A.J.M. has been in placement, Father has been in prison. Father's first release from prison following A.J.M.'s initial placement occurred in November 2001. Parole violations, many involving drugs, as well as several new offenses, resulted in

additional periods of incarceration. These include from July 2002 until December 2003, from August 2004 until December 2004, from August 2005 until in or about November 2005, and from November 2005 until the present time. Father's current sentence will be completed in September 2008.

At no time during A.J.M.'s life has Father provided for his son's financial support, either directly or indirectly. He has never provided a home for A.J.M., clothes, or food. He has never been active in A.J.M.'s education, or even inquired as to his progress in school. He has never provided for A.J.M.'s health needs.¹ He has never provided for A.J.M.'s emotional and social well-being. The most that can be said is that during those periods in 2002 and 2004 when Father was not in prison, he consistently attended visits with his son arranged through Children & Youth. These visits occurred every other week and varied from one to four hours in duration. The visits, at first supervised, later became unsupervised.

Having lost his mother when he was barely six years old, A.J.M. found himself alone and scared. The visits A.J.M. received from his father opened the possibility of being raised by a member of his family, something A.J.M. desperately desired. When A.J.M.'s father told him that drugs were no longer a part of his life, that he had reformed and would no longer be returning to prison, that nothing was more important to him than his son, and that the two would soon be living together as a family, A.J.M. believed him. A.J.M. was convinced that his father was genuinely interested in his future and would become an integral part of his life.

By the time Father returned to prison in August 2004, A.J.M.'s hopes of some day living with his father were shattered. As described by his caseworker, A.J.M. was sick and tired of his father's false promises; he felt betrayed and abandoned. A.J.M. testified that he needed someone to look up to and to help him, and that his father was never there. Once again A.J.M. was separated from his family. He was hurt, angry, and bitter. That he had these feelings and was unable to suppress them—throwing temper tantrums

¹ A.J.M. has been diagnosed with ADHD and ADD; he currently sees a therapist once a week for anger management counseling and attends monthly appointments with a psychiatrist from whom he receives prescriptions for psychotropic medication.

and becoming disruptive and unruly in his foster home—was not surprising. Unfortunately, the foster parents with whom A.J.M. had been staying for more than three years were unable to cope with his behavioral outbursts and requested that he be removed from their home. A.J.M. was transferred to a residential treatment facility on March 7, 2005; he remained there until June 30, 2006.

Since early 2005, A.J.M. has wanted nothing to do with his father: he has opposed further visits, and has refused to accept phone calls or receive letters from his father. A.J.M. does not want to see or speak with his father. Since June 30, 2006, he has resided in a therapeutic foster home with his current foster father, M.N., and J.E., another male foster child, who is seven years old. A.J.M. has adjusted well to this new home.

While in prison, Father has asked for photographs of A.J.M. and, at times, sent letters and made phone calls, although the number and frequency of both is unclear from the record. During the six-month period immediately preceding the filing of Children & Youth's petition, Father wrote one or two letters to A.J.M., which A.J.M. refused to read. During this time, Father did not telephone, did not see A.J.M. other than at court proceedings, and took no other steps to maintain a relationship with A.J.M.

None of the goals which Children & Youth originally set in 2001 for Father to gain custody of his son have been fully met: that Father participate in regularly scheduled visits with A.J.M.; that Father establish and maintain suitable housing; that Father attend and successfully complete parenting classes; and that Father be evaluated and successfully treated for his drug addiction. Father's visits with A.J.M., while intended to found a relationship upon which to build, were never able to accomplish this goal, in part, because of Father's frequent returns to prison. Father never obtained suitable housing, never provided Children & Youth with proof that he completed parenting classes begun by him, and never accepted or sought treatment for his drug addiction. Given Father's history of drug abuse and its effects on his life; his ongoing refusal to abide by the laws of society, in consequence of which he has been repeatedly imprisoned and is there now; and his long-standing failure to establish or maintain a relationship with his son which has resulted in their estrangement, it is clear that a close, lasting

relationship between A.J.M. and his father will not occur in the near future, if ever.

Children & Youth's petition was filed on December 26, 2006. The statutory bases for termination set forth in the petition are those authorized by 23 Pa. C.S.A. §2511(a)(1), (2) and (5). A hearing on the petition was held on June 19, 2007. At this hearing, A.J.M. was represented by court-appointed counsel, as was Father.

DISCUSSION

The right of natural parents to decide the care, custody and management of their children is a fundamental liberty interest protected by the Fourteenth Amendment. **Santosky v. Kramer**, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394-95, 71 L.Ed.2d 599 (1982). "As with any constitutional right, however, it is circumscribed by duties and when the fulfillment of duties and responsibilities upon which the right is founded are not implemented, the right must fail." **In Interest of Lilley**, 719 A.2d 327, 329 (Pa. Super. 1998). Consequently, "[a] parent's basic constitutional right to the custody and rearing of his or her child is converted, upon the failure to fulfill his or her parental duties, to the child's right to have proper parenting and fulfillment of his or her potential in a permanent, healthy, safe environment." **In re B., N.M.**, 856 A.2d 847, 856 (Pa. Super. 2004), **appeal denied**, 872 A.2d 1200 (Pa. 2005). In recognition of the importance of the right at stake, termination of parental rights may occur only when the standard of clear and convincing evidence is met, and even then, only when the court's findings establish a clear necessity to justify this conclusion. **In Interest of Lilley**, 719 A.2d at 329; **see also, Santosky v. Kramer**, **supra** at 747-48, 102 S.Ct. at 1391-92 (holding that before parental rights can be severed completely and irrevocably, "due process requires that the State support its allegations by at least clear and convincing evidence").²

In deciding whether to terminate parental rights, the court must answer two basic questions: (1) has the petitioner proven one

² "The standard of 'clear and convincing' evidence is defined as testimony that is so clear, direct, weighty, and convincing as to enable the trier of fact to come to a clear conviction, without hesitance, of the truth of the precise facts in issue." **In re G.P.-R.**, 851 A.2d 967, 973 (Pa. Super. 2004); **see also, In Interest of Lilley**, 719 A.2d 327, 330-31 (Pa. Super. 1998).

or more grounds for termination as set forth in Section 2511 of the Adoption Act, 23 Pa. C.S.A. §2511 (a)? and (2) is the termination of parental rights in the best interest of the child? **In re Adoption of R.J.S.**, 901 A.2d 502, 508 (Pa. Super. 2006). The focus of the first inquiry is on the conduct of the parent; that of the second on the child, specifically on his “developmental, physical and emotional needs and welfare.” **Id.**; 23 Pa. C.S.A. §2511(b).

These two questions must be answered in the order presented.³ In Pennsylvania, before the parent-child relationship can be involuntarily terminated, the court must be persuaded by clear and convincing evidence that the parent’s conduct meets one or more statutory grounds for termination and that the child’s needs and welfare will be best served by terminating parental rights. **In re C.P.**, 901 A.2d 516, 520 (Pa. Super. 2006). Only if the parent’s conduct warrants termination does the focus of the inquiry shift to the needs and welfare of the child, as determined under the standard of the child’s best interests. **In re Adoption of R.J.S., supra** at 508. “The needs and welfare of the child are a discrete consideration to be determined only after the statutory requirements for termination have been met.” **In re B.L.L.**, 787 A.2d 1007, 1014 (Pa. Super. 2001); **see also, In the Interest of Coast**, 385 Pa. Super. 450, 479, 561 A.2d 762, 776 (1989) (en banc) (Beck, J., concurring) (“Needs and welfare is not a concept that fosters

³ This sequence has constitutional significance; a State cannot constitutionally terminate a parent’s rights without showing parental unfitness and “for the sole reason that to do so was in the children’s best interest.” **In the Interest of Coast**, 385 Pa. Super. 450, 484, 561 A.2d 762, 779 (1989) (en banc) (Tamilia, J., concurring and dissenting), **appeal denied**, 525 Pa. 593, 575 A.2d 560 (1990); **see also, Santosky v. Kramer**, 455 U.S. 745, 760 n.10, 102 S.Ct. 1388, 1398 n.10, 71 L.Ed.2d 599 (1982) (**citing Quilloin v. Walcott**, 434 U.S. 246, 255, 98 S.Ct. 549, 554, 54 L.Ed.2d 511 (1978) (“We have little doubt that the Due Process Clause would be offended ‘[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest,’” **quoting Smith v. Organization of Foster Families**, 431 U.S. 816, 862-63, 97 S.Ct. 2094, 2119, 53 L.Ed.2d 14 (1977) (Stewart, J., concurring in judgment))); **see also, In Interest of Lilley, supra** at 329 (“[O]nce intervention by the State has occurred on legitimate due process grounds, [the child] stands in a different relationship to the parents than a child in an intact family whose rights are protected and fulfilled by his parents.”).

parental termination. It is a concept that inhibits it.”), **appeal denied**, 525 Pa. 593, 575 A.2d 560 (1990).

Because of the importance of the continuity of relationships in a child’s life, “[o]ne major aspect of the needs and welfare analysis concerns the nature and status of the emotional bond between the parent and child.” **In re Adoption of R.J.S., supra** at 508. This examination requires an evaluation both of the child’s relationship with his parents and the parents’ demonstration of love, protection, and concern for the child. When close parental ties or emotional bonds exist between a parent and child, the effect a termination of parental rights will have on the child must be considered. **In re Termination of C.W.S.M.**, 839 A.2d 410, 416 (Pa. Super. 2003).

The Law: Statutory Grounds for Termination

In this Commonwealth, the termination of parental rights is controlled by statute. As is relevant to this case, Section 2511(a) and (b) of the Adoption Act sets forth the following criteria for involuntary termination:

§2511. Grounds for involuntary termination

(a) General rule.—The rights of a parent in regard to a child may be terminated after a petition filed on any of the following grounds:

(1) The parent by conduct continuing for a period of at least six months immediately preceding the filing of the petition either has evidenced a settled purpose of relinquishing parental claim to a child or has refused or failed to perform parental duties.

(2) The repeated and continued incapacity, abuse, neglect or refusal of the parent has caused the child to be without essential parental care, control or subsistence necessary for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent.

* * *

(5) The child has been removed from the care of the parent by the court or under a voluntary agreement with an agency for a period of at least six months, the conditions which led to the removal or placement of the child continue to exist, the parent

cannot or will not remedy those conditions within a reasonable period of time, the services or assistance reasonably available to the parent are not likely to remedy the conditions which led to the removal or placement of the child within a reasonable period of time and termination of the parental rights would best serve the needs and welfare of the child.

* * *

(8) The child has been removed from the care of the parent by the court or under a voluntary agreement with an agency, 12 months or more have elapsed from the date of removal or placement, the conditions which led to the removal or placement of the child continue to exist and termination of parental rights would best serve the needs and welfare of the child.

(b) Other considerations.—The court in terminating the rights of a parent shall give primary consideration to the developmental, physical and emotional needs and welfare of the child. The rights of a parent shall not be terminated solely on the basis of environmental factors such as inadequate housing, furnishings, income, clothing and medical care if found to be beyond the control of the parent. With respect to any petition filed pursuant to subsection (a)(1), (6) or (8), the court shall not consider any efforts by the parent to remedy the conditions described therein which are first initiated subsequent to the giving of notice of the filing of the petition.

23 Pa. C.S.A. §2511. Proof of any one of these grounds, together with satisfying the requirements of Section 2511(b), is sufficient for termination. **In re Adoption of R.J.S., supra** at 508 n.3.

Section 2511(a) defines the minimum standards of care which must be provided for a child's physical, mental, and emotional well-being before parental rights may be terminated. Section 2511(a)(1) defines a standard of abandonment; that of Section 2511(a)(2) one of neglect, regardless of fault; and that of Section 2511(a)(5) one of placement where no reasonable likelihood of reunification exists. **See e.g., In the Interest of Coast, supra** at 459, 561 A.2d at 766-67. Termination pursuant to Section 2511(a)(1) requires that for a period of at least six months prior to the filing of the petition, the parent's conduct demonstrates a settled purpose to relinquish

parental rights or the parent has refused or failed to perform parental duties. **In re Adoption of M.E.P.**, 825 A.2d 1266, 1272 (Pa.Super. 2003).⁴

Under Section 2511(a)(2) termination requires: (1) repeated and continued incapacity, abuse, neglect or refusal; (2) such incapacity, abuse, neglect or refusal has caused the child to be without essential parental care, control or subsistence necessary for his physical or mental well-being; and (3) the causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied. **In re Adoption of M.E.P.**, *supra* at 1272. “Unlike Section 2511(a) (1), Section 2511(a)(2) does not emphasize the parent’s refusal or failure to perform parental duties. Rather, its emphasis is on the child’s present and future need for essential parental care, control or subsistence necessary for his physical or mental well-being.” **In re Adoption of M.J.H.**, 348 Pa. Super. 65, 76-77, 501 A.2d 648, 654 (1985) (citation and quotation marks omitted), **appeal denied**, 514 Pa. 636, 522 A.2d 1105 (1987).

With respect to Section 2511(a)(5), termination requires that (1) the child has been removed from parental care for at least six months; (2) the conditions which led to the child’s removal or placement continue to exist; (3) the parents cannot or will not remedy the conditions which led to removal or placement within a reasonable period of time; (4) the services reasonably available to the parents are unlikely to remedy the conditions which led to removal or placement within a reasonable period of time; and (5) termination

⁴ Although this six-month period is the most critical period to be examined when considering any petition filed pursuant to subsection (a)(1), we must consider “the whole history of a given case and not mechanically apply the six-month statutory provision.” **In re B., N.M.**, 856 A.2d 847, 855 (Pa. Super. 2004). “[P]arents who fail to meet their parental obligations for a six-month period do not automatically forfeit their parental rights.” **In re Adoption of Dale A., II**, 453 Pa. Super. 106, 114, 683 A.2d 297, 301 (1996). Additionally,

[o]nce the evidence establishes a failure to perform parental duties or a settled purpose of relinquishing parental rights, the court must engage in three lines of inquiry:

- (1) the parent’s explanation for his or her conduct;
- (2) the post-abandonment contact between the parent and child; and
- (3) consideration of the effect of termination pursuant to Section 2511(b).

In re C.M.S., 832 A.2d 457, 464-65 (Pa. Super. 2003) (citation omitted).

of parental rights would best serve the needs and welfare of the child. **In re Adoption of M.E.P., supra** at 1273-74.⁵

Whether parental duties have been fulfilled under Section 2511(a)(1) and (2) requires an examination of what is required of a parent.

The Supreme Court has defined [this] parental duty as follows:

There is no simple or easy definition of parental duties. Parental duty is best understood in relation to the needs of a child. A child needs love, protection, guidance, and support. These needs, physical and emotional, cannot be met by a merely passive interest in the development of the child. Thus, this court has held that the parental obligation is a positive duty which requires affirmative performance.

This affirmative duty encompasses more than a financial obligation; it requires continuing interest in the child and a genuine effort to maintain communication and association with the child.

Because a child needs more than a benefactor, parental duty requires that a parent ‘exert himself to take and maintain a place of importance in the child’s life’.

In re C.M.S., 832 A.2d 457, 462 (Pa. Super. 2003) (**citing In re Burns**, 474 Pa. 615, 379 A.2d 535 (1977)). See **In re: G.P.-R.**, 851 A.2d 967, 976 (2004) (internal citation omitted). Parental duty requires that the parent act affirmatively with good faith interest and effort, and not yield to every problem, in order to maintain the parent-child relationship to the best of his or her ability, even in difficult circumstances. **In re Adoption of Dale A., II**, 453 Pa. Super. 106, 683 A.2d 297,

⁵ Unlike Section 2511(a)(5), Section 2511(a)(8) of the Adoption Act requires only that Children & Youth show: “(1) that the child has been removed from the care of the parent for at least twelve (12) months; (2) that the conditions which led to the removal or placement of the child still exist; and (3) that termination of parental rights would best serve the needs and welfare of the child.” Termination under this subsection does not require evaluating a parent’s willingness or ability to remedy the conditions that initially led to placement, nor does it require an evaluation of the availability or efficiency of Children & Youth Services. **In re Adoption of R.J.S.**, 901 A.2d 502, 511 (Pa. Super. 2006).

302 (1996) (internal citations omitted). A parent must utilize all available resources to preserve the parental relationship, and must exercise reasonable firmness in resisting obstacles placed in the path of maintaining the parent-child relationship. **In re C.M.S., supra** at 462 (**citing In re Shives**, 363 Pa. Super. 225, 525 A.2d 801 (1987)). Parental rights are not preserved by waiting for a more suitable or convenient time to perform one's parental responsibilities while others provide the child with his or her physical and emotional needs. **In re D.J.S., supra** at 287.

Where a parent is incarcerated, the fact of incarceration does not, in itself, provide grounds for the termination of parental rights. **Id.** at 286. However, a parent's responsibilities are not tolled during incarceration. **Id.** The focus is on whether the parent utilized resources available while in prison to maintain a relationship with his or her child. **In re the Adoption of Dale, A., II, supra** at 302. An incarcerated parent is expected to utilize all available resources to foster a continuing close relationship with his or her children. **In the Interest of A.P.**, 692 A.2d 240, 245 (Pa. Super. 1997) (internal citation omitted).

In re B., N.M., supra at 855; see also, **In re Adoption of M.J.H., supra** at 80, 501 A.2d at 656 ("Section 2511(a)(2), focusing as it does on the needs of the child, requires us to examine, not the **fact** of a parent's incarceration, but its **effects** on the child.") (emphasis in original); **In the Interest of Coast, supra** at 460, 561 A.2d at 767 (explaining with respect to Section 2511(a)(2)'s predecessor that "judicial inquiry necessarily looks at whether the needs of the child, both physical and emotional, are being served, for the purpose of determining whether or not the parent is performing his function").

Being a parent requires more than being someone whose existence and identity is known to the child. It requires taking an interest and being involved in the child's life, and providing the child with a source of security and stability to which he can turn for advice and assistance, by someone who the child knows is genuinely concerned for his well-being, can be trusted, and will protect and love him unconditionally. Parental duties are defined by the circumstances and needs of the child, and whether they

have been fulfilled is determined by how the parent responds to those circumstances and needs.

A parent must be active, not passive, in maintaining a real presence in his child's life, and if he has failed to do so, before such conduct will be excused by obstacles which he contends have interfered with the exercise of his parental rights, he must demonstrate "reasonable firmness" by using those means available to him in attempting to overcome such limitations. **In re Adoption of Dale A., II**, 453 Pa. Super. 106, 115, 683 A.2d 297, 301 (1996). "Parental duty requires that the parent not yield to every problem, but must act affirmatively, with good faith interest and effort, to maintain the parent-child relationship to the best of his or her ability, even in difficult circumstances." **Id.** at 117, 683 A.2d at 302 (citations omitted). "[A]dequate parenting requires action as well as intent." **In re A.L.D.**, 797 A.2d 326, 340 (Pa. Super. 2002) (citations and quotation marks omitted). An intent or promise to act in the future is insufficient. "All circumstances must be considered when analyzing a parent's performance of parental obligations in a proceeding for termination of parental rights; the parent's performance must be measured in light of what would be expected of an individual in circumstances which the parent under examination finds herself." **In re: Adoption of Sabrina**, 325 Pa. Super. 17, 23, 472 A.2d 624, 627 (1984).

Factual Basis for Termination

In this case, Children & Youth has proven that Father has never provided for his son's financial, educational, medical or emotional needs. During the first five years of A.J.M.'s life, no relationship was established between him and his father. After Mother's death, Father called occasionally, sent several letters, and gave Christmas gifts in 2005 and 2006. He also began a schedule of planned visits which ended when he was in prison and which never matured into a positive, sound, or meaningful relationship with his son. Father has never truly assumed the role of parent and caretaker to A.J.M.; he has never maintained a continuing presence in his son's life.

During the six month period immediately preceding the filing of Children & Youth's petition—with the exception of one or two letters and Christmas gifts in 2006—Father has presented no evidence of any contact made by him or attempted to be made by

him. There can be no question that during this period and before, A.J.M. was without essential parental care, control, and subsistence provided by Father. For more than two years before the filing of the petition, A.J.M. has been solely dependent on Children & Youth and his foster family for all of his basic physical, mental, and emotional needs. Father's consistent refusal to abide by the terms and conditions of his release, and his past conduct, make evident that the conditions and cause of his neglect and failure to provide care will not be remedied by him. Father has not addressed his drug-related problems and has not exhibited the necessary resolve, tenacity, or firmness to foster a parental relationship with his son.

Here, the evidence presented by Children & Youth of Father's minimal involvement in A.J.M.'s life is essentially undisputed. G.J.S.'s contacts with his son have been infrequent and insubstantial. Though Father's imprisonment explains, in part, this minimal contact, Father has failed to explain why he has not been more active in A.J.M.'s life, or to present any evidence to support a finding that he has satisfied his parental obligations or maintained a relationship with his son "to the best of his ability, even in difficult circumstances." **In re E.M.**, 908 A.2d 297, 306 (Pa. Super. 2006). The burden of producing evidence that those resources available to maintain a close parental relationship have been utilized is upon the parent in prison. **Adoption of Baby Boy A. v. Catholic Social Services**, 512 Pa. 517, 521 n.5, 517 A.2d 1244, 1245 n.5 (1986).⁶

Father has not proven that his failure to provide financial support, to communicate with his son, or to keep informed of his son's progress was beyond his control. Father presented no evidence regarding his earnings or financial circumstances, correspondence he sent to his son and when, or any telephone contacts he attempted to make since his son's placement on June 30, 2006. He has not shown whether he contacted prison authorities to schedule visits with his son, or whether any rules or regulations of the prison where he is housed prevent visitation. Nor has Father presented any evidence of the existence or non-existence of family members or friends, of

⁶ Significantly, following his parole in November 2001, the cause of Father's subsequent imprisonment and separation from his son was the direct result of personal decisions made by him. If anything, the barriers of which Father complains were created by him. Moreover, during one period of Father's release from prison, Father was employed and paid support for another child, but not for A.J.M.

prison counselors or social service agencies, or of legal resources available to him, inside or outside of the prison system, which he used, or may have attempted to use, in order to develop, maintain, or encourage a consistent, meaningful relationship with his son. Father has totally failed to identify what resources were available to him while he was in prison or to prove that he exercised "reasonable firmness" in attempting to form or maintain a bond with A.J.M. Father's evidence is void of any committed effort to "take and maintain a place of importance in [A.J.M.'s] life."

Father has had more than twelve years to establish a relationship with his son and is no closer now than he was when his son was first put in placement to achieving this goal. Father's plea for more time is disingenuous and untimely; there is no evidence that Father ever provided or can provide a suitable home and stable family life for his son. **Cf. In re Termination of C.W.S.M., supra** at 421 ("[A] child's life, happiness and vitality simply cannot be put on hold until the parent finds it convenient to perform parental duties.").

