Carbon County Law Journal

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COMMONWEALTH of PENNSYLVANIA
vs. GERALD J. SMITH, Defendant

Criminal Law—Post Conviction Relief Act—Ineffectiveness of Counsel—Validity of Guilty Plea

1. A guilty plea which a defendant claims was the product of ineffectiveness of counsel and was therefore unlawfully induced is properly analyzed under Section 9543(a)(2)(ii) of the Post Conviction Relief Act ("Act"), rather than under Section 9543(a)(2)(iii) of the Act. The former requires a defendant to plead and prove that counsel's ineffectiveness improperly induced him to enter a plea which he would not otherwise have entered; the latter requires the defendant to plead and prove that he was unlawfully induced to plead guilty **and** that he is innocent.

2. In claiming ineffectiveness of counsel as the basis for an invalid plea, the defendant has the burden of proving each of the three elements of an ineffectiveness claim: (1) that the underlying claim has arguable merit, (2) that counsel's performance was not reasonably designed to effectuate the defendant's interest, and (3) that counsel's unreasonable performance prejudiced the defendant.

3. Counsel will not be deemed ineffective because of youth or inexperience alone. Were it otherwise, the number of years counsel practiced or the number of trials counsel participated in, rather than counsel's competence or preparedness, would become the unwarranted focus of a PCRA claim.

4. Counsel is presumed to be effective and the defendant has the burden of proving otherwise. A defendant who claims he was compelled to plead guilty because his counsel was inexperienced and unprepared fails to establish a claim of ineffectiveness where the credible evidence establishes that even though defendant's primary counsel did not previously try a criminal matter before a jury, he had conducted appropriate discovery, kept defendant advised of the status of his case, met with defendant during the period of representation and in preparation for trial, and not only was prepared for trial but had arranged to have an experienced trial attorney with him to assist in jury selection and at trial.

5. A defendant fails to establish that ineffectiveness of counsel was the cause of his plea, where the undisputed evidence establishes that both the charges admitted and the sentence received were extremely favorable to the defendant, that defendant understood the consequences and implications of his plea at the time made, and where defendant admitted in the plea colloquy that he was satisfied with the representation of his counsel and that he had not been pressured or forced in any way to enter a plea.

NOS. 684-CR-2005, 686-CR-2005

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

MICHAEL P. GOUGH, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—February 25, 2008

The Defendant, Gerald J. Smith, has appealed from our decision denying his request for post-conviction collateral relief.

Defendant raises four issues on appeal, all of which implicate the effectiveness of his trial counsel. In substance, Defendant contends that his trial counsel was inexperienced and unprepared for trial, and as a consequence, he was forced to enter involuntary pleas which he would not otherwise have entered.

PROCEDURAL AND FACTUAL BACKGROUND

Defendant was charged with a number of offenses involving three separate criminal episodes: one on August 25, 2005 (Docket No. 493 CR 05); one on October 10, 2005 (Docket No. 684 CR 05); and one on November 24, 2005 (Docket No. 686 CR 05). As a prior-convicted felon, Defendant was also facing a potential charge of unlawful possession of a firearm arising out of the November 24, 2005 incident, but for which no charge was pending at the time of his pleas.

On May 8, 2006, as part of a global plea agreement, Defendant pled guilty to one count of simple assault related to the August 25, 2005 incident,[1] one count of possession of drug paraphernalia with respect to the October 10, 2005 incident,[2] and one count of simple assault involving the November 24, 2005 incident.[3] In accordance with the plea agreement, immediately following the entry of his pleas Defendant was sentenced to an aggregate sentence of no less than one year nor more than three years in a state correctional facility. The plea agreement further provided that Defendant would not be prosecuted for the weapons violation (N.T. 6/19/07, pp. 72, 107-108).

At the time of his pleas, Defendant was represented on all charges by the Carbon County Public Defender's Office. Joseph D. Perilli, Esquire was assigned by this office to represent Defendant on the charges arising from the October 10, 2005, and November 24, 2005 incidents; George T. Dydynsky, Esquire represented Defendant on the August 25, 2005 incident. Both Attorneys Perilli and Dydynsky were present in Court at the time Defendant entered his pleas and was sentenced, as was Gregory L. Mousseau, Esquire, the Chief Public Defender.

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[1] 18 Pa. C.S.A. §2701(a)(1).

[2] 35 P.S. §780-113(a)(32).

[3] 18 Pa. C.S.A. §2701(a)(1).

Defendant was in Court on May 8, 2006, for purposes of selecting a jury in the case emanating from the November 24, 2005 incident, at which time the Court was advised that the parties had reached an agreement with respect to all charges pending against the Defendant. Defendant challenges only those pleas on which he was represented by Attorney Perilli.

Defendant asserts as the basis for his claims of ineffectiveness that Attorney Perilli had no previous experience in selecting or trying a case before a jury, that Attorney Perilli failed to obtain copies of police photographs showing injuries Defendant sustained in the November 24, 2005 incident, evidence which would potentially corroborate a claim of self-defense, and also that Attorney Perilli failed to respond to numerous letters and phone calls made by Defendant to Attorney Perilli requesting discovery of information potentially relevant to his defense, or to meet with Defendant and discuss the information which was obtained. Convinced that Attorney Perilli could not effectively defend him at trial, and faced with the prospect of being convicted of more serious charges, Defendant contends he was left with no alternative but to take the best deal he could obtain on the eve of trial.[4]

DISCUSSION

To begin, it is important to distinguish between Sections 9543(a)(2)(ii) and 9543(a)(2)(iii) of the Post Conviction Relief Act[5] ("PCRA") when examining a claim of ineffectiveness of counsel in connection with a guilty plea.

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[4] At the time he entered his pleas, Defendant testified that he was satisfied with the representation of his counsel, that he had not been pressured or forced in any way to enter his pleas, and that he recognized he was receiving a substantial break under the plea agreement both as to the nature of the charges being admitted and as to the sentence agreed upon (N.T. 6/8/06, p. 16; **see also,** Written Colloquy, Nos. 35-39, 43-45). In these proceedings, Defendant, in effect, repudiates his previous testimony. Defendant, however, cannot pick and choose as to when he will testify truthfully under oath and when he will not, and expect us to accept the most recent version he provides. **Cf. Commonwealth v. Myers,** 434 Pa. Super. 221, 229, 642 A.2d 1103, 1107 (1994) (stating that "a criminal defendant who elects to plead guilty has a duty to answer questions truthfully" and that a defendant may not with impunity contradict his prior testimony) (**quoting Commonwealth v. Cappelli,** 340 Pa. Super. 9, 20, 489 A.2d 813, 819 (1985) (citation omitted)). Moreover, we find credible the testimony of the Commonwealth witnesses: Joseph D. Perilli, Esquire, Gregory L. Mousseau, Esquire and Chief Matthew B. Bender.

[5] 42 Pa. C.S.A. §§9541-9546.

Section 9543(a)(2)(iii) provides:

> To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following: … (2) That the conviction or sentence resulted from one or more of the following: … (iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.

42 Pa. C.S.A. §9543(a)(2)(iii). To be eligible for relief under this Section, the petitioner must plead and prove that "he was unlawfully induced to plead guilty and that he is innocent[.]" **Commonwealth v. Lynch,** 820 A.2d 728, 732 (Pa. Super. 2003), **appeal denied,** 575 Pa. 691, 835 A.2d 709 (2003).

Section 9543(a)(2)(ii) provides:

> To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following: ... (2) That the conviction or sentence resulted from one or more of the following: ... (ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

42 Pa. C.S.A. §9543(a)(2)(ii). To be eligible for relief under this Section, the petitioner must plead and prove that counsel's ineffectiveness improperly induced him to enter a plea which he would otherwise not have entered; this basis for relief does not require innocence. **See Lynch, supra** at 732. It is this latter Section which applies to Defendant's claims on appeal.

Claims of ineffectiveness of counsel must be examined under the three-part ineffectiveness test: "that the underlying claim has arguable merit, that counsel's performance was not reasonably designed to effectuate the defendant's interests, and that counsel's unreasonable performance prejudiced the defendant." **Id.** at 733 (citation omitted). "Allegations of ineffectiveness in connection with the entry of a guilty plea will serve as a basis for relief only if the ineffectiveness caused the defendant to enter an involuntary or unknowing plea." **Commonwealth v. Hickman,** 799 A.2d 136, 141 (Pa. Super. 2002) (citation omitted). Moreover, counsel

is presumed to be effective, and the defendant has the burden of proving otherwise. **See Commonwealth v. Jones,** ___ A.2d ___, 2008 WL 314930 (Pa. Super. 2008). In this regard, it is also important to understand that at this point in the criminal proceedings, a defendant is no longer presumed innocent and the burden of proving the elements of ineffectiveness is upon the defendant.

Attorney Perilli was admitted to the Pennsylvania Bar in 1999 (N.T. 6/19/07, p. 104). At the time Defendant entered his pleas, Attorney Perilli had been a public defender for more than two years, and before that had handled conflict cases (N.T. 6/19/07, p. 104). While it is true that Attorney Perilli had not previously selected a jury in a criminal matter, or tried a criminal case before a jury—facts which Attorney Perilli readily disclosed to the Defendant—Attorney Mousseau, the Chief Public Defender, was present in Court on May 8, 2006, for the express purpose of assisting Attorney Perilli in jury selection and throughout Defendant's trial (N.T. 6/19/07, pp. 105, 119-120, 143-144). Defendant was aware of Attorney Mousseau's presence for these purposes (N.T. 6/19/07, pp. 25-26, 45-46, 75-76, 96). Additionally, it was Attorney Mousseau who reviewed with Defendant the written guilty plea colloquy submitted in this case (N.T. 6/19/07, pp. 56, 144-146).

As to this issue, Defendant has failed to produce any evidence that Attorney Perilli acted unreasonably or contrary to Defendant's interests, or in any manner misled Defendant as to his experience. Nor has Defendant demonstrated any prejudice. Moreover, were we to give any credence to Defendant's argument, the number of years counsel practiced or the number of trials counsel participated in, rather than counsel's competence or preparedness, would become the unwarranted focus of a PCRA claim.

As to Attorney Perilli's preparation for trial, Attorney Perilli testified that he had requested and obtained discovery from the Commonwealth and had examined the two photographs taken at the police station following Defendant's arrest on November 24, 2005. The photographs of Defendant's upper body depicted some bruises on Defendant's arms, but not how the injuries were sustained, the crux of Defendant's claim of self-defense (N.T. 6/19/07, pp. 98, 134). Attorney Perilli discussed with Defendant what the photographs revealed and also the risks of going to trial when the

only two witnesses to the event were the Defendant and the arresting officer, thereby pitting Defendant's testimony against that of the officer (N.T. 6/19/07, pp. 98, 110-111, 116, 121, 129, 132).

With respect to Defendant's claim that Attorney Perilli failed to communicate with him or keep him advised of the status of his case, Attorney Perilli credibly denied this. Attorney Perilli testified that he forwarded copies of all discovery he received from the Commonwealth to the Defendant, spoke with the Defendant on numerous occasions, and met with the Defendant many times, including a minimum of three to five times at the Carbon County Correctional Facility (N.T. 6/19/07, pp. 109-110, 122-125, 136). According to Attorney Perilli, he began preparing for trial several weeks before the trial date, and spent several hours with the Defendant the night before trial reviewing Defendant's testimony (N.T. 6/19/07, pp. 110, 130). Moreover, the plea itself was not a reflex decision the day of trial; it occurred only after hours of negotiation and with Defendant having the benefit of three public defenders, including the Chief Public Defender, during these negotiations (N.T. 6/19/07, pp. 53-54, 105).

Defendant has not convinced us that Attorney Perilli's conduct was ineffective or that he acted in any manner which was inconsistent with Defendant's interests. To the contrary, Defendant received substantial concessions in the plea agreement, both as to the charges admitted and the sentence received, a fact not disputed, even by Defendant (N.T. 6/19/07, pp. 69-70). **Cf. Commonwealth v. Lewis,** 791 A.2d 1227, 1235 (Pa. Super. 2002), **appeal denied,** 806 A.2d 859 (Pa. 2002) (stating that a favorable sentence is "a strong indicator of the voluntariness of the plea").

CONCLUSION

There is no merit to Defendant's claim that Attorney Perilli was ineffective or that Attorney Perilli's conduct improperly influenced his decision to plead guilty. When Defendant entered his plea, he understood the consequences and implications of his plea (N.T. 6/19/07, p. 55). The plea agreement, as Defendant also conceded, was too good to refuse (N.T. 6/19/07, p. 76). The sentence Defendant received was the exact sentence he agreed to and bargained for. Under all of the circumstances, there is nothing unjust in re-

quiring that Defendant be bound to his plea agreement and that he be required to serve the sentence we imposed in accordance with that agreement.

In accordance with the foregoing, it is respectfully requested that our decision to deny Defendant's Petition for Post-Conviction Collateral Relief be affirmed and that Defendant's appeal be denied.

IN RE: ESTATE of IRENE MAKUCH, DECEASED

*Civil Law—**Inter Vivos** Gift—Grounds for Setting Aside—Incapacity—Undue Influence—Burden of Proof—Confidential Relationship—Power of Attorney—Dead Man's Act*

1. The **prima facie** elements of an **inter vivos** gift are donative intent and delivery. The initial burden of establishing that a gift has been made is upon the donee and requires proof by clear, precise and convincing evidence.

2. Once the **prima facie** elements of a gift have been proven, a presumption arises that the gift is valid. The burden then shifts to the person challenging the gift to rebut this presumption by evidence which itself must be clear, precise and convincing.

3. In disputing the presumptive validity of a gift, the person challenging the gift may assert the existence of a confidential relationship between the donor and the donee. If, at the time a gift is alleged to have been made, a confidential relationship exists, the burden of proof immediately shifts to the donee to show that the gift was free of any taint of undue influence or deception.

4. A confidential relationship exists as a matter of fact whenever one person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms either because of an overmastering dominance on one side, or weakness, dependence or justifiable trust, on the other.

5. The existence of a general power of attorney between the parties to a gift is strong evidence that a confidential relationship exists between the two.

6. A gift may be set aside if the donor lacked the capacity to make the gift or if the donee exercised undue influence.

7. Ordinarily, the mental capacity of a donor to make a gift is presumed. This presumption, however, disappears if a confidential relationship existed between the donor and donee. Instead, a contrary presumption arises that the gift is void.

8. If a confidential relationship exists between the donor and donee of a gift, the burden is upon the donee to prove by clear, precise and convincing evidence not only that the gift was unaffected by any taint of undue influence, but also that the donor possessed the mental capacity to make the gift. To meet this burden, the donee must prove both that the gift was the free, voluntary and intelligent act of the donor, and, since the parties did not deal on equal terms, that the donee acted with scrupulous fairness and good faith and that the gift was unaffected by any taint of undue influence or deception.

9. Once the **prima facie** validity of a gift by a decedent has been established by independent and disinterested testimony, the donee is not barred by the Dead Man's Act from testifying in support of the gift. Instead, after the validity of a gift is presumed, the testimony of a beneficiary of the decedent's estate will be viewed as adverse to the decedent's interest and itself barred by the statute.

10. A gift of an annuity will be set aside where a confidential relationship is shown to have existed between the donor, an elderly woman residing in a personal care home, and the donee, a trusted friend, at the time of the gift and where the gift, which consists of the bulk of the donor's estate, singularly benefits the recipient at the expense of the donor and the recipient fails to establish by the requisite degree of proof either that the terms and consequences of the gift were fully explained to and understood by the donor or that the gift was unaffected by any taint of undue influence, imposition, or deception.

NO. 05-9024

KEITH PAVLACK, ESQUIRE—Counsel for Nancy Scott.

ERIC STRAUSS, ESQUIRE—Counsel for Gary Makuch, Executor of the Estate of Irene Makuch.

MEMORANDUM OPINION

NANOVIC, P.J.—January 24, 2008

FACTUAL AND PROCEDURAL HISTORY

On January 9, 2005, Irene Makuch ("Decedent") died testate naming Gary Makuch ("Makuch"), her nephew by marriage, executor of her estate. Decedent's will was admitted to probate on January 18, 2005, at which time letters testamentary were granted to Makuch.

At the time of her death, Decedent was 94-years-old and a resident of Maple Shade Personal Care Home, an assisted-living facility, located in Nesquehoning, Carbon County, Pennsylvania. Decedent's husband, John Makuch, died in 1990. There were no children of the marriage.

At the time of her husband's death, Decedent suffered from macular degeneration. In consequence, her vision was impaired and became increasingly worse over time. Although Decedent could recognize people, she was unable to read, or to drive, or to get around on her own. She was also hard of hearing.

Following John Makuch's death, Nancy Scott ("Scott") and her husband, Thomas Scott, became active in caring for Decedent and in helping to manage her affairs. At the time of John Makuch's

death, the Makuches were residents of New Jersey, as were Scott and her husband, with the two families living approximately three miles from one another. Thomas Scott was the nephew of John Makuch, and Decedent, his aunt by marriage.

Thomas Scott died in 1994. When this happened, Decedent became even more dependent on Scott, relying primarily on Scott to take her places (**e.g.,** to the hairdresser and to the bank), to run her errands (**e.g.,** shopping), and to check her mail and pay her bills. Decedent further appointed Scott as her power of attorney. This power remained in place until shortly after Scott retired and moved to Pennsylvania in 1998; it was replaced with a new power of attorney naming another resident of New Jersey as Decedent's representative. When Scott moved to this county, where her family was originally from, she invited Decedent to accompany her; however, Decedent decided to remain in New Jersey.

At some point after Scott moved to Pennsylvania, Decedent was hospitalized for intestinal problems and was later placed in a nursing home for rehabilitation. Upon being discharged from the nursing home, she required in-home care. Decedent was uncomfortable with these living arrangements and thought about assisted living. She also felt neglected by her power of attorney who was not well known to her and seldom visited.

Decedent missed Scott's companionship and interest in her well-being. She wanted Scott, with whom she felt cared for and in whom she trusted and confided, to take over her affairs and make the arrangements for her care. When Scott agreed, Decedent's counsel in New Jersey prepared a new power of attorney and Scott was again authorized to act for Decedent.

Rather than entering assisted living, in September or October 2000, Decedent came to live with Scott at her home in Pennsylvania. While Decedent lived at Scott's home, Decedent insisted on contributing to the cost of her care and paid Scott $600.00 monthly. This amount, Decedent noted, was less than the $800.00 per month she paid in New Jersey for in-home care, in addition to the cost of providing room and board for her caretakers. She also made payments to Scott's daughter, Carol L. Scott, who assisted in watching over her.

On December 24, 2000, Decedent executed a general and durable power of attorney prepared by Pennsylvania counsel which revoked all prior powers of attorney. Under this instrument, Scott was given, **inter alia,** "the full power, right and authority to do, perform and to cause to be done and performed all such acts, deeds, matters and things in connection with [Decedent's] property and estate as [Scott], in [Scott's] sole discretion, shall deem reasonable, necessary and proper, as fully, effectually and absolutely as if [Scott] were the absolute owner and possessor thereof," as well as the power and authority "to authorize [Decedent's] admission to a medical, nursing, residential or similar facility and to enter into agreements for [Decedent's] care." (Plaintiff's Exhibit 3, Power of Attorney, Paragraphs 11 and 12). **See also, Estate of Reifsneider,** 531 Pa. 19, 610 A.2d 958 (1992) (applying the common-law principle that general language can serve to grant specific powers with reference to a power of attorney), **superseded by statute,** 20 Pa. C.S.A. §5601.2 (Special rules for gifts), **as recognized in In re Weidner,** 938 A.2d 354 (Pa. 2007). This power of attorney remained in effect until Decedent's death.

In January 2001, Decedent began experiencing repeated blackouts. She was admitted to Pine Meadows, an assisted-living facility. When the blackouts continued to increase in frequency, Decedent was transferred in June of 2001 to Maple Shade where more intensive care was available. Although Decedent and Scott no longer resided in the same household after January 2001, Scott continued to be attentive to Decedent's needs, personal and financial, and would frequently visit Decedent. During this time, Decedent depended heavily on Scott to advise her and to guide her in making important decisions in her life; Decedent relied upon and trusted Scott to do what was in Decedent's best interest. In this regard, Decedent entrusted Scott with the sale of her home in New Jersey (the proceeds of which were placed in a Merrill Lynch brokerage account), placement into assisted living, and management of her life savings.

While she was living at Maple Shade, on December 20, 2001, Decedent signed an application to purchase a fixed annuity at a cost of $220,000.00 from American Investors Life Insurance Company ("American Investors"). The cost of this annuity represented the

bulk of Decedent's assets, whose overall value at the time was approximately $291,000.00. The application, together with a check in the amount of $220,000.00 made payable to American Investors, were delivered to Phillip J. Cannella ("Cannella"), an American Investors' agent, on December 20, 2001. The check was endorsed by Scott in her capacity as Decedent's power of attorney on funds which originally derived from the sale of Decedent's home. This payment was authorized by Decedent.

The annuity named Scott the annuitant, Decedent the primary beneficiary, and Scott and Decedent together as the two co-owners, with a right of survivorship.[1] Under the terms of the annuity, by being named co-owner of the policy, Scott received an immediate and direct benefit and was entitled, when acting jointly with Decedent as the other co-owner, to exercise all rights described in the policy, including payment of the cash surrender value upon surrender of the policy. As annuitant, Scott also received a future and indirect benefit, contingent upon her survival, to receive annuity payments made on and after the annuity date. The annuity date, that is the date when monthly payments of $2,598.73 would begin, was December 21, 2016.

As primary beneficiary, Decedent was entitled to receive payment of the death benefit provided by the policy upon the death of the annuitant. At the time the annuity was purchased, Decedent was 91 years of age and Scott 64 years old. The alternate beneficiaries named were Scott's three children: Carol L. Scott, Patricia A. Scott, and Thomas D. Scott.

Before Decedent signed the annuity application and authorized the premium payment, Scott and Cannella met with Decedent at Maple Shade on December 20, 2001. This meeting was arranged by Scott for Cannella to meet Decedent and obtain Decedent's signature on the annuity application. Six days earlier, on December 14, 2001, the investments in Decedent's Merrill Lynch brokerage account were liquidated at Scott's request. This money was used to purchase the annuity, with the balance of the proceeds from the liquidation, $51,800.00, placed into a money market account. At

[1] The meaning of these terms is defined in the annuity contract, not the application.

an earlier meeting, Scott told Cannella she was concerned about keeping Decedent's monies invested in equities, where recent losses had been reported, and wanted to protect Decedent's property from being consumed by the expense of nursing home care.[2]

During his meeting with Decedent, Cannella never explained the details of the annuity to the Decedent. Instead, he limited his discussion with Decedent to three principal points: (1) that he believed the purchase of an annuity, with a guaranteed minimum rate of return, was a more secure investment for Decedent than stocks and bonds, especially in light of the recent events of September 11, 2001; (2) that if Decedent transferred assets to Scott, these assets would be protected from having to be used to pay the costs of Decedent's anticipated nursing home care, without a transfer penalty, provided the transfer was made at least three years before nursing home care was required; and (3) that if Decedent purchased the annuity and named Scott a joint owner, the monies she used to purchase the annuity would no longer be hers unless Scott predeceased her.

Cannella testified that when he met with Decedent on December 20, 2001, Decedent was lucid and responded appropriately to his questions, and that when he asked Decedent if she understood what he had told her, she replied affirmatively. Cannella then presented the application to Decedent for her signature and watched as

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[2] On November 13, 2001, Scott signed an engagement letter with counsel, in her capacity as power of attorney, for estate planning services to be provided to Decedent. At the time, it was contemplated that a revocable living trust agreement would be prepared as well as a pour-over will. A retainer fee of $1,995.00 was paid. As part of the estate-planning package Scott received, she was advised that a no-obligation consultation could be arranged with a financial services representative to "discuss benefits of various financial planning options, including annuities, at your home in a friendly, no pressure setting." Scott was referred to Cannella and subsequently met with him at her home approximately two weeks prior to the December 20, 2001 meeting. At this meeting between Scott and Cannella, Scott discussed Decedent's financial circumstances as well as her own estate planning. Prior to the December 20, 2001 meeting, Cannella explained to Scott the details of the annuity he was recommending for Decedent. The annuitant, beneficiary and owner designations made in the application Decedent signed were based on information Cannella was provided by Scott. A request to cancel the estate planning services Scott had previously arranged on November 13, 2001, was signed by Decedent on December 20, 2001, the same date the annuity application was executed and payment made.

she signed it. The application was also signed by Scott, as annuitant and co-owner, and by Cannella, as American Investors' agent.

The annuity contract was delivered to Scott by Cannella on January 4, 2002; no evidence exists that this contract, or a copy, was ever provided to Decedent. No evidence exists that the terms of the contract were ever explained to the Decedent after it was issued. Nor does any evidence exist that Decedent ever had the opportunity, or even knew she had the right, to cancel the policy within ten days of its delivery.

Decedent's will is dated December 17, 2002, and was prepared by Attorney Susan Sernak Martinelli. Attorney Martinelli was contacted by Makuch, who made the arrangements for Martinelli and Decedent to meet. Attorney Martinelli met with Decedent twice: first, at Makuch's home on November 27, 2002, and next, on December 17, 2002, at Attorney Martinelli's office, where the will was signed. At the first meeting, Attorney Martinelli obtained some limited background information on the Decedent, ascertained that the Decedent was competent to make a will, was told by the Decedent that her entire estate consisted of a bank account with a value of somewhere between $200,000.00 and $300,000.00, and was provided by Decedent with the names of those individuals to whom she wanted to distribute her estate and in what percentages. At this meeting, Decedent never mentioned the existence of an annuity. In accordance with the information Martinelli received, the will which Martinelli prepared and which was later signed by Decedent provides first for the payment of Decedent's debts, and then directs that the residue of the estate be divided fifty percent to Makuch, thirty percent to Scott, and twenty percent to Scott's daughter Carol.

At issue in this case is whether Scott's interest in the annuity should be set aside as an invalid gift, either on the basis of Decedent's incapacity at the time made or as the product of undue influence exercised by Scott. If the gift is invalidated, the annuity will become an asset of the estate distributable in accordance with the provisions of Decedent's will. If not, ownership of the annuity will remain with Scott as the surviving co-owner. To adjudicate the rights and status of the parties with respect to this annuity, Scott commenced the instant declaratory judgment action against Decedent's estate.

DISCUSSION

As a general proposition, the burden of persuasion and of going forward with evidence to establish a valid **inter vivos** gift by a decedent is initially upon the donee. This burden requires the donee to establish the **prima facie** elements of a valid **inter vivos** gift—donative intent and delivery—by clear, precise and convincing evidence. **Hera v. McCormick,** 425 Pa. Super. 432, 439, 625 A.2d 682, 686 (1993). Once this burden is met, a presumption of validity arises and the burden then shifts to the party contesting the gift to rebut this presumption by evidence which is clear, precise and convincing. **Id.; see also, In re Estate of Clark,** 467 Pa. 628, 634, 359 A.2d 777, 781 (1976). However, if the contestant is able to show that "a confidential relationship between the donor and donee existed at the time of the gift, the burden then shifts to the donee to show that the gift was free of any taint of undue influence or deception." **In re Estate of Clark, supra** at 634, 359 A.2d at 781.

A. **Existence of a Gift**

On December 20, 2001, when Decedent and Scott signed the annuity application, Decedent was aware that her money would be used to purchase the annuity, and that the annuity would be jointly owned by her and Scott. Based upon what Cannella told her, she was also aware that she was transferring assets into Scott's name and that by naming Scott as a co-owner of the annuity, Scott would significantly benefit from the purchase. Decedent understood that her property was being used to purchase the annuity and that Scott would be benefited by the transaction. She also desired for this to happen. Scott was the one person who had consistently cared for Decedent in New Jersey and also in Pennsylvania, invited Decedent into her home, made arrangements for Decedent's admission to Pine Meadows and Maple Shade, and continued thereafter to be attentive to Decedent's personal needs, to visit her and to show concern for her well-being.

In Pennsylvania, transactions that might not be considered gifts in the traditional sense have been recognized as gifts in the legal sense, such as beneficiary designations in retirement plans. **See e.g., Fiumara v. Fiumara,** 285 Pa. Super. 340, 349 n.6, 427 A.2d

667, 671 n.6 (1981). "[W]hen actual physical delivery of property is impractical and the donor delivers a written assignment, deed of gift or equivalent writing to the donee under circumstances which manifest the donor's present intention to pass right of possession to the donee, the delivery of the instrument operates as a constructive delivery so as to effectuate the gift." **Meluskey Estate,** 455 Pa. 589, 593, 317 A.2d 607, 609 (1974) (citation omitted).

Here, the annuity application called for Scott to be a joint owner of the annuity contract along with the Decedent and designated Scott as the annuitant. Once Decedent signed the annuity application with Scott, and authorized the premium payment and submission of the application, nothing further remained to be done by Decedent to complete the transfer and delivery of this gift. The annuity contract later delivered to Scott, consistent with Cannella's statements to Decedent, named the Decedent and Scott as co-owners of the policy with right of survivorship. **Cf. Furjanick Estate,** 375 Pa. 484, 489-90, 100 A.2d 85, 88 (1953) (holding that the establishment of a joint banking account, with right of survivorship, funded solely by one party, is **prima facie** evidence of a gift **inter vivos** by the depositor to the other); **see also, Banko v. Malanecki,** 499 Pa. 92, 96, 451 A.2d 1008, 1010 (1982) ("When two parties sign a contract with a bank that creates a joint interest in a bank account with the right of survivorship, there is **prima facie** evidence of the intent of the party funding the account to make an **inter vivos** gift to the other joint tenant.").

Under the facts presented—the signed application, accompanied by Cannella's explanation to Decedent, and payment of the annuity premium using Decedent's monies—**prima facie** evidence of a valid **inter vivos** gift from Decedent to Scott of a joint interest in the annuity was established. With this presentation, the burden shifted to Makuch to show that the gift was invalid, either because Decedent lacked the capacity to make the gift or because of undue influence.[3] Where, however, a confidential relationship is shown to

[3] At the time of trial, it was clear that the **inter vivos** transfer by Decedent was **prima facie** valid and that Scott, having presented independent evidence of the validity of the gift through Cannella, was not barred by the Dead Man's Act, 42 Pa. C.S.A. §5930, from testifying. **See Friedeman v. Kinnen,** 452 Pa. 365, 369, 305 A.2d 3, 4 (1973) ("[I]f the alleged donee fails to establish a **prima facie** gift

exist between the parties to a gift, the burden immediately shifts to the recipient to demonstrate by clear and convincing evidence that the gift was the free, voluntary and intelligent act of the donor, and that the gift was unaffected by any taint of undue influence. **See Lochinger v. Hanlon,** 348 Pa. 29, 36, 33 A.2d 1, 4 (1943); **see also, Fiumara, supra** at 350, 427 A.2d at 672. Because Makuch relies upon this evidentiary device to shift to Scott the burden of proving affirmatively Decedent's mental capacity to make the gift and that the gift was not the product of undue influence, imposition or deception, we consider next whether Makuch's evidence establishes the existence of a confidential relationship.

B. **Confidential Relationship**

"A confidential relationship exists [ ] as a matter of fact whenever one person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms, either because of an overmastering dominance on one side, or weakness, dependence or justifiable trust, on the other." **In re Estate of Clark,** 467 Pa. at 635, 359 A.2d at 781 (quotation marks and citations omitted). "Although no precise formula has been devised to ascertain the existence of a confidential relationship, it has been said that such a relationship is not confined to a particular association of parties, but exists whenever one occupies toward another such a position of advisor or counselor as reasonably to inspire confidence that he will act in good faith for the other's interest." **Estate of Lakatosh,** 441 Pa. Super. 133, 142, 656 A.2d 1378, 1383 (1995) (internal quotation marks and citations omitted). "A confidential relationship is marked by such a disparity in position that the inferior party places complete trust in the superior party's advice and seeks no other counsel, so as to give rise to a potential abuse of power." **eToll, Inc. v. Elias/Savion Advertis-**

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by independent testimony before he takes the stand, he will not be competent to testify."). In contrast, Makuch's testimony proffered to prove that the purchase of the annuity naming Scott as a co-owner and annuitant was invalid, either because Decedent did not possess sufficient mental capacity to make a gift or because it was effected by undue influence, was adverse to Decedent's interests and therefore barred by the Dead Man's Act. **See Long v. Long,** 361 Pa. 598, 601, 65 A.2d 683, 684 (1949); **King v. Lemmer,** 315 Pa. 254, 173 A. 176 (1934). We also note, that as a principal beneficiary under Decedent's will, Makuch, individually, was not a disinterested witness otherwise competent to testify under the Act.

ing, Inc., 811 A.2d 10, 23 (Pa. Super. 2002) (citation omitted). When a confidential relationship exists, "unfair advantage in a transaction is rendered probable, then the burden is shifted, and the transaction is presumed void, and it is incumbent on the party in whom such confidence is reposed ... to show affirmatively that no deception was used, and that all was fair, open, voluntary and well understood." **Hanlon, supra** at 37, 33 A.2d at 4 (quotation marks and citations omitted).

On the facts of this case, Decedent's trust and confidence in Scott was complete. Decedent was an elderly lady, who needed help caring for herself and managing her affairs. Over the years, Decedent relied upon Scott on virtually all aspects of her personal and financial affairs including, shopping, laundering, payment of bills, preparation and filing of her income tax returns, processing mail, administering medications, bathing, and placing phone calls. Decedent's eyesight prevented her from driving or reading; she depended on Scott to read her mail and other documents for her.

Significantly, Decedent provided Scott with a general power of attorney. As stated in **Estate of Clark,** 461 Pa. 52, 63, 334 A.2d 628, 633-34 (1975): "[I]f there be any clearer indicia of a confidential relationship than the giving by one person to another of a power of attorney over the former's entire life savings, this Court has yet to see such indicia." (quotation marks and citation omitted). "This is particularly true [ ] when the alleged donee is shown to have spent a great deal of time with the decedent or assisted in decedent's care." **In re Estate of Lakatosh, supra** at 142, 656 A.2d at 1383 (quotation marks and citation omitted). Indeed, it was the power of attorney given by Decedent to Scott which enabled Scott to consummate the sale of Decedent's New Jersey home, place the proceeds in a Merrill Lynch brokerage account, and later liquidate this account, using $220,000.00 to purchase the annuity and place the balance—$51,800.00—in a money market account.[4] This same power of attorney provided the authorization for Scott to arrange for Decedent's admission to Pine Meadows and later Maple Shade.

[4] Scott testified that transfers from this money market account were used to fund Decedent's checking account when the checking account balance was low. This checking account was used to pay Decedent's daily living expenses. In

We find that Decedent's dependence on Scott and Scott's assumption of primary responsibility for Decedent's personal and financial affairs established, without question, that the two stood in a confidential relationship to one another at the time the gift was made. We next consider whether Scott has met her burden of proving that Decedent fully understood what she was doing and that the gift was free of any taint of undue influence or deception.

C. **Validity of Gift: Mental Capacity and Undue Influence**

In general, "[t]he presumption as to gifts, **inter vivos,** is that the donor has mental capacity." **Null's Estate,** 302 Pa. 64, 66, 153 A. 137, 139 (1930). For these purposes:

> Capacity relates to soundness of mind, or in other words a mind that has full and intelligent knowledge of an act engaged in, an intelligent perception and understanding of the dispositions made of property, and the persons and objects one desires shall be the recipients of one's bounty. … Old age, sickness, distress or debility of body do not prove or raise a presumption of incapacity … , nor do inability to transact business, physical weakness, peculiar beliefs and opinions, or failure of memory.

Id. at 66-67, 153 A.2d at 139 (citations omitted); **see also, Horner v. Horner,** 719 A.2d 1101, 1104 (Pa. Super. 1998). However,

> [w]hen a confidential relation is established, the presumption is that the transaction, if of sufficient importance, is void and there is cast on the donee the burden of proving affirmatively a compliance with equitable requisites and thereby overcoming the presumption; he must affirmatively show that no deception was used and the act was the intelligent and understood act of the grantor, fair, conscientious and beyond the reach of suspicion ... .

Null's Estate, supra at 68-69, 153 A. at 139.

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addition to deposits from the money market account, Decedent received social security payments of approximately $1,000.00 per month which were deposited directly into the checking account. Had the funds in the money market account been insufficient for these purposes, Scott further testified that early withdrawals from the annuity would have been made to cover Decedent's expenses. As it turned out, this was not necessary and no withdrawals from the annuity were made during Decedent's lifetime.

In this case, Scott must affirmatively show that the gift was the free, voluntary and understood act of the Decedent, and, since the parties did not deal on equal terms, Scott was also required to show that she acted with scrupulous fairness and good faith and that she did not abuse the confidence placed in her by the Decedent. **See In re Estate of Clark,** 467 Pa. at 636, 359 A.2d at 781. Scott must prove "that the transaction was in all respects fair and beyond the reach of suspicion." **Hanlon, supra** at 35, 33 A.2d at 4 (citations omitted). "[U]ndue influence is a subtle, intangible and illusive thing." **Estate of Clark,** 461 Pa. at 67, 334 A.2d at 635 (internal quotations and citation omitted). It is "generally accomplished by a gradual, progressive inculcation of a receptive mind." **Id.** at 65, 334 A.2d at 634. "Such a transaction will be condemned, even in the absence of evidence of actual fraud, or of mental incapacity on the part of the donor, unless there is full and satisfactory proof that it was the free and intelligent act of the donor, fully explained to him, and done with a knowledge of its consequences." **Hanlon, supra** at 36, 33 A.2d at 4 (citations omitted).

The burden imposed on Scott to establish Decedent's mental capacity to make a gift and to disprove undue influence requires proof by clear, precise and convincing evidence. This standard requires that "the witnesses must be found to be credible, that the facts to which they testify are distinctly remembered and the details thereof narrated exactly and in due order, and that their testimony is so clear, weighty, and convincing as to enable the [factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." **Hera, supra** at 446, 625 A.2d at 689. This burden has not been met by Scott.

(1) **Capacity**

At trial, Cannella testified that because Decedent was elderly and in a personal care home, in order not to overwhelm or confuse her with the details of the annuity, he focused instead on explaining and emphasizing three principal points: (1) that in his opinion an annuity was a safer form of investment for an older person than owning equities, such as Decedent's Merrill Lynch brokerage account, which were more volatile and subject to market risk; (2) that to the extent she divested herself of owning property, the property she gave away could no longer be burdened with paying the costs

of any future nursing home care she might require; and (3) that by making Scott a joint owner of the annuity, the monies she used to purchase the annuity would no longer be Decedent's unless Scott predeceased her. While this information was important, it was incomplete. The meaning of critical terms and conditions of the annuity were not contained in the application and were never explained to the Decedent before the application was signed: namely that the principal benefit of being named primary beneficiary was the receipt of death benefits under the policy which would only occur if Scott, as the annuitant, would predecease the Decedent; that Scott was to be the annuitant and what this meant (**i.e.,** that Scott was the person entitled to receive the annuity payments—not Decedent); that the annuity payments would not begin until the year 2016, fifteen years after the contract was entered, at a time when it was unlikely that any of the annuity payments would be used for Decedent's benefit due to Decedent's age; that no withdrawals could be made by anyone within the first year of the policy regardless of need; and that any withdrawals made after the first year and before the annuity date would require Scott's consent and could not exceed annually the lesser of ten percent of the accumulated value or the accumulated interest, without penalty. Moreover, what Decedent was told by Cannella before she signed the application may have been misleading, even if unintentional: it is entirely plausible for Decedent to have believed that notwithstanding Scott being named a co-owner of the annuity, as primary beneficiary, Decedent would be the beneficiary of immediate annuity payments to begin during her lifetime, and that only to the extent she did not outlive these payments, would the remaining payments be paid to Scott's children as the contingent beneficiaries, or to Scott, if Scott, as the surviving owner surrendered the policy or changed the beneficiary designation.

The evidence was undisputed that the terms and consequences of the annuity were never **fully explained** by Cannella, and that the transaction was a complex one, especially to an older person. Additionally, at the time Decedent purchased the annuity, she was aged and infirm. She exhibited symptoms consistent with her age: forgetfulness and confusion, blackouts, difficulty hearing, and she was legally blind and thus unable to read.

Absent proof that someone familiar with annuities explained the nature and the effect of the annuity to Decedent, there is no credible evidence to support a finding that the Decedent understood all, or even most, of the implications of the annuity. Accordingly, Scott has not sustained her burden of establishing that Decedent possessed the requisite capacity to make a gift at the time made, that is "a mind that has full and intelligent knowledge of an act engaged in, an intelligent perception and understanding of the dispositions made of property, and the persons and objects one desires shall be the recipients of one's bounty." **Null's Estate, supra** at 66-67, 153 A. at 139 (citation omitted).

(2) **Undue Influence**

We have no doubt that Scott truly cared for Decedent and took care of her, and that Decedent recognized and appreciated this interest and attention and wanted to reward Scott for what she had done. This is evident in Decedent's December 17, 2002 will. We are also cognizant that care must be taken not to confuse an act of love and affection with an act arising from the abuse of a confidential relationship. **Null's Estate, supra** at 69, 153 A. at 140.

We are unable to find, however, by the requisite standard of proof imposed on Scott that Decedent's purchase of the annuity was "unaffected by any taint of undue influence, imposition, or deception." **Hanlon, supra** at 36, 33 A.2d at 4 (citations omitted). "Where one is bound to act for the benefit of another, he can take no advantage to himself." **Null's Estate, supra** at 68, 153 A. at 139. On this issue, the credible and mostly undisputed evidence establishes that Scott initiated the steps taken to arrange for Decedent's estate planning and engaged counsel on November 13, 2001, for these purposes; that Scott was concerned not only about the loss in value in Decedent's Merrill Lynch brokerage account, but also wanted to protect this property from the expense of nursing home care; that Scott approached Cannella and discussed with him the benefits of having Decedent purchase an annuity, at a time when Scott was doing her own estate planning; that the decision to name Scott as the co-owner and annuitant, and her children the alternate beneficiaries, was based on what Scott told Cannella, not on what Decedent told Cannella; that the details of the annuity were discussed between Scott and Cannella, and never with Decedent;

that the assets in Decedent's Merrill Lynch brokerage account were liquidated by Scott one week before Cannella's meeting with Decedent on December 20, 2001, and that these monies were the source of the premium payment for the annuity; and that on the same date the annuity was purchased, the engagement letter with counsel for estate planning purposes was canceled.

The annuity, in effect, became Decedent's estate plan. Its effect, however, singularly benefited Scott at Decedent's expense: by making the annuity joint, Scott acquired an irrevocable interest in the bulk of Decedent's estate, and by being named the annuitant, Scott alone became the beneficiary of deferred annuity payments, to the exclusion of any payment benefits to Decedent; by severing Decedent from the majority of her assets at a time when it was anticipated Decedent would soon require nursing home care, Decedent's eligibility for Medicaid was jeopardized, and by limiting Decedent's ability to make any withdrawals for one year, compounded by substantial early withdrawal penalties thereafter, Decedent's ability to fund the costs of nursing home care during the period of any Medicaid transfer penalty was severely compromised; and by naming Decedent, who was then 91 years of age, primary beneficiary of an annuity whose annuitant was 64 years of age, the prospect of Decedent ever being benefited was illusory. Finally, the distribution realized by the annuity was irreconcilable with an equal distribution between Scott (including her daughter) and Makuch, both of whom were related to the Decedent by affinity, the apparent object of Decedent's last will.

CONCLUSION

When parties know one another well and have a close relationship, it is often difficult to distinguish between gifts which are the product of affection and those caused by undue influence. In setting aside a gift between persons so situated, "the power to do so is of an exceedingly delicate character, not to be lightly exercised, and only to be invoked when the manifest justice of the case requires it." **Null's Estate, supra** at 70, 153 A. at 140 (quotation marks and citations omitted). This is such a case.

While it may well be that had the terms of the annuity been fully explained to the Decedent and understood by her, she would have purchased the annuity regardless, the confidential relationship

which existed between Scott and the Decedent, placed on Scott the burden of proving the validity of the gift, rather than requiring Makuch to prove its invalidity. Having determined that Scott failed to meet this burden, we find that the gift to Scott is invalid, that Decedent's estate is the sole owner of the annuity, and that Scott individually has no ownership right, interest or property therein.

American Investors Life Insurance Company is not a party to these proceedings. Therefore, in accordance with **Hanlon, supra** at 40, 33 A.2d at 6, we have not directed that the annuity be reformed to reflect this declaration of Scott's ownership interest. However, if the estate elects to surrender the annuity and requests payment of its cash surrender value, payment of this figure by American Investors Life Insurance Company to the estate shall be in complete discharge of its obligation to Scott under the annuity. For this reason, our Decree dated this same date directs that a copy of this Opinion and the Decree be served upon American Investors Life Insurance Company by Decedent's estate.

JAMES YORK, SR. and CAROLE YORK, his wife, Plaintiffs vs. PALMERTON HOSPITAL and GARRY M. CARBONE, M.D., Defendants

Civil Law—Medical Malpractice—Expert Opinions—Degree of Certainty Required—Claim for Personal Injury—Trial Bifurcation

1. Where professional liability is at issue, expert testimony is generally required to establish several elements of the cause of action: (1) the proper standard of care, (2) the defendant's failure to exercise that standard of care, and (3) the actual relationship between the failure to exercise the standard of care and the plaintiff's injury.

2. The question of whether an expert opinion has been expressed with sufficient certainty to be heard and considered by the fact-finder, is a question of law to be determined by the trial judge.

3. To be competent, a medical expert's opinion must be expressed "within a reasonable degree of medical certainty." To satisfy this standard, the opinion need not be expressed in the precise language of the standard; it must, however, be expressed within a degree of reasonable certainty by an expert who is qualified to render an opinion of the type proffered.

4. In contrast to the degree of certainty required of the expert medical testimony presented on behalf of a plaintiff upon whom the burden of proof resides, a defense medical expert need not express his opinions on causation to the same degree of certainty provided the basis for the opinion is disclosed.

5. Bifurcation of the issues of liability and damages in the trial of a claim for personal injuries should be sparingly granted. Only where the evidence as to liability is clearly distinct, separate and severable from the evidence relating to damages is it appropriate to bifurcate the trial of these two issues.

NO. 03-0717

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JOHN R. HILL, ESQUIRE—Counsel for Palmerton Hospital.

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MEMORANDUM OPINION

NANOVIC, P.J.—February 6, 2008

PROCEDURAL AND FACTUAL BACKGROUND

On April 10, 2003, James York, Sr. and Carole York, his wife (collectively hereinafter referred to as the "Plaintiffs"), commenced, by complaint, a professional liability action in this Court because of injuries the Plaintiff, James York, Sr., (hereinafter referred to as the "Plaintiff," stated in the singular), sustained while a patient at the Palmerton Hospital (hereinafter the "Hospital") during the period between December 31, 2001, and January 16, 2002. Plaintiff, then 70 years old, was admitted to the Hospital on December 31, 2001, with symptoms of shaking chills, back pain, dysuria, and blood in his urine. Diagnostic tests ordered by the Defendant, Garry M. Carbone, M.D., indicated that Plaintiff had hypocalcemia, low calcium blood levels, which, in Dr. Carbone's opinion, explained some of the physical symptoms Plaintiff was experiencing. In order to raise Plaintiff's calcium levels, Dr. Carbone ordered the intravenous administration of calcium chloride, four amps, over an eight-hour period, two amps each to be run for four hours in a 100cc saline solution.

Administration of the IV began on January 4, 2002, at approximately 8:40 P.M. and ended on January 5, 2002, at approximately 4:30 A.M. The setup and administration of the IV was conducted by members of the nursing staff of the Hospital who testified that they frequently checked the IV site—at least every hour—and that no signs of infiltration (**e.g.,** redness, swelling, temperature, pain) were observed.

On January 5, 2002, at approximately 8:00 A.M., after the IV had run its course and the IV needle was withdrawn, Plaintiff first

complained of discomfort in his right arm, with redness noted. It was later determined that the calcium chloride solution had extravasated into the tissues of Plaintiff's right forearm causing a chemical burn of his right forearm and wrist area.

At trial, Plaintiff claimed that Dr. Carbone was negligent in diagnosing hypocalcemia as the cause of his symptoms, when in fact he did not have a calcium deficiency; in prescribing calcium chloride to elevate his calcium levels, rather than calcium gluconate, which was less caustic and, therefore, less likely to cause tissue necrosis in the event of extravasation; and by directing infusion through a peripheral vein, rather than through a central line or deep vein. Plaintiff's claim against the Hospital was predicated on his belief that the Hospital's nursing staff improperly inserted the IV and thereafter failed to adequately monitor the IV site and regulate the rate of infusion.

On September 5, 2006, the Hospital filed a petition to bifurcate, which was later joined in by Dr. Carbone. A Rule to Show Cause was issued by the Court on September 8, 2006, returnable in twenty days. This period was later extended to October 13, 2006, in response to Plaintiffs' Motion to Extend the Plaintiffs' Response (**See** Order dated October 4, 2006). Following a pretrial conference held on January 30, 2007, at which time the Court determined that there would be no overlap in the evidence of liability with that of damages, bifurcation was granted by Order dated January 31, 2007.

A four-day jury trial began with jury selection on November 5, 2007, and ended on November 8, 2007, with the jury reaching a defense verdict. On December 6, 2007, Plaintiffs filed an appeal from the jury's verdict. The Court first learned of this appeal on December 24, 2007, when so advised by the Superior Court. A post-trial motion has never been filed, the verdict has never been reduced to judgment, and no transcript of the trial proceedings has ever been ordered by the Plaintiffs.

On December 24, 2007, the Court issued a Rule 1925 Order directing the Plaintiffs to advise the Court of the matters which they intend to raise on appeal. Plaintiffs filed a timely statement on January 14, 2008, in which they identify two issues to be addressed

on appeal: (1) whether the Court abused its discretion when it inquired at the conclusion of the direct testimony of Dr. Carbone's medical expert witness, Dr. David Knutson, if counsel intended to ask the expert if his opinions were being rendered within a reasonable degree of medical certainty and then permitting this question to be asked; and (2) whether the Court improperly bifurcated the issue of liability from damages. This opinion is provided in accordance with Pa. R.A.P. 1925(a).

DISCUSSION

Initially, it appears that both issues Plaintiffs intend to raise have been waived by Plaintiffs' failure to file a Motion for Post-Trial Relief and to request a transcript of the trial proceedings. Pa. R.C.P. 227.1(b) specifically provides that except as otherwise provided by Pa. R.E. 103(a), post-trial relief may not be granted unless the grounds were properly preserved prior to, or during, the trial proceedings, and have been raised and identified in a motion for post-trial relief. Pa. R.A.P. 302(a) further states that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." [1]

Certainty of Expert Opinion

To be legally competent it is only necessary that a medical expert's opinion be expressed with reasonable certainty; it is not necessary that any specific language or "magic words" be used to meet this standard.[2] **See e.g., Smith v. Grab,** 705 A.2d 894, 900

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[1] After this opinion was originally drafted, by **per curiam** order filed on January 29, 2008, the Superior Court dismissed the appeal finding that Plaintiffs' failure to file any post-trial motions had resulted in a waiver of the issues Plaintiffs intend to raise. In addition to Pa. R.A.P. 302(a), the Superior Court cited to **Chalkey v. Roush,** 569 Pa. 462, 805 A.2d 491 (2002), and **Lane Enterprises, Inc. v. L.B. Foster Co.,** 551 Pa. 306, 710 A.2d 54 (1998) in support of its order. Since, at this time, we do not know whether Plaintiffs intend to pursue their appeal further, we felt it appropriate to file this opinion notwithstanding the Superior Court's order of dismissal.

[2] As to the necessity for expert testimony in a medical malpractice action, the Pennsylvania Superior Court recently stated the following:

> To prevail in any negligence action, the plaintiff must establish the following elements: the defendant owed him or her a duty, the defendant breached the duty, the plaintiff suffered actual harm, and a causal relationship existed between the breach of duty and the harm. … When the alleged negligence is rooted in professional malpractice, the determination of whether there was a breach of duty comprises two steps: first, a determination of

(Pa. Super. 1997) (citation omitted) (stating that experts are not required to use "magic words" when testifying, instead "we look to the substance of the testimony"), **appeal denied,** 786 A.2d 989 (Pa. 2001). The level of confidence with which an expert opinion must be expressed to be admissible deals not with the qualifications of the expert to render the opinion, but with the quality of the opinion rendered and whether it is competent evidence—a legal question—to be heard and considered by the fact-finder, **Kovach v. Central Trucking, Inc.,** 808 A.2d 958, 959 (Pa. Super. 2002) ("[n]o matter how skilled or experienced the witness may be, he will not be permitted to guess or to state a judgment based on mere conjecture"); nor is the question one of credibility or the weight to be given the opinion, both of which are questions for the fact-finder, in this case the jury, to determine.

The legal standard by which a medical expert's opinion is to be judged, "within a reasonable degree of medical certainty," is easy to state, but sometimes difficult to apply, in part because of the subjectivity inherent in any opinion, and in part because of the uncertainty inherent in the field of medicine which, given the complexities and uniqueness of the human body, and the wonders and mysteries of life itself, is as much an art as it is a science. In discussing this standard, the Superior Court in **Montgomery v. South Philadelphia Medical Group, Inc.,** 441 Pa. Super. 146, 656 A.2d 1385 (1995) stated:

> [An] expert must testify with 'reasonable certainty' that 'in his "professional opinion, the result in question did come from the cause alleged."' … An expert fails this standard of certainty if he testifies 'that the alleged cause "possibly", or "could have" led to the result, that it "could very properly account" for the

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the relevant standard of care, and second, a determination of whether the defendant's conduct met that standard. … Furthermore, to establish the causation element in a professional malpractice action, the plaintiff must show that the defendant's failure to exercise the proper standard of care caused the plaintiff's injury. … Expert testimony is generally required in a medical malpractice action to establish several of [these] elements: the proper standard of care, the defendant's failure to exercise that standard of care, and the causal relationship between the failure to exercise the standard of care and the plaintiff's injury.

Freed v. Geisinger Medical Center, 910 A.2d 68, 72-73 (Pa. Super. 2006), **appeal granted,** 593 Pa. 354, 930 A.2d 1249 (2007) (citations omitted).

result, or even that it was "very highly probable" that it caused the result.'

Id. at 156, 656 A.2d at 1390 (citations omitted), **appeal denied,** 542 Pa. 648, 666 A.2d 1057 (1995). **See also, Corrado v. Thomas Jefferson University Hospital,** 790 A.2d 1022, 1031 (Pa. Super. 2001) (finding expert opinion that defendant "more likely than not" deviated from standard of care insufficiently certain).

What constitutes reasonable certainty lies somewhere between inadmissible conjecture and speculation, at one extreme, and testimony which is absolute and unqualified at the other. The point at which this standard is reached is not determined by a bright line, or by requiring that the opinion be expressed "in precisely the same language we use to enunciate the legal standard", but by the level of certainty or confidence with which the opinion is expressed. **Kovach, supra,** 808 A.2d at 960.

> 'The issue is not merely one of semantics. There is a logical reason for the rule. The opinion of a[n] … expert is evidence. If the fact finder chooses to believe it, he can find as fact what the expert gave as an opinion. For a fact finder to award damages for a particular condition to a plaintiff it must find as a fact that the condition was legally caused by the defendant's conduct. … [I]t is the intent of our law that if the plaintiff's … expert cannot form an opinion with sufficient certainty so as to make a [professional] judgment, there is nothing on the record with which a [factfinder] can make a decision with sufficient certainty so as to make a legal judgment.' However, to make an admissible statement on causation, an expert need not testify with absolute certainty or rule out all possible causes of a condition. Expert testimony is admissible when, taken in its entirety, it expresses reasonable certainty that the accident was a substantial factor in bringing about the injury. The expert need not express his opinion in precisely the same language we use to enunciate the legal standard. That an expert may, at some point during his testimony, qualify his assertion does not necessarily render his opinion inadmissibly speculative.