Father has done nothing to change the conditions which originally led to A.J.M.'s placement in foster care. He has failed to do what would be expected of a reasonable person to maintain an active relationship and bond with his son. Under the circumstances, we conclude that Children & Youth has met both its burden of persuasion and burden of going forward under 23 Pa. C.S.A. §2511(a)(1) and (2).

Children & Youth has also proven by the requisite standard those facts necessary to support termination under Section 2511 (a) (5): (1) that A.J.M. has been removed from the care of his father for at least six months; (2) that the conditions which led to his removal or placement still exist; (3) that Father cannot or will not remedy those conditions within a reasonable period of time; (4) that the services or assistance reasonably available to Father have not and are unlikely to remedy the conditions which led to the removal and placement of his son within a reasonable period of time;⁷ and

⁷ As previously stated, Father has been continuously in prison since November 2005 and is expected to be confined there until August 2008, a period of almost three years. Given this length of confinement and the reasons underlying A.J.M.'s adjudication of dependency, there are no services or assistance which Children

(5) that termination of Father's parental rights will best serve the needs and welfare of his son.⁸

Effect of Termination: Needs and Welfare Analysis

We are also convinced that termination of Father's parental rights is in A.J.M.'s best interests. In reaching this conclusion, we do not rely solely on those material or environmental factors which have, to some extent, been beyond Father's control while in prison.

A.J.M. is now twelve years of age. He has been in placement for more than half of his life. During this time, Father has not only failed to provide for A.J.M.'s material needs—adequate housing, clothing, food, and medical care—but also failed to provide the necessary love, guidance, and interest in A.J.M.'s well-being that a child needs and deserves. At no point in his testimony did Father address any of these intangibles or even once mention that he loves his son. **Cf. In Re Involuntary Termination of Stickler**, 356 Pa. Super. 56, 60-61, 514 A.2d 140, 142 (1986) ("The life of a child is unique and priceless and its best interest must supersede that of parental whim to retain a possessory interest based on the act of procreation, when parenting has failed, producing a vacuum where love and care are vital.").

There has never been a close personal relationship between A.J.M. and his father and one is unlikely to develop. Certainly there

& Youth can provide to remedy these circumstances. We further take judicial notice of the Court's order dated March 29, 2006, in A.J.M.'s juvenile proceedings, the Honorable David W. Addy presiding, wherein A.J.M.'s placement goal was changed from reunification to adoption. **See In re Adoption of S.E.G.**, 587 Pa. 568, 901 A.2d 1017, 1021 (2006) (affirming the principle that a Juvenile Court decision ordering a goal change from reunification to adoption "definitely and finally determines that the services provided by CYS were adequate and that CYS need not continue to provide services to the parent").

⁸ With respect to this last element, the "needs and welfare" of the child is a requisite element under both Section 2511(a) and Section 2511(b). **See In Interest of Coast, supra** at 477-81, 561 A.2d at 775-77 (Beck, J., concurring) (noting that Section 2511(a) requires a consideration of needs and welfare twice: once in paragraph (a)(5) and again under subsection (b)). Because of this duplication, as well as the applicability of Section 2511(b) to all grounds for termination, the discussion of this requirement for termination appears below under the heading "Effect of Termination: Needs and Welfare Analysis".

has been no discernible progress in this regard in the six years A.J.M has been in placement. Father has never provided stability, security, or direction in A.J.M.'s life; nor has a relationship of mutual love, respect, and caring ever materialized.

"Being a parent means assuming responsibility so that a real bond develops, not just having a casual relationship with one's children." **In re J.L.C.**, 837 A.2d 1247, 1249 (Pa. Super. 2003). G.J.S. has never exhibited a steady commitment to A.J.M. or provided for his basic needs. He has never maintained a position of importance in A.J.M.'s life through contact or communication. The limited involvement G.J.S. has had in A.J.M.'s life has resulted in little more than A.J.M.'s awareness of who G.J.S. is, that G.J.S. cannot be trusted, and that G.J.S. has been absent when A.J.M. needed him.

A.J.M. will not benefit from continuing this relationship. There exists no emotional bond between the two. G.J.S. is A.J.M.'s father in name only. Terminating the legal status of this relationship will not adversely affect A.J.M.'s physical or psychological well-being.

In contrast, A.J.M. currently has a stable, secure family relationship with his foster father and has developed a sibling relationship with J.E., the other foster child with whom he resides. M.N. would like to adopt both A.J.M. and J.E. M.N. has shown a sincere interest in A.J.M. and has been active in A.J.M.'s schooling and activities. A **de facto** father-son relationship has developed between the two, and both love one another. A.J.M. describes M.N. as a person he can talk to. He refers to M.N. as "dad". A.J.M. wishes to be adopted by M.N., and his counsel supports this decision.

To allow A.J.M. to move from foster care and form lasting bonds with an adopting family is in A.J.M.'s best interests. For more than six years, he has been held captive in foster care, knowing "neither a committed parent nor ... some semblance of a normal family life that is legally and emotionally equivalent to a natural family." **In re B.L.L., supra** at 1016. This state of uncertainty has existed for too long. Critical to A.J.M.'s long-term welfare is the development of permanent, dependable relationships.⁹

⁹ The primacy of forming positive permanent relationships as early as possible in a child's life and the need for concurrent planning to promote this objective,

A.J.M. is desperately in need of having a home which is safe, sound, and secure—a home in which he can grow up, mature and form lasting bonds. A.J.M. is at an age where adoption is becoming less and less viable as an option. To deprive A.J.M. of the opportunity to be adopted by his foster father and to live in and become a permanent part of a family he loves, and which loves him, would be destructive of the progress and emotional commitment A.J.M. has made to this relationship. A.J.M. needs permanency in his life, a stable parental figure, and someone who cares and is there to guide him. He needs and deserves certainty, permanency and finality in his relationship with his foster father.

A.J.M.'s foster father was himself a foster child and, as A.J.M. testified, is familiar with the range of emotions and feelings A.J.M. is experiencing. A.J.M. needs M.N. To foster this relationship is clearly in A.J.M.'s best interest. To grant the termination of G.J.S.'s parental rights and allow for M.N. to become A.J.M.'s legal parent is equally in A.J.M.'s best interest.

pervades much of the Adoption and Safe Families Act (ASFA), 42 U.S.C. §671 **et seq.** **In re Adoption of S.E.G.**, 587 Pa. 568, 901 A.2d 1017, 1019 (2006); **In re Adoption of A.M.B.**, 812 A.2d 659, 673 (Pa. Super. 2002). Under prior practice, the requirement that reasonable efforts at rehabilitation and reunification be exhausted before a child could be placed for adoption—and conditioning federal funding on this requirement being met—subverted foster care from its intended purpose of being a transitional stage to permanent placement to becoming a place where children grew up and lost their childhood. The ASFA seeks in two principal ways to reduce the time spent in foster care: (1) by authorizing States to define “aggravated circumstances” which allow reasonable efforts at reunification to be bypassed in favor of the prompt termination of parental rights (**Id.** at 671 n.2; **see also**, 42 U.S.C. §671(a)(15)(D)(i)); and (2) by requiring States to file a petition to terminate parental rights once reasonable efforts at reunification over a reasonable period of time (fifteen of the most recent twenty-two months) have failed. 42 U.S.C. §675(5)(E); **see also**, **In re B.L.L., supra** at 1016 (finding the commitment for permanency planning to mean that: “when a child is placed in foster care, after reasonable efforts have been made to reestablish the biological relationship, the needs and welfare of the child require CYS and foster care institutions to work toward termination of parental rights, placing the child with adoptive parents”). Pennsylvania has implemented the principles of the ASFA into its laws. **See e.g.**, 42 Pa. C.S.A. §6301(b)(1) (providing that the Juvenile Act should be interpreted “[t]o preserve the unity of the family whenever possible or to provide another alternative permanent family when the unity of the family cannot be maintained”).

CONCLUSION

Even in the best of circumstances, the decision whether to terminate parental rights is never easy. Next to the death of a child, perhaps the most difficult event which can befall a parent is the termination of parental rights. Conversely, when termination is warranted, the harm to a child by not severing parental rights may be far greater than that resulting from the death of a parent. In this case, we are firmly convinced that the statutory criteria for termination applicable to a parent's conduct have been met and that termination is not only justified, but necessary for A.J.M.'s well-being. A.J.M. has much to gain if G.J.S.'s parental rights are terminated and even more to lose if we fail to grant Children & Youth's petition. We decline to preserve in law a relationship which has never existed in fact.

COMMONWEALTH OF PENNSYLVANIA vs. CHRISTOPHER DAVID KARPER, Defendant

- Criminal Law—Suppression—Miranda—Learning Disability*
1. The obligation of police to provide **Miranda** warnings to a criminal suspect in custody and the suspect's concomitant right to counsel when subjected to custodial interrogation are judicially created procedural rights.
 2. A suspect is deemed to be in custody for **Miranda** purposes where he 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. As to the latter basis for determining custody, the test is not what the police intended but rather the reasonable impression conveyed to the person being detained.
 3. A suspect who voluntarily accompanies two plain clothed police officers to the police station, who has been advised that he is not under arrest and is at no time restrained by the police, and who freely answers questions posed by the police and believes at all times that he is free to leave, is not in custody.
 4. When **Miranda** rights are required, whether a suspect has validly waived his **Miranda** rights depends on a two-part analysis: (1) was the waiver voluntary, in the sense that defendant's choice was not the end result of governmental pressure; and (2) was the waiver knowing and intelligent. In answering both questions, the totality of the circumstances surrounding the defendant and the interrogation must be examined. The burden is upon the Commonwealth to prove by a preponderance of the evidence that the waiver was knowing and intelligent.
 5. In determining the validity of statements made by a suspect with learning disabilities, the court must determine whether the suspect has sufficient

mental capacity at the time of giving his statements to know what he was saying and to have voluntarily intended to say it. The existence of a learning disability by itself does not **per se** render a confession invalid.

6. A confession made to police by a nineteen-year-old male who is enrolled in a special education program in the eleventh grade and who at no time while being questioned by the police exhibited any difficulty in understanding or responding to questions asked, who appeared throughout the questioning as coherent and calm, and who expressed remorse for his conduct as a firefighter in starting fires, will not be suppressed where the Defendant's statements, given after **Miranda** warnings, evidenced a clear understanding of what he had done and his desire to acknowledge his guilt and to accept responsibility for his conduct.

NOS. 088 CR 2007, 089 CR 2007, 091 CR 2007, 094 CR 2007

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

ROBERT T. YURCHAK, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—December 5, 2007

On December 5, 2006, the Defendant, Christopher D. Karper, confessed to Trooper David Klitsch of the Pennsylvania State Police and Detective Joseph Schatz of the Jim Thorpe Police Department that he had intentionally set three fires within the Borough of Jim Thorpe and taken \$110.00 from the Fairview Hose Company. Defendant seeks to suppress these statements contending that they were coerced and involuntarily made. For the following reasons, we deny Defendant's suppression motion.

FACTUAL BACKGROUND

Trooper Klitsch is a deputy state fire marshal. In this position he investigates the cause and origin of fires. On December 5, 2006, he was called to investigate a fire at 1370 Germantown Road in the Borough which had occurred earlier that day at the Marzen Campground. As part of this investigation, Klitsch learned of the description of a vehicle seen speeding away from the area where the fire was discovered shortly before it was reported. He also learned that a vehicle matching this description was parked outside the Fairview Hose Company.

After concluding his investigation at the scene of the fire, Klitsch, accompanied by Schatz, drove to the Fairview Hose Com-

pany. The suspicious vehicle which Klitsch had previously been apprised of was still there. This vehicle, Klitsch had also been told, was owned by the Defendant. Defendant was an active fire fighter with the Fairview Hose Company (he, in fact, responded in this capacity to each of the fires which are the subject of the criminal charges against him) and was known by Klitsch beforehand from his work training fire fighters.

Klitsch and Schatz entered the fire station, found Defendant, and asked whether they could question him about another fire which had occurred three days earlier, on December 2, 2006, in a garage near where Defendant resided. In response to Defendant's offer to go outside and talk, Klitsch suggested that because it was cold outside, it would be easier and more comfortable to meet at the police station. Defendant was also told that he was not under arrest, and that after they spoke he would be returned to the fire station. Both officers were in plain clothes during this conversation. Defendant agreed to Klitsch's suggestion and was taken by both officers to the police station. Defendant was not frisked, handcuffed or restrained.

At the police station, Defendant met with Klitsch and Schatz in a separate interview room. Before any questions were asked, Klitsch read and advised Defendant of his **Miranda** warnings,¹ then handed him a printed copy of these warnings which Defendant signed. On this form, Defendant indicated that he understood each of the rights listed and, having these rights in mind, he was willing to speak with the officers (Commonwealth Exhibit No. 1). Defendant recorded the time he signed the form as 8:20 P.M.

Before questioning Defendant about the garage fire, Klitsch asked Defendant where he had been that day. Defendant explained his whereabouts, none of which placed him in Germantown. When told that his car had been seen in Germantown before the fire was reported, Defendant became quiet. Klitsch told Defendant that if he was involved in setting the fire, he needed help; Klitsch also

¹ **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966) (prior to custodial interrogation, suspect must be advised that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of counsel, and that counsel would be appointed if he could not afford an attorney).

offered to assist Defendant in getting treatment and counseling. At this point, Defendant admitted he had set the fire. Defendant's description of how and when the fire was set corroborated the results of Klitsch's investigation, which had not been disclosed, and which concluded that the fire had been started on the rear wall of the structure near a window.

When next asked about the December 2 garage fire, Defendant initially denied any responsibility but claimed that the fire was started by three minors he had observed smoking marijuana at the site. After Klitsch expressed disbelief over this version of the cause of the fire, Defendant admitted to setting the fire. Again, his description of how and where the fire was set was consistent with the results of Klitsch's investigation. At the officers' request, Defendant provided a handwritten statement admitting his part in starting both fires (Commonwealth Exhibit No. 2). This statement was prepared without assistance from either officer.

Klitsch next asked Defendant if he had any information regarding a fire which had occurred on February 4, 2006, damaging two buildings on Center Street—one at 330 Center Street, the other at 332 Center Street—which were separated by a common walkway. Defendant at first denied any direct knowledge but said that he had heard that gasoline was poured on the walkway between the two buildings. When Klitsch told Defendant that this information had been kept confidential as part of his investigation and was known only to himself, Detective Schatz and the person or persons responsible for the fire, Defendant confessed to starting this fire as well. Again, Defendant's description of where and how the fire was set was consistent with the findings of Klitsch's investigation. Defendant also provided a second handwritten statement admitting his responsibility for this third fire (Commonwealth's Exhibit No. 3).

After being questioned about the three fires, Detective Schatz asked Defendant if he knew anything about any other incidents at the Fairview Hose Company. When Defendant asked what he was referring to, Detective Schatz mentioned a theft which had been reported to have occurred on September 11, 2006. Defendant admitted taking \$110.00 from a locked cabinet within the fire station

and also described how he used this money to purchase a money order from Turkey Hill to pay for his car insurance. No written statement was prepared regarding this offense.

The entire interview with Defendant took approximately one and a half hours. During this time, Defendant was coherent and calm. His answers were responsive to what he was asked, and he never appeared to be confused or to not understand what was occurring. Defendant was remorseful for what he had done and provided information that only the person responsible for the fires would know. At no time did the officers trick or deceive Defendant. At no time did the Defendant request to speak with an attorney or his parents. At the conclusion of the interview, Defendant was formally arrested and taken before a district justice for preliminary arraignment.

DISCUSSION

Miranda Waiver—Effect of Learning Disability

Defendant initially contends that he was learning disabled and did not have the mental capacity to comprehend the meaning of the **Miranda** warnings he was given or to appreciate the consequences of waiving these safeguards. At the time Defendant was questioned, he was nineteen years old and in the eleventh grade. Defendant testified that he had previously failed two grades, had difficulty reading and comprehending what he read, and was enrolled in a special education program. Defendant's father corroborated this testimony.

No expert evidence was presented by a psychologist or otherwise as to Defendant's mental age, his I.Q., or the extent of his capacity to waive constitutional rights based on mental or physical deficiencies. Defendant himself testified that at the time he was questioned, he understood his right to counsel and to remain silent. Though Defendant denied knowing the significance of speaking to the police and how any statements he made could and would be used against him, he also admitted that since being questioned by the police, this warning was further explained to him and he understood it. It was also undisputed that when Defendant was asked by the police if he understood his **Miranda** warnings, he stated he did.

“[T]he determination of whether a defendant has validly waived his **Miranda** rights depends upon a two-prong analysis: (1) was the waiver voluntary, in the sense that defendant’s choice was not the end result of governmental pressure; and (2) was the waiver knowing and intelligent?” **Commonwealth v. Brown**, 400 Pa. Super. 316, 327, 583 A.2d 805, 810-11 (1990) (holding that this two-prong inquiry applies “whenever a defendant claims he was incapable of making a valid waiver because of a mental or psychological defect”), **cert. denied**, 502 U.S. 946, 112 S.Ct. 391, 116 L.Ed. 2d 341 (1991); **see also**, **Commonwealth v. Cephas**, 361 Pa. Super. 160, 164-65, 522 A.2d 63, 65-66 (1987), **appeal denied**, 516 Pa. 616, 531 A.2d 1118 (1987), **cert. denied**, 484 U.S. 981, 108 S.Ct. 495, 98 L.Ed. 2d 494 (1987). As to the second prong, “the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it.” **Cephas, supra** at 163, 522 A.2d at 65.

Whether the waiver was voluntarily given, and was knowingly and intelligently given when given, requires us to view and assess the totality of the circumstances surrounding the defendant and the interrogation, including, as applicable, the defendant’s mental age, low I.Q., mental disease, limited education and general condition, as well as the duration and means of the interrogation, 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. **See Brown, supra** at 327, 583 A.2d at 811; **Commonwealth v. Nester**, 551 Pa. 157, 709 A.2d 879, 882 (1998). “Only if the ‘totality of the circumstances surrounding the interrogation’ reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that **Miranda** rights have been waived.” **Cephas, supra** at 163, 522 A.2d at 65. It is the Commonwealth’s burden to prove by a preponderance of the evidence that the waiver was knowing and intelligent. **Commonwealth v. Fogan**, 449 Pa. 552, 558, 296 A.2d 755, 758 (1972).

On this issue, Defendant expressed no difficulty to the police in understanding the questions asked of him or the warnings he was provided. He was at all times alert and responsive to the officers’ questions. His demeanor, according to Klitsch, was that of a person

who knew what he had done, was remorseful for his conduct, and wanted to take responsibility.

Defendant's statements, particularly his written ones, evidence a clear understanding of what he had done, that he was admitting wrongdoing, and that he understood the implications of what he was saying. These written statements are lucid and detailed. They express clearly Defendant's appreciation of the seriousness and the consequences of his conduct.

We also find that at no time was Defendant subjected to any threats, promises, or coercion, psychological or physical, which improperly induced him to incriminate himself. **Commonwealth v. Whitney**, 511 Pa. 232, 241, 512 A.2d 1152, 1157 (1986) ("The line of distinction between a voluntary and an involuntary confession is that at which governing self-direction is lost and compulsion propels the confession."); **see also, Commonwealth v. Jones**, 546 Pa. 161, 178, 683 A.2d 1181, 1189 (1996) (fact that suspect was read **Miranda** rights immediately prior to making statement weighed in favor of finding voluntariness). To the contrary, Defendant's denials and evasive responses to the officers, corrected only when confronted with contrary evidence, indicate strongly that Defendant retained the ability to independently evaluate his situation and that his decision to confess was the product of a rational and free choice.

Although we believe that Defendant does indeed have learning difficulties, we are not convinced that Defendant was intellectually incapable of giving a knowing, intelligent, and voluntary statement. "The mental age and condition of [a defendant] are serious considerations, but a low IQ and limited education are not in themselves sufficient to render the confession involuntary." **Brown, supra** at 328, 583 A.2d at 811 (citation and quotation marks omitted). A defendant need not have the training of a lawyer or the raw intelligence of a genius to be able to knowingly and intelligently waive his **Miranda** rights. "The test is whether he had sufficient mental capacity at the time of giving his statement to know what he was saying and to have voluntarily intended to say it." **Commonwealth v. Smith**, 447 Pa. 457, 460, 291 A.2d 103, 104 (1972) (applying the test to a situation where defendant claimed he was too intoxicated to understand the **Miranda** warnings). On this point, viewing the

totality of the circumstances, we find Defendant's waiver of his **Miranda** rights to have been voluntarily, knowingly and intelligently given.²

Miranda Rights—When Applicable (Custodial Interrogation)

Implicit in Defendant's claim that his **Miranda** waiver was invalid is that **Miranda** warnings were required and, therefore, that he was in custody at the time he was questioned by the police. **See Commonwealth v. Umstead**, 916 A.2d 1146, 1152 (Pa. Super. 2007) (stating that **Miranda** is not implicated unless the individual is in custody **and** subjected to interrogation), **appeal denied**, 929 A.2d 645 (Pa. 2007); **see also, Miranda**, 384 U.S. at 444 (defining a custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way"). With the Defendant's underlying premise, we are not in full agreement.

"The test for determining whether a suspect is being subjected to custodial interrogation so as to necessitate **Miranda** warnings is

² "The question of voluntariness is not whether the defendant would have confessed without interrogation, but whether the interrogation was so manipulative or coercive that it deprived the defendant of his ability to make a free and unconstrained decision to confess." **Commonwealth v. Nester**, 551 Pa. 157, 709 A.2d 879, 882 (1998). "[T]he totality of the circumstances, including any alleged inducement, must be considered in evaluating the voluntariness of a confession." **Commonwealth v. Templin**, 568 Pa. 306, 795 A.2d 959, 961 (2002). The standard for measuring whether a confession is voluntary is not the narrow "but for" test (*i.e.*, would the defendant have confessed but for the threat or promise), implied by **Bram v. United States**, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897), quoted below, and apparently relied upon by the Defendant, but a review based on the totality of the circumstances. **See Nester, *supra***, 709 A.2d at 883.

[A] confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by **any** sort of threats or violence, nor obtained by **any** direct or implied promises, **however slight**, nor by the exertion of **any** improper influence. * * * A confession can **never** be received in evidence where the prisoner has been **influenced** by **any** threat or promise.

Bram, 168 U.S. at 542-43, 18 S.Ct. at 186-87 (emphasis added). "The United States Supreme Court has explicitly declared that the quoted passage from **Bram** is not the correct standard for determining the voluntariness of a confession, instead the totality of the circumstances determine voluntariness." **Nester, *supra***, 709

whether he 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 such interrogation.” **Commonwealth v. Chacko**, 500 Pa. 571, 577, 459 A.2d 311, 314 (1983) (citations omitted); **see also, Commonwealth v. Boczkowski**, 577 Pa. 421, 846 A.2d 75, 90 (2004). “[T]he test is not what the police intended but rather the reasonable impression conveyed to the person subjected to the seizure.” **Commonwealth v. Rodriguez**, 330 Pa. Super. 295, 307, 479 A.2d 558, 565 (1984) (citation omitted).