Id. at 960 (**quoting Cohen v. Albert Einstein Medical Center, Northern Div.,** 405 Pa. Super. 392, 400, 592 A.2d 720, 723-24

(1991)). Therefore, even if the expert does not use the precise language by which we define the standard, his opinion will not be considered speculative if the substance of his opinion, when viewed in its entirety, is reasonably certain. **Cf. Sears, Roebuck & Co. v. W.C.A.B. (Moore),** 48 Pa. Commw. 161, 167 n.2, 409 A.2d 486, 489 n.2 (1979) (finding that a medical opinion which was expressed with the same degree of certainty which the doctor would require of himself in treating a patient was not speculative, notwithstanding the doctor's difficulty with the legal phrase "to a reasonable degree of medical certainty"); **Michaelson v. W.C.A.B. (R.R. Leininger & Son),** 126 Pa. Commw. 542, 548, 560 A.2d 306, 309 (1989) (finding medical opinion which, in expert's view, has an eighty percent probability of being correct to be sufficiently certain).

Here, Dr. Knutson's qualifications to testify were not in dispute. Dr. Knutson was board-certified in internal medicine and nephrology and had practiced in these fields for more than forty years. The substance of Dr. Knutson's testimony was that Dr. Carbone had accurately diagnosed hypocalcemia and that his treatment using calcium chloride for this condition was proper and appropriate given Plaintiff's medical history, his measured levels of calcium, and the need to act swiftly. The factual basis for these conclusions was identified by Dr. Knutson and explained during his testimony.

During the course of Dr. Knutson's direct examination, Plaintiff never objected to any of Dr. Knutson's opinions as being speculative or equivocal, nor does Plaintiff claim in his concise statement of matters to be appealed that the substance of Dr. Knutson's opinions was not expressed to a "reasonable degree of medical certainty." If not waived for failure to make a timely objection at trial, Plaintiff has further failed to identify in what respect Dr. Knutson's opinions were not sufficiently certain and why the opportunity we afforded Dr. Carbone's counsel was not inconsequential or without prejudice. Finally, as to the competence of Dr. Knutson's testimony, we note that a defense expert witness on causation need not testify to the same degree of certainty as an expert for the plaintiff, on whom the burden of proof resides. **See Neal by Neal v. Lu,** 365 Pa. Super. 464, 476-77, 530 A.2d 103, 109-10 (1987) (holding that a defense medical expert witness need not express his opinions on causation to the same degree of certainty as the plaintiff's expert, provided the basis for the opinion is disclosed).

Bifurcation

On the question of bifurcation, Plaintiffs never filed a timely response to the Rule issued on September 8, 2006. Rather than prejudice Plaintiffs by this failure, the Court elected to withhold its decision on bifurcation until meeting with counsel. Subsequently, at the time of the pretrial conference, the Court specifically inquired of counsel as to whether there would be any overlap in the testimony regarding the issues of liability and damages. Only after this conference was held and after the Court was convinced that there would be no overlap, did the Court issue its order of January 31, 2007, granting the requested bifurcation. In this regard, the order specifically states:

> AND NOW, this 31st day of January, 2007, upon consideration of the motion of the Defendant, Palmerton Hospital, to bifurcate the trial of this matter between the issues of liability and damages, which motion has been joined by the Defendant, Garry M. Carbone, M.D., by motion filed on October 11, 2006, and no response having been made by Plaintiffs,[3] after reviewing this issue with counsel at a pretrial conference held on January 30, 2007, at which time the Court was advised that there appears to be no overlap in the evidence of liability with that of damages, it is hereby
>
> ORDERED and DECREED that the motions of the Defendants, the Palmerton Hospital and Garry M. Carbone, M.D., are granted and that the trial of this matter shall be bifurcated between the issues of liability and damages.

At the time of trial, the evidence as to liability was clearly distinct, separate, and severable from any evidence the Plaintiffs intended to offer with respect to damages. **See Stevenson v. General Motors Corp.,** 513 Pa. 411, 422, 521 A.2d 413, 419 (1987) (noting that before a trial involving personal injuries is bifurcated,

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[3] The docket reflects that a response to the Hospital's request for bifurcation was filed by the Plaintiffs the same date as the pretrial conference, January 30, 2007. At this time, the Court does not recall whether the Plaintiffs' response was brought to the attention of the Court at the time of the conference. In any event, the evidence of which the Court was made aware at the time of the pretrial conference, and that actually presented at the time of trial, demonstrates a clear break in the facts between those relevant to liability and those relevant to damages.

the court must first determine that the issues of liability and damages are totally independent from one another); **see also, Pascale v. Hechinger Company of Pennsylvania,** 426 Pa. Super. 426, 438, 627 A.2d 750, 756 (1993) (citation omitted) ("Where liability and damage issues are not interwoven, bifurcation may be used as a means to insure against taint of the jury through sympathy occasioned by knowledge of the severity of the injury."). No evidence was presented, or proffered, of any complaints of pain or discomfort Plaintiff experienced after the insertion of the IV and during its administration. To the contrary, during a substantial period while the IV was being administered, the Plaintiff was asleep. Only after the IV had been completed and the needle was withdrawn, did the Plaintiff awake and later complain of discomfort. We are unaware of any evidence Plaintiffs contend they were prevented from presenting on the issue of liability because of our decision to bifurcate and, therefore, know of no prejudice Plaintiffs have sustained by this decision. **Cf. McClain v. Welker,** 761 A.2d 155, 156 (Pa. Super. 2000) ("To constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party.") (citation and quotation marks omitted), **appeal denied,** 771 A.2d 1286 (Pa. 2001).

CONCLUSION

In accordance with the foregoing, it is respectfully submitted that the issues sought to be raised by Plaintiffs have either been waived, or alternatively are without merit. In either event, the verdict should be upheld.

ALLAN J. NOWICKI, Plaintiff vs.
THOMAS W. McBRIEN, Defendant

Civil Law—Statute of Frauds—Oral Contract—Measure of Damages—Declaratory Judgment Act

1. An oral agreement between two parties for one to negotiate the terms of purchase for a tract of land on behalf of another and thereafter to oversee the development and improvement of the property for the successful buyer, in consideration of being paid a combined fixed and percentage fee on the sale of lots, minerals and timber from the property purchased is within the Statute of Frauds.

2. A failure to comply with the written requirement of the Statute does not void an otherwise valid contract. Such failure affects only the remedy, not the validity of the contract.

3. An oral contract within the purview of the Statute of Frauds is not specifically enforceable nor may the injured party ordinarily recover damages in an action at law measured by the loss of the bargain. To permit damages so measured would be tantamount to affording specific performance of the contract in a different form.

4. As a statement of policy to guard against the creation of interests and estates in land by fraud, the Statute acts as a shield against, rather than a sword to perpetrate fraud. Therefore, if an otherwise valid oral agreement exists, the Statute does not bar the recovery of damages for the value of services performed, or reimbursement for the reasonable costs and expenses incurred by the injured party in reliance upon the contract. Moreover, because equitable considerations underlie the public policy principles behind the Statute, if the oral contract was secured by fraud, the injured party may also recover as damages the loss of his bargain.

5. A cause of action for either unjust enrichment or promissory estoppel, being equitable in nature, is not barred by the Statute of Frauds. Both are founded on the premise that no contract exists which would run afoul of the Statute's formal requirements.

6. An action seeking a declaratory judgment is an optional substitute for established or available remedies and, therefore, should ordinarily be dismissed when other causes of action have been pled for which an appropriate remedy exists. Where a request for declaratory judgment contained in a multi-count complaint is duplicative, rather than independent, of other viable pending claims contained in the same complaint, and will not further the resolution of those claims, the claim for declaratory judgment will be dismissed.

NO. 05-0093

ALLAN J. NOWICKI—Pro se.

BARRY M. ROTHMAN, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—March 17, 2008

PROCEDURAL AND FACTUAL BACKGROUND

On January 14, 2005, the Plaintiff, Allan J. Nowicki, commenced this suit against the Defendant, Thomas W. McBrien, by complaint. In his complaint, Nowicki asserts the existence of three separate agreements between the parties which have allegedly been breached by McBrien and for which various forms of relief are requested: a timber harvest contract, a sawmill contract, and a 1,500-acre property agreement. It is the latter alleged contract which is the subject of McBrien's Motion for Partial Judgment on the Pleadings now before us.

In substance, Nowicki alleges that in December 2003, McBrien became interested in purchasing a 1,559 (+/-) acre parcel of prop-

erty located in Weatherly, Carbon County, Pennsylvania[1] and asked Nowicki to investigate the possibilities of developing this property. According to Nowicki, McBrien wanted to determine whether the property was suitable for constructing a 500-home residential subdivision, together with a golf course and amenities, and also an upscale recreational vehicle park and campground.

Following Nowicki's preliminary assessment, Nowicki contends the parties entered into a parol agreement pursuant to which Nowicki was to negotiate the terms for the purchase of this property on behalf of McBrien and to provide his construction, development and land-planning experience in overseeing the development and improvement of the entire 1,500-acre parcel. In return, Nowicki claims he was to receive the following compensation for his services:

1. $25,000.00 upon execution of the agreement of sale;

2. $25,000.00 at the time of settlement;

3. a fee of ten percent on each conveyance out of the 1,500-acre property;

4. fifty percent of all proceeds from the sale or use of all minerals, oil, gas and/or stone on the 1,500-acre property; and

5. seventy-five percent of all proceeds from the sale of saw logs harvested from the timber on the 1,500-acre property.

Nowicki further alleges that due to his efforts an agreement to purchase the property was in fact entered between McBrien and the owner of the 1,500-acre tract for which settlement has been held, but that McBrien has breached all aspects of his agreement with Nowicki.

DISCUSSION

McBrien first argues that the agreement upon which Nowicki's claim against him is premised is one governed by the Statute of Frauds, 33 P.S. §1 **et seq.** (the "Statute"), and because no written agreement was ever prepared, or signed by him, as a matter of law there exists no cognizable agreement on which to award relief to

[1] This parcel is identified throughout the complaint as the 1,500-acre property in issue.

Nowicki. Nowicki does not dispute the non-existence of a written agreement.

As to the threshold question regarding the applicability of the Statute of Frauds to the 1,500-acre property agreement, we find McBrien's position to be correct. The Statute of Frauds prohibits the creation of interests or estates in real estate absent a writing "signed by the parties so making or creating [the interest in real estate], or their agents, thereunto lawfully authorized by writing ... ." 33 P.S. §1; **see also, Davis v. Hillman,** 288 Pa. 16, 19-20, 135 A. 254, 255 (1926). It has further been held that an oral agreement between two parties for one to prepare plans and specifications for the development of the other's property and to oversee the construction of these improvements, in consideration of being paid a fixed fee for the preparation of the plans and specifications plus one-half of the net profits derived from the sale of that property once developed, is within the Statute. **See Redditt v. Horn,** 361 Pa. 533, 536, 64 A.2d 809, 810-11 (1949). While the oral agreement described in this case also provides for the acquisition of the real estate to be developed and resold, the addition of this term does not place the agreement outside of the reach of the Statute of Frauds. **Cf. Davis v. Hillman, supra** at 21, 135 A. at 257 (holding that an oral agreement between two parties providing for the acquisition and resale of real estate, and the division of profits resulting from that resale, is within the Statute).

"The statute of frauds is not a rule of evidence, but a declaration of public policy ... ." **Eastgate Enterprises, Inc. v. Bank and Trust Co. of Old York Road,** 236 Pa. Super. 503, 506, 345 A.2d 279, 280 (1975) (**quoting Schuster v. Pennsylvania Turnpike Commission,** 395 Pa. 441, 450-51, 149 A.2d 447, 451-52 (1959)). The fundamental purpose of the Statute's requirement that the agreement be in writing and signed by the party to be charged is "to prevent assertion of verbal understandings in the creation of interests or estates in land and to obviate the opportunity for fraud and perjury regarding said estates." **Knauer v. Knauer,** 323 Pa. Super. 206, 229, 470 A.2d 553, 565 (1983) (citations omitted). In practice, this purpose is achieved by limiting judicial authority to afford certain remedies. **See Fannin v. Cratty,** 331 Pa. Super. 326, 340-41, 480 A.2d 1056, 1063-64, 1065 (1984) (Wieand, J.,

dissenting). Thus, the Statute prohibits specific performance of an oral agreement within its purview as well as the right to recover damages in an action at law measured by the loss of the bargain, because to provide such relief "would be tantamount to affording [ ] specific performance of the contract in a different form ... ." **Redditt, supra** at 536, 64 A.2d at 811; **see also, Fannin, supra** at 336, 480 A.2d at 1061.

The Statute, however, does not render void those contracts governed by its provisions which are oral or which fail to comply with its formal requirements. **See Fannin, supra** at 332, 480 A.2d at 1059. Rather, when such circumstances occur and an otherwise valid contract exists, the Statute allows the injured party to recover monetary damages for the value of services performed in reliance upon the oral agreement, together with costs and expenses incurred, and for which the party has not been compensated or reimbursed. **See Redditt, supra** at 536, 64 A.2d at 811; **Weir v. Rahon,** 279 Pa. Super. 508, 515, 421 A.2d 315, 318 (1980) (Spaeth, J., concurring and dissenting) ("The purpose of permitting the action for damages is not to give a disappointed vendee the benefits of his oral bargain, for that would be tantamount to enforcing a contract that is unenforcible [sic] under the Statute of Frauds; rather, the purpose is to indemnify a vendee who has incurred losses in reliance on the contract." (citations omitted)).

Moreover, the Statute's bar against the creation of interests in real estate absent hard evidence of an agreement is not absolute. Courts must be vigilant to those circumstances where an inflexible or mechanical application of the Statute would subvert its purpose of protecting against frauds and perjuries and would instead shield a greater injustice. For this reason, "specific performance of an oral contract for the sale of real estate may be ordered where it appears that continuous and exclusive possession of the subject property was taken under the oral contract and improvements were made by the buyer which are not readily compensable in money." **Hostetter v. Hoover,** 378 Pa. Super. 1, 8-9, 547 A.2d 1247, 1251 (1988), **appeal denied,** 523 Pa. 642, 565 A.2d 1167 (1989). Likewise, where the contract is oral and was obtained by fraud, the buyer "may recover as damages the loss of his bargain ... ." **Weir, supra** at 513, 421 A.2d at 317 (**quoting Seidlek v. Bradley,** 293 Pa. 379,

383, 142 A. 914, 915-16 (1928)). However, for this to occur, the fraud referred to "must be actual fraud that reaches back to the original contract," and not afterwards. **See id.; see also, Rineer v. Collins,** 156 Pa. 342, 352, 27 A. 28, 30 (1893) ("According to all authorities, the fraud necessary to entitle the vendee to recover must be such as inhered in the original agreement. A subsequent fraudulent purpose is not enough."). As these cases illustrate, equitable considerations underlie the application of the Statute and must be taken into account by the court. This approach comports with the Statute's use "as a shield and not as a sword, as it was designed to prevent frauds, not to encourage them." **See Fannin, supra** at 332, 480 A.2d at 1059 (citation omitted).

In accordance with the foregoing principles, Counts IX and X of the complaint, both seeking specific performance of the 1,500-acre property agreement, will be dismissed. McBrien's motion with respect to Count XI, asserting a claim for breach of contract, and Counts XIII and XIV, setting forth claims for fraud and negligent misrepresentation respectively, will be denied.[2]

Count XII of the complaint states a claim for unjust enrichment, and Count XV, a claim for promissory estoppel. Contrary to McBrien's assertions, given their foundations in equity, neither of these claims is barred by the Statute of Frauds. **See Davis, supra** at 20, 135 A. at 256 (recognizing an exception to the Statute when the relationship between the parties "arises by implication or legal construction"). A claim for unjust enrichment exists where there is

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[2] McBrien's argument that the complaint fails to aver with the particularity required by Pa. R.C.P. 1019(b) the factual basis for his claims of fraud and therefore, is unable to withstand a motion for judgment on the pleadings is misdirected where the complaint otherwise sets forth the **prima facie** elements of a cause of action for fraud and misrepresentation. The filing of preliminary objections raising failure of a pleading to conform to a rule of court is the proper procedure for challenging the technical requirements of a pleading. **See** Pa. R.C.P. 1028(a)(2).

"[T]o recover on a claim of fraud, the plaintiff must prove by clear and convincing evidence six elements: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance." **Kraus Industries, Inc. v. Moore,** 2007 WL 2744194, at *6 (W.D.Pa. 2007) (**quoting McCloskey v. Novastar Mortg., Inc.,** 2007 WL 2407103, at *9 (E.D.Pa. 2007) (citations omitted)). These elements are sufficiently pled in the complaint.

no agreement, but when the circumstances existing between the parties make it unjust for a defendant to retain benefits conferred by the other party without compensating that party for the value of those benefits. **See Villoresi v. Femminella,** 856 A.2d 78, 84 (Pa. Super. 2004) ("Such a 'quasi-contract' imposes a duty not as the result of any agreement, whether expressed or implied, but in spite of the absence of an agreement where the circumstances demonstrate that it would be inequitable for the defendant to retain the benefit conferred without payment." (citations and quotation marks omitted)), **appeal denied,** 872 A.2d 1200 (Pa. 2005).[3] Likewise, Nowicki's claim for promissory estoppel is premised on a theory of recovery which seeks to enforce a promise, not because it is supported by contractual consideration, but because "injustice can be avoided only by enforcement of the promise." **Thatcher's Drug Store v. Consolidated Supermarkets, Inc.,** 535 Pa. 469, 476, 636 A.2d 156, 160 (1994);[4] **see also,** Restatement of Property Section 524.[5] "Promissory estoppel is an equitable remedy to be

[3] The elements necessary to support a claim for unjust enrichment are: "(1) benefits conferred on one party by another; (2) appreciation of such benefits by the recipient; and (3) acceptance and retention of those benefits in such circumstances that it would be inequitable for the recipient to retain the benefits without payment of value." **Kraus Industries, Inc.,** 2007 WL 2744194, at *8 (citations omitted). "Where an express contract governs the relationship between the parties, a party's recovery is limited to the amount provided in the express contract and where the contract fixes the value of the services involved, there can be no recovery under a theory of quantum meruit." **Combustion Systems Services, Inc. v. Schuylkill Energy Resources, Inc.,** 1993 WL 523713 at *5 (E.D.Pa. 1993) (citations omitted).

[4] "Under Pennsylvania law, the elements for a promissory estoppel or detrimental reliance claim are: (1) the promisor made a promise that he should have reasonably expected to induce action or forbearance on the part of the promisee; (2) the promisee actually took action or refrained from taking action in reliance on the promise; and (3) injustice can be avoided only by enforcing the promise." **Kraus Industries, Inc.,** 2007 WL 2744194, at *7 (citations omitted).

[5] This section of the Restatement, entitled "Promises Enforceable by Estoppel" provides:

> An oral promise or representation that certain land will be used in a particular way, though otherwise unenforceable, is enforceable to the extent necessary to protect expenditures made in reasonable reliance upon it.

As of the date of this opinion, this section of the Restatement has not been adopted by this Commonwealth. **See Thatcher's Drug Store v. Consolidated Supermarkets, Inc.,** 535 Pa. 469, 474 n.3, 636 A.2d 156, 157 n.3 (1994).

implemented only when there is no contract; it is not designed to protect parties who do not adequately memorialize their contracts in writing." **Kraus Industries, Inc. v. Moore,** 2007 WL 2744194, at *8 (W.D.Pa. 2007) (**quoting Iversen Baking Co., Inc. v. Weston Foods, Ltd.,** 874 F. Supp. 96, 102 (E.D.Pa. 1995)).

At this time, McBrien denies the existence of any agreement with Nowicki respecting the 1,500-acre parcel. If this proves to be correct, Nowicki may nonetheless still have a viable claim for unjust enrichment or promissory estoppel based upon the averments appearing in Counts XII and XV of his complaint. If, however, an agreement is shown to exist, Nowicki will then be confined to recovery for breach of that agreement and will not be permitted recovery under either Count XII or Count XV. **See Villoresi, supra,** 856 A.2d at 84 ("Where an express contract already exists to define the parameters of the parties' respective duties, the parties may avail themselves of contract remedies and an equitable remedy for unjust enrichment cannot be deemed to exist." (citation omitted)); **Kraus Industries, Inc.,** 2007 WL 2744194, at *8 ("[W]hile courts have held that breach of contract and promissory estoppel may be pleaded in the alternative, [ ] if the court finds that a contract exists, the promissory estoppel claim must fall.") (quotation marks and citation omitted). At this stage of the proceedings, Nowicki is entitled to allege and pursue alternate and inconsistent theories of recovery, and it is premature to confine him to any particular set of facts. **See** Pa. R.C.P. 1020(c).[6]

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[6] In his motion, McBrien also contends that in a claim for **quantum meruit** the claimant must specially plead the reasonable value of the services performed, **citing Pulli v. Warren National Bank,** 488 Pa. 194, 197, 412 A.2d 464, 465-66 (1979). While this is an accurate statement of **Pulli,** it does not necessarily follow that McBrien is entitled to judgment on the pleadings for Nowicki's failure to comply with Pa. R.C.P. 1019(f). In **Pulli,** an executor's motion for judgment on the pleadings was granted where, in addition to failing to plead the reasonable value of the services performed, plaintiff admitted in her pleadings that she received substantial benefits from the estate's decedent and the complaint failed to allege that she had not received reasonable compensation for her services. In contrast, Nowicki's complaint alleges that services were performed and that no payments were received. Under these circumstances, while the complaint may have been objected to for failure to conform with Rule 1019(f), we do not believe this defect by itself entitles McBrien to judgment on the pleadings where, under the pleadings, it is clear that some damages exist.

Finally, McBrien seeks to dismiss Count XVI of the complaint which seeks a declaratory judgment regarding the 1,500-acre property contract. The primary purpose of the Declaratory Judgments Act, 42 Pa. C.S.A. §§7531-7541, is "to speedily determine issues that would … be delayed, to the possible injury of those interested if they were compelled to wait the ordinary course of judicial proceedings." **Osram Sylvania Products, Inc. v. Comsup Commodities, Inc.,** 845 A.2d 846, 849 (Pa. Super. 2004) (quotation marks and citation omitted). The Act is "remedial in nature and its purpose is to provide relief from uncertainty and establish various legal relationships." **Curtis v. Cleland,** 122 Pa. Commw. 328, 331, 552 A.2d 316, 318 (1988) (citation omitted).

"[A]n action seeking declaratory judgment is not an optional substitute for established or available remedies and should not be granted where a more appropriate remedy is available. … Where another remedy has already been sought in a pending proceeding, a declaratory judgment action should not ordinarily be entertained." **Pittsburgh Palisades Park, LLC v. Pennsylvania State Horse Racing Commission,** 844 A.2d 62, 67 (Pa. Commw. 2004) (citations omitted), **appeal denied,** 581 Pa. 703, 864 A.2d 1206 (2004). Whether a court will take jurisdiction of a declaratory judgment is largely a matter of judicial discretion. **Eureka Casualty Co. v. Henderson,** 371 Pa. 587, 591, 92 A.2d 551, 553 (1952).

Nowicki's claim for declaratory relief, one count of eight with respect to the 1,500-acre property, is clearly subordinate to and in support of these other counts. This count, as well as the others involving the 1,500-acre property, involves common questions of fact which preclude the resolution of any one count before the others and renders meaningless any declaration of rights which necessarily will be decided vis-à-vis the other counts pled and for which appropriate relief may be obtained. Under the circumstances, because we do not believe Nowicki's request for a declaratory judgment will in any manner assist in resolving the issues between the parties, this count will be dismissed.

CONCLUSION

To the extent Nowicki's complaint seeks specific performance of purported parol agreements subject to the Statute of Frauds,

these claims will be dismissed. However, to the extent the complaint seeks damages and forms of equitable relief which are not inimical to the Statute, McBrien's motion will be denied. Lastly, because Nowicki's claim for declaratory relief will clearly not further the resolution of the various other claims Nowicki has raised in this litigation, and is in fact duplicative rather than independent of those claims, this claim, as well, will be dismissed.

ERIE INSURANCE EXCHANGE, Plaintiff vs. DONNA M. LARRIMORE and CHARLES LARRIMORE, h/w, Defendants

Civil Law—Motor Vehicle Financial Responsibility Law—Underinsured Motorist Benefits—Reducing UIM Coverage—Section 1734

1. Under the MVFRL the amount of UM/UIM coverage provided to protect an insured against the risk of being injured by an uninsured or underinsured motorist is presumed to be the same as that selected by the insured to protect himself against third party personal injury liability.

2. Two requirements must be met for an insured to validly reduce the amount of UM/UIM coverage below the limits of bodily injury liability provided for in his policy: (1) the insured must have had notice of his rights under the MVFRL; and (2) the insured must have voluntarily requested in writing that the limits of his UM/UIM coverage be reduced.

3. The first requirement is met by showing compliance with Section 1791 of the MVFRL. Section 1791 requires the insurer to provide the insured with a statutorily-mandated form "Important Notice" advising the insured of the available benefits and limits of coverage which must be offered to him under the MVFRL, and of his right to select or reject higher or lower limits of coverage. When complied with, the "Important Notice" forms a conclusive presumption that the insured had notice of the UM/UIM limits and coverages which were available.

4. The second requirement is determined by compliance with Section 1734 of the MVFRL. Section 1734 requires that the insured make a written request to reduce the amount of UM/UIM benefits. No specific form or particular language is required to comply with Section 1734.

5. As construed by our courts, requests for specific limits of UM/UIM coverage less than those for bodily injury liability must (1) manifest the insured's desire to purchase UM/UIM coverage in amounts equal to or less than the bodily injury limits; (2) be signed by the named insured; and (3) include an express designation of the amount of UM/UIM coverages requested.

6. In order for an application for motor vehicle insurance to meet the requirements of a Section 1734 writing, it must clearly and unambiguously demonstrate on its face that the insured intended to and did request a reduced amount of UM/UIM coverage and expressly designated an amount of UM/UIM coverage requested. If these conditions are not met, the amount of UM/UIM coverage will be deemed equivalent to the bodily injury liability limits.

NO. 07-1991

KARL L. STEFAN, Esquire, and DAVID R. FRIEDMAN, Esquire—Counsel for Plaintiff.

STEVEN J. MARGOLIS, Esquire—Counsel for Defendants.

MEMORANDUM OPINION

NANOVIC, P.J.—January 13, 2009

On July 25, 2006, Donna M. Larrimore ("Larrimore") was injured in a motor vehicle accident. Larrimore has settled her bodily injury claim against the third party defendant responsible for the accident and seeks in these proceedings additional compensation through the Underinsured Motorist Coverage ("UIM") contained in her own automobile insurance policy with Erie Insurance Exchange.[1] At issue is the amount of UIM coverage which her policy provides; specifically, whether she made a written request for UIM coverage limits below the coverage requested for bodily injury liability. Both parties have filed cross motions for summary judgment on this issue.

PROCEDURAL AND FACTUAL BACKGROUND

On April 24, 2000, Larrimore, who was then single and known as Donna Green, dated and executed a Private Passenger Auto Application ("Application") for insurance coverage on her vehicle. The Application listed the types and amounts of coverage applied for as follows:

COVERAGES	**LIMITS OF PROTECTION**
Bodily Injury Liab	300,000—300,000
Property Damage Liab	50,000
First Party Med Exp	50,000
First Party Income	1,500/Mo—25,000 Max
First Party Acc Death	25,000
First Party Funeral	2,500
UM Bodily Injury	15,000—30,000 Unstacked
UIM Bodily Injury	15,000—30,000 Unstacked
Comprehensive	50,000 Ded—ACV
Road Service	Yes

[1] Larrimore's claim against the third party defendant was settled with Erie's consent.

Application, page 2. On page 8 of the Application, the following language appears immediately above Larrimore's signature:

> APPLICANT TO EXCHANGE—SIGN HERE.
>
> I certify that I have given true and complete answers to the questions in this application. I also certify that I have been offered alternative coverage limits and **those listed on this application reflect my choices.**
>
> * * *
>
> Subscriber: /s/Donna Green Date: 4/24/00

(emphasis added).

The policy application was based on a telephone contact. The eight-page Application was prepared by a representative of the Englert Insurance Agency, the agency Larrimore contacted to obtain insurance, and completed in advance for Larrimore's signature. All of the information contained in the Application was typed in by the insurance agent before the Application was signed by Larrimore.

The Application was accompanied by a number of other forms also signed by Larrimore on the same date, April 24, 2000, and included the statutorily-mandated "Important Notice" required by Section 1791 of the Motor Vehicle Financial Responsibility Law ("MVFRL"), 75 Pa. C.S.A. §§1701-1799.7. This form, which consists of one page and contains Larrimore's signature at the bottom, provides in relevant part:

> - - - NOTICE OF AVAILABLE
> BENEFITS AND LIMITS - - -
> IMPORTANT NOTICE
>
> Insurance companies operating in the Commonwealth of Pennsylvania are required by law to make available for purchase the following benefits for you … .
>
> * * * * * *
>
> (6) Uninsured, Underinsured and Bodily Injury Liability coverage up to at least $100,000 because of injury to one person in any one accident and up to at least $300,000 because of injury to two or more persons in any one accident … .
>
> Additionally, insurers may offer higher benefit levels than those enumerated above as well as additional benefits. How-

ever, an insured may elect to purchase lower benefit levels than those enumerated above.

YOUR SIGNATURE ON THIS NOTICE OR YOUR PAYMENT OF ANY RENEWAL PREMIUM EVIDENCES YOUR ACTUAL KNOWLEDGE AND UNDERSTANDING OF THE AVAILABILITY OF THESE BENEFITS AND LIMITS AS WELL AS THE BENEFITS AND LIMITS YOU HAVE SELECTED.

If you have any questions or you do not understand all of the various options available to you, contact your agent or company.

If you do not understand any of the provisions contained in this notice, contact your agent or company before you sign.

Applicant's signature /s/Donna Green

Date 4/24/00

At the time the Application was signed by Larrimore, Erie Insurance Forms UF-2044 and UF-2047 were made available to applicants to request limits of uninsured and underinsured motorist coverage in an amount less than the limits of bodily injury liability coverage they selected and, in conjunction therewith, to specifically insert the amount of uninsured and underinsured motorist coverage which they wished to purchase from Erie. This form, when used, was to be signed and dated by the insured. Whether such a form was in fact signed by Larrimore, or even presented to her for signature, is unknown. Erie has admitted, however, that it has been unable to locate either a form UF-2044 or a form UF-2047 signed by Larrimore.

The original Policy issued to Larrimore upon receipt of the Application provided bodily injury liability coverage of $300,000.00 per person and $300,000.00 per accident, and UM/UIM coverage in the amount of $15,000.00 per person and $30,000.00 per accident, for each vehicle covered. Prior to the motor vehicle accident in which Larrimore was injured on July 25, 2006, the policy was amended to also include her husband, Charles Larrimore, as a named insured, and to add a second vehicle. The policy in effect at the time of the accident provided stacked UM/UIM coverage in the same amounts as originally applied for by Larrimore on April 24, 2000, for two vehicles.

On June 22, 2007, Erie commenced the instant declaratory judgment action with respect to Larrimore's claim for underinsured motorist benefits. Larrimore contends that she is entitled to UIM benefits equal to the amount of her bodily injury liability limits stacked for two vehicles, an amount totaling $600,000.00. Erie claims that Larrimore's UIM coverage is limited to the amount of UM/UIM coverage she requested in the application on which the issuance of the policy was based, $15,000.00 per person and $30,000.00 per accident, an amount which was never requested to be changed and the amount on which Larrimore's premium payments have been determined.

DISCUSSION

Pennsylvania's Motor Vehicle Financial Responsibility Law requires insurers who issue motor vehicle liability policies in this Commonwealth to offer their customers UM/UIM coverage in amounts equal to the bodily injury liability limits of the customer's policy. In order to reduce the amount of UM/UIM coverage beneath the bodily liability limits of the policy, a written request must be made by the insured. **See Lewis v. Erie Insurance Exchange,** 568 Pa. 105, 793 A.2d 143, 150 (2002). Section 1731 of the MVFRL provides in pertinent part:

> Availability, scope and amount of coverage
>
> (a) Mandatory offering.—No motor vehicle liability insurance policy shall be delivered or issued for delivery in this Commonwealth, with respect to any motor vehicle registered or principally garaged in this Commonwealth, unless uninsured motorist and underinsured motorist coverages are offered therein or supplemental thereto in amounts as provided in section 1734 (relating to request for lower limits of coverage) … .

Section 1734 of the MVFRL provides:

> Request for lower limits of coverage
>
> A named insured may request in writing the issuance of coverages under section 1731 (relating to availability, scope and amount of coverage) in amounts equal to or less than the limits of liability for bodily injury.

Section 1791 of the MVFRL requires an insurer doing business in this Commonwealth to furnish the policy applicant with a copy of the "Important Notice" mandated by that section.

> This notice must advise the applicant of the types and amounts of coverages which are required to be offered to him/her. This notice must also inform the applicant that he/she may purchase or reject these coverages. The applicant must also be made aware that he/she may purchase coverages in higher or lower amounts than those set forth in the 'Important Notice.'

Motorists Insurance Co. v. Emig, 444 Pa. Super. 524, 529, 664 A.2d 559, 561-62 (1995). The intent of Section 1791, in part, is "to ensure that motorists act knowingly and voluntarily when they choose reduced UM/UIM coverage." **Nationwide Mutual Insurance Company v. Heintz,** 804 A.2d 1209, 1215 (Pa. Super. 2002), **appeal denied,** 818 A.2d 505 (Pa. 2003).

When the "Important Notice" required by Section 1791 is provided to an applicant, the notice "operates as a conclusive presumption [provided] the insurer strictly follows the mandate of that section." **Emig, supra** at 529, 664 A.2d at 562. This conclusive presumption extends both to the applicant's knowledge and understanding of available benefits and limits as well as her knowledge and understanding of the benefits and limits of coverage she has selected. "However, in order for the conclusive presumption of Section 1791 to [apply to the benefits and limits of the coverage requested], an insured must have actually selected coverage(s), and the selection process must first be in conformity with the law, **i.e.,** in this case, with Section 1734." **Id.** at 543, 664 A.2d at 569. In the instant case, it is not disputed that the "Important Notice" provided to Larrimore and signed by her on April 24, 2000, complies with the statutory wording dictated by Section 1791. That Larrimore had notice of the UM/UIM limits and coverage available to her under the MVFRL must therefore be conclusively presumed.

Section 1734's requirement of a written request to reduce UM/UIM coverage limits below the limits of bodily injury liability coverage does not mandate the use of a specific form or particular language to effect a valid waiver or acknowledgement

of reduced benefits. **See Lewis v. Erie Insurance Exchange,** 753 A.2d 839, 850 (Pa. Super. 2000) ("The plain meaning [of Section 1734] contains no standards concerning the language or form that a named insured uses to 'request in writing' the issuance of reduced UM/UIM coverages."), **aff'd,** 568 Pa. 105, 793 A.2d 143 (2002).[2] However, to be valid and enforceable the writing required by Section 1734 must:

(1) Manifest the insured's desire to purchase UM/UIM coverage in amounts equal to or less than the bodily injury limits;

(2) Be signed by the named insured; and

(3) Include an express designation of the amount of UM/UIM coverages requested. **See Hartford Insurance Company v. O'Mara,** 907 A.2d 589, 602-603 (Pa. Super. 2006) (en banc), **appeal denied,** 920 A.2d 833 (Pa. 2007). If these conditions are not met, as a matter of law, the amount of UM/UIM coverage will be deemed equivalent to the bodily injury liability limits. **See Emig, supra** at 530, 664 A.2d at 563.

It is Erie's position that Larrimore's signature on the Application, in conjunction with her receipt and signed acknowledgement of the statutory "Important Notice", operates as a conclusive presumption that she actually knew and understood the limits of her UM/UIM coverage. Larrimore disagrees and claims that the Application she signed does not meet the necessary prerequisites to qualify as a valid Section 1734 writing and, therefore, the conclusive presumption of Section 1791, as it relates to a requested reduction in UM/UIM benefits, does not apply. Specifically, Larrimore argues that the Application does not evidence her intent to select reduced UM/UIM benefits or that she actually selected such benefits. Consequently, the issue to be decided is whether the Application

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[2] Section 1734 applies when the insured wants to reduce the limits of UM/UIM coverage below those provided for bodily injury liability and, in conjunction therewith, designates specific alternative UM/UIM coverage limits. In contrast, when it is the insured's intent to waive or reject UM/UIM coverage in total, the technical requirements of Section 1731(c.1) must be strictly complied with. **See Lewis v. Erie Insurance Exchange, supra,** 793 A.2d at 155. "Accordingly, Section 1731(c.1) applies to the outright waiver/rejection of UM/UIM coverage, and Section 1734 applies to the selection of specific limits of UM/UIM coverage." **Brethren Mutual Ins. Co. v. Triboski-Gray,** 2008 WL 2705539, *5 (M.D. Pa. 2008).

signed by Larrimore on April 24, 2000, both manifests her desire to purchase UIM coverage less than the limits of the third party bodily injury coverage provided for in the policy and contains an express designation of the amount of such reduced coverage.

Section 1734's requirement for a written request to reduce UM/UIM coverage benefits below those mandated by Section 1731, is to be narrowly and strictly construed. **See Nationwide Insurance Co. v. Resseguie,** 980 F.2d 226, 232 (3d Cir. 1992), **cited with approval** in **Blood v. Old Guard Insurance Co.,** 594 Pa. 151, 934 A.2d 1218, 1226 (2007). At the same time, the MVFRL in general is to be liberally construed to afford an injured claimant the greatest possible coverage. **See Emig, supra** at 538, 664 A.2d at 566. "In close or doubtful cases, we must interpret the intent of the legislature and the language of insurance policies to favor coverage for the insured." **Id.** at 538, 664 A.2d at 566.

From this perspective, we are not convinced that the Application objectively manifests that a request for reduced UM/UIM coverage was made by Larrimore, as opposed to a selection made by the insurance agent. The question is not whether Larrimore had notice of her rights under the MVFRL or was provided adequate information upon which to make an informed decision. She was. When compliance with the statutorily mandated "Important Notice" requirement of Section 1791 has occurred,

> [i]t shall be presumed that the insured has been advised of the benefits and limits available under this chapter ..., and no other notice or rejection shall be required[.]

75 Pa. C.S.A. §1791.

In **Heintz,** the court explicitly held that "to the extent that §1734 contains a requirement that insureds elect reduced UIM reduction benefits in a knowing and voluntary manner, this requirement can be satisfied only by complying with §1791, **assuming the writing requirement of §1734 has been met.**" **Heintz, supra,** 804 A.2d at 1221 (emphasis added). While compliance with Section 1791 ensures that a request to reduce the amount of UM/UIM coverage is knowing and voluntary, the **Heintz** court also observed that Section 1734 "requests for specific limits coverage, in contrast to outright waiver/rejection, require not only the signature of the insured, but also, an express designation of the amount of cover-

age requested, thus lessening the potential for confusion." **Id.; see also, Breuninger v. Pennland Insurance Company,** 450 Pa. Super. 149, 158, 675 A.2d 353, 357 (1996) ("[I]n order for the conclusive presumption of Section 1791 to be effective, an insured must have actually selected coverage, and the selection process must be in conformity with Section 1734, **i.e.,** the insured must have requested in writing a lower UM/UIM coverage.") (noting also that an insured's payment of premiums for several years computed on reduced policy limits for UM/UIM coverage will not operate as a waiver under Sections 1734 or 1791).

The requirement that the Section 1734 writing manifest the insured's desire to purchase reduced UIM benefits is separate and distinct, albeit overlapping with any requirement that the election be made in a knowing and voluntary manner. In order for the writing to manifest the insured's desire to purchase reduced coverage, it must be apparent from the face of the writing that a selection process has in fact been engaged in by the insured and that the amount of coverage selected represents a choice made by the insured. The Application before us does not reveal such an election. To the contrary, all of the information on the Application was inserted and completed by the insurance agent. The Application does not conspicuously and unambiguously evidence that the request is for reduced UIM benefits in relation to what benefits are available. **See O'Mara, supra,** 907 A.2d at 602. Nor does the Application on its face permit Larrimore to make a choice among various options or to insert the limits of coverage sought.

Moreover, the preprinted language on page 8 of the Application, stating that Larrimore has been offered alternative coverage limits and that the amounts listed on the Application reflect her choice of limits, does not strictly and unambiguously reveal that such was in fact the case with respect to the limits of UM/UIM benefits listed on the Application rather than applying to one or more of the other types and limits of coverage which appear on page 2 of the Application. Such a showing might be made, for instance, by a separate form specific to UM/UIM benefits and providing for the selection of coverage amounts, or by a separate heading and section in the Application itself with respect to UM/UIM benefits and directing the insured to designate the amount of benefits selected and to initial her choice. **See e.g., Young v. State**

Farm Mut. Auto. Ins. Co., 54 Fed.Appx. 365, 367-68 (2002 WL 31846193) (3d Cir. 2002) (insured signed Section 1791 Important Notice and binder portion of the application acknowledging that he had read the application and chose the limits himself, and insured's initials directly below UIM box with "15/30" written in was a valid waive down under Section 1734). Here, Larrimore's signature on the Application is separated from the listing of coverage types and amounts by six pages of intervening information.

In **O'Mara,** the court analyzed the Coverage Option Form before it to determine whether it reflected a valid request for the reduction of UM/UIM coverage limits. **Id.,** 907 A.2d at 603. In pertinent part, the court stated:

> In our view, the language of the Coverage Options Form satisfies this requirement. The form notifies the insured that 'Uninsured and Underinsured Coverages are optional in Pennsylvania' and that the insured may reject such coverage. In the 'Uninsured and Underinsured Motorist Coverage Selections' Section of the form, the language directs that the insured must '[u]se this sheet to select your coverage limits' and that the failure to make a selection indicates that his/her 'policy will include limits equal to the Liability limits (unless [the insured] has returned the rejection form)'. The sheet then provides two headings, 'Uninsured Motorist Coverage limits' and 'Underinsured Motorist Coverage limits', and three options underneath each of the headings. The first option permitted the insured to select the 'Maximum amount available (an amount equal to the Liability Limits of [the] policy).' The second option permitted the insured to choose and specify an amount. The third option permitted the insured to select the 'Minimum amount available ($15,000 per person/$30,000 per accident).' The form reveals a handwritten 'X' next to the third option under both the uninsured and underinsured headings. Additionally, Elizabeth O'Mara signed the bottom of this form. This form, viewed as a whole, indicates Mrs. O'Mara's decision to select uninsured and underinsured coverage in an amount less than the amount of her liability limits, namely, $15,000 per person and $30,000 per accident.

Id., 907 A.2d at 603-604. In contrast, the language and format of the Application signed by Larrimore does not clearly manifest

her desire "to purchase uninsured and underinsured coverage in amounts less than or equal to bodily injury limits and the amount of the requested coverage." **Id.** at 603.

In **Brethren Mut. Ins. Co. v. Triboski-Gray, supra,** the issue before the court was virtually identical to that presented here: whether the insured's signature on an application completed by the insurance company's agent constituted a written request in accordance with the requirements of Section 1731 for UM/UIM coverage limits in an amount less than the limits of coverage requested for third party bodily injury. **Id.,** 2008 WL 2705539, *1 (M.D. Pa. 2008). "The dispositive question here is not whether [the insured] was aware of the coverage limits; the controlling question is whether she made a written request for UM/UIM coverage limits below the coverage limits for third party bodily injury." **Id.** at *3. In **Triboski-Gray,** the insurer also argued, as here, that "the designation of UM/UIM limits ... made by [the agent] became [the insured's] written request for such limits when she signed the insurance application." **Id.,** 2008 WL 2705539 at *6.

The language of the application in **Triboski-Gray** appears, in all material respects, to be identical with the subject application in these proceedings. In finding that the application before it was not a "written request" as contemplated by Section 1734 of the MVFRL, the court relied heavily on the Pennsylvania Superior Court's decision in **Emig,** which held that an insured's signature at the end of a policy change request form, similar to an insured's signature at the end of an insurance policy application, "merely evidences the insured's acceptance of the policy ..., and cannot amount to a statutorily enforceable waiver of insured/underinsured motorist coverage limits equal to bodily injury limits." **Id.** (**quoting Emig, supra** at 536-37, 664 A.2d at 565) (internal quotation marks omitted). In short, "requests for specific limits coverage ... require not only the signature of the insured, but also, an express designation of the amount of coverage requested ... ." **Lewis, supra,** 793 A.2d at 153.[3] While the rationale of **Triboski-Gray** focuses primarily

[3] In **Triboski-Gray,** the court found it significant that several months after the insured purchased her insurance policy, the insurer began using UM/UIM selection forms which required the insured to specify the limits of UM/UIM coverage being selected, with the insured's signature coming immediately

on the third element required by **O'Mara** for a valid Section 1731 writing, rather than the first element upon which we place primary emphasis, it, together with **Emig,** provides additional support for our decision to nullify the lower UM/UIM coverage limits stated in the policy, thus deeming the UM/UIM coverage equivalent to the bodily injury liability coverage limits.

CONCLUSION

In accordance with the foregoing, we find the underinsured motorist coverage limits in Larrimore's policy with Erie to be equal to the bodily injury limits, that is $300,000.00 per person and $300,000.00 per occurrence, stacked for two vehicles, for a total of $600,000.00 in benefits.

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under the amount selected, finding that this removed the ambiguity found by the court in that case. Id., 2008 WL 2705539 at *7 n.10. Similarly, had Erie Insurance Forms UF-2044 and UF-2047 been used here, there would be no question that Larrimore had actually selected a reduced amount of UM/UIM coverage and designated the specific limits of coverage requested.

COMMONWEALTH OF PENNSYLVANIA vs.
ALBERT EDWARD BROOKE, Defendant

Criminal Law—PCRA—Self-representation—Competency Required To Waive Counsel—Ineffectiveness of Standby Counsel

1. To be eligible for PCRA relief, a defendant must establish that the issues on which he bases his claim have not been previously litigated or waived. The question of a defendant's mental competency to waive counsel and to represent himself is not waived during the period of self-representation.

2. A defendant who claims he was mentally incompetent to waive his right to counsel or to enter a plea has the burden of establishing this claim by a preponderance of the evidence.

3. The focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the cognitive **ability** to understand the proceedings. The competence that is required of a defendant seeking to waive his right to counsel is the competence to **waive the right,** not the competence to represent himself. The level of competency required for a defendant to waive his right to counsel is the same as that required for a defendant to plead guilty or to stand trial.

4. Before a criminal defendant who is mentally competent to waive counsel will be permitted to do so, his decision must be a knowing and voluntary one: it must be established that he was advised of his right to counsel and that he understood both the significance and consequences of not having counsel. The object of the "knowing and voluntary" inquiry, in contrast to that for mental competency, is to determine whether the defendant actually does

understand the significance and consequences of a particular decision and whether the decision is uncoerced. In assuming his own representation, a defendant assumes the consequences of that representation, including doing so to his own detriment.

5. A defendant who knowingly and intelligently waives his right to counsel, and has the mental capacity to do so, may not later claim ineffectiveness of counsel in his own representation of himself.

6. The role of standby counsel to a defendant who insists on representing himself is limited: to assist the defendant if and when he requests assistance and to be available to represent him in the event that termination of the defendant's self-representation is necessary. A defendant who claims that his standby counsel was ineffective must establish that such counsel failed to perform competently within the limited scope of the duties assigned to or assumed by him. Counsel will not be found ineffective for respecting his client's wishes.

NOS. 128-CR-2003 and 129-CR-2003

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

KENT D. WATKINS, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—November 5, 2008

PROCEDURAL AND FACTUAL BACKGROUND

On August 11, 2004, Albert Edward Brooke ("Defendant") pled **nolo contendere** to one count of Aggravated Indecent Assault[1] (F2), two counts of Corruption of Minors[2] (M1), and two counts of Endangering the Welfare of a Child[3] (M1), in the case docketed to No. 128 CR 2003 for incidents involving his stepdaughter when she was five and six years old; Defendant also pled **nolo contendere** to one count of Corruption of Minors (M1) and one count of Endangering the Welfare of a Child (M1), in the case docketed to No. 129 CR 2003, for incidents involving his four-year-old stepson. Defendant's pleas were entered pursuant to a negotiated plea agreement in which the majority of the charges filed were to be **nolle prossed,** several consisting of felonies of the first degree.[4]

[1] 18 Pa. C.S.A. §3125.

[2] 18 Pa. C.S.A. §6301.

[3] 18 Pa. C.S.A. §4304.

[4] The validity of Defendant's pleas was previously litigated when Defendant filed a post-sentence motion to withdraw his pleas on the basis that the pleas were not knowingly, intelligently, voluntarily, and understandingly entered, which

Under this agreement, Defendant was to receive an aggregate sentence of four to eight years' imprisonment in a state correctional facility, followed by twenty years' probation. The plea agreement was accepted by this court and, in accordance with the agreement, Defendant was sentenced on the same date.[5]

On May 21, 2007, Defendant filed the instant Petition for Post-Conviction Collateral Relief **pro se.** An amended, counseled petition ("Petition") was filed on November 5, 2007. In this Petition, Defendant claims that while he was competent to stand trial, he was not competent to represent himself and that standby counsel was ineffective in permitting him to enter a plea.[6]

A hearing on Defendant's Petition, at which Defendant was present and represented by counsel, was held on January 31, 2008. Defendant's Petition is now before us for disposition.

DISCUSSION

1) Self Representation

On August 11, 2004, after jury selection was complete, Defendant requested and was granted permission to represent himself with the assistance of his former trial counsel as standby counsel. Defendant now argues he should not have been permitted to do so, averring that he was not mentally competent to represent himself in legal proceedings. We are at a loss to explain why Defendant now

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we denied. **See** Defendant's Concise Statement of Matters Complained of on Appeal, filed April 27, 2006. This decision was affirmed by the Superior Court on February 28, 2007.

[5] Defendant was sentenced to a period of imprisonment of not less than thirty-four months nor more than sixty-eight months on the Aggravated Indecent Assault charge docketed to No. 128 CR 2003; four consecutive five-year periods of probation on the two Corruption of Minors charges and the two Endangering the Welfare of a Child charges docketed to No. 128 CR 2003; a period of imprisonment of not less than seven months nor more than fourteen months on the Corruption of Minors charge docketed to No. 129 CR 2003, consecutive to the sentence imposed in No. 128 CR 2003; and a period of imprisonment of not less than seven months nor more than fourteen months on the Endangering the Welfare of a Child charge docketed to No. 129 CR 2003, consecutive to the sentences imposed in No. 128 and No. 129 CR 2003.

[6] At the **nolo contendere** plea hearing, Defendant was assisted by two members of the Carbon County Public Defender's Office who acted as standby counsel: Chief Public Defender Gregory Mousseau, Esquire, and Public Defender William G. Schwab, Esquire (N.T., 08/11/2004 (Plea Colloquy), pp. 2-3).

chooses to raise this issue, rather than in any of his scores of previous filings, particularly his motion to withdraw his **nolo contendere** pleas, for which he was represented by new counsel.

To be eligible for relief under the Post Conviction Relief Act ("PCRA"), a defendant must establish by a preponderance of the evidence that his conviction or sentence resulted from one or more errors set forth in 42 Pa. C.S.A. §9543 **and** that the issue has not been previously litigated or waived. For purposes of the PCRA, "an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state post-conviction proceeding." 42 Pa. C.S.A. §9544(b); **see also, Commonwealth v. Rounsley,** 717 A.2d 537, 539 (Pa. Super. 1998) (recognizing that "nearly all claims are waived under the PCRA since nearly all claims potentially could have been raised on direct appeal"). Waiver is an issue which may be raised **sua sponte** by the PCRA Court. **See Commonwealth v. Davis,** 393 Pa. Super. 88, 97, 573 A.2d 1101, 1105 (1990), **appeal denied,** 527 Pa. 597, 589 A.2d 688 (1991).

Nevertheless, waiver will not be found where the issue involves a defendant's competency to waive a constitutional right. "[I]t would be contradictory to argue that a defendant may be incompetent, and yet knowingly and intelligently 'waive' his right to have the court determine his capacity to stand trial." **Commonwealth v. Santiago,** 579 Pa. 46, 855 A.2d 682, 692 (2004). Thus, we hold only that during the time Defendant represented himself this issue was not waived.

In addressing the merits of this claim, we must first be precise in defining the claim: the issue is not whether the colloquy which preceded our granting Defendant's request to represent himself at trial was sufficient, but whether Defendant was mentally ill and therefore not competent to waive his constitutional right to counsel and thereby represent himself.[7] The burden of establishing

[7] A criminal defendant has a constitutional right, guaranteed by the Sixth and Fourteenth Amendments, to self-representation. **See Faretta v. California,** 422 U.S. 806, 807 (1975). However, before this right may be exercised, the defendant must be advised of his right to counsel, and his decision to waive counsel and to represent himself must be unequivocal, voluntary and intelligent, timely, and not for purposes of delay. **See Commonwealth v. Blakeney,** 946 A.2d 645, 655 (Pa. 2008); **Commonwealth v. Vaglica,** 449 Pa. Super. 188, 192, 673 A.2d

mental incompetency is upon the defendant and must be met by a preponderance of the evidence. **See Commonwealth v. Appel,** 547 Pa. 171, 189, 689 A.2d 891, 899 (1997). The record in this case does not evidence that Defendant was incapable of waiving either his right to counsel or entering a plea.

The competency standard for evaluating a criminal defendant's ability to stand trial and his ability to waive counsel and enter a plea are the same. **See Godinez v. Moran,** 509 U.S. 389, 397-98 (1993). To be competent to stand trial, a defendant must (1) have "a rational as well as factual understanding of the proceedings against him" and (2) have a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." **Dusky v. United States,** 362 U.S. 402, 402 (1960) (per curiam). Likewise, the Mental Health Procedures Act provides that a defendant is legally incompetent if he is "substantially unable to understand the nature or object of the proceedings against him or to participate and assist in his defense." 50 P.S. §7402(a).

In **Godinez,** the court "rejected the notion that competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from) the **Dusky** standard." **Indiana v. Edwards,** 128 S.Ct. 2379, 2384 (2008). The

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371, 373 (1996). The defendant must understand both the significance and consequences of his decision.

To ensure a defendant's waiver of counsel is knowing, voluntary, and intelligent, Pa. R.Crim.P. 121, in its present form, adopts the "probing colloquy" standard described in **Commonwealth v. Starr,** 541 Pa. 564, 585, 664 A.2d 1326, 1335 (1995). Under this standard, if the inquiry is deficient, "relief is warranted only if the [defendant] suffers actual prejudice as a result thereof." **Commonwealth v. Davis,** 393 Pa. Super. 88, 102 n.7, 573 A.2d 1101, 1108 n.7 (1990), **appeal denied,** 527 Pa. 597, 589 A.2d 688 (1991). From the evidence of record, there is no reason to believe that Defendant's plea was unlawfully induced by his decision to waive counsel, or that he suffered any prejudice regardless of the sufficiency of his colloquy.

In this case, an extensive colloquy was conducted in which we explained Defendant's rights to him, emphasized the dangers of representing himself—including the responsibilities he would assume as his own counsel, and inquired into Defendant's understanding of the charges and the penalties he faced if convicted (N.T., 08/11/04 (Waiver Colloquy), pp. 9-27). At the conclusion of this waiver colloquy, we determined that Defendant's decision to proceed without counsel was knowingly, voluntarily, and intelligently made, and we granted Defendant's request.

court further found that "[t]he decision to plead guilty ... is no more complicated than the sum total of decisions that a [represented] defendant may be called upon to make during the course of a trial," and that "there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights." **Id.** However, "[i]n addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary." **Godinez, supra,** 509 U.S. at 400. "The focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the ability to understand the proceedings." **Id.** at 401 n.12. "The purpose of the 'knowing and voluntary' inquiry, by contrast, is to determine whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced." **Id.**

In distinguishing further between competence and what is required for a knowing and voluntary waiver, the court noted that "even assuming that self-representation might pose special trial-related difficulties, the competence that is required of a defendant seeking to waive his right to counsel is the competence to **waive the right,** not the competence to represent himself." **Indiana, supra,** 128 S.Ct. at 2384 (emphasis in original). "[A] criminal defendant's ability to represent himself has no bearing upon his competence to choose self-representation." **Godinez, supra,** 509 U.S. at 400; **see also, Commonwealth v. Starr,** 541 Pa. 564, 585, 664 A.2d 1326, 1337 (1995). Therefore, while "a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." **Faretta v. California,** 422 U.S. 806, 835 (1975). Simply put, a criminal defendant's "technical legal knowledge [is] not relevant to an assessment of his knowing exercise of the right to defend himself." **Id.** at 836.

In **Godinez,** the court's finding that the standard for measuring a defendant's competency to stand trial is the same as that for measuring his competency to enter a plea decided the case. At issue

in **Godinez** was the defendant's decision to represent himself and to change his pleas from not guilty to guilty. The present case, at least ostensibly, goes one step further, asking whether a higher standard applies to measure a defendant's ability to conduct a defense at trial, as opposed to his ability to enter a plea. That is, is there a competency limitation to the right of self-representation.

In **Indiana v. Edwards,** the court held that "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under **Dusky** but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." **Id.,** 128 S.Ct. at 2380. In applying the principles of **Indiana** and **Godinez** to the present case, while we determined at the time of trial that Defendant was mentally competent to conduct his own defense, given the limited period of Defendant's self-representation and his ultimate decision to enter a plea, we find **Godinez** to be closer factually to what actually occurred in this case.

Significantly, the issue of the validity of Defendant's plea was previously litigated and is binding on Defendant. Moreover, Defendant's plea was taken on the same day he waived his right to counsel. Also significant is that in pretrial proceedings when Defendant's competence to stand trial was questioned by his then counsel, we determined that Defendant was competent to stand trial, a finding which Defendant has not challenged. **See** Order dated April 30, 2004. At that time, Dr. David G. Petkash, a diplomat in the American Board of Psychiatry and Neurology, board certified in general adult psychiatry, forensic psychiatry, addiction psychiatry, and geriatric psychiatry, credibly opined that Defendant had the capacity to rationally and factually understand the nature of the proceedings against him and to rationally interact with counsel and assist in his own defense.

As importantly, if not more so, in both the waiver of counsel and plea colloquies Defendant responded appropriately to the court's questions, openly acknowledged facts of which he was unaware, and disclosed that when certain questions in the written guilty plea colloquy were unclear to him, he sought standby counsel's assistance and guidance. At times, Defendant asked his own questions which themselves demonstrated an understanding

of what was at issue. He also requested and accepted the appointment of standby counsel to provide assistance. In opening to the jury, he responded appropriately when an objection was made by the Commonwealth.

The plea agreement which was eventually reached, and which Defendant was actively involved in negotiating, was extremely beneficial to Defendant. Additionally, at both the hearing on Defendant's motion to withdraw his plea, and the hearing on the instant Petition, standby counsel credibly testified that Defendant was an intelligent man who knew what he was doing. **See generally, Medina v. California,** 505 U.S. 437, 450 (1992) (observing that "defense counsel will often have the best-informed view of the defendant's ability to participate in his defense"). All of the foregoing supports our conclusion that Defendant's decision to waive counsel was an informed and independent one, made knowingly and voluntarily. While we believe Defendant's decision to represent himself was unwise, and so advised Defendant at the time of the waiver colloquy, we continue to believe that Defendant knew what he was doing and was entitled to exercise his right to represent himself at trial. Defendant has presented no evidence to the contrary. **See generally, Appel, supra** at 188, 689 A.2d at 899 (noting that "the sensitive nature of competency determinations requires that a trial judge's conclusions be afforded 'great deference' because the judge has the opportunity to personally observe a defendant's behavior").

It must also be emphasized that Defendant was represented by counsel in all pretrial and post-trial proceedings. Defendant was represented by counsel as early as March 14, 2003, when counsel filed an Application for Competency Evaluation, and counsel continued to represent Defendant through and including jury selection. Defendant opened to the jury on his own and decided after the first Commonwealth witness was called, but before extensive questioning of that witness had occurred, to enter a plea. When Defendant sought to challenge this plea and have it withdrawn, separate counsel was again appointed at Defendant's request. Counsel represented Defendant during these post-sentence proceedings and on direct appeal, and continues to do so in the instant post-conviction collateral proceedings.

In sum, Defendant's representation of himself was limited to that which occurred on August 11, 2004. While this period of self-representation was unquestionably significant, Defendant does not dispute his guilt and has failed to establish any prejudice or unfairness in the proceedings. More specifically, he has failed to establish that he was so mentally incompetent that he was incapable of waiving his constitutional right to counsel or exercising his right to represent himself.

2) **Ineffective Assistance of Standby Counsel in Entering Nolo Contendere Pleas**

As already discussed, prior to pleading **nolo contendere,** Defendant was granted permission to represent himself with the assistance of standby counsel. Again, we must be precise in defining the issue: the issue is not whether Defendant was ineffective in representing himself, but whether court-appointed standby counsel was ineffective in their representation of Defendant. Indeed, "[a] criminal defendant who knowingly and intelligently waives his right to counsel so that he may represent himself at trial may not later rely upon his own lack of legal expertise as a ground for a new trial." **Commonwealth v. Bryant,** 579 Pa. 119, 855 A.2d 726, 736 (2004) (**citing Faretta,** 422 U.S. at 834 n.46 ("[A] defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel.")); **see also, Appel, supra** at 198, 689 A.2d at 904 ("claims of ineffective assistance of counsel are not cognizable during post-trial proceedings, when the defendant has previously insisted on representing himself"). To hold otherwise would make "a mockery of the judicial process and guarantee immunity from the consequences of self-representation." **Bryant, supra,** 855 A.2d at 736.[8]

Standby counsel's role in representing a defendant who insists on representing himself is limited: to assist the defendant if and when he requests assistance and to be available to represent him in

[8] On this issue, it is important to note that at the time of Defendant's waiver of counsel, we specifically advised Defendant that an accused who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel, and Defendant indicated his understanding of this concept (N.T., 08/11/2004 (Waiver Colloquy), p. 21).

the event that termination of the defendant's self-representation is necessary. **See Faretta, supra,** 422 U.S. at 834 n.46. If Defendant fails to request assistance, he cannot "bootstrap from his own failure to raise [a] claim by blaming [standby] counsel for failing to remedy his own mistake." **Bryant, supra,** 855 A.2d at 740. To impose such an obligation on standby counsel would necessarily infringe upon the Defendant's right of self-representation, the converse of which is that a state cannot force a lawyer upon an accused who insists on conducting his own defense. **See Faretta, supra,** 422 U.S. at 807. In assuming his own representation, a defendant assumes the consequences of that representation, including doing so to his own detriment: "his choice must be honored out of that respect for the individual which is the lifeblood of the law." **Faretta, supra,** 422 U.S. at 834. Here, Defendant knowingly, voluntarily, and intelligently waived his right to counsel; having done so, he cannot now argue his own ineffectiveness.

Turning to Defendant's claim that standby counsel was ineffective, Defendant is entitled to no relief. "To prevail on a claim that counsel acting in an advisory or other limited capacity has rendered ineffective assistance, a self-represented defendant must show that counsel failed to perform competently **within the limited scope of the duties assigned to or assumed by counsel.**" **People v. Bloom,** 774 P.2d 698, 718 (Cal. 1989) (emphasis in original), **cert. denied,** 494 U.S. 1039 (1990), **cited in Bryant, supra,** 855 A.2d at 752 n.1 (Saylor, J. dissenting).

Pursuant to the PCRA, a petitioner's claim of ineffective assistance of counsel will succeed only where trial counsel's alleged ineptitude "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa. C.S.A. §9543(a)(2)(ii). To establish this degree of ineffectiveness, the petitioner must "rebut the presumption of [counsel's] professional competence by demonstrating that: (1) his underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the proceedings would have been different." **Bryant, supra,** 855 A.2d at 735-36.

Not once has Defendant alleged in these post-trial proceedings, much less proven, that standby counsel's performance undermined the truth-determining process. Defendant does not affirmatively assert his innocence. At the PCRA hearing, he claimed only that he could not remember the incidents. Defendant has not identified what counsel should have done differently or how this affected his decision to enter a plea. Defendant does not dispute that at the time of the plea colloquy it was, in fact, his intent to enter a plea. Nor does Defendant dispute that the plea agreement reached was to his benefit. To the contrary, at the PCRA hearing Defendant testified he knew he could have faced more time in jail, potentially the rest of his life, if he had gone through a trial.

We fail to understand how Defendant was prejudiced by the conduct of standby counsel. Defendant insisted on representing himself. He negotiated a plea which was favorable to his long-term interests and he participated in a plea colloquy which demonstrated clearly that he had a full understanding of the plea and its consequences. In **Appel,** our Supreme Court held that it would "not deem counsel ineffective for respecting his or her client's wishes." **Appel, supra** at 201, 689 A.2d at 906. Nor will we do so here.

CONCLUSION

After a thorough review of the record, for the above reasons, we conclude that Defendant is not entitled to relief under the PCRA on either his claim of the improper grant of permission to represent himself or his claim of ineffective assistance of standby counsel.

MAR-PAUL COMPANY, INC., Plaintiff vs. JIM THORPE AREA SCHOOL DISTRICT and POPPLE CONSTRUCTION, INC., Defendants

Civil Law—Construction Contract—Damages Attributable to the Delay and Additional Expense of Unexpected Subsurface Conditions—Assumption of Risk—Effect of Constructive Fraud and Interference with Performance—Liability of a Governmental Entity for Damages Caused by Delays in Construction—Necessity of Following Contract Procedure To Preserve Claim—Requirement of Privity for Claims by and on Behalf of a Subcontractor—Defining the Measure of Damages in a Contract—Mitigation of Damages

1. As a general rule, the risk of unforeseen subsurface conditions is assumed by the contractor in a construction contract, unless performance is rendered

impossible by an act of God, the law, or the other party. This risk can be transferred as agreed upon by the parties in the contract.

2. The risk assumed by a contractor for subsurface conditions will shift to the governmental agency letting the bid if the agency is guilty of constructive fraud relied upon by the contractor or if the agency has interfered with and prevented the contractor's performance.

3. For constructive fraud to entitle a contractor to relief against unforeseen subsurface conditions, the contractor must establish a positive misrepresentation of material fact reasonably relied upon by the contractor to his detriment. Where the governmental agency letting a contract includes in its bid package the results of site borings which suggest that the site is suitable for construction, and at the same time withholds the contents of a project narrative which warns that soil of the type present at the project site is unsuitable for winter grading, if reasonably relied upon to the detriment of the contractor, such conduct will support a claim of constructive fraud. When constructive fraud exists, it will supersede a contract's exculpatory provisions and permit an aggrieved contractor to recover the additional costs and expenses attributable to the unforeseen conditions.

4. The doctrine of active interference prohibits a party from raising exculpatory provisions of a contract as a defense if: (1) there is an affirmative or positive interference by the owner with the contractor's work, or (2) there is a failure on the part of the owner to act in some essential manner necessary to the prosecution of the work. Where a governmental agency fails to disclose the contents of a project narrative concluding that the project site is unsuitable for earth work during the winter months, and instead distributes the results of site borings which contain no such limitations but imply general assurances to the contrary, the agency's directive to commence work in the winter constitutes an affirmative interference with the contractor's work.

5. Where a contractor claims damages against a governmental entity attributable to delay, claiming it was prevented from performing work in accordance with the time schedule contemplated by the parties, to recover, the contractor must prove: (1) the extent of the delay within a reasonable degree of accuracy; (2) the delay was caused solely by the government's actions; and (3) the delay caused specific, quantifiable injury to the contractor.

6. In computing the amount of delay damages to which a contractor may be entitled against a governmental agency, the parties, in their contract, can agree to the standard by which such damages will be measured.

7. Where a public contract sets forth a specific procedure to be followed for the resolution of disputes, including claims for additional compensation, such claims will not be allowed unless the provisions of the contract have been strictly complied with, including the time period within which notice of the claims must be presented.

8. As a general rule, an action on a contract cannot be maintained against a person who is not a party to the contract. Consequently, in a dispute between an owner and a general contractor concerning the terms of their contract, the general contractor has no authority to bring a claim on behalf of a subcontractor against the owner of the construction project. Likewise, the subcontractor has no direct claim for breach of contract against the owner, either at common law or under the Public Works Act.

9. Where the party responsible for breaching a contract claims the other failed to mitigate its damages, the burden is upon the breaching party to show how further loss could have been avoided through the reasonable efforts of the injured party. The duty to mitigate is judged by a standard of reasonableness determined from all the facts and circumstances and must be judged in the light of one viewing the situation at the time the breach occurred.

NO. 04-2595

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MEMORANDUM OPINION

NANOVIC, P.J.—July 31, 2008

I. PROCEDURAL AND FACTUAL BACKGROUND

In 2002 and 2003, the Jim Thorpe Area School District ("District") built a new kindergarten through eighth grade elementary school in Kidder Township, Carbon County, Pennsylvania ("Project"). The general contractor for the Project was Mar-Paul Company, Inc. ("Mar-Paul"). The subcontractor for the site work was Popple Construction, Inc. ("Popple"). Collectively, Mar-Paul and Popple are hereinafter referred to as the "Contractors."

In accordance with the Public School Code of 1949, the Project was subject to competitive bidding. 24 P.S. §7-751(a). Mar-Paul's bid for general construction was submitted to the District on October 30, 2001. On November 19, 2001, the District passed a motion to award the general construction contract to Mar-Paul subject to certain conditions. Under the terms of the bid documents, as well as the contract subsequently signed by the parties, the Project contained a fixed and firm completion date of August 1, 2003.

A written agreement between the District, as Project owner, and Mar-Paul, as general contractor, was entered on February 4, 2002 ("Contract").[1] On this same date, the District issued its notice

[1] The three-month delay which occurred between the bid opening and signing the Contract was caused by bidding problems associated with two other contracts for the Project, those for HVAC and plumbing work. Although Mar-Paul and Popple complain that this delay further shortened the construction period for the August 1, 2003 deadline, this delay was foreseeable. By statute,

to proceed which, pursuant to the Contract, obligated Mar-Paul to commence work within ten days. Section 01120, Summary of Work, ¶1.07 (A). Popple's proposal for the site work was submitted to Mar-Paul on October 30, 2001; the subcontract between Mar-Paul and Popple was entered on January 10, 2002.

In accordance with its subcontract with Popple, Mar-Paul directed Popple to immediately begin site work for the Project. By March 13, 2002, Popple was reporting that excessive moisture levels in the subgrade soil prevented compaction as required by the contract specifications. By letter dated March 21, 2002, Mar-Paul formally notified the District's architect, Hayes Large Architects ("Architect"), of the moist soil conditions and that it was "prevented from proceeding as planned" and needed direction on how to proceed.[2] These same issues were previously discussed at a job site conference held on March 18, 2002, with representatives present from the District, Mar-Paul, Popple, the Architect, and United Inspections Services ("United"), a geotechnical engineer acting as the District's consultant.

In answer to the high moisture content of the soil, United recommended that both planned access roads and the building pad area be undercut by removing eighteen to twenty-four inches of soil, and that geogrid and stone be used for stabilization before fur-

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public work contracts must be awarded within sixty days of the date of the bid opening and executed within sixty days of the date that the contract is awarded. 62 Pa. C.S.A. §§3911(a) and 3912; **cf. NVC Computer Sales, Inc. v. City of Philadelphia,** 695 A.2d 933, 936 (Pa. Commw. 1997), **appeal denied,** 705 A.2d 1312 (Pa. 1997), ("Where a municipal body advertises for bids for public work and receives an apparently satisfactory bid, it is within the contemplation of both the bidder and acceptor that no contractual relation arises until a written contract has been entered into embodying all material terms of the offer and acceptance." (**quoting Crouse, Inc. v. Braddock Borough School Dist.,** 341 Pa. 497, 19 A.2d 843 (1941))).

[2] Under the Contract, the Architect acted as both the District's architect and representative with authority to act on the District's behalf. The Contract provides:

> Select Fill: Due to the actual soil conditions which may prevail on the site, it may be necessary to select the sequence and manner in which fill material is spread and compacted. The contractor shall not proceed with such operations without first making satisfactory arrangements with, and receiving the written approval of the Architect.

Section 02220, Excavating, Filling and Grading, ¶3.03(D).

ther backfilling. **See** United "Site Recommendation Report" dated March 22, 2002.[3] This recommendation was followed by Popple's proposal on March 25, 2002, to perform the overexcavation,[4] stone, and geogrid work at a cost ranging between $114,174.86 to $191,910.76, depending upon the depth of subgrade soil removed. Mar-Paul forwarded Popple's proposal to the District's Architect by letter dated March 29, 2002.

The Architect disagreed with the Contractors' request for additional compensation to address the wet soil conditions. Rather than approving United's recommendation to remove and replace unsuitable soils, or suggesting another option, by its letter of April 4, 2002, the Architect responded:

> ...I am directing your firm to proceed with the work as described in the contract documents (refer to General Conditions, Par. 4.3.3).[5] All work shall be done to meet the intent of the contract documents.

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[3] The recommendation made by United would have required Popple to overexcavate to a depth below the specified cut elevations in the Contract specifications and drawings. Because this work would be outside the scope of the work bid, it involved "additional work" for which Popple would be entitled to additional compensation. **See Dept. of Transp. v. Gramar Construction Co.,** 71 Pa. Commw. 481, 485, 454 A.2d 1205, 1207 (1983) ("The law is clear that a contractor who performs work beyond the scope of its contract is entitled to additional compensation."); **see also, Thomas M. Durkin & Sons, Inc. v. Department of Transportation,** 742 A.2d 233, 238-39 (Pa. Commw. 1999) (holding that additional rock which was required to be removed beyond that "precisely" designated in the design plans represented work outside the scope of the contract and entitled the contractor to additional compensation). This fact, the Contractors contend, is significant because it explains why the District's Architect would not approve United's recommendation for overexcavation, even though this would have provided an immediate solution to the moisture issue, and instead insisted that the existing soil be disked and air-dried, thereby contributing to the delay for which the Contractors seek compensation.

[4] "Overexcavation" is commonly used and understood in the earthmoving and excavation industry to apply to the removal of unsuitable soils below subgrade and the replacement of same with suitable, compacted material.

[5] This provision states:

> Continuing Contract Performance. Pending final resolution of a Claim except as otherwise agreed in writing or as provided in Subparagraph 9.7.1 and Article 14, the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents.

General Conditions, Administration of the Contract, ¶4.3.3.

This letter further stated that if the specified compaction results could not be met, then Mar-Paul was to notify United and the Architect, at which time, United would "provide the necessary recommendations as required for you to achieve the results as shown and noted on the project drawings and specifications."

Subsequently, United was again asked to examine the issue and suggest solutions. In its letter dated April 9, 2002, United suggested two options: Option "A" recommended removal and replacement of soils; Option "B" recommended that the existing site soils be scarified and windrowed—**i.e.,** disked and air-dried—until the moisture content was reduced to optimum levels. On April 10, 2002, the Architect directed that Option "B" be employed. Popple was advised of the Architect's decision by April 11, 2002, and began disking and loosening the soil, exposing it to the air. Field tests performed on April 17, 2002, showed the soil was still unacceptable.

On April 17, 2002, the District's Clerk of the Works recommended the District employ a new geotechnical engineer, CMT Laboratories, Inc. ("CMT"), to replace United. This recommendation was approved by the District on the same date. In its report issued on April 24, 2002, CMT stated that while United's recommendation of overexcavation and placement of stone and geogrid "... would allow for the **immediate** continuation of site preparation activities" (emphasis added), continued air-drying of the existing soil should also allow the contractor to achieve the required compaction. No time period was projected for the second alternative.[6]

On April 29, 2002, the District's Architect again directed Mar-Paul to continue air-drying the soil. As a result, scarifying and windrowing operations continued. On May 6, 2002, CMT reported

[6] CMT also noted in its report that precautions normally taken to avoid or stabilize wet soil conditions had not been implemented. Previously, United had reported that the site was damaged by clearing and grubbing operations, and that truck traffic was too heavy for the wet soil conditions that existed at the time. The District contends these problems were caused by Popple and that they delayed the Project. The District further contends that additional delay was caused because Popple did not appropriately and aggressively perform the scarifying and windrowing operations. Popple claims that the clearing and grubbing work it performed was conducted in accordance with industry standards, as was the means and methods it employed to air-dry the soil, which had been used by it on numerous prior occasions.

the first successful compaction test result with respect to Building Pad A. Additional sections were successfully tested between May 6 and May 20, 2002. In the meantime, the site preparation which Popple was to perform was delayed by more than two months, from March 13 to May 20, 2002.

Popple claims it is owed $33,809.00 for the work it performed due to the wet soil conditions: air-drying the subsoil, overexcavation, and stone placement.[7] Popple also claims that during the time the District was deciding how to proceed, its equipment at the site stood idle. For this downtime, from March 23 through May 20, 2002, Popple claims it is owed $187,810.00.[8] In addition to these two claims, both connected to the underlying soil conditions at the Project site, Popple claims it is owed $12,696.00 for the time its equipment stood idle during the six-day period from October 22, 2003, through October 28, 2003, as part of its costs for remobilization and demobilization. All of Popple's figures for idle equipment are derived from rental values appearing in the Blue Book, rather than actual costs.[9]

The total amount Popple claims for additional costs and for delay damages which it attributes to unforeseen wet soil conditions is $221,619.00. Mar-Paul seeks to recover $136,517.00 in increased costs for supervision, soil testing, extra heating, and other expenses it incurred because of these same conditions.

Before us is the District's Motion for Partial Summary Judgment as to Counts I through IV of Mar-Paul's Complaint for additional work and delay damages claimed as a result of the wet soil conditions. Counts I and II of the Complaint are direct claims by

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[7] This updated figure was first submitted to Mar-Paul by Popple on August 21, 2002. Previously, on May 2, 2002, Popple had advised Mar-Paul that its costs for overexcavation and stone replacement for Building Pad A were $35,312.12.

[8] This figure was also provided to Mar-Paul by Popple on August 21, 2002. Previously, on April 30, 2002, Popple had forwarded correspondence to Mar-Paul enclosing costs for idle equipment derived from the "Rental Rate Blue Book" and indicating that daily costs would apply until Popple's equipment was "up and running again."

[9] All of the equipment which Popple had located at the Project site during the relevant time period was owned by it, rather than leased. With respect to this equipment, the documentation Popple produced in response to discovery showed that the total actual equipment costs it incurred during the alleged period of delay was $8,319.19.

Mar-Paul for breach of contract and breach of the duty of good faith and fair dealing respectively, each in the amount of $136,516.00. Counts III and IV assert claims by Mar-Paul on behalf of Popple on the same legal basis as those asserted in Counts I and II, each in the amount of $221,619.00, in which Mar-Paul seeks to be indemnified under the "pass through" provisions of the Mar-Paul/Popple subcontract for Popple's claims attributable to the wet soil conditions. Under the subcontract between Popple and Mar-Paul, Popple is only entitled to recover additional compensation from Mar-Paul if Mar-Paul is able to "pass through" this expense for payment by the District.[10]

The District also moves for partial summary judgment against Popple on Counts I, II, and VI through IX of Popple's New Matter Counterclaim. Counts I, II, VII and VIII of this Counterclaim re-

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[10] Mar-Paul cites **Pennsylvania Dept. of Transp. v. Brayman Construction Corporation-Bracken Construction Company, Joint Venture,** 99 Pa. Commw. 373, 513 A.2d 562 (1986) as authority to bring these claims on behalf of Popple. **See** Mar-Paul's Brief in Opposition to the School District's Motion for Partial Summary Judgment, pg. 42. **Brayman,** however, does not support this position. To the contrary, after a brief discussion of **Severin v. United States,** 99 Ct.Cl. 435 (1943), **cert. denied,** 332 U.S. 733 (1944), which held that a general contractor cannot recover on behalf of its subcontractor against the owner of a construction project unless it has directly suffered damages or bears liability to the subcontractor as a result of the owner's alleged breach, the **Brayman** court stated: "This doctrine [referring to **Severin**] has not been adopted in Pennsylvania … ." **Id.** at 377, 513 A.2d at 564. Whether Mar-Paul has standing to bring these claims appears, at this time, to be an open question. Because it would be inappropriate for us to **sua sponte** raise and rule on an issue which does not involve subject matter jurisdiction, we will discuss it no further. **See e.g., School Security Services, Inc. v. Duquesne City School District,** 851 A.2d 1007, 1011 (Pa. Commw. 2004); **see also, Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh,** 554 Pa. 249, 721 A.2d 43, 46 n.6 (1998) ("whether a party has standing to maintain an action is not a jurisdictional question").

The "pass through" provision in the Mar-Paul/Popple subcontract provides as follows:

> Delays. ...Subcontractor agrees that it shall not be entitled to nor claim any cost reimbursement, compensation or damages for any delay, obstruction, hindrance or interference to the Work except to the extent that Contractor is entitled to corresponding cost reimbursement, compensation or damages from Owner under the Principal Contract for such delay, obstruction, hindrance or interference, and then only to the extent of the amount, if any, which Contractor, on behalf of Subcontractor, actually receives from Owner on account of such delay, obstruction, hindrance or interference.

Subcontract, ¶17.

peat the claims raised in Counts III and IV of Mar-Paul's Complaint, with Count VII being couched in terms of a contract implied-in-law and fact, and Count VIII being characterized as one for **quantum meruit.** Counts VI and IX set forth claims under the Pennsylvania Contracts for Public Works Act, 62 Pa. C.S.A. §§3901-3942.

Also before us is Mar-Paul's Motion for Partial Summary Judgment against Popple regarding Count IV of Popple's Counterclaim. In this Counterclaim, Popple seeks a declaratory judgment against Mar-Paul.

Upon consideration of the parties' submissions, argument thereon, and for the reasons set forth herein, we grant in part and deny in part the District's Motion for Partial Summary Judgment, and deny Mar-Paul's Motion for Partial Summary Judgment.[11]

II. DISCUSSION

A. Mar-Paul's Claims on Its Own Behalf and on Behalf of Popple Arising From Unexpected Soil Conditions

The first issue we address is which party bears the risk of additional work due to unforeseen subsurface conditions in a construction contract: the owner or the contractor. Ordinarily, contractual obligations are absolute, unless the contract provides otherwise. As a general rule, "a contractor is presumed, in the absence of an express provision to the contrary, to have assumed the risk of unforeseen contingencies arising during the course of the work, unless performance is rendered impossible by an act of God, the law, or the other party." **O'Neill Construction Company Inc. v. City of Philadelphia,** 335 Pa. 359, 361, 6 A.2d 525, 526-27 (1939); **see also, Commonwealth, Department of General Services v. Osage Company, Inc.,** 24 Pa. Commw. 276, 281-82, 355 A.2d 845, 848 (1976).

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[11] The standard for granting a motion for summary judgment is set forth in Pa. R.C.P. 1035.2. Essentially, "[a] proper grant of summary judgment depends upon an evidentiary record that either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a **prima facie** cause of action or defense." **Noel v. First Financial Bank,** 855 A.2d 90, 92 (Pa. Super. 2004). The court is not to decide issues of fact, but rather determine whether there exist genuine issues of material fact to be tried. "Summary judgment is proper only when the facts are so clear that reasonable minds cannot differ." **Limbach Company, LLC v. City of Philadelphia,** 905 A.2d 567, 573 (Pa. Commw. 2006).

In the present case, the Contract provides in relevant part:

> Claims for Concealed or Unknown Conditions. If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall so notify the Owner and Contractor in writing, stating the reasons. Claims by either party in opposition to such determination must be made within 21 days after the Architect has given notice of the decision. If the conditions encountered are materially different, the Contract Sum and Contract Time shall be equitably adjusted, but if the Owner and Contractor cannot agree on an adjustment in the Contract Sum or Contract Time, the adjustment shall be referred to the Architect for initial determination, subject to further proceedings pursuant to Paragraph 4.4.

General Conditions, Administration of the Contract, ¶4.3.4.

Neither of the two qualifying conditions described in this provision have been established: the Contractors have not pointed to any material discrepancies between the soil conditions represented to exist in the contract documents and those actually existing, nor have they proven that the soil conditions at the site differ materially from those ordinarily found to exist and which are generally recognized as inherent in construction activities of the type provided for in the contract documents. Instead, the Contractors argue that the

District, due to constructive fraud and interference with the Contract, assumed the risk of subsurface conditions. For the reasons which follow, each of these issues presents questions of fact which preclude summary judgment.

Both arguments center on the existence and availability to prospective bidders of a Project Narrative ("Narrative"), dated April 27, 2000, prepared on behalf of the District by Rettew Associates, Inc. (a consultant to the Architect) in conjunction with an Erosion and Sedimentation Plan ("Plan") for the Project site. These two documents complement one another. As is relevant to this discussion, the Plan delineates and identifies the types of soil throughout the Project site and the Narrative describes the characteristics of each soil type. The predominant soil type depicted on the Plan is in the AsA category, known as "Alvira and Shelmadine Silt Loam." As to this soil type, the Narrative states it is unsuitable for winter grading and further warns: "Site grading on AsA soil shall not be performed during the winter time."

The parties appear to all agree that none of the bidders received a copy of this Narrative as part of the bid package. Whether any of the bidders requested a copy and, if so, whether a copy was made available, is in dispute. The contract documents state:

> A copy of the Sedimentation and Erosion Control Plan and Project Narrative shall be kept available for inspection on the construction site at all times through the term of the project.
>
> 1. Contractor shall request a copy of the Project Narrative from the Architect. The contractor's copy, once reviewed, shall be available in the contractor's field office.

Section 02215, Sedimentation and Erosion Control, ¶1.03(D).

The Contractors argue that under the plain language of this provision, the Narrative was only made available to contractors (**i.e.,** successful bidders), and not to those bidding during the bidding process. Additionally, the District's Architect, when questioned about the availability of the Project Narrative, testified as follows:

> Q. And which geotechnical report was available for the general contractor's review?
>
> A. United Inspection's geotech report.

Q. It wasn't the Rettew report that we had looked at earlier?

A. The Rettew report would have been a part of the E&S control. **That would not be part of it.** It would have been the United Inspection's geotech report.

Q. **So it was Popple Exhibit 2 that was available for them to review, not Popple Exhibit 3?**

A. **To the best of my knowledge, that is correct.**

Harris Deposition, 7/27/2006, 228:19-229:11 (emphasis added).

United was employed by the District to take soil borings at the Project site. The employment of United and the results of its testings were disclosed and made available to bidders. The contract documents provided:

> 3.5.2 Subsurface drilling was performed on the site by **United Inspection Services.** Prepared forms containing information secured by these borings are available at the Architect's Office upon receipt of signed release form and payment of a Twenty five ($25.00) Dollar fee. The release form, to be used by bidders requesting subsurface drilling information, has been provided in the Appendix to Volume 1. Bidders are instructed to copy the release form in the Project Manual to submit their request. Where borings, test pits, test piles, and existing underground and overhead structure locations are shown, they are for the information of the Owner only; their correctness is not guaranteed by the Owner or the Architect, and in no event is this information to be considered a part of the Contract, or to be used for computations in submitting a Proposal. If this information is used by a bidder in preparing its Proposal, it must assume all risks resulting from conditions differing from the approximation shown.

Section 00210, Supplementary Instructions to Bidders, ¶3.5.2.

United's report of its testings was prepared in 1997, four years before the bids were opened. It contains general assurances that the site soil is "suitable for construction" and also states:

> 1. 'Ground water was not encountered within the soil borings at the time of soil investigation' (pg. 6);

2. 'Based on the field and laboratory investigations, the site is suitable for the proposed construction using shallow spread footings' (pg. 7); and

3. 'Soil at the site is suitable for use as a structural fill material' (pg. 7).[12]

The Contractors claim that when the District withheld the Narrative, yet made assurances to the contrary in the United report, its conduct was intended to mislead and deceive as to the suitability of the Project site for grading during the winter months. As argued by the Contractors, the information contained in United's report, when read in light of the Narrative, was incomplete and, at least as to the winter grading, misleading. **Cf. Department of General Services v. Pittsburgh Building Company,** 920 A.2d 973, 986 (Pa. Commw. 2007), **appeal denied,** 939 A.2d 890 (Pa. 2007).

1) Constructive Fraud

In **Acchione and Canuso, Inc. v. Department of Transportation,** the Pennsylvania Supreme Court set forth a five-part test for determining whether constructive fraud has occurred which will supersede a contract's exculpatory provisions and entitle an aggrieved contractor to recover additional costs and damages:

(1) Whether a positive representation of specifications or conditions relative to the work is made by the governmental agency letting the contract or its engineer.

(2) Whether this representation goes to a material specification in the contract.

(3) Whether the contractor, either by time or cost constraints, has no reasonable means of making an independent investigation of the conditions or representations.

(4) Whether these representations later prove to be false and/or misleading either due to actual misrepresentation on

[12] The Contractors have presented no evidence that United's subsurface drilling report was inaccurate either as to the location of the borings or the results obtained. Therefore, this report by itself would not support a claim of fraud. **Cf. O'Neill Const. Co. v. City of Philadelphia,** 335 Pa. 359, 366-67, 6 A.2d 525, 529 (1939). In fairness, the report also notes that ground water levels can be expected to fluctuate throughout the year (pg. 6), that moisture density tests of all soils need to be conducted to determine the maximum dry density and optimum moisture content (pg. 8), and that variations of water levels can be anticipated (Appendix A, General Notices, pg. 2).

> the part of the agency or its engineer or, by what amounts to a misrepresentation through either gross mistake or arbitrary action on the part of the agency or its engineer.
>
> (5) Whether, as a result of this misrepresentation, the contractor suffers financial harm due to his reliance on the misrepresentation in the bidding and performance of the contract.

501 Pa. 337, 343-44, 461 A.2d 765, 768 (1983) (emphasis removed).

Under this test, the misrepresentation must have been intentionally or negligently made; a "mere inaccuracy or innocent mistake" is insufficient. **Pennsylvania Turnpike Commission v. Smith,** 350 Pa. 355, 362, 39 A.2d 139, 142 (1944), **overruled on other grounds by Spector v. Commonwealth,** 462 Pa. 474, 341 A.2d 481 (1975). The representation must also be positive in nature and either (1) so precise and definite in its assertion that the claimant is clearly entitled to accept and rely upon it without further investigation as part of the basis on which the contract is entered, or (2) one in which the circumstances establish the contracting agency knew, or should have known, the claimant had no reasonable means of conducting an independent investigation of the facts asserted, either because of time or cost restraints, and was bound to rely upon the representation. **See id.** at 362-63, 39 A.2d at 142 (discussing several relevant, authoritative cases);[13] **see also, Acchione, supra** at 344, 461 A.2d at 768-69 (independent testing

[13] In **Branna Construction Corp. v. West Allegheny Joint School Authority,** 430 Pa. 214, 219, 242 A.2d 244, 246 (1968), the Pennsylvania Supreme Court explained:

> [T]he decision in **Smith** was predicated upon several factors ...: (1) that the contractor was compelled to rely upon the plans as to the subsurface conditions since it was virtually impossible to make a thorough and independent investigation of the conditions in the short time allotted between the receipt of the plans and the time for bidding; (2) the Turnpike Commission had knowledge that the subsurface was predominantly rock and not soft loose earth as represented by the plans, and (3) the misrepresentations actually worked a constructive fraud upon the contractor.

Moreover, in **Central Penn Industries, Inc. v. Commonwealth, Dept. of Transportation,** 25 Pa. Commw. 25, 30, 358 A.2d 445, 448 (1976), the Court stated that "insufficiency of the time allowed for investigation by bidders, standing alone, will not support a claim for extra compensation for unanticipated subsoil conditions." It must also be shown that "the information conveyed by the govern-

to verify accuracy of PennDOT's representation impractical due to size of project and impracticality of testing, as well as superior knowledge of PennDOT); **Department of Transp. v. P. DiMarco and Company, Inc.,** 711 A.2d 1088, 1091 (Pa. Commw. 1998) ("If the investigation purportedly required by the contract could not reasonably have been performed, those [bidder representation] provisions cannot be used to deny recovery to the contractor.").

When constructive fraud exists, the exculpatory clauses of the contract no longer shield the agency letting the contract from liability and the risk of unexpected subsurface conditions shifts to the government agency. **See Pittsburgh Bldg. Co.,** 920 A.2d at 985; **cf. Branna Construction Corp. v. West Allegheny Joint School Authority,** 430 Pa. 214, 217-18, 242 A.2d 244, 246-48 (1968) (holding that information about subsurface conditions provided by a government authority which is later determined to be inaccurate will not alone support a claim of constructive fraud provided the agency lacked any prior knowledge of the unanticipated subsurface conditions; under such circumstances, the exculpatory provisions of the contract apply and will be enforced).[14] To hold otherwise would allow a party who secures a contract by fraud to deprive the other of relief, a consequence inimical to the law and unenforceable. **Cf. Smith,** 350 Pa. at 363, 39 A.2d at 143.[15]

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ment agency was false or misleading, whether it was mistakenly so or due to arbitrary action or intentional subterfuge." **A.G. Cullen Construction, Inc. v. State System of Higher Education,** 898 A.2d 1145, 1170 (Pa. Commw. 2006).

[14] In **Branna Construction Corp.,** as here, a number of exculpatory provisions in the contract placed the risk of unforeseen subsurface conditions on the contractor:

> (1) no responsibility is assumed by the owner or architect for subsurface conditions; (2) the information concerning these conditions was obtained by the owner for its own use in designing the project; (3) bidders shall make their own investigation of existing subsurface conditions; (4) the project was to be completed on an 'unclassified' basis which in construction business parlance means that anything discovered by the contractor after the execution of the contract will be at the sole risk and responsibility of the contractor; (5) such information is given to the contractor for guidance only and (6) the contractor will be held responsible for carrying out and completing all excavation work regardless of the formations encountered.

Id. at 220-21, 242 A.2d at 247.

[15] Notwithstanding our denial of the District's motion, Mar-Paul's claim of constructive fraud, when examined against the **Acchione** factors, appears tenu-

2) Interference With Contract

"The doctrine of active interference prohibits a party from raising exculpatory provisions of a contract as a defense if: (1) there is an

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ous. **Cf. Acchione and Canuso, Inc. v. Department of Transportation,** 501 Pa. 337, 343-44, 461 A.2d 765, 768 (1983). Its claim hinges on the contents of United's report and its reliance on those contents.

To begin, Mar-Paul has failed to point to any inaccuracies in the United report. **See supra** n.12. This report appears to be balanced and, on its face, is qualified. While the court in **Pittsburgh Bldg. Co.,** held that an affirmative misrepresentation is not required for constructive fraud to exist—that a representation which is misleading in light of other information known and withheld by the government agency is sufficient—whether the representation is false or misleading is a separate question from whether there has been a positive representation which the contractor has a right to rely upon. **See Department of General Services v. Pittsburgh Bldg. Co.,** 920 A.2d 973, 986 (Pa. Commw. 2007), **appeal denied,** 939 A.2d 890 (Pa. 2007). **Acchione,** as well as the Supreme Court precedents on which it is based, requires that a positive misrepresentation be made to support a claim of constructive fraud. **Id.** at 344, 461 A.2d at 768. Whether the United report—given the technical nature of some of the information which it contains and which requires experience or training in this field to fully understand, as well as the qualifications which have been made in the report to such information—presents misleading or factually inaccurate information is a close factual question more appropriately resolved after the record has been fully developed. There is also a serious question whether the United report was ever received or, in fact, relied upon by the Contractors. Mar-Paul's Brief in Opposition to School District's Motion for Partial Summary Judgment, pgs. 8-9, 27. Absent such reliance, there can be no fraud.

The third element in the **Acchione** test examines whether the contractor had any reasonable means of making an independent investigation of the conditions or representations which later proved to be false or misleading. **Id.** at 344, 461 A.2d at 768. Neither Mar-Paul nor Popple appear to have requested or obtained a copy of United's report, nor to have requested or attempted to obtain a copy of the Narrative. It is therefore uncertain whether a copy of the Narrative would have been provided if requested. Even if the request had been refused, there is still a question whether such information was not contained in public documents and therefore readily available to the Contractors. In this respect, it must be remembered that the Erosion and Sedimentation Plan was available to bidders; it was only the Narrative which the Contractors contend was withheld. However, the Narrative's description of the characteristics of each soil type depicted on the Plan was not based on specific soil tests or samples taken from the Project site, but on the general geological characteristics of each soil type involved. Although the District contends that this information was available to Mar-Paul and Popple in public documents, there is nothing in the record to substantiate this contention. Nor would it be appropriate for us to take judicial notice of such fact as requested by the District.

If the United report is not considered, by default, Mar-Paul has only the withholding of the Narrative to support its claim of fraud. Standing alone, and

affirmative or positive interference by the owner with the contractor's work, or (2) there is a failure on the part of the owner to act in some essential manner necessary to the prosecution of the work." **Pittsburgh Bldg. Co.,** 920 A.2d at 987 (quotation marks omitted). "[W]here an owner by an unwarranted positive act interferes with the execution of a contract, or where the owner unreasonably neglects to perform an essential element of the work in furtherance thereof, to the detriment of the contractor, [the owner] will be liable for damages resulting therefrom." **Henry Shenk Co. v. Erie County,** 319 Pa. 100, 106, 178 A. 662, 665 (1935).

In **Pittsburgh Bldg. Co.,** the court held that the Department of General Services' failure to disclose the contents of a memorandum concluding that the site was unsuitable for earthwork in winter, which memorandum was contrary to a geotechnical report which was provided and which did not accurately reveal the extent of the subsurface conditions, compounded by its direction to commence work in winter, amounted to an affirmative interference with the contractor's work which was "not reasonably contemplated by the parties in carrying out [their] contract, especially since contracts impose upon the parties an implicit duty of good faith and fair dealing." 920 A.2d at 987; **see also, Donahue v. Federal Express Corporation,** 753 A.2d 238, 242 (Pa. Super. 2000) ("Every contract in Pennsylvania imposes on each party a duty of good faith and fair dealing in its performance and its enforcement.").

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absent any representations to the contrary, there appears to be no separate and affirmative duty on a government agency to disclose to prospective bidders adverse subsurface conditions of which it is aware. **See O'Neill Construction Co., supra** at 368, 6 A.2d at 529. This contrasts with such a duty when the condition is a dangerous one of which the owner has knowledge. **See Quashnock v. Frost,** 299 Pa. Super. 918 n.4, 445 A.2d 121, 126 n.4 (1982) (holding that the seller of a termite-infested home, which is not discoverable upon a reasonable examination of the property, has an affirmative duty to disclose this condition, if he is aware of it, to an unsuspecting buyer, notwithstanding that the buyer made no inquiry about termites or defects in the home). Moreover, the duty of good faith and fair dealing implied in a contract arises only once the contract exists, not before. **See Pennsylvania Chiropractic Ass'n v. Independence Blue Cross,** 2001 WL 1807781, *5 (Pa.Com.Pl. 2001) (**citing Creeger Brick and Building Supply v. Mid-State Bank and Trust Co.,** 385 Pa. Super. 30, 35, 560 A.2d 151, 153 (1989)). Consequently, even if Mar-Paul is able to show that the District withheld or failed to disclose the Narrative, this by itself, in the context of the exculpatory provisions of the Contract, is insufficient to sustain a cause of action for fraud.

Here, the District knew based on the contents of the Narrative that grading of the Project site was not feasible during the winter months. It also knew that it had not provided a copy of the Narrative to any of the bidders, and that, in all probability, the information advising that the soil was unsuitable for winter grading was unknown to the Contractors. The District further knew that it alone retained authority under the Contract to determine when work would commence and that but for the delays involved in securing contracts for the HVAC and plumbing work, construction would have begun earlier. Notwithstanding this knowledge, the District issued a notice to proceed in the middle of winter (**i.e.,** on February 4, 2002), which required the Contractors to commence site grading within ten days.

In doing so, the District virtually assured that difficulties and delays would be encountered. This was compounded by the District after it was informed by Mar-Paul of the wet conditions when its Architect was unhelpful and slow to respond, arguably in violation of its contractual duties, only adding to the delay which could have been avoided had United's initial recommendation of overexcavation been approved. The Contractors also contend that underlying the Architect's decisions was a singular desire to avoid the additional costs associated with overexcavation, which in the end, created an even greater expense in costs and delays. If these facts—presented in the light most favorable to the Contractors—are accepted, they would support a finding that the District affirmatively interfered with work Mar-Paul was contractually obligated to perform and failed to act on an essential matter necessary for Mar-Paul's timely prosecution of such work.

3) Cause of Delay

Likewise, Popple's related and dependent claim for idle equipment due to the underlying soil conditions cannot be resolved by summary judgment. In order to recover against a governmental entity for an alleged compensable delay, the contractor must prove: (1) the extent of the delay within a reasonable degree of accuracy; (2) the delay was caused solely by the government's actions; and (3) the delay caused specific, quantifiable injury to the contractor.

> A contractor must show the government was the 'sole proximate cause' of the delay and no concurrent cause would

> have equally delayed the contract, regardless of the government's action or inaction. 'Only if the delay was caused **solely** by the government will the contractor be entitled to … recovery of excess costs associated with the delay.' A 'court [will] award delay damages only for the unreasonable portion of a government-caused delay.'

A.G. Cullen Construction, Inc. v. State System of Higher Education, 898 A.2d 1145, 1160 (Pa. Commw. 2006) (citations omitted) (quotations and emphasis in original). The burden of establishing these factors is upon the contractor. **Id.**

As already discussed, the assignment of responsibility for the delay attributable to the soil conditions is not clear cut. Nor does **A.G. Cullen Construction, Inc.** require that the government be the exclusive cause of all delay for delay damages to be recoverable by a contractor. It is sufficient if a specific, definable period of delay attributable solely to the District is established. **Id.** at 1161. "[W]here each party bears responsibility for a portion of the total project delay, the plaintiff must prove how the lump sum of extra cost can be broken down and assigned to the responsible party." **Id.** Moreover, neither Mar-Paul nor Popple is requesting damages solely attributable to delay; each has set forth claims based upon actual and estimated direct costs for extra work in addition to delay-related damages resulting from the subsurface soil conditions.

B. **Preservation of Claim—Contract Procedures**

Whether viewed as a request for additional compensation because their efforts to remediate the underlying soil conditions required more work than Mar-Paul was already obligated to perform under the Contract, or as a measure of damages for the District's failure to disclose information it was legally bound to disclose, the District argues any right to a recovery has been lost by Mar-Paul's failure to follow Contract procedures. If recovery is premised on performing additional work not contemplated in the contract documents, the Contract requires a change order as a prerequisite to recovery. "Changes," as this term is used in the Contract, refers to work that the Architect, Owner, and Contractor all acknowledge and agree is a change to the contractor's work. **See** General Conditions, Changes in the Work, ¶7.1.2. When the basis for recovery

cannot be agreed upon, it is considered a "Claim." **See** General Conditions, Administration of the Contract, ¶4.3.1.

The Contract provides "Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive or order for a minor change in the Work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents."[16] General Conditions, Changes in the Work, ¶7.1.1. No change order or construction change directive was ever issued or signed by the District or the Architect for changes in the work due to soil conditions. In consequence, the District argues Mar-Paul has forfeited any rights it may have had to be paid additional monies for extra work performed because of the moisture content of the subgrade soils. "Where a public contract states the procedure in regard to work change and extras, claims for extras will not be allowed unless these provisions have been strictly followed." **Nether Providence Township School Authority v. Thomas M. Durkin & Sons, Inc.,** 505 Pa. 42, 47, 476 A.2d 904, 906-907 (1984).

The District's current position, to label the Contractors' claim as one requiring a change order, is different from that taken earlier when Mar-Paul and Popple first asserted that the excessive moisture content of the site's subgrade soils was affecting Popple's ability to proceed with its work. Starting with Popple's letter of March 13, 2002 and Mar-Paul's notice to the Architect eight days later, and proceeding through the March 22, 2002 recommendation of United to remove and replace the unsuitable soil with stone and geogrid and the March 25, 2002 proposal by Popple to perform the work described in United's recommendation, the District's Architect refused to acknowledge or approve the need for additional work to remedy the problem. Instead, in its letter dated April 4, 2002, the Architect expressly treated the Contractors' response

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[16] A Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor and Architect, stating their agreement upon all of the following:

.1 change in the Work;

.2 the amount of the adjustment, if any, in the Contract Sum; and

.3 the extent of the adjustment, if any, in the Contract Time.

General Conditions, Changes in the Work, ¶7.2.1.

to United's recommendation as a claim. **See supra** notes 3 and 5 and accompanying text. Later, in its letter dated April 29, 2002, following United's April 9, 2002 reevaluation which recommended either removal and replacement of soil or air-drying the existing soil, the Architect wrote that there was "no basis to recommend that a Change Order be issued for either option." As is evident from this exchange, Mar-Paul's request is properly classified as a claim, the parties being in disagreement as to whether the work performed by Mar-Paul and Popple to remediate the soil conditions between March and May of 2002 constitutes additional work beyond that contracted for, for which additional compensation is due.[17]

As a claim, under the dispute provisions of the Contract, Mar-Paul's only contractual obligation is to "initiate" it in writing to the Architect and the District "within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later." General Conditions, Administration of the Contract, ¶4.3.2. The "event" giving rise to this claim is the excessive moisture content of the soil which Popple first documented in its letter of March 13, 2002. In accordance with Subparagraph 4.3.2 of the General Conditions, Mar-Paul was required to initiate a claim by written notice to the Architect and the District within twenty-one days of March 13, 2002. **See Scott Township School District Authority v. Branna Construction Corporation,** 409 Pa. 136, 139, 185

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[17] The Contract defines a "Claim" as:

> [A] demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term 'Claim' also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract.

General Conditions, Administration of the Contract, ¶4.3.1. Unlike the contract in **Nether Providence Township School Authority v. Thomas M. Durkin & Sons, Inc.,** 505 Pa. 42, 476 A.2d 904 (1984), the contract documents in this case distinguish between "Changes" and "Claims" and contain specific procedures relative to each. Articles 4.3 and 4.4 of the General Conditions, governing "Claims and Disputes" and "Resolution of Claims and Disputes," respectively, set forth specific procedures for making, resolving, and determining "Claims," distinct from the procedures for "Changes", which, as discussed earlier, are premised on an acknowledgement and agreement by the Owner, the Contractor, and the Architect that there has been a change in the Contractor's work. **See** General Conditions, Changes in the Work, ¶7.1.2.

A.2d 320, 322 (1962) (affirming dismissal of contractor's claim due to failure to adhere to contract procedures regarding work changes and extra compensation). **But see James Corporation v. North Allegheny School District,** 938 A.2d 474, 486-87 (Pa. Commw. 2007) (declining to require "[strict] and narrow application of the [contract's] notice requirements" where application "would be out of tune with the language and purpose of the notice provisions" and where "government is quite aware of the operative facts," and finding notice provisions were informally satisfied and School District suffered no prejudice from Contractor's failure to submit written claim for damages pursuant to contract's notice provisions), **reargument denied** (2008).

As has already been recited, Mar-Paul notified the Architect and the District of the moisture problem in its letter dated March 21, 2002, followed on March 29, 2002, by a copy of Popple's proposal to perform the overexcavation, stone, and geogrid work. Although these documents do not quantify the amount of the claim, which information was not known until May 20, 2002, they do, at least arguably, meet the requirement of Subparagraph 4.3.2 of the General Conditions that the contractor initiate the claim by written notice within twenty-one days of learning of the condition giving rise to the claim. Because the contract documents do not otherwise address how or when the contractor must substantiate the claim, we are unable to find as an undisputed matter of fact, that Mar-Paul's claim is untimely.

C. **Popple's Crossclaims for Breach of Contract (Counts I and II)—Lack of Privity of Contract**

In Count I of Popple's New Matter Crossclaim against the District, Popple asserts a direct claim for breach of contract to recover for the costs of extra work performed due to the allegedly unexpected high moisture content of the soil and for delay damages measured by the cost of its idle equipment. In Count II of this New Matter Crossclaim, Popple asserts a direct claim against the District for breach of the duty of good faith and fair dealing and requests identical damages to those sought in Count I.

Popple is not a party to any contract with the District. Its only direct contractual relationship is with Mar-Paul, with whom it entered into a subcontract to perform the site work in question.

As to both claims, the District seeks dismissal for lack of privity of contract.

"As a general rule, an action on a contract cannot be maintained against a person who is not a party to the contract unless the plaintiff is a third party beneficiary of the contract ... ." **State Public School Bldg. Authority v. Noble C. Quandel Co.,** 137 Pa. Commw. 252, 260, 585 A.2d 1136, 1140 (1991) (footnote omitted). A party does not become a third party beneficiary to a contract unless both parties to the contract so intend and that intention is expressly indicated in the contract itself. **See Manor Junior College v. Kaller's Inc.,** 352 Pa. Super. 310, 313, 507 A.2d 1245, 1246 (1986).

Pursuant to the express provisions of the Contract between Mar-Paul and the District, Popple is not a third party beneficiary. The Contract provides:

> The Contract Documents form the Contract for Construction. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. The Contract may be amended or modified only by a Modification. **The Contract Documents shall not be construed to create a contractual relationship of any kind** (1) between the Architect and the Contractor, (2) **between the Owner and a Subcontractor or Sub-subcontractor,** (3) between the Owner and Architect or (4) between any persons or entities other than the Owner and Contractor. The Architect shall, however, be entitled to performance and enforcement of obligations under the Contract intended to facilitate performance of the Architect's duties.

General Conditions, General Provisions, ¶1.1.2 (emphasis added). "Such exculpatory clauses in contracts have been held to be dispositive by the courts in this Commonwealth for rejecting third-party beneficiary claims asserted by subcontractors for unpaid materials or services." **Buttonwood Company, Inc., et al. v. E. Clifford Durell & Sons, Inc., et al.,** 34 Phila. 193, 207 (1997) (**citing Demharter v. First Federal Savings & Loan Ass'n,** 412 Pa. 142, 152-53, 194 A.2d 214, 219 (1963)).

In accordance with the foregoing, Popple's New Matter Crossclaims for breach of contract and breach of the duty of good faith

and fair dealing against the District cannot be maintained and will be dismissed.[18]

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[18] Nor will the facts of record sustain Counts VII and VIII of Popple's New Matter Crossclaim. A contract implied-in-fact "is an actual contract which arises when parties agree upon the obligation to be incurred, but their intention is not expressed in words and is, instead, inferred from their actions in light of the surrounding circumstances." **Green Valley Dry Cleaners, Inc. v. Westmoreland Company Industrial Development Corp.,** 832 A.2d 1143, 1156 (Pa. Commw. 2003), **appeal denied,** 578 Pa. 697, 851 A.2d 143 (2004). Popple's contract, in this case, was with Mar-Paul; no direct contractual relationship existed between Popple and the District.

Popple's claim for **quantum meruit,** as an implied-in-law contract, is equally unsustainable. The **sine qua non** of a claim for **quantum meruit** is unjust enrichment: there must be enrichment (**i.e.,** a benefit conferred) and it must be unjust. **See Torchia v. Torchia,** 346 Pa. Super. 229, 233, 499 A.2d 581, 582 (1985) ("To sustain a claim of unjust enrichment, a claimant must show that the party against whom recovery is sought either 'wrongfully secured or passively received a benefit that it would be unconscionable for her to retain.' "). "Where unjust enrichment is found, the law implies a contract, which requires the defendant to pay to the plaintiff the value of the benefit conferred." **Limbach Co., supra,** 905 A.2d at 575.

As applied to a traditional construction contract which involves the owner of the project, a general contractor, and one or more subcontractors, a subcontractor who seeks payment directly from the owner for services and materials provided under a theory of unjust enrichment must establish (1) a benefit conferred on the owner, which for purposes of unjust enrichment, is measured by the value of the benefit to the owner, rather than the value of or expense to the subcontractor of the labor and materials supplied and (2) misleading or other conduct by the owner which, under the circumstances, would cause the owner's retention of the benefit without paying any compensation to the subcontractor to be unjust. **See D.A. Hill Co. v. CleveTrust Realty Investors,** 524 Pa. 425, 432, 573 A.2d 1005, 1009 (1990); **see also, Buttonwood Company, Inc., et al. v. E. Clifford Durell & Sons, Inc., et al., supra,** 34 Phila. at 201 (1997).

Here, Popple has presented no evidence that the value of the Project to the District was any greater because of its services than what the District contracted for and paid for. As to the second prong, there is no evidence of record that the District has been **unjustly** enriched, or that it misled or dealt directly with Popple. Under the contractual arrangement which existed between the parties—keeping in mind that by law the Project was required to be bid—the contract which created the District's right to enforce performance was that which existed between it and Mar-Paul, who separately contracted out the site work to Popple. Under this contractual chain, the District's directives were relayed to Mar-Paul who, in turn, directed Popple. **See** General Conditions, Subcontractors, ¶5.3.1. To the extent the availability of United's report combined with the withholding of the Narrative constitutes a misrepresentation, this representation was directed to those bidding on the Project; the record is devoid of any evidence that Popple received or relied upon such representation independently of Mar-Paul.