Police detentions only become custodial 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. Factors which may be considered include the basis, duration, location, and method of detention, as well as the investigative methods used. **See also, Commonwealth v. Holcomb**, 508 Pa. 425, 498 A.2d 833 (1985) (suggesting consideration of whether defendant goes

A.2d at 883 (**citing Arizona v. Fulminante**, 499 U.S. 279, 285, 111 S.Ct. 1246, 113 L.Ed. 2d 302 (1991)); **see also, Templin, supra**, 795 A.2d at 964.

Defendant’s argument that the statements he made were unlawfully induced and coerced by a promise made at the Fairview Hose Company to return him to the station after he was questioned cannot stand because the promise was not coercive or misleading in any way. The police did not know beforehand what Defendant was going to say, or that he would implicate himself in these offenses. A voluntary confession by a defendant that he committed an offense establishes probable cause to arrest. **Commonwealth v. Edmiston**, 535 Pa. 210, 228, 634 A.2d 1078, 1087 (1993). More importantly, the officers neither promised leniency if Defendant confessed nor threatened to file charges or arrest him if he did not. **Cf. Nester, supra**, (discussing that a confession extracted as a **quid pro quo** for a promise of leniency must be carefully examined in evaluating the voluntariness of the confession; also holding that an offer to assist a defendant in getting treatment, not conditioned on the defendant’s confession, is not improperly coercive). “Encouraging a suspect to cooperate with the investigation and answer questions honestly is a permissible interrogation tactic.” **Id.** at 884.

Additionally, we find credible the officers’ testimony that Defendant’s statements to them were made in their presence, without threats or deception, and we find no credibility in Defendant’s testimony at the suppression hearing that there was present in the police station, outside of the interview room, an unidentified police officer who threatened to harass him if he did not confess.

to the police station voluntarily, and whether he is informed that he is free to leave).

Brown, supra at 325, 583 A.2d at 810 (citations and quotation marks omitted). “[T]he mere giving of **Miranda** [warnings] does not signal arrest.” **Rodriguez, supra** at 307 n.8, 479 A.2d at 564 n.8.

Here, Defendant was under no outward compulsion to go to the police station. He volunteered to do so after being told by the police that he was not under arrest. While at the police station, Defendant manifested all of the signs of a person who was contrite and wanted to cooperate. Not once did Defendant ask that the questioning stop or did he request an attorney. Consistent with this appearance, Defendant testified that during the time he was questioned at the station, he believed at all times he was free to leave.

At the time the police began their questioning of the Defendant, it was evident that the police were investigating and seeking information regarding suspicious fires in the Borough. It must also have been clear to the Defendant early on—when the discrepancy between his reported whereabouts earlier in the day and the spotting of his vehicle in Germantown was brought to his attention—that he was a possible suspect. Knowing this, knowing also—as only he could—his own feelings of remorse and guilt for what he had done, and knowing further that he was at a crossroads and needed to make a choice between accepting responsibility for his actions and continuing to deny the intrinsic irony, and tragedy, of being a fire fighter responsible for setting the fires he fights, Defendant decided it was in his best interest to fully cooperate.

Only after Defendant confessed and admitted his involvement was Defendant formally arrested and taken before a district justice for arraignment. At some point before this occurred and after Defendant began to incriminate himself, it would have been reasonable for him to conclude that he was no longer free to leave. That he did not do so militates against us finding that he was reasonably and subjectively in custody prior to being arrested. That neither Klitsch nor Schatz restricted his movements nor exercised control over him prior to his arrest likewise precludes a finding that he was in the physical custody of the police beforehand. Only after

the decision to charge and transport the Defendant to the district justice's office was made and conveyed to him, did Defendant's status shift from that of a suspect being questioned and volunteering information to that of a suspect in custody about to be charged and under arrest.

Miranda Rights—Right to Counsel

To the extent Defendant also argues that his privilege against self-incrimination was violated because he was questioned while in custody and after requesting the assistance of counsel, we reject both the factual and legal predicates on which this argument is made and find it to be without merit. A defendant's right to counsel encompassed within the Fifth Amendment privilege against self-incrimination is a judicially created procedural right dependent upon the defendant being subjected to custodial interrogation. **Commonwealth v. Arroyo**, 555 Pa. 125, 723 A.2d 162, 166 and 170 (1999). Defendant was not in custody at the time the statements in issue were made, and **Miranda** warnings were not necessary. Additionally, we have accepted as credible Klitsch's testimony that Defendant never requested an attorney.

CONCLUSION

In accordance with the foregoing, we hold that the Commonwealth has met its burden of proving by a preponderance of the evidence that Defendant's confession was voluntary, and knowingly and intelligently given. Defendant's Omnibus Pretrial Motion to Suppress will be denied, and the statements he made while questioned by Trooper Klitsch and Detective Schatz on December 5, 2006, will be admissible at trial.

DANKA RANKOVICH and DANNY RANKOVICH, Plaintiffs vs. MICHAEL SIGNORE and BETHANN SIGNORE, Defendants

Civil Law—Contempt—Violation of Court Order—Sanctions (Conditional/Unconditional)—Requirement of Purge Conditions

1. The power of the courts to enforce their orders by contempt is essential to the legitimacy of the court's authority. Without it, a court's decision would be little more than a recommendation.
2. The distinction between criminal and civil contempt is a difference not in the underlying conduct but in the judicial response to the contumacious behavior. If the dominant purpose is to prospectively coerce the contemnor

to comply with an order of the court, the adjudication of contempt is civil. If, however, the dominant purpose is to punish the contemnor for disobedience of the court's order or some other contemptuous act, the adjudication of contempt is criminal.

3. Substantively, civil contempt requires that: (1) the contemnor have notice of the specific order or decree that was disobeyed; (2) the act constituting the violation was volitional; and (3) the contemnor acted with wrongful intent.

4. Procedurally, a finding of civil contempt generally involves a five-step, two-hearing process: (1) a rule to show cause why an attachment should not issue, (2) an answer and hearing, (3) a rule absolute (arrest), (4) a hearing on the contempt citation, and (5) an adjudication of contempt. When, however, the contempt proceedings are predicated on a violation of a court order that follows a full hearing, due process requires no more than notice of the violations alleged and an opportunity for explanation and defense.

5. The purpose of civil contempt is to compel performance of lawful orders, and in some instances, to compensate the complainant for the loss sustained. When a term of imprisonment is imposed as a means of coercing the contemnor to comply with the court order, the conditions imposed for the contemnor to purge himself of contempt must be reasonable and fully capable of being performed. In contrast, attorney fees and other expenses incurred by the complainant, as well as compensatory fines, are recoverable and may be imposed unconditionally by the court without regard to the contemnor's ability to pay.

6. A finding of contempt is justified where property owners, without excuse, have violated the restrictive covenants of the subdivision in which they reside and have failed to complete construction of their home in accordance with a lawful order of the court. Under such circumstances, a fine in the amount of \$100.00 per day for each day that the violation continues, to be entered as an **in rem** judgment in favor of the complainant, is an appropriate civil sanction whose dominant purpose is to prospectively coerce the contemnor to comply with the order and complete construction of the home.

NO. 03-2851

CAROLE J. WALBERT, Esquire—Counsel for Plaintiffs.

Michael Signore—Pro se.

Bethann Signore—Pro se.

MEMORANDUM OPINION

NANOVIC, P.J.—June 13, 2008

PROCEDURAL AND FACTUAL BACKGROUND

Before us is Plaintiffs', Danny Rankovich and Danka Rankovich's, motion to find the Defendants, Michael Signore and Bethann Signore, in contempt for violation of our order dated March

3, 2006. In that order, we found Defendants had violated certain restrictive covenants governing the residential subdivision in which the parties reside. In consequence, Defendants were directed to complete the construction of their home and to remove different items of debris from the outside of their property within specific time periods. This order followed a full hearing on Plaintiffs' claim for injunctive relief.

Upon receipt of Plaintiffs' motion for contempt, a rule to show cause issued to which Defendants filed a timely response. Thereafter, a contempt hearing was held which concluded on September 24, 2007. At this hearing, Plaintiffs presented the testimony of Eugene Mulligan, a certified home inspector, who identified multiple areas of Defendants' home yet to be completed. In response, the Defendant husband testified that substantial improvements had been made to the home since the March 3, 2006 order, that the order was ambiguous and subject to more than one interpretation as to what Defendants were required to do for compliance and that, to the extent any violation of the order existed, it was inconsequential and caused no harm to the Plaintiffs.

DISCUSSION

We are convinced that the testimony of Plaintiffs' expert describing work still to be done on the outside and inside of Defendants' home is accurate and should be accepted. Indeed, to find otherwise would be a capricious disregard of competent, credible testimony. The extent to which these shortcomings fail to comply with the March 3, 2006 order are set forth in detail in the order which accompanies this opinion.

This conclusion, however, is not dispositive of a finding of contempt.¹ "[A] mere showing of noncompliance with a court

¹ "[T]he power [of courts] to enforce their decrees [by contempt] is necessarily incident to the jurisdiction of courts. Without such power, a decree would in many cases be useless. All courts have this power, and must necessarily have it; otherwise they could not protect themselves from insult, or enforce obedience to their process. Without it, they would be utterly powerless." **Knaus v. Knaus**, 387 Pa. 370, 376, 127 A.2d 669, 672 (1956) (quotation marks omitted); see also, **The Marian Shop, Inc. v. Baird**, 448 Pa. Super. 52, 55, 670 A.2d 671, 672-73 (1996). Because the classification of contempt as either civil or criminal controls the procedures which must be followed and the sanctions which may be

imposed, understanding the distinction between the two is important to an understanding of our decision.

“Contempts broadly fall into two categories, civil and criminal. Criminal contempts are further subdivided into direct and indirect contempts.” **Knaus, supra** at 375, 127 A.2d at 671.

A direct criminal contempt proceeding is summary, involving arrest and imprisonment. … In an indirect criminal contempt proceeding, the defendant is entitled to the right to bail, the right to be notified of the accusations against him and reasonable time to prepare a defense, the assistance of counsel, and the right, upon demand, to a jury trial; he can only be found guilty if every element of the crime is proven beyond a reasonable doubt.

Schnabel Associates, Inc. v. Building and Construction Trades Council of Philadelphia and Vicinity, 338 Pa. Super. 376, 386-87, 487 A.2d 1327, 1333 (1985) (citations omitted).

The same facts may give rise to criminal as well as civil contempt, each with its own distinct procedures. See **Barrett v. Barrett**, 470 Pa. 253, 260, 368 A.2d 616, 619 (1977). “The difference is not of the essence, but of the purpose sought by their use.” **Crozer-Chester Medical Center v. Moran**, 522 Pa. 124, 130, 560 A.2d 133, 136 (1989).

The determination of whether a particular order contemplates civil or criminal contempt is crucial, as each classification confers different and distinct procedural rights on the defendant. … There is nothing inherent to a contemptuous act or refusal to act which classifies the act itself as ‘criminal’ or ‘civil.’ … The distinction between criminal and civil contempt is rather a distinction between two permissible judicial responses to contumacious behavior. … These judicial responses are classified according to the dominant purpose of the court. … If the dominant purpose is to vindicate the dignity and authority of the court and to protect the interest of the general public, it is a proceeding for criminal contempt. … But where the act of contempt complained of is the refusal to do or refrain from doing some act ordered or prohibited primarily for the benefit of a private party, proceedings to enforce compliance with the decree of the court are civil in nature. … The purpose of a civil contempt proceeding is remedial. … Judicial sanctions are employed to coerce the defendant into compliance with the court’s order, and in some instances, to compensate the complainant for losses sustained.

Lachat v. Hinchliffe, 769 A.2d 481, 487-88 (Pa.Super. 2001) (citations omitted); see also, **In re Martorano**, 464 Pa. 66, 346 A.2d 22 (1975).

A judgment in a civil contempt proceeding for the benefit of a private plaintiff will, of course, incidentally vindicate the authority of the court just as on the other hand a criminal contempt judgment, which is punitive, may often advance private interests. But the test is the dominant purpose, not the incidental result[.]

Knaus, supra at 377, 127 A.2d at 672.

The factors generally said to point to a civil contempt are these: (1) Where the complainant is a private person as opposed to the government or

a governmental agency; (2) where the proceeding is entitled in the original ... action and filed as a continuation thereof as opposed to a separate and independent action; (3) where holding the defendant in contempt affords relief to a private party; (4) where the relief requested is primarily for the benefit of the complainant; and (5) where the acts of contempt complained of are primarily civil in character and do not of themselves constitute crimes or conduct by the defendant so contumelious that the court is impelled to act on its own motion.

Lachat, supra at 488. Each of these factors is present in the instant proceedings and confirms their status as being civil in nature.

The typical sanction for civil contempt is remedial in nature. For example, a court may require the contemnor to compensate the opposing party for losses incurred as a result of the violation or reimburse the party's attorneys' fees and costs. It is also common in civil contempt for a court to impose a conditional prison sentence, giving the contemnor an opportunity to purge the contempt and avoid the sentence by compensating the opposing party, paying counsel fees, or doing some other affirmative act within a certain time period.

Gunther v. Bolus, 853 A.2d 1014, 1016 (Pa. Super. 2004), **appeal denied**, 853 A.2d 362 (Pa. 2004).

"When contempt is civil, a court must impose conditions on the sentence so as to permit the contemnor to purge himself." **Gunther, supra** at 1018 (quotation marks omitted). However, "a court is not permitted to impose a coercive sentence conditioned on the contemnor's performance of some act that is incapable of performance." **Diamond v. Diamond**, 715 A.2d 1190, 1194 (Pa. Super. 1998). The conditions imposed on a prison sentence must be reasonable and fully capable of being performed by the contemnor, otherwise they become punitive rather than remedial, and criminal rather than civil, resulting in punishment for a past act rather than coercive of prospective conduct. The "[d]ominant purpose of coercion or punishment is expressed in the sanction imposed. A civil adjudication of contempt coerces with a conditional or indeterminate sentence of which the contemnor may relieve himself by obeying the court's order, while a criminal adjudication of contempt punishes with a certain term of imprisonment or a fine which the contemnor is powerless to escape by compliance." **Martorano, supra** at 78-79, 346 A.2d at 28 (footnote omitted); **see also, Crozer-Chester Medical Center, supra** (holding that a contempt decree imposing a fine of \$1,500.00 or a term of imprisonment of forty-five (45) days for the contemnor's violation of a court injunction, albeit conditional in the sense that the contemnor could purge himself by staying off of the complainants' property in the future, imposed a fixed criminal sanction for a past violation). "[T]he only limitations on civil-contempt sentences are that they must be conditional and they may not exceed the period in which the contemnor is able to comply." **Martorano, supra** at 84, 346 A.2d at 31.

"Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into

order, or even misconduct, is never sufficient alone to prove civil contempt.” **Lachat v. Hinchliffe**, 769 A.2d 481, 488 (Pa. Super. 2001). “In proceedings for civil contempt of court, the general rule is that the burden of proof rests with the complaining party to demonstrate, by [a] preponderance of the evidence, that the defendant is in noncompliance with a court order.” **Id.** To sustain a finding of civil contempt, “the moving party must prove that: (1) the contemnor had notice of the specific order or decree that he disobeyed; (2) the act constituting the violation was volitional; and (3) the contemnor acted with wrongful intent.” **Gunther v. Bolus**, 853 A.2d 1014, 1017 (Pa. Super. 2004), **appeal denied**, 853 A.2d 362 (Pa. 2004). “The order alleged to have been violated must be **definite, clear, and specific**—leaving no doubt or uncertainty in the mind of the contemnor of the prohibited conduct and is to be strictly construed.” **Id.** (quotation marks omitted) (emphasis in original). A present inability to comply with a court order is an affirmative defense which the alleged contemnor has the burden of proving. **See Barrett v. Barrett**, 470 Pa. 253, 263, 368 A.2d 616, 621 (1977).

Beyond these substantive and evidentiary requirements, the practice and procedure for holding a person in civil contempt

compliance with the court’s order, and to compensate the complainant for losses sustained.” **Borough of Slatington v. Ziegler**, 890 A.2d 8, 12 (Pa. Commw. 2005) (quotation marks omitted), **appeal denied**, 589 Pa. 741, 909 A.2d 1291 (2006). “Because an award of counsel fees is intended to reimburse an innocent litigant for expenses made necessary by the conduct of an opponent, it is coercive and compensatory, and not punitive.” **Wood v. Geisenhemer-Shaulis**, 827 A.2d 1204, 1208 (Pa. Super. 2003).

“A purge condition is not a sanction. It is the opportunity to remove a sanction. However, the imposition of counsel fees and costs are sanctions.” **Borough of Slatington, supra** at 11. Notwithstanding this status, because of their compensatory nature as an item of special damages, attorney fees and other fees relevant to the contempt action are recoverable and may be imposed unconditionally by the court to compensate the complainant for losses sustained. **See Diamond v. Diamond**, 792 A.2d 597, 600 (Pa. Super. 2002); **Schnabel Associates, Inc., supra** at 397-98 n.7, 487 A.2d at 1339 n.7. Likewise, an unconditional fine may be imposed made payable to a private party who has been injured to deter future or continued violations of the order. **See Rouse Philadelphia, Inc. v. Ad Hoc '78**, 274 Pa. Super. 54, 73, 417 A.2d 1248, 1258 (1979), **cert. denied**, 449 U.S. 1004 (1980); **Whitt v. Philadelphia Housing Authority**, 325 Pa. Super. 135, 141 n.3, 472 A.2d 684, 687 n.3 (1984).

generally requires a five-step, two-hearing process. As repeatedly stated in the case law, these five steps are: (1) a rule to show cause why an attachment should not issue, (2) an answer and hearing, (3) a rule absolute (arrest), (4) a hearing on the contempt citation, and (5) an adjudication of contempt. **See Crislip v. Harshman**, 243 Pa. Super. 349, 352, 365 A.2d 1260, 1261 (1976).

The interrelationship between the substantive elements and the requisite procedural steps is elusive and difficult to pinpoint in the case law. From what we can determine, the focus of the first three steps is to determine whether a **prima facie** case for contempt exists (**i.e.**, whether there exists a lawful, enforceable order and no apparent excuse for noncompliance) such that a writ of attachment should issue. If the rule is not discharged, the fourth and fifth steps determine the merits of the contempt charge (**i.e.**, whether willful disobedience or intentional neglect exists, or the violation is otherwise inexcusable) and, if the violation is found to be contemptuous and the respondent to be presently able but unwilling to comply with the order, the imposition of appropriate sanctions to coerce compliance.²

² In explaining the procedure required for civil contempt, Judge Spaeth quoted with approval the following language from **Commonwealth v. Snowden**, 1 Brewster 218 (Pa. 1868):

A rule is generally granted in the first instance on affidavits, upon the return of which the defendant answers on oath, the evidence is heard, and if the Court should be of opinion that the fact on which the rule was taken is not sufficiently answered or excused, and that in point of law a contempt has been incurred, an attachment is awarded when the defendant is brought in on this writ to answer interrogatories propounded to him on behalf of the Commonwealth, in whose name the writ always issues, and if he gives such answers as purge him from the criminality, he must be discharged.

Crislip v. Harshman, 243 Pa. Super. 349, 364, 365 A.2d 1260, 1267 (1976) (Spaeth, J., concurring and dissenting). From this language, Judge Spaeth concluded that

[T]he first hearing is only to decide whether an attachment should issue; if it does issue, then the second hearing is to decide whether the person attached shall be held in contempt, or, as succinctly stated in **Magaziner v. Magaziner**, 434 Pa. 1, 5, 253 A.2d 263, 266 (1969): it is a ‘hearing on the contempt citation, [and an] adjudication of contempt.’

Id. at 366, 365 A.2d at 1268.

A failure to comply with a court order is “wilful” if it results from “an intentional, designed act and one without justifiable excuse.” **Id.** at 1262 (quotation

Use of imprisonment in civil proceedings as a sanction to compel compliance with a court order is not punitive provided the dominant purpose of the order is remedial, it seeks to coerce future compliance (*i.e.*, is not punishment for a past violation), and the conditions imposed for purging the contempt are fully capable of being performed by the contemnor. When these circumstances exist, a prison sentence “is not to vindicate the authority of the law, but is remedial, and is intended to coerce the defendant to do the thing required by the order for the benefit of the complainant.” **Knaus v. Knaus**, 387 Pa. 370, 379, 127 A.2d 669, 673 (1956). “[H]e carries the keys of his prison in his own pocket. He can end the sentence and discharge himself at any moment by doing what he had previously refused to do.” **Id.** (quotation marks omitted). Moreover, in order to protect against a coercive sentence from becoming punitive, the Supreme Court in **Barrett** held that where “the court in civil proceedings finds there has been willful noncompliance with its earlier … orders constituting contempt but the contemnor presents evidence of his present inability to comply … , the court, in imposing coercive imprisonment for civil contempt, should set conditions for purging the contempt and effecting release from imprisonment with which it is convinced **beyond a reasonable doubt**, from the totality of the evidence before it, the contemnor has the present ability to comply.” **Barrett, supra** at 263-64, 368 A.2d at 621 (emphasis in original).

When the order sought to be enforced is entered after a full hearing on the merits, the five-step attachment and contempt proceedings described above can be streamlined to a single hearing confined to the fourth and fifth steps. **See Wood v. Geisenhemer-Shaulis**, 827 A.2d 1204, 1208 (Pa. Super. 2003). Under these circumstances, the first three steps are redundant and the proceedings may be commenced by attachment. “[D]ue process requires no more than notice of the violations alleged and [an] opportunity for explanation and defense.” **Neshaminy Water Resources Authority v. Del-Aware Unlimited, Inc.**, 332 Pa. Super. 461, 472, 481

marks omitted). “There is no contempt if the alleged contemnor, without fault on his part is unable to comply with the order, and has in good faith attempted to comply.” **Cecil Township v. Klements**, 821 A.2d 670, 675 (Pa. Commw. 2003).

A.2d 879, 885 (1984); **see also, Americans Be Independent v. Commonwealth**, 14 Pa. Commw. 179, 189-90, 321 A.2d 721, 727 (1974) (where civil penalties for violation of an injunction are sought, the following process is due: (1) accused must be informed of accusations against him; (2) he must be given timely notice and opportunity to answer and defend; and (3) proceedings must be fair and impartial).

These abbreviated safeguards apply to the instant proceedings. The March 3, 2006, order was entered and provided to Defendants after a full hearing in which Defendants participated and were represented by counsel. Defendants were notified of the claimed violations of that order and have been provided a full and complete opportunity in the contempt hearings to explain and justify their conduct.

Clarity and Specificity of Order

An order which “forms the basis for the contempt process in civil proceedings must be definitely and strictly construed. Any ambiguity or omission in the order forming the basis for the civil contempt proceeding must be construed in favor of the defendant. Where the order is contradictory or the specific terms of the order have not been violated, there is no contempt.” **Wood**, 827 A.2d at 1207-1208.