D. **Popple's Crossclaims Under the Pennsylvania Contracts for Public Works Act (Counts VI and IX)—Lack of Privity of Contract with the District**

Counts VI and IX of Popple's New Matter Crossclaim against the District assert direct claims for violation of the Pennsylvania Contracts for Public Works Act, 62 Pa. C.S.A. §§3901-3942 ("Public Works Act"). As with contractual claims generally, the Public Works Act only provides for recovery by a contractor that contracts directly with a government agency. 62 Pa. C.S.A. §§3931, 3933, 3939. Since Popple was expressly excluded as a party to Mar-Paul's Contract with the District, these claims are not sustainable and will be dismissed.

E. **Measure of Damages**

The duty and burden of establishing damages by evidence sufficient to "furnish a basis for the legal assessment of damages according to some definite and legal rule" is upon the claimant. **Tyus v. Resta,** 328 Pa. Super. 11, 29, 476 A.2d 427, 436 (1984).

> Pennsylvania law does not require proof of damages to a mathematical certainty. … Rather, evidence of damages may consist of probabilities and inferences as long as the amount is shown with reasonable certainty. … To prove damages, however, a plaintiff must present sufficient evidence for the fact-finder to make an intelligent estimation, without conjecture, of the amount to be awarded. …

A.G. Cullen Construction, Inc., supra, 898 A.2d at 1160-61 (citations omitted). "[I]f the facts afford a reasonably fair basis for calculating the amount to which Plaintiff is entitled, such evidence cannot be regarded as legally insufficient to support a claim for damages." **Acchione, supra** at 344-45, 461 A.2d at 769.

To a certain extent, the parties may also agree to limit or define how damages will be measured. **Cf. A.G. Cullen Construction, Inc., supra,** 898 A.2d at 1161-62 (discussing the purpose and enforceability of liquidated damage clauses). In this case, the District claims that by incorporating PennDOT Publication 408 into the Contract, the parties agreed not to use Blue Book Rental values as a means of measuring the cost of idle equipment attributable to any delay for which the District is responsible. **See** Section 01425, Ref-

erence Standards, ¶2.01(A)(6) and Section 02215, Sedimentation and Erosion Control, ¶1.03(B). As to this limitation, the District relies upon the following language in Publication 408:

> When measuring additional equipment expenses (**i.e.,** ownership expenses) arising as a direct result of a delay caused by the Department, **do not use in any way the Blue Book** or any other rental rate book similar thereto. **Use actual records** kept in the usual course of business, and measure increased ownership expenses pursuant to generally accepted accounting principles.

PennDOT Publication 408, Section 111.04(d) (emphasis added). This language, according to the District, requires that Popple's loss for idle equipment be derived from real equipment cost information using actual records kept in the usual course of its business and computed pursuant to generally accepted accounting principles. According to the District, Popple's losses for idle equipment are therefore limited to $8,319.19, the total amount of actual equipment costs it is able to document.

In response, Popple claims that the foregoing is a payment provision which the parties agreed to exclude from their incorporation of PennDOT Publication 408. To support this position, Popple refers to the following language in the Contract:

> The 'PDT Sections' noted herein refer to sections contained in the Commonwealth of Pennsylvania Department of Transportation Specifications Publication 408, latest edition. The references pertain only to materials, construction, equipment, methods and labor. The payment provisions do not apply to work to be performed under this Contract.

Section 02535, Traffic Control Signs, ¶1.03(A). This language, as indicated, is under that section of the Contract dealing with traffic control signs. To further complicate this issue, Section 110 of Publication 408 is entitled "Payment", whereas Section 111, under which Section 111.04(d) appears, is entitled "Delay Claims."

As more fully presented, the issue has three subparts: (1) whether the incorporation of Publication 408 applies to the type of work which is in dispute in this litigation; if it does (2) whether Section 02535 also applies; and if so, (3) whether the parties' reference to the payment provisions of Publication 408 in this section

of their Contract was intended to be specific and precise—to exclude Section 110 only—or to be more generic and to exclude any provision which involves the payment of money, including those related to delay damages. The facts necessary to decide this issue are not so clear on the record before us that reasonable minds cannot differ, a requirement for summary judgment. **See Yocca v. Pittsburgh Steelers Sports, Inc.,** 578 Pa. 479, 854 A.2d 425, 437 (2004) ("[W]here a term in the parties' contract is ambiguous, parol evidence is admissible to explain or clarify or resolve the ambiguity, irrespective of whether the ambiguity is created by the language of the instrument or by extrinsic or collateral circumstances." (quotation marks omitted)); **see also, Kohn v. Kohn,** 242 Pa. Super. 435, 443, 364 A.2d 350, 354 (1976) (holding that for parol evidence to be admissible on the basis of ambiguity, the ambiguity need not appear on the face of the written agreement; "extrinsic facts and circumstances may be proved to show that language apparently clear and unambiguous on its face is, in fact, latently ambiguous").

F. **Mitigation of Damages**

On this issue, the District argues that if it is responsible for delay damages, Popple could have and should have mitigated its loss for idle equipment. **See Gaylord Builders, Inc. v. Richmond Metal Mfg. Corp.,** 186 Pa. Super. 101, 104, 140 A.2d 358, 359-60 (1958) (holding that a claimant may recover only those damages that could not, with reasonable effort, be avoided). This duty to mitigate is judged by a standard of reasonableness "determined from all the facts and circumstances … and must be judged in the light of one viewing the situation at the time the problem was presented." **Toyota Indus. Trucks U.S.A., Inc. v. Citizens Nat. Bank of Evans City,** 611 F.2d 465, 471 (3d Cir. 1979). "[T]he burden is on the party who breaches the contract to show how further loss could have been avoided through the reasonable efforts of the injured party." **Pontiere v. James Dinert, Inc.,** 426 Pa. Super. 576, 587, 627 A.2d 1204, 1209 (1993), **appeal denied,** 537 Pa. 623, 641 A.2d 588 (1994).

Whether Popple failed to exercise reasonable efforts to mitigate its damages is a question of fact. Neither this question nor the one which underlies it—whether the District breached the Contract—

can be decided at this stage of the proceedings given the number of critical facts in dispute.

G. **Popple's Counterclaim for Declaratory Judgment (Count IV)**

In Count IV of Popple's counterclaim against Mar-Paul, Popple seeks compensation from Mar-Paul for the same soil delay claims Mar-Paul has asserted on behalf of Popple in Mar-Paul's complaint against the District, Counts III and IV, plus an additional $123,627.00. The claims made by Mar-Paul, as previously discussed, arise from the pass-through provisions of its contract with Popple. **See supra,** note 10.

In Mar-Paul's cross-motion for partial summary judgment against Popple, Mar-Paul asks for summary judgment in the event we find that the District is entitled to summary judgment on all or part of the soil delay claims made by Mar-Paul on Popple's behalf since, to that extent, we will have determined that Mar-Paul is not entitled to recover on Popple's behalf. Under Paragraph 17 of the Subcontract, Popple agreed that it would "not be entitled to nor claim any cost reimbursement, compensation, or damages for any delay, obstruction, hindrance or interference to the **Work except to the extent that Contractor is entitled** to corresponding cost reimbursement, compensation or damages from Owner … ." (emphasis added).

Because we have denied the District's Motion for Partial Summary Judgment with respect to Counts III and IV of Mar-Paul's complaint, we likewise deny Mar-Paul's Motion for Partial Summary Judgment as to Count IV of Popple's Counterclaim.

III. CONCLUSION

In accordance with the foregoing, the District's Motion for Partial Summary Judgment has been granted with respect to Counts I, II, VI, VII, VIII and IX of Popple's New Matter Counterclaim. In all other respects, the District's Motion for Partial Summary Judgment has been denied, as has Mar-Paul's Cross-Motion for Partial Summary Judgment.

COMMONWEALTH OF PENNSYLVANIA vs. CETEWAYO FRAILS, Defendant/Petitioner

*Criminal Law—PCRA—Exception to Timely Filing of Petition—Newly Discovered Evidence—**Brady** Claim Based on Plea Agreement—Reinstatement of PCRA Appellate Rights **Nunc Pro Tunc**—Abandonment of Counsel on Discretionary Review*

1. Ordinarily, a PCRA petition must be filed within one year of when the judgment of sentence becomes final. Timely filing of the PCRA petition is a jurisdictional prerequisite to consideration of the merits of the petition. "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 sixty 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."

2. The burden of pleading and proving a statutory exception to the PCRA's one-year filing requirement is upon the petitioner. For the newly-discovered evidence exception (42 Pa. C.S. §9545(b)(1)(ii)), the petitioner must plead and prove that the facts on which his claim is based were in fact unknown to him and that they were also unknowable notwithstanding the exercise of due diligence. For purposes of this exception, information is not unknown when the information is a matter of public record.

3. A **Brady** claim based on the Commonwealth's alleged failure to fully disclose to a defendant the terms of a plea agreement with a material witness is time-barred when the basis for believing a violation has occurred exists in the public record of the witness' sentencing which the defendant was aware of before the one-year period to file a PCRA petition had expired.

4. The PCRA bars relitigation of an issue previously decided and ruled upon. This includes an issue previously raised and decided in a proceeding collaterally attacking the conviction or sentence.

5. To establish a **Brady** violation, the petitioner must show that there has been a suppression by the prosecution of either exculpatory or impeachment evidence that was favorable to the accused, and that the omission of such evidence prejudiced the defendant. A **Brady** violation does not exist where a cooperating witness' expectation of leniency is based upon a unilateral belief that cooperation will ultimately be considered in future proceedings and does not emanate from any promises, assurances or understandings created by the Commonwealth.

6. Where counsel abandons a defendant on direct appeal, prejudice is presumed and the defendant is entitled to reinstatement of his appellate rights. Where, however, abandonment occurs on discretionary review of a collateral proceeding, prejudice is not presumed. Instead, the petitioner bears the burden of identifying and demonstrating that the issues he seeks to have reviewed are meritorious and not frivolous.

NO. 048 CR 1998

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

DANIEL SILVERMAN, Esquire—Counsel for the Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—September 30, 2008

PROCEDURAL HISTORY

On April 21, 1999, Cetewayo Frails ("Defendant") was convicted of felony murder, robbery, criminal conspiracy, and aggravated assault[1] for his role in the October 26, 1997 drug-related shooting and death of Koran Harrington, a.k.a. Tyrone Hill. Thereafter, Defendant was sentenced to life imprisonment on the murder charge, followed by consecutive sentences of not less than four nor more than eight years for criminal conspiracy, and not less than five nor more than ten years for robbery; the convictions for robbery and aggravated assault merged for sentencing purposes.

Defendant filed post-sentence motions for acquittal, the award of a new trial, and to modify his sentence, all of which the Court, the Honorable Richard W. Webb presiding, substantially denied on September 17, 1999.[2] The Superior Court affirmed the judgment of sentence on December 6, 2000, and Defendant's petition for allowance of appeal from this decision was denied by the Pennsylvania Supreme Court on June 19, 2001.

On June 5, 2002, Defendant filed **pro se** his first petition for collateral relief 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 October 15, 2002, the petition was denied without hearing on June 4, 2003. The Superior Court affirmed this denial on March 17, 2005. Not until May 12, 2005, after the time to seek review before the Pennsylvania Supreme Court had expired, did Defendant learn of the Superior Court's decision from his counsel (N.T., 12/10/07, p. 91).

On June 28, 2005, Defendant filed a **pro se** petition for allowance of appeal **nunc pro tunc** with the Pennsylvania Supreme Court. The factual basis for this late filing, which we credit, was that Defendant's prior PCRA counsel had not timely advised him

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[1] 18 Pa. C.S.A. §§2501(a) and 2502(b), 3701(a)(1), 903(a)(1), and 2702(a)(1), respectively.

[2] With the exception of Defendant's motion to vacate his sentence for robbery, which was granted, all of Defendant's remaining post-sentence motions were denied.

of the Superior Court's denial of his PCRA claim or of his right to petition the Pennsylvania Supreme Court for review of that denial. Defendant's request for allowance of appeal was treated by our Supreme Court as a petition for leave to file a petition for allowance of appeal **nunc pro tunc.** The Court denied this request on January 29, 2007, without prejudice to Defendant's right to seek relief in accordance with the PCRA.

Prior to this denial by the Pennsylvania Supreme Court, Defendant attempted to file a second **pro se** PCRA petition on April 28, 2006. On June 5, 2006, we dismissed this petition as premature because Defendant's request to the Supreme Court for review of the denial of his first PCRA petition was still pending.

What is numerically Defendant's third PCRA petition was filed **pro se** on February 7, 2007. After obtaining new counsel, the petition was amended on July 19, 2007, and is now before us for disposition. A hearing on this amended petition was held on December 10, 2007. At the time of the hearing, the various issues Defendant identified in his amended petition were reduced to two: (1) whether newly-discovered evidence in the nature of a plea agreement which Defendant claims existed between the Commonwealth and Verna Russman, one of Defendant's co-conspirators, and which Defendant alleges the Commonwealth failed to disclose, entitles him to relief on the basis of **Brady v. Maryland**[3] and its progeny and, (2) whether Defendant is entitled to have his original PCRA appellate rights reinstated **nunc pro tunc** on the basis of counsel's alleged ineffectiveness in timely consulting with him about the Superior Court's denial of his first PCRA petition, thereby depriving him of the opportunity to seek further review of that decision before the Pennsylvania Supreme Court (N.T., 12/10/07, p. 3).

FACTUAL BACKGROUND

At trial, Russman testified that Tyrone Hill was shot and killed in his apartment by Myles Ramzee. In addition to Russman and Ramzee, Kaquwan Milligan, Dennis Edward Boney, and Defendant were also present. Ramzee, Milligan, Boney, Hill and Defendant were all drug dealers; Russman was addicted to crack cocaine and sold drugs supplied by these five men to support her habit.

[3] 373 U.S. 83 (1963).

Although Russman denied any prior knowledge of a plan to kill Hill, she admitted to knowing beforehand that Ramzee, Milligan, Boney, and Defendant intended to rob Hill. She further described how on Saturday, October 25, 1997, the day before the murder, she overheard Ramzee, Milligan, Boney, and Defendant plot to rob Hill of his money and drugs to put him out of business. She also testified that later that day she was paged by Defendant to drive him, Ramzee, and Boney to Hill's apartment, where Milligan was already located, to rob Hill as planned, and how the four of them arrived at the apartment in the early morning hours of October 26, 1997.

According to Russman, once they were inside Hill's apartment, Defendant guarded the entrance to the apartment while Ramzee went into another room, returned shortly thereafter, and, without warning, shot Hill from behind in the back of his head. As Defendant and Ramzee rummaged through Hill's pockets taking drugs, Milligan dragged Russman, who was visibly shaken by what she had witnessed, from the room and ordered her to calm down. When Russman and Milligan returned to the room where Hill had been killed, Boney and Defendant told Russman that if she told anyone about what had happened, her family would be harmed. Throughout the time they were in Hill's apartment, Ramzee, Milligan, Boney, and Defendant were all calm and deliberate; Russman, in contrast, expressed evident stress and disbelief at seeing Hill killed.

All participants, including Russman, were charged with criminal homicide, robbery, criminal conspiracy, and aggravated assault. Ramzee, the shooter, was tried separately before a jury in March of 1999 and convicted of first-degree murder, robbery, conspiracy, and aggravated assault. Defendant, along with Milligan and Boney, was jointly tried before a jury in April of 1999; all three men were convicted of second-degree murder, robbery, 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. Judge Webb, the trial judge, limited counsel's use of the applications for this purpose.

On June 3, 1999, seventeen days after Defendant was sentenced, Russman pled guilty to third-degree murder with the remaining counts to be **nolle prossed** (N.T., 12/10/07, Commonwealth's Exhibit No. 2). On June 28, 1999, she was sentenced to imprisonment in a state correctional facility for a period of not less than five nor more than ten years. In imposing this sentence, Judge Webb recognized, as acknowledged 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 because, although she was present when Hill was killed, she did not plan or expect his death.

DISCUSSION

A. ***Brady*** **Claim**

1) **Timeliness of Appeal**

There exists no constitutional right to collateral review of a criminal proceeding or to the appointment of PCRA counsel. **See Commonwealth v. Haag,** 570 Pa. 289, 809 A.2d 271, 282-84 (2002), **cert. denied,** 539 U.S. 918 (2003).[4] However, when a state provides for such review, the statutory and procedural requirements promulgated by the state, including the limitations imposed on this review, must be complied with. **See id.,** 809 A.2d at 283-84.

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[4] 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. **See** Pa. R.Crim.P. 904(C); **Commonwealth v. White,** 871 A.2d 1291, 1293-94 (Pa. Super. 2005). This right extends throughout the litigation of the first PCRA petition, including appeals. **See Commonwealth v. Brown,** 836 A.2d 997, 998-99 (Pa. Super. 2003) (holding that where a petitioner files an appeal from a first PCRA petition **pro se,** the PCRA court must either instruct counsel of record that he or she remains obligated to represent the petitioner, or appoint new counsel to represent the petitioner on appeal). This procedural right to counsel, in addition, assures the defendant of the right to the effective assistance of counsel. **See Commonwealth v. Haag,** 570 Pa. 289, 809 A.2d 271, 283 (2002), **cert. denied,** 539 U.S. 918 (2003).

With respect to the timing of a petition for collateral relief, 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 judgmen.t 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).

These time limitations are jurisdictional prerequisites to the consideration of the merits of a PCRA petition: "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) (internal quotation marks omitted). Whether Defendant's petition has been timely filed is therefore a jurisdictional threshold to our consideration of the merits of the petition.

In this case, Defendant's sentence became final on September 17, 2001,[5] the date the ninety-day period allowed for appeal to the United States Supreme Court expired. **See** 42 Pa. C.S.A. §9545(b)(3); **Commonwealth v. Lambert,** 765 A.2d 306, 319 (Pa. Super. 2000). Consequently, the one-year period for Defendant to file a timely petition ended on September 17, 2002. The present petition, numerically Defendant's third but legally his second, was filed on February 7, 2007, almost four and a half years beyond this deadline. On its face, the petition is untimely.[6]

To avoid this bar, Defendant argues that his claims fall within the statutory exception for newly-discovered evidence, 42 Pa. C.S.A. §9545(b)(1)(ii).[7] When a defendant claims that he fits within one or more of the three statutory exceptions to the one-year filing

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[5] There is a ninety-day period for seeking appellate review to the Supreme Court of the United States. **See** 28 U.S.C.A. U.S.Sup.Ct. Rule 13 (allowing ninety days to file a petition for certiorari). Because the Supreme Court of Pennsylvania rendered its denial of allocatur on June 19, 2001, Defendant's conviction became final ninety days after that date.

[6] The timeliness requirement is applicable to all PCRA petitions, including second and subsequent ones. **See** 42 Pa. C.S.A. §9545(b)(1); **Commonwealth v. Greer,** 866 A.2d 433, 436 (Pa. Super. 2005); **Commonwealth v. Davis,** 816 A.2d 1129, 1134 (Pa. Super. 2003), **appeal denied,** 839 A.2d 351 (Pa. 2003).

[7] Depending on the reason for delay, statutory authorization to raise a **Brady** violation more than one year after the sentence becomes final can exist under either Section 9545(b)(1)(i) or Section 9545(b)(1)(ii) of the PCRA.

> Although a **Brady** violation may fall within the governmental interference exception, the petitioner must plead and prove the failure to previously raise the claim was the result of interference by government officials, and the information could not have been obtained earlier with the exercise of due diligence. … Section 9545(b)(1)(ii)'s exception requires the facts upon which the **Brady** claim is predicated were not previously known to the petitioner

requirement, the burden is upon him to plead and prove the relevant exception applies. **See Commonwealth v. Sattazahn,** 869 A.2d 529, 533 (Pa. Super. 2005), **appeal denied,** 547 Pa. 742, 690 A.2d 1162 (1997), **cert. denied,** 522 U.S. 895 (1997). The Section 9545(b)(1)(ii) exception requires Defendant to plead and prove that the facts on which his claim is based were in fact unknown to him and that they were also unknowable notwithstanding the exercise of due diligence. Defendant must further file his petition "within 60 days of the date the claim could have been presented." 42 Pa. C.S.A. §9545(b)(2).

Defendant's **Brady** claim is predicated upon the alleged existence of a plea agreement between the Commonwealth and Verna Russman, which Defendant contends was unknown to him and "could not have been ascertained by the exercise of due diligence" as required by 42 Pa. C.S.A. §9545(b)(1)(ii). Specifically, Defendant claims that this evidence first became available to him after he received a copy of Russman's sentencing transcript from his co-defendant, Kaquwan Milligan, on March 4, 2006 (N.T., 12/10/07, pp. 94-95). The PCRA petition Defendant filed on April 28, 2006, was filed within sixty days of this date but was dismissed as premature because Defendant's petition for allowance of appeal of his first PCRA petition was still pending before the Pennsylvania Supreme Court, albeit on a **nunc pro tunc** basis. **See Commonwealth v. Lark,** 560 Pa. 487, 746 A.2d 585, 588 (2000) (when PCRA appeal is pending, subsequent PCRA petition cannot be filed until resolution of review of pending PCRA petition by highest state court in which review is sought, or at expiration of time for seeking such review).

The Supreme Court denied Defendant's petition for discretionary review on January 29, 2007. Within sixty days of this date,

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> and could not have been ascertained through due diligence. … In **Bennett,** we clarified that §9454(b)(1)(ii)'s [sic] exception does not contain the same requirements as a **Brady** claim, noting 'we made clear the exception set forth in subsection (b)(1)(ii) does not require any merits analysis of the underlying claim. Rather, the exception merely requires that the "facts" upon which such a claim is predicated must not have been known to appellant, nor could they have been ascertained by due diligence.' [**Commonwealth v. Bennett,** 593 Pa. 382, 930 A.2d 1264, 1271 (2007).]

Commonwealth v. Abu-Jamal, 596 Pa. 219, 941 A.2d 1263, 1268 (2008) (citations omitted), **petition for cert. filed** (July 18, 2008).

on February 7, 2007, Defendant filed the present PCRA petition which is now under review. This notwithstanding, Defendant has failed to explain why the facts upon which he now relies for his claim that a plea agreement existed between the Commonwealth and Russman could not have been ascertained earlier with the exercise of due diligence. **See id.** (finding that in order for petitioner to meet PCRA filing deadline exception, petitioner must plead and prove that the facts upon which his claim is based could not have been previously discovered with the exercise of due diligence). This omission is critical to Defendant's claim.

In **Commonwealth v. Taylor, infra,** Judge Gantman of the Pennsylvania Superior Court wrote:

> Our Supreme Court has held 'for purposes of 42 Pa.C.S. §9545(b)(1)(ii) information is not "unknown" to a PCRA petitioner when the information was a matter of public record.' … For purposes of the exception to the PCRA's jurisdictional time-bar under Section 9545(b)(1)(ii), a petitioner fails to meet his burden when the facts asserted were merely 'unknown' to him. … A petitioner must also explain why his asserted facts could not have been ascertained earlier with the exercise of due diligence. … The '60-day rule' is strictly enforced.

Commonwealth v. Taylor, 933 A.2d 1035, 1040-41 (Pa. Super. 2007) (citations omitted), **appeal denied,** 951 A.2d 1163 (Pa. 2008); **see also, Commonwealth v. Yarris,** 557 Pa. 12, 731 A.2d 581, 590 (1999) (concluding that the §9545(b)(1)(ii) exception was not met because the petitioner failed to make a sufficient proffer of why it took so long to present his claims, and therefore, did not show that he acted with due diligence, thereby precluding consideration of his untimely claims). Due to the public nature of Russman's sentencing, Defendant has not reasonably explained why, with the exercise of due diligence, he could not have discovered and presented this issue within one year of the date his own judgment of sentence became final, that is, on or before September 17, 2002. Russman's sentencing occurred more than three years prior to this date, was a matter of public record, and was clearly known by Defendant prior to the filing of his amended first PCRA petition on October 15, 2002, for which he was represented by appointed counsel.

2) **Previous Litigation**

Beyond this time-bar to Defendant's claim, in order to state a cognizable claim under the PCRA, a petitioner must plead and prove, **inter alia,** that his conviction or sentence resulted from one or more of the errors or defects listed in 42 Pa. C.S.A. §9543(a)(2), and that the issue he seeks to raise has not been previously litigated or waived, as required by 42 Pa. C.S.A. §9543(a)(3). For purposes of Defendant's pending PCRA petition, "an issue has been previously litigated if: ... (3) it has been raised and decided in a proceeding collaterally attacking the conviction or sentence." 42 Pa. C.S.A. §9544(a). The issue Defendant presents here was previously raised in his first PCRA petition.

In Paragraph 12F(B), pages 7 and 8, of Defendant's **pro se** petition filed on June 5, 2002, Defendant claimed that Verna Russman "got the deal of the century of 5-10 years for her knowing participation in a Murder." Petition, pp. 7-8. After appointment of counsel, the petition was amended, and though it then couched the claim under the guise of prosecutorial misconduct and not, as it does now, as newly-discovered evidence, paragraph 21 of the amended first PCRA petition claimed "[t]he Commonwealth engaged in prosecutorial misconduct by offering the knowingly untrue testimony of Ms. Russman, who testified at trial that she was not offered a deal from the Commonwealth, when, in fact, she struck some type of bargain as a result of the Commonwealth telling her that she would be going to jail, and that she would not see her child if she refused to testify." Amended Petition, ¶21. The reasoning behind this issue, as discussed further below, is the same as that which underlies the rule in **Brady.** The issue was addressed and denied by Judge Webb on page 7 of his Opinion dated October 6, 2003; it was not, however, retained among those which Defendant chose to pursue in his appeal to the Pennsylvania Superior Court and has, on this basis alone, also been waived.[8]

[8] As to counsel's decision to forego this issue on appeal, whether counsel was ineffective in doing so was for self-evident reasons not an issue in his first PCRA petition filed with this Court and has not been included in the issues Defendant seeks to pursue in the instant petition. "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict

3) **Substantive Basis of Claim**

"In order for a defendant to establish the existence of a **Brady** violation, he must establish that there has been a suppression by the prosecution of either exculpatory or impeachment evidence that was favorable to the accused, and that the omission of such evidence prejudiced the defendant." **Commonwealth v. Collins,** 585 Pa. 45, 888 A.2d 564, 577-78 (2005). In the PCRA context, this violation must have "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place," which standard is "equivalent to the prejudice requirement applied on ineffectiveness claims raised on direct appeal." **Commonwealth v. Liebel,** 573 Pa. 375, 825 A.2d 630, 636 n.11 (2003); 42 Pa. C.S.A. §9543(a)(2)(i). Accordingly, Defendant must prove

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rendered suspect." **Commonwealth v. Collins,** 585 Pa. 45, 888 A.2d 564, 572 (2005) (**quoting Kimmelman v. Morrison,** 477 U.S. 365, 374-75 (1986)).

Moreover, it is by no means clear that Defendant could pursue such a claim even if he had chosen to do so. In **Collins,** the Pennsylvania Supreme Court determined that a PCRA claim challenging counsel's effectiveness at the trial level or on direct appeal is qualitatively and analytically a discrete legal ground from the underlying issue with respect to which counsel is claimed to have been ineffective. An ineffectiveness claim is not tantamount to relitigating the underlying issue under a different theory, a practice barred by the "previous litigation" doctrine as defined by 42 Pa. C.S.A. §§9543(a)(3) and 9544(a). Because of the constitutional guarantee of counsel at the trial level (**i.e.,** the Sixth Amendment right to the effective assistance of counsel in the United States Constitution and the corresponding right appearing in Article I, Section 9 and Article V, Section 9 of the Pennsylvania Constitution), the decision in **Collins** was expressly restricted to ineffectiveness claims in the context of underlying issues which were raised, or which could have been raised, on direct appeal and did not include issues raised on collateral review as defined by 42 Pa. C.S.A. §9544(a)(3). **Collins, supra,** 888 A.2d at 570 n.5. In sum, **Collins** held that "ineffectiveness claims are distinct from those claims that are raised on direct appeal." **Id.** at 573.

Additionally, in those cases where a claim of ineffectiveness of counsel is the proper subject of collateral review, the petitioner must satisfy the three-prong ineffectiveness standard adopted by the Pennsylvania Supreme Court: "that the claim has arguable merit, that counsel had no reasonable basis for his action or omission, and that the defendant was prejudiced by counsel's conduct." **Id.** at 571 n.7. For this reason, where the underlying issues have in fact been previously litigated and decided on direct appeal, a claim of ineffectiveness based on such underlying issues will, for the most part, fail "for the same reasons as they failed on direct appeal." **Id.** at 574-75. In the present case, in addition to Judge Webb's denial of the claim as presented in Defendant's first PCRA petition, for the reasons discussed in the succeeding text, we believe Defendant's **Brady** claim is without merit.

that had the evidence in issue been produced, a reasonable probability exists that the result of the trial would have been different. **See Commonwealth v. Strong,** 563 Pa. 455, 761 A.2d 1167, 1171 (2000). Additionally, "no **Brady** violation occurs where the parties had equal access to the information or if the defendant knew or could have uncovered such evidence with reasonable diligence." **Collins, supra,** 888 A.2d at 578.

(a) **Existence of violation**

Brady as interpreted and extended by the United States Supreme Court requires the Commonwealth to disclose all exculpatory information material to the guilt or punishment of an accused even in the absence of a specific request. **See Strong, supra,** 761 A.2d at 1171 n.5. In addition to evidence which directly impacts upon the guilt or innocence of a defendant, "[e]xculpatory evidence also includes evidence of an impeachment nature that is material to the case against the accused." **Id.** at 1171. "[I]mpeachment evidence is material, and thus subject to obligatory disclosure, if there is a reasonable probability that had it been disclosed the outcome of the proceedings would have been different." **Id.** at 1174. "Impeachment evidence which goes to the credibility of a primary witness against the accused is critical evidence and it is material to the case whether that evidence is merely a promise or an understanding between the prosecution and witness." **Id.** at 1175. "Any implication, promise, or understanding that the government would extend leniency in exchange for a witness' testimony is relevant to the witness' credibility." **Id.** at 1171.

Brady is founded on the underlying principle that it is fundamentally unfair and a violation of due process for the Commonwealth to secure a conviction on information which it knows is false or which the fact-finder is prevented from fully evaluating because of material evidence suppressed by the Commonwealth. **See United States v. Giglio,** 405 U.S. 150, 153-54 (1972). "Where evidence material to the guilt or punishment of the accused is withheld [by the Commonwealth], irrespective of the good or bad faith of the prosecutor, a violation of due process has occurred." **Strong, supra,** 761 A.2d at 1171. To avoid this consequence, the Commonwealth must disclose concrete exculpatory evidence of which it is aware, including any promises, representations, or as-

surances of leniency extended by the Commonwealth in exchange for a witness' testimony.

However, where the Commonwealth has done nothing to encourage or solicit a witness' cooperation, the witness' assumption that cooperation will buy consideration, does not by itself create an obligation on the Commonwealth to disclose this belief. A witness' unilateral expectation of leniency in return for cooperation is not the equivalent of a promise, assurance, or understanding joined in by the Commonwealth. Such subjective "impressions" or "expectations" do not impose a duty on the Commonwealth to disclose what is in the witness' mind and what is equally ascertainable by the defense. **See Commonwealth v. Burkhardt,** 833 A.2d 233, 242-43 (Pa. Super. 2003) **(en banc), appeal denied,** 847 A.2d 1277 (Pa. 2004). Moreover,

> for a District Attorney to indicate that truthful testimony and cooperation would be considered in future proceedings falls far short of any promise of leniency and represents nothing more than the type of general response that D.A.'s have been uttering for decades. It is the kind of general promise of which effective defense counsel is aware and for which counsel would examine a prosecution witness as a matter of course. We decline to ... mandate that the Commonwealth has the burden of affirmatively disclosing such a generic statement absent a request from a defendant for such a disclosure. Moreover, a defendant's subjective hope and even expectation of more lenient treatment is not something the Commonwealth is required, or even able, to disclose. * * * The Commonwealth may not be charged with knowledge of what is hidden in the defendant's mind. Due process has not been violated.

Id. at 243-44; **cf. Strong, supra,** 761 A.2d at 1176 (holding that the Commonwealth's assurances to the defense that truthful cooperation "would get consideration" and "fair treatment" expressed an understanding which implicated the due process protections of **Brady**).

In this case, Russman confessed and incriminated herself before she had counsel. Why she did so may have been a matter of conscience, as suggested by counsel at the time of her sentencing, an attempt to curry favor in subsequent criminal proceedings

which she believed were inevitable, or for any number of other reasons which we may never know. Regardless, once counsel was obtained, counsel concluded that Russman's confession could not be suppressed and determined that the best course of action was for Russman to continue her cooperation and, if possible, negotiate a plea agreement with the Commonwealth. With this objective in mind, Russman's counsel repeatedly attempted to obtain some concession from the Commonwealth. The Commonwealth consistently rebuffed these efforts and made no promises, representations, or assurances to Russman for either her favorable testimony, her assistance, or her cooperation.

Defendant's belief that some agreement or understanding existed between Russman and the Commonwealth is predicated, almost entirely, on the fact that on June 3, 1999, approximately two weeks after Defendant was sentenced, Russman entered a plea to third-degree murder and later received a sentence within the mitigated range as recommended by the Commonwealth. In doing so, Defendant asks us to ignore the legitimate reasons for mitigation presented during those same sentencing proceedings and accepted as credible by the Court.

At the time of Russman's sentencing, both the Court and the Commonwealth observed that Russman was the least culpable of all the defendants, that in the absence of her coming forward and revealing to the police what had happened there may never have been a prosecution, and that without her testimony there may never have been a conviction. At the same time, the Commonwealth represented to the Court that Russman's cooperation was unconditional, that no plea agreement or deal preceded her testimony, and that, in effect, she placed herself at the mercy of the Commonwealth (N.T., 06/28/99 (Russman's Sentencing Transcript), p. 15).

Defendant's contention that some agreement or understanding existed between Russman and the Commonwealth is pure conjecture. **See Commonwealth v. Jackson,** 947 A.2d 1260, 1267 (Pa. Super. 2008) (holding mere conjecture that the Commonwealth had a specific, undisclosed deal with a witness during or prior to the defendant's case is insufficient to prove a **Brady** violation) (**citing Commonwealth v. Champney,** 574 Pa. 435, 832 A.2d 403

(2003)). In contrast to this speculation is Russman's own testimony at the time of trial that no agreement existed (N.T., 04/15/99, pp. 250, 302), the testimony of both of Russman's trial counsel at the PCRA hearing that no agreement existed (N.T., 12/10/07, pp. 29, 43-44, 53, 55-56, 67, 82-83), and the testimony of the prosecuting District Attorney that no agreement existed (N.T., 06/09/06, pp. 89-92, 101). With this evidence before us, we find that no agreement or arrangement—final, tentative, or tacit—existed for Russman to cooperate with the Commonwealth in exchange for any leniency.

(b) **Materiality**

Even were we to find that the Commonwealth had a practice of recommending favorable treatment to helpful co-defendants, or that the Commonwealth had every reason to suspect that Russman was cooperating with the expectation, albeit open-ended, that she would be rewarded with leniency for her cooperation, and that there therefore existed an implicit or veiled agreement cognizable under **Brady** and imposing a duty to disclose,[9] our inquiry would not end there. It is also incumbent upon Defendant to establish that the Commonwealth's failure to disclose this information was material to his conviction before he is entitled to any relief. In other words, Defendant must further show that had the information been disclosed, a reasonable probability exists that the outcome of Defendant's trial would have been different. **See Strong, supra,** 761 A.2d at 1171.

At trial, Russman was cross-examined about her reasons for cooperating and about any deal she may have had with the Commonwealth. She denied that any deal existed and indicated that she was acting out of self-interest, and that she "hoped" she would be more leniently treated because of her cooperation (N.T., 4/15/99, p. 334). Since, at best, this is the only "understanding" which existed, the jury was not misled as to what Russman hoped to obtain by

[9] The basis for this finding, presumably, would be Russman's counsels' testimony that having been rebuffed in their attempts to secure some agreement with the Commonwealth, they nevertheless believed that continued cooperation was in Russman's best interest because, in the past, when their clients cooperated and testified truthfully, the Commonwealth responded favorably (N.T., 12/10/07, pp. 30, 50, 77-78, 80). To our knowledge, no court has ever extended **Brady** this far and we decline to do so. **Cf. Commonwealth v. Burkhardt,** 833 A.2d 233, 243-44 (Pa. Super. 2003) **(en banc), appeal denied,** 847 A.2d 1277 (Pa. 2004).

her testimony; all of the information on which Russman based her expectations and which can be attributed to the Commonwealth was presented to the jury. No other agreements or arrangements existed. Consequently, there is no basis to believe that Russman's testimony was incomplete or that "there is a reasonable probability that ... the result of the proceeding would have been different" had the jury heard further evidence on this issue. **United States v. Bagley,** 473 U.S. 667, 682 (1985).[10]

B. **Request for Reinstatement of Defendant's PCRA Appellate Rights**

As for Defendant's request to reinstate his right to file a petition for allowance of appeal from the Superior Court's denial of his first PCRA petition, we agree that the conduct of his PCRA counsel at the time caused him to lose this right by not timely notifying him of the Superior Court's March 17, 2005 decision denying his petition. Further, Defendant was entitled in these collateral proceedings to the effective assistance of his appointed counsel. **See** Pa. R.Crim.P. 904(F)(2) (providing that "the appointment of counsel shall be effective throughout the post-conviction collateral proceedings, including any appeal from disposition of the petition for post-conviction collateral relief"); **cf. Liebel, supra,** 825 A.2d at 633-34 (finding a rule-based right to effective assistance of counsel through and including a petition for allowance of appeal on direct appeal notwithstanding the absence of a federal constitutional right to counsel on a petition for discretionary review). Among the duties of competent counsel is the duty "to adequately consult with

[10] Because Defendant's pending petition is being treated as his second for PCRA purposes, Defendant must also meet the requirements of **Commonwealth v. Lawson,** 519 Pa. 504, 513, 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. **See id.** 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. **See Burkhardt, supra,** 833 A.2d at 236. Whether a subsequent petition satisfies the **Lawson** standard must separately be decided before a PCRA court can entertain the merits of the petition. **See e.g., Commonwealth v. Allen,** 557 Pa. 135, 732 A.2d 582, 590 (1999). Because Defendant has not proven the existence of a fundamental miscarriage of justice, the dismissal of Defendant's assertion of a **Brady** violation on this additional basis is equally justified.

the defendant as to the advantages and disadvantages of an appeal where there is reason to think that a defendant would want to appeal." **Commonwealth v. Bath,** 907 A.2d 619, 623 (Pa. Super. 2006), **appeal denied,** 591 Pa. 694, 918 A.2d 741 (2007).

In **Commonwealth v. Lantzy,** 558 Pa. 214, 736 A.2d 564 (1999) and in **Liebel, supra,** 825 A.2d 630, because counsel's actions, respectively, deprived the defendants from raising any issues on direct appeal and from seeking any discretionary review of such issues by the Pennsylvania Supreme Court, the defendants involved suffered a complete denial of counsel vis-à-vis their rights on direct appeal. Under such circumstances, when counsel has completely abandoned a defendant concerning the exercise of his rights on direct appeal, prejudice is presumed. Here, however, Defendant's claim of ineffectiveness centers on counsel's failure to notify him of the Superior Court's decision in collateral proceedings and to consult with him regarding his right to seek review of that decision before the Pennsylvania Supreme Court.[11] In this context, ineffective assistance of counsel is not presumed and the burden is upon the petitioner to establish each of the following: (1) that the underlying claim is of arguable merit, (2) that counsel's conduct lacked any reasonable basis, and (3) that counsel's ineffectiveness prejudiced the petitioner. **See Commonwealth v. Jones,** 951 A.2d 294, 302 (Pa. 2008). The failure to satisfy any prong of this test will cause the entire claim to fail. **See id.**

As to these criteria, while Defendant is not required to establish the impossible, that the Supreme Court would have granted a request for allowance of appeal, he is, at a minimum, required to establish a duty to consult by indicating that the issues he seeks to have reviewed are meritorious and not frivolous. **See Bath, supra,** 907 A.2d at 623 (finding defendant failed to meet the prejudice prong of the test for ineffective assistance of counsel due

[11] Because this claim of counsel's ineffectiveness was initially presented to the Pennsylvania Supreme Court by Defendant within sixty days of when he first learned of the Superior Court's denial of his PCRA appeal and of his counsel's failure to seek review of that decision, which claim was denied by the Supreme Court without prejudice to Defendant's filing a claim under the PCRA, and because Defendant filed his instant PCRA petition within sixty days of the Supreme Court's denial of his petition for allowance of appeal **nunc pro tunc,** we find Defendant's petition as to this issue to be timely.

to counsel's failure to consult because defendant did not advance any issue raised upon direct appeal that would rise above mere frivolity upon further review). In these proceedings, Defendant has made no attempt to identify which issues he believes would not be considered frivolous upon further review, much less why. In consequence, Defendant has not met his burden of showing how he was prejudiced by counsel's failure to consult with him regarding his right to file a petition for allowance of appeal to the Pennsylvania Supreme Court. Nor is it incumbent upon us to independently conduct a PCRA analysis as to the merits of each of the issues Defendant might have raised had a timely petition for allowance of appeal been filed. In the absence of a showing of prejudice, Defendant's claim of counsel's ineffectiveness must fail and no relief in the form of a reinstatement of his right to file a petition for allowance of appeal **nunc pro tunc** is due.

CONCLUSION

In accordance with the foregoing, we conclude that Defendant's claim of a **Brady** violation is without merit for the reasons stated and is therefore dismissed. We further conclude that by failing to establish the potential merit for further review of any issues raised before the Superior Court on his first PCRA petition, Defendant has failed to establish a duty of counsel to affirmatively consult with him about the viability of seeking such review. We therefore deny his request for leave to file a petition for allowance of appeal with the Pennsylvania Supreme Court **nunc pro tunc.** We further note that not once has Defendant asserted his innocence of the crimes charged; he seeks only to negate the consequences of his convictions. As such, there has been no injustice sufficient to warrant the granting of any relief.

ORDER OF COURT

AND NOW, this 30 day of September, 2008, upon consideration of Defendant Cetewayo Frails' Petition for Post-Conviction Relief filed on February 7, 2007, as amended, and in accordance with our Memorandum Opinion of this same date, it is hereby

ORDERED and DECREED that the Petition is dismissed in part and denied in part as follows:

a) Petitioner's claim for relief pursuant to a **Brady** violation is hereby DISMISSED.

b) Petitioner's request to reinstate his right to petition the Pennsylvania Supreme Court for allowance of appeal of the denial by the Pennsylvania Superior Court of his first PCRA is DENIED.

Notice to Petitioner

1. You have the right to appeal to the Pennsylvania Superior Court from this Order dismissing and denying 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, you may also "proceed **pro se,** or by privately retained counsel, or not at all." **Commonwealth v. Turner,** 518 Pa. 491, 495, 544 A.2d 927, 929 (1988).

WAYNE A. SCHAUB, Plaintiff vs.
TRAINER'S INN, INC., Defendant

*Civil Law—Liquor License Liability—Service to a Minor or a Physically Intoxicated Patron—Negligence **Per Se**—Causation (Actual and Proximate Cause)—Effect of Plaintiff's Conviction of a Specific Intent Crime—Damages—No-Felony Conviction Recovery Rule—Collateral Consequences of a Plaintiff's Criminal Conviction*

1. A **prima facie** case of negligence requires proof of four elements: (1) a duty or obligation recognized at law; (2) breach of that duty by the defendant; (3) a causal connection between the defendant's breach of that duty and the resulting injury; and (4) actual loss or damage suffered by the claimant.

2. The Liquor Code imposes a duty on a liquor licensee not to sell or furnish any liquor, or malt or brewed beverages, to any minor or to any person who is visibly intoxicated. A breach of this duty constitutes negligence **per se.**

3. Relation-back testimony alone is insufficient to establish a patron's visible intoxication at the time of service. However, when combined with other independent evidence of visible intoxication, evidence of a person's blood alcohol content will support an inference that the person was visibly intoxicated at the time of service.

4. To establish causation, a claimant must show that the defendant's conduct is both the proximate and actual cause of an injury. The test for factual causation is the "but for" test. The test for proximate causation is whether the defendant's conduct was a "substantial factor" in bringing about the claimant's harm.

5. Proximate cause is a question of law. For proximate causation to exist, the risk created by the defendant's conduct must have been a foreseeable cause of the claimant's harm and must be found sufficiently significant for legal responsibility or culpability to attach.

6. A plaintiff's own conduct, for which he has been convicted of a specific intent felony offense and for which he seeks to hold the defendant responsible, serves to break the chain of proximate causation notwithstanding that defendant's conduct may have played a role leading to plaintiff's imprisonment.

7. Under the "no felony conviction recovery rule," as a matter of public policy, a plaintiff who has been convicted of a felony offense is barred from recovering civil damages for the collateral consequences of his criminal conviction, including imprisonment.

8. Civil liability does not exist against a liquor licensee for the criminal or violent acts of its patrons against third parties which occur off premises where the damages sought are claimed by the patron for his conduct which results in the intentional killing of another.

NO. 06-2257

JOSHUA D. FULMER, Esquire—Counsel for Plaintiff.

MARK T. SHERIDAN, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—February 17, 2009

By Order dated February 5, 2009, we granted Defendant's Motion for Summary Judgment. This Opinion explains the basis for that decision.

FACTUAL BACKGROUND

On July 14, 2004, at approximately 11:11 P.M., Henry Kibler, Jr. ("Decedent") was fatally injured when he was struck multiple times with a baseball bat wielded by the Plaintiff, Wayne A. Schaub. According to Schaub, the Decedent was attacking him, acting under the apparent belief that Schaub had done something to harm the Decedent's son. Schaub described his encounter with the Decedent as beginning while he was sitting on the tailgate of a pickup truck parked on the side of an alleyway drinking beer with his friends when the Decedent drove by, stopped, got out, took off his belt, and approached Schaub, swinging his belt above his head, the buckle at the furthest end, and yelling, "You are the punk that did it." Schaub claims that he never met the Decedent before and did not know what he was talking about.

As the Decedent came closer, one of Schaub's friends handed him a baseball bat. The Decedent was undeterred. Instead, he

continued to move forward as Schaub stepped back, closing the gap between them, all the time swinging his belt, and then landing a blow to Schaub's forearm. The impact was solid, painful, and tore into Schaub's muscle. At this point, Schaub struck the Decedent with the bat in the area of his left elbow hoping to get the Decedent to back down. When hit, the Decedent appears to have hesitated and then kept coming; only now Schaub held his ground.

Although Schaub claims not to remember hitting the Decedent any further, it is clear he did so: the autopsy which followed evidenced that Decedent was also struck in the chest and at least once in the head. There is no dispute that the injuries inflicted by Schaub caused the Decedent's death or that the cause of death was blunt force trauma to the head. On May 13, 2005, Schaub pled guilty to voluntary manslaughter[1] and was sentenced to not less than five and a half nor more than eleven years in a state correctional facility.

In these proceedings, Schaub contends that the Defendant, Trainer's Inn, Inc., should be held responsible for his conduct and is civilly liable to him in damages for the effect this incident has had on his life. Schaub was at Trainer's earlier on July 14, 2004, where he drank heavily with a group of friends. Although the exact times are in dispute, when stated in the light most favorable to Schaub, he arrived at Trainer's at approximately 5:30 P.M. and likely left

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[1] 18 Pa.C.S.A. §2503. This section in its entirety reads as follows:

§2503. Voluntary manslaughter

(a) General rule.—A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:

(1) the individual killed; or

(2) another whom the actor endeavors to kill, but he negligently or accidentally causes the death of the individual killed.

(b) Unreasonable belief killing justifiable.—A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify the killing under Chapter 5 of this title, but his belief is unreasonable.

(c) Grading.—Voluntary manslaughter is a felony of the first degree.

Schaub pled guilty pursuant to Section 2503(a)(1).

sometime between 7:30 and 8:00 P.M. While at Trainer's, according to Schaub's count, he was served and consumed eleven drinks of Jack Daniels and Coke, five drinks containing Bacardi Rum and at least one drink containing Goldschlager, an alcoholic beverage. Again, according to Schaub, he was served alcoholic beverages even though he was visibly intoxicated and notwithstanding that he was twenty years old, a fact which he asserts was known by the bartender. Between the time Schaub left Trainer's and the time of his clash with the Decedent, roughly three hours, Schaub consumed between five and six beers.[2]

On February 9, 2007, Schaub filed a four-count complaint alleging negligence generally (Count 1), negligence **per se** for being served alcohol while visibly intoxicated and underage (Count 2), negligent supervision by Trainer's of its employees (Count 3), and punitive damages (Count 4). Each count of negligence focuses on the same common factual predicate: that Trainer's and its employees owed a duty not to sell or serve alcoholic beverages to either a minor or a visibly intoxicated person, that this duty was breached since Schaub was both visibly intoxicated and a minor at the time he was served alcohol, and that the damages he sustained were proximately caused by Trainer's conduct.

By Order dated August 28, 2008, this case was set for trial to commence on February 9, 2009, with leave on each party to file a motion for summary judgment on or before November 1, 2008. On November 3, 2008, Trainer's filed a motion for summary judgment asking that judgment be entered in its favor on both Schaub's claims and those raised by the Estate of Henry Kibler, Jr. in a separate action consolidated for purposes of trial with these proceedings. In this motion, Trainer's contends that there is no issue of material fact and that it is entitled to judgment as a matter of law.

DISCUSSION

Schaub claims that Trainer's conduct set in motion an uninterrupted chain of events which culminated in the Decedent's death, that given the extent and conspicuousness of his intoxication he

[2] The Decedent was fifty-five years old at the time of his death. There is no evidence that the Decedent was under the influence of drugs or alcohol when the confrontation with Schaub occurred.

was a clear danger to himself and others, and that the violence he exhibited was a result of his intoxication and his consequent loss of judgment and inhibitions. In response, Trainer's argues that any link between its conduct and the Decedent's death was broken by Schaub's criminal actions and that, in an offshoot to the issue of proximate cause, the civil law does not permit an award of compensatory damages consequent to a criminal sentence. Distilled to its essence, the question presented is whether Dram Shop liability exists against a liquor licensee for the criminal or violent acts of its patrons against third parties which occur off premises, where the damages sought are those clamed by the patron.

The elements of a cause of action for negligence are well known and not in dispute. A **prima facie** case of negligence requires a plaintiff to prove four elements: (1) a duty or obligation recognized at law; (2) breach of that duty by the defendant; (3) a causal connection between the defendant's breach of that duty and the resulting injury; and (4) actual loss or damage suffered by the complainant. **See Reilly v. Tiergarten Inc.,** 430 Pa. Super. 10, 14, 633 A.2d 208, 210 (1993), **appeal denied,** 538 Pa. 673, 649 A.2d 675 (1994).

Duty

Preliminarily, we agree with Schaub that sufficient evidence exists to support the first two elements of a **prima facie** cause of action. The Liquor Code imposes a duty on a licensee not to sell or furnish any liquor, or malt or brewed beverages, to any minor or to any person who is visibly intoxicated. 47 P.S. §4-493(1).[3] There is no dispute that Trainer's was licensed to serve alcoholic beverages and that Schaub was a minor within the meaning of the Liquor Code on July 14, 2004.[4] While Trainer's disputes that the evidence supports a finding that Schaub was visibly intoxicated, we disagree.

The proscription of serving a visibly intoxicated person under the Dram Shop Act applies to that point in time at which the person

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[3] Section 4-493 of the Liquor Code makes it unlawful "[f]or any licensee ... or any employee, servant or agent of such licensee ... to sell, furnish or give any liquor or malt or brewed beverages, or to permit any liquor or malt or brewed beverages to be sold, furnished or given, to any person visibly intoxicated, or to any minor ... ." 47 P.S. §4-493(1).

[4] Under the Liquor Code, a minor is any person less than twenty-one years of age. 1 Pa. C.S. §1991 (defining "minor").

is served alcoholic beverages. "Even if a patron is intoxicated at the time he or she is injured or causes injury to another, the tavern keeper who served the alcoholic beverages to the patron will not be held civilly liable unless the patron was served at a time when he or she was visibly intoxicated." **Holpp v. Fez, Inc.,** 440 Pa. Super. 512, 517, 656 A.2d 147, 149 (1995). By stressing what can be seen, **"[t]he practical effect of the law is to insist that the licensee be governed by appearances, rather than by medical diagnoses." Johnson v. Harris,** 419 Pa. Super. 541, 615 A.2d 771, 776 (1992) (emphasis in original).

Trainer's is correct that the record does not disclose direct eyewitness testimony of Schaub's visible intoxication at the time he was served alcoholic beverages on its premises. Trainer's is also correct that expert testimony concerning the **probable** blood alcohol content of a patron at the time of service together with the expected effect of this alcohol concentration on the **average** person is insufficient by itself to create a genuine issue of fact concerning visible intoxication. **See id.** Nevertheless, when used in conjunction with other independent evidence of visible intoxication, evidence of a person's blood alcohol content will support an inference that the person was visibly intoxicated at the time of service. **See Hinebaugh v. Pennsylvania Snowseekers Snowmobile Club,** 63 D. & C. 4th 140, 148 (Lawrence Cty. 2003); **Estate of Mickens v. Stevenson,** 57 D. & C. 4th 287, 298 (Fayette Cty. 2002). Here, in addition to Schaub's proffered expert testimony that his blood alcohol content was .28 percent or greater by the time he left Trainer's and that he would have exhibited obvious signs of visible intoxication while being served alcoholic beverages, the receipt Schaub received from Trainer's, time stamped 7:06 P.M., for the drinks he was billed; the fact that Schaub became boisterous, was disturbing other guests, and failed to quiet down after being told to do so, prompting the bartender to refuse to serve him further because she felt Schaub had had enough and to ask him to leave; and Schaub's own testimony that he was drunk; independently evidence the number and type of drinks consumed by Schaub, the time of his last drink, and visible effects of intoxication which, when combined with the proffered toxicology testimony, is sufficient to raise an issue of fact for the jury.

Breach

"A violation of the Dram Shop Act is negligence **per se.**" **Miller v. The Brass Rail Tavern, Inc.,** 702 A.2d 1072, 1078 (Pa. Super. 1997) (footnote omitted). The source of liability to a licensee for serving a visibly intoxicated customer, who is himself the injured party seeking recovery, is Section 4-493(1). **See Hiles v. Brandywine Club,** 443 Pa. Super. 462, 468 n.3, 662 A.2d 16, 19 n.3 (1995), **appeal denied,** 544 Pa. 631, 675 A.2d 1249 (1996); **see also, Holpp, supra** at 517, 656 A.2d at 149; **Baker v. Township of Mt. Lebanon,** 98 Pa. Commw. 422, 424, 512 A.2d 71, 71-72 (1986); **cf. Detwiler v. Brumbaugh,** 441 Pa. Super. 110, 114, 656 A.2d 944, 946 (1995) (holding that Section 4-497 of the Liquor Code is a shield which restricts the liability of a licensee to third parties for damages caused off premises by a customer, to those customers who were visibly intoxicated when served alcoholic beverages; this section does not create a cause of action). In the case of a minor who has been served alcohol and is later injured and files suit, liability against the licensee arises under both Section 4-493(1) and the Crimes Code. **See Matthews v. Konieczny,** 515 Pa. 106, 111, 527 A.2d 508, 511 (1987); **Reilly, supra** at 14, 633 A.2d at 210.[5]

Causation

"[T]he breach of a statutory duty does not establish a cause of action in negligence, absent proof of causation and injury." **Reilly, supra** at 15, 633 A.2d at 210. In the instant case, Schaub must show that the harm he sustained was caused either because Trainer's provided him with alcohol when he was visibly intoxicated or because he was a minor at the time the alcohol was provided. **See Holpp, supra** at 517-18, 656 A.2d at 149-50. To satisfy this requirement, Schaub "must demonstrate that the breach was both

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[5] In **Congini by Congini v. Portersville Valve Co.,** 504 Pa. 157, 162-63, 470 A.2d 515, 518 (1983), the Pennsylvania Supreme Court held that serving alcohol to a minor to the point of intoxication is negligence **per se,** being a violation of Section 6308 of the Crimes Code, 18 Pa. C.S.A. §6308, and that the person furnishing the alcohol can be held liable for injuries proximately resulting from the minor's intoxication. **See also, Matthews v. Konieczny,** 515 Pa. 106, 113-14, 527 A.2d 508, 513-14 (1987) (holding visible intoxication is not a prerequisite for liability when service is to a minor).

the proximate cause and the actual cause of his injury." **Reilly, supra** at 15, 633 A.2d at 210. These two aspects of causation are separate and distinct concepts, both of which must be proven for liability to exist.

(1) Factual Cause

Whether a defendant's conduct is the cause in fact or actual cause of a plaintiff's harm is often determined by the "but for" test.[6] This test requires the plaintiff to establish that "but for" the defendant's negligent conduct, he would not have sustained an injury. **See First v. Zem Zem Temple,** 454 Pa. Super. 548, 553 n.2, 686 A.2d

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[6] This test, however, is not infallible. In its strictest sense, the "but for" test requires a definitive determination that the defendant's negligence was an absolute prerequisite to what happened. Consequently, "where causation is a significant issue because of the concurrent negligence of more than one actor, the 'but for' test is inaccurate since both actors may be responsible even though the accident would have occurred in the absence of the acts of either one of them." **Takach v. B. M. Root Co.,** 279 Pa. Super. 167, 172, 420 A.2d 1084, 1087 (1980). In contrast, by accepting that the defendant's negligence need only be a significant contributing factor, not always an indispensable one, to the harm which results, the "substantial factor" test permits a finding of liability under the same circumstances. **See e.g.,** Restatement (Second) of Torts §432(2); Pa. S.S.J.I. (Civ.) 3.17 (Concurring Causes—Either Alone Sufficient). For purposes of the "substantial factor" test, "a cause can be found to be substantial so long as it is significant or recognizable; it need not be quantified as considerable or large." **Jeter v. Owens-Corning Fiberglas Corp.,** 716 A.2d 633, 636-37 (Pa. Super. 1998) ("In essence, as recognized in the cases, 'substantial' in the 'substantial factor' test means 'significant'.").

The current version of the Pennsylvania Suggested Standard Civil Jury Instructions uses the term "factual cause" in explaining the element of causation to a jury. **See** Pa. S.S.J.I. (Civ.) 3.15 (Factual Cause) and 3.16 (Concurring Causes). This use merges the interplay of "but for" causation with what is a "substantial factor" in bringing about an injury. **See** Subcommittee Note, Pa. S.S.J.I. (Civ.) 3.15 (stating that the terms "factual cause", "substantial factor", and "legal cause" are conceptually interchangeable); **see also, Gorman v. Costello,** 929 A.2d 1208, 1212-13 (Pa. Super. 2007) (finding the court's failure to provide a complete definition of factual cause to the jury amounted to a fundamental error requiring a new trial). As perceived by the Pennsylvania Superior Court in **Takach,** "the 'but for' standard is only one element of the 'substantial factor' standard. First it must be proved that **but for** the negligence, the harm would not have occurred, and then it must be proved that in addition, the negligence was a **substantial factor** in bringing about the harm." **Id.** at 171, 420 A.2d at 1087 (emphasis in original). This latter determination "involves the making of a judgment as to whether the defendant's conduct although a cause in the 'but for' sense is so insignificant that no ordinary mind would think of it as a cause for which a defendant should be held responsible." **Ford v. Jeffries,** 474 Pa. 588, 595, 379 A.2d 111, 114 (1977).

18, 21 n.2 (1996), **appeal denied,** 700 A.2d 441 (Pa. 1997). If this standard is met, then a direct factually-based causal connection exists between the defendant's negligence and the plaintiff's injury. If plaintiff's injury would have occurred notwithstanding defendant's negligent conduct, then defendant cannot be held responsible for the injury. **See Jeter v. Owens-Corning Fiberglas Corp.,** 716 A.2d 633, 637 (Pa. Super. 1998).

Under this test, Schaub must establish that an actual causal connection exists between Trainer's act in serving him alcohol and his injury. As a matter of law, we cannot say that violent behavior is not a foreseeable or predictable consequence of underage drinking, or that Schaub's behavior at the time he injured the Decedent was not caused, at least in part, because of the alcohol he was furnished at Trainer's. Schaub claims he does not have a violent disposition and that his behavior on July 14, 2004, was out of character because of his intoxication. We accept, therefore, for purposes of Trainer's motion, that its conduct was a contributing and factual cause of the harm which Schaub claims.

(2) Proximate Cause

In contrast, legal causation requires an evaluation not only of the foreseeability of consequences but also whether, as a matter of law, legal responsibility should attach to such consequences.[7] Whereas the question of negligence (**i.e.,** duty and breach) centers on whether the defendant's conduct unreasonably risked harm to someone or something, the question of proximate cause centers on whether the harm caused to the specific plaintiff in the case was a foreseeable result of the risk which makes the defendant's conduct unreasonable. **See Berry v. The Borough of Sugar Notch,** 191 Pa. 345, 43 A. 240 (1899) (holding that the risk which makes exceeding the speed limit negligent, was not the cause of plaintiff's harm which occurred when a tree fell on a speeding trolley in which

[7] The Restatement (Second) of Torts §431(a) (1965) defines "Legal Cause" as follows:

> §431. What Constitutes Legal Cause
>
> The actor's negligent conduct is a legal cause of harm to another if
>
> (a) his conduct is a substantial factor in bringing about the harm, and
>
> (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.

plaintiff was the driver, even though the trolley would not have been at that precise point had it not been speeding). "Proximate cause, is a question of law, to be determined by the judge, and it must be established before the question of actual cause may be put to the jury." **Reilly, supra** at 15, 633 A.2d at 210.[8]

The test for proximate causation is whether the defendant's acts or omissions were a "substantial factor" in bringing about the plaintiff's harm. **See Brown v. Philadelphia College of Osteopathic Medicine,** 760 A.2d 863, 869 (Pa. Super. 2000), **appeal denied,** 781 A.2d 137 (Pa. 2001).

> The following considerations are in themselves or in combination with one another important in determining whether the actor's conduct is a substantial factor in bringing [about] harm to another:
>
> (a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;
>
> (b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible; [and]
>
> (c) lapse of time.

Restatement (Second) of Torts, §433 (1965); **Brown, supra,** 760 A.2d at 869.

Whether a factor is a "substantial" factor involves practical consideration of whether the cause is a real cause to which legal responsibility or culpability should be imputed. **See** Restatement (Second) Torts §431 cmt. a (1965). Reasoning and judgment, in addition to the physical consequences of conduct, play an important

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[8] "While actual and proximate causation are 'often hopelessly confused', a finding of proximate cause turns upon: whether the policy of the law will extend the responsibility for the [negligent] conduct to the consequences which have in fact occurred. ... The term 'proximate cause' is applied by the courts to those more or less undefined considerations which limit liability even where the fact of causation is clearly established." **Brown v. Philadelphia College of Osteopathic Medicine,** 760 A.2d 863, 868 (Pa. Super. 2000), **appeal denied,** 781 A.2d 137 (Pa. 2001).

part in determining whether any specific act is a substantial factor. Under this test, plaintiff must establish that the nexus between the wrongful acts (or omissions) and the injury sustained is of such a nature that it is socially and economically desirable to hold the wrongdoer liable. "Proximate cause is a term of art denoting the point at which legal responsibility attaches for the harm to another arising out of some act of defendant." **Hamil v. Bashline,** 481 Pa. 256, 265, 392 A.2d 1280, 1284 (1978).

"A determination of legal causation, essentially regards 'whether the negligence, if any, was so remote that as a matter of law, [the actor] cannot be held legally responsible for [the] harm which subsequently, occurred.'" **Reilly, supra** at 15, 633 A.2d at 210 (brackets in original). In other words, "the court must determine whether the injury would have been foreseen by an ordinary person as the natural and probable outcome of the act complained of." **Id.** "[L]iability is contingent upon the probability or foreseeability of the resulting injury, not merely the possibility that it could occur." **Id.** "Proximate cause will not be found when the causal chain of events resulting in plaintiff's injury is so remote that it seems highly extraordinary that defendant's conduct caused the harm." **Miller, supra,** 702 A.2d at 1078.

In this case, Schaub argues, in effect, that we should find Trainer's negligent for failing to protect him from the consequences of his own actions. Schaub claims that but for the acts of Trainer's: (1) he would not have killed the Decedent; (2) he would not have been convicted of voluntary homicide; (3) he would not have been incarcerated; and (4) he would not be suffering from the consequences of being in prison. **Paraphrasing Van Mastrigt v. Delta Tau Delta,** 393 Pa. Super. 142, 151, 573 A.2d 1128, 1132 (1990).

In **Van Mastrigt,** the plaintiff sought damages for personal injuries resulting from his confinement for the murder of another student, Jeanne Goldberg, claiming that the defendants were responsible for his injuries because of their negligence in serving and/or permitting him to be served alcohol and drugs as a minor at a fraternity party. In affirming the trial court's dismissal of the plaintiff's complaint, the court stated:

> Even if we were to agree with appellant that the defendants played a role in placing appellant in his current predicament, we would be unable to make the quantum leap necessary for excusing appellant from his own crime. None of the defendants put a knife in appellant's hand. None of the defendants were responsible for the act of killing Jeanne Goldberg. A court determined that appellant alone was responsible for the actual murder of Jeanne Goldberg. It was as a result of this determination that appellant was incarcerated. If this incarceration has resulted in personal injuries, appellant has only to look to himself for the consequences of his senseless action. We find no error in the lower court's determination.

Id. at 151, 573 A.2d at 1132.

Here, as in **Van Mastrigt,** Schaub's criminal conduct involved an element of intent[9] and occurred off Trainer's premises several hours after he was served alcoholic beverages by the Defendant. Further distancing the effects of Trainer's conduct is that Schaub continued to consume additional alcohol after leaving Trainer's, contends he was defending himself against a stranger who was attacking him, and wielded a baseball bat which was unexpectedly thrust into his hands. Critical to the decision in **Van Mastrigt,** was plaintiff's attempt to recover damages for the consequences of his own criminal and violent behavior, the same as Schaub seeks in these proceedings.

In **Van Mastrigt,** the court ultimately determined, as we do here, that the plaintiff's own conduct, not that of the defendant, was the proximate cause of his injuries. **See also, Reilly, supra** at 15, 633 A.2d at 210 (holding establishment serving liquor to minor breached duty under the Dram Shop Act; however, minor's subsequent assault on his father and police, as well as subsequent wounds suffered from police shots fired, were not natural and probable results of defendant's failure to comply with Act). Under the facts of this case, none of Schaub's injuries are properly attributed to Trainer's conduct. **See e.g., Holt v. Navarro,** 932 A.2d 915 (Pa. Super. 2007), **appeal denied,** 951 A.2d 1164 (Pa. 2008), discussed below.

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[9] An essential element of the offense of voluntary manslaughter is the specific intent to kill. **See Commonwealth v. Rosario-Hernandez,** 446 Pa. Super. 24, 37, 666 A.2d 292, 298-99 (1995).

Damages

Schaub's complaint does not specifically identify what personal injuries he sustained for which compensation is sought.[10] Notwithstanding the generality of the injuries claimed, with the possible exception of the injury to his forearm, all of the injuries Schaub claims to have suffered appear to be related to his conviction and confinement.[11]

In **Holt,** a mentally unstable patient claimed one of the defendants, an ambulance organization, was negligent and responsible for his reduced earning potential as a result of his convictions for robbery and assault,[12] crimes which the plaintiff committed after escaping from defendant's ambulance while being transported between a hospital and psychiatric facility. The Superior Court reversed the entry of a jury verdict in favor of the plaintiff and found that plaintiff's injuries were not proximately caused by defendant's conduct and that to award a convicted felon for his crimes contravened Pennsylvania public policy.

On the issue of proximate cause, the court determined that plaintiff's reduced earning potential due to his convictions was a remote and unforeseeable consequence of defendant's failure to restrain him during transport and was not the "natural and prob-

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[10] In his complaint, Schaub alleges that he suffered and continues to suffer:

(a) severe mental anguish and pain;

(b) loss of his liberty, as a result of the criminal prosecution for his actions on this occasion;

(c) inability to pursue his usual occupation;

(d) loss of earnings and earning capacity;

(e) loss of life expectancy, loss of happiness, and loss of the pleasures of life; and

(f) substantial financial expenses.

Complaint, Paragraph 15.

[11] As set forth in the factual background, the injury to Schaub's forearm occurred when he was being attacked by the Decedent and before Schaub struck back in any manner. There is therefore no basis to attribute responsibility for this injury to Trainer's, nor does Schaub argue otherwise.

[12] The Superior Court noted that both these offenses are specific intent crimes. **See Holt v. Navarro,** 932 A.2d 915, 923 n.1 (Pa. Super. 2007), **appeal denied,** 951 A.2d 1164 (Pa. 2008). In **Holt,** the defendant received a sentence of seven years' probation; he was not imprisoned. **See id.** at 918.

able" result of defendant's actions or omissions. **Id.** at 920. Plaintiff's own criminal conduct was held to be the true proximate cause, in effect a superseding cause, of his reduced earnings. On this point, the court stated:

> Whereas [plaintiff's] escape from the ambulance truck might have been a natural and foreseeable consequence of [defendant's] failure to restrain [plaintiff] during transport, we cannot agree that [plaintiff's] loss of income due to his criminal behavior following the escape was a natural and probable outcome of [defendant's] breach.

Id. at 924.

On the question of public policy, the court determined that the "no felony conviction recovery rule" prevents convicted felons from recovering damages that would not have occurred but for their criminal conviction. On this issue, the court stated:

> Under the 'no felony conviction recovery' rule, the law precludes [plaintiff] from benefiting in a civil suit flowing from his criminal convictions. [Plaintiff's] convictions for robbery, a second degree felony, and simple assault, a second degree misdemeanor, are serious criminal offenses. We hold that, as a matter of law, [defendant] cannot be liable for the collateral consequences of [plaintiff's] criminal convictions. Therefore, the court erred in denying [defendant's] post-trial motion for JNOV.

Id. at 923 (citations omitted).

CONCLUSION

In accordance with the foregoing, we have granted Trainer's Motion for Summary Judgment. Conversely, for reasons which we believe are evident from the discussion above, we have also denied Trainer's Motion for Summary Judgment with respect to the claims of the Estate of Henry Kibler, Jr. against Trainer's and are directing that case to proceed to trial. **Compare Nichols v. Dobler,** 655 N.W.2d 787, 791 (Mich.App. 2003) (finding it inaccurate to hold, as a matter of law, that the criminal or violent acts of a minor that do not involve a motor vehicle accident are not foreseeable results of the serving of alcohol to the minor, and therefore, cannot serve as a basis for liability to third parties, particularly when the liability of a liquor licensee under the Dram Shop statute is at issue).

IN RE: TERMINATION OF PARENTAL RIGHTS OF D.A. AND L.W. IN AND TO E.M.W., A MINOR

Civil Law—Termination of Parental Rights—Duty of Parent Whose Status As an Untreated Sexual Offender Poses Danger to Child To Obtain Treatment—Duty of Court To Provide Rehabilitative Services to the Parent—Adoption and Safe Families Act—Effect of Change in Placement Goal From Reunification to Adoption

1. As a general principle, parents who have been separated from their children have an affirmative duty to remove the cause of separation and to act in good faith to the best of their ability to maintain a parent/child relationship.

2. A mother who has abused and permitted others to sexually abuse one of her children, and who has been found to be a sexual offender with a high risk for re-offense if untreated, is under a duty to exercise her best efforts to successfully complete sexual treatment, a condition imposed for the reunification of the mother and her son, who has been adjudicated dependent because of the mother's risk for re-offense.

3. Under the Adoption Act, the court has a responsibility to provide rehabilitative services to the parent of a dependent child to address the cause of dependency, the object being the reunification of the parent and child. This responsibility is met when the county's children and youth services (CYS) agency repeatedly refers the mother for the evaluation and treatment of the cause of her son's placement in foster care, notwithstanding the mother's failure to take advantage of these services for more than three years without reasonable excuse.

4. Consistent with the policy underlying the federal Adoption and Safe Families Act to prevent children from languishing indefinitely in foster care, the focus of dependency proceedings under the Juvenile Act, including change of goal proceedings, is on the child, with the well-being of the child taking precedence over all other considerations, including the rights of the parents.

5. Once the goal in dependency proceedings has been changed from reunification to adoption, the adequacy of CYS' efforts toward reunification has been satisfied since, inherent in the change in goal, is the court's determination that CYS has provided adequate services to the parent but that she is nonetheless incapable of caring for the child.

6. A mother whose status as an untreated sexual offender has prevented her from having contact with her son for more than two years, and who has unreasonably denied her need for treatment and failed to exercise reasonable efforts to obtain treatment to reduce the risk of re-offense and the danger to her son, may properly have her parental rights terminated when in the child's best interest to allow the child to be adopted by his foster parents.

NO. 08-9049

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MEMORANDUM OPINION

NANOVIC, P.J.—January 8, 2009

The Respondent, L.W. ("Mother"), in the above-captioned termination proceedings has appealed from our Order dated October 6, 2008, terminating her parental rights in her son, E.M.W. ("Child").[1] For the following reasons, it is respectfully requested that the Mother's appeal be denied and that the Final Decree be affirmed.

FACTUAL BACKGROUND

The Final Decree entered on October 6, 2008, sets forth both the legal and factual basis for the involuntary termination of the Mother's parental rights. Those findings reflect, **inter alia,** the following.

The Child who is the subject of these proceedings was born on June 15, 2006, and is now two years old. At the time of his birth, he was taken directly from the hospital by the Petitioner, the Carbon County Children and Youth Services Office (hereinafter referred to at times as "CYS" and at times as the "Agency"), and immediately placed in protective custody. The Agency was concerned that the Child was in immediate danger of being abused based upon information it had received of severe sexual abuse of the Child's older brother, Jacob, by the Mother and his biological father, between January 2005 and September 8, 2005. Jacob, who was born on February 5, 2001, was removed from the Mother's home on September 8, 2005.

As part of the Family Service Plan for Jacob, the Mother was required to obtain a sexual offender's evaluation and follow all recommendations thereof, and also to obtain a mental health evaluation and receive counseling as recommended. These goals remained in place at the time of the Child's birth and had yet to be complied with by the Mother.

A mental evaluation took place in October 2005 and recommended counseling. The Mother failed to make arrangements for counseling. Again in October 2006, mental health recommended

[1] The natural father's parental rights were terminated by Final Decree dated April 8, 2008. The father has not appealed from that decree.

counseling and the Mother failed to make the necessary arrangements. When the Mother finally appeared for an in-take interview in October 2007, it was determined that she would not benefit from counseling because of impaired judgment and limited insight. Consequently, the request for counseling did not proceed further.

The Mother had two sexual offender's evaluations. The first occurred on April 25, 2006, approximately two months prior to the Child's birth. Weekly treatment was recommended. When the Mother failed to attend scheduled appointments and to make any efforts to pay the costs of the counseling, she was unsuccessfully discharged in July 2006 (N.T. 9/19/08, p. 10; N.T. 9/30/08, p. 20).

The second evaluation occurred in February 2008, following CYS' referral to Forensic Treatment Services on September 25, 2007. On October 25, 2007, Forensic Treatment Services contacted the Mother to schedule an intake appointment. Because of delays attributable to the Mother, the evaluation requested in September 2007 did not occur until February 2008.

As part of the evaluation process performed by Forensic Treatment Services, a polygraph examination was administered. In a pre-test interview, the Mother admitted that she was aware that Jacob's father sexually abused him and she did nothing about it (N.T. 9/19/08, pp. 64-65). In a post-test interview, the Mother admitted that she herself had sexually abused Jacob on two separate occasions (N.T. 9/19/08, p. 66).

Based upon Forensic Treatment Services' evaluation, the Mother was once more recommended for weekly sexual offender's treatment. Again, as previously, she failed to keep appointments and to make an effort to pay the costs. In March 2008, she was discharged and designated by Forensic Treatment Services as an untreated sexual offender. This status placed her at a high risk for re-offense. Forensic Treatment Services recommended that she have no contact with children under eighteen years of age, including her own children (N.T. 9/19/08, p. 13).

On September 28, 2006, the Mother pled guilty to a charge of endangering the welfare of children with respect to Jacob. She received a sentence of no less than nine nor more than twenty-three months in prison, with thirty days credit. In accordance with this

sentence, she was in prison from January 22, 2007 through August 18, 2007 (N.T. 9/30/08, p. 18). While in prison, CYS did not permit any visits between the Mother and the Child to occur.

Prior to the Mother's imprisonment on January 22, 2007, supervised visits between the Child and the Mother occurred every other week between June 2006 and January 2007. These visits resumed following the Mother's release from prison in August 2007 and continued until February 2008 when Forensic Treatment Services found the Mother was an untreated sexual offender and recommended that she not be in contact with children until treatment was successfully completed. For this reason, no visits have occurred between the Mother and Child since February 2008.

The Child's entire life to date has been in foster care. He has never lived with his Mother and the Mother has never provided for any of his physical, emotional, or developmental needs. The Mother has not been an active participant in the Child's life and there exists no close parental ties or emotional bonds between the two.

The Petition for Involuntary Termination was filed on February 7, 2008. It identifies three grounds for termination: 23 Pa. C.S.A. Section 2511(a)(1) (abandonment); Section 2511(a)(2) (neglect); and Section 2511(a)(5) (placement for a period of six months or more with no reasonable likelihood of reunification within a reasonable period of time). Hearings on the Petition were held on September 19, 2008 and September 30, 2008. The Findings of Fact contained in the Final Decree dated October 6, 2008, support the termination of the Mother's parental rights on each of these bases. The reasons the Mother has given to reverse our decision are stated in a Concise Statement of Matters Complained of on Appeal, which the Mother filed in response to our Rule 1925(b) Order. They are narrow and limited and, we believe, without merit. They are each addressed below.

DISCUSSION

"Parents are required to make diligent efforts towards the 'reasonably prompt assumption of full parental responsibilities.'" **In re E.A.P.,** 944 A.2d 79, 83 (Pa. Super. 2008). "Where the parent does not exercise reasonable firmness in 'declining to yield to obstacles,' his (parental) rights may be forfeited." **Id.** "Further, 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." **In re J.I.R.,** 808 A.2d 934, 938 (Pa. Super. 2002), **appeal denied,** 821 A.2d 587 (Pa. 2003).

As of the date of the termination hearing, the Child was out of his Mother's care for over two years. Why this occurred is the real question that has to be answered. "The duty of the court under the Juvenile Act to provide rehabilitative services to the parent of a dependent child is recognized as a correlative responsibility, **with that of the parent,** to satisfy the mandate contained in the Adoption Act, prior to CYS proceeding to petition for involuntary termination of parental rights pursuant to Section 2511(a)." **In Interest of Lilley,** 719 A.2d 327, 331 (Pa. Super. 1998) (emphasis added) (footnote omitted). "Where the child is in foster care, this affirmative duty requires the parent to work towards the return of the child by cooperating with the Agency to obtain rehabilitative services necessary for [her] to be capable of performing [her] parental duties and responsibilities." **In re G.P.-R.,** 851 A.2d 967, 977 (Pa. Super. 2004).

The real reason for the separation between the Mother and the Child is the Mother's refusal to accept responsibility for the abuse of Jacob and her need for sexual offender's treatment (N.T. 9/30/08, p. 51). The Mother argues, at times, that her role in the abuse of Jacob was purely passive; that she was aware of the abuse and did nothing to stop it, hence her limited plea to reckless endangerment of a child (Concise Statement, No. 1). That stance, however, is not completely accurate. As the evidence developed at trial, not only was the Mother aware of the abuse, she was present when Jacob's father molested him. Further, on at least two occasions that she disclosed to the polygraph examiner, she herself physically and sexually abused Jacob. The need for the Mother to successfully complete sexual offender's treatment before the Child can be safely returned to her is undeniable.

Every argument the Mother makes as to why she did not promptly obtain a sexual offender's evaluation and follow through with its recommendation fails (Concise Statement, No. 2). The

question of transportation was addressed by Megan Lukasevich, who testified that she provided the Mother with information on who to contact for transportation (N.T. 9/19/08, pp. 9, 32-35). Not once did the Mother testify that she made an effort to contact any of these resources (N.T. 9/30/08, pp. 12-13). Further, the Mother's sister and brother-in-law were possible resources and, in fact, provided transportation if she required it on other occasions (N.T. 9/30/08, p. 29).

The issue of costs is exaggerated. The Mother resided with her own mother and, consequently, her living expenses were reduced. She receives monthly disability payments of $341.00 and has the ability to be employed part-time (N.T. 9/30/08, pp. 29-30, 48). Krista Welter of Forensic Treatment Services testified that they were willing to work with the Mother regarding payments and funding, but she made no effort to cooperate (N.T. 9/19/08, p. 67).

Even now, the Mother questions the need for the sexual offender's evaluation and refuses to accept responsibility for her failure to successfully complete the sexual offender's treatment which two separate agencies have recommended. Instead, she argues that the fault is attributable to CYS, in that CYS failed to provide her with the requisite information to obtain the requested services (Concise Statement, No. 4). This claim ignores the testimony of Megan Lukasevich as to the availability of transportation as well as the referrals and arrangements CYS made to have the Mother evaluated and then treated, as recommended. To the extent the Mother argues that CYS was obligated to fund the costs of the evaluation and treatment, and its failure to do so was an obstacle to her receipt of these services, the Mother cites no authority that CYS was obligated to do so. **Cf. In re N.W.,** 859 A.2d 501, 510 (Pa. Super. 2004) (noting that an agency's failure to provide either housing or employment does not excuse noncompliance with those goals in a family service plan); **In re Baby Boy H.,** 401 Pa. Super. 530, 534, 585 A.2d 1054, 1056-57 (1991) (finding that actual obstruction by a social agency will excuse failure to perform parental duties). Again, the real cause of noncompliance has been the Mother's failure to come to terms with her situation and make a serious effort to comply with the goals set by CYS.

The Mother first contacted Forensic Treatment Services to make an appointment for an evaluation on December 31, 2007, because she was aware that a review hearing in the dependency proceedings was scheduled for January 4, 2008, and that a change in goal from reunification to termination and adoption was a possibility (N.T. 9/19/08, p. 11; N.T. 9/30/08, p. 33). Then, approximately one week prior to the September 19, 2008 termination hearing, she again contacted Forensic Treatment Services and indicated her willingness to reschedule and be readmitted for treatment (N.T. 9/19/08, pp. 13, 78). These attempts at delay and manipulation will not be condoned. As observed in **In re K.Z.S.,** 946 A.2d 753, 758 (Pa. Super. 2008), "A parent's vow to cooperate, after a long period of uncooperativeness regarding the necessity or availability of services, may properly be rejected as untimely or disingenuous."

It is true that CYS did not permit visits between the Mother and the Child while she was in prison between February 2007 and August 2007 (Concise Statement, No. 3). This fact, however, does not explain or justify her failure to provide for the Child or to perform parental duties for the fourteen-month period when she was not in prison: the eight-month period between June 15, 2006 and February 2007, and the six-month period between August 2007 and February 2008.

Nor are we convinced that the Mother exercised reasonable firmness in maintaining, to the extent possible, a continuing close relationship with the Child while she was in prison. "[A] parent's incarceration does not preclude termination of parental rights if the incarcerated parent fails to utilize given resources **and** to take affirmative steps to support a parent-child relationship." **E.A.P., supra,** 944 A.2d at 83 (emphasis in original). The burden of producing evidence that those resources available to maintain a close parental relationship have been utilized is upon the parent in prison. **See e.g., Adoption of Baby Boy A. v. Catholic Social Services,** 512 Pa. 517, 521 n.5, 517 A.2d 1244, 1246 n.5 (1986); **see also, In re C.L.G.,** 956 A.2d 999, 1006-1007 (Pa. Super. 2008) (holding that where a mother's addiction to drugs placed her daughter in danger and also led to criminal conduct which resulted in imprisonment it was "the underlying drug issues which preclude[d] Mother from properly caring for [the child], and not the incarceration, which is

merely a consequence of Mother's inability to lead a life free from involvement with drugs").

The real and still existing cause of her separation from the Child has been the delayed evaluation, determination, and treatment of her status as an untreated sexual offender for more than three years. This status makes her a risk to the Child and to all children. This status is one for which she bears the responsibility, yet refuses to accept it. This status is the one which has most directly and substantially prevented her from forming and maintaining a relationship with the Child. The Mother has clearly failed to remedy this status within a reasonable time (N.T. 9/19/08, p. 16; N.T. 9/30/08, pp. 46-47).

On January 22, 2008, the Child's placement goal in the dependency proceedings was changed from reunification to termination and adoption (N.T. 9/19/08, p. 6). This change in goal is significant. "By allowing CYS to change its goal to adoption, the trial court has decided that CYS has provided adequate services to the parent but that he/she is nonetheless incapable of caring for the child and that, therefore, adoption is now the favored disposition." **N.W., supra,** 859 A.2d at 509. Once the placement goal has been changed from reunification to adoption, "[t]he adequacy of CYS' efforts toward reunification is not a valid consideration [in termination proceedings], as the law allows CYS to 'give up on the parent' once the service plan goal has been changed to adoption." **In re A.L.D.,** 797 A.2d 326, 341 (Pa. Super. 2002).

In **In re N.C.,** 909 A.2d 818 (Pa. Super. 2006), the court stated:

> Placement of and custody issues pertaining to dependent children are controlled by the Juvenile Act, which was amended in 1998 to conform to the federal Adoption and Safe Families Act ('ASFA'). ... The policy underlying these statutes is to prevent children from languishing indefinitely in foster care, with its inherent lack of permanency, normalcy, and long-term parental commitment. … Consistent with this underlying policy, the 1998 amendments ... place the focus of dependency proceedings, including change of goal proceedings, on the child. Safety, permanency, and well-being of the child must

take precedence over **all** other considerations, including the rights of the parents.

Id., 909 A.2d at 823 (citations omitted) (emphasis in original) (footnotes omitted). The ASFA is "designed to curb an inappropriate focus on protecting the rights of parents when there is a risk of subjecting children to long term foster care or returning them to abusive families." **In re C.B.,** 861 A.2d 287, 295 (Pa. Super. 2004), **appeal denied,** 582 Pa. 692, 871 A.2d 187 (2005).

The ASFA recognizes that the safety, permanency and well-being of the Child are paramount in his best interests and to his future. 42 U.S.C.A. §671(a)(15)(A). The ASFA requires that when a child has been in foster care under the responsibility of the state for fifteen of the most recent twenty-two months, the state is required to file a petition to terminate the parental rights of the child's parents. 42 U.S.C.A. §675(5)(E). At the time CYS filed the termination petition, the Child was in placement for at least fifteen of the most recent twenty-two months. In filing the petition, CYS was doing what the legislature expected and required it to do.

At this point, the Child has been in foster care for more than two years. To allow this status to continue indefinitely, in the hope that the Mother will eventually receive treatment which she believes is unnecessary and has repeatedly resisted even before the Child was born, is not in the Child's best interest. Instead, we believe that the Child's need for permanency is best achieved by terminating the Mother's parental rights and permitting the Child to be adopted by his foster parents.

CONCLUSION

In accordance with the foregoing, it is respectfully requested that the Mother's appeal be denied and that the Final Decree of Termination dated October 6, 2008, be affirmed.

COMMONWEALTH of PENNSYLVANIA vs.
CHARLES FREDERICK OLIVER, II, Defendant

Criminal Law—Sentencing—Recidivism Risk Reduction Incentive—Retroactivity—State Intermediate Punishment—Re-Sentencing—Timeliness of Appeal

1. The Recidivism Risk Reduction Incentive is an alternative minimum sentence applicable to a defined class of state prisoners who by successfully

completing specified Department of Corrections' programs designed to reduce their risk of re-offense become eligible for parole earlier.

2. To be eligible for the Recidivism Risk Reduction Incentive, a prisoner must have received a Recidivism Risk Reduction Incentive sentence and successfully completed the Recidivism Risk Reduction Incentive program.

3. The Recidivism Risk Reduction Incentive is not to be given retroactive effect. Consequently, a defendant serving a current sentence at the time of enactment of this statute is not entitled to be re-sentenced after the statute's effective date, November 24, 2008.

4. To be eligible for re-sentencing under the State's Intermediate Punishment Program, a written request for re-sentencing is to be initiated with the court by the Department of Corrections with re-sentencing to occur within 365 days of the date of the offender's admission into the Department of Corrections' custody. Under this Program, a defendant incarcerated in a State facility has no right to directly petition the court.

5. A request for reconsideration does not stay the time within which to appeal from the underlying order. Therefore, an appeal from the denial of a request for reconsideration which occurs more than thirty days after the order which is the subject of the request is untimely and should be quashed.

NO. 14 CR 2006

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

CHARLES FREDERICK OLIVER, II—Pro se.

MEMORANDUM OPINION

NANOVIC, P.J.—March 16, 2009

PROCEDURAL BACKGROUND

On August 24, 2006, Charles Frederick Oliver, II ("Defendant"), then represented by counsel, entered a guilty plea to one count of Possession with Intent to Deliver a Controlled Substance (F).[1] That same day, Defendant was sentenced to a period of imprisonment of not less than two years nor more than four years in a State Correctional Institution, with credit for thirty-two days served.

On November 18, 2008, Defendant filed a **pro se** Motion for Recidivism Risk Reduction Incentive Application, which we denied by Order dated November 20, 2008, for two reasons. The first was that it was filed prematurely, as the statutes Defendant relied upon became effective on November 24, 2008. **See** Act 2008-81 §11(3), 192 Gen.Assem., Reg.Sess. (Pa.). The second was that Defendant

[1] 35 P.S. §780-113(a)(30) (2005).

invoked the incorrect procedure, in that the Department of Corrections is to identify prisoners eligible for the Recidivism Risk Reduction Incentive and notify the Board of Probation and Parole, who then initiates proceedings with the court. **See** 44 Pa. C.S.A. §5306 and 61 P.S. §331.21(b.2)(1) and (2) (2008).[2] For the State Intermediate Punishment Program, re-sentencing of an offender who has been previously sentenced is to be initiated with the court by the Department of Corrections. **See** 42 Pa. C.S.A. §9904(d.1) (2008). Based upon these procedural defects, we did not address the merits of Defendant's Motion at that time.

On December 11, 2008, Defendant filed a Petition to Reconsider the Motion for Recidivism Risk Reduction Incentive Application, which we also denied by Order dated January 26, 2009. Defendant now appeals our denial of his Petition to Reconsider, thereby requiring the preparation of this Opinion, which we respectfully submit in accordance with Pa. R.A.P. 1925(a) (2007).[3]

DISCUSSION

In addition to directly petitioning the court, in violation of the procedures set forth as described above, Defendant is not eligible for either the Recidivism Risk Reduction Incentive or the State Intermediate Punishment Program regardless.[4] Eligibility for the

[2] The Pennsylvania Board of Probation and Parole has jurisdiction over parole for state sentences such as that imposed on Defendant. **See** 61 P.S. §331.17 (2008). The Recidivism Risk Reduction Incentive is an alternative minimum sentence applicable to a defined class of state prisoners who by successfully completing specified Department of Corrections' programs designed to reduce their risk of reoffense become eligible for parole earlier. **See** 44 Pa. C.S.A. §§5303 (definition of "eligible offender") and 5312 (applicability) (2008). To be eligible for early parole, a prisoner must have received a Recidivism Risk Reduction Incentive sentence and successfully completed the Recidivism Risk Reduction Incentive program. **See** 42 Pa. C.S.A. §9756(b.1) (2008); 44 Pa. C.S.A. §5306(a) (2008).

[3] Defendant filed his Appeal on February 26, 2009, from the January 26, 2009 Order denying his Petition for Reconsideration. Because a request for reconsideration does not stay the time within which to appeal from the underlying order, Defendant's Appeal from the November 20, 2008 Order is untimely and should be quashed. **See Valley Forge Center Associates v. RIB-IT/K.P., Inc.,** 693 A.2d 242, 245 (Pa. Super. 1997) ("an untimely appeal divests this Court of jurisdiction"). This notwithstanding, for purposes of being inclusive, we also address the substance of Defendant's Appeal.

[4] It should be noted that application of the statutes is entirely discretionary, and the statutes do not expressly grant any rights to Defendant. **See** 44 Pa. C.S.A. §§5306(d), 5311 (2008) and 61 P.S. §331.21(b.2)(6) (regarding Recidivism Risk

Recidivism Risk Reduction Incentive is to be determined at the time of sentencing. **See** 44 Pa. C.S.A. §5305 (2008). For State Intermediate Punishment, eligibility is to be determined by the court prior to the original sentencing, after an evaluation by the Department of Corrections, or prior to re-sentencing following a written request by the Department of Corrections. 42 Pa. C.S.A. §9904(d) and (d.1) (2008). As noted, Defendant was sentenced on August 24, 2006, over two years prior to the statutes' effective date of November 24, 2008.

"No statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly." 1 Pa. C.S.A. §1926 (1972). Our review of the Recidivism Risk Reduction statute reveals no such intent on the part of the Pennsylvania legislature. **See** 44 Pa. C.S.A. §§5301-5312 (2008) (regarding Recidivism Risk Reduction Incentive). Regarding the State Intermediate Punishment Program, eligible offenders may be re-sentenced, but Defendant is not an eligible offender because he was not re-sentenced within 365 days of the date of his admission to the Department of Corrections' custody. **See** 42 Pa. C.S.A. §9904(d.1)(4) (2008). This would not have been possible seeing as Defendant was admitted into the Department of Corrections' custody on August 29, 2006, over two years prior to the statutes' effective date of November 24, 2008.

In Defendant's Concise Statement of Matters Complained of on Appeal, he requests relief "pursuant to **nunc pro tunc**" and Pa. R.Crim.P. 105 (2006). **"Nunc pro tunc"** means "now for then". Black's Law Dictionary (6th ed.). It signifies a thing done now which shall have the same effect as if done at the time when it ought to have been done. **See id.** As detailed above, it would not have been possible for us to sentence Defendant under either the Recidivism Risk Reduction Incentive or State Intermediate Punishment Program "at the time when it ought to have been done" seeing as the two statutes were not in effect at such time, **i.e.,** the time of sentencing for purposes of either statute, or within 365 days of sentencing for purposes of the State Intermediate Punishment

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Reduction Incentive); 42 Pa. C.S.A. §9908 (2008) (regarding State Intermediate Punishment Program).

Program statute. Therefore, Defendant is not entitled to any relief **nunc pro tunc.**[5]

Defendant also requests relief pursuant to Pa. R.Crim.P. 105(E) (2006),[6] which states "No case shall be dismissed nor request for relief granted or denied because of failure to comply with a local rule. In any case of noncompliance with a local rule, the court shall alert the party to the specific provision at issue and provide a reasonable time for the attorney to comply with the local rule." Defendant's request for relief was not denied because of failure to comply with any local rule. Defendant seeks relief pursuant to state statutes, neither of which qualifies him for relief. This is so regardless of any local rules whatsoever and Defendant is therefore not entitled to any relief pursuant to Pa. R.Crim.P. 105(E) (2006).

CONCLUSION

Because the law supports the decisions made on the issues presented in Defendant's Motion for Recidivism Risk Reduction Incentive Application and Petition for Reconsideration, we respectfully request that our Orders denying both be affirmed.

[5] Defendant's Concise Statement of Matters Complained of on Appeal, while concise, is not entirely coherent. "[T]he Pa. R.A.P. 1925(b) statement must be sufficiently 'concise' and 'coherent' such that the trial court judge may be able to identify the issues to be raised on appeal ... ." **Jiricko v. Geico Insurance Company,** 947 A.2d 206, 210 (Pa. Super. 2008), **appeal denied,** 958 A.2d 1048 (Pa. 2008). Although we have made a good faith effort to address Defendant's **nunc pro tunc** argument, its incoherence likely merits its waiver. **See id.** at 211 n.8.

[6] Defendant actually cites to "§§ R.C.P. Rule (105), Local Rules, (a)(b)(1)(6)(E)"; Pa. R.Crim.P. 105(E) (2006) is our best surmisal of Defendant's intended citation. It should also be noted that a new version of Pa. R.Crim.P. 105 went into effect on February 1, 2009, with a similar provision contained in subsection (I).

COMMONWEALTH OF PENNSYLVANIA
vs. KENNETH SHIFFERT, Defendant

Criminal Law—PCRA—Drug Trafficking—Mandatory Minimum Sentence—Requirement of Prior Conviction

1. For purposes of imposing a mandatory minimum sentence for a second conviction of drug trafficking under Section 7508 of the Crimes Code, the requirement of a prior conviction is met, if at the time of the sentencing, the defendant has been convicted of another drug trafficking offense, regardless of when that offense occurred relative to the offense underlying the second conviction.

2. A defendant who pleads guilty to ten separate drug trafficking offenses on the same date may properly be sentenced on a subsequent date to a mandatory minimum term of imprisonment for one of the convictions since, at the time of sentencing, each of the other nine drug trafficking offenses constitute a prior conviction.

NO. 420 CR 06

ANDREA F. McKENNA, Esquire, Attorney General Office—Counsel for Commonwealth.

KENT D. WATKINS, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—March 2, 2009

The Defendant, Kenneth Shiffert, has appealed from our order dated December 26, 2008, denying his Amended Petition for Relief under the Post-Conviction Collateral Relief Act ("Petition"). In that Petition, the sole issue raised was that the Court erred at the time of sentencing in imposing a five-year mandatory minimum sentence with respect to Defendant's conviction on a drug trafficking offense (Count 3 of the Information) because the Defendant had no prior record of conviction of another drug trafficking offense.

A hearing was scheduled on Defendant's Petition for December 23, 2008. At that time, neither side presented any testimony or other evidence, and the sole issue Defendant sought to pursue was the one identified in the previous paragraph. Consequently, while Defendant has identified two issues in his Concise Statement of Matters Complained of on Appeal filed in response to our January 23, 2009 order directing the filing of this statement, the second issue Defendant has raised, that pertaining to sentencing entrapment, is not factually supported by the record in this case and has been waived.

As to the first issue, on April 10, 2007, the Defendant pled guilty to multiple counts of possession with intent to deliver cocaine, methamphetamine and marijuana. 35 P.S. §780-113(a)(30). Prior to this plea, the Commonwealth served notice upon the Defendant of its intent with respect to Count 3 "to proceed under 18 Pa. C.S.A. §7508(a)(3)(ii) which sets forth the mandatory sentencing provision provided when an individual is convicted of violating Section 13(a)(30) of the Controlled Substance, Drug, Device and Cosmetic Act, for a second and subsequent time, in that the con-

trolled substance is cocaine and the amount of cocaine involved is more than ten grams, whereby the Commonwealth will seek the imposition of a mandatory sentence of no less than five years in a prison and $30,000.00 in fines or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal drug activity." **See** Commonwealth's Notice of Mandatory Sentencing. In accordance with the mandatory sentencing provisions of 18 Pa. C.S.A. §7508(a)(3)(ii), and the amount of cocaine not being in dispute, at the time of Defendant's sentencing on June 5, 2007, the Court imposed a sentence of not less than five years nor more than ten years for the offense described in Count 3 of the Information. At that time, Defendant was also sentenced on nine other drug trafficking offenses and seven other drug-related offenses to which he pled guilty on April 10, 2007. The sentence imposed followed the recommendation contained in a presentence investigation ordered in the case.

Prior to Defendant's pleas on April 10, 2007, Defendant did not have a previous conviction for another drug trafficking offense as that term is described in 18 Pa. C.S.A. §7508(a.1). For purposes of this statute, Defendant's nine other convictions entered on April 10, 2007, for violating Section 13(a)(30) of the Controlled Substance, Drug, Device and Cosmetic Act, constituted convictions of other drug trafficking offenses which existed at the time Defendant was sentenced on June 5, 2007. Defendant nevertheless argues that the Court's use of Defendant's pleas on April 10, 2007, to the other drug trafficking offenses—eight of which occurred on a separate date from the offense described in Count 3—as another conviction sufficient to trigger a five-year mandatory minimum sentence on Count 3 was improper.

In both **Commonwealth v. Williams,** 539 Pa. 249, 652 A.2d 283 (1994) and **Commonwealth v. Vasquez,** 562 Pa. 120, 753 A.2d 807 (2000), the Pennsylvania Supreme Court held that Section 7508 means what it says and that "as long as **at the time of sentencing,** a defendant 'has been convicted' of another qualifying 'offense', the defendant shall receive the enhanced sentence." **Vasquez, supra,** 753 A.2d at 809 (emphasis in original). It makes no difference whether the prior conviction arises from a multi-count complaint or a separate complaint. Accordingly, since the

Defendant pled guilty on April 10, 2007, to multiple counts of possession with intent to deliver a controlled substance, at the time the Defendant was sentenced on June 5, 2007, and received a mandatory minimum term of imprisonment for his violation of the offense charged in Count 3 of the Information, he had been previously convicted of nine other drug trafficking offenses.

In accordance with the foregoing, Defendant was properly sentenced and is not entitled to post-conviction relief.

COMMONWEALTH OF PENNSYLVANIA
vs. RALPH W. FISHER, Defendant

Criminal Law—PCRA—Ineffectiveness of Counsel—Failure To Impeach Witness—Requirement of Prejudice

1. Ineffectiveness of trial counsel requires a showing of three elements: (1) that the underlying claim is of arguable merit, (2) that no basis existed for counsel's action or inaction, and (3) that there is a reasonable probability the outcome of the proceedings would have been different but for counsel's failures.

2. Prejudice, under the standard of proving ineffectiveness, requires defendant to show actual prejudice, that is, that counsel's ineffectiveness was of such magnitude that it could have reasonably had an adverse effect on the outcome of the proceedings.

3. Counsel's alleged failure to interview certain witnesses or to investigate certain information, will only be deemed prejudicial if defendant establishes that the witnesses not interviewed or the information not investigated would have been helpful to the defense.

4. Where defendant claims that a material witness for the Commonwealth suffered from mental health issues and used prescriptive medication which affected the witness' ability to observe, comprehend or recall evidence, the burden is upon the defendant to offer some testimony as to the nature or extent of the witness' illness and the types and effects of the medication taken, before defendant's claims will be considered anything other than speculative.

NOS. 532 CR 04, 533 CR 04, 534 CR 04, 535 CR 04

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

MICHAEL P. GOUGH, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—March 24, 2009

PROCEDURAL AND FACTUAL BACKGROUND

On September 16, 2005, at the conclusion of a two-day jury trial, the Defendant, Ralph W. Fisher, was convicted of possession

of a controlled substance (four counts),[1] possession with intent to deliver a controlled substance (four counts),[2] unlawful delivery of a controlled substance (four counts),[3] and possession of drug paraphernalia (four counts)[4] with respect to the sale of marijuana on four separate occasions to Jason Shiffert, a confidential informant. The four transactions occurred on January 2, 8, and 30 of 2004, and February 5, 2004. Each was witnessed by Officer Brian Biechy of the Lehighton Borough Police Department. The first two purchases were made by Shiffert from Defendant and his co-defendant, Frederick Theesfeld, III. The third and fourth purchases involved Defendant and Shiffert only. With respect to the first two purchases, Defendant was also charged and convicted of criminal conspiracy (two counts).[5]

At trial, Shiffert, Theesfeld, and Biechy testified on behalf of the Commonwealth. Each described Defendant's involvement in the sale and delivery of marijuana to Shiffert. In each case, the marijuana was contained within a clear plastic baggie handed to Shiffert. To assure against any chicanery by Shiffert, prior to each purchase the police met with Shiffert at police headquarters, directed him to undress to his underwear, and patted him down. Each time the police provided Shiffert with the money for the controlled buy; drove him to within a block of where the transaction was to occur—outdoors, on the sidewalk, in front of his Mother's home; watched as he walked to the designated location where the purchase was to occur; and parked across the street where they waited and remained until the transaction was completed and Shiffert transferred to their custody the marijuana he had purchased from Defendant. In short, Shiffert was under constant police surveillance from the time he entered the police station until the time he provided the police with the drugs purchased.

Defendant took the stand on his own behalf and denied giving or participating in any drug-related activity. Defendant denied delivering any packages of any type to Shiffert. Instead, Defendant

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[1] 35 P.S. §780-113(a)(16).

[2] 35 P.S. §780-113(a)(30).

[3] 35 P.S. §780-113(a)(30).

[4] 35 P.S. §780-113(a)(32).

[5] 18 Pa. C.S.A. §903(a)(1).

testified that on one occasion he picked up a package from Shiffert for Theesfeld which he believed contained jewelry. Defendant also denied receiving any money from Shiffert. To the contrary, the only exchange of money which Defendant acknowledged was money he paid to Shiffert in repayment of a loan he had received from Shiffert's girlfriend. In rebuttal, the Commonwealth presented evidence of Defendant's prior conviction of receiving stolen property in 2001, a **crimen falsi** offense.

Following his convictions, Defendant was sentenced on January 23, 2006, to an aggregate state sentence in a state correctional facility of no less than two nor more than four years imprisonment. These sentences were affirmed on direct appeal by the Superior Court; Defendant's request for discretionary review before the Pennsylvania Supreme Court was denied on May 8, 2007. Defendant filed a **pro se** petition for relief under the Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. §§9541-9546, on May 7, 2008, whereupon we appointed counsel to represent Defendant. Thereafter, the amended petition which is now before us for disposition was filed. An evidentiary hearing was held on October 6, 2008.

The sole basis of Defendant's claim for collateral relief which Defendant has elected to pursue, is that of the alleged ineffectiveness of his trial counsel, Brian Gazo, Esquire (Letter Memorandum, p. 2). Specifically, Defendant contends that trial counsel failed to adequately investigate and present evidence as to Shiffert's involuntary commitment to a mental health institution, use of prescriptive medication, and affliction with a seizure disorder and that, had he done so, the testimony of Shiffert would have been substantially discredited. Defendant further claims that Shiffert has difficulty understanding information communicated to him, and had this been investigated further by trial counsel, Shiffert would have been determined to be incompetent as a witness.

DISCUSSION

Ineffectiveness of trial counsel as a basis for collateral relief requires a defendant to plead and prove by a preponderance of the evidence that his conviction or sentence was caused by inadequate representation. In finding that counsel's representation was deficient, three elements must be shown: (1) that the underlying claim is of arguable merit, (2) that no reasonable basis existed for

counsel's action or inaction, and (3) that there is a reasonable probability the outcome of the proceedings would have been different but for counsel's failures. **See Commonwealth v. Pierce,** 515 Pa. 153, 157-58, 527 A.2d 973, 974-75 (1987). A failure to satisfy any prong of this test requires rejection of the claim of ineffectiveness. **See Commonwealth v. Daniels,** 963 A.2d 409, 419 (Pa. 2009).

While counsel's failure to interview witnesses or gather information which could be helpful to the defense and of which he is aware may exist, "supports a finding of ineffective assistance of counsel," this finding alone "will not be equated with a conclusion of ineffectiveness of counsel absent some positive demonstration that [the evidence] would have been helpful to the defense." **Commonwealth v. Bailey,** 322 Pa. Super. 249, 262, 469 A.2d 604, 611 (1983). Under **Pierce,** "a defendant is required to show actual prejudice; that is, that counsel's ineffectiveness was of such magnitude that it could have reasonably had an adverse effect on the outcome of the proceedings." **Commonwealth v. Howard,** 538 Pa. 86, 99, 645 A.2d 1300, 1307 (1994) (internal quotation marks omitted).

In these post-conviction proceedings, Defendant has failed to produce any evidence which he contends his trial counsel failed to discover or use at trial which would have had a reasonable likelihood of affecting the outcome of the proceedings. Without knowing why Shiffert was involuntarily committed, what medications he was taking, why he experienced seizures, and what his mental capacity was, Defendant has presented no evidence upon which to base a finding to a reasonable degree of probability that the absence of such information prejudiced Defendant. Defendant asks us to speculate as to the significance and consequences of information which he claims was not obtained by trial counsel without himself producing the information or demonstrating how it would have made a difference at trial.

At the PCRA hearing, Defendant testified that during the six- to seven-month period preceding trial, he was aware that Shiffert was taking prescription medication, although the types and reasons for the medication were unknown to him. Defendant further testified that on one occasion, within the three-month period leading to trial, he recalled Shiffert taking some medication and then twenty

to twenty-five minutes later experiencing a seizure. Defendant was also aware that Shiffert had been involuntarily hospitalized in a mental health institution, although he did not know the reason. Defendant also testified that Shiffert has difficulty with words, in speaking and writing, and that he has a limited capacity to comprehend what is going on. Finally, Defendant testified that all of this information was communicated to Attorney Gazo and that Attorney Gazo advised Defendant he would investigate.

When questioned by Defendant's counsel at the PCRA hearing, Attorney Gazo admitted that Defendant had told him that Shiffert took prescriptive medication and had been involuntarily committed. Attorney Gazo concluded that Shiffert had some mental health issues but that Shiffert's medical records would likely be privileged and protected from discovery. **See** 50 P.S. §7111. Nevertheless, at trial Attorney Gazo questioned Shiffert about the medications he was then taking, and Shiffert acknowledged that these medications clouded his thoughts somewhat (N.T. 9/15/05, p. 107). Attorney Gazo further asked Shiffert whether he had attempted suicide. The Commonwealth objected on the basis of relevancy and the objection was sustained (N.T. 9/15/05, pp. 110-112). Defendant has raised no claim of trial court error in this ruling. **Cf. Commonwealth v. Harris,** 578 Pa. 377, 852 A.2d 1168, 1172 n.10 (2004) (noting that a claim of trial court error not included in a PCRA petition will not be considered by the court).

As to Defendant's claim that Shiffert had cognitive difficulties, Attorney Gazo testified that Shiffert appeared to understand and responded appropriately to questions asked of him at trial. Defendant has presented no evidence of a debilitating condition rendering Shiffert incompetent to testify. To the extent Shiffert's testimony exhibited any limitations, this goes to its weight, not its admissibility. Indeed, the trial record indicates that Defendant himself had as much, if not more, difficulty in responding to questions and being coherent than did Shiffert.

To establish prejudice, Defendant "must demonstrate that there is a reasonable probability that the outcome of the proceedings would have been different had counsel pursued the theory [he] now present[s]." **Daniels, supra,** 963 A.2d at 427. Defendant has not persuaded us that this is the case. Nor can counsel be deemed

ineffective for failing to impeach a witness with evidence of a suicide attempt which the court has ruled is irrelevant. **See Harris, supra,** 852 A.2d at 1173 (finding that trial counsel is not ineffective for failing to impeach a witness with mental health information which the trial court has precluded from being introduced).[6]

Moreover, the thrust of the evidence Defendant asserts should have been discovered, was primarily to challenge Shiffert's credibility with respect to his ability to accurately perceive, recall and communicate what occurred at the time of each purchase. As to this objective, it cannot be forgotten that Shiffert's testimony was in fact consistent with that of two other Commonwealth witnesses, Theesfeld and Officer Biechy, both in a position to observe. Theesfeld was side by side with Defendant for the first two buys; Biechy witnessed each buy from across the street. Consequently, the prejudice of which Defendant complains appears harmless at most.

CONCLUSION

In that Defendant has not proven prejudice, Defendant's claim of trial counsel's ineffectiveness fails and his Petition for Post-Conviction Relief will be denied.

[6] At the PCRA hearing, Defendant produced a copy of the application for Shiffert's involuntary commitment pursuant to Section 302 of the Mental Health Procedures Act. The application, dated June 4, 2004, indicates that Shiffert was suicidal and was admitted on June 3, 2004, for involuntary emergency examination and treatment. The application indicates that Shiffert, who was then twenty-three years old, was distraught over breaking up with his girlfriend. There is nothing in this record to indicate that Shiffert's mental health issues somehow affected his ability to observe, comprehend, or recall the drug transactions to which he testified. **Cf. Commonwealth v. Rizzuto,** 566 Pa. 40, 777 A.2d 1069, 1082-83 (2001) (defining the critical question regarding the relevance of a witness' mental health history in terms of the witness' ability to observe and remember) (abrogated on other grounds).

RONALD RIGHTER and MEGAN RIGHTER, Plaintiffs vs. EBIN M. WALTER, Defendant

Civil Law—Lay Witnesses—Opinion Testimony—JNOV—Weighing the Evidence

1. The opinion testimony of a lay witness is admissible if it is based upon his own perceptions and helpful to a clear understanding of his testimony or the determination of a fact in issue. This is true even if the opinion is on an ultimate issue of fact.

2. A lay witness who observes a motor vehicle accident will be permitted to express an opinion as to the cause of the accident when the cause is readily apparent and capable of being determined by a non-expert.