The March 3, 2006 order which is the subject of these contempt proceedings, directs that the Defendants “complete in full all exterior construction of their home” within ninety days of the order and that the home be “fully completed, both inside and outside” within one hundred and twenty days of the order. The order then lists specific work to be performed expressly cautioning that this listing is “for purposes of clarification, and not limitation” of the requirement that all construction of the home be completed within the periods stated.

Defendants’ attempt to interject ambiguity or contradiction into this order when none exists will not be condoned. Strict construction is not a rule of nullification in which the plain meaning of language is parsed to an absurd conclusion. The order is sufficiently definite to put Defendants on notice of what they were required to do. The order is clear, precise, and enforceable.

Violation of Order

There is also no question that Defendants have violated the order. Defendants make the specious argument that the home is complete because they consider it complete, and they live in it. The work which remains to be completed under our March 3, 2006, order is itemized in the order which accompanies this opinion.

Defendants further argue that it has been their intent from the outset to build their home in stages and that to the extent work in an earlier stage of construction may be incomplete because it anticipates future construction, they have not violated the order or, at a minimum, the order is unclear in this respect. As an example of this contention, Defendants claim the row of rebar sticking out of the concrete foundation on the western side of their home was installed in anticipation of tying this foundation into the concrete floor of a garage addition to be built in the future.

A vast difference exists, however, between construction which is incomplete in what has been built and construction which is incomplete in what has yet to be built. While Defendants' plan to build an attached garage is an example of the latter, Defendants' failure to complete the framing and trim work within those areas of their home which have already been built and their failure to construct second story outdoor decks for sliding glass doors on the rear of the home which open ten feet or more above ground level are examples of the former.³ As is evident from our order of this same date, it is only those areas of the home which have been built which we require to be completed. Moreover, as to such work, our order of March 3, 2006, which was not appealed, has become the law of this case.

On the record before us, Defendants have failed to present credible evidence either that they were unable to comply with the

³ Defendants' argument that because they call these doors windows, they are not doors, is ludicrous. The doors on the second story rear of Defendants' home are identical to those installed on the third floor for which an outside deck has been constructed. Additionally, lag bolts have already been installed on the outside of the home in preparation for the construction of an outdoor deck at this location. We do not accept Defendants' Alice in Wonderland view that words mean what Defendants declare they mean.

March 3, 2006, order or that they attempted to do so in good faith. Defendants have offered no credible evidence to justify their failure to complete their home as we directed. Instead, notwithstanding the passage of more than two years since that order was entered, Defendants have continually and continuously delayed and neglected to perform the work they were directed to complete and, in doing so, willfully failed to comply with the Court's order.

Sanctions

Although we find Defendants have not completed their home as we directed, we agree with Defendants that they have made significant improvements to their home since the March 3, 2006, order. We also do not believe that placing Defendants in prison indefinitely to coerce compliance with that order will serve any useful purpose. At the same time, we are fully cognizant of the frustration Plaintiffs must be experiencing by Defendants' dilatory conduct and of Plaintiffs' right to insist upon Defendants' compliance with the restrictive covenants. With the intent of bringing this matter to a conclusion and impressing upon Defendants the expense of further delay, and with appropriate deference to Plaintiffs' rights, the order which accompanies this Opinion provides Defendants ninety days to complete all unfinished work identified in that order. Should Defendants fail to comply with this order, they will be automatically assessed a **per diem** fine, to be entered as a judgment **in rem** in favor of Plaintiffs and against the property which is the subject of these proceedings, in the amount of \$100.00 per day for each day following this ninety-day period during which Defendants fail to complete the work required to be done.

CONCLUSION

In accordance with the foregoing, we find Defendants in contempt of the March 3, 2006, order and will provide Defendants an opportunity to purge that contempt.

**JOHN FALLABEL, Plaintiff vs.
SHANNON BROPHY-WOLTER, Defendant**

Civil Law—Covenant Not To Compete (Enforcement)—Proof of Damages for Breach of Contract—Requirement That Loss Be Attributable to Breach—Standard of Sufficiency of Evidence To Reasonably Determine Loss—Liquidated Damage Clause—Standard for Enforcement (Reasonable and Good Faith Substitute for Actual Damages)—Exclusive Measure of Damages—Recovery of Attorney Fees Provided for by Contract—Necessity of Proof at Time of Trial

1. A threshold requirement to enforcement of a covenant not to compete is the protection of a legitimate business interest. If met, the court must then balance the private and public interests at stake and determine whether the restriction is reasonable and should be enforced.
2. Damages for breach of contract must be established by evidence sufficient to afford a reasonably fair basis for calculating the amount of loss actually sustained. Damages need not be proven to a mathematical certitude. To be recoverable, such damages must also be proven to be a result of the claimed breach.
3. Liquidated damages are an agreed upon substitute for damages that are difficult to estimate in advance or to prove after a breach occurs. To be enforceable, a liquidated damage clause must represent a reasonable approximation of an expected loss, even if that loss may be difficult to measure or prove. Absent a rational relationship to actual damages, a liquidated damage provision will be treated as an unlawful penalty.
4. A liquidated damage provision which the parties intend to be the exclusive measure of damages for a defined category of loss precludes one party from unilaterally adopting a separate measure of damages from that agreed upon by the parties.
5. Unlike federal practice, testimony at a preliminary injunction hearing is not automatically part of the trial record at the time of final hearing for a permanent injunction. Such testimony will not be judicially noticed by the court after the parties have rested and the record has been closed.
6. Unlike counsel fees authorized by statute or other governing authority to be taxed as costs of the proceedings, counsel fees provided for by contract are an element of damages resulting from a breach of duty imposed by the contract. As such, like other damages, they must be proven at the time of trial before the fact-finder to be recoverable.

NO. 05-0520

RICHARD N. SHAPIRO, Esquire—Counsel for the Plaintiff.
STEVEN R. SERFASS, Esquire and JOHN A. ADAMS, Esquire—
Counsel for the Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—November 26, 2008

PROCEDURAL AND FACTUAL BACKGROUND

The parties to this litigation are both professionals who, for sixteen months (between August 11, 2003 and December 1, 2004), practiced dentistry together in an employer-employee relationship pursuant to a written employment contract. This contract, designated as an Associate Contract (“Contract”), provided for the employment of Shannon Brophy-Wolter (“Brophy”) by John Fallabel (“Fallabel”) for an initial term of one year effective August 11, 2003. The agreement also provided for automatic renewal on an annual basis if not otherwise terminated (Contract, Section 2.1) and further provided that either party could terminate the contract without cause by giving ninety days written notice to the other (Contract, Section 6.1).

At the time the contract was executed on July 30, 2003, Brophy had just graduated from dental school; Fallabel was a fifty-one-year-old solo-practitioner with more than twenty-six years experience and with offices located at 1212 North Street, Jim Thorpe, Carbon County, Pennsylvania. Fallabel hoped—although not expressed in the contract—that if the arrangement were successful, Brophy would eventually purchase his practice and employ him, and after several years he would be able to retire. Unfortunately, the arrangement was not successful; Brophy chose to terminate the relationship; and Fallabel commenced the instant litigation.

Fallabel filed his complaint, in both equity and law, on March 14, 2005. In Count 1 of the complaint, Fallabel seeks to enforce and enjoin Brophy’s alleged violation of a covenant not to compete, together with other provisions of the contract. In this Count, damages, both specific and general, are requested. In Count 2 of the two-count complaint, Fallabel seeks liquidated damages as provided for in the contract for violation of certain provisions, as well as general relief.

Fallabel’s request for a preliminary injunction was denied by the Honorable Richard W. Webb following a hearing held on April 8, 2005. Upon Judge Webb’s retirement at the end of 2004, the case was assigned to the Honorable David W. Addy, who recused

himself on May 2, 2007, at Fallabel's request, following a hearing on Fallabel's petition to enforce a purported settlement agreement which Judge Addy denied. The case was then assigned to the undersigned before whom a nonjury trial was held on September 21, 2007.

During the first year of the contract it appears that the parties' employment relationship worked reasonably well. Brophy took her job seriously and worked hard. Fallabel agreed that she was "responsible, honest, hard-working, cooperative and professional while employed in [his] office." (N.T. 9/21/07, p. 58) Although disagreements arose between Brophy and some of the longer-serving staff in the office and Brophy was, at times, offended by several comments made by Fallabel, these difficulties were not enough to cause either party to elect to sever their relationship or to opt not to renew the agreement after the first year. (Contract, Section 2.1).¹

During the latter half of September, 2004, Fallabel and Brophy argued about the treatment provided to one of the patients Brophy had seen. A second argument occurred on October 1, 2004, about inputting the office's patient list into a computer which office staff had been in the process of compiling for approximately three months. The argument got out of hand and unfortunately things were said that should never have been said: Fallabel belittled, berated, and demeaned Brophy. Brophy was upset, mad, and offended. She was also pregnant and less than a month away from delivering her first child. The argument ended with Brophy informing Fallabel that she was then and there giving him a ninety-day notice of her intent to terminate the contract. Fallabel was dumbfounded and in disbelief at what was happening. He apologized to Brophy later that same day, but it was too late.

Brophy was on maternity leave from October 8 to November 5, 2004. During this period, Fallabel received a mailed letter from Brophy dated October 21, 2004, confirming, in her words, the "agreement [they] made on October 1, 2004, stating that [their] contract would be terminated in ninety days" and calculating the of-

¹ In characterizing these difficulties as being relatively minor, it is important to note that this is from Fallabel's perspective. Brophy did not testify at the time of trial and instead chose to rest immediately after the conclusion of Fallabel's case in chief.

ficial termination date to be December 29, 2004, that is, ninety days from October 1, 2004. Notwithstanding the contractual requirement that the ninety-day notice be in writing, Fallabel acquiesced in this timing of Brophy's departure, hoping nevertheless that he would be able to convince her to change her mind.

Within a week after Brophy's return from maternity leave, Fallabel learned that Brophy's decision to leave was irrevocable. At that time, Brophy told him that she had purchased the LeMaster's building along Route 443 in West Penn Township, Schuylkill County, Pennsylvania and planned to open her practice there. He also learned that Brophy was planning to take Tina Gerhardt, a front desk receptionist, with her. Ms. Gerhardt replaced another employee of Fallabel's (Jennifer Soates) who had been hired to support the addition of Brophy to his practice. Ms. Gerhardt was trained from scratch by Fallabel for this position. She was also Brophy's cousin.

Devastated by this turn of events, and also determined to enforce his contractual rights, Fallabel drove from his office to the LeMaster's building to measure the distance between the two. It was less than fifteen miles. The parties' contract provided that Brophy would not open a competing dental practice for a period of twelve months after termination of her employment within a straight-line radius of fifteen miles of Fallabel's office (Contract, Section 8.2). The contract further provided that Brophy would not solicit any of Fallabel's patients or staff during this same twelve-month time frame (Contract, Sections 8.3 and 8.7).²

² “At a minimum, for a non-competition or restrictive covenant to be enforceable, it must be ‘reasonably related to the protection of a legitimate business interest.’” **WellSpan Health v. Bayliss**, 869 A.2d 990, 996 (Pa. Super. 2005) (**quoting Hess v. Gebhard & Co., Inc.**, 570 Pa. 148, 160, 808 A.2d 912, 918 (2002)). If this threshold requirement is met, the court must next balance the private and public interests at stake: the employer’s protectable business interest against the employee’s interest in earning a living, and the interests of the employer and employee with the interests of the public, in particular, when the covenant involves a healthcare professional, the paramount interest of the public in access to healthcare. See **WellSpan Health, supra** at 999; **New Castle Orthopedic Associates v. Burns**, 481 Pa. 460, 469, 392 A.2d 1383, 1387-88 (1978).

In addressing the private interests, to be valid and enforceable a restrictive employment covenant must be (1) reasonably limited in duration of time and

Within days, Fallabel advised Brophy that where she intended to locate was too close to his office and she should get an attorney. She did. On December 1, 2004, Fallabel received a hand-delivered letter from Brophy's counsel accusing Fallabel of workplace harassment and declaring that the agreement was immediately terminated.³ This basis for termination was not pursued at trial.

The parties do not dispute that the LeMaster's building is within fifteen miles of Fallabel's office. They also agree that prohibiting Brophy from opening a practice at this location at this time is no longer a viable remedy. The one-year restriction on opening an office within fifteen miles of Fallabel's office has long since passed. The question is one of damages: for what, how measured, and in what amount.

geographic extent, (2) reasonably necessary to protect the employer without imposing an undue hardship on the employee, (3) ancillary to an employment relation, and (4) supported by consideration. **See Hess, *supra***, 808 A.2d at 917; **see also, John G. Bryant Co., Inc. v. Sling Testing and Repair, Inc.**, 471 Pa. 1, 11, 369 A.2d 1164, 1168 (1977). "In contrast, a post-employment covenant that merely seeks to eliminate competition *per se* to give the employer an economic advantage is generally not enforceable." **WellSpan Health, *supra*** at 996 (emphasis in original). Additionally, "[t]he law is clear that the burden is on him who sets up unreasonableness as the basis of contractual illegality to show how and why it is unlawful." **John G. Bryant Co., Inc., *supra*** at 12, 369 A.2d at 1169.

Brophy has not proven that the non-competition covenant found in Section 8.2 is unreasonable. At the time of trial, the evidence was undisputed that eighty percent of Fallabel's patients live within fifteen miles of his practice. The preservation of patient relationships is a legitimate, protectable business interest. **See WellSpan Health, *supra*** at 997 (discussing various protectable interests recognized by our Supreme Court). Further, the geographic area and time period set forth in this covenant were specifically negotiated between Fallabel and Brophy, who was represented by counsel at the time the contract was entered, and the duration, at Brophy's request, was reduced from twenty-four months in the initial draft to twelve months in the final contract. The evidence is also undisputed that within one year of the contract's termination Brophy was able to attract approximately seven hundred patients to her practice. Finally, no evidence was presented of a shortage of dentists or unmet patient demands within the restricted area; instead, the evidence established that within this area between eighty to eighty-five dentists maintain a dental practice.

³ Under the contract, if the decision to terminate is for cause, as that term is defined in the contract, no period of advance notice is required for termination (Contract, Section 6.2).

Fallabel presented expert testimony from his certified public accountant of twenty-nine years, Geoffrey B. Borda, that during the one-year period between December 1, 2004 and November 30, 2005, he sustained a loss in net patient income of somewhere between \$116,000.00 and \$145,000.00 attributable to Brophy opening an office within fifteen miles of his. Fallabel also contends that within one year of the termination date, Brophy employed a dental hygienist and receptionist who had been employed by him during the term of their employment relationship and that, in accordance with the contract, he is entitled to liquidated damages of \$7,500.00 for the hygienist and \$5,000.00 for the receptionist (Contract, Section 8.7). Fallabel also claims that as the prevailing party, pursuant to the contract, he is entitled to recover all costs of litigation, including his legal fees and expert witness expenses (Contract, Section 13.11). Brophy disputes that these, or any damages, are due, or have even been proven.

DISCUSSION

In a breach of contract claim, a plaintiff must prove three elements: "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract, and (3) resultant damages." **See Omicron Systems, Inc. v. Weiner**, 860 A.2d 554, 564 (Pa. Super. 2004). To sustain this burden, the elements must be proven by a preponderance of the evidence. **See Snyder v. Gravell**, 446 Pa. Super. 124, 127, 666 A.2d 341, 343 (1995), **appeal denied**, 544 Pa. 676, 678 A.2d 366 (1996).

It is the province of the fact-finder to determine what loss, if any, has been sustained and in what amount. **See Omicron Systems, Inc., supra** at 564. In doing so, "[t]he fact-finder must assess the testimony, by weighing the evidence and determining its credibility, and by accepting or rejecting the estimates of the damages given by the witnesses." **Id.**

1. Compensatory Damages

In order to establish compensatory damages, the burden is upon the proponent to produce evidence which affords a reasonably fair basis for calculating the amount of loss actually sustained. **See Kaczkowski v. Bolubasz**, 491 Pa. 561, 567, 421 A.2d 1027, 1030 (1980). Though such evidence need not quantify damages according to a standard of mathematical exactness, it must, at a minimum,

fairly approximate actual damages caused by the breach. **See Fish v. Gosnell**, 316 Pa. Super. 565, 583, 463 A.2d 1042, 1051 (1983). Where one party has been injured and another is at fault, and the only uncertainty is in valuing the loss because certain types of damages are not capable of precise measurement or because they are of an inherently uncertain nature, recovery will not be denied if the evidence presented affords a fair basis for making a reasonable calculation of the loss sustained. **See Greer v. Bryant**, 423 Pa. Super. 608, 618, 621 A.2d 999, 1004-1005 (1993). Under these circumstances, “[s]ubstantial justice is better than exact injustice.” **Osterling v. Frick**, 284 Pa. 397, 404, 131 A. 250, 252 (1925).

To a certain extent, the fact-finder may use a measure of speculation in estimating damages: “The fact-finder may make a just and reasonable estimate of the damage based on relevant data, and in such circumstances may act on probable, inferential, as well as direct and positive proof.” **Omicron Systems, Inc., supra** at 565. However, damages cannot be awarded on the basis of speculation, guesswork, or conjecture. **Id.**

Borda testified that he computed Fallabel’s loss by averaging Brophy’s actual monthly gross receipts from patients for the second and third quarters of 2004, applied a productivity factor to this monthly average based on anticipated future growth in the number of patients she would have seen had she remained in Fallabel’s employ, and made an adjustment for a fee increase which Fallabel implemented in March 2005. From this monthly average, Borda subtracted the expenses attributable to this income, including Brophy’s anticipated salary computed pursuant to the contract, to determine a projected loss of net income for 2005. On cross-examination, however, it became apparent that these figures bore no relationship to any actual damages Fallabel may have sustained from a breach of the covenant not to compete.

Borda candidly admitted that his calculations had nothing to do with where Brophy located her office. Whether Brophy opened her office within a fifteen-mile radius of Fallabel’s office, beyond this fifteen-mile range, or decided not to open an office at all, made no difference in Borda’s computation of the amount of the loss sustained by Fallabel for Brophy’s breach of the contract’s covenant not to compete. In effect, the amount computed by

Borda was not an estimate of any loss sustained by Fallabel due to competition from Brophy, but was the projected amount Fallabel would have realized had Brophy remained in his employment for an additional year.

The two are not the same: while Brophy was clearly prohibited by the contract from competing within the restricted fifteen-mile territory for one year after termination of the contract, she was not obligated by the contract to remain in Fallabel's employ for one year following notice of her intent to terminate. At most, she was committed to continuing her employment with Fallabel for ninety days after giving notice of her intent to terminate. Borda's testimony does not prove that Fallabel sustained any actual financial loss as a result of Brophy opening a dental practice within fifteen miles of his office—an essential element of his claim.

2. Liquidated Damages

(a) Solicitation of Patients

Beyond the issue of whether Borda has measured the proper damages is the equally important question of whether Borda has assumed the proper measure of damages. At issue is whether a party may sue for a different measure of damages than that which was agreed upon in the contract. Specifically, as to damages for solicitation of Fallabel's patients, the parties' contract provides:

[Brophy] will not solicit or aid in the solicitation of any patients of [Fallabel], for her own account or for the account of others, for a period of twelve (12) months after the termination of this Agreement. In the event of a breach of this subsection by [Brophy], then in addition to any other remedy the employer may have, [Brophy] will pay to [Fallabel], not as a penalty but as a reasonable estimate of damages, the liquidated sum of three hundred fifty (\$350) for each patient of the Practice who transfers to [Brophy] as a result of such solicitation.

(Contract, Section 8.3)

"[A] provision which represents a good-faith and reasonable forecast of anticipated damages for breach which are otherwise difficult to prove with certainty will be construed as one for liquidated damages . . ." **Geisinger Clinic v. DiCuccio**, 414 Pa. Super. 85, 101, 606 A.2d 509, 517 (1992), **appeal denied**, 536 Pa. 625, 637

A.2d 285 (1993), **cert. denied**, 513 U.S. 1112 (1995). Liquidated damages are those which “a party to a contract agrees to pay if he breaks some promise, and which, having been arrived at by a good faith effort to estimate in advance the actual damage that will probably ensue from the breach, [are] legally recoverable … if the breach occurs.” **Pantuso Motors, Inc. v. CoreStates Bank, N.A.**, 568 Pa. 601, 798 A.2d 1277, 1282 (2002). Liquidated damage clauses are enforceable provided, “at the time the parties enter into the contract, the sum agreed to is a reasonable approximation of the expected loss rather than an unlawful penalty.” **A.G. Cullen Construction, Inc. v. State System of Higher Education**, 898 A.2d 1145, 1162 (Pa. Commw. 2006); **see also, Geisinger Clinic, supra** at 99, 606 A.2d at 516 (identifying four criteria to differentiate a liquidated damage provision from a penalty or forfeiture term in a restrictive covenant clause of an employment agreement). When the parties to a contract have themselves agreed upon a fair means of measuring damages which are difficult to estimate in advance or to prove after a breach occurs, the fundamental fairness of awarding damages as bargained-for by the parties should be beyond reproach. **See Worldwide Auditing Services, Inc. v. Richter**, 402 Pa. Super. 584, 594, 587 A.2d 772, 777-78 (1991) (“Damages arising out of a breach of a covenant not to compete are difficult to compute with precision.”); **see also, West Conshohocken Restaurant Associates, Inc. v. Flanigan**, 737 A.2d 1245, 1249 (Pa. Super. 1999) **appeal denied**, 757 A.2d 934 (Pa. 2000) (limiting total damages for breach of a contract to the liquidated damages set forth in the contract).

The contract in issue does not provide that Brophy may be subject to certain defined damages for soliciting and accepting Fallabel’s patients. Rather, it provides that in such event, Brophy “will pay to [Fallabel], not as a penalty but as a reasonable estimate of damages, the liquidated sum of \$350.00 for each patient of the Practice who transfers to [Brophy] as a result of such solicitation.” (Contract, Section 8.3) (emphasis added)⁴

⁴ Fallabel’s argument that an alternate measure of damages is permitted because the contract provides that an injured party is entitled to liquidated damages “in addition to any other remedy,” misreads the agreement. Since liquidated damages are a substitute for actual damages, permitting the recovery of both liquidated and actual damages for the same loss could be nothing but a penalty.

This provision, however, is of no benefit to Fallabel since no evidence was presented that Brophy acquired any of his patients during the prohibited period. The burden is upon the party claiming a breach to establish that breach and to prove that liquidated damages are due and owing. **A.G. Cullen Construction, Inc.,** *supra* at 1162.⁵

We do not believe this was intended by the parties. Instead, a fair and plausible reading of this language, and the one we accept, is that the term "any other remedy" refers to other remedies, including equitable relief, for harm which is nootherwise compensated for, and contemplated by, the provision for liquidated damages. Cf. Section 8.9 of the contract (providing that equitable remedies are available when monetary damages are insufficient to adequately compensate for a breach of duty imposed by the agreement).

⁵ In an attempt to correct this deficiency, Fallabel asks that we consider his testimony at the preliminary injunction hearing held before Judge Webb on April 8, 2005. Fallabel argues that this testimony is automatically part of the trial record and must be considered as a matter of law. In response, Brophy argues that it would be fundamentally unfair to consider this testimony; that, at the time of trial, the parties reached a stipulation to incorporate the preliminary hearing testimony of Ralph Clay, a surveyor, but not that of Fallabel; and that based upon this stipulation and her assessment of the testimony Fallabel presented at trial, she made a tactical decision to rest her case without presenting any evidence.

At the time of trial, counsel for both parties represented to the Court that a stipulation had been reached to incorporate the testimony of Mr. Clay taken at the preliminary hearing, thus avoiding the necessity of calling this witness again at trial. As pertinent to this issue, the following exchange occurred at the time of trial:

THE COURT: So the testimony in the preliminary injunction hearing before Judge Webb with respect to Mr. Clay has been stipulated to and will become part of the record in this proceeding?

MR. SHAPIRO: Yes. And I guess the affidavit of Mr. Clay that was marked and admitted in the hearing was stipulated to as well.

THE COURT: I know that Dr. Fallabel also testified at that time. His testimony is not being stipulated as being made part of this proceeding, just so I am clear?

MR. SHAPIRO: Yes, that is correct.

THE COURT: Okay. So the stipulation is that Mr. Clay's testimony in its entirety, plus his affidavit which I believe was marked as Exhibit 7 in that proceeding is admitted in this proceeding?

MR. ADAMS: That is correct, Your Honor.

THE COURT: So stipulated and it will be admitted. Dr. Fallabel, you can take the stand. Mr. Clay, you are free to go.

(N.T. 9/21/07, p. 68)

(b) Solicitation of Staff

Section 8.7 of the contract prohibits Brophy for a period of twelve months after termination of the agreement from hiring or engaging the services of any hygienist, dental assistant, or any other person employed by Fallabel at any time during the term, until twelve months after such person was last employed by Fallabel, without Fallabel's consent. Similar to Section 8.3, Section 8.7 further provides that "[i]n the event of a breach of this Section 8.7 by [Brophy], and in addition to any other remedy which [Fallabel] may have, [Brophy] will pay to [Fallabel], not as a penalty but as a genuine estimate of damages, a liquidated sum equal to" \$7,500.00 for any hygienist and \$5,000.00 for any other employee hired by Brophy in violation of this restriction. Fallabel claims that Brophy hired two of his employees, a receptionist (Tina Gerhardt) and a hygienist in violation of the contract and that he is entitled to \$12,500.00 in liquidated damages as a consequence.

Again, this claim has not been proven. Fallabel presented no evidence of any hygienist formerly employed by him who was hired by Brophy. With respect to Tina Gerhardt, Fallabel testified

Under these circumstances, we agree that it would be fundamentally unfair to enlarge the record beyond that which was agreed to at the time of trial. Had such evidence been offered by Fallabel and admitted by the Court, at a minimum Brophy would have been placed on notice that all of the testimony taken at the preliminary hearing would be considered by the Court, and she would have had an opportunity, in light of this notice, to decide whether to cross-examine Fallabel about his prior testimony and whether to present any direct testimony to the contrary. **Cf. Lackey v. Sacoolas**, 411 Pa. 235, 239, 191 A.2d 395, 397-98 (1963) (upholding the trial court's incorporation of the testimony from a preliminary hearing into the final hearing on the injunction, over defendants' objection, where defendants had a full opportunity to present additional direct testimony and to subject the witnesses at the preliminary hearing to cross-examination).

We further believe that absent a stipulation by the parties or Fallabel's request at the time of trial to incorporate this testimony, with a full opportunity for Brophy to respond, Fallabel's preliminary hearing testimony cannot be considered. Unlike Federal Rule of Civil Procedure 65(a)(2) which automatically incorporates that evidence from a preliminary injunction hearing which is admissible at trial into the trial record, Pa. R.Civ.P. 1531 does not contain similar authority and is, in fact, silent on the issue. Moreover, Fallabel's preliminary hearing testimony does not fit the hearsay exception for former testimony since he in fact was available and was present at the time of trial. Pa. R.E. 804(b)(1).

only that when he learned in November 2004 that Brophy had purchased the LeMaster's building and was intending to open a practice there, he also learned that Brophy was intending to have Gerhardt, her cousin, accompany her.

The agreement was not terminated until December 29, 2004, or December 1, 2004, at the earliest, the last day Brophy worked for Fallabel. Fallabel testified that after Brophy left, he asked Gerhardt to stay on and she asked to be laid off. Fallabel did so, however, there is no evidence that after Gerhardt left Fallabel's employ she was subsequently employed by Brophy.

3. Counsel Fees

The agreement in this case provides for an award of counsel fees to the prevailing party (Contract, Section 13.11). Neither party, however, presented any evidence at the time of trial as to the amount or reasonableness of any counsel fees they incurred. Having failed to do so, this claim has been waived.

Attorney fees, when provided for in a contract, are an element of compensable damages resulting from a breach of duty imposed by the contract and which the parties have agreed the prevailing party is entitled to recover. Attorney fees, as so provided, are qualitatively distinct from attorney fees authorized by statute or other governing authority to be taxed as costs under certain specifically defined and limited circumstances. **See e.g.**, 42 Pa. C.S.A. §1726(a) (1) (providing that attorney fees are not an item of taxable costs except to the extent authorized by 42 Pa. C.S.A. §2503). In cases such as this, the recovery of attorney fees is part of the contract claim for which evidence of the fees incurred and their reasonableness must be presented to the fact-finder at the time of trial. **Cf. Matter of Howarth's Estate**, 310 N.W.2d 255, 257 (Mich. App. 1981) (In denying a claim for attorney fees because the expenses incurred were not introduced at trial, the court stated, "We believe that the better rule is to require introduction of evidence. A party asserting a breach of contract claim bears the burden of proving his damages with reasonable certainty. Appellee's claim for attorney fees here was simply a claim for damages for breach of contract and should have been treated as any other such claim.").

While the parties, with the approval of the Court, can agree that the amount of compensable attorney fees will be determined in a

post-trial evidentiary hearing, unless statutory or other authority exists to tax attorney fees as costs to be assessed after trial, a party proceeds at his own risk in failing to address this issue up front at the time of hearing. Such a request was not made by either party prior to the close of the evidence.⁶

CONCLUSION

In accordance with the foregoing, Fallabel has failed to prove either compensatory damages caused by breach of the covenant not to compete or liquidated damages as provided for in the contract for soliciting patients or employing members of his staff. Therefore, judgment will be entered in favor of Brophy and against Fallabel on both counts of the complaint.

⁶ At the time of trial, the issue of attorney fees was first raised by Fallabel after both parties had rested. After expressing concern about the timing of the request, the Court suggested that if both parties were in agreement, the issue of attorney fees could be addressed in a post-verdict proceeding. Brophy advised she would not agree with a post-trial submission and was taking the position that the issue had been waived by both parties. Moreover, since Fallabel is not a prevailing party under our decision, Fallabel's claim for attorney fees is moot.

**IN RE: JAMES MURPHY, PETITION FOR APPOINTMENT OF
BOARD OF VIEWERS TO LAY OUT AND OPEN A PRIVATE
ROAD OVER PROPERTY OF TOWAMENSING TRAILS
PROPERTY OWNERS' ASSOCIATION, INC.**

*Civil Law—Private Road Act—Bifurcation of
Proceedings—Determination of Necessity of
Private Road—Determination of Damages*

1. The Private Road Act permits a landowner whose property is landlocked to condemn a private road over property of another for access to a public highway. Upon the filing of a petition under the Act requesting the opening and laying out of a private road over another's property, the matter is referred to a board of viewers appointed by the court whose duty it is to view the site, take evidence, if necessary, and report back to the court.
2. The proceedings to condemn a private road are bifurcated between proceedings to determine the necessity and location of a private road and those to determine damages. The trial court must determine all legal issues relating to the necessity and location of the road before damages can be assessed.
3. The taking of property for private use is presumptively unconstitutional. Therefore, the test of necessity requires a finding of strict necessity before the opening and laying out of a private road across another's property will be permitted. This standard, while not one of absolute necessity, requires, in the case of an existing road, not merely inconvenience in access but that "the

existing access is extremely difficult and burdensome in its use and warrants the appropriation of another more convenient course.”

4. Damages in a private road proceeding are to be determined in the same manner as in the case of a public road. The condemnee is entitled to fair and just compensation for the land taken. The measure of damages for the taking of a private road is the difference in fair market value of the condemnee’s property before and after the condemnation.

5. In reviewing the findings of the board of viewers, the court of common pleas acts in an appellate capacity. The court cannot look beyond the record or consider questions of fact. Instead, the court’s review is limited to ascertaining the validity of the board’s jurisdiction, the regularity of the proceedings, questions of law and whether the board abused its discretion.

6. All legal issues relating to the necessity of the taking are determined by the court as a matter of law. However, on appeal from the board’s award of damages, the aggrieved party is entitled to a trial **de novo** on the issue of damages.

7. An owner of property in a private residential subdivision whose lot is inaccessible using the roads as depicted on the approved subdivision plan for the development within which his property is located, being separated from public access by a stream and adjoining wetlands which bisect the subdivision and over which no crossing has been built, will be granted a right-of-way over property of an adjoining development and its existing roads when governmental permits necessary to cross the stream and wetlands appear impossible to obtain, and the cost of construction, assuming the permits can be obtained, is so disproportionate to the value of the property as to make it useless.

NO. 90 MD 2006

ANTHONY ROBERTI, Esquire—Counsel for Petitioner, James Murphy.

DAVID JAMES WILLIAMSON, Esquire—Counsel for Respondent, Towamensing Trails Property Owners’ Association, Inc.

MEMORANDUM OPINION

NANOVIC, P.J.—December 12, 2008

In these condemnation proceedings, James Murphy, as the owner of landlocked property, seeks to acquire a right-of-way across property owned by Towamensing Trails Property Owners’ Association, Inc. (“Association”) pursuant to the Private Road Act. The matter has been tried before a Board of Viewers (“Board”) and the Association has filed exceptions to the Board’s reports. These exceptions raise two primary issues: (1) whether Murphy’s property is in fact landlocked, justifying the need for access across the Association’s property and, if so, (2) whether the Board ap-

plied the proper measure of damages to determine what amount of compensation should be paid to the Association for the taking of its property.

PROCEDURAL AND FACTUAL BACKGROUND

Penn Forest Acres is a private residential subdivision located in Penn Forest Township, Carbon County, Pennsylvania. It contains ninety-six lots, each an acre or more in size and each dependent on on-lot water and septic systems. The only entrance to the subdivision is from State Route 534, with which two of the development roads intersect: Hemlock Drive and Laurel Drive. The subdivision lies entirely on the western side of State Route 534 which is also the eastern boundary line for the development.

Penn Forest Acres is bisected by Mud Run, a high-quality stream which runs for most of its course within the development in a north/south direction. On the west side of Mud Run is a group of thirty-two lots. These lots have not been built on and the development roads on this side of the stream have yet to be constructed. As depicted on the approved subdivision plan for Penn Forest Acres, the only means of public access to these thirty-two lots after entering the development is by traveling west on Hemlock Drive to its intersection with Maple Lane, south on Maple Lane to its intersection with Forest Drive, and west on Forest Drive to its projected crossing over Mud Run, a total distance of approximately 2,500 feet.¹ Neither a bridge nor other means to cross Mud Run, however, has ever been constructed; accordingly, none of these thirty-two lots has vehicular access to a public road.

On November 14, 2003, the unsold properties of the original developer of Penn Forest Acres were sold at a judicial tax sale to Statewide Investments Ltd. for \$15,000.00. The properties purchased by Statewide included all of the thirty-two lots on the west side of Mud Run as well as all development roads. By deed dated April 14, 2005, Murphy purchased Lot No. 42 in Penn Forest Acres from Statewide for \$10,000.00. This lot is included in the group of thirty-two lots located on the west side of Mud Run.

¹ Laurel Drive has not been fully constructed and only extends approximately four hundred feet from its intersection with Route 534.

On April 17, 2006, Murphy filed a petition for the appointment of a Board of Viewers under the Private Road Act (“Act”), Act of June 13, 1836, P.L. 551, as amended, 36 P.S. §§1781-2891, to lay out and open a private road over and across property owned by the Association, the property owners’ association for Towamensing Trails. Towamensing Trails is a major subdivision, separate and apart from Penn Forest Acres, which abuts Penn Forest Acres on its western boundary where the group of thirty-two lots is located.

In his petition filed pursuant to Section 11 of the Act, 36 P.S. §2731, Murphy claims that his property is landlocked for all practical purposes and has no access to a public highway because any easement or right-of-way he has the right to use within Penn Forest Acres is “separated by a 100’ wide area of creek/stream called ‘Mud Run’ (and adjoining ‘wetlands’),” which lay between his property and Route 534 (Petition, Paragraph 5). Murphy further claims that the cost of constructing a bridge would be exorbitant and disproportionate to the value of his property, assuming the regulatory authorities would issue the necessary permits (which he describes as unlikely), and that the effects of construction would be dangerous and harmful to the environment (Petition, Paragraph 11). Murphy identifies the right-of-way requested as consisting of “Lovelace Road” in the Towamensing Trails subdivision² and over and across other existing development roads owned by the Association to access Old Stage Road (Township Road T-516) (Petition, Paragraph 8).³ Murphy further alleges that the right-of-way requested is the shortest and most direct reasonable route to obtain access to a public highway, and that because it utilizes existing roads, it will cause the least injury to any private person, including the Association (Petition, Paragraphs 9, 14, 18, and 21).

The route Murphy proposes to use crosses a parcel of unimproved land owned by the Association, 40 feet in width and 150

² Lovelace Road provides travel in an east/west direction. Within Towamensing Trails, that portion of Lovelace Road east of its intersection with Whitman Lane has been built and that portion west of this intersection—the only section of the route proposed by Murphy which would require construction of a road—is unbuilt.

³ We believe and have thus treated the property interest condemned as being one for an easement, rather than a fee simple. The petition itself is unclear on this point.

feet in length, which, according to the recorded subdivision plan for Towamensing Trails, is dedicated for use as a development road, namely that portion of Lovelace Road lying between its intersection with Whitman Lane on the west and its easternmost point within Towamensing Trails where it enters Penn Forest Acres. This section of Lovelace Road is also depicted on the subdivision plan for Penn Forest Acres where, after entering Penn Forest Acres, it continues within Penn Forest Acres as a private development road under the same name. The distance between Lot 42 and the point where Lovelace Road enters Penn Forest Acres, by way of the paper roads depicted on the approved subdivision map for Penn Forest Acres, is approximately 950 feet. From the intersection of Lovelace Road and Whitman Lane, the shortest distance to a public road would require Murphy to travel across approximately six thousand feet of the Association's existing roads.⁴

A Board of Viewers was appointed on April 24, 2006. By stipulation, the parties agreed that the necessity for a private road should first be heard and determined by the Board, with subsequent proceedings, if required, to determine the amount of damages.

The Board first convened, viewed the site, and held a hearing on August 8, 2006. On November 17, 2006, it filed its first report in which it determined that a private road was necessary for the benefit of Murphy's property and that the location of this road as proposed by Murphy was appropriate. The Board recommended a subsequent hearing on the question of damages.

In its first report, the Board determined that access to Lot 42 through Penn Forest Acres as designated on the approved subdivision plan for this development was impractical, if not impossible, due to the topographical conditions of Mud Run and its adjoining wetlands. Based on the testimony of expert witnesses, the Board

⁴ Towamensing Trails contains more than 4,200 lots on which more than 2,250 homes have been built. Its road system consists of more than fifty-two miles of roadway with twenty-seven exits and entrances to public roads. The shortest route identified appears to be by traveling north on Whitman Lane from its intersection with Lovelace Road to Teddyuscung Trail, west on Teddyuscung Trail to Towamensing Trail, and then north on Towamensing Trail to its intersection with State Route 903 (N.T. 8/08/06, pp. 119-20). This route also appears to be the route approved by the Board. See Footnote 10, *infra*. All parties agree that to limit Murphy's use to a specific route would be unenforceable.

found that the cost to construct a crossing over Mud Run and its surrounding wetlands at the Forest Drive site, involving approximately one hundred feet of wetlands on either side of Mud Run, would be approximately \$4,500,000.00. This assumes that both the United States Army Corps of Engineers and the Pennsylvania Department of Environmental Resources (**i.e.**, both federal and state agencies) will approve a permit to cross and encroach upon Mud Run and its surrounding wetlands. Given the designation of Mud Run as a coldwater fishery stream and the exceptional value of the surrounding wetlands, the Board accepted Murphy's expert witness testimony that the probability of this happening is unlikely. Although no application to obtain a permit has been filed, the Board also accepted Murphy's expert witness testimony that the application process to determine whether a permit would be approved would itself cost approximately \$100,000.00. In contrast, the cost to construct the unopened portion of Lovelace Road across the Association's property was estimated at \$45,000.00. Assuming road access and suitability for an on-lot septic system (neither a test pit nor perc test had been conducted as of the date of the Board's hearing), Murphy's property has a fair market value of between \$30,000.00 and \$35,000.00. In addition to finding that the opening of a private road was necessary for Lot 42 to have public access, the Board recommended that the width of this right-of-way across the Association's property be set at twenty-five feet.

In accordance with the parties' agreement, following the Board's initial report, the parties petitioned this Court to reconvene the Board to determine damages. An additional hearing for these purposes was held on April 25, 2007, following which the Board, on August 13, 2007, filed its second report. In this report, the Board stated that the parties had reached an agreement on the amount of damages to be awarded for Murphy's taking of a 25 feet by 150 feet right-of-way over the unopened portion of Lovelace Road and that this amount should be set at \$1,500.00. In valuing the loss sustained by Murphy's use of the Association's existing roads, the Association requested damages of \$330,000.00. This amount represents half of the cost to construct six thousand linear feet of road as well as \$30,000.00, which it attributed to the nuisance value of additional traffic. No testimony with respect to damages was presented by Murphy.

The Board found the Association's evidence of damages to be incredulous. Instead, it recommended that the fairest measure of damages would be for the Association to assess Murphy an annual fee identical to that which it assesses its members each year for the costs associated with the use and maintenance of the development roads. The Board further recommended an award of \$1,500.00 as stipulated to by the parties, and an additional \$500.00 for attorney and appraisal fees, citing 26 P.S. §1-610 (repealed 2006) as authority for this figure.⁵

The Association filed exceptions to each of the Board's reports. In these exceptions, the Association challenges the necessity of the taking and the computation of damages.

DISCUSSION

At the outset, we believe a basic understanding of certain procedural and substantive aspects of the Act is important to a better understanding of the issues presented by the Association.⁶ Procedurally, the Act provides for bifurcated proceedings: "The initial proceedings to open (**i.e.**, condemn) private roads and subsequent proceedings to assess damages . . ." **In re Brinker**, 683

⁵ The Eminent Domain Code was revised effective September 1, 2006. Because the instant taking occurred prior to this effective date, the section cited by the Board applies rather than the current statute, 26 Pa. C.S.A. §710.

⁶ The Private Road Act provides for the condemnation of and compensation for private property by private parties for private purposes with an ultimate public good: providing landlocked property with an access to a public road. Indeed, "the constitutionality of the Private Road Act rests entirely on the existence of public benefits derived from the establishment of a private road." **In re Opening a Private Road**, 954 A.2d 57, 71 (Pa. Commw. 2008) (quotation marks omitted). Less evident, but nevertheless critical to a full understanding of the role of the Act as part of a comprehensive scheme for the creation of a road system in this Commonwealth, is an awareness that when all land in this Commonwealth was originally conveyed by the proprietors or the Commonwealth, the grantee received an additional six percent of land, free of charge, for the establishment of roads as they became necessary. **See id.** at 65. This six percent allowance was, in effect, conveyed in trust to the original grantees, their heirs and assigns, for the public benefit of opening roads in the future, including private roads. Consequently, "[t]he laying out of private roads is not a taking in the ordinary sense, but an incorporeal burden on those whose lands the private road is to traverse to be exercised by those seeking a private road in the manner determined by the General Assembly." **Id.** at 72 (upholding the constitutionality of the Private Road Act against a challenge under the Fifth Amendment to the United States Constitution and Article I, Sections 1 and 10 of Pennsylvania's Constitution).

A.2d 966, 969 (Pa. Commw. 1996). The proceedings commence when a landlocked property owner petitions the court of common pleas to open a private road so that the owner's property will have access to a public highway or to any private way leading to a highway. 36 P.S. §2731. If satisfied that the petition is in proper form, the court appoints a board of viewers to view the site where the road is requested and to report back to the court. 36 P.S. §2731; **In re Private Road in Nescopeck Township**, 281 Pa. Super. 341, 344, 422 A.2d 199, 201 (1980).

Once appointed, the board must determine if a private road is necessary. 36 P.S. §2732. This is a factual question to be decided after the board views the property and, if necessary, holds a hearing. **See Mattei v. Huray**, 54 Pa. Commw. 561, 565-66, 422 A.2d 899, 901 (1980). If the requisite necessity for a private road is found, the board must also determine the location for the road considering the following factors: (1) the shortest distance, (2) the best ground for the road, (3) the least injury to private property, and (4) as far as practical, the desire of the petitioner. 36 P.S. §1785.

The board's report of its findings is then filed with the court that directed the view and that court may confirm the report, or reject it and direct a review. 36 P.S. §§1832, 2732; **see also, Brinker, supra** at 969. If confirmed, the court, not the board, fixes the width of the road to be opened at the time that it approves **nisi** the board's report. 36 P.S. §§1832, 2732; **see also, Brinker, supra** at 969 n.7. This private road width may in no case exceed twenty-five feet. 36 P.S. §1901; **Fengfish v. Dallmyer**, 434 Pa. Super. 250, 642 A.2d 1117 (1994) (finding that the board's action in creating a right to use the entire width of an existing fifty feet wide private easement was without authority and void).

Following confirmation **nisi**, in a second proceeding, the board determines the amount of damages sustained which is to be computed in the same manner provided in the case of a public road. 36 P.S. §§1881, 2736; **see also, Brinker, supra** at 969, 971. The board's report on this issue is then submitted to the court which can either confirm or reject it. Again, the court's confirmation **nisi** is subject to exceptions or an appeal by either party.

No road shall be opened until the damages have been paid in full. 36 P.S. §2736. If a road is not physically opened within five

years of the final decree confirming the opening and laying out of the road, then the entire proceedings “shall be deemed to be void and of no effect, and the land proposed to be taken shall revert to the owners of the land, as in the case of the vacation of a public road, free of any easement or right of the petitioner or petitioners for such road to use the same.” 36 P.S. §2738.