3. The remedy for a challenge to the sufficiency of a claimant's evidence, if sustained, is the entry of a judgment in favor of the defendant (**i.e.,** a judgment notwithstanding the verdict). In contrast, the remedy for a successful challenge where the verdict is found to be contrary to the weight of the evidence is the award of a new trial.

4. In determining whether the evidence is sufficient to sustain a verdict, the court must view the evidence in the light most favorable to the verdict winner, grant that party the benefit of all reasonable inferences, and determine whether the evidence introduced at trial is sufficient to sustain a verdict.

5. When weighing the evidence in ruling upon post-trial motions, the trial court may grant a new trial only if the jury's verdict is so contrary to the evidence that it "shocks one's sense of justice." To be overturned, the verdict must be so devoid of any rational basis that it could only have resulted from passion, prejudice, or some other non-judicial cause, such that justice requires the verdict be set aside, and the case retried.

6. The jury is free to believe all, some, or none of the evidence presented by a witness. Where the plaintiff's evidence as to causation and damages is contested, contradictory, and raises serious doubts as to its reliability and believability, the jury is within its province in disbelieving plaintiff's witnesses and finding in favor of the defendant, notwithstanding the defendant's admission that he was responsible for the motor vehicle accident in which the plaintiff claims to have been hurt.

NO. 04-0699

GEORGE G. OSCHAL, III, Esquire, and JAMES J. ALBERT, Esquire—Counsel for the Plaintiffs.

REBECCA E. JELLEN, Esquire—Counsel for the Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—March 12, 2009

FACTUAL AND PROCEDURAL BACKGROUND

On May 22, 2002, a pickup truck driven by Ebin M. Walter ("Defendant") rear-ended a van driven by Ronald Righter ("Plaintiff").[1] The accident occurred at the intersection of Sixth and Mahoning Streets, in Lehighton, Carbon County, Pennsylvania. Both

[1] The Plaintiff, Megan Righter, as the wife of Ronald Righter, has a claim for loss of consortium. Because Mrs. Righter's claim is dependent on that of her husband's and because the jury found Defendant was not responsible for any injuries claimed by Mr. Righter, for purposes of this opinion, we refer to Ronald Righter as the "Plaintiff".

vehicles were traveling in the same direction on Mahoning Street, Defendant behind Plaintiff and Plaintiff behind a third vehicle driven by Janet Bonner. As a result of this accident, Plaintiff claims he suffers from neck and lower back pain.

A jury trial commenced on June 11, 2008, and concluded on June 12, 2008, when the jury returned a verdict finding that Defendant was negligent, but that Plaintiff suffered no injuries as a result of Defendant's negligence. Plaintiff has timely filed a Motion for Post-Trial Relief seeking a new trial on damages only. In short, Plaintiff asserts that the verdict is contrary to the evidence and contrary to the weight of the evidence. Plaintiff also asserts that we erred in allowing a lay witness to offer an opinion as to the fault of a non-joined third party. For the reasons which follow, Plaintiff's Post-Trial Motion will be denied.

DISCUSSION

1) **Lay Witness Testimony**

Procedurally, Plaintiff's assertion that we erred in allowing a lay witness to offer opinion testimony on the fault of a non-joined third party is deemed waived. At trial, Hillary Hancock testified that she was stopped on Sixth Street, at its intersection with Mahoning Street, waiting for traffic to pass, when she saw the accident occur. Because she believed Mrs. Bonner was responsible for the accident—by making a sudden, abrupt left turn which caused the Plaintiff to unexpectedly brake and Defendant, in turn, to run into Plaintiff's van—she followed Mrs. Bonner, who apparently was totally unaware of the accident behind her, to a nearby doctor's office and then returned to the scene of the accident and reported to the investigating police officer where Mrs. Bonner could be found. Plaintiff's counsel failed to object to any of Ms. Hancock's testimony at trial, or to have any portion of it stricken. "[P]ost-trial relief may not be granted unless the grounds therefor, (1) if then available, were raised ... by ... objection ... or other appropriate method at trial ... ." Pa. R.C.P. 227.1(b)(1) (2004); **see also, Frederick v. City of Pittsburgh,** 132 Pa. Commw. 302, 306, 572 A.2d 850, 852 (1990) ("The import of the Rule is that the grounds for relief requested must have been raised in pre-trial proceedings or at trial and that those grounds must be stated in the motion.").

Even had the issue been properly preserved for our review, it would not warrant setting aside the jury's verdict, nor would it warrant a new trial on damages.

> A lay witness may express an opinion if it is based upon his own perceptions and helpful to a clear understanding of his testimony or the determination of a fact in issue. … Although the admission of an opinion on an ultimate issue of fact does not constitute error per se, ... if its admission would confuse, mislead, or prejudice the jury, it should be excluded. … In order for a ruling on evidence to constitute reversible error, it must be shown not only to have been erroneous, but harmful to the party complaining.

McManamon v. Washko, 906 A.2d 1259, 1276 (Pa. Super. 2006) (citations and quotations omitted) (finding no prejudice in trial court's admission of party-witness' lay opinion testimony as to fault regarding automobile accident), **appeal denied,** 921 A.2d 497 (Pa. 2007); **see also, Wilson v. Pennsylvania Railroad Co.,** 421 Pa. 419, 427, 219 A.2d 666, 671 (1966) (placing discretion with the court on the admissibility of a lay witness' opinion, based upon personal knowledge and helpful to an understanding of the witness' testimony).

Here, no ruling was made on the evidence because, as mentioned, counsel did not object. Moreover, there is no basis to believe that the jury was confused or misled by Ms. Hancock's opinion of fault, or that the Plaintiff was prejudiced by its admission, as the jury found Defendant was negligent.

> [T]he ultimate issue rule has been criticized because of the inherent difficulty in deciding what constitutes an ultimate issue in the particular case. … Moreover, the rationale for the rule, that ultimate issue opinion should be excluded because it 'usurps' the jury's function, has been labeled 'mere empty rhetoric', because no witness can usurp the jury's function even if he wants to. … If the word 'usurp' is put aside, and the ultimate issue rule considered as prohibiting opinions that might lead the jury to forgo an independent analysis of the case, still the question remains whether any ultimate issue lay opinion does have such an effect. The opinion cannot prevent an independent jury decision; the jury is still free to decide. Moreover,

> it is at best doubtful that a jury is influenced more by opinion testimony on the ultimate issue than it is by fact testimony on the ultimate issue; yet we do not exclude fact testimony on the ultimate issue. … If a jury reaches the same conclusion as that offered by the lay witness, it seems more likely that the jury interpreted the facts in the same way and accepted the witness's opinion because it fit the facts, than that it failed to make an independent analysis of the facts merely because it happened to hear an opinion. Where the opinion is not supported by the facts, that may be pointed out by cross-examination and argument, and the jury persuaded to reject the opinion.

McKee by McKee v. Evans, 380 Pa. Super. 120, 138-39, 551 A.2d 260, 268-69 (1988) (citations and quotations omitted), **appeal denied,** 522 Pa. 604, 562 A.2d 827 (1989).

As to the effect of any fault which the jury might attribute to Mrs. Bonner, the jury was specifically instructed that the question of Defendant's negligence as a cause of the accident was independent of any other causes and that, if Defendant's conduct was determined to be a legal cause of harm to Plaintiff, Plaintiff was entitled to be fully compensated for all injuries caused by Defendant's conduct notwithstanding that the conduct of other persons who are not parties to these proceedings may also have contributed to the harm.[2] Accordingly, Plaintiff's assertion that we erred in allowing a lay witness to offer opinion testimony on the fault of a non-joined third party is without merit, if not waived, and does not constitute reversible error.[3]

2) **Sufficiency of the Evidence**[4]

We next turn to Plaintiff's assertion that the verdict is contrary to the evidence. This claim is a challenge to the sufficiency of the

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[2] Plaintiff raised no objections to these instructions.

[3] We also note that Plaintiff has apparently abandoned this issue. No argument, or legal authority in support of the issue, is contained in Plaintiff's Brief in Support of Motion for Post-trial Relief.

[4] "[T]he remedy of entry of judgment in a party's favor is proper only when a party successfully challenges the sufficiency of the evidence. … On the other hand, the remedy of a new trial is proper when the verdict rendered by the trial court indicates that the trial court abused its discretion when weighing the evidence. … This distinction is crucial and is repeated **ad nauseum** by the appellate courts of this Commonwealth in both civil and criminal cases." **Morin v. Brassington,** 871 A.2d 844, 851 (Pa. Super. 2005) (citations omitted).

evidence. "Where the evidence is insufficient to sustain the verdict, the remedy granted in civil cases is a judgment notwithstanding the verdict." **Lilley v. Johns-Manville Corp.,** 408 Pa. Super. 83, 91, 596 A.2d 203, 206 (1991), **appeal denied,** 530 Pa. 644, 607 A.2d 254 (1992). "Judgment n.o.v. is an extreme remedy properly entered by the trial court only in a clear case where, after viewing the evidence in the light most favorable to the verdict winner, no two reasonable minds could fail to agree that the verdict was improper." **Robertson v. Atlantic Richfield Petroleum Products Co.,** 371 Pa. Super. 49, 58, 537 A.2d 814, 819 (1987), **appeal denied,** 520 Pa. 590, 551 A.2d 216 (1988).

> In considering a challenge to the sufficiency of the evidence, [we] must view the evidence presented in a light most favorable to the verdict winner, grant that party the benefit of all reasonable inferences, and determine whether the evidence introduced at trial was sufficient to sustain the verdict. … A party moving for judgment notwithstanding the verdict (**i.e.,** challenging the sufficiency of the evidence) contends that the evidence and all inferences deducible therefrom, viewed in the light most favorable to the verdict winner, is insufficient to sustain the verdict.

Gorski v. Smith, 812 A.2d 683, 691 (Pa. Super. 2002) (citations and quotations omitted), **appeal denied,** 856 A.2d 834 (Pa. 2004). This same standard is applied by the courts of common pleas in addressing a post-trial motion. **See e.g., Michaels et ux. v. State Farm Fire and Casualty,** 33 Phila. 59, 61 (1997), **affirmed,** 707 A.2d 557 (Pa. Super. 1997).

Viewing the evidence, together with all favorable inferences drawn therefrom, in the light most favorable to Defendant as the verdict winner, we find ample support for the jury's determination that the Defendant's negligence was not a substantial factor in bringing about Plaintiff's alleged harm. This determination is one for the jury. **See Peterson v. Shreiner,** 822 A.2d 833, 840 (Pa. Super. 2003). "[W]hether the defendant caused the plaintiff's injuries and whether the plaintiff suffered from compensable pain" is within the province of the jury. **Id.** at 838-39.

We do not agree with Plaintiff's assessment that the evidence is insufficient to sustain the verdict. Plaintiff premises his argument

upon the mistaken belief that there was **uncontested** evidence at trial of his injuries, and indeed refers us to a line of cases in which there was truly uncontested evidence of injury. **Cf. Andrews v. Jackson,** 800 A.2d 959, 965 (Pa. Super. 2002) (holding that where a defendant's negligence is the cause of an auto accident and both parties' medical experts agree that plaintiff sustained some injury as a result of the accident, a jury finding that defendant's negligence was not a substantial factor in causing at least some injury to the plaintiff warranted a new trial on the issue of damages), **appeal denied,** 813 A.2d 835 (Pa. 2002). However, Plaintiff's assertion that his evidence was uncontradicted is belied by the record. Defendant chose not to call a medical expert witness, and relied instead upon thorough cross-examination of Plaintiff's expert witness and Plaintiff himself. Defendant never conceded liability for Plaintiff's injuries, nor did he present an expert witness who conceded that Plaintiff suffered any injury as a result of the accident. **Cf. Peterson, supra,** 822 A.2d at 836, 838, 840 (reinstating jury's verdict in motor vehicle accident case that defendant was negligent, but that negligence was not a substantial factor in bringing about plaintiffs' harm, after trial in which defendant did not concede liability for plaintiffs' alleged injuries, did not present an expert witness, and relied upon cross-examination of plaintiffs' witnesses).

More directly, Defendant testified that at the time of the accident when he inquired whether Plaintiff was hurt, Plaintiff denied any injuries.[5] Additionally, Plaintiff's own testimony raises serious doubts about the injuries for which he seeks to hold Defendant responsible. Plaintiff admitted he did not seek medical assistance at the scene of the accident or until three weeks had passed. Plaintiff acknowledged that shortly after the accident, he went about his day as planned. Defendant's counsel elicited discrepancies between Plaintiff's testimony at trial of what caused the accident and Plaintiff's version given to the police at the time of the accident, as well as in his pretrial deposition. Plaintiff was unable to explain why he did not provide a complete medical history of injuries, treatment, and complaints he experienced before the accident to

[5] Plaintiff did not request that any portion of the trial transcript be prepared for post-trial proceedings. Therefore, our references are limited to our review of the trial recording, being unable to cite to any transcript.

Dr. Albert Janerich, the physician Plaintiff presented at trial as his medical expert in the field of physical medicine and rehabilitation. Plaintiff also testified that he was involved in another motor vehicle accident which occurred after his accident with Defendant, and that he also fell down fourteen steps following which diagnostic studies were taken of both his back and neck. By exaggerating the injuries which he claimed were caused in the instant motor vehicle accident, Plaintiff undermined his credibility regarding both the existence and the extent of such injuries.

Our review of Dr. Janerich's testimony is equally damaging to Plaintiff's cause.[6] Dr. Janerich testified that he examined Plaintiff nine months after the accident at the request of Plaintiff's counsel (N.T. 02/13/2008, pp. 8-9, 70), that Plaintiff did not sustain any bulges or disc herniations in the cervical spine region (N.T. 02/13/2008, p. 62), that straightening of the cervical lordosis can be a result of the patient's position during the diagnostic study (N.T. 02/13/2008, p. 62), that Plaintiff sustained a lumbar injury prior to the accident requiring the surgical placement of Harrington Rods (N.T. 02/13/2008, p. 10), that Plaintiff failed to see other physicians and to comply with treatment as recommended (N.T. 02/13/2008, p. 65), and perhaps most importantly, that he relied almost entirely upon medical records supplied to him by Plaintiff's counsel in ascertaining Plaintiff's medical history prior to the accident, without obtaining complete medical records from Plaintiff's medical providers (N.T. 02/13/2008, pp. 49-50, 58-61).

The medical records not reviewed by Dr. Janerich revealed that Plaintiff saw a pain management specialist sixteen days prior to the accident in question (N.T. 02/13/2008, p. 76) and that Plaintiff had previously sustained damage to his left leg nerve (N.T. 02/13/2008, pp. 54-55). Dr. Janerich was further unable to tell the jury what medications Plaintiff was taking for pain management at the time of the accident (N.T. 02/13/2008, p. 54). In short, Dr. Janerich's opinion was based upon his limited treatment of Plaintiff to whom he was introduced by Plaintiff's counsel, Plaintiff's self-serving oral

[6] Dr. Janerich's deposition testimony taken on February 13, 2008, was read into the trial record. For purposes of post-trial proceedings, Plaintiff submitted a copy of Dr. Janerich's deposition testimony, and it is to this transcript that we cite.

medical history, and a misleading summary of Plaintiff's medical records created by Plaintiff's counsel and reviewed by the doctor on the day of his deposition (N.T. 02/13/2008, pp. 11, 49-50). Without question, Dr. Janerich's testimony was suspect and the jury was entitled to discredit this testimony in its entirety. **See Bezerra v. National Railroad Passenger Corp.,** 760 A.2d 56, 63 (Pa. Super. 2000) ("[T]he jury is not required to accept everything or anything a party presents."), **appeal denied,** 785 A.2d 86 (Pa. 2001).

The burden in this case was upon Plaintiff to prove and persuade the jury of the merits of his case. Plaintiff failed to do so and the record is more than adequate to sustain the validity of the jury's verdict. **See Morgan v. Philadelphia Electric Company,** 299 Pa. Super. 545, 549, 445 A.2d 1263, 1265 (1982) (stating that "a jury may properly ignore any plaintiff's claim for damages when it disbelieves the witnesses of the plaintiff and therefore is unconvinced by plaintiff's evidence"). Further, a jury is not required to find every injury compensable and may, according to our Superior Court, dismiss a bruise as "a transient rub of life," undeserving of compensation. **Kennedy v. Sell,** 816 A.2d 1153, 1157 (Pa. Super. 2003). Based upon the record presented, we would abuse our discretion were we to set aside the jury's findings on causation and enter judgment notwithstanding the verdict. **See Rohm and Haas Company v. Continental Casualty Company,** 732 A.2d 1236, 1248 (Pa. Super. 1999), **aff'd,** 566 Pa. 464, 781 A.2d 1172 (2001).

3) **Weight of the Evidence**

Lastly, we turn to Plaintiff's contention that the verdict was contrary to the weight of the evidence, and again find that the jury did not err. As noted, the remedy if the evidence was improperly weighed is the granting of a new trial. **See Morin v. Brassington,** 871 A.2d 844, 851 (Pa. Super. 2005).

> There should be nothing difficult about a decision to grant a new trial for inadequacy: the injustice of the verdict should stand forth like a beacon. Nor, weighing difficulties, may a court resolve them with a coin, when the result is to overturn the verdict of a jury reached on dubious evidence of damages.

Elza v. Chovan, 396 Pa. 112, 118, 152 A.2d 238, 241 (1959). "A trial court may only grant a new trial when the jury's verdict is so

contrary to the evidence that it 'shocks one's sense of justice.'" **Neison v. Hines,** 539 Pa. 516, 520, 653 A.2d 634, 636 (1995).

> It is hard to imagine a situation which calls for a more deferential standard of review than a weight of the evidence claim. It is the exclusive province of the jury, as factfinder, to hear evidence on damages and decide what amount fairly and completely compensates the plaintiffs. A trial court should be loath to substitute its judgment for the jury's and may do so only in very limited circumstances.

Matheny v. West Shore Country Club, 436 Pa. Super. 406, 407-408, 648 A.2d 24, 24 (1994), **appeal denied,** 540 Pa. 601, 655 A.2d 990 (1995). For Plaintiff to be awarded a new trial, the jury's verdict must be so devoid of any rational basis that it must have reflected passion, prejudice, or some other nonjudicial basis, such that the entire effort of the jury must be disregarded, and the case retried.

It is true that "where a defendant concedes liability and his or her expert concedes injury resulting from the accident that would reasonably be expected to cause **compensable** pain and suffering, the jury's verdict is against the weight of the evidence where it finds for the defendant." **Peterson, supra,** 822 A.2d at 837. Here, although Defendant conceded liability, he never conceded injury resulting from the accident, and Plaintiff presented no reliable evidence of compensable pain and suffering for the jury's consideration. Indeed, the only testimony substantiating the claimed injuries was that of Plaintiff and his treating physician, both of whose credibility was severely tested as described above. **See Brodhead v. Brentwood Ornamental Iron Co.,** 435 Pa. 7, 11, 255 A.2d 120, 122 (1969). "From time immemorial, it has been the province of the jury in [negligence] cases, where oral testimony is concerned, to pass upon the credibility of witnesses even though uncontradicted by [defense] witnesses or even though the defendant introduces no testimony at all." **Id.**

In short, the weight of the evidence available to the jury, as described above, amply supports its verdict and the verdict in no way shocks our sense of justice. We cannot hold that the jury's disbelief in Plaintiff's or his expert's testimony was wholly unwar-

ranted and against the weight of the evidence and we will not usurp this prerogative vested in the jury. The jury was "free to believe all, some, or none of the testimony presented by a witness." **Neison, supra** at 520, 653 A.2d at 637. "[Plaintiff's] motion for a new trial [merely represents] the act of a disappointed litigant raising sails on the ship of a defeated cause, hoping that some vagrant or wanton wind might bear the craft into a happier port. [We] believe that the [Plaintiff is] aboard a ship [devoid of] a cargo of legal and justified complaint." **Thomas v. Mills,** 388 Pa. 353, 362, 130 A.2d 489, 493 (1957) (Musmanno, J., dissenting).

CONCLUSION

For the reasons given, Plaintiff's Motion for Post-Trial Relief will be denied.

ORDER

AND NOW, this 12th day of March, 2009, upon consideration of Plaintiff's Motion for Post-Trial Relief, Defendant's Response thereto, and counsels' submissions and argument thereon, and in accordance with our Memorandum Opinion of this same date, it is hereby

ORDERED and DECREED that said Motion is DENIED. Accordingly, judgment is hereby entered on the jury's verdict in favor of the Defendant, Ebin M. Walter, and against the Plaintiffs, Ronald Righter and Megan Righter.

HAZEL FRASER and LLOYD FRANCIS, Objectors/Exceptants vs. CARBON COUNTY TAX CLAIM BUREAU, Respondent

Civil Law—Objections to Tax Sale—Additional Notice Efforts —Notice by Posting—Notice by Public Advertisement

1. When the Tax Claim Bureau has reason to believe that an owner has not received written notification of a pending upset sale, the Bureau is required by statute to exercise additional efforts to locate the owner before a tax sale of the owner's property can occur. 72 P.S. §5860.607a(a).

2. Provided the Tax Claim Bureau has strictly complied with the notice requirements of the Real Estate Tax Sale Law, the fact that the owner may not have actually received notice is insufficient to set aside the sale.

3. In providing notice of a tax sale by posting, the manner of posting must be reasonable and likely to inform the owner, as well as the public, of the impending sale; must be securely attached; and must be conspicuous, meaning that the posting must be such that it will likely be seen by the property owner and the public generally.

4. The property description used in the advertised notice of an upset tax sale must be the same as that stated in the claims entered and is sufficient if the property is described by reference to assessment maps found in the assessment office.

5. When property is titled in more than one name, the advertised notice of the upset tax sale must state the name of each record owner. If this requirement is not met, the notice is fatally defective and the tax sale will be set aside.

6. When property is jointly titled in more than one name, an advertised notice of the upset tax sale which contains the name of only one of the property owners is fatally defective, not only with respect to the owner whose name does not appear in the public advertisement, but also with respect to the owner whose name does appear, and will be set aside.

NO. 07-3579

KIM R. ROBERTI, Esquire—Counsel for the Plaintiffs.

DANIEL A. MISCAVIGE, Esquire—Counsel for the Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—April 28, 2009

Hazel Fraser and Lloyd Francis, the owners of real property known as Lot 186, Section FVI, Towamensing Trails, Penn Forest Township, Carbon County, Pennsylvania, a/k/a PRC No. 22A-51-FVI186 (the "Property"), have filed exceptions and/or objections to the upset sale of the Property held by the Carbon County Tax Claim Bureau (the "Bureau") on September 21, 2007. Following a hearing thereon, we make the following findings and conclusions.

FINDINGS OF FACT

1. The Property which is the subject of these proceedings is an unimproved vacant lot located on Emerson Drive in Towamensing Trails, Penn Forest Township, Carbon County, Pennsylvania.

2. The Property was sold by the Bureau for delinquent real estate taxes at the upset sale held on September 21, 2007.

3. At the time of the upset sale, Hazel Fraser and Lloyd Francis (the "Owners") were the record owners of the Property. However, no evidence was presented as to how the Owners hold title, whether as joint tenants, as tenants in common, or by the entireties.

4. On October 24, 2007, the Owners filed exceptions and/or objections seeking to set aside the upset sale which are now before us for disposition.

5. On or about March 1, 2006, the Bureau sent notice of the return of unpaid real estate taxes for the year 2005 and the entry of a claim therefore to the Owners at 582 E. 26th St., Brooklyn, N.Y. 11210 by United States certified mail, return receipt requested, postage prepaid. **See** 72 P.S. §5860.308(a). This notice was returned to the Bureau on April 18, 2006, unclaimed.

6. Thereafter, on April 18, 2006, a courtesy letter was sent by United States first-class mail to the Owners at the same address—582 E. 26th St., Brooklyn, N.Y. 11210—together with a copy of the 2005 return and claim notice. This mailing was not returned to the Bureau.

7. Following the Bureau's receipt of the undelivered return and claim notice for the 2005 tax year, notice of this return and claim was posted on the Property on August 6, 2006, by Michael Zavagansky, a person designated by the Carbon County Board of Commissioners to post notice of the return and claim. **See** 72 P.S. §6860.308(a).

8. On November 1, 2006, the Bureau again sent notice of the delinquent taxes to the Owners at 582 E. 26th St., Brooklyn, N.Y. 11210 by United States first-class mail. This mailing was not returned to the Bureau.

9. On March 1, 2007, the Bureau sent notice of the return of unpaid real estate taxes for year 2006 and the entry of a claim therefore to the Owners at 74 Terrace Ave., West Orange, N.J. 07052 by United States certified mail, return receipt requested, postage prepaid. This change in address was based upon information the Bureau received from the Carbon County Assessment Office. A signed receipt for this notice was returned to the Bureau on or about March 13, 2007. **See** 72 P.S. §5860.308(a).

10. On June 1, 2007, the Bureau sent notice of the September 21, 2007 upset sale to Lloyd Francis at 74 Terrace Ave., West Orange, N.J. 07052 by certified mail, restricted delivery, return receipt requested, postage prepaid. **See** 72 P.S. §5860.602(e)(1). A signed receipt for this notice was returned to the Bureau on June 13, 2007.

11. On June 1, 2007, the Bureau sent notice of the September 21, 2007 upset sale to Hazel Fraser at 74 Terrace Ave., West Orange, N.J. 07052 by certified mail, restricted delivery, return

receipt requested, postage prepaid. **See** 72 P.S. §5860.602(e)(1). A signed receipt for this notice was returned to the Bureau on June 13, 2007.

12. Notice of the upset sale of the Property scheduled for September 21, 2007, was also posted by the Bureau on the Property on July 29, 2007. **See** 72 P.S. §5860.602(e)(3). This notice was attached to a surveyor's stake located approximately five feet from Emerson Drive and was visible from Emerson Drive.

13. On August 17, 2007, notice of the September 21, 2007, scheduled upset sale of the property was published in the **Times News,** a newspaper of general circulation, and the **Carbon County Law Journal. See** 72 P.S. §5860.602(a). This notice described the Property as being located at 186 Emerson Drive with a Map No. of 22A-51-FVI186. The sole owner of the Property identified in each notice was Lloyd Francis.

14. On August 27, 2007, notice of the upset sale scheduled for September 21, 2007, was sent by United States first-class mail to Lloyd Francis at 74 Terrace Ave., West Orange, N.J. 07052. A certificate of mailing for this notice was obtained by the Bureau from the post office. **See** 72 P.S. §5860.602(e)(2). This mailing was not returned to the Bureau.

15. On August 27, 2007, notice of the upset sale scheduled for September 21, 2007, was sent by United States first-class mail to Hazel Fraser at 74 Terrace Avenue, West Orange, N.J. 07052. A certificate of mailing for this notice was obtained by the Bureau from the post office. **See** 72 P.S. §5860.602(e)(2). This notice was not returned to the Bureau.

16. The address for the Owners used by the Bureau in the August 27, 2007, mailings—74 Terrace Avenue, West Orange, N.J. 07052—was ascertained by the Bureau after searching local telephone directories for the County, dockets and indices of the County Tax Assessment Office, Recorder of Deeds Office and Prothonotary's Office, as well as checking with the tax collector for the affected taxing districts, and reviewing the Bureau's own records. **See** 72 P.S. §§5860.602(e)(2) and 5860.607a(a).

17. On September 26, 2007, the Bureau notified Lloyd Francis by United States certified mail, restricted delivery, return receipt

requested, postage prepaid, addressed to 74 Terrace Ave., West Orange, N.J. 07052 that the Property was sold at the upset sale held on September 21, 2007. **See** 72 P.S. §5860.607(a.1)(1). This notice was returned to the Bureau unclaimed on October 30, 2007. **See** 72 P.S. §5860.607(b.1).

18. On the same date, October 30, 2007, the Bureau sent notice to Lloyd Francis by United States first-class mail addressed to 74 Terrace Ave., West Orange, N.J. 07052 of the upset sale held on September 21, 2007. This notice was not returned to the Bureau.

19. On September 26, 2007, the Bureau notified Hazel Fraser by United States certified mail, restricted delivery, return receipt requested, postage prepaid, addressed to 74 Terrace Ave., West Orange, N.J. 07052 that the Property was sold at the upset sale held on September 21, 2007. **See** 72 P.S. §5860.607(a.1)(1). This notice was returned to the Bureau unclaimed on October 29, 2007. **See** 72 P.S. §5860.607(b.1).

20. On the same date, October 29, 2007, the Bureau sent notice to Hazel Fraser by United States first-class mail addressed to 74 Terrace Ave., West Orange, N.J. 07052 of the upset sale held on September 21, 2007. This notice was not returned to the Bureau.

21. At the time of hearing, the only witness called by the Owners was a title searcher. No evidence was presented as to the Owners' actual addresses at any relevant time period or whether the Owners in fact received any of the notices which were not returned to the Bureau.

DISCUSSION

At the time of the hearing, the Owners identified three defects which they claim are fatal to the upset sale of their Property: (1) that the additional efforts made by the Bureau to ascertain the Owners' address for notification of the upset sale were insufficient; (2) that the notice of the upset sale posted on the Property was insufficient; and (3) that the Property description contained in the advertised public notice of the upset sale was insufficient and failed to identify both Hazel Fraser and Lloyd Francis as owners of the Property. These issues will be addressed in the sequence presented.

(1) **Additional Notice Efforts**

The requirement for additional notification efforts by the Bureau appears in Section 607.1 of the Real Estate Tax Sale Law, 72 P.S. §5860.607a(a), and provides in pertinent part that additional efforts are required to locate an owner when the mailed notification of a pending upset sale set by the bureau 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 ... ." Here, the separate notices of the upset sale sent by the Bureau to the Owners on June 1, 2007, by certified mail, restricted delivery, were in fact delivered and signed for. While the signature for each receipt appears to be that of the same individual and does not appear to be that of either Owner, there is nothing in the record to indicate that the individual who accepted this mail was not authorized to do so by the Owners. **See Eathorne v. Westmoreland County Tax Claim Bureau,** 845 A.2d 912, 915-16 (Pa. Commw. 2004) ("[I]n evaluating whether notice requirements as to tax sales have been strictly complied with, our '**inquiry is not to be focused on the neglect of the owner,** which is often present in some degree, **but on** whether the **activities of the** Bureau comply with the requirements of the statute.' ") (emphasis in original); **see also,** 72 P.S. §5860.602(h).

Assuming nevertheless that one or more of the conditions triggering the necessity for additional notification efforts has been met, the Bureau exercised reasonable efforts to determine the whereabouts of the Owners. The sources of information specified in Section 607.1 need not each be investigated and are not the exclusive means of satisfying an owner's due process right to be notified before his property is sold. **See Wiles v. Washington County Tax Claim Bureau,** 2009 WL 425886 *5 (Pa. Commw. 2009). Only if it is obvious that notice given by the bureau is not reaching the owners, is the bureau obligated to go beyond notice by certified mail. **See id.** "[D]ue process does not require the taxing bureau to perform the equivalent of a title search or to make decisions to quiet title ... ." **Id.** Further, as already mentioned in our findings, there is nothing in the record before us to suggest that any additional examination of the county records by the Bureau,

beyond those made, would have resulted in any different address for the Owners. **See id.**

(2) **Posting of the Notice of Sale**

The affidavit of Mr. Zavagansky, who posted notice of the upset sale on the Property, states the date and time of posting. At the hearing held in this matter, Mr. Zavagansky testified that he posted notice of the upset sale on a surveyor's stake, using staples to fasten the notice to the stake. The stake was approximately two inches in width and extended approximately two feet above ground. The stake was located on the Property approximately five feet from Emerson Drive and, once posted, this notice was visible from the road.

With respect to the requirements for posting notice of an upset sale, the Commonwealth Court recently stated the following:

> While the [Real Estate Tax Sale Law] is silent as to the manner of posting required, this Court has interpreted Section 602(e)(3) to mean that the method of posting must be reasonable and likely to inform the taxpayer as well as the public at large of an intended real property sale. Case law requires that the posting be reasonable, meaning conspicuous to the owner and public and securely attached. 'Conspicuous' means posting such that it will be seen by the property owner and public generally.

Id. at *3 (citations omitted). Accepting the testimony of Mr. Zavagansky as credible, which we do, the Bureau has met its burden of establishing that the posting was reasonable. **See In re Upset Price Tax Sale of September 10, 1990,** 147 Pa. Commw. 52, 55, 606 A.2d 1255, 1257 (1992) (placing the burden of proving compliance with proper posting upon the Bureau); **see also, Wiles,** 2009 WL 425886 at *3-*4 (finding posting of notice on a two inch wide piece of wood fastened with staples and located on a vacant lot seven to eight feet from the road complied with Section 602(a)(3)).

(3) **Adequacy of Public Advertisement**

(a) **Description of Property**

The Owners' claim that the property description used in the advertised public notice for the September 21, 2007 upset sale was inadequate is without merit. The description used in this adver-

tisement is the same as that used in the claim entered. Compare Exhibits 15 (advertisement) and 1 (notice of return and claim; **see also,** 72 P.S. §5860.602(a)(5) (requiring the property description in the advertised notice of upset sale to be the same as that stated in the claims entered)). Moreover, not only was the Owners' evidence challenging the accuracy of the Property's street address as 186 Emerson Drive unconvincing, the Bureau's additional description of the Property by reference to assessment maps found in the assessment office complies with Section 309 of the Real Estate Tax Sale Law, 72 P.S. §5860.309(c)(3).

(b) **Identity of Owner**

Notwithstanding the adequacy of this description, the public notice advertising the upset sale identified only Lloyd Francis as the owner of the Property. Among the requirements for the legal advertising of an upset sale is that the notice describe not only the property to be sold but also include the name of the owner. **See** 72 P.S. §5860.602(a)(5).

In pertinent part, the Real Estate Tax Sale Law defines "owner" as "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." 72 P.S. §5860.102. Under this definition, whether the Owners' interest in the Property is as joint tenants or as tenants in common, each owner has a separate interest in the Property for which individual notice of the upset sale is required. **See Appeal of Marshalek,** 116 Pa. Commw. 1, 5, 541 A.2d 398, 400 (1988), **appeal denied,** 521 Pa. 632, 558 A.2d 533 (1989). This requirement has not been met with respect to the legal advertisement placed concerning Hazel Fraser's interest in the Property.

Nor can we ignore the error as being harmless. In notifying the public generally of an upset sale, advertising notice of the upset sale serves both to attract bidders to the upset sale and to inform "many people who may be concerned for the welfare of the owners." **Hicks v. Och,** 17 Pa. Commw. 190, 194, 331 A.2d 219, 220 (1975). "Such advertising, calling attention to the owners' plight, might prompt these people to take such steps as they may consider appropriate to see to it that the owners' interests are protected." **Id.** Additionally, absent proof that the record owner has received actual notice of an impending upset sale, a fact not evident in the record

before us, "a failure by a tax claim bureau to comply with all the statutory notice requirements ordinarily nullifies a sale." **Aldhelm, Inc. v. Schuylkill County Tax Claim Bureau,** 879 A.2d 400, 403 (Pa. Commw. 2005), **appeal denied,** 890 A.2d 1060 (Pa. 2005); **see also, Krawec v. Carbon County Tax Claim Bureau,** 842 A.2d 520, 523-24 (Pa. Commw. 2004) ("If any method of notice is defective, the tax sale is void. ... The Law's notice requirements must be strictly construed to guard against the deprivation of property without due process of law ... .").

The more interesting question is the effect of this defect on the sale of Lloyd Francis' interest in the Property. While it might appear at first glance that the failure to name Hazel Fraser in the legal advertisement should not affect the sale of the interest of Lloyd Francis, this is not the law. In **Appeal of Marshalek,** the court held that absent notice of the upset sale to all tenants in common, the sale of one tenant's undivided one-fifth interest in real estate was invalid notwithstanding notice of the upset sale to the tenant whose interest was sold. **See Marshalek, supra** at 6, 541 A.2d at 400-401. A tenant in common owns the whole of an undivided fractional interest in the real estate. **See id.** at 6, 541 A.2d at 401. Consequently, as specifically noted by the court, the fractional interest of those co-owners who were not notified would be affected by the upset sale and such owners are entitled to notice both as a matter of due process and under the Real Estate Tax Sale Law. **See id.** at 5-6, 541 A.2d at 400-401; **see also,** 72 P.S. §5860.602(e)(1) (requiring that "each owner" be notified by certified mail of the upset sale).[1] By extension, and also recognizing that it would be fundamentally unfair to bind the successful bidder at an upset sale to the purchase of a fractional interest in property at the same price for which the purchase of the entire ownership interest was bid, the failure to include Hazel Fraser in the legal advertisement also taints the sale of Lloyd Francis' interest in the Property.

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[1] In **Appeal of Marshalek,** the court stated:

> It is contradictory to acknowledge that other owners of fractional interests exist and to state that their interests may not be affected. The fact that they are owners of fractional interests means they have 'interests' that will be affected.

Id., 116 Pa. Commw. 1, 5, 541 A.2d 398, 400 (1988) (footnote omitted), **appeal denied,** 521 Pa. 632, 558 A.2d 533 (1989).

CONCLUSIONS OF LAW

1. Prior to the September 21, 2007, upset sale of the Property, the Bureau made a reasonable investigation to ascertain the identity and whereabouts of the owners of record of the Property for the purpose of providing notice to the Owners of the upset sale.

2. The Bureau has met its burden of proving that the posted notice of the September 21, 2007, upset sale of the Property was reasonable and conspicuous, in a manner likely to be seen and likely to inform both the Owners as well as the public at large of the intended upset sale.

3. The description of the Property contained in the legal advertisement for the September 21, 2007 upset sale complied with the requirements of Section 602(a)(5) of the Real Estate Tax Sale Law, 72 P.S. §5860.602(a)(5).

4. The failure of the public advertisement for the September 21, 2007, upset sale to include the name of Hazel Fraser as an owner of the Property, is a fatal defect both to the sale of Hazel Fraser's interest in the Property as well as that of Lloyd Francis, an additional named owner of the Property.

MARTIN STIO and LINDA STIO, Petitioners vs. COUNTY OF CARBON BOARD OF ASSESSMENT & APPEALS, Respondent and JIM THORPE AREA SCHOOL DISTRICT, Intervenor

Civil Law—Tax Assessment Appeal—Challenge to Uniformity—Common Level Ratio

1. In a tax assessment appeal where the taxpayer claims that the assessment of his property is disproportionate or non-uniform with respect to other comparable properties in the county, the taxpayer has the burden of proving a violation of equal protection and of showing a discriminatory effect.

2. The taxpayer may prove non-uniformity by presenting evidence of the assessment-to-value ratio of similar properties of the same nature in the neighborhood.

3. When the common level ratio published by the State Tax Equalization Board varies by more than 15 percent from the established pre-determined ratio set by the county commissioners, the common level ratio should be applied to the property's fair market value to determine the assessed value of the property for tax purposes.

NO. 07-3403

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LAURA A. SCHELTER, Esquire—Counsel for the Intervenor.

MEMORANDUM OPINION

NANOVIC, P.J.—April 28, 2009

This matter having come before the Court on appeal by Martin and Linda Stio (hereinafter referred to as the "Petitioners"), and after hearing thereon, we make the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The property which is the subject of this appeal (hereinafter referred to as the "Property") consists of a ranch styled vacation home located on Lot 666 Keats Lane, Towamensing Trails, Albrightsville, Penn Forest Township, Carbon County, Pennsylvania (being Parcel No. 22A-51-B666) and also located within the Jim Thorpe Area School District.

2. The Property was purchased by Petitioners by deed dated October 3, 2006, for $158,900.00.

3. On or about August 22, 2007, the Jim Thorpe Area School District (hereinafter referred to as the "Intervenor") appealed the assessment of the Property (for the 2008 tax year) to the Carbon County Board of Assessment Appeals (hereinafter referred to as the "Board").

4. On or about September 10, 2007, the Board of Assessment Appeals entered its decision determining the assessed value of the Property as follows:

PARCEL 22A-51-B666

Total Assessed Value $50,929.00

A total assessed value of $50,929.00 equates to an aggregate fair market value of $158,900.00.

5. On October 9, 2007, Petitioners filed their appeal to this Court from the decision of the Board of Assessment Appeals, fol-

lowing which a **de novo** hearing was held by the Court on October 16, 2008.

6. The Property consists of one parcel of land totaling approximately 0.459 acres located in a Residential Zoned District. Located on the Property is a 792 ± square foot, one-story, ranch-style dwelling with a wood deck and enclosed porch attached. The balance of the Property is relatively level and moderately wooded.

7. At the time of hearing, the Board placed in evidence the records of the tax assessment office.

8. Kim Steigerwalt of the Carbon County Board of Assessment testified that the fair market value of the Property as indicated in the Board's records is $158,900.00.

9. At the time of the hearing, the Petitioners presented testimony from Thomas McKeown, a certified real estate appraiser, who opined that the fair market value of the Property was $149,000.00.

10. We find the fair market value of the Property for the 2008 tax year to be One Hundred and Forty-nine Thousand Dollars ($149,000.00).

11. The predetermined ratio used to assess taxpayers in Carbon County for the tax year 2008 is fifty percent of the fair market value.

12. The common level ratio as determined by the State Tax Equalization Board for properties in Carbon County for the tax year 2008 is 32.05 percent of the fair market value.

13. The common level ratio as determined by the State Tax Equalization Board for properties in Carbon County for the tax year 2009 is 31.25 percent of the fair market value.

14. Although Petitioners presented evidence of the assessed values for various properties comparable to that of the subject Property, Petitioners failed to present any evidence as to the actual value of any of these comparable properties.

15. The Petitioners' evidence failed to establish that a change in the assessed value of the Property will result in a disproportionate or non-uniform assessment of the Property with respect to other comparable properties in Carbon County.

CONCLUSIONS OF LAW

1. The fair market value of the Property for the tax year 2008 is One Hundred and Forty-nine Thousand Dollars ($149,000.00).

2. Petitioners have the burden of proving a violation of equal protection and of showing a discriminatory effect. **Millcreek Township School District v. Erie County Board of Assessment Appeals,** 737 A.2d 335, 339 (Pa. Commw. 1999), **appeal denied,** 759 A.2d 389 (Pa. 2000).

3. "A taxpayer may prove non-uniformity by presenting evidence of the assessment-to-value ratio of 'similar properties of the same nature in the neighborhood.'" **Downingtown Area School District v. Chester County Board of Assessment,** 590 Pa. 459, 913 A.2d 194, 199 (2006). This Petitioners have failed to do. As such, Petitioners have failed to sustain their burden of proof as a matter of law. **See Albarano v. Board of Assessment and Revision of Taxes and Appeals, Lycoming County,** 90 Pa. Commw. 89, 93, 494 A.2d 47, 49 (1985).

4. Petitioners have failed to prove that the Board deliberately and purposefully discriminated against them in handling the appeal or reassessing their Property without performing a county-wide reassessment. **Appeal of Armco, Inc.,** 100 Pa. Commw. 452, 515 A.2d 326 (1986).

5. The common level ratio published by the State Tax Equalization Board on or before July 1, 2007, varies by more than fifteen (15) percent from the established predetermined ratio set by the Carbon County Commissioners for the tax year 2008.

6. The common level ratio published by the State Tax Equalization Board on or before July 1, 2008, varies by more than 15 percent from the established pre-determined ratio set by the Carbon County Commissioners for the tax year 2009.

7. 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 2008 is the State Tax Equalization Board's common level ratio of 32.05 percent. 72 P.S. §5453.704(c).

8. 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 2009 is the State Tax Equalization Board's common level ratio of 31.25 percent. 72 P.S. §5453.704(c).

9. The assessed value of the Petitioners' Property, Parcel No. 22A-51-B666, for the tax year 2008 is Forty-seven Thousand and Seven Hundred and Fifty-four Dollars and Fifty Cents ($47,754.50), representing a fair market value of One Hundred and Forty-nine Thousand Dollars ($149,000.00).

10. The assessed value of the Petitioners' Property, Parcel No. 22A-51-B666, for the tax year 2009 and until legally changed is Forty-six Thousand and Five Hundred and Sixty-two Dollars and Fifty Cents ($46,562.50), representing a fair market value of One Hundred Forty-nine Thousand Dollars ($149,000.00).

CHRISTOPHER S. SMITH, Petitioner/Appellant v. CARBON COUNTY BOARD OF ASSESSMENT APPEALS, Respondent/Appellee and JIM THORPE AREA SCHOOL DISTRICT, Intervenor

Civil Law—Tax Assessment Appeal—Spot Assessments—Difference in Assessment Methods (Countywide Assessments versus Assessments on Appeal)—Uniformity—Establishing a ***Prima Facie*** *Case—Equal Protection—Remedy*

1. Neither the taxing body which files an assessment appeal nor the board of assessment which decides the appeal assumes the role of a tax assessor. Therefore, the conduct of neither is an assessment, much less a spot assessment.

2. That separate methods of assessing real estate are provided for by the County Assessment Law—**i.e.,** base year market value multiplied by the established predetermined ratio for a countywide assessment (Section 602) and current market value multiplied by either the established predetermined ratio or the common level ratio in the case of an assessment arising from an appeal (Section 704)—does not violate the principle of uniformity since the end result of both is uniform assessed values.

3. The protection afforded by the federal Equal Protection Clause is incorporated within this state's Uniformity Clause and serves as the floor for assuring uniform assessments. The effect of this floor is to permit uniformity challenges by examining sub-classifications of similar property within the larger class of real estate generally.

4. The burden is upon the taxpayer alleging a violation of the Uniformity Clause to show that there is deliberate discrimination in the application of the law or that it has a discriminatory effect.

5. Under the federal Equal Protection Clause, the floor for uniformity, tax assessments can be challenged based upon a lack of uniformity in the assessment of comparable properties, those having like characteristics and qualities in the

same area. Therefore, a taxpayer meets his burden of proof for a violation of the Uniformity Clause once he shows non-uniformity in the assessment-to-value ratio between his property and other similar properties of the same nature in the neighborhood.

6. Once an owner rebuts the presumption of uniformity which accompanies the administrative assessment of his property, he is entitled to a reduction of that assessment to an amount proportionate with that of similar properties of the same nature unless the taxing authority's evidence shows that such comparables are not representative of the district as a whole, or that the owner has, in fact, not been assessed at more than the common level ratio in the district.

7. Assessing a condominium unit at a value of more than 75 percent of almost half of the condominium units in a development having the same or substantially the same characteristics and qualities (**i.e.,** similar properties of comparable value) violates the fundamental precepts of uniformity).

NO. 07-3343

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MEMORANDUM OPINION

NANOVIC, P.J.—May 29, 2009

By deed dated October 16, 2006, Christopher Smith ("Smith") purchased Condominium Unit No. F201 at Midlake on Big Boulder Lake ("Midlake") for Two Hundred Seventy-Five Thousand Dollars ($275,000.00). At the time of purchase, the unit had an assessed value of Fifty Thousand Three Hundred Dollars ($50,300.00). Thereafter, prompted by the recent purchase price, the Jim Thorpe Area School District ("School District") filed a statutory appeal to the Carbon County Board of Assessment Appeals ("Board") challenging the property's assessed value for the 2008 tax year. The Board sustained the appeal and increased the assessed value by over seventy-five percent to Eighty-Eight Thousand One Hundred and Forty-One Dollars ($88,141.00). On the basis of the County's common-level ratio of 32.1 percent, this reflected a fair market value of Two Hundred Seventy-Five Thousand Dollars ($275,000.00), an amount equal to the price paid by Smith.[1] Smith has appealed the Board's decision to this Court.

[1] Carbon County is a county of the sixth class. Accordingly, Smith's appeal is governed by The Fourth to Eighth Class County Assessment Law, 72 P.S. §§5453.101-5453.706, and, to the extent not inconsistent with such enactment, The

FACTUAL BACKGROUND

Midlake is a residential condominium development formed in 1988 and located in Kidder Township, Carbon County, Pennsylvania. It consists of 132 two-bedroom condominium units located in nine separate buildings: five buildings with twelve units each and four buildings with eighteen units each. The units are divided between those with 1,096 square feet of living space, located on the first two floors of each building, and those with a loft and 1,315 square feet of living space, located on the third floor of each building. There are a total of eighty-eight smaller units and forty-four larger units. The smaller units, which include the unit owned by Smith and are the units Smith compares his property to, have identical floor plans and are mirror images of one another.

Forty-two of these smaller units, almost forty-eight percent of the total, have an assessed value ranging between $49,300.00 and $50,300.00. An additional five, approximately six percent of the total, have an assessed value ranging between $53,430.00 and $64,781.00. Of these forty-seven units, forty-three were acquired prior to January 1, 2004, and four since that date. For twenty-four of the units transferred prior to January 1, 2004, those which Smith's real estate expert associated with bona fide purchase prices, the average assessed value is $51,991.67.[2] The average sales price for these same twenty-four units is $118,395.83.

General County Assessment Law, 72 P.S. §§5020-101—5020-602. The property is located within the Jim Thorpe Area School District.

Section 102 of The Fourth to Eighth Class County Assessment Law, 72 P.S. §5453.102, defines the term "common-level ratio" as "the ratio of assessed value to current market value used generally in the county as last determined by the State Tax Equalization Board ['STEB'] pursuant to the Act of June 27, 1947 (P.L. 1046, No. 447), referred as the State Tax Equalization Board Law."

[2] The report submitted by Smith's real estate expert states that the bona fide sales price for a number of the sales prior to January 1, 2004, could not be determined for various reasons. According to the report, the public records indicate no sales price or deed dates for those units occupied by the original owners and several of the deeds (**i.e.,** six) state only a nominal $1.00 consideration. Additionally, Smith's expert described two of the sales as likely distress sales with sale prices of $75,000.00 and $40,000.00. These refer to Units E191 and F207 respectively. Although criticized by the School District for excluding transactions which are not at arm's length, this approach is similar to that taken by the State Tax Equalization Board, which develops and calculates an annual common level ratio for each county based upon real estate transfers involving bona fide selling

Since January 1, 2004, thirty-six units, including two of the four units referred to in the previous paragraph, have been transferred in what appear to be arm's length transactions.[3] The assessed value for the units transferred since January 1, 2004, range between $49,500.00 and $118,500.00, with the average being $83,122.69. This is a sixty percent increase in the average assessed value from those similar units acquired prior to January 1, 2004.

The most recent six sales of the smaller bedroom units occurred between July 1, 2007 and June 23, 2008 (the date of the most recent sale provided). The prices for these properties range from $225,000.00 to $275,000.00, with the average being $249,250.00. The average assessed value is $69,009.17.

Primarily on the basis of this information, Smith contends that the revised assessment for his property is excessive and discriminatory in relation to comparable properties in Midlake and should be set aside for one or more of the following reasons: (1) as a spot assessment; (2) because the same methodology for assessing comparable properties has not been utilized by the Board; and (3) because the constitutional requirements of uniformity and equal protection have been violated. Each of these grounds is addressed below.

DISCUSSION

1. **Spot Assessment**

"As a general proposition, selective reassessment or 'spot reassessment' by a body clothed with the power to prepare or revise assessment rolls, value property, change the value of property, or establish the predetermined ratio is improper." **Vees v. Carbon County Board of Assessment Appeals,** 867 A.2d 742, 747 (Pa. Commw. 2005), **appeal denied,** 595 Pa. 713, 939 A.2d 891

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prices, supplemented by independent appraisal data and other relevant information. **See** 61 Pa. Code §603.31(b).

[3] These two units, Units H228 and H234, each have an assessed value of $49,500.00. Unit H228 was sold on or about March 21, 2006, for a price of $281,500.00; Unit H234 was sold on or about October 12, 2007, for a price of $275,000.00. The two other units transferred since January 1, 2004, with assessed values less than $50,300.00, were not considered to be arm's length transactions by Smith's real estate expert. The deeds for these two sales each show a nominal consideration of $1.00: Unit G219 conveyed on or about December 7, 2005, and Unit B156 conveyed on or about January 27, 2005.

(2007). Spot assessments are those initiated by a body possessing the power to assess or reassess, which generally involve a limited or narrow group of properties, and which create such a disparity or disproportionality in the tax burden between the affected properties and other similar or comparable properties in the taxing district that there exists either a violation of the Uniformity Clause of the Pennsylvania Constitution or the Equal Protection Clause of the United States Constitution, or both.

As a matter of law, neither the taking of an assessment appeal by a taxing body nor the adjudication of such an appeal by an administrative agency is a spot reassessment. **See Vees, supra,** 867 A.2d at 746-48. In neither case, are the actions of the taxing body or the board an assessment. In the case of a municipal body filing an appeal, its appeal is the exercise of a statutory right to **review** an assessment made by the county assessor's office of which it feels aggrieved, 72 P.S. §5453.706; in the case of the board of assessment deciding the appeal, it acts in its statutory capacity to **hear** the appeal, 72 P.S. §5453.702. Accordingly, Smith's challenge on this basis is misplaced and without merit.

2. **Methodology**

Under The Fourth to Eighth Class County Assessment Law, real property in the county is originally valued and assessed either by reference to the current market value at the time of assessment or by reference to a prior year upon which the market value of all property in the county is based. **See** 72 P.S. §5453.602(a).[4] In Carbon County, the base year upon which real property market values are based is 2001, the year in which the county last conducted a countywide reassessment. In contrast, for an assessment appeal, the relevant market value is the property's value as of the date the

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[4] Section 602 of the law reads in pertinent part as follows:

> After there has been established and completed for the entire county the permanent system of records consisting of tax maps, property record cards and property owners' index, as required by section three hundred six of the act herein amended, real property shall be assessed at a value based upon an established predetermined ratio ['EPR'], of which proper notice shall be given, not exceeding one hundred per centum (100%) of actual value. Such ratio shall be established and determined by the board of county commissioners. In arriving at actual value the county may utilize the current market value or it may adopt a base year market value.

72 P.S. §5453.602(a).

appeal was filed before the Board. **See** 72 P.S. §§5453.702(b)(1), 5453.704(b)(1).[5]

At this time, the assessed values for approximately half of the smaller units in Midlake have been computed by reference to the base year market value of each unit while the assessed values for the remaining units, those for which an appeal was filed, have been computed by reference to the market value as of the date of the appeal. Smith contends that by using the base year market value multiplied by the established predetermined ratio to assess some properties, and the current market value multiplied by either the established predetermined ratio or the common-level ratio, if the two differ by more than fifteen percent, to assess those properties for which an appeal has been taken, two different methods of assessing real estate exist, with the result being disproportionate and unequal treatment of comparable properties. As stated by Smith: the County should not be permitted to use a base year valuation multiplied by a predetermined ratio for some properties and a current market value multiplied by the current STEB ratio for other properties without violating the constitutional requirement for tax uniformity (Smith Post-Trial Memorandum, p. 10).

In denying this challenge, we find it significant first that the difference in valuation methods which Smith criticizes is that directed by The Fourth to Eighth Class County Assessment Law.

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[5] Section 704 of the law, governing appeals to the court, reads in pertinent part as follows:

> (b) In any appeal of an assessment the court shall make the following determinations:
>
> (1) The market value as of the date such appeal was filed before the board of assessment appeals. ...
>
> (2) The common level ratio which was applicable in the original appeal to the board. ...
>
> (c) The court, after determining the market value of the property pursuant to subsection (b)(1), shall then apply the established predetermined ratio to such value unless the corresponding common level ratio determined pursuant to subsection (b)(2) varies by more than fifteen per centum (15%) from the established predetermined ratio, in which case the court shall apply the respective common-level ratio to the corresponding market value of the property.

72 P.S. §5453.704. The common-level ratio referred to in subsection (b)(2) is the ratio of assessed value to market value as determined by the State Tax Equalization Board. **See** 72 P.S. §5453.102 (defining "common-level ratio").

Compare 72 P.S. §5453.602(a) **with** 72 P.S. §§5453.702, 5453.704. Neither in Smith's petition to this Court appealing the decision of the Board of Assessment nor in Smith's post-trial memorandum does Smith challenge the constitutionality of any provision of The Fourth to Eighth Class County Assessment Law or of The General County Assessment Law.