The proceeding to determine the necessity of a road and the proceeding to assess damages for the taking are distinct and require separate analyses. **See Brinker, supra** at 969. All legal and factual issues relating to the necessity of the taking must be determined by the court before damages are assessed. **See id.** at 970. “Only after it has been decreed that a private road is necessary and is to be opened across the land of another, and the location, width, and distance thereof have been determined, does it become possible to estimate damages ‘in the manner provided in the case of a public road.’” **Driver v. Temple**, 374 Pa. Super. 389, 393, 543 A.2d 134, 136 (1988) (footnote omitted), **appeal denied**, 520 Pa. 607, 553 A.2d 969 (1988). It has also been held that “[t]he commencement of proceedings for the assessment of damages ... is a waiver of defects in the order confirming the opening of the private road.” **Id.** at 393, 543 A.2d 136.

“[A]n aggrieved party is entitled to a jury trial solely on the issue of damages and not on the issue of necessity.” **Brinker, supra** at 970. If the board’s award of damages is appealed, a trial **de novo** restricted to the issue of damages is held before either the court alone or a jury, if demanded. **See Brinker, supra** at 970-71.

The Act “grants to boards of view broad authority to determine whether a private road is necessary and, if so, where it shall be located.” **Driver, supra** at 394, 543 A.2d at 136. The board constitutes an independent tribunal and its authority “will not be infringed upon by a court’s substituting its judgment for that of the viewers.” **Fengfish, supra** at 254, 642 A.2d at 1119. “It is not for the trial court to determine whether, in fact, a necessity has been proven; that is a matter for the board of viewers.” **Lobdell v. Leichtenberger**, 442 Pa. Super. 21, 29, 658 A.2d 399, 403 (1995). The court “cannot look beyond the record or consider questions of fact.” **Brinker, supra** at 969. “Rather, Common Pleas has appellate review which is limited to ascertaining the validity of the Board’s

jurisdiction, the regularity of the proceedings, questions of law and whether the Board abused its discretion.” **Id.**

Section 4 of the Act, 36 P.S. §1832, was repealed by Section 2(g) of the Judiciary Act Repealer Act of 1980 (“JARA”), 42 Pa. C.S. §20002(g), and supplanted by Section 5571(b) of the Judicial Code, 42 Pa. C.S. §5571(b). **See Brinker, supra** at 970. As applied to a private road case, “the ‘order appealed from’ [under 42 Pa. C.S. §5571(b)] is the Court’s order confirming **nisi** the Board’s report.” **Id.** at 971. Consequently, a party desiring to challenge the board of viewers’ report “must file exceptions regarding the Board’s finding of necessity and/or an appeal of the Board’s assessment of damages, with Common Pleas within thirty days after the date on which the Court’s order confirming **nisi** the Board’s report is entered on the docket.” **Id.** (footnote omitted).

The board’s report has no effect unless and until the report is confirmed **nisi** by the court of common pleas. **See id.** This differs from the board’s award in an eminent domain proceeding under the Eminent Domain Code, where the award of the board itself is appealed to common pleas and where if no appeal is taken within thirty days after the report has been docketed, the report becomes final as of course. 26 P.S. §1-515 (repealed 2006) (decree confirming report of viewers after it has been determined finally shall constitute final order); **see also, Brinker, supra** at 971.

If the court denies a party’s exceptions to the board’s report on the question of necessity for a private road, review of the court’s final order is by direct appeal. **See Brinker, supra** at 970 n.10; **see also, Driver, supra** at 393, 543 A.2d at 136. If the challenge is to a jury verdict on the amount of damages, either post-trial motions or a direct appeal may be taken. **See Brinker, supra** at 970 n.10. With this background, we now turn to the specific issues raised by the Association.

(a) **Necessity**

In **Little Appeal**, 180 Pa. Super. 555, 119 A.2d 587 (1956), the court stated:

The Act provides for this Board [of viewers] to determine the necessity of the road, ... and ordinarily this is a factual matter to be determined by actually viewing the premises and

if necessary, by holding hearings. To determine what in fact is necessary the Board naturally has to know as a matter of law what the Act requires, and in this sense, the Board must interpret the law

This legislation, allowing the appropriation of private property for private use is at the very least in the nature of eminent domain legislation and must therefore be strictly construed. . . . The word necessity, the key to this entire Act must likewise be given a strict interpretation.

While the Act does not require an absolute necessity, such as being completely landlocked, the mere inconvenience in the use of an existing road is not enough. . . . The existing road must be of a limited privilege, . . . or ‘extremely difficult and burdensome’ in its use, . . . to warrant the appropriation of another more convenient course. In short, the Act is said to require the ‘strictest necessity.’

Id. at 558-59, 119 A.2d at 589 (citations omitted); **see also, Graff v. Scanlan**, 673 A.2d 1028, 1031 (Pa. Commw. 1996). Additionally, “necessity must be based upon the present facts, not on some contemplated future use.” **Lobdell, supra** at 68, 658 A.2d at 403.

Here, the Board found Murphy’s property to have a fair market value of between \$30,000.00 and \$35,000.00, at most. Although it appeared unlikely that a permit could be obtained, the costs of applying for and obtaining a permit were estimated to be near \$100,000.00. And, if obtained, the cost of constructing a crossing over the stream and wetlands is estimated to be \$4,500,000.00. Under these circumstances, we do not believe the Board abused its discretion in concluding that an alternate route is necessary for Murphy to have access to his property. Cf. **Lobdell, supra** at 27, 658 A.2d at 403 (holding that a petition describing the existence of a creek-side right-of-way which was narrowed and unstable due to stream erosion, making its use dangerous and unsafe, met the requisite standard of necessity, that the owner was more than merely inconvenienced in her access, but rather that the existing access is extremely difficult and burdensome in its use and warrants the appropriation of another more convenient course); **Mattei, supra** at 563, 422 A.2d at 900 (holding that necessity ex-

isted notwithstanding the existence of a right-of-way; the existing right-of-way was determined to be not feasible for a private road because topography would make construction of the road extremely expensive and would make the road inaccessible for a portion of each year during times of inclement weather).⁷

(b) **Location**

The Board's duties are defined in Section 2 of the Act as follows:

The persons appointed as aforesaid shall view such ground, and if they shall agree that there is occasion for a road, they shall proceed to lay out the same, having respect to the shortest distance, and the best ground for a road, and in such manner as shall do the least injury to private property, and also be, as far as practicable, agreeable to the desire of the petitioners.

36 P.S. §1785.

In this case, although the location approved by the Board is the longest route, it requires the least construction and follows an existing road. Cf. **In re Private Road, Cogan Township**, 684 A.2d 237, 241 (Pa. Commw. 1996) (upholding the board's decision locating the condemned right-of-way over an existing three-mile private road rather than across an alternative route nine hundred feet in length); **In re Laying Out and Opening a Private Road**, 405 Pa. Super. 298, 305 n.3, 592 A.2d 343, 347 n.3 (1991) (holding that the "prior existence of a roadbed is a factor to be considered as to the placement of a private road"). To the extent the route involves new construction, it will cross property already dedicated for use as a road. Additionally, the route chosen will not disturb wetlands

⁷ To the extent the Association argues that necessity cannot exist if Murphy knew or should have known at the time of purchase that his property was landlocked, the Association is in error. A purchaser's knowledge that property is landlocked will not defeat a finding of "strict necessity." **Graff v. Scanlan**, 673 A.2d 1028, 1035 n.12 (Pa. Commw. 1996). Likewise, the Association's argument that other properties which adjoin Penn Forest Acres may also be suitable for the construction of a private road and, therefore, there is no necessity that a private access road cross its property, misses the point. See **In re Laying Out and Opening a Private Road**, 405 Pa. Super. 298, 304-305, 592 A.2d 343, 346 (1991) (holding that once the necessity of a private road has been determined, such necessity will not be defeated by the existence of more than one adjoining landowner over whose property the road could be constructed). "Absolute necessity' is not a requirement of the [Act]." **Id.**

or jeopardize the environment, and will involve significantly less construction than the alternate route suggested by the Association. The location is also that selected by Murphy and appears to be the most practical and economical course.

In **Holtzman v. Etzweiler**, 760 A.2d 1195 (Pa. Commw. 2000), the court stated:

The location of the road is wholly within the province of the viewers. Viewers go upon the premises of a proposed road and observe all the physical aspects of the land and are far better able to select a location than any judges sitting in the courthouse. The statute gives the viewers power to locate the road.

Id. at 1197. It is evident from the Board's report that the Board considered all of the factors listed in Section 2 of the Act and all of the evidence presented regarding possible access over other properties and, in its discretion, decided that the establishment of a private road where one already existed and where another was planned, would cause the least injury to surrounding property and would be the least expensive to construct. See **Cogan Township, supra** at 241 n.7 (noting that “[t]he board need not make specific findings as to the factors listed in Section 2 of the Act as long as it is apparent from the board's report that the board considered those factors in its decision”). Given the deference to which the Board's findings are entitled, we find no abuse of discretion in the location of the road chosen by the Board.

(c) Damages

The Private Road Act provides that in the event it is determined that a private road should be opened over another's property, damages are to be determined in the same manner as provided for in the case of a public road. 36 P.S. §2736. The Commonwealth and Superior Courts disagree on whether or not this reference tying damages in private road takings to those involved in the opening of a public road brings private road actions within the scope of the Eminent Domain Code. 26 Pa. C.S.A. §§101-1106.⁸ Both agree,

⁸ In **Mattei v. Huray**, 54 Pa. Commw. 561, 565, 422 A.2d 899, 901 (1980), the Commonwealth Court held that Section 2736's reference to public roads is to the provisions for opening a public road found at 36 P.S. §§1781 *et seq.*, includ-

however, that the distinction is more in form than in substance, and that the same measure of damages applies: the difference between the fair market value of the entire property immediately before and immediately after the taking. **See Benner v. Silvis**, 950 A.2d 990, 993 n.1 (Pa. Super. 2008). Therefore, while the board of viewers has the duty to initially determine the amount of damages sustained, the applicable measure of damages imposes a specific limitation on the board's authority to determine damages. If the board fails to perform its duties, or, in doing so, abuses its discretion or commits an error of law, its report should be rejected and remanded to the board for further proceedings. **See Feng-fish, supra** at 254, 642 A.2d at 1119-20; **In re Private Road in Greene Township**, 343 Pa. Super. 304, 309-10, 494 A.2d 859, 862 (1985) (finding absence of evidence as to the amount of damages suffered by the condemnee required remand to the board to take additional testimony on this issue).

The burden is on Murphy, as the condemnor, to present expert testimony as to the appropriate amount of damages. **See In re Laying Out and Opening a Private Road, supra** at 306, 592 A.2d at 347. Unfortunately, no evidence was presented to the Board as to the value of the Association's existing roadways before or after the taking of a private right-of-way for Murphy. Recoupment of previously expended monies for construction, as requested by the Association, was clearly inappropriate. **See Benner**, 950 A.2d at 995. Murphy, in contrast, presented no evidence of damages and, in essence, argued that because of the number of lots and homes located in Towamensing Trails, one additional user would cause no measurable harm to the Association. We disagree.

ing 36 P.S. §2151, specifically authorizing appeals from the award of damages in public road cases; **see also, In re Brinker**, 683 A.2d 966, 969 n.9 (Pa. Commw. 1996). The Superior Court has found to the contrary, that because the procedures and measurements of damages set forth in the Eminent Domain Code apply to takings for public roads, they apply equally to takings for private roads. **See Benner v. Silvis**, 950 A.2d 990, 993 n.1 (Pa. Super. 2008); **see also, In re Laying Out and Opening a Private Road, supra** at 306-307 n.5, 592 A.2d at 347-48 n.5. Both courts agree, however, that "cases brought pursuant to the Private Road Act are in the nature of eminent domain proceedings and thus within the exclusive jurisdiction of the Commonwealth Court pursuant to 42 Pa. C.S.A. §762(a)(6)." **Benner, supra** at 993 (citing both Commonwealth and Superior Court precedents). Therefore, no jurisdictional distinction exists between public and private condemnations.

While the difference may be slight, it cannot be said as a matter of law that the additional burden on the land and the concomitant effect on the property owner resulting from the creation of a new party's right to use the owner's property is inconsequential. Even if the burden is minimal, the owner is entitled to compensation. The obligation which the Board found Murphy will bear in the future to contribute equitably on an annual basis to the future expenses for the maintenance, use, and upkeep of the Association's roads is separate and apart from the damages attributable to the taking itself and the creation of a new right to use another's property.⁹ See 36 P.S. §2735. The Board thus erred as a matter of law in its computation of damages.

CONCLUSION

In accordance with the foregoing, the Association's exceptions to the Board's determination of the necessity for a statutory private road and its location across Lovelace Road, together with an accompanying right-of-way over the Association's existing roads which provide the shortest and most direct access to a public road, will be denied. The width of this right-of-way shall be set at twenty-five feet. However, on the issue of damages, we remand to the Board for further consideration of this issue, including, if necessary, the taking of additional testimony, and an award of damages consistent with this Opinion.¹⁰ Either party will have the right to appeal such award to this Court.

⁹ At the time of the hearing before the Board, Murphy was a member of the Association by virtue of his ownership of property within Towamensing Trails. The easement being acquired, however, is appurtenant to Murphy's property in Penn Forest Acres. Therefore, Murphy's present membership in the Association has no bearing on the amount of damages to be awarded.

¹⁰ "Proper evidence must support a board's findings as to damages." **Laying Out and Opening a Private Road, supra** at 307, 592 A.2d at 348. Further, in a private road condemnation, "[t]he condemnor must present adequate evidence of the fair market value of [the property interest condemned] to determine the exact amount of damages due [the condemnee]." **Id.** (footnote omitted) If the board has insufficient evidence to render a finding of damages, it is appropriate to remand the matter to the board for new findings on this issue. See **id.** Therefore, upon remand, Murphy must present expert evidence as to the value of the Association's existing roads before and after the taking. See **id.** In determining the loss sustained by the Association, the Board must also consider and make appropriate findings whether the use being acquired is in reality a **de facto** taking of all of the Association's roads within Towamensing Trails, and/or whether such

use has an impact on the use and value of the entire road system as an integrated unit such that the before and after valuation of the entire road system, not just the six thousand feet distance to the closest public road, must be taken into account. **See Matter of Laszczynsky**, 118 Pa. Commw. 1, 544 A.2d 551 (1988), **appeal denied**, 521 Pa. 607, 555 A.2d 117 (1988); **West Whiteland Associates v. Commonwealth, Department of Transportation**, 690 A.2d 1266, 1269 (Pa. Commw. 1997), **appeal denied**, 550 Pa. 714, 705 A.2d 1313 (1997); **see also**, **Mandracchia v. Stoney Creek Real Estate Corp.**, 133 Pa. Commw. 510, 513, n.1, 576 A.2d 1181, 1182 n.1 (1990) (noting that the provisions of the Eminent Domain Code are not applicable to private condemnations “except by analogy or perhaps, necessity”).

The Board’s report filed on September 7, 2007, is unclear as to what existing roads Murphy is entitled to use, at one point appearing to limit Murphy’s use of the Association’s roads to six thousand linear feet (Report, p. 5) and at another point suggesting that Murphy’s use will include other roads as well (Report, p. 6). Under the Act, the Board is required to annex to its report and return a plot or draft of the proposed private road as mandated by Section 3 of the Act, 36 P.S. §1831. **See In re Private Road, Cogan Township**, 684 A.2d 237, 239-40 (Pa. Commw. 1996). The parties must know what route the Board has decided is necessary for Murphy to have access to his property in order that the loss sustained can be valued. The Association must be fully and fairly compensated for what has been taken and returned to as good a position financially as if its property were not taken. **See Adelphia Cablevision Associates of Radnor, L.P. v. University City Housing Co.**, 755 A.2d 703, 713 (Pa. Super. 2000).

The calculation of damages must be strictly limited to the increased burden placed on the roads and the Association, as the owner of such property, attributed to the right acquired by Murphy **vis-à-vis** Lot 42. Neither Statewide Investments Ltd. nor any other owner of property within Penn Forest Acres is entitled to use the right-of-way acquired by Murphy in these proceedings. **See McGinnis v. McCarter**, 940 A.2d 581, 584 (Pa. Commw. 2008) (holding that under the Private Road Act only access which is strictly necessary to continue the existing use may be acquired, not access to enhance the value of the property for future development or for the benefit of another private developer who wishes to use the property in conjunction with future development), **appeal denied**, 954 A.2d 579 (Pa. 2008). However, others may petition to use the private road and the trial court then determines what sum the person should contribute to those who opened the private road and what additional compensation is owed to the owner of the land on which the private road is located. 36 P.S. §2761.

At the hearing before the Board, the Association argued that opening its roads to Murphy’s use would affect the privacy of its development and would make it difficult to control the use of its roads by non-members. We are not unsympathetic to this concern, however, we note that the Association does not use gates or other barriers to preclude the general public from using its roads. The Private Road Act permits the owner of land over which a private access is granted to obtain the court’s permission to erect swinging gates. 36 P.S. §§2733-34; **In re Jones**, 168 Pa. Commw. 225, 230, 649 A.2d 488, 491 (1994), **appeal denied**, 540 Pa. 640, 659 A.2d 561 (1995). Further, the Association’s fear that it will lose total control of the use of its roads appears to be without basis. “When

land is taken for use as a highway the owner does not surrender his entire title to the land so taken but reserves rights above, below and on the surface that do not interfere with the use of such land for highway purposes.” **William Laubach & Sons v. City of Easton**, 347 Pa. 542, 545, 32 A.2d 881, 883 (1943). See also, **Wagner v. Woolverton**, 57 D. & C. 2d 257, 260 (Centre Co. 1972) (finding the installation of speed bumps on a private road to control vehicle speed is neither an unreasonable nor a substantial interference with the rights of the easement owner); **Sides v. Cleland**, 436 Pa. Super. 618, 622-23, 648 A.2d 793, 795-96 (1994) (upholding the trial court’s imposition of regulations on the use of a private right-of-way that were neither oppressive nor unreasonable noting that the holder of an easement may not unreasonably interfere with the use of the servient estate), **appeal denied**, 540 Pa. 613, 656 A.2d 119 (1995).

EUGENE A. RUTCH, Plaintiff vs. PENNSYLVANIA LIQUOR CONTROL BOARD, Defendant

Civil Law—Liquor License Appeal—Denial of Renewal Application—Requirement and Meaning of “Good Repute”—Character Evidence

1. An appeal from the Liquor Control Board’s denial of an application to renew a liquor license is heard and decided **de novo** by the trial court.
2. In order to renew a liquor license, the applicant must satisfy the requirement that he is a person of “good repute.”
3. Whether an applicant is a person of “good repute” is primarily a question of character and whether he is predisposed to act in compliance with the law, specifically those provisions relating to the sale, consumption and service of alcoholic beverages.
4. The burden of establishing “good repute” is upon the applicant. In determining whether this burden has been met, evidence of the applicant’s character as proven both by reputation and specific instances of conduct is admissible.
5. As between character proven by reputation and character proven by conduct, the latter evidence is arguably a more reliable measure of a person’s true character, particularly with respect to predicting whether an applicant will properly exercise the trust reposed in a licensee to assure that the public is protected in the sale and service of alcoholic beverages.
6. A character witness on behalf of an applicant’s suitability to hold a liquor license may properly be cross-examined about specific instances of misconduct to establish “either that the witness is not familiar with the reputation concerning which he has testified or that his standard of what constitutes good repute is unsound.” Further, in assessing character evidence presented by a practicing attorney who represented the applicant with respect to prior criminal proceedings, it is appropriate to consider that such witness has an ethical obligation not to testify adversely about a client with respect to those matters which were the subject of legal representation.
7. Given the applicant’s history of convictions and arrests for alcohol-related offenses during the six-year period immediately preceding the date of application (one within the most recent licensing period), together with his record

of violating the Liquor Code on three separate occasions during this same six-year period (two within the most recent licensing period), the applicant failed to establish that he is a person of "good repute" for alcohol-related activities such that he should be entrusted with a liquor license and the privilege to serve alcoholic beverages to the general public.

NO. 06-3438

ROBERT T. YURCHAK, Esquire—Counsel for Plaintiff.

JAMES F. MAHER, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—December 17, 2007

Eugene A. Rutch (hereinafter "Rutch"), t/a M.J.'s Cocktail Lounge, appeals from the Pennsylvania Liquor Control Board's (hereinafter "the Board") denial of his application to renew the liquor license for M.J.'s Cocktail Lounge, a bar and restaurant located at 106 East Catawissa Street, Nesquehoning, Carbon County, Pennsylvania. The primary issue before us is whether Rutch is a person of "good repute" within the meaning of the Liquor Code 47 P.S. §§1-101—8-803 (hereinafter the "Code"), the basis of the Board's denial of Rutch's renewal application.

FACTUAL AND PROCEDURAL BACKGROUND

Rutch is the owner, operator and sole employee of M.J.'s Cocktail Lounge. Rutch has held a restaurant liquor license in his name for this establishment since July 1991. The business is operated as a sole proprietorship.

On June 30, 2004, Rutch applied to renew the liquor license for M.J.'s for the licensing period beginning September 1, 2004, and ending August 31, 2006. By letter dated August 20, 2004, the Board's Bureau of Licensing advised Rutch pursuant to Section 470 of the Code that it objected to the renewal of his liquor license, finding, on the basis of his citation history and prior criminal record, that he was no longer reputable as required by Sections 102, 404 and 470 of the Code, 47 P.S. §§1-102, 4-404, and 4-470.¹

¹ This letter provided Rutch with notice of the following specific objections upon which the Board relied:

1. Rutch's conviction on June 9, 2000, of two counts of driving under the influence, misdemeanors of the second degree, arising out of an incident which occurred on September 12, 1999. The record of these proceedings is docketed to No. 084 CR 2000 in the Clerk of Court's Office for the Carbon

An administration hearing to determine whether Rutch's prior record warranted non-renewal of his license was held before a

County Court of Common Pleas. The conviction followed a jury trial held in Carbon County. On October 30, 2000, Rutch was sentenced to imprisonment for a period of no less than thirty days nor more than eighteen months, fined \$300.00, and had his driving privileges suspended for a period of one year.

2. Rutch's arrest on August 17, 2002, for two counts of driving under the influence, misdemeanors of the second degree, and one count of reckless driving, a summary offense, arising out of an incident which occurred on August 17, 2002. At a bench trial held on January 13, 2004, Rutch was convicted of all offenses charged. On February 24, 2004, he was sentenced to imprisonment for a period of no less than thirty days nor more than eighteen months, fined \$500.00, and had his driving privileges suspended for a period of one year. The record of these proceedings is docketed to No. 009 CR 2003 in the Clerk of Court's Office for the Carbon County Court of Common Pleas. Subsequently, on appeal to the Pennsylvania Superior Court, this conviction was vacated by Order dated January 18, 2005. Allowance of appeal was denied by the Pennsylvania Supreme Court on August 30, 2005. The fact of Rutch's conviction and subsequent reversal on appeal was made part of the record at the hearing before the hearing examiner held on December 21, 2005.