Second, the same challenge made by Smith was rejected by the Commonwealth Court in **Appeal of Armco, Inc.,** 100 Pa. Commw. 452, 515 A.2d 326 (1986), **appeal denied,** 516 Pa. 643, 533 A.2d 714 (1987). In **Armco,** the county asserted that Section 602 requires one method of assessing real estate, and Section 704 requires a different method only as to those taxpayers who appeal. The **Armco** decision and its reasoning behind the two approaches to computing assessed values were recently explained by the Commonwealth Court in **Vees** as follows:

> An **en banc** panel of this court rejected the county's argument. The court explained that section 602 provides an efficient administrative method of assessing real estate by allowing a county to apply the EPR to base year market value. However, the assessment method is imperfect because base year market value may not reflect current year market value. On the other hand, section 704 provides a method for reviewing administrative assessments so that they reflect the reality of appreciation or depreciation in property value. Although section 704 reassessments utilize current market values instead of base year market values, the **STEB ratio converts current market values to equivalent base year assessed values.** … In other words, the constitutional goal is uniform **assessed** values, and the application of the STEB ratio to current market values under section 704 results in uniform assessed values.

Vees, supra, 867 A.2d at 752 (Friedman, J., dissenting) (citation omitted) (footnote omitted) (emphasis in original); **cf. Downingtown Area School District v. Chester County Board of Assessment Appeals,** 590 Pa. 459, 913 A.2d 194, 204-205 (2006) (holding that to the extent the statutory scheme for equalization set forth in 72 P.S. §5349(d.2), which is essentially the same as that found in 72 P.S. §5453.704, requires application of the EPR against the fair market value of the property as of the year of the appeal (**i.e.,** to the extent the common-level ratio does not vary by more

than fifteen percent from the EPR), it creates a class of taxpayers who are subjected to a disproportionately high tax burden, thereby rendering the provision arbitrary and unconstitutional).

3. **Uniformity**

The third and final issue is whether the assessed value placed on Smith's property by the Board following the School District's appeal results in an assessment which is unconstitutional for lack of uniformity. Smith contends that this assessment, while consistent with the property's current fair market value, imposes a disproportionate tax burden when evaluated against the assessed value of similar property in relation to its current market value. **See Fosko v. Board of Assessment Appeals, Luzerne County,** 166 Pa. Commw. 393, 400, 646 A.2d 1275, 1279 (1994) ("Where a taxpayer claims that an assessment violates the principle of uniformity, the taxpayer admits that the fair market value assigned to his or her property is correct but that other comparable properties are assigned a substantially lower fair market value and when the ratio is applied to that lower value, the owners of the comparable properties pay less than the complaining taxpayer."); **see also, Cumberland Coal Co. v. Board of Revision,** 284 U.S. 23, 29 (1931) ("Applying the same ratio to the same assigned values, when the actual values differ, creates the same disparity in effect as applying a different ratio to actual values when the latter are the same.").

(a) **Defining the Standard of Uniformity**

The Uniformity Clause of the Pennsylvania Constitution, Article VIII, Section 1 states, "All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." Similarly, the Equal Protection Clause of the United States Constitution provides that "No state shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Constitution, Amendment XIV §1. Significantly, in **Downingtown** the Pennsylvania Supreme Court reiterated that the protection afforded by the Equal Protection Clause is incorporated within the Uniformity Clause and imposes a floor for assuring uniform assessments. **See Downington, supra,** 913 A.2d at 200-201.

The Uniformity Clause views all forms of real estate within the taxing district as comparable for purposes of calculating the

appropriate ratio of assessed value to market value.[6] In contrast, the Equal Protection Clause is narrower and requires only that similar properties, those having like characteristics and qualities located within the same taxing district, be treated the same. In analyzing this relationship further, our Supreme Court stated:

> At the outset, while we agree with the trial court that this Court has interpreted the Uniformity Clause as precluding real property from being divided into different classes for purposes of systemic property tax assessment, we do not find that this general uniformity precept eliminates any opportunity or need to consider meaningful sub-classifications as a component of the overall evaluation of uniform treatment in the application of the taxation scheme. Indeed, this would represent an impermissible departure from federal equal protection jurisprudence, which sets the floor for Pennsylvania's uniformity assessment.

Id., 913 A.2d at 200.[7] Thus, **Downingtown** reaffirms "the prevailing requirement that similarly situated taxpayers should not be deliberately treated differently by taxing authorities." **Id.** at 201.[8]

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[6] In **Deitch Company v. Board of Property Assessment,** 417 Pa. 213, 209 A.2d 397 (1965), the court explained why this is so:

> In determining ... whether the constitutional requirement with respect to uniformity has been complied with in a taxing district, all properties are comparable in constructing the appropriate ratio of assessed value to market value. This is because the uniformity requirement of the Constitution of Pennsylvania has been construed to require that all real estate is a class which is entitled to uniform treatment. … In establishing such ratio in a particular district, the property owner, the taxing authority, and the courts may rely on any relevant evidence.

Id. at 223, 209 A.2d at 402-403 (citation omitted).

[7] In permitting uniformity challenges by examining sub-classifications of similar property within the larger class of real estate generally, the Pennsylvania Supreme Court also observed:

> In this regard, it must be acknowledged that a tension remains between this Court's decisions which tend to analyze uniformity solely in terms of a single classification of all real property in a taxing district, and federal equal protection law, which clearly takes into account disparate treatment of comparable properties within the broader classification.

Downingtown Area School District v. Chester County Board of Assessment Appeals, 590 Pa. 459, 913 A.2d 194, 202 n.11 (2006).

[8] "In this context, the term 'deliberate' does not exclusively connote wrongful conduct, but also includes any intentional or systematic method of enforcement of the tax laws." **Id.,** 913 A.2d at 201 n.10.

(b) **Proving Lack of Uniformity**

Under both the Equal Protection Clause and the Uniformity Clause, "a taxpayer alleging that the administration of a tax violates its rights to be taxed uniformly with others of its class must demonstrate deliberate, purposeful discrimination in the application of the tax before constitutional safeguards are violated." **Armco, supra** at 458, 515 A.2d at 329. "It is the burden of the taxpayer alleging a violation of the Uniformity Clause to show that there is deliberate discrimination in the application of the tax or that it has a discriminatory effect." **City of Lancaster v. County of Lancaster,** 143 Pa. Commw. 476, 486-87, 599 A.2d 289, 294 (1991), **appeal denied,** 530 Pa. 634, 606 A.2d 903 (1992); **see also, Millcreek Township School District v. Erie County Board of Assessment Appeals,** 737 A.2d 335, 339 (Pa. Commw. 1999), **appeal denied,** 759 A.2d 389 (Pa. 2000).

"A taxpayer may prove non-uniformity by presenting evidence of the assessment-to-value ratio of 'similar properties of the same nature in the neighborhood.'" **Downingtown, supra,** 913 A.2d at 199. In **In re Brooks Building,** 391 Pa. 94, 101, 137 A.2d 273, 276 (1958), the Pennsylvania Supreme Court found that a taxpayer satisfied his burden of proving a lack of uniformity by presenting "evidence of the market value of his property and of similar properties of the same nature in the neighborhood and by proving the assessments of each of these properties and the ratio of assessed value to actual or market value." In **Deitch Company v. Board of Property Assessment,** 417 Pa. 213, 209 A.2d 397 (1965), the Supreme Court further stated:

> The evidence supplied by the taxpayer in **Brooks** illustrates one method by which a taxpayer can meet his burden of proving a lack of uniformity, but we do not consider it to be the only method. It would be equally satisfactory to produce evidence regarding the ratios of assessed values to market values as the latter are reflected in actual sales of any other real estate in the taxing district for a reasonable period prior to the assessment date. Thus, for example, the taxpayer's expert witness or witnesses could select a number of recent representative sales

and offer testimony with respect to such sales as proof of the ratio in the taxing district.

Id. at 223, 209 A.2d at 403. **See also, Keebler Company v. Board of Revision of Taxes of Philadelphia,** 496 Pa. 140, 143, 436 A.2d 583, 584 (1981) (permitting the use of sales data to compute the common-level ratio).[9]

The Uniformity Clause "requires substantial uniformity, rather than mathematically precise uniformity ... ." **Clifton v. Allegheny County,** 969 A.2d 1197, 1226 (Pa. 2009). It permits practical inequities and, because taxation is not an exact science, "rough uniformity with a limited amount of variation is permitted so long as the taxing scheme does not impose substantially unequal tax burdens." **Beattie v. Allegheny County,** 589 Pa. 112, 907 A.2d 519, 529-30 (2006). Consequently, inequities in assessment, beyond the practical, which impose substantially unequal tax burdens, violate the Uniformity Clause.

(c) **Applying the Standard**

In this case, Smith's condominium unit is one of eighty-eight virtually identical units in Midlake. These units are clearly simi-

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[9] In **Appeal of F.W. Woolworth Company,** 426 Pa. 583, 235 A.2d 793 (1967), the Supreme Court held:

> [A] valid study of the ratio of assessed value to market value covering the entire taxing district is the preferred way of determining a common-level ratio. Since uniformity has as its heart the equalization of the ratio among **all** properties in the district, a determination based upon the district as a whole necessarily is more conducive to achieving a constitutional result than one based upon a few properties.

Id. at 586-87, 235 A.2d at 795 (citation omitted) (emphasis in original).

In qualifying this preference, the Court in **Keebler Company v. Board of Revision of Taxes of Philadelphia,** 496 Pa. 140, 143, 436 A.2d 583, 584 (1981), explained that because "[p]ractical considerations ... prohibit the construction of a common-level ratio by way of an evaluation of the assessment and fair market value of each and every parcel of realty in the taxing district", the common-level ratio may be constructed by "any relevant evidence." Further, because **Downingtown** permits tax assessments to be challenged based on a lack of uniformity in the assessment of properties having like characteristics and qualities in the same area, an evaluation of properties throughout the county and the consequent determination of the common-level ratio for the entire county is no longer necessary, at least so far as showing that a lack of uniformity exists. **See also, Chartiers Valley Industrial & Commercial Development Authority v. Allegheny County,** 963 A.2d 587, 592 (Pa. Commw. 2008) (discussing the

lar and comparable. A fair estimate of their current fair market value can be taken from the average of the six most recent sales, $249,250.00. Yet while forty-eight percent of these units have an assessed value ranging between $49,300.00 and $50,300.00, for a ratio of assessed to current market value of approximately twenty percent,[10] the assessed value for Smith's property as determined by the Board, $88,141.00, represents a ratio of assessed to current market value of thirty-five percent, using the same fair market figure of $249,250.00.

The range of assessed valuations for all units of the type owned by Smith is between $49,300.00 and $118,500.00, a spread of more than 140 percent. The spread between Smith's unit and the lowest of these assessments, $49,300.00, is seventy-nine percent. These differences are not explained by any difference in the features of the units or their true values when compared to one another at the same point in time, but primarily because of differences in purchase price over time. The variance in assessments between those properties conveyed prior to January 1, 2004, and those after January 1, 2004, evidence a practice which systematically results in excessive assessments for properties conveyed after January 1, 2004.

Under the standards set by our Supreme Court, a taxpayer's burden is met once he shows non-uniformity in the assessment-to-value ratio between his property and other "similar properties of the same nature in the neighborhood." **Downingtown, supra,** 913 A.2d at 199 (comparing the subject property assessed at 100% of market value with seven other shopping centers in the county whose ratio of assessed to market value ranged between 34% and 69%); **see also, McKnight Shopping Center, Inc. v. Board of Property Assessment,** 417 Pa. 234, 239, 209 A.2d 389, 392 (1965) (taxpayer "produced uncontradicted testimony that its property was assessed at 88.5% of its market value while two other shopping centers were assessed at 57% and 76% of their market values"); **Brooks, supra** at 98, 137 A.2d at 274 (taxpayer established that

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conclusion in **Downingtown** that tax assessments can be challenged based on a lack of uniformity in the assessment of properties having like characteristics and qualities in the same area).

[10] When measured against Smith's purchase price, $275,000.00, this ratio is 18.11 percent.

his property was assessed at 91.9% while similar properties were assessed between 40.2% and 57.2% of their market values). This Smith has done.

The assessed values in Midlake, as they exist today, evidence a widespread disparity in the assessed values of generally comparable properties which is pervasive, substantial, and arbitrary. If we were to allow the assessed value of Smith's property as determined by the Board to stand, Smith would be required to pay property taxes more than seventy-five percent greater than almost half the properties in Midlake which are virtually identical to his. The gross inequity and disproportionality which would result is unsupportable from a constitutional perspective. **See Clifton, supra,** 969 A.2d at 1213-14. (An "[i]ntentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property."); **see also, Goodman, Assessment Law & Procedure,** at 257 (quoted with approval in **Downingtown, supra,** 913 A.2d at 204 n.16) ("Failing to equalize on (new assessments) is an intentional violation of state law by the local assessing agency and is in direct violation of the United States Supreme Court holding in **Allegheny Pittsburgh Coal.**").

(d) **Remedy**

Inherent in the requirement of uniformity is the principle that "a taxpayer should pay no more or no less than his proportionate share of the cost of government. Implementation of this principle [requires] that an owner's assessment be reduced so as to conform with the common-level [ratio] of assessment in the taxing district." **Deitch, supra,** at 220, 209 A.2d at 401.[11] From this, the School

[11] As to what constitutes the common-level ratio, the Supreme Court, in **Deitch,** stated:

> Where the evidence shows that the assessors have applied a fixed ratio of assessed to market value throughout the taxing district, then that ratio would constitute the common level. However, where the evidence indicates that no such ratio has been applied, and that ratios vary widely in the district, the average of such ratios may be considered the 'common level'. … Furthermore, it may be that the evidence will show some percentage of assessed to market value about which the bulk of individual assessments tend to cluster, in which event such percentage **might** be acceptable as the common level.

Deitch, supra at 220-21, 209 A.2d at 401 (footnote and citation omitted) (emphasis in original).

District argues that because Smith has confined his analysis of comparable properties to one development, rather than to representative properties throughout the County, he has failed to establish that his property has been assessed at a percentage of value greater than that applied generally throughout the taxing district and, therefore, is entitled to no relief beyond that required by 72 P.S. §5453.704(c). **See Baechtold v. Monroe County Board of Assessment Appeals,** 804 A.2d 713, 717-18 n.5 (Pa. Commw. 2002), **appeal denied,** 814 A.2d 678 (Pa. 2002). Nonetheless, in **Brooks,** our Supreme Court stated that it is erroneous to conclude that an "assessment cannot be changed [or] reduced unless [the taxpayer] proves that a uniform ratio of assessed value to actual value has been applied generally throughout the entire district ... ." **Brooks, supra** at 101, 137 A.2d at 276.

Where a taxpayer's property is assessed at a greater percentage than that of other similarly situated properties, the remedy is "to have the [taxpayer's] assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law." **Brooks, supra** at 101, 137 A.2d at 276. Such result comports with the Supreme Court's recent admonition in **Downingtown,** that notwithstanding the Commonwealth's desire "to achieve overall uniformity by attempting to standardize treatment among differently situated property owners, its efforts in this regard do not shield it from the prevailing requirement that similarly situated taxpayers should not be deliberately treated differently by taxing authorities." **Downingtown, supra,** 913 A.2d at 201 (footnote omitted).

Once non-uniformity has been proven, the taxpayer is entitled to a reduction of his assessment to that proportionate with similar properties of the same nature unless "the evidence shows that [such comparables] are not representative of the district as a whole, [or] that the taxpayer has, in fact, not been assessed at more than the common-level [ratio] in the district." **Deitch, supra** at 219, 209 A.2d at 401 (explaining the rationale behind **Appeal of**

Rick, 402 Pa. 209, 167 A.2d 261 (1961) (holding that "a taxpayer is not entitled to have his assessment reduced to the lowest ratio of assessed value to market value to which he could point in the taxing district if such lowest ratio does not reflect the common assessment level which prevails in the district as a whole")); **see also, Green v. Schuylkill County Board of Assessment Appeals,** 565 Pa. 185, 772 A.2d 419, 425-26 (2001) (explaining that once the presumptive validity of the assessment created by the taxing authority's presentation of the assessment record into evidence has been rebutted by credible, relevant evidence introduced by the taxpayer, the taxing authority bears the risk of having the taxpayer's evidence accepted by the court if it fails to offer additional countervailing evidence). The alternative, as suggested by the School District, is to recognize that a core breakdown in the protection afforded by the Equal Protection Clause has occurred, yet provide no relief. This we will not do.

"To ensure proportionality, all property must be taxed uniformly, with the same ratio of assessed value to actual value applied throughout the taxing jurisdiction." **Clifton, supra,** 969 A.2d at 1224. At what point the scale weighing the ratios of assessed to market values balances in favor of uniformity is never without controversy and will, more often than not, vary given the fluctuating nature of market values. To determine where that point lies in this case is better understood by a brief review of the assumptions underlying base year assessments.

Under the base year system of assessment, the initial assessment is determined by multiplying the base year market value by the county's predetermined ratio. Thereafter, uniformity is maintained—at least in theory—by requiring that for all administrative reassessments (**i.e.,** those initiated by the board), the board designates the new value in terms of base year dollars. **See** 72 P.S. §5453.102 (defining "base year" and stating that "[r]eal property values shall be equalized within the county and any changes by the board shall be expressed in terms of such base year values"). Consequently, a property's base year assessment is not ordinarily changed with fluctuations in a property's market value attributable to market conditions alone but "remains static, fixed at its base year

level until the next countywide reassessment." **Clifton, supra,** 969 A.2d at 1203.

> This is so because a county utilizing a base year method of valuation typically does not consider market fluctuations subsequent to the base year when assessing 'current value,' or factor in variables such as improvements to a property that may increase its assessed value. If a building is constructed on a lot that was vacant during the base year, the property's assessed value is determined by using either sales of comparable properties in the base year or base year construction schedules.

Id.

In contrast, the process of reviewing administrative assessments by appeal is premised on the assumption that where the current fair market values for a taxing district have appreciated and depreciated over time from their initial base year market values, the STEB's common-level ratio acts as a means of equalizing a property's actual ratio of assessed to current market value with the then prevailing ratio of assessed to market value in the district. Were no adjustments to be made, "[a] taxpayer could pay substantially more or less than his proportionate share of government by paying taxes based upon a predetermined ratio of a property's base year value where the current market value is, in fact, substantially less or greater than its base year value." **Armco, supra** at 460, 515 A.2d at 330. Ultimately, the "inequities that inevitably result from the prolonged use of base year assessment values in a county where property values have changed at divergent rates" require a countywide reassessment to withstand a constitutional challenge. **Clifton, supra,** 969 A.2d at 1226, 1231.

As applies to Unit No. F201, the base year assessment for this property was $50,300.00. This figure remained unchanged through the time of Smith's purchase, with no triggering events occurring in the interim.[12] The sole reason for the Board reassess-

[12] To justify a reassessment initiated by the Board, one of three conditions must occur: (1) the property is divided and conveyed away in smaller parcels; (2) the county's economy or a portion of it has depreciated or appreciated to such an extent that real estate values are affected in that area; or (3) improvements to a property are made, removed, or destroyed. **See** 72 P.S. §5453.602a; **see also,** 72 P.S. §5347.1.

ing the property in 2007 was the School District's appeal, and the primary, if not the only, information upon which the Board relied to change the actual value of the property from $100,600.00 (the base year valuation) to $275,000.00 was the purchase price paid by Smith in 2006.

At all times relevant to these proceedings, the County's estimated predetermined ratio has remained constant at fifty percent. In 2007, the STEB common-level ratio was 32.1 percent and in 2008, 31.3 percent. Because the common-level ratio exceeded the estimated predetermined ratio by more than 15 percent, the Board was required by statute to apply the common-level ratio, which it did, setting the assessed value of the property at $88,141.00. This assessment, as discussed above, is unequal, excessive, and unjust, and we are not bound by it. **Downingtown, supra,** 913 A.2d at 205 (holding that the constitutional requirement of tax uniformity prevails over the statutory scheme for tax equalization and that the legislature may not usurp the judiciary's function of interpreting the Pennsylvania Constitution).

Instead, we find the initial base year assessed value of the property to be a solid reference point upon which to base a uniformity determination. The uniformity of assessed values immediately following a countywide reassessment is not only presumptively valid but likely to be as close to countywide uniformity as is reasonably possible. In this respect, the assessment which existed at the time Smith purchased the property postdated the County's most recent countywide reassessment by five years, a relatively short period when reviewing the frequency of such assessments. **See Clifton, supra,** 969 A.2d at 1225 n.39 (noting the correlation between a county's coefficient of dispersion and its most recent countywide reassessment).

Absent the School District's appeal, the assessment of this property would have remained at $50,300.00. The ratio of this assessed value to Smith's purchase price, 18.29 percent, is roughly equivalent to the assessment ratio of 18.11 percent which exists for the forty-two comparable units at Midlake with assessed values of $49,300.00 to $50,300.00 when measured against the same purchase price. These assessments are clustered within a narrow range of one another and bear a consistent ratio of assessed to

market values. In contrast, the thirty-two units which have been transferred since January 1, 2004, have a wide range of assessed values with divergent ratios of assessed to market values for like property. The assessment set by the Board intensifies this diversity while maintaining the assessment at $50,300.00 is consistent with the assumptions and premise of a base year valuation system. Given these considerations, to maintain equalization of the ratio of assessed value to current market value within the County requires that the property's assessment remain at $50,300.00.

CONCLUSION

Fundamentally, it is unconscionable and unconstitutional to assess like or similar properties in the same neighborhood differently. When this occurs, it is the responsibility of the courts to determine where uniformity lies and which properties have been unfairly burdened. "[A]ny system which results in the intentional or systematic undervaluation of like or similar properties is impermissible." **Fosko, supra** at 400, 646 A.2d at 1279.

Here, the Board's reassessment of Smith's property on appeal has resulted in a substantial and unjustifiable disparity in the assessed value of Smith's property and that of other properties in Midlake having like characteristics and qualities.[13] While we accept and affirm the Board's determination that the fair market value of this property is $275,000.00, uniformity and equality in assessed value requires that the assessed value of the property remain at $50,300.00.

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[13] The burden of correcting the inequity in assessed values which currently exists in Midlake cannot be passed to Smith by requiring him to challenge the assessments of his neighbors' property. **See Allegheny Pittsburgh Coal Co. v. County Comm'n. of Webster County, West VA,** 488 U.S. 336, 342-43 (1989). To the contrary, the county has an implicit duty, imposed by the Uniformity Clause, to impose assessments that are reasonable and proportionate, and the taxpayer has a right, guaranteed by that same provision, to pay taxes that are not excessively burdensome when compared with those imposed on other properties similarly situated. Correspondingly, "[i]t is the duty of the courts in dealing with this subject to enforce as nearly as may be equality of burden and uniformity of method in determining what share of the burden each taxable subject must bear." **Clifton v. Allegheny County,** 969 A.2d at 1197, 1210 (Pa. 2009).

COMMONWEALTH OF PENNSYLVANIA vs.
TIMOTHY STEPHEN KEER, Defendant

Criminal Law—Search and Seizure—
Plain Feel Doctrine—Suppression

1. The terms search and seizure, while often used together in the law, are not synonymous. The plain feel doctrine, like the plain view doctrine, is a doctrine which authorizes the seizure of, not the search for, contraband.

2. Under the plain feel doctrine, an officer conducting a lawful **Terry** frisk or a consensual weapons pat-down may seize contraband from a suspect if (1) the officer is lawfully in a position to detect the presence of contraband, (2) the incriminating nature of the contraband is immediately apparent from its tactile impression, and (3) the officer has a lawful right of access to the object.

3. An officer who has a defendant's consent to conduct a protective pat-down for the officer's safety is not authorized under the plain feel doctrine to seize cocaine wrapped in cellophane found in the defendant's pocket which the officer, after having concluded that the item is not a weapon, is not able to immediately identify as contraband without further manipulation. The latter constitutes an extended search beyond that authorized for the officer's protection and requires suppression of the cocaine seized.

NO. 377 CR 2008

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

GEORGE T. DYDYNSKY, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—June 16, 2009

In these proceedings, the Defendant, Timothy Stephen Keer, seeks to suppress crack cocaine seized from his person during the course of a consensual pat-down search for weapons. The only question before us is whether this seizure exceeded the scope of the consent given for a protective pat-down.

BACKGROUND FACTS

On November 21, 2007, Officer Frank Buonaiuto of the Franklin Township Police Department was on routine patrol within the township. At approximately 1:47 A.M. he observed the Defendant walking alone along the side of Fairyland Road, approximately fifty feet from the location of a known narcotic house. The Defendant was dressed in a black jacket and camouflage pants.

Officer Buonaiuto stopped to see if the Defendant needed help. The Defendant informed the officer that he was fine and was walking to his home in Coaldale. The Defendant gave no

appearance of being under the influence of alcohol or drugs. Officer Buonaiuto offered to drive the Defendant home, and the Defendant accepted.

Before entering the police cruiser, Officer Buonaiuto requested that the Defendant provide him with identification. This was provided and the Defendant correctly identified himself. Officer Buonaiuto, who was by himself, also advised the Defendant that before entering the cruiser he would have to consent to a pat-down search for weapons for the officer's safety. The Defendant agreed.

As the Defendant was being patted down, Officer Buonaiuto felt a bulge in the Defendant's left front pants pocket. While neither the size nor shape of the buldge was described, Officer Buonaiuto did testify that the bulge was soft and crinkled, leading him to believe that he was feeling cellophane, and not a weapon. When he squeezed further, he felt a hard, rock-like object. At this point, Officer Buonaiuto believed he was dealing with a controlled substance, likely cocaine, wrapped in cellophane.

Officer Buonaiuto then reached into the Defendant's pocket and removed the item which, on sight, also appeared to be cocaine, a fact later confirmed by field testing. The Defendant was arrested, taken to the police station, and **Mirandized;** he admitted that the substance seized was crack cocaine.

DISCUSSION

The burden of establishing, that evidence has not been obtained in violation of a defendant's rights, is upon the Commonwealth in a suppression proceeding. **See** Pa. R.Crim.P. 581(H). Here, the Commonwealth contends that the crack cocaine was seized pursuant to the plain feel doctrine.

> Under the plain feel doctrine, a police officer may seize non-threatening contraband detected through the officer's sense of touch during a **Terry** frisk if the officer is lawfully in a position to detect the presence of contraband, the incriminating nature of the contraband is immediately apparent from its tactile impression and the officer has a lawful right of access to the object. [T]he plain feel doctrine is only applicable where the officer conducting the frisk feels an object whose mass or contour makes its criminal character immediately apparent.

> Immediately apparent means that the officer readily perceives, without further exploration or searching, that what he is feeling is contraband. If, after feeling the object, the officer lacks probable cause to believe that the object is contraband without conducting some further search, the immediately apparent requirement has not been met and the plain feel doctrine cannot justify the seizure of the object.

Commonwealth v. Pakacki, 587 Pa. 511, 901 A.2d 983, 989 (2006) (citations omitted). The parties do not dispute that this standard applies equally to the present circumstances where consent is voluntarily given and is limited to a search for weapons. **See generally, Commonwealth v. Moultrie,** 870 A.2d 352 (Pa. Super. 2005) (treating a consensual weapons pat-down the same as a **Terry** frisk).

Such a search, being an intrusion on a defendant's constitutionally protected rights, must be strictly "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." **Terry v. Ohio,** 392 U.S. 1, 26 (1968); **see also, Commonwealth v. Canning,** 402 Pa. Super. 438, 440, 587 A.2d 330, 331 (1991) (agreeing with **Terry** that because the sole justification for the search is the protection of the officer, it must be confined in scope to a search for weapons). The purpose of this search is not to discover evidence, but to protect the officer or others nearby. **See Commonwealth v. Stevenson,** 560 Pa. 345, 744 A.2d 1261, 1264 (2000). Once the officer determines that there are no weapons, there is no legal justification, at least under **Terry** and the terms of consent here, to conduct a further search. **Cf. Commonwealth v. Wilson,** 927 A.2d 279, 285 (Pa. Super. 2007) ("Following a protective pat-down search of a suspect's person, a more intrusive search can only be justified where the officer **reasonably believed** that what he had felt appeared to be a weapon.") (emphasis in original).

"[I]f the protective search goes beyond that which is necessary to determine whether the suspect is armed, it is no longer valid, and its fruits will be suppressed." **Commonwealth v. Graham,** 554 Pa. 472, 721 A.2d 1075, 1078 (1998). However, until that determination has been made, an officer in the process of securing his safety may lawfully seize contraband whose incriminating

nature is immediately apparent upon touch, rather than through a further search.[1] To be immediately apparent requires that the incriminating nature of an object be determined at or before the officer's legal basis to search for weapons ceases, otherwise the information upon which the officer's recognition of contraband is based will have been acquired without legal justification. **See In the Interest of S.J.,** 551 Pa. 637, 713 A.2d 45, 53 (1998) (Cappy, J., concurring and dissenting) ("Manipulation of any object detected during a pat down [sic], once the officer is satisfied that the object is not a weapon, is unacceptable.").[2]

Here, Officer Buonaiuto testified that when he first touched the bulge in the Defendant's pocket, it was soft and crinkled, and felt to him like cellophane. Officer Buonaiuto did not articulate any reason to believe that what he felt in the Defendant's pocket was a weapon or contraband. **See Commonwealth v. E.M.,** 558 Pa. 16, 735 A.2d 654, 664 n.8 (1999) ("In order to remain within the boundaries delineated by **Dickerson,** an officer must be able to substantiate what it was about the tactile impression of the object that made it immediately apparent to him that he was feeling contraband"). To the contrary, the object did not feel like a weapon and he did not believe it was a weapon. Nevertheless, he squeezed

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[1] In this respect it is helpful to note that the plain feel doctrine, like that for plain view, "establishes an exception to the requirement of a warrant **not to search for an item, but to seize it.**" **Commonwealth v. Graham,** 554 Pa. 472, 721 A.2d 1075, 1080 (1998) (emphasis in original). "This artful distinction between search and seizure highlights the principle that the plain view doctrine permits police officers to seize contraband that is in their purview if an independent justification gives the officer a lawful right of access to the item, but cannot, on its own, justify an officer extending his or her search for that item." **Id.**

[2] In **Minnesota v. Dickerson,** 508 U.S. 366 (1993), the Supreme Court stated:

> If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.

Id. at 375-76; **see also, Commonwealth v. Zhahir,** 561 Pa. 545, 751 A.2d 1153, 1160 (2000) ("Because the existing requirements under **Terry** serve to limit the scope and duration of the search, and because the plain feel seizure applies solely to items immediately apparent as contraband, the privacy interests of the suspect are not further compromised by recognition of the plain feel doctrine.").

the bulge to see if he could feel if anything was contained inside the cellophane. At this point, he felt a hard, rock-like object and, based on his experience and training, immediately formed the conclusion that the cellophane contained a controlled substance. The Defendant argues that the pat-down conducted by Officer Buonaiuto exceeded his consent to search for weapons, that once the officer was able to discern that the bulge in his pocket was not a weapon, the officer exceeded his authority in squeezing and probing further and, in effect, conducting an extended search beyond that authorized.

The evidence presented by the Commonwealth shows that while the packaging, cellophane, was immediately apparent to Officer Buonaiuto, its contents were not. Cellophane alone is not **per se** contraband. It can be used to hold either legal or illegal substances.[3] Only after Officer Buonaiuto explored further, squeezing the bulge, was he able to feel the contents and conclude the Defendant possessed cocaine. In doing so after determining that the bulge was not a weapon, Officer Buonaiuto exceeded both the scope of the consent given and his lawful authority. Once Officer Buonaiuto's justification for the pat-down ended (**i.e.,** officer security), and before the incriminating nature of the bulge was apparent to him, he had no independent justification to search further or to seize any object from the Defendant's pockets.

Particularly apropos to the present facts is the following language from the United States Supreme Court's decision adopting the plain feel corollary to the plain view doctrine:

> Here, the officer's continued exploration of respondent's pocket after having concluded that it contained no weapon was

[3] In **Commonwealth v. Stevenson,** 560 Pa. 345, 744 A.2d 1261 (2000), a case which examined the immediately apparent requirement in the context of items which have both legal and illegal uses, the Pennsylvania Supreme Court stated:

> We agree with the **Fink** and **Stackfield** courts that the immediately apparent requirement of the plain feel doctrine is not met when an officer conducting a **Terry** frisk merely feels and recognizes by touch an object that could be used to hold either legal or illegal substances, even when the officer has previously seen others use that object to carry or ingest drugs. To find otherwise would be to ignore **Dickerson's** mandate that the plain feel doctrine is a narrow exception to the warrant requirement that only applies when an officer conducting a lawful **Terry** frisk feels an object whose mass or contour makes its identity as contraband immediately apparent.

Id., 744 A.2d at 1266.

> unrelated to '[t]he sole justification of the search [under **Terry**:] ... the protection of the police officer and others nearby.' It therefore amounted to the sort of evidentiary search that **Terry** expressly refused to authorize and that we have condemned in subsequent cases.

Minnesota v. Dickerson, 508 U.S. 366, 378 (1993) (citations omitted) (finding that when officer felt small hard object wrapped in plastic and determined it was crack cocaine only after conducting further search, **i.e.,** squeezing and manipulating object, seizure of object was not justified by plain feel doctrine); **see also, Commonwealth v. Stackfield,** 438 Pa. Super. 88, 96, 651 A.2d 558, 562 (1994) (finding officer's testimony that he felt a zip-lock baggie during **Terry** frisk did not support conclusion that officer felt item that he immediately recognized as contraband since baggie is not "**per se** contraband").

CONCLUSION

In accordance with the foregoing, the search as conducted exceeded the scope of a permissible pat-down, resulting in a violation of the Defendant's constitutional right to be free from an unreasonable search and seizure. Consequently, the cocaine seized from the Defendant must be suppressed, as must all evidence obtained subsequent to and flowing from this seizure, including the Defendant's later confession.

JOHN F. CHIMENTI, Plaintiff vs.
SONIA Y. HERNANDEZ, Defendant

Civil Law—Divorce—Jurisdiction Over Economic Claims—Doctrine of Divisible Divorce—Waiver

1. Jurisdiction to grant a divorce exists in any state in which at least one of the parties is domiciled.

2. The existence of jurisdiction to grant a divorce does not, by itself, confer jurisdiction to also decide economic issues related to the marriage, such as equitable distribution or alimony. Where neither **in personam** jurisdiction over the parties nor **in rem** jurisdiction over the marital assets exist, absent consent or waiver, a separate action involving the economic or property aspects of the marriage must be commenced in a separate forum. The result is a "divisible" also known as a "dual-state" divorce.

3. In general, where the parties are married in New York; reside there their entire married life until separation; acquire most, if not all, of their marital assets in New York, where the assets continue to be located; and where one

spouse continues to reside in New York, has never resided in this Commonwealth, and has no minimum contacts with Pennsylvania, the fact that the other spouse has established residence in this Commonwealth and is entitled to file a divorce action with this Court does not create either **in personam** jurisdiction over the nonresident spouse or **in rem** jurisdiction over the marital assets such that this Court can determine the resident spouse's claim for equitable distribution of the marital assets.

4. Where an out-of-state resident over whom **in personam** jurisdiction does not exist, nevertheless appears and participates, taking action on the merits of litigation commenced in this Commonwealth without objection, such conduct manifests the party's intent to submit to the Court's jurisdiction and constitutes a waiver of **in personam** jurisdiction.

NO. 07-4296

JOSEPH J. MATIKA, Esquire—Counsel for Plaintiff.

ARTHUR F. SILVERBLATT, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—June 24, 2009

In this divorce action the issue before us is whether the actions of a nonresident spouse imply consent or constitute a waiver to the exercise of this Court's personal jurisdiction over her.

PROCEDURAL AND FACTUAL BACKGROUND[1]

John F. Chimenti ("Husband") and Sonia Y. Hernandez ("Wife") were married on September 26, 1993, in the state of New York. They lived together in New York their entire married life until their separation in 2005. At that time, Husband left the marital home and moved to Pennsylvania where he established legal residence.

On December 31, 2007, Husband commenced a divorce action in this county. The original complaint, which was limited to a single claim for divorce pursuant to Section 3301(d) of the Divorce Code, was served constructively on Wife by certified mail on or before January 10, 2008. An amended complaint, which included a new count for equitable distribution of the marital assets, was filed on April 3, 2008. This complaint was served by first-class mail on Wife's then New York counsel.

[1] The facts upon which we base our decision are not in dispute. At the time this matter was argued, the parties agreed that a hearing was not required and stipulated that the facts set forth by each in their respective filings and briefs could be relied upon by the Court. Accordingly, the facts as stated herein are those gleaned from the parties' filings and briefs.

By Order dated April 29, 2008, we scheduled a management conference to be held on June 19, 2008. Following this Order, on June 18, 2008, Wife's present counsel entered his appearance on behalf of Wife and also requested that the management conference scheduled for June 19, 2008, be continued. The basis for this request was counsel's assertion that he had only recently entered his appearance on behalf of Wife and needed time in order to familiarize himself with the file. This continuance request was granted and the management conference was rescheduled for July 28, 2008.

On July 28, 2008, both parties appeared through counsel and advised the Court that discovery was necessary and that they sought to serve interrogatories and a request for production of documents on one another within the next thirty days. This time frame was approved by the Court and adopted in our Order dated July 29, 2008.

In accordance with the parties' agreed discovery period, Wife served interrogatories on Husband on July 29, 2008, which were answered by Husband on August 15, 2008. Wife also submitted a request for production of documents to Husband on August 29, 2008, which was answered on October 1, 2008. Husband served his interrogatories and request for production of documents on Wife on July 31, 2008. Wife has not responded to this discovery.

On October 15, 2008, Wife filed preliminary objections to the amended complaint nunc pro tunc. In these objections, Wife challenges the jurisdiction of this Court to entertain Husband's claim for equitable distribution. Prior to this filing, Wife did not file an answer to the complaint or otherwise object to the divorce proceedings. Husband has filed preliminary objections to Wife's preliminary objections contending Wife's objections are untimely and the issue waived. The aforesaid objections of the parties are now before us for resolution.

DISCUSSION

To begin, Wife does not contest the jurisdiction of this Court to adjudicate Husband's right to a divorce, nor could she successfully. "Jurisdiction over a divorce is a function of the domicile of the individuals involved in the divorce." **Sinha v. Sinha,** 834 A.2d 600, 603 (Pa. Super. 2003), **appeal denied,** 847 A.2d 1288 (Pa.

2004); **see also, Williams v. North Carolina,** 317 U.S. 287, 297-99 (1942). Here, it is not in dispute that Husband is domiciled in Pennsylvania and Wife in New York. Accordingly, both New York and Pennsylvania share jurisdiction for purposes of granting a divorce to the parties.[2]

Wife argues, however, that it does not necessarily follow from this Court's jurisdiction to terminate the marriage that it also has jurisdiction to decide the rights of the parties in every other matter ancillary to divorce, such as alimony or, as in this case, the equitable distribution of marital assets. In **Estin v. Estin,** 334 U.S. 541, 548-49 (1948), the United States Supreme Court held that while jurisdiction may lie with respect to terminating a marriage, the court may not necessarily have jurisdiction over the economic claims relating to the marriage. In certain cases, predominately those where the spouses reside in different states, and the divorce action is commenced in one state and the marital assets are located in another, in the absence of **in personam** jurisdiction, the court in which the action is commenced does not have jurisdiction "to decide any financial or property issues, because … matters in a divorce case are within the jurisdiction of the state where that property is located." **Cheng v. Cheng,** 347 Pa. Super. 515, 525, 500 A.2d 1175, 1180 (1985). In effect, two divorce actions in separate states are required: one involving the marital status of the parties, the other involving the economic or property aspects of the divorce. **See generally, Scoggins v. Scoggins,** 382 Pa. Super. 507, 555 A.2d 1314 (1989).

This concept known as a "divisible divorce" or "dual-state divorce" limits the jurisdiction of each state to those matters in which it has the dominant concern and in which its domiciliaries are principally interested. **See Stambaugh v. Stambaugh,** 458

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[2] Section 3104(a) of the Divorce Code delineates the scope of the Courts of Common Pleas' jurisdiction in this Commonwealth to hear and decide divorce matters, including the equitable distribution of marital assets if raised in the pleadings. 23 Pa. C.S.A. §3104(a). Section 3104(b) of the Code further authorizes any spouse who has been a bona fide resident of this Commonwealth for at least six months to commence an action for divorce or annulment. 23 Pa. C.S.A. §3104(b). "'Bona fide residence' means domicile; **i.e.,** actual residence coupled with the intention to remain there permanently or indefinitely." **Zinn v. Zinn,** 327 Pa. Super. 128, 130, 475 A.2d 132, 133 (1984).

Pa. 147, 155, 329 A.2d 483, 487-88 (1974); **Estin, supra,** 334 U.S. at 549. To a large extent, the concept has been codified in Sections 3104(d) and 3323(f) of the Divorce Code. 23 Pa. C.S.A. §§3104(d), 3323(f); **see also, Cheng, supra** at 527, 500 A.2d at 1175 (finding authority under former 23 Pa. C.S.A. §401(c), now Section 3323(f), to grant economic relief to a spouse who appeared and participated in a foreign divorce proceeding where equitable considerations predominated in favor of such relief and the matter had not been decided in the foreign forum). Nevertheless, a court need not give full faith and credit to a foreign decree where the issuing court was without jurisdiction to adjudicate the matter in dispute. **See Stambaugh, supra** at 154, 329 A.2d at 486; **Estin, supra,** 334 U.S. at 549.

In this case, Wife contends that not only did the parties reside as husband and wife solely in New York but that most, if not all, of the property that was accumulated by them prior to their separation is located in New York, including Wife's workman's compensation settlement, which is governed by New York law, and which is compensation for an injury that occurred while Wife worked in the state of New York. In effect, Wife claims that all of the "attributes of marriage were experienced in New York," and, therefore, New York is the only state that has jurisdiction over the economic claims related to this divorce action.

To the extent that an order of this Court would purport to act directly on property located outside of this Commonwealth, Wife is absolutely correct that "a Pennsylvania court cannot exercise **in rem** jurisdiction over real or personal property which is located outside the state." **Russo v. Russo,** 714 A.2d 466, 466 (Pa. Super. 1998). This, however, begs the deeper question of our authority to entertain Husband's claim for equitable distribution since, if **in personam** jurisdiction exists, we have the power to divide marital assets and to direct the parties to act in accordance with such division. **See id.** at 467 (noting the difference between a Florida court's order adjudicating rights in Pennsylvania real estate, one awarding a Florida resident an undivided one-half interest in marital assets located in this state, and an order directing the parties to sell real estate located outside of the Commonwealth and to divide the proceeds from the sale); **see also, Kulko v. California,** 436 U.S. 84, 91-92 (1978).

In **Wagner v. Wagner,** 564 Pa. 447, 768 A.2d 112 (2001), our Supreme Court stated:

> The requirement of personal jurisdiction flows from the Due Process Clause and restricts judicial power as a matter of individual right. … A party may insist that the right be observed or he may waive it. … Personal jurisdiction, like other individual rights, is often the subject of procedural rules. … Frequently, when the rules that govern personal jurisdiction are not followed, the right is lost. … Thus, the failure to file a timely objection to personal jurisdiction constitutes, under the Federal Rules of Civil Procedure and comparable state rules, a waiver of the objection.

Id., 768 A.2d at 1119 (citations omitted). Similarly, "under the Pennsylvania Rules of Civil Procedure, an objection to personal jurisdiction may be waived, if preliminary objections to a complaint raising the issue are not filed within twenty days after service." **Id.** (**citing** Pa. R.C.P. Nos. 1026, 1028, 1032(a)).

In this case, Wife contends that she is not subject to Pennsylvania's long-arm statute, 42 Pa. C.S.A. §5322, and has insufficient minimum contacts with this state to constitutionally subject her to **in personam** jurisdiction. Husband argues that Wife has waived and impliedly consented to the exercise of personal jurisdiction by this Court in these proceedings. Specifically, Husband notes Wife's acceptance of service of the complaint by signing the certified mail receipt; the entry of appearance by Wife's counsel without qualification; the presence and participation of Wife's counsel at a management conference in which counsel agreed to exchange discovery between the parties; the participation in discovery by Wife's counsel, including the submission of interrogatories and request for production of documents addressed to Husband and Husband's answering of this discovery; and the late filing by Wife of any objections to Husband's claim for equitable distribution until more than six months after the amended complaint containing the objected to claim for equitable distribution was filed.

In Pennsylvania, courts are permitted to exercise personal jurisdiction over nonresident defendants "to the fullest extent allowed under the Constitution of the United States and [such jurisdiction] may be based upon the most minimum contact with

this Commonwealth allowed under the Constitution of the United States." **Efford v. Jockey Club,** 796 A.2d 370, 373 (Pa. Super. 2002) (**citing** 42 Pa. C.S.A. §5322(b)). "[D]ue process requires only that in order to subject a defendant to a judgment **in personam,** if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " **International Shoe Co. v. Washington,** 326 U.S. 310, 316 (1945). Still, "[q]uestions of personal jurisdiction, venue and notice, which relate to the method by which a court having the power to adjudicate the matter first obtained superintendence of the cause of action … must be raised at the first reasonable opportunity or they are waived." **Commonwealth ex rel. Schwarz v. Schwarz,** 252 Pa. Super. 95, 99, 380 A.2d 1299, 1301 (1977) (quotation marks and ellipsis omitted). "But, we must also bear in mind that procedural rules are not ends in themselves, and that above and beyond everything else they are to be construed in a manner to the end that justice may be administered." **Yentzer v. Taylor Wine Company, Inc.,** 409 Pa. 338, 342, 186 A.2d 396, 398 (1962).

Before personal jurisdiction over a party can be exercised, it must exist, and before it exists, it must be obtained by consent, waiver, or proper service of process. **See Cox v. Hott,** 246 Pa. Super. 445, 450, 371 A.2d 921, 923 (1977). When a nonresident is involved, the propriety of such an exercise must also be tested against Pennsylvania's long-arm statute and the due process clause of the Fourteenth Amendment. **See Efford, supra,** 796 A.2d at 373. Additionally, objections to personal jurisdiction must be made by preliminary objection (Pa. R.C.P. 1028(a)(1)), must be filed within twenty days if the complaint contains a notice to defend (Pa. R.C.P. 1026(a)), and are deemed waived if not timely filed, except for certain enumerated exceptions not applicable here (Pa. R.C.P. 1032(a)). Wife's preliminary objections in this case were filed more than six months after the amended complaint was filed and are clearly late. "A party who fails to raise a question of the court's **in personam** jurisdiction by timely preliminary objections waives that claim." **Cox, supra** at 449, 371 A.2d at 923 (emphasis in original).

A written appearance by itself neither confers jurisdiction nor waives the right of a nonresident defendant to question the court's jurisdiction over his person. **See Hoeke v. Mercy Hospital of Pittsburgh,** 254 Pa. Super. 520, 525, 386 A.2d 71, 74 (1978) (**citing** Pa. R.C.P. 1012). "[T]o find a waiver of **in personam** jurisdiction the courts ordinarily have looked for 'some other and further action **on the merits**' beyond the mere filing of an appearance by the party seeking not to be bound." **Id.** at 526, 371 A.2d at 923 (emphasis in original). A defendant manifests the intent to submit to the court's jurisdiction when the defendant takes "some action (beyond merely entering a written appearance) going to the merits of the case, which evidences an intent to forego objection to the [court's jurisdiction]." **Cathcart v. Keene Industrial Insulation,** 324 Pa. Super. 123, 135, 471 A.2d 493, 499 (1984), **abrogated on other grounds, Cleveland v. Johns-Manville Corp.,** 547 Pa. 402, 690 A.2d 1146 (1997).

Here, after Wife's counsel entered his appearance, he proceeded to litigate the action. By requesting and taking substantive discovery, unrelated to contesting **in personam** jurisdiction, Wife both submitted to, and purposely availed herself of, the jurisdiction of this Court to litigate the underlying merits of the controversy. **See Ball v. Barber,** 423 Pa. Super. 358, 361-62, 621 A.2d 156, 158 (1993).

CONCLUSION

It is not disputed that the requirements of procedural due process have been met and that Husband's domicile in this state serves as the foundation for a decree of divorce. By affirmatively appearing through counsel, without qualification, and by actively participating in a divorce proceeding and using the resources of this Court, without any objection to jurisdiction having been timely filed, Wife has accepted and is bound to the exercise of personal jurisdiction by this Court over the parties and the issues in dispute. Accordingly, Wife's preliminary objections will be dismissed, and those of Husband dismissed as moot.[3]

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[3] At the time of argument, Wife advised that under New York law her workman's compensation settlement is not a marital asset but that it is under Pennsylvania law. In deciding we have personal jurisdiction over the parties, we do not decide and have not determined whether under a conflict of laws interest analysis New York or Pennsylvania law should govern what is a marital asset.

COMMONWEALTH OF PENNSYLVANIA
vs. KEVIN BRANDWEIN, Defendant

Criminal Law—PCRA—Ineffectiveness of Counsel—Validity of Plea—Guilty But Mentally Ill—Failure To Appeal

1. A person who pleads guilty is presumed to know what he is doing; he has the burden of proving otherwise.

2. A plea of guilty but mentally ill is an admission of criminal wrongdoing and not a defense. In comparing a finding of guilty with one of guilty but mentally ill, the comparison is between types of guilt, with the difference being on defendant's post-verdict disposition, the latter focusing on treatment as well as incarceration.

3. A defendant need not prove his innocence to present a valid claim of ineffectiveness of counsel; he need only show that counsel's conduct was prejudicial to the exercise of his constitutional rights. To establish that counsel was ineffective in failing to recommend and advocate a plea of guilty but mentally ill, as compared to one of guilty alone, defendant must prove both that such a plea was viable and that its absence adversely affected him.

4. A plea of guilty but mentally ill requires a finding that defendant was mentally ill at the time of the offense. When sentencing a defendant found guilty but mentally ill, the court must determine whether the defendant is severely mentally disabled and in need of treatment **at the time of sentencing.**

5. An unjustified failure to file a requested direct appeal is ineffective assistance of counsel **per se.** If, however, no appeal was requested, but counsel failed to consult with his client as to the advantages and disadvantages of an appeal when he was duty bound to do so, this failure may itself justify a finding of ineffectiveness notwithstanding that the defendant himself did not request that the judgment of sentence be appealed.

NOS. 657 CR 2005, 241 CR 2006

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

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

MEMORANDUM OPINION

NANOVIC, P.J.—July 16, 2009

PROCEDURAL AND FACTUAL BACKGROUND

On July 10, 2006, Kevin Brandwein, the Defendant in these proceedings, pled guilty to assaulting a juvenile court officer while in the performance of his duties and to harassing a prison guard at a time when he was an inmate at the Carbon County Prison, both felony offenses.[1] The aggravated assault charge stems from

[1] Aggravated assault, the charge to which Defendant pled guilty in the case docketed to No. 657 CR 05 is a felony of the second degree. 18 Pa. C.S.A. §2702(a)

an incident which occurred on November 1, 2005, in the Carbon County Courthouse while Defendant was awaiting a disposition proceeding in a juvenile matter. The aggravated harassment of a prison guard occurred on January 5, 2006.

Before accepting Defendant's pleas, Senior Judge John P. Lavelle, before whom the pleas were entered, conducted a colloquy to ascertain that Defendant's pleas were being made knowingly, intelligently, and voluntarily. Following his acceptance of Defendant's pleas, Judge Lavelle sentenced Defendant to two concurrent terms of imprisonment of eighteen to sixty months in a state correctional institution. Both the pleas and the sentences imposed by Judge Lavelle were in accordance with a plea agreement previously reached between Defendant and the Commonwealth on May 18, 2006. Pursuant to that agreement, all remaining charges in each case were to be **nolle prossed.**[2]

In neither case did Defendant file a post-sentence motion or a direct appeal. Accordingly, the judgment of sentence in each case became final on August 9, 2006. Thereafter, on July 16, 2007, Defendant filed a Post Conviction Relief Act ("PCRA")[3] Petition, his first, **pro se.** Upon receiving this Petition, we appointed post-conviction counsel to represent Defendant in presenting his claim.

At the hearing on Defendant's Petition, counsel identified three issues which Defendant wished to pursue: (1) whether medication prescribed to Defendant for mental health issues so clouded his thinking that he was unable to enter a knowing, voluntary, and intelligent plea; (2) whether Defendant's history of mental health illness and ongoing treatment dictated a plea of guilty but mentally ill, rather than one of guilty alone, and if so, whether trial counsel was then ineffective for failing to consider, present, and develop a plea of guilty but mentally ill on Defendant's behalf; and (3) whether

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(3). In the case docketed to No. 241 CR 06, Defendant pled guilty to aggravated harassment by a prisoner, a felony of the third degree. 18 Pa. C.S.A. §2703.1.

[2] In the case docketed to No. 657 CR 05, the charges to be dismissed were assault by a prisoner (18 Pa. C.S.A. §2703(a)), resisting arrest (18 Pa. C.S.A. §5104), and disorderly conduct (18 Pa. C.S.A. §5503(a)(1)). In the case docketed to No. 241 CR 06, the charges to be dismissed were simple assault (18 Pa. C.S.A. §2701(a)(3)) and harassment (18 Pa. C.S.A. §2709(a)(1)).

[3] 42 Pa. C.S.A. §§9541-9546.

Defendant is entitled to reinstatement of his direct appeal rights **nunc pro tunc** for counsel's failure to file an appeal on Defendant's behalf, which Defendant claims he requested (PCRA Hearing, pp. 4-6).[4] These issues will be discussed in the order presented.

DISCUSSION

Defendant is a young man with a troubled past. He has been in placement most of his life. Since he was four or five years of age, he has suffered from, and has been treated for, bipolar disorder and anger management problems (PCRA Hearing, p. 7). He is now twenty-two years old, having been born on July 7, 1987.

Validity of Plea[5]

At the time of his plea, Defendant advised Judge Lavelle that he was being treated for mental health issues, specifically for bipolar disorder and having anger management problems, and that he took medication for his illness (Plea and Sentencing, pp. 8-9). When asked by Judge Lavelle whether he was taking any medication, Defendant responded that he was and that the only medication whose name he could recall was Depakote, 1500 milligrams per day. When Judge Lavelle inquired further about Defendant's ability to understand the proceedings, Defendant replied that he understood and comprehended what was occurring (Plea and Sentencing, pp. 9-10). In contrast, at the PCRA hearing, Defendant testified that he was heavily medicated at the time of his plea—that he was then taking 800 milligrams of Trazodone, 800 milligrams of Trileptal, and 2000 to 2500 milligrams of Depakote—and that he did not truly understand what was happening or what he was doing (PCRA Hearing, p. 12). On this basis, Defendant contends that his plea was not voluntarily, knowingly and intelligently made. The record, however, belies this contention.

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[4] The PCRA hearing occurred on January 9, 2009, with the transcript of those proceedings being filed on May 14, 2009. The transcript of the proceedings surrounding Defendant's plea and sentencing which occurred on July 10, 2006, is separately referred to in this Opinion.

[5] This issue has not been couched in terms of counsel's alleged ineffectiveness and appears to have been waived. "Absent extraordinary circumstances, the failure to file a direct appeal from a judgment of sentence amounts to waiver of any claim which could have been raised in such an appeal, thereby precluding collateral relief." **Commonwealth v. Fanase,** 446 Pa. Super. 654, 661, 667 A.2d 1166, 1169 (1995). Nevertheless, because Defendant has also requested reinstatement of his direct appeal rights, we address the merits in the interest of justice.

When questioned by Judge Lavelle during his plea colloquy, Defendant testified that: (1) he was being treated for mental illness; (2) the medications he was taking did not adversely affect his understanding or comprehension of the proceedings; (3) he understood the factual bases for his pleas; (4) he was pleading guilty because he was guilty; (5) his attorney had reviewed the charges with him, the sentences, and his rights as a defendant; (6) he was familiar with the plea agreement and had no questions he wanted to ask about the plea; and (7) he understood the Court was not a party to the plea agreement.

In the written guilty plea colloquy which accompanied Defendant's oral plea and which was made part of the record, Defendant represented that he: (1) read and understood the English language (No. 6); (2) was not under the influence of alcohol or any kind of drugs (No. 7); (3) was currently being treated for mental illness and was taking medication, identified as Depakote (Nos. 10 and 11); (4) had sufficient mental capacity to understand what he was doing and to understand the written questions directed to him and to answer them correctly (No. 12); (5) understood the nature of the offenses to which he was pleading guilty and the elements of those offenses (Nos. 14 and 15); (6) understood his right to trial by jury (Nos. 17 and 18); (7) understood that he was presumed innocent until proven guilty (No. 19); (8) was aware of the permissible range of sentences and/or fines for the offenses for which he was pleading guilty (No. 28); and (9) was entering the pleas of his own free will and had not been pressured or forced by anyone to do so (Nos. 35, 36, and 37).