3. Rutch's arrest on September 23, 2003, for two counts of persistent disorderly conduct, misdemeanors of the third degree, two counts of disorderly conduct, both summary offenses, and one count of public drunkenness, a summary offense, arising out of an incident which occurred on September 23, 2003. The record of these proceedings is docketed to No. 710 CR 2003 in the Clerk of Court's Office for the Carbon County Court of Common Pleas. On December 2, 2005, Rutch entered a plea of **nolo contendere** to one count of disorderly conduct, graded as a misdemeanor of the third degree, all remaining charges being **nol prosessed**. The fact of Rutch's plea was made part of the record at the hearing before the hearing examiner held on December 21, 2005.

4. Three adjudicated violations of the Liquor Code bearing citation numbers 98-0783, 03-0762, and 04-0179.

a) With respect to Citation No. 98-0783, Rutch was fined \$500.00 for permitting his eight-year-old daughter behind the bar, tapping beer, in violation of Section 493(13) of the Liquor Code, 47 P.S. §4-493(13). This incident occurred on March 18, 1998.

b) With respect to Citation No. 03-0762, Rutch was fined \$100.00 for an incident which occurred on April 15, 2003, at which time Rutch was open for business without a valid health permit or license in violation of Section 437 of the Liquor Code, 47 P.S. §4-437, and Section 5.41 of the Board's Regulations, 40 Pa. Code §5.41.

c) With respect to Citation No. 04-0179, Rutch was fined \$250.00 for an incident which occurred on January 13, 2004, in which alcoholic beverages were sold on credit in violation of Section 493(2) of the Liquor Code, 47 P.S. §4-493(2), and Sections 11.192 and 11.193 of the Board's Regulations, 40 Pa. Code §§11.192 and 11.193.

hearing examiner designated by the Board on December 21, 2005, pursuant to Section 464 of the Code, 47 P.S. §4-464. At this hearing, the Board presented certified documentary evidence of Rutch's prior criminal record and history of adjudicated citations; no further evidence was presented on behalf of the Board. Rutch testified on his own behalf.

By order dated October 18, 2006, the Board denied Rutch's application. Rutch appealed the Board's denial to this Court on October 19, 2006, whereupon, by Order dated October 20, 2006, we granted a supersedeas and stay pursuant to Section 464 of the Code, 47 P.S. §4-464, permitting Rutch to continue operating during the administrative process. On November 20, 2006, the Board issued its opinion in which it concluded that "[a]s a result of the adjudicated citations and the misdemeanor convictions, [Rutch] is no longer a person of good repute as required by the Code and, therefore, he has abused the privilege of holding a liquor license." (Board Opinion, p. 15)

Following several continuance requests by Rutch, a **de novo** hearing was held before this Court on April 19, 2007. At this hearing, the Board placed in evidence the record of the proceedings held before the hearing examiner and a copy of the Board's opinion. No new evidence was presented by the Board.

In support of his appeal, Rutch testified that his difficulties with alcohol are in the past, that he is well-respected in the community, and that recently he was notified by the Nesquehoning Veterans of Foreign Wars Outpost that he has been chosen to receive its Business Loyalty Day Award. Rutch also presented three additional witnesses each of whom testified that since 2004 Rutch has addressed his drinking problems, and that he is a good person. These witnesses were Todd Leslie, a full-time officer with the Jim Thorpe Borough Police Department and a resident and former council member in Nesquehoning; Charles Parker, Sr., a retired police officer who resides in Beaver Meadows, Carbon County, Pennsylvania, and who is a former constable in Carbon County; and Cynthia S. Ray, Esquire, a practicing attorney who represented Rutch in several of the matters on which the Board based its decision not to renew his application.

DISCUSSION

When an appeal is taken from a Board decision, under Section 464 of the Liquor Code, the trial court hears the matter **de novo** and renders its own findings of fact and conclusions of law. **Two Sophia's, Inc. v. Pennsylvania Liquor Control Board**, 799 A.2d 917, 919 (Pa.Cmwth. 2002). The trial court must receive the record of the proceedings below, if offered, and may hear new evidence. **Id.** at 922. The trial court has the authority to sustain, alter, change, modify or amend a decision of the Board, even if the court does not make findings of fact that are materially different from those found by the Board. **Id.** at 922, n.5.

Goodfellas, Inc. v. Pennsylvania Liquor Control Board, 921 A.2d 559, 565 (Pa. Commw. 2007), **appeal denied**, 934 A.2d 1279 (Pa. 2007). The trial court enjoys broad discretion in conducting its **de novo** review of the Board's decision. **See id.** at 566. In exercising its judgment, the court has the authority "to sustain or over-rule the board, without regard to whether the same or different findings of fact or conclusions of law are made." **Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Cantina Gloria's Lounge, Inc.**, 536 Pa. 254, 265, 639 A.2d 14, 19 (1994).

Section 404 of the Liquor Code provides, in pertinent part, that "[u]pon receipt of the application and proper fees, and upon being satisfied ... that the applicant is a person of good repute, ... the board shall ... issue to the applicant a liquor license" 47 P.S. §4-404. Section 470(a) of the Code, 47 P.S. §4-470(a), provides that a license shall be renewed unless, among other things, "the applicant has by his own act become a person of ill repute." Additionally, Section 470(a.1) of the Code, 47 P.S. §4-470(a.1)(1) and (2), grants the Board the authority to refuse to renew a liquor license if the licensee has violated any of the laws of this Commonwealth, any regulations of the Board, or has one or more adjudicated citations with respect to the involved license.

Whether a person is one of "good repute" concerns primarily whether that person is appropriate to hold a liquor license, whether he will comply with the provisions of the Liquor Code and its regulations, and whether he will properly exercise the trust

reposed in a licensee to assure that the public is protected in the sale and service of alcoholic beverages. **See e.g., Street Road Bar & Grille, Inc. v. Pennsylvania Liquor Control Board**, 583 Pa. 72, 876 A.2d 346, 357 (2005) (“The ‘repute’ of which the Code speaks can only be understood in terms of the purpose for which repute is to be considered, **i.e.**, to determine if issuance of a liquor license is appropriate.”). The question is essentially one of the applicant’s character—whether he is a person who is predisposed to act in certain ways—with the focus on those traits of character relevant to being in the liquor business. “[I]n light of the ‘peculiar nature’ of this particular type of business endeavor, a person ‘who applies for and receives permission from the Commonwealth to carry on the liquor trade assumes the highest degree of responsibility to his fellow citizens.’” **Street Road, supra**, 876 A.2d at 355 (**quoting Commonwealth v. Koczwara**, 397 Pa. 575, 581, 155 A.2d 825, 828 (1959)). Unlike in a criminal case, however, where character evidence predictive of a defendant’s conduct is confined to reputation evidence, in a civil proceeding, such as this, “where character or a trait of character is admissible as an element of a claim or defense, character may be proved by specific instances of conduct.” Pa. R.E. 405(b)(1). In these proceedings, Rutch’s “citation history and prior misdemeanor convictions are relevant to the question of good repute.” **Street Road, supra**, 876 A.2d at 347-48; **see also**, Board Regulation Section 1.5, 40 Pa. Code §1.5.²

The burden of establishing “good repute” is upon the applicant. **See Street Road, supra**, 876 A.2d at 347. Rutch knows this and understands as well that his conduct in the past will not sustain this burden. Recognizing this, Rutch seeks to distance himself from his past. To do so, he argues that he is no longer the person he once was, that he has reformed himself, and that he is currently eligible

² This regulation provides as follows:

§1.5 Reputation: Use of criminal and citation history.

When considering whether a person is reputable or the repute of a person under any section of the Code or this title, the Board may consider whether that person has been convicted of any crimes including misdemeanors and felonies, the person’s history regarding licenses issued by the Board, including the citation history of the licensee, and any other factor the Board deems appropriate.

and qualified to hold a license. Rutch asks us in effect to judge him not by what he has done, but by what he says he has become.

Both Leslie and Parker testified that Rutch no longer consumes alcohol to the degree he once did, that he offers assistance to and demonstrates respect for the police, and that he is, in general, a good person. All this may well be true, however, the fact that an applicant “has a localized reputation as a ‘good guy’ generally,” is not the issue. ***Id.***, 876 A.2d at 357. Moreover, when questioned specifically about the effect of Rutch’s prior convictions on his reputation, Leslie stated there was none. **See generally, Commonwealth v. Becker**, 326 Pa. 105, 114, 191 A. 351, 356 (1937) (explaining that a character witness may be questioned on specific acts of prior misconduct to establish “either that the witness is not familiar with the reputation concerning which he has testified [i.e., his basis of knowledge of the person or trait] or that his standard of what constitutes good repute is unsound”); **see also, Street Road, supra**, 876 A.2d at 358-59 (quoting McCormick on Evidence, §191 at 676-77 n. 27 (5th edition 1999) to the same effect).

Ray testified that Rutch is a close personal friend, that she represented him for the 1999 driving under the influence and 2003 disorderly conduct charges, that these incidents were a wake-up call for him, and that since 2004, Rutch has dramatically changed his drinking habits. According to Ray, Rutch is a new man, and today, when he sits at his bar for a drink, he has only water in his beer glass. Ray, who clearly was familiar with Rutch’s criminal history, testified generally that he is highly respected as a law-abiding citizen in his community. In addition to the significance of her specific knowledge of Rutch’s past misconduct as it bears on our assessment of her testimony regarding Rutch’s reputation for being a law-abiding citizen, **see Becker, supra**, Ray was never asked directly what Rutch’s reputation is for following the laws applicable to the operation of a licensed business or his reputation for sobriety in his personal life. Finally, as a practicing attorney in this Commonwealth, Ray has an ethical obligation not to testify adversely about a client with respect to matters on which she represented him. Pennsylvania Rules of Professional Conduct 1.9(c).

On his own behalf, although Rutch admitted his drinking in 2003 and 2004 was getting out of hand, he denied that he was intox-

cated or had consumed alcohol with respect to the 2003 disorderly conduct incident. He asserted that he was a Good Samaritan who came to the rescue of the driver of his car who was being bullied and ridiculed by the police without basis. He submitted that the charges the police filed against him were manufactured to discredit him and to deter him from testifying in support of the driver in the event a civil rights claim was filed. This testimony was in stark contrast to the affidavit of probable cause for this incident filed by the Nesquehoning Police, and made part of the record in these proceedings, in which the arresting officers reported that Rutch repeatedly yelled and verbally abused both officers, screaming obscenities at them, as they tested the driver for intoxication; that Rutch's conduct frustrated their investigation, inciting the driver to defy the police; and that all the time this was occurring Rutch himself appeared intoxicated: his speech was slurred, his eyes were red and glassy, his breath reeked of alcohol, and his clothes were in disarray.

Rutch also testified that he successfully completed out-patient drug and alcohol counseling on March 19, 2004, and is today a moderate drinker. He opined that he is highly respected for being a law-abiding citizen and is a firm backer of the police. In apparent contradiction, he also acknowledged in the administrative hearing before the hearing examiner that he has a reputation for being a troublemaker.

The Board's evidence established that between March 18, 1998, and January 13, 2004, on three separate occasions, Rutch violated various provisions of the Liquor Code and Board Regulations, two within the most recent licensing period preceding the period in question here. Additionally, between September 12, 1999, and September 23, 2003, on three different occasions, Rutch was charged with misdemeanor offenses, all involving alcohol-related incidents and all resulting in convictions, albeit the conviction, which is related to the August 17, 2002 incident, was reversed on appeal.³ The September 23, 2003, offense also occurred within the most recent licensing period preceding that at issue here.

³ At the time of hearing, we were asked by Rutch to take judicial notice of the fact of this reversal. In doing so, we believe it is also appropriate to note that the basis for reversal, as found by the Superior Court, was the legality of the stop

The foregoing evidences repeated violations over a recent sixteen-year period of various laws governing the sale and consumption of alcohol, both in Rutch's business and in his personal life. Such conduct demonstrates a disregard of both the liquor laws and the criminal laws of this Commonwealth. To argue that Rutch's conduct does not affect his "good repute" for alcohol-related activities in a small community, or reflect adversely on his reputation as a responsible, law-abiding holder of a liquor license, strains the limits of credibility.

As between character proved by reputation and character proved by conduct, the latter may be a more accurate measure of a person's true character, particularly when involving multiple acts over an extended period. In contrast to reputation evidence, which, by its very nature, is indirect evidence of a person's character based upon a general summary opinion prevalent in the community,⁴ character proven by specific instances of conduct is direct evidence of how a person actually behaved when confronted with circumstances relevant to those at issue. As stated by our Supreme Court, "[a]rguably, the single most important factor in assessing fitness for the privilege of licensure is the applicant's Liquor Code performance and compliance in the past." **Street Road, *supra***, 876 A.2d at 358.

and consequent suppression of evidence. Though an arrest itself cannot be used to test a character witness' knowledge of a defendant's reputation in a criminal matter, this bar does not preclude consideration of an arrest as it affects a person's character or reputation for sobriety in a civil proceeding where there has been no expungement of the criminal record. See **Street Road Bar & Grille, Inc. v. Pennsylvania Liquor Control Board**, 583 Pa. 72, 876 A.2d 346, 358-59 (2005); see also, **V.J.R. Bar Corporation v. Pennsylvania Liquor Control Board**, 480 Pa. 322, 390 A.2d 163 (1978) (holding that civil sanctions may be imposed against license holders even when criminal charges have not resulted in a conviction).

⁴ The word 'character' is frequently used interchangeably with the word 'reputation.' In a legal sense it means 'reputation' as distinguished from 'disposition.' Character grows out of particular acts, but is not proved by them, inasmuch as a person may under the stress of special circumstances do a thing which is contrary to his ordinary disposition and practice. The method of proving character is by showing the general reputation of the person in the neighborhood in which he lives. What is proven, therefore, is not a person's real character, but his character as reputed among his neighbors, or what the consensus of opinion of the neighbors is as to his character.

Commonwealth v. Webb, 252 Pa. 187, 196, 97 A. 189, 196 (1916), quoted with approval in **Street Road, *supra***, 876 A.2d at 357.

"Like prior Liquor Code violations, misdemeanor convictions speak to the applicant's law-abiding character." **Id.** at 359.

When weighing the evidence presented by Rutch as to his good repute against the specific instances of Rutch's criminal convictions and arrests for alcohol-related matters in his personal life, and violations of the Liquor Code in operating his business, we are not convinced that Rutch has carried his burden of establishing "good repute". Three of these violations occurred within the immediately preceding license period to that at issue. Rutch's criminal convictions and arrest record reveal continuing alcohol abuse over a period of at least four years, extending to a time within one year of the renewal period in issue.

The responsibility which accompanies the privilege of holding a liquor license requires that the burden of establishing "good repute" is on the applicant. "As remedial civil legislation, the Code is to be liberally construed to effectuate its purpose to protect the public health, welfare, peace and morals." **Hyland Enterprises, Inc. v. Pennsylvania Liquor Control Board**, 158 Pa. Commw. 283, 288-89, 631 A.2d 789, 792 (1993). Rutch's history of convictions and arrests for alcohol-related matters during a four-year period inevitably puts in question the appropriateness of his serving alcoholic beverages to the general public. His record of violating the Liquor Code on three separate occasions—once within this same four-year period and once more recently—when even a single violation of the Liquor Code can be a sufficient basis to decline to renew a license, **id.** at 286, 631 A.2d at 791, weighs even further against nonrenewal.

CONCLUSION

Under the circumstances, Rutch's appeal will be denied.

COMMONWEALTH of PENNSYLVANIA vs. CHARLES BARRY FERNANDES, Defendant

*Criminal Law—Megan's Law—Reporting and
Registration Requirements—Ex post Facto Punishment—
Conviction Dependent on Notice of Obligation to Report
and Register—Double Jeopardy—Reliance Doctrine*

1. The reporting and registration requirements of Megan's Law are remedial, rather than punitive in nature. Therefore, neither the federal nor state

ex post facto clauses are violated by imposing reporting and registration requirements on the perpetrator of a predicate offense which occurred prior to the effective date of the statute.

2. In order for a person who violates either the reporting or registration requirements of Megan's Law with respect to an underlying conviction which occurred prior to the effective date of the statute to be convicted of such violation, the conduct forming the basis of the violation must have occurred after the adoption of the relevant Megan's Law requirement and adequate notice of the duty to comply must have been given.
3. Before a person who is subject to the registration or reporting requirements of Megan's Law can be convicted for violating these requirements, actual knowledge of the duty to register or report, or proof of the probability of such knowledge, and subsequent failure to comply must be proven.
4. Dismissal of charges under an earlier version of Megan's Law with respect to similar conduct which occurred at a different time and location than that charged presently does not trigger double jeopardy concerns. Commonality, not similarity of facts, is a prerequisite to the protection afforded a defendant under principles of double jeopardy.
5. As a defense to a criminal prosecution, the reliance doctrine holds generally that an affirmative representation that certain conduct is legal made by a government official charged with knowing and enforcing the law upon which the defendant actually relies bars criminal prosecution for such conduct when the defendant's reliance is in good faith and reasonable. This doctrine, which imposes the burden of proof on the defendant, is a narrow exception to the maxim that ignorance of the law is no excuse.
6. Prosecution for a subsequent violation of the reporting and registration requirements of Megan's Law is not barred by the reliance doctrine where the defendant was discharged in a previous prosecution for a different offense under a separate provision of Megan's Law because the penalty provisions of the law, as they then existed, were determined to be excessive and unconstitutional.

NO. 448 CR 2006

JAMES M. LAVELLE, Esquire, Assistant District Attorney—
Counsel for Commonwealth.

PAUL J. LEVY, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—December 31, 2007

FACTUAL AND PROCEDURAL HISTORY

On April 12, 1988, the Defendant, Charles Barry Fernandes (hereinafter "Defendant"), pled guilty to rape¹ and other related offenses before the Court of Common Pleas of Northampton County. On April 16, 1988, he was sentenced by that court to imprisonment

¹ 18 Pa. C.S.A. §3121.

for a period of not less than six nor more than twelve years in a state correctional facility. At the time, no statutory registration and verification requirements for sexual offenders existed.

Because of additional parole violations, Defendant was not released from the state correctional facility until November of 2003. Prior to his release, Defendant was notified that due to his rape conviction, he was subject to the lifetime registration requirements of Megan's Law,² which became effective on October 24, 1995. See 42 Pa. C.S.A. §9795.1(b)(2).

Defendant was later arrested and charged on March 22, 2004, in Bucks County, Pennsylvania, for violating 42 Pa. C.S.A. §9795.2 (a)(2), the registration requirements of Megan's Law. On December 3, 2004, the Court of Common Pleas of Bucks County, the Honorable John J. Rufe presiding, discharged the Defendant, finding that although the penalty provisions of Section 9795.2(d)(2) of Megan's Law, as they then existed, applied to offenders who are subject to the lifetime registration requirements of Section 9795.1(b)(2), the provisions were punitive, and therefore, unconstitutional. In doing so, Judge Rufe referred to and relied heavily upon the Pennsylvania Supreme Court's decision in Commonwealth v. Williams, 574 Pa. 487, 832 A.2d 962 (2003), in which the Supreme Court found a clear distinction between the statute's requirements of registration and verification for sexually violent predators, which were held to support a legitimate governmental purpose and to be valid, and the prescribed penalties for violating these provisions of the law, which were held to be unconstitutionally punitive, but severable.

On June 9, 2006, a criminal complaint was filed against the Defendant in the office of Magisterial District Justice Edward M. Lewis, charging the Defendant with knowingly failing to verify his address or to be photographed as required by 42 Pa. C.S.A. §9796(b). See 18 Pa. C.S.A. §4915(a)(2). A preliminary hearing was held on August 2, 2006, and the charge was bound over.

Presently before the court is Defendant's Omnibus Pretrial Motion (hereinafter the "Motion"), filed on November 9, 2006, in which Defendant claims his prosecution violates basic principles

² 42 Pa. C.S.A. §§9791-9799.9.

of due process and fair notice under the United States and Pennsylvania constitutions. Defendant requests dismissal of the charge. A hearing on Defendant's Motion was held before us on March 9, 2007, and both parties have submitted briefs.

DISCUSSION

Defendant has raised several issues for our review: (1) the failure of the Commonwealth to prove beyond a reasonable doubt that he received notice of his registration and reporting obligations under the statute, (2) that applying the penalty provisions³ for violating the annual verification and photographing requirements⁴ of Megan's Law constitutes a violation of the **ex post facto** provisions of the constitutions of the United States and of this Commonwealth; (3) that the notice Defendant received regarding his statutory obligations under Megan's Law was somehow defective, and therefore, Defendant could not knowingly violate the statute; (4) that prosecution for Defendant's failure to verify his residence in Carbon County is barred by principles of double jeopardy because he had already been prosecuted in Bucks County for failing to report a change in residence and employment; and (5) that when the Court of Common Pleas of Bucks County discharged the Defendant, the statements made by the Court implicate the reliance doctrine—a doctrine predicated upon reliance on misrepresentations of law made by government officials⁵—pursuant to which prosecution by the Commonwealth would be fundamentally unfair under the circumstances presented here.

³ 18 Pa. C.S.A §4915(c).

⁴ 42 Pa.C.S.A. §§9795.1(b) and 9796(b).

⁵ In **Commonwealth v. Kratsas**, 564 Pa. 36, 764 A.2d 20 (2001), the Pennsylvania Supreme Court outlined the source of the reliance doctrine as follows:

[T]he reliance doctrine emerged from the trilogy of United States Supreme Court decisions cited by the trial court: **Raley**, 360 U.S. at 423, 79 S.Ct. at 1257, **Cox**, 379 U.S. at 559, 85 S.Ct. at 476, and **PICCO**, 411 U.S. at 655, 93 S.Ct. at 1804. In **Raley**, four individuals were convicted of criminal contempt for refusing to answer questions from Ohio's Un-American Activities Commission after the committee chairman erroneously informed them that they were protected under the state constitution's privilege against self-incrimination (the chairman failed to mention that an Ohio immunity statute applied to their testimony and deprived them of the privilege). The Supreme Court set aside three of the convictions as fundamentally unfair and violative of the Due Process Clause of the Fourteenth Amendment. In reaching this conclusion, the Court emphasized both the source and the

Burden of Proof

Defendant's first claim that the Commonwealth has failed to prove all of the elements of the offense beyond a reasonable doubt,

content of the advice that the defendants had received. **See id.** at 437, 79 S.Ct. at 1266 (stating that '[t]he Chairman of the Commission, who clearly appeared to be the agent of the State in a position to give such assurances, apprised [the defendants] that the privilege in fact existed'); **id.** at 438, 79 S.Ct. at 1266 (describing the chairman's comments as active misleading). The Supreme Court also appeared to take into consideration the element of immediacy connected with the testimonial setting. **See id.** at 438-39, 79 S.Ct. at 1267 (characterizing the chairman as 'the voice of the State most presently speaking to the [defendants]'). The Court explained that sustaining a conviction under the circumstances 'would be to sanction the most indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State clearly had told him was available to him.' **Id.** at 426, 79 S.Ct. at 1260.