"Our law presumes that a defendant who enters a guilty plea was aware of what he was doing. He bears the burden of proving otherwise." **Commonwealth v. Rush,** 909 A.2d 805, 808 (Pa. Super. 2006). Further, "a criminal defendant who elects to plead guilty has a duty to answer questions truthfully." **Commonwealth v. Cortino,** 387 Pa. Super. 210, 216, 563 A.2d 1259, 1262 (1989). The Court is entitled to rely on what the defendant says and the defendant may fairly be bound by what he tells the Court during a plea colloquy. Moreover, the Court may "assess for itself the [defendant's] mental state at the time of the colloquy." **Id.**

The transcript of Defendant's oral colloquy before Judge Lavelle shows that Defendant was attentive, coherent, and re-

sponsive to the Court's questions. When asked specifically about his mental illness and the medication he was taking, Defendant acknowledged that he was alert, knowledgeable, and understood the proceedings. Significantly, after questioning Defendant about his mental illness and medication, Judge Lavelle documented his perception of Defendant's appearance and stated, "You look very sharp to me, and you seem to comprehend everything that is going on." (Plea and Sentencing, p. 9)

Based upon our review of the record, we believe that Defendant was capable of rationally understanding his plea and its consequences and are convinced that at the time of his plea and sentencing he in fact understood what he was doing and why. The sentences Defendant received were both within the standard guideline range, were concurrent to one another rather than consecutive, and followed the plea agreement which Defendant had entered almost two months earlier. Accordingly, we concur with Judge Lavelle's assessment that Defendant's plea was knowingly, voluntarily, and intelligently entered.

Guilty But Mentally Ill

Defendant's second and third issues rely on Section 9543(a)(2)(ii) of the PCRA, ineffective assistance of counsel, as the basis for challenging his convictions.[6] To prevail on a claim of ineffective-

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[6] Under this section, a claim for ineffectiveness may be raised if the ineffectiveness "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa. C.S.A. §9543(a)(2)(ii). Under previous interpretations of this language which required an ineffectiveness claim to raise a question of whether an "innocent individual" had been convicted, Defendant's claim would not be cognizable under the PCRA since a plea of guilty but mentally ill is itself an admission of criminal wrongdoing and not a defense. **See Commonwealth v. Grier,** 410 Pa. Super. 284, 289, 599 A.2d 993, 995-96 (1991). This is no longer the case. In **Commonwealth v. Cappello,** 823 A.2d 936 (Pa. Super. 2003), the court stated:

> [A]ll constitutionally-cognizable claims of ineffectiveness are reviewable under the PCRA. In **[Commonwealth ex rel.] Dadario [v. Goldberg,** 565 Pa. 280, 773 A.2d 126 (2001)], our Supreme Court interpreted the 'truth-determining process' language contained in section 9543(a)(2)(ii) as the legislature's attempt to adopt the known Sixth Amendment standard of prejudice discussed in **Strickland v. Washington,** [466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984),] rather than its intent to limit the scope of ineffectiveness claims reviewable in PCRA proceedings. Therein, the court stated, 'Therefore, if a petitioner claims that he or she was denied the effec-

ness of counsel, Defendant must show: "(1) that the claim is of arguable merit; (2) that counsel has no reasonable strategic basis for his or her action or inaction; and, (3) that, but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different." **Commonwealth v. Bath,** 907 A.2d 619, 622 (Pa. Super. 2006), **appeal denied,** 918 A.2d 741 (Pa. 2007). "The failure to satisfy any prong of this test will cause the entire claim to fail." **Id.** "Finally, counsel is presumed to be effective and [Defendant] has the burden of proving otherwise." **Id.**

Defendant claims counsel was ineffective for failing to recommend and advocate a plea of guilty but mentally ill. Such a plea, Defendant contends, would have provided needed treatment for his underlying health issues, rather than incarceration alone. Defendant's argument implicitly assumes, without analysis, both the viability of this plea and its omission as adversely affecting him.

A plea of guilty but mentally ill is not a matter of right. Such a plea in this case would have required both the consent of the Commonwealth—a fact belied by its belief that the time for treatment was over (PCRA Hearing, pp. 41-42, 46) and its agreement to dismiss other charges—and the approval of the Court. Pa. R.Crim.P. 590(A)(3). Moreover, before accepting a plea of guilty but mentally ill, the court is required to hold a hearing to determine whether the defendant was "mentally ill **at the time of the offense** to which the plea is entered." 18 Pa. C.S.A. §314(b) (emphasis added). Definitionally, a person is mentally ill if as a result of mental disease or defect he "lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law." 18 Pa. C.S.A. §314(c)(1).[7]

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tive assistance of counsel in violation of the Sixth Amendment and Article 1, Section 9 of the Pennsylvania Constitution, Section 9543(a)(2)(ii) of the PCRA allows the petitioner to seek relief.'

Id. at 941 (citations omitted). Consequently, both of Defendant's claims of ineffectiveness of counsel are cognizable under the PCRA.

[7] A plea of guilty but mentally ill is not an acquittal but is an acknowledgement of criminal wrongdoing. It is therefore not a defense to criminal charges. "[A] finding of guilt with mental illness does not negate the intent element of crimes, nor should it act as a mitigating factor at sentencing." **Commonwealth v. Rabold,** 597 Pa. 344, 951 A.2d 329, 340 (2008); **see also, Commonwealth**

None of the illnesses with which Defendant has been diagnosed necessarily affect his cognitive functioning and his ability to distinguish between right and wrong. At least, Defendant has not proven or persuaded us to the contrary. While his anger management problems signal a possible inability to conform conduct to the requirements of the law, the extent of Defendant's disability in this regard and its role, if any, in understanding why Defendant did what he did was never explained. To the contrary, the separate incidents with which Defendant was charged occurred two months apart and each involved planning and thought. The November 1, 2005 incident involved Defendant's decision to commit an offense as an adult so he would not be returned to juvenile detention. The January 5, 2006 incident involved Defendant preparing a mixture of urine and feces which he later sprayed on a prison guard.

The question asked in the second half of the definition of mental illness is whether Defendant lacked substantial capacity to conform his conduct to the requirements of the law at the time of the incident. Defendant has not proven this. People are afflicted by mental illness to varying degrees, yet most lead law-abiding lives. Defendant's reasoning that his failure to comply with the law proves he lacked the substantial capacity to do so is inverted and does not present a meritorious claim.

Additionally, a person found guilty but mentally ill is guaranteed no specific sentence. In this respect, Section 9727(a) of the Judicial Code expressly provides that "[a] defendant found guilty

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v. Sohmer, 519 Pa. 200, 210, 546 A.2d 601, 606 (1988) ("Mental illness under our Crimes Code will not be permitted to eliminate the **mens rea** requirement for culpability or otherwise criminal conduct unless the M'Naghten test is met.") (emphasis in original). Such a finding is "not determinative of the defendant's criminal responsibility or culpability, but rather goes to an aspect of his post-verdict disposition." **Rabold, supra,** 951 A.2d at 345.

Unlike a finding of insanity which negates intent and therefore acquits, "in considering whether to find a defendant guilty but mentally ill or simply guilty, the jury is considering types of guilt, not the questions of innocence or valid defenses." **Commonwealth v. Trill,** 374 Pa. Super. 549, 602, 543 A.2d 1106, 1132 (1988) (Beck, J., concurring), **appeal denied,** 522 Pa. 603, 562 A.2d 826 (1989). "The legislature, in formulating the guilty but mentally ill verdict has established an intermediate category to deal with situations where a defendant's mental illness does not deprive him of substantial capacity sufficient to satisfy the insanity test but does warrant treatment in addition to incarceration." **Id.** at 581, 543 A.2d at 1122.

but mentally ill or whose plea of guilty but mentally ill is accepted ... may have any sentence imposed on him which may lawfully be imposed on any defendant convicted of the same offense." 42 Pa. C.S.A. §9727(a). "The only distinction between the convicted defendant and the convicted defendant determined to have been mentally ill at the time of the commission of the offense is that, in the case of the latter, the judge, before imposing sentence, must take testimony and make a finding as to whether the person **at the time of sentencing** is severely mentally disabled and in need of treatment." **Commonwealth v. Sohmer,** 519 Pa. 200, 210-211, 546 A.2d 601, 606 (1988) (emphasis in original). Such treatment, if found necessary, may be provided in a prison or hospital setting. **See Commonwealth v. Cain,** 349 Pa. Super. 500, 518-519, 503 A.2d 959, 968-969 (1986).

No mental health evaluation of Defendant was done, and Defendant has failed to present any competent psychiatric or psychological evidence to establish that he is in need of continued psychiatric or psychological treatment, or that the treatment he is currently receiving within the State correctional system is insufficient or inadequate (PCRA Hearing, p. 11). In this respect, Defendant has further failed to meet his burden of showing how he was in fact prejudiced by counsel's conduct.[8] Having failed to

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[8] In **Commonwealth v. Fanase,** the court stated:

> Under **Pierce** and its progeny, a defendant is required to show actual prejudice; that is, that counsel's ineffectiveness was of such magnitude that it 'could have reasonably had an adverse effect on the outcome of the proceedings.' … This standard is different from the harmless error analysis typically applied when determining whether the trial court erred in taking or failing to take certain action. The harmless error standard, as set forth by this Court in **Commonwealth v. Story,** 476 Pa. 391, 383 A.2d 155 (1978), states that '[w]henever there is a "**reasonable** possibility" that an error "might have contributed to the conviction," the error is not harmless.' … This standard, which places the burden on the Commonwealth to show that the error did not contribute to the verdict beyond a reasonable doubt, is a lesser standard than the **Pierce** prejudice standard, which requires the defendant to show that counsel's conduct had an actual adverse effect on the outcome of the proceedings. This distinction appropriately arises from the difference between a direct attack on error occurring at trial and a collateral attack on the stewardship of counsel. In a collateral attack, we first presume that counsel is effective, and that not every error by counsel can or will result in a constitutional violation of a defendant's sixth amendment right to counsel.

Id. at 666-668, 667 A.2d at 1172 (citations omitted) (emphasis in original).

establish both the merits of this claim and its prejudicial effect, Defendant's claim on this basis is without merit.

Reinstatement of Appellate Rights

Finally, Defendant claims that counsel was ineffective for failing to file an appeal from the judgments of sentence imposed by Judge Lavelle. An "unjustified failure to file a requested direct appeal is ineffective assistance of counsel **per se.**" **Bath, supra,** 907 A.2d at 622. When this occurs, Defendant "need not show that he likely would have succeeded on appeal in order to meet the prejudice prong of the test for ineffectiveness." **Id.** Prejudice is presumed. However, "before a court will find ineffectiveness of counsel for failing to file a direct appeal, the defendant must prove that he requested an appeal and that counsel disregarded that request." **Id.**

As to the factual predicate on which Defendant bases this claim, we are unconvinced that Defendant requested trial counsel to file an appeal and find to the contrary. Defendant's testimony in this regard does not ring true. If, as Defendant contends, his mind was numbed by medication and his thoughts clouded, it appears unlikely that he would have had the mental foresight to request an appeal. If, on the other hand, as we find, Defendant understood and agreed to the plea and the sentence imposed, it makes no sense that Defendant would have requested an appeal and there would be no basis to do so. Instead, we accept and credit the testimony of trial counsel that Defendant never requested his sentences be appealed (PCRA Hearing, p. 45).

This, however, does not end the inquiry since counsel has a duty to adequately consult with his client as to the advantages and disadvantages of an appeal where there is reason to think that a defendant would want to appeal. A failure to consult under these circumstances may justify a finding of counsel's ineffectiveness for not filing an appeal, even if the defendant himself did not request that an appeal be filed. **See Bath, supra,** 907 A.2d at 623. "[C]ounsel has a constitutional duty to consult with a defendant about an appeal where counsel has reason to believe either (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) that this

particular defendant reasonably demonstrated to counsel that he was interested in appealing." **Id.**

Neither of these circumstances exists in this case. As to the first, we have already stated that it makes no rational sense for Defendant to request an appeal from a plea and sentence which he had agreed to and which was accepted and imposed. Under this scenario, there exist no issues of colorable merit to appeal. As to the second, we have factually determined that Defendant did not request an appeal be filed. Since Defendant has failed to establish a duty to consult, Defendant has likewise failed to establish any breach of that duty.

CONCLUSION

In accordance with the foregoing, having examined each of the issues raised by Defendant in these post-conviction proceedings and finding them to be without merit, Defendant's petition is denied.

CHARLES N. MESSINA, AGNES MESSINA & LEHIGH ASPHALT PAVING & CONSTRUCTION CO., Appellants vs. EAST PENN TOWNSHIP, Appellee, NANCY BLAHA, CHRISTOPHER PEKURNY, Intervenors

[1] *Zoning and Planning—Judicial Review or Relief—Proceedings—Parties—Intervention and New Parties*

Intervention was granted pursuant to Pa. R.C.P. No. 2327(4) on the ground that intervenors have a legitimate legal interest in sustaining a zoning Ordinance and that that interest may not be adequately represented by the Township.

[2] *Statutes—Enactment, Requisites, and Validity in General—Determination of Validity of Enactment—In General*

Strict adherence to adoption procedure of zoning ordinances is mandatory to protect the public interest.

[3] *Municipal Corporations—Proceedings of Council or Other Governing Body—Ordinances and Bylaws in General—Evidence—Presumptions and Burden of Proof*

Township ordinances enjoy presumption of validity, and burden is on challenger to prove ordinance's invalidity.

[4] *Zoning and Planning—Validity of Zoning Regulations—Procedural Requirements—Notice and Hearing—In General*

Publication of an entire 91-page ordinance would have been unnecessary and the summary published was sufficient to satisfy the statutory requirements of 53 P.S. §10610(a).

[5] *Zoning and Planning—Validity of Zoning Regulations—Procedural Requirements—Filing, Recording, or Publication*

Publication in newspaper stating that "copies of the proposed ordinance may be reviewed in the East Penn Township Municipal Building … or the Carbon County Law Library" satisfied Court that copies of the ordinance were made available pursuant to 53 P.S. §10610(a)(2) where there was no evidence to the contrary.

[6] *Zoning and Planning—Modification or Amendment—Manner of Modifying or Amending—In General*

A proposed change in a zoning ordinance is substantial where there is a significant disruption in the continuity of the proposed legislation or some appreciable change in the overall policy of the ordinance.

[7] *Municipal Corporations—Proceedings of Council or Other Governing Body—Ordinances and Bylaws in General—Validity in General—In General*

Procedural defects in the enactment of a municipal ordinance may render the ordinance void **ab initio,** and a void **ab initio** ordinance is to be treated as though it never had existed, so that the limitations period for challenging the ordinance never began to run.

[8] *Statutes—Enactment, Requisites, and Validity in General—Effect of Total Invalidity*

The void **ab initio** doctrine applicable to statutes and ordinances only concerns those claims that implicate notice, due process, or other constitutional rights of a party.

[9] *Zoning and Planning—Validity of Zoning Regulations—Procedural Requirements—Filing, Recording, or Publication*

Failure to notify the Planning Commission of an amendment 45 days prior to adoption of a zoning ordinance did not impermissibly prejudice public's right to Notice pursuant to 42 Pa. C.S. §5571.1(e)(2)(ii).

[10] *Municipal Corporations—Proceedings of Council or Other Governing Body—Ordinances and Bylaws in General—Evidence—Presumptions and Burden of Proof*

After twelve years and three amendments, with no evidence to the contrary, it was held that an ordinance enjoyed substantial compliance as defined by 42 Pa. C.S. §5571.1(d)(2).

[11] *Zoning and Planning—Validity of Zoning Regulations—Procedural Requirements—Notice and Hearing—In General*

The presumption of substantial reliance under Section 5571.1(d)(2), and the requirement in Section 5571.1(e)(2)(iii) that Appellants offer sufficient evidence to rebut it, apply to all procedural defects, even those that may have resulted in insufficient notice to the public and the deprivation of constitutional rights.

[12] *Municipal Corporations—Proceedings of Council or Other Governing Body—Ordinances and Bylaws in General—Evidence—Presumptions and Burden of Proof—Zoning and Planning—Validity of Zoning Regulations—Procedural Requirements—In General*

A municipality's reliance on, or acquiescence in, an ordinance over a long period of time supports a refusal to apply the void **ab initio** doctrine despite evidence of defects in the enactment process.

[13] *Municipal Corporations—Proceedings of Council or Other Governing Body—Ordinances and Bylaws in General—Evidence—Presumptions and Burden of Proof*

Under §5571.1(e)(2)(iii) it was incumbent upon the Appellants to affirmatively prove that there was no substantial reliance on the Ordinance.

[14] *Constitutional Law—Due Process—Protections Provided and Deprivations Prohibited in General—Rights, Interests, Benefits, or Privileges Involved in General—Property Rights and Interests—In General*

The Fourteenth Amendment to the United States Constitution prohibits a state or local government from depriving a person of a property interest without due process of law.

[15] *Constitutional Law—Rights to Open Courts, Remedies, and Justice—Conditions, Limitations, and Other Restrictions on Access and Remedies—Time for Proceedings*

Where legal notice was timely published advertising the original proposed ordinance and where plaintiff was aware of ordinance for at least 9 years, several times acting in reliance upon that ordinance and bringing suit under its protections, it cannot be said plaintiff's lack of due process notice has prevented the property owner from taking timely action to protect his property interest.

[16] *Constitutional Law—Enforcement of Constitutional Provisions—Persons Entitled To Raise Constitutional Questions; Standing—In General—Requirement That Rights Be Affected—In General*

The constitutionality of statutes and municipal ordinances cannot be questioned by a person not injuriously affected by the particular matter alleged to be unconstitutional.

[17] *Action—Grounds and Conditions Precedent—Persons Entitled To Sue*

In order to have standing to challenge an official order or action, a party must be aggrieved by the action or order; for a party to be aggrieved, it must have a substantial, direct, immediate, and not remote interest in the subject-matter of the litigation.

[18] *Zoning and Planning—Judicial Review or Relief—In General—Right of Review*

For a party to be "aggrieved," for purposes of the Municipalities Planning Code, the interest of the party who will be affected by the alleged illegal law must be distinguishable from the interest shared by all of the citizens. 53 P.S. §10916.1

[19] *Zoning and Planning—Judicial Review or Relief—In General—Right of Review*

Where the Court was unable to determine the substance of an amendment to a zoning ordinance, it was held that plaintiffs lacked standing to bring suit

as it was impossible to determine if they had a right distinguishable from the interest shared by all of the citizens.

NO. 2254 CV 2008

MARC JONAS, Esquire and JULIE L. VON SPRECKELSEN, Esquire—Counsel for the Appellants.

JAMES R. NANOVIC, Esquire—Counsel for the Appellee.

JOSEPH J. MATIKA, Esquire—Counsel for the Intervenors.

OPINION

BLACK, S.J.—September 8, 2009

Appellants, Charles N. Messina, Agnes Messina, and Lehigh Asphalt Paving & Construction Co., have filed a procedural validity challenge to the East Penn Township Zoning Ordinance, Township Ordinance No. 1996-94, adopted July 22, 1996 (hereinafter the "Ordinance"). Appellants aver that procedural errors occurred at the time the Ordinance was adopted and that as a result the Ordinance is void **ab initio.** However, the challenge was not filed until August 11, 2008, more than 12 years after adoption of the Ordinance, and in the meantime the Township and its residents and landowners have substantially relied on the validity and effectiveness of the Ordinance. Therefore, Appellants' procedural validity challenge is time-barred.

I. FACTS AND PERTINENT HISTORY

A. **Procedural History**

On August 11, 2008, Appellants commenced this action by filing an appeal in the nature of a procedural validity challenge to the Ordinance. The appeal was filed with this Court pursuant to 42 Pa. C.S. §5571.1(a) of the Judicial Code and 53 P.S. §11002-A(b) of the Municipalities Planning Code (hereinafter the "MPC"). On September 9, 2008, the Carbon County Prothonotary issued a Writ of Certiorari directing East Penn Township to file with the Prothonotary a record of its proceedings regarding the adoption of the Ordinance. Pursuant to this Writ, the Township filed its records regarding adoption of the Ordinance on October 24, 2008.

On November 6, 2008, Nancy Blaha filed a Notice of Intervention with the Prothonotary of Carbon County seeking to intervene in this matter for the purpose of opposing the Appellants' claim that the Ordinance is invalid. Subsequently, on December 5, 2008,

Chris Pekurny also sought to intervene in the matter for the same purpose. Intervenor Blaha is a resident of East Penn Township, and Intervenor Pekurny owns property adjacent to the quarry at the center of this legal dispute.

[1]

The Intervenors originally sought to intervene as a matter of right, but later petitioned to intervene pursuant to Pa. R.C.P. 2327(4) on the ground that they have a legitimate legal interest in sustaining the Ordinance and that this interest may not be adequately represented by the Township. We granted their petition to intervene, and they have participated in the briefing and argument through counsel.

Argument was held on the merits of the procedural validity challenge on July 27, 2009, following the submission of briefs. At the time of argument we offered to schedule a hearing for any party to submit relevant evidence. None of the parties expressed any interest in presenting evidence. Therefore, we have limited our review of evidence to those documents filed of record with the Prothonotary in response to the Writ of Certiorari.

B. **Relevant Facts**

Charles N. Messina and Agnes Messina are the legal owners of a parcel of land located in East Penn Township, Carbon County, Pennsylvania, identified as Carbon County tax map parcel no. 99-8-11B and presently used as a quarry (hereinafter the "Quarry"). Lehigh Asphalt Paving and Construction Company is the equitable owner of the Quarry pursuant to an option contract to purchase the property. The record is unclear as to when Lehigh Asphalt was granted the Option or whether the Option has been exercised.

The Quarry is comprised of 114.4 acres and is located in the Rural (R) and Rural Residential (RR) Zoning Districts established pursuant to the Ordinance. Appellants' use of the Quarry is for mining and excavation. They aver that the Ordinance prevents them from expanding their mining and excavation operations.

Prior to July 22, 1996, the Township did not have a zoning ordinance. The Ordinance adopted by the Township on that date established a comprehensive zoning ordinance effective July 27, 1996. The effect of the Ordinance was "to place restrictions on the

use and development of land in the [T]ownship."[1] Subsequent to its initial adoption, the Ordinance has been amended three times, in 2000, 2001, and 2005, all prior to the instant procedural challenge.

The record filed in this case contains documents relating to the enactment of the Ordinance by the Township Planning Commission, including minutes of the Planning Commission dating from 1994 through 1996. Additionally, proofs of publication dated April 15, May 15, and July 16, 1996, are part of the record; as well as minutes of the Township Board of Supervisors meetings in 1996. Finally, various letters from concerned Township residents regarding the proposed Ordinance, including a letter from Greg Solt suggesting a change, are also part of the record.

The record indicates that on July 22, 1996, the night the Ordinance was adopted, the Township Supervisors took an initial vote on the Ordinance as advertised. That vote failed to produce the necessary votes for adoption. Amendments proposed by Greg Solt were then made to the proposed zoning map. A second vote was taken, this time on the Ordinance as amended. On this second vote the Ordinance as amended was adopted. The minutes of the July 22, 1996 meeting state in relevant part:

> Joe Ehritz made a motion to adopt the Zoning Ordinance with the Greg Solt's changes on the Zoning Map. Motion was then changed to 'as proposed'. [sic] There being no second, motion did not pass. Joe Ehritz made a motion seconded by Steve Fatzinger to adopt a Pending Ordinance Doctrine. AIF.[2]
>
> Executive session was called at 8:10 p.m. and ended at 8:40 p.m. (litigation).
>
> After further discussion on the Zoning map, Joe Ehritz made a motion, seconded by Ted Smith to adopt the Zoning Ordinance with the Greg Solt's changes on the Zoning Map. AIF. Changes were made on the map.[3]

It is apparent that changes were made to the zoning ordinance on the night of its adoption. This means that the Ordinance actu-

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[1] Township Ordinance No. 96-94, Introduction, p. 1.

[2] AIF: "All in Favor."

[3] Record ("R") at 58.

ally adopted differed to some extent from the Ordinance proposed and advertised prior to the meeting. There is no evidence that the Planning Commission reviewed the changes or that Township residents were on notice of the changes prior to the meeting of July 22, 1996.

Nor can we discern from the record with certainty the precise change or changes made.[4] It is possible that the changes made were those requested in the June 22, 1996 letter of Greg Solt.[5] Those changes were limited to movement of the boundary line between the "Business Commercial Zone" and "Village Commercial Zone" from the east to the west side of the Repsher Subdivision. Because the Quarry does not abut the Repscher Subdivision and is not located in either the Business Commercial Zone or Village Commercial Zone, the movement of this line may not have had any impact on the Quarry or its proposed expansion.

II. ANALYSIS

A. **Procedural Defects in the Adoption of the Ordinance**

The process for enacting a zoning ordinance under the MPC is complex with specific rules concerning notice and procedure. [2]

Our appellate courts have stated that strict adherence to these rules is mandatory to protect the public interest. **See e.g., Glen-Gery Corporation v. Zoning Hearing Board of Dover Township,** 589 Pa. 135, 907 A.2d 1033 (2006); and **Lower Gwynedd Township v. Gwynedd Properties, Inc.,** 527 Pa. 324, 591 A.2d 285 (1991). In **Cranberry Park Associates v. Cranberry Township Zoning Hearing Board,** 561 Pa. 456, 751 A.2d 165 (2000), the zoning ordinance was invalidated because of a failure to properly number, sign, date, and record the proposed ordinance. In

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[4] We recognize that the record could be more complete. There are certainly omissions, gaps, and ambiguities probably arising from the lapse of 12 years between the adoption of the Ordinance in 1996 and the commencement of the present action in 2008. That is why we proposed during argument that an evidentiary hearing might be advisable. However, none of the parties desired to present evidence. Therefore, in deciding this appeal, we are limited to the record as transmitted to the Prothonotary by the Township.

[5] R. at 92.

Kohr v. Lower Windsor Township Board of Supervisors, 867 A.2d 755 (Pa. Commw. 2005), the zoning ordinance was invalidated for failure to re-advertise or give notice to the municipal planning commission after amendments had been made to the ordinance during the initial adoption process.

In the present case, Appellants contend that East Penn Township did not adhere strictly to the procedural requirements for adoption of a zoning ordinance in four respects.

[3]

The Ordinance is presumed to be valid, and the burden of proving facts sufficient to establish a procedural defect falls on Appellants as the parties objecting to the Ordinance. **Cranberry Park Associates v. Cranberry Township Zoning Hearing Board, supra** at 459, 751 A.2d at 167.

[4]

1. First, Appellants contend that the public notice of the proposed amendment published in the **Times Leader,** a newspaper of general circulation in the county, did not include either the full text of the proposed Ordinance or a "brief summary" setting forth the provisions of the Ordinance "in reasonable detail," as required by Section 610(a) of the MPC, 53 P.S. §10610(a). Obviously, publication of the entire 91-page Ordinance would have been ridiculous. We believe that the summary published was sufficient and did meet the requirements of the MPC.

[5]

2. Second, Appellants contend that an attested copy of the proposed Ordinance was not filed with the Carbon County Law Library, as required by Section 610(a)(2) of the MPC, 53 P.S. §10610(a)(2). However, Appellants have not submitted any evidence to support this contention. Moreover, the record contains a copy of the legal notice published in the **Times News** on July 5 and July 12, 1996, stating that "copies of the proposed ordinance may be reviewed in the East Penn Township Municipal Building … or the Carbon County Law Library."[6] This legal notice supports the Township's position on this issue.

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[6] R. at 60.

3. Third, Appellants contend that the Ordinance was not re-advertised before adoption after substantial amendments were made to it. Section 610(b) of the MPC is specific that when

> substantial amendments are made in the proposed ordinance or amendment, before voting upon enactment, the governing body shall, at least ten days prior to enactment, re-advertise, in one newspaper of general circulation in the municipality, a brief summary setting forth all the provisions in reasonable detail together with a summary of the amendments.

53 P.S. §10610(b).

It appears from the record that the proposed Ordinance was amended on the night of its enactment, July 22, 1996, without re-advertisement before it was voted on and adopted. However, not every amendment requires re-advertisement. Under Section 610(b), re-advertisement is necessary only if the amendment was "substantial." In **Schultz v. City of Philadelphia,** 385 Pa. 79, 122 A.2d 279 (1956), in discussing the issue of substantiality our Supreme Court stated:

> While it is obvious that an insignificant amendment made to a proposed ordinance after advertisement and a public hearing does not require a re-advertisement and public hearing, the case is clearly otherwise if the amendment is substantial in relation to the legislation as a whole.

Id. at 82, 122 A.2d at 281.

[6]

The Supreme Court expounded on this principle in **Willey Appeal,** 399 Pa. 84, 87, 160 A.2d 240, 242 (1960), holding that for substantiality to exist "there must be a significant disruption in the continuity of the proposed legislation or some appreciable change in the overall policy of the bill." In **Willey,** the court found that the amendment "did not add or delete any permitted use; it did not change a district boundary or classification, nor did it vary any regulation." **Id.** Therefore, the court found that the amendment was insubstantial, and refused to invalidate the zoning ordinance at issue, even though it had not been re-advertised following the amendment. The Commonwealth Court reached a different conclusion on substantiality in **Save Our Local Environment II v.**

Foster Township Board of Supervisors, 137 Pa. Commw. 505, 508-509, 587 A.2d 30, 31-32 (1991), holding that modification of a zoning district from agricultural to industrial amounts to a substantial change when applied to 3,300 acres.

In the instant case it is not clear from the record before us exactly what the amendment was. Therefore, we are unable to find that it was substantial. Appellants, who had the burden of proof on this issue, failed to prove facts sufficient to establish its claim of a substantial amendment. The amendment may have consisted of the change suggested by Greg Solt in his letter of June 22, 1996, **i.e.,** the movement of the dividing line between the Business Commercial and Village Commercial Districts on the property known as the Repsher Subdivision. If so, this may have been a substantial change under the test established by our Supreme Court in **Willey.** However, the change adopted at the July 22, 1996 meeting might have been something else. We cannot decide an important case such as this—or any case for that matter—on the basis of guesswork. In the absence of any evidence as to the specific content of the amendment, we are unable to find that it was "substantial". Hence, we cannot find that the failure to re-advertise was a fatal flaw in the enactment process.

4. Appellants also assert a fourth defect in the enactment process in that the Township failed to submit the final version of the Ordinance, including all amendments, to the County Planning Commission at least 45 days prior to the enactment of the Ordinance. The MPC requires in Section 607(e) that "at least 45 days prior to the public hearing by the local governing body as provided in Section 608,[7] the municipality shall submit the proposed ordinance to said county planning agency for recommendations." 53 P.S. §10607(e). This requirement has been interpreted strictly. It applies whether or not the proposed amendment is substantial. **Kohr v. Lower Windsor Township Board of Supervisors, supra,** 867 A.2d at 758 (holding that "each amendment (must) be submitted to the planning agency whether substantial changes have occurred to it or not"). Since an amendment was accepted on the very night the Ordinance was adopted, it is obvious that the

[7] 53 P.S. §10608.

Ordinance as amended was not submitted to the County Planning Commission at least 45 days before its adoption. Accordingly, based on the holding in **Kohr** and the plain meaning of Section 607(c), we must conclude that there was a violation of the strict requirement to inform the County Planning Commission of the content of the proposed Ordinance, including all amendments, at least 45 days prior to its adoption.

B. ***Glen-Gery* and the Doctrine of Void *ab Initio***

The Pennsylvania Supreme Court has taken up the issue of procedural irregularities in the adoption of municipal ordinances with some frequency.

[7]

In a line of cases including **Glen-Gery Corporation v. Zoning Board of Dover Township, supra,** the Court has held that procedural defects in the enactment of a municipal ordinance render the ordinance void **ab initio,** and that a void **ab initio** ordinance is to be treated as though it never had existed, so that the limitations period for challenging the ordinance never began to run.

In **Lower Gwynedd Township v. Gwynedd Properties, Inc., supra,** the township had enacted an ordinance authorizing the condemnation of a developer's property for use as a conservation area. The township had published a summary of the ordinance in the local newspaper but had failed to file a copy of the ordinance with the county law library or another county office. Upon a procedural challenge by the landowner, our Supreme Court held:

> [T]he procedures established by the legislature for the enactment of ordinances must be followed strictly in order for an ordinance to be valid. … The precedents of this Court have been consistent in holding that statutory publication requirements are mandatory and that ordinances adopted without strict compliance are void. The public's interest in the legislative process demands no less.

Id. at 327-29, 591 A.2d at 287-88.

The precedent set by the Supreme Court in **Lower Gwynedd** was followed in **Schadler v. Zoning Hearing Board of Wiesenberg Township,** 578 Pa. 177, 850 A.2d 619 (2004), where the Court also held a municipal ordinance void **ab initio** because of the

municipality's failure to comply with statutory notice requirements prior to enactment. **Schadler** involved a landowner's procedural challenge to the enactment of an ordinance regulating mobile homes. The challenge was filed 200 days after the ordinance had been enacted. The Supreme Court determined that because of procedural defects in enactment of the ordinance, it was void **ab initio.** Hence the 30-day limitation period set forth in 53 Pa. C.S. §10909.1(a)(2) never began to run and did not bar the procedural challenge. The Court stressed the importance of requiring compliance with procedural requirements:

> The purpose of requiring compliance with the procedural requirements for enacting township ordinances is premised on the importance of notifying the public of impending changes in the law so that members of the public may comment on those changes and intervene when necessary.

Id. at 189, 850 A.2d at 627.

The Supreme Court re-affirmed this principle in **Glen-Gery Corporation v. Zoning Board of Dover Township, supra.** The Court explained that the effect of determining an ordinance to be void **ab initio** because of procedural defects is that the ordinance never became law. Therefore, the limitations period never commenced, and a procedural challenge to the zoning ordinance at issue could be filed at any time in the future. **See also, Luke v. Cataldi,** 593 Pa. 461, 932 A.2d 45 (2007), holding that a municipality's failure to give public notice or hold a hearing before granting conditional use permits caused the permits to be void **ab initio.**

In **Glen-Gery** the Court appeared to recognize the potential danger in eliminating all cut-off dates for challenging the validity of ordinances.

[8]

Thus, in a footnote to its opinion the Court stated that the void **ab initio** doctrine applies only to procedural defects implicating "notice, due process, or other constitutional rights." **Glen-Gery, supra** at 143 n.5, 907 A.2d at 1037 n.5. The Court also referred to its earlier statement in **Schadler v. Zoning Hearing Board of Wiesenberg Twp., supra** at 189, 850 A.2d at 627, that "we may someday be presented with a case in which a procedurally defective

ordinance has been 'on the books' and obeyed in practice for such a long time that public notice and acquiescence can be presumed … ." **Glen-Gery, supra** at 145 n.6, 907 A.2d at 1039 n.6.

C. **Legislative Modification of the Void *ab Initio* Doctrine**

In July of 2008,[8] following the decision of the Supreme Court in **Glen-Gery,** the Pennsylvania Legislature took action to limit application of the void **ab initio** doctrine. Recognizing the need for a measure of certainty and stability in land use planning and development, the Legislature enacted an amendment to the Judicial Code at 42 Pa. C.S. §5571.1 placing time limits on procedural challenges to an ordinance even where the procedural defects raise constitutional issues. The amendment continues the intent of the void **ab initio** doctrine to some extent by allowing procedural challenges to an ordinance after expiration of the 30-day appeal period to avoid "an impermissible deprivation of constitutional rights." However, the legislature balanced this provision with a temporal limit on such challenges unless certain conditions are met. The statute accomplishes this by establishing certain presumptions and certain burdens that the challenging party must meet to invoke the void **ab initio** doctrine. The relevant portions of Section 5571.1 are set forth below:

> **(c) Exemption from limitation.**—An appeal shall be exempt from the time limitation in subsection (b) [30 days] if the party bringing the appeal establishes that, because of the particular nature of the alleged defect in statutory procedure, the application of the time limitation under subsection (b) would result in an impermissible deprivation of constitutional rights.
>
> **(d) Presumptions.**—Notwithstanding any other provision of law, appeals pursuant to this section shall be subject to and in accordance with the following:
>
> (1) An ordinance shall be presumed to be valid and to have been enacted or adopted in strict compliance with statutory procedure.

[8] The Legislative history of Public Law 328, 2008 (which would become, in part, 42 Pa. C.S. §5571.1) indicates that the bill was first sent to the House Local Government Committee on May 24, 2007, nine months after the decision in **Glen-Gery** was handed down on September 28, 2006.

(2) In all cases in which an appeal filed in court more than two years after the intended effective date of the ordinance is allowed to proceed in accordance with subsection (c) the political subdivision involved and residents and landowners within the political subdivision shall be presumed to have substantially relied upon the validity and effectiveness of the ordinance.

(3) An ordinance shall not be found void from inception unless the party alleging the defect in statutory procedure meets the burden of proving the elements set forth in subsection (e).

(e) Burden of proof.—Notwithstanding any other provision of law, an ordinance shall not be found void from inception except as follows:

(1) In the case of an appeal brought within the 30-day time limitation of subsection (b), the party alleging the defect must meet the burden of proving that there was a failure to strictly comply with statutory procedure.

(2) In the case of an appeal which is exempt from the 30-day time limitation in accordance with subsection (c), the party alleging the defect must meet the burden of proving each of the following:

(i) That there was a failure to strictly comply with statutory procedure.

(ii) That there was a failure to substantially comply with statutory procedure which resulted in insufficient notification to the public of impending changes in or the existence of the ordinance, so that the public would be prevented from commenting on those changes and intervening, if necessary, or from having knowledge of the existence of the ordinance.

(iii) That there exist facts sufficient to rebut any presumption that may exist pursuant to subsection (d)(2) that would, unless rebutted, result in a determination that the ordinance is not void from inception.

In the present case, the appeal was filed on August 11, 2008, more than 12 years after to the enactment of the Ordinance and more than 30 days after the effective date of Section 5571.1 of the Judicial Code.[9] Thus, Appellants must meet the burden of proving

[9] The effective date of the amendment to the Judicial Code was July 4, 2008.

those propositions set forth in Subsection (e)(2) above in order to be exempt from the 30-day appeal deadline.

[9]

We previously concluded[10] that the Township had failed to strictly comply with the relevant statutory procedures for notifying the Carbon County Planning Commission of the amendment to the Ordinance at least 45 days prior to its enactment. However, this procedural violation affected only possible input from the Planning Commission. It did not cause "insufficient notification **to the public** of impending changes in or the existence of the ordinance, so that **the public** would be prevented from commenting on those changes and intervening, if necessary, or from having knowledge of the existence of the ordinance." 42 Pa. C.S. §5571.1(e)(2)(ii) (emphasis added). Consequently, Appellants have failed to meet the condition in Section 5571.1(e)(2)(ii) for excusing compliance with the 30-day appeal deadline.

[10]

Also fatal to Appellants' appeal, in view of the 12-year delay, is Appellants' total failure to prove any facts to rebut the presumption in Section 5571.1(d)(2) that the Township and its residents and landowners have substantially relied upon the validity and effectiveness of the Ordinance. Evidence of such facts is required by the third prong of Section 5571.1(e)(2). In the absence of such evidence, we must presume that the Township and its residents and landowners did in fact substantially rely on the Ordinance. In view of this substantial reliance, Appellants' appeal is untimely. Any other conclusion would be manifestly unfair to the Township and its residents and landowners. **See Geryville Materials, Inc. v. Lower Milford Township Zoning Hearing Board,** 972 A.2d 136, 144 (Pa. Commw. 2009) (zoning and subdivision ordinances held valid despite procedural defects in order to avoid "potential chaos" in the community).

[11]

It should be noted that the presumption of substantial reliance under Section 5571.1(d)(2), and the requirement in Section 5571.1(e)(2)(iii) that Appellants offer sufficient evidence to rebut it,

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[10] **See** pp. 213-214 **supra.**

apply to all procedural defects, even those that may have resulted in insufficient notice to the public and the deprivation of constitutional rights. Thus, even if the amendment at the meeting of July 22, 1996, had been a substantial amendment and the Ordinance was not thereafter re-advertised, the presumption of substantial reliance in Section 5571.1(d)(2) is still applicable.

The statutory presumption of substantial reliance is very appropriate under the circumstances here. The Ordinance has been on the Township books for over 12 years. Since its adoption the Township has amended the Ordinance on three occasions. Presumably, people have purchased property in the Township and have made improvements to their properties in reliance on the existence of the Ordinance. Appellants themselves acknowledge at Paragraph 11 of their Appeal that "[t]he Ordinance affected the substantive property rights of all property owners in the Township at the time it was enacted and continues to affect the rights of all current owners of real property in the Township. ..." Significantly, one of the Appellants, Lehigh Asphalt Paving and Construction Company, has itself relied very substantially on the validity and effectiveness of the Ordinance. Lehigh Asphalt submitted an application to the Township on May 20, 2000, for a special exception under the Ordinance to expand its quarry operations. In June 11, 2001, it commenced a mandamus action against the Township Board of Supervisors alleging a deemed approval of a land development plan it had submitted in July 1999. The mandamus action was successful following an appeal to the Commonwealth Court. **See Lehigh Asphalt Paving and Construction Company v. Board of Supervisors of East Penn Township,** 830 A.2d 1063 (Pa. Commw. 2003).

The case of **Geryville Materials, Inc. v. Lower Milford Township Zoning Hearing Board,** cited above, is instructive. **Geryville** involved a procedural challenge to 10 zoning and subdivision ordinances of the township. These ordinances had been on the township's books for periods ranging from three to 39 years. The challenges were filed prior to the amendment to the Judicial Code referred to above.[11] Nevertheless, despite procedural defects

[11] 42 Pa. C.S. §5571.1.

in the enactment process, the Commonwealth Court upheld the ordinances, refusing to apply the void **ab initio** doctrine.

[12]

The Court noted that the Supreme Court in **Glen-Gery** had stated in dicta that a municipality's reliance on, or acquiescence in, an ordinance over a period of time could support a refusal to apply the void **ab initio** doctrine despite evidence of defects in the enactment process. The Commonwealth Court then stated in **Geryville,** "The simple fact that no party has sought before to challenge the procedural process involved with these ordinances is a plain indication that interested parties have obeyed the ordinances." **Geryville, supra,** 972 A.2d at 143. The court further observed that "from a reliance perspective, it takes little imagination to envision the sort of inequities/unfairness that would be imposed upon the Township's residents" if ordinances that have been applied and accepted for a long period of time are suddenly declared void. **Id.** at 143 n.9. Referring to the "potential chaos" that would result, the court concluded:

> If we were to reach the result urged by **Geryville,** we believe that the turmoil that might ensue would cause greater harm to all of those who have an interest in land use in the Township, and who have innocently relied on the challenged ordinances, than would result by electing not to apply the void **ab initio** doctrine.

Id. at 144.

In the instant case, as in **Geryville,** it takes little imagination to envision the chaos and unfairness that is likely to ensue if the Township were to be suddenly without a zoning ordinance. That would be an unreasonable and unnecessary burden to place on the Township residents and landowners, who for more than 12 years have relied on the validity and effectiveness of the Ordinance.

As noted above, Appellants did not produce any evidence to sustain their burden of proof that there was no substantial reliance on the Ordinance. At oral argument, Appellants' counsel stated that East Penn Township is a quiet little township where people really are unaware of such matters as zoning. This statement is a rather condescending observation without any foundation in the

record of the case. The residents and landowners of East Penn Township are entitled to the same statutory presumptions as any other persons, including the presumption under Section 5571.1(d)(2) that they "substantially relied upon the validity and effectiveness of the ordinance."

[13]

It was incumbent upon the Appellants to affirmatively prove that there was no substantial reliance on the Ordinance. Without such proof, we are bound to accept the statutory presumption that there **was** substantial reliance. In view of this substantial reliance, it would be improper to set aside the Ordinance. As a result, Appellants' procedural validity challenge, filed more than 12 years after enactment of the Ordinance and more than 30 days after the enactment of Section 5571.1 of the Judicial Code, 42 Pa. C.S.§5571.1, is time-barred.

D. **Due Process of Law**

[14]

The Fourteenth Amendment to the United States Constitution prohibits a state or local government from depriving a person of a property interest without due process of law. A similar requirement exists under the Pennsylvania Constitution. **See Palmer v. Bartosh,** 959 A.2d 508 (Pa. Commw. 2008), analyzing Article I §1 of the Pennsylvania Constitution. Due process includes advance notice and an opportunity to be heard in legal proceedings that may adversely affect one's property.

Appellants have not challenged the constitutionality of Section 5571.1 of the Judicial Code continuing the 30-day limitations period for challenges to municipal ordinances, absent evidence that there was a deprivation of constitutional rights. Indeed, Appellants have quoted Section 5571.1 in their brief as the applicable law.[12] Appellants contend, however, that they are exempt from any time limitation because they have been denied due process of law.

[15]

We find their argument unconvincing. Statutes of repose are a legitimate and important part of our jurisprudence. They provide

[12] Appellants' Brief in Support of Procedural Validity Challenge, p. 9.

needed stability and predictability. They apply even where constitutional due process claims are asserted. The only exception is when the lack of due process notice has prevented the property owner from taking timely action to protect his property interest. That is not the case here for two reasons.

First, it is undisputed that a legal notice was timely published advertising the original proposed Ordinance back in 1996, prior to the amendment. Although the Ordinance as amended was not re-advertised, Appellants have been aware of the passage of the amended Ordinance since at least the year 2000, when Appellant submitted an application for a special exception under the Ordinance, and probably earlier in 1999, when it submitted a land development plan to the Township Board of Supervisors. Yet Appellants took no action to challenge the validity of the Ordinance until 2008. In the meantime the Township and its residents and landowners have substantially relied on the validity and effectiveness of the Ordinance. Under these circumstances it would be inequitable to permit Appellants to succeed on their validity challenge. Principles of estoppel preclude their assertion of a due process claim at this late date.

[16]

Second, there is the issue of standing. It is black-letter law that "one cannot question the constitutionality of a statute—and this includes municipal ordinances—unless injuriously affected by the particular matter alleged to be unconstitutional." **Commonwealth v. Kennedy,** 129 Pa. Super. 149, 154, 195 A. 770, 773 (1937).

[17]

Our Courts have held that for "a party to be aggrieved, it must have a substantial, direct, immediate, and not remote interest in the subject-matter of the litigation." **Commonwealth v. Finley,** 860 A.2d 132, 136 (Pa. Super. 2004).

[18]

This same standard applies to determine standing for land use issues. **See Mosside Associates, Ltd. v. Zoning Hearing Board of Municipality of Monroeville,** 70 Pa. Commw. 555, 562, 454 A.2d 199, 203 (1982), where the court stated: "In order to have standing as a 'person aggrieved' the person must have a direct

interest that is adversely affected by the action which he seeks to challenge. The interest must also be substantial, immediate, and not a remote consequence of the challenged action." "For a party to be 'aggrieved,' the interest of the party who will be affected by the alleged illegal law must be distinguishable from the interests shared by all citizens." **See Office of Attorney General, ex rel. Corbett v. Richmond Township,** 917 A.2d 397, 401 n.9 (Pa. Commw. 2007).

This principle was applied in **Laughman v. Zoning Hearing Board of Newberry Township,** 964 A.2d 19 (Pa. Commw. 2009), to reject a township resident's challenge to a rezoning ordinance and amendment. In that case the Commonwealth Court held the appellant, though a township resident lacked standing to challenge the ordinance and amendment. The Court found that his properties in the township were not in close proximity to a Rural Commercial Overlay (RCO) created by the ordinance and amendment. The resident's commercial properties were located two miles from the RCO district, his rental residential properties were located 0.8 miles from the district, and the resident did not show that the RCO district would have a detrimental effect on any of his properties.

A similar result was reached **Society Created to Reduce Urban Blight (SCRUB) v. Zoning Hearing Board of Adjustment of City of Philadelphia,** 951 A.2d 398, 402-403 (Pa. Commw. 2008). SCRUB, a civic organization, opposed an advertiser's application for a variance to erect a billboard in a commercial district, but failed to show any specific interest in the decision beyond that of the common citizen. Thus, the Commonwealth Court found that the organization lacked standing to appeal the grant of a variance by the zoning board of appeals. The Court noted that the organization had articulated only a general purpose to keep signs out of areas where they are prohibited, and neither the organization nor its members had property interests in the immediate neighborhood of the proposed sign.

[19]

In the present case, the only proven procedural defect was the Township's failure to notify the Carbon County Planning Commis-

sion of the proposed amendment 45 days prior to the vote on the Ordinance. As we noted above though,[13] we do not know what the content or subject of this amendment was. We are unable to discern this information from the record submitted, and Appellants have not submitted any evidence despite our stated willingness to hold a hearing if they had wished to do so. It is quite possible that the amendment incorporated the changes proposed by Greg Solt in his letter of June 22, 1996. If so, these changes affected only the location of the boundary line between the Village Commercial and Business Commercial Zoning Districts on the property known as the Repscher Subdivision. The Quarry is not located in, or adjacent to, the Repscher Subdivision. Nor is it located in either the Business Commercial or the Village Commercial Zones in the Township. In fact, the Quarry is situated a substantial distance away in the Rural and Rural Residential Districts on the West side of the Township. Appellants have submitted no evidence from which we could conclude that their property is affected in any way by the amendment or that they have any interest in the amendment beyond a general interest attributable to any citizen in the Township. Thus, Appellants are without standing to challenge the amendment procedure on due process grounds.

IV. CONCLUSION

For the reasons stated, we conclude that Appellants' procedural challenge to the East Penn Township Zoning Ordinance must be denied. More than 12 years have elapsed since passage of the amended Ordinance, and Appellants have failed to produce any evidence to overcome the presumption under 42 Pa. C.S. §5571.1(d)(2) that the Township and its residents and landowners have substantially relied on the validity and effectiveness of the Ordinance since it adoption. Thus, Appellants' procedural challenge filed more than 30 days after enactment of the Ordinance is untimely. In addition, Appellants have not established any basis for challenging the amendment to the Ordinance at the meeting of July 22, 1996, on constitutional grounds.

[13] **See** p. 210 **supra.**

COMMONWEALTH OF PENNSYLVANIA
vs. WILLIAM D. WEHR, JR., Defendant

Criminal Law—Theft by Deception—Theft by Failure To Make Required Disposition—Requisite Elements for a ***Prima Facie*** *Case*

1. To establish a **prima facie** case at a preliminary hearing, the Commonwealth must prove the existence of each material element of each crime charged. A petition for writ of habeas corpus is the appropriate method for a defendant to challenge in court whether a **prima facie** case was established before the issuing magisterial district judge.

2. With respect to payments made to a contractor pursuant to a construction contract, theft by deception requires the Commonwealth to prove that the contractor intentionally deceived the payor into making the payments at the time the payments were made. The contractor's subsequent failure to perform or breach of contract is insufficient, by itself, to establish that the contractor had the requisite intent to deceive at the time the payments were made.

3. Theft by failure to make required disposition of funds received requires the Commonwealth to prove that the defendant (1) obtained property of another; (2) subject to an agreement or legal obligation to make specified payments or other disposition therefore; (3) dealt with the property as his own; and (4) failed to make the required disposition of the property.

4. Ordinarily, payments made pursuant to a construction contract become the property of the contractor at the time made unless the contract specifically requires that the payments be used for a specific purpose. In the context of a construction contract, this requirement is met where the parties agree that certain payments made by the owner to the contractor are to be used for the purchase and delivery of a modular home from a third-party manufacturer.

NO. 165 CR 2009

JOSEPH J. MATIKA, Esquire, Assistant District Attorney—Counsel for the Commonwealth.

CHRISTIAN D. FREY, Esquire—Counsel for the Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—October 19, 2009

On April 9, 2009, the Defendant, William D. Wehr, Jr., filed a petition for writ of habeas corpus asking that we dismiss the charges filed against him. At issue is whether the Commonwealth presented sufficient evidence at the time of the preliminary hearing to establish a **prima facie** case.

PROCEDURAL AND FACTUAL BACKGROUND

On November 24, 2007, Wehr, a general construction contractor, signed a written contract with Irina Lyakhovitskaya and Yevgenity Lyakhovitskiy ("Owners") to erect and construct a one-

floor, modular home on their property in Indian Mountain Lakes, Penn Forest Township, Carbon County, Pennsylvania.[1] The total contract price was $116,800.00. In anticipation of the contract, the Owners paid Wehr $20,000.00 on October 27, 2007. An additional $12,000.00 was paid when the contract was signed on November 24, 2007. Ten thousand dollars was paid on February 9, 2008, for the completed foundation. Also on February 9, 2008, the Owners paid Wehr $63,800.00 to be used for the purchase and delivery of the home from the manufacturer. In all, the Owners have paid Wehr a total of $105,800.00.

Under the contract, Wehr's work was to be completed by January 31, 2008. This has not occurred. What work has been done consists primarily of obtaining permits, clearing the property for construction, digging trenches and installing pipes, and pouring the foundation for the home; the home, however, has never been delivered.

The amount of money Wehr spent toward the erection of the home does not appear on the record of the preliminary hearing. Nor does the record reveal what Wehr has done with all of the monies he received from the Owners. Nevertheless, the record is clear that at some point Wehr experienced financial difficulties, was unable to perform his work on time, and has never completed the work he was to perform for the Owners.

On February 3, 2009, Wehr was charged with theft by deception[2] and theft by failure to make required disposition of funds received.[3] Both charges were bound over by the magisterial district judge. In evaluating whether this decision is supported by the evidence, we have been provided with a transcript of the preliminary hearing and have before us the same record presented to the district judge.

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[1] To be precise, the contract is between Wehr's construction business, Pocono Mountain Modular Homes, Ltd. and the Owners. Wehr is the president of this company and appears to control its operations. Consequently, Wehr individually may be held criminally responsible. **See Commonwealth v. Wood,** 432 Pa. Super. 183, 201, 637 A.2d 1335, 1344 (1994) ("It is well settled that individuals are subject to indictment for acts done under the guise of a corporation where the individual personally so dominated and controlled the corporation as to immediately direct its action.").

[2] 18 Pa. C.S.A. §3922(a)(1).

[3] 18 Pa. C.S.A. §3927(a).

DISCUSSION

The thrust of Wehr's argument is that this is a civil matter, not a criminal one, and that no crime has been committed. Wehr concedes that the Owners have a cause of action for breach of contract but denies that he ever made false statements, deceived the Owners, or entered the contract with the intent of not performing. Absent evidence to the contrary, and Wehr claims there is none, Wehr argues there is no crime.

The burden of proof is on the Commonwealth to show the existence of each material element of each crime charged when it attempts to establish a **prima facie** case. In determining whether the facts presented by the Commonwealth make out a **prima facie** case, we apply a mechanical standard:

> Our function is to take the facts proven by the Commonwealth at the preliminary hearing and to determine whether the sum of those facts fits within the statutory definition of the types of conduct declared by the Pennsylvania legislature in the Crimes Code to be illegal conduct. If the proven facts fit the definition of the offenses with which the [defendant is] charged, then a **prima facie** case was made out as to such ... offenses. If the facts do not fit the statutory definitions of the offenses charged against [the defendant] then [the defendant] is entitled to be discharged.

Commonwealth ex rel. Lagana v. Commonwealth, Office of Attorney General, 443 Pa. Super. 609, 613, 662 A.2d 1127, 1129 (1995) (brackets and omission in original). Under this standard, we accept Wehr's argument, in part, but not in total.

Theft by Deception

Section 3922(a)(1) of the Crimes Code, the section with which Wehr has been charged, together with subsection (b), define theft by deception as follows:

> §3922. Theft by deception
>
> (a) Offense defined.—A person is guilty of theft if he intentionally obtains or withholds property of another by deception. A person deceives if he intentionally:
>
> (1) creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind;

> but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise;
>
> ***
>
> (b) Exception.—The term 'deceive' does not, however, include falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed.

18 Pa. C.S.A. §3922(a)(1), (b). As is evident from this language, for theft by deception to exist, the Commonwealth must prove intentional deception in the acquisition of another's property. In the context of a construction contract, this intention must exist at the time the payments are received, as distinguished from a subsequent failure to perform the contract. **See Commonwealth v. Bentley,** 302 Pa. Super. 264, 267, 448 A.2d 628, 629 (1982).

The record before us proves only that Wehr failed to perform. No evidence exists of an intent to deceive. To the contrary, at the time the contract was entered, Wehr provided his correct name, address, and telephone number. He began work and obviously spent money in this regard. When, because of money shortages, he was unable to pay for the modular home, Wehr wrote the Owners of his predicament and asked that they give him additional