In **Cox**, the Supreme Court applied **Raley** to reverse a conviction for violating a statute prohibiting demonstrations near a courthouse, because the picketers had been advised by the local police chief that they could lawfully protest across the street. **See Cox**, 379 U.S. at 571, 85 S.Ct. at 484 (stating that the 'highest police officials of the city, in the presence of the Sheriff and Mayor, in effect told the demonstrators that they could meet where they did'). The Court noted the 'lack of specificity' in the use of the word 'near' in the statute, which the Court found 'foresees a degree of on the spot administrative interpretation by officials charged with responsibility for administering and enforcing it' and renders it 'apparent that demonstrators ... would justifiably tend to rely on this administrative interpretation of how "near" the courthouse a particular demonstration might take place.' **Id.** at 568-69, 85 S.Ct. at 483.

Finally, in **PICCO**, the Court addressed a conviction for violating a statute that prohibited the discharging of refuse into navigable waters. At the time of the offense, the responsible administrative agency, the Army Corps of Engineers, had interpreted the statute as applying solely to water deposits that affected navigation, and such interpretation was reflected in the agency's regulations. **See PICCO**, 411 U.S. at 658-59, 93 S.Ct. at 1808-09. At trial, the court refused to allow PICCO to present evidence and obtain a jury instruction that it had acted upon a good faith belief that the administrative construction given the statute rendered its conduct of discharging industrial refuse permissible. The Supreme Court reasoned, however, that PICCO had a right to consult the Corps of Engineers' regulations for guidance respecting the requirements of the statute, and that 'to the extent that the regulations deprived PICCO of fair warning ..., traditional notions of fairness prevent the Government from proceeding with the prosecution.' **Id.** at 674, 93 S.Ct. at 1816-17. Thus, the Court remanded the case, holding that PICCO was entitled to present evidence to support its claim that it was affirmatively misled. **See id.** at 675, 93 S.Ct. at 1817.

Id. at 27-28 (internal footnotes omitted).

namely that Defendant was subject to registration under 42 Pa. C.S.A. §9795.1(b)(2) and knowingly failed to verify his address or to be photographed as required by 42 Pa. C.S.A. §9796(b), is not properly before the Court. “It is well settled in this Commonwealth that a petition for writ of **habeas corpus** is the proper vehicle for challenging a pre-trial finding that the Commonwealth presented sufficient evidence to establish a **prima facie** case.” **Commonwealth v. Carbo**, 822 A.2d 60, 67 (Pa. Super. 2003) (internal quotations omitted) (**quoting Commonwealth v. Kohlie**, 811 A.2d 1010, 1013 (Pa. Super. 2002)); **see also, Commonwealth v. Morman**, 373 Pa. Super. 360, 364, 541 A.2d 356, 363 (1988). At the hearing held in response to Defendant’s Omnibus Pretrial Motion, counsel for Defendant represented that he did not wish to pursue **habeas corpus** relief and that, at present, he was only requesting relief for the constitutional due process violations. Defendant has not filed any motion seeking **habeas corpus** relief and, therefore, has not made a proper challenge to the sufficiency of evidence. Accordingly, Defendant’s first claim is not properly before the Court and provides no basis for relief.⁶

Ex Post Facto Challenge

Defendant next claims that subjecting him to criminal liability for failing to comply with the reporting and registration requirements of Megan’s Law constitutes a violation of due process in the form of **ex post facto** punishment. At the outset, it is important to note that the reporting requirements of Megan’s Law are deemed remedial, rather than punitive, and, therefore, do not constitute criminal punishment for purposes of the federal and state **ex post facto** clauses. **See Commonwealth v. Gaffney**, 557 Pa. 327, 733 A.2d 616, 619 (1999); **see also, Williams, supra**, 832 A.2d at 984 (holding that the registration, notification, and counseling requirements of Megan’s Law are non-punitive). It is also clear that criminal prosecution of a defendant who is subject to registration due to his conviction of one of the predicate offenses enumerated in 42 Pa. C.S.A. §9795.1 is constitutional. **Commonwealth v.**

⁶ Additionally, the standard applied by Defendant is incorrect. At the pretrial stage, the Commonwealth need only demonstrate the existence of a **prima facie** case, and need not prove every element of the case beyond a reasonable doubt. **See Commonwealth v. Carbo**, 822 A.2d 60, 63 (Pa. Super. 2003).

Killinger, 585 Pa. 92, 888 A.2d 592, 600 (2005) (upholding the constitutionality of criminal sanctions imposed on non-sexually violent predators, subject to a ten-year reporting requirement, who fail to comply with the statute's registration provisions).

Here, it is undisputed that Defendant has a prior conviction for rape pursuant to 18 Pa. C.S.A. §3121, and that it is this conviction that subjects him to the registration and reporting requirements of Megan's Law. 42 Pa. C.S.A. §9795.1(b)(2) (lifetime registration) and 42 Pa. C.S.A. §9796(b) (annual verification and photographing). It is the asserted knowing violation of the verification provision which forms the basis of the new offense with which Defendant has been charged under 18 Pa. C.S.A. §4915(a) and which must be submitted to a fact-finder and proven beyond a reasonable doubt before new criminal penalties can be imposed. Cf. **Commonwealth v. Wilson**, 589 Pa. 559, 910 A.2d 10 (2006) (upholding the constitutionality of those portions of Megan's Law which subject non-sexually violent offenders, whether lifetime reporters or ten-year reporters, to criminal liability for failing to comply with the statute's reporting provisions). Nor does the fact that Defendant's underlying rape conviction predates the original enactment of Megan's Law afford relief. Cf. **United States v. Brady**, 26 F.3d 282 (2d Cir. 1994) (holding that defendant's felony conviction which predated enactment of the Federal Gun Control Act could be used as a predicate offense for being a felon in possession of a firearm since he had adequate notice that possessing a firearm was illegal given his prior conviction), cited with approval in **Lehman v. Pennsylvania State Police**, 576 Pa. 365, 839 A.2d 265, 270 (2003) (noting that “[t]he date of his conviction was irrelevant because the crime was possession of a firearm by a felon, and the prohibited act of possession occurred after the adoption of [the relevant section of the Gun Control Act]”). Therefore, Defendant's claim that enforcement of this statute is violative of the **ex post facto** provisions of the constitutions of the United States and this Commonwealth is without merit.

Sufficiency of Notice

Defendant next alleges that the notice provided to him of the reporting and registration requirements under Megan's Law was

defective. He offers no specific reason for this defect, nor any clarification beyond this bald assertion.⁷ As we are unaware at this time of any defect in notice, Defendant has failed to demonstrate any grounds for relief for a violation of his constitutional due process rights.⁸

Double Jeopardy

Defendant also claims that because he was previously charged in Bucks County for neglecting to report a change in his residence and employment, and the charges were dismissed, the charges arising out of his current failure to report and verify his address in

⁷ The only argument offered in support of this position is found in Defendant's Memorandum, which states: "In reviewing the record, the only notice provided to Mr. Fernandes is dated November 17, 2004. This signed form offers no real explanation of what is required of Mr. Fernandes. Furthermore, it appears to have been signed one year after Mr. Fernandes had already been released from state prison." (Defendant's Memorandum in Support of Omnibus Pretrial Motion, p. 2) The record contradicts this assertion however, as Exhibit C presented at the hearing contains a document entitled "Sexual Offender Address Work Sheet", with a subtitle "Megan's Law" which was signed and dated on February 25, 2003. Additionally, no testimony was presented regarding the circumstances surrounding the execution of any of these documents. Defendant has therefore not satisfied his burden of proof in this regard.

⁸ To the extent that the Defendant is claiming that he could not have knowingly violated the registration or verification requirements of the statute, an element of the offense (**see** 18 Pa. C.S.A. §4915(a)(2)), and is thereby challenging the sufficiency of evidence presented by the Commonwealth, we have already held that such a challenge is not properly before the Court. **See** discussion of Defendant's first issue, **supra**.

To the extent Defendant is questioning what must be proven for a violation, Defendant's citation to **Lambert v. California**, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed. 2d 228 (1957) appears to require no more than the statute already requires. In **Lambert**, the court addressed the constitutionality of provisions of the municipal code of Los Angeles. These provisions required convicted felons to register with the city's Chief of Police upon their taking up residence within the city limits. The **Lambert** court noted that the provisions of the code required no showing of "willfulness" for convictions, either explicitly or by judicial implication. **See id.** at 227. The Court further noted that the Defendant provided proof at trial that she had no actual knowledge of the registration requirement. **See id.** Ultimately, the Court held that "actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand." **Id.** at 229. Under 18 Pa. C.S.A. §4915(a)(2), the crime with which Defendant has been charged, the Commonwealth must show that the Defendant knowingly failed to verify his address as he was required to do under 42 Pa. C.S.A. §9796.

this county are barred by principles of double jeopardy.⁹ We are not aware of any authority, nor does the Defendant cite any, which supports the general principle stated here: namely, that once a defendant has faced prosecution for failure to report a change in his residence or his employment in accordance with the registration provisions of Megan's Law (42 Pa. C.S.A. §9795.2(a)(2)), the Commonwealth is thereafter barred from prosecuting any subsequent failure to annually verify his address and be photographed. 42 Pa. C.S.A. §9796(b). The offense charged in Bucks County and that charged here arise out of two separate provisions of Megan's Law with different substantive requirements, and involve different locations, over different time periods, with the present violation alleged to have occurred approximately nine months after the prosecution for the first had run its course. Contrary to what Defendant argues, commonality, not similarity of facts, is a prerequisite to the protection afforded a defendant under principles of double jeopardy.

Reliance Doctrine

Finally, Defendant claims that application of the reliance doctrine creates a constitutional bar to the Commonwealth's prosecution of this matter. “[W]here an adequate claim of such circumstances is presented in the form of a pre-trial motion to dismiss, it is incumbent upon the trial courts to determine the doctrine's applicability and effect. They are fully authorized to take evidence, to the extent necessary, and to make dispositive findings and conclusions concerning whether trial should proceed.” **Commonwealth v. Kratsas**, 564 Pa. 36, 764 A.2d 20, 31 (2001) (citations omitted). A finding by the trial court that the doctrine applies will foreclose a criminal prosecution on that offense. **See id.**

The reliance doctrine, because founded in due process principles, is necessarily a fluid concept not confined to a specific formula, but dependant upon a basic need to avoid prosecution which “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” **Id.** 764 A.2d at 27 (quotation marks and citations omitted). Recogniz-

⁹ Defendant cites to **Blockburger v. U.S.**, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) for this proposition. **Blockburger** applies only where the same act or transaction constitutes a violation of two distinct statutory provisions. **Id.** at 304.

ing the impossibility of foreseeing all circumstances and contexts which might arise, but desiring to offer some guidance for when a colorable claim based upon the due process reliance doctrine exists, our State Supreme Court set forth the following factors to be considered to varying degrees when deciding whether the doctrine should be applied: (1) that there be an affirmative representation that certain conduct is legal; 2) that the representation be made by an official or a body charged by law with responsibility for defining permissible conduct respecting the offense at issue; (3) that the defendant actually rely on the official's statements; and (4) that the defendant's reliance is in good faith and reasonable given the identity of the government official, the point of law represented, and the substance of the statement. **Id.**, 764 A.2d at 32-33. "Reliance is reasonable and in good faith only where a person truly desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries." **Id.**, 764 A.2d at 33 (**quoting United States v. West Indies Transport, Inc.**, 127 F.3d 299, 313 n.13 (3rd Cir. 1997), **cert denied**, 522 U.S. 1052, 118 S.Ct. 700, 139 L.Ed. 2d 644 (1998)). The burden of proof to satisfy each of these elements is on the defendant. **See id.**, 764 A.2d at 33.

The **Kratsas** court further noted that the reliance doctrine is a narrow exception to the maxim that ignorance of the law is no excuse. **See id.**, 764 A.2d at 29. Its application requires unique and compelling circumstances to avoid what would otherwise be an egregious injustice. **See id.**, 764 A.2d at 31. And given its effect on another branch of government's decision to prosecute, it must not only be applied sparingly, but is, in fact, "rarely available." **Id.**, 764 A.2d at 32.

Factually, the doctrine focuses primarily on the nature of the official conduct, but also to some extent, on the defendant's state of mind. **See id.**, 764 A.2d at 38 n.25. Here, Defendant appears to base his claim on statements made by Judge Rufe from the bench when announcing his decision. At that time, Judge Rufe found "the penalty provisions [of Megan's Law] for noncompliance with registration to be excessive and, therefore, unconstitutional." (N.T., 12/3/04, p. 3). He later stated, "[t]herefore, we determine the statute to be unconstitutional under the authority of **Commonwealth**

v. Williams [574 Pa. 487, 832 A.2d 962] by the Pennsylvania Supreme Court and direct that the Defendant be discharged.” **Id.**

Defendant’s reliance on the reliance doctrine under these circumstances is misplaced. Judge Rufe never condoned Defendant’s failure to register or held that his actions were legal; he never opined that the registration and reporting requirements of Megan’s Law were unconstitutional and impossible of being enforced; he never intimated that the law was inexorably written and not subject to change. Judge Rufe interpreted a specific statutory provision in the context of a specific set of facts presented to him and found the penalty provisions of the law, as they then existed, to be unconstitutional. As a judicial pronouncement, Judge Rufe’s statements were necessarily case-specific, and should not “bind the state beyond the immediate context in which they were provided.” **Kratsas, supra**, 764 A.2d at 38 n.26 (**quoting** Parry, **Culpability, Mistake and Official Interpretations of Law**, 25 A.J.Crim.L. 1, 41 (Fall 1997)). Moreover, both the substantive provision of Megan’s Law under which Defendant is currently being prosecuted and the applicable penalty for violation of this provision are different from those ruled upon by Judge Rufe. Nothing Judge Rufe said, or later wrote in his memorandum opinion filed on February 7, 2005, rendered the Commonwealth’s prosecution of the Defendant in this case fundamentally unfair or at odds with “the community’s sense of fair play and decency.” **Id.**, 764 A.2d at 27 (quotation marks and citations omitted).

Defendant’s asserted belief that he is immune from prosecution because of what Judge Rufe stated, whether or not sincere, is clearly not reasonable. “[A]n expectation of non-enforcement, at least in the absence of extraordinary circumstances, will [not] support application of the reliance doctrine to bar a prosecution.” **Id.**, 764 A.2d at 36 n.21. Under the circumstances of this case, Defendant has failed to establish facts sufficient to properly invoke application of the due process reliance doctrine and to bar his prosecution.

CONCLUSION

In accordance with the foregoing, Defendant’s Omnibus Pretrial Motion to foreclose his prosecution for violating Section 4915(a)(2) of the Crimes Code, 18 Pa. C.S.A. §4915(a)(2), will be denied.

Index

Civil Law

- Abatement of Nuisance 349
- Absence of Jurisdiction 245
- Act 111 260
- Action To Quiet Title 127
- Adequacy of Jury Verdict 147
- Alleged Physical Disability 430
- Allocation of Costs Between Servient and Dominant Estate Holders 322
- Amendment of Pleadings 132
- Amount 225
- Appeal of Drivers License Suspension 430
- Appropriateness of Request by Police for Second Chemical Test 57
- Assessment Against Principal 132
- Assessment of Association Fees to Maintain Roads 322
- Attorney's Fees 444
- Authority To Bind Subsequent Boards to Contracts 407
- Award in Excess of Arbitrator's Authority 260
- Award of Attorney Fees 357, 463
- Balancing the Equities 204
- Bifurcation of Proceedings 529
- Burden of Proof 61
- Character Evidence 545
- Child Custody 184
- Claims for Contribution 1
- Classification of Engagement Ring As a Non-Marital Asset 18
- Closing Argument 132
- Constitutional and Statutory Limitations 260
- Constitutionality 386
- Constitutional Right to Privacy 184
- Constructive Notice of Filed Documents 444
- Contempt 506
- Contract Formation 407
- Co-Participant Eligibility 225
- Cost of Maintaining Easement 322
- Covenant Not To Compete (Enforcement) 517

Curative Instruction 132
Custody 61
Declaration 444
Declaratory Relief 407
Deed Covenants 444
Defective Verdict Slip 147
Demolition 349
Denial of Renewal Application 545
Determination and Deprivation of Constitutionally Protected Property or Liberty Interests 100
Determination of Damages 529
Determination of Necessity of Private Road 529
Dilapidated Structure 349
Divorce 18, 300, 333
Dog Bite 415
Easement by Necessity 322
Effect of Notice to Defend 337
Enforcement 204
Entry of Default Judgment While Preliminary Objections Are Pending 337
Equitable Distribution 18
Equitable Partition 1
Estoppel 287
Exceptions 300, 333
Exclusive Measure of Damages 517
Expert Testimony 147
Express and Implied Contracts 357
Fear of Needles 430
Future Medical Expenses 132
Governmental / Proprietary Functions 407
Homeowners Association 415
Implied Consent Law 57
Incarceration 479
Inherent Authority of Court to Modify Master's Recommendations 300, 333
Introduction of New Cause of Action 132
Involuntary Termination 479
Judicial Immunity 245
Juvenile Act 225, 245
Knowing and Conscious Refusal of Chemical Test 430

Liquidated Damage Clause 517
Liquor License Appeal 545
Malfunction of Breathalyzer 430
Master's Report 300, 333
Meaning of "Accreditation" 287
Meeting of the Minds 407
Mental Health Procedures Act 184
Municipal Authorities 407
Municipal Claims and Tax Liens Act 376
Necessity of Notice and Control 415
Necessity of Proof at Time of Trial 517
Nonprofit Corporation 10
Notice to Driver of Reason for Request As a Prerequisite to the Suspension of Operating Privileges for Refusal To Submit to a Second Test 57
Notice to Owner 386
Parental Rights 479
Parent's Psychiatric and Mental Health Records 184
Pennsylvania Public Employee Relations Act ("Act 195") 287
Permissive Joinder 127
Planned Residential Community 463
Pleading Requirements 1
Police Officer's Pension Benefits 260
Post-Termination Name-Clearing Hearing 100
Powers of Property Owners' Association 444
Prejudgment Interest 357
Preliminary Objections 337
Preservation of Liens 376
Pre-Termination **Loudermill** Hearing 100
Private Road Act 529
Proof of Damages for Breach of Contract 517
Psychotherapist-Patient Privilege 184
Punitive Damages 132
Qualifications/Factual Basis for Opinion 147
Quantum Meruit 357
Quashing an Improper Appeal 198
Real Estate 1, 463
Real Estate Tax Sale Law 386
Reasonable Basis for Calculation 132
Recovery of Attorney Fees Provided for by Contract 517

Regulation of Common Properties 463
Regulation of Fences 444
Remedy 349
Remedy for Misjoinder 127
Request for Additional Test 430
Request for Injunction 444
Required Assent by Governing Body of Municipal Entity 100
Requirement and Meaning of “Good Repute” 545
Requirement of Competent Medical Evidence 430
Requirement of Purge Conditions 506
Requirement of Substantial Benefit 204
Requirements for the Validity and Enforceability of a Release Agreement 268
Requirements of an Appealable Order 198
Requirements of Statutory Due Process 10
Requirement That Loss Be Attributable to Breach 517
Re-Sale Certificate 444
Restitution 225
Restrictions on the Use of Privately Owned Property 463
Restrictive Covenants 204
Review of Arbitrator’s Award 287
Rules and Regulations 444
Sale from Repository 386
Sanctions (Conditional/Unconditional) 506
Settlement Agreement 100
Severance and Dismissal 127
Slander of Title 444
Standard for Enforcement (Reasonable and Good Faith Substitute for Actual Damages) 517
Standard of Review 287
Standard of Sufficiency of Evidence To Reasonably Determine Loss 517
State and Federal Constitutional Law 100
Statute of Limitations 132
Statutory Appeal 260
Striking Judgment 337
Substantive and Procedural Due Process 100
Tax Assessment Appeal 68
Termination from Employment of Public Employee 100
Termination of Membership 10

Third-Party Standing 61
Timeliness 337
Tort Liability 415
Treatment of Retirement Benefits As Both a Marital Asset and a Source of Income 18
Ultra Vires Acts by “Lame Duck” Boards 407
Unfair Trade Practices and Consumer Protection Law 357
Uniformity Challenge 68
Uniform Planned Community Act 415, 444
Upset Sale 376
Vicarious Liability 132
Violation of Court Order 506
Waiver 300, 333
Weight of the Evidence 147

Criminal Law

Accomplice Liability 174
Adequacy of Jury Instructions 42
Admissibility of BAC Testing in Absence of In-Court Testimony of Phlebotomist 94
Assertion of Innocence and Coercion 216
Chain of Custody As a Prerequisite for the Admission of Physical Evidence 42
Co-Conspirator Rule 174
Consent to Blood Test 165
Conspiracy 174, 368
Constitutional Change 312
Constitutionality of Traffic Stops Based Upon Erratic Driving 34
Conviction Dependent on Notice of Obligation to Report and Register 554
Distinction Between Confidential Informants and Accomplices 238
Double Jeopardy 554
Driving Under the Influence 34
Effect of Incomplete Implied Consent Warning 165
Effect on Sentencing Scheme 304
Enforcement of Municipal Ordinance 28
Equal Protection Challenge 28
Exceptions 312
Exercise of Prosecutorial Discretion 94
Ex post Facto Punishment 554

Habeas Corpus 368
Jurisdictional Prerequisite 276, 312
Jury Selection 238
Learning Disability 496
Legality of Traffic Stop 165
Megan's Law 554
Mental Disability 256
Miranda 496
Motion To Dismiss 368
Notice of Appeal 310
Plea Agreement 304
Policy-Based Criteria for ARD Admission 94
Post Conviction Relief Act (PCRA) 276, 312
Presumed Prejudice 238
Presumption of Validity 94
Prima Facie Case 368
Privilege Against Self-incrimination 256
Probable Cause 165
Quashed for Untimeliness As Distinguished From a
PCRA Petition 310
Recklessly Endangering the Welfare of a Child 368
Relationship Between Receiving Stolen Property and Theft by
Unlawful Taking 174
Reliance Doctrine 554
Reporting and Registration Requirements 554
Requisite Nexus 304
Restitution 304
Right to Counsel 165
Rule 600 (Distinction Between Excludable Time and
Excusable Delay) 42
Sentencing 304
Standard for Recusal (As Consisting of Both a Subjective and
Objective Component) 42
Suppression 165, 496
Time Limitations 276
Timely Petition 312
Validity of **Miranda** Waiver 256
Void for Vagueness 28
Waiver 304
Withdrawal of Plea 216

Family Law

- Appealability of Finding of Contempt, Unaccompanied by Sanctions 79
- Child Custody 79
- Contempt As a Factor in Custody Order 79
- Parent Versus Third-Party Disputes 79
- Propriety of Appealing Two Separate Orders by One Notice of Appeal 79

Zoning

- Appeal of Enforcement Notice 394
- Interpretation of Zoning Ordinance 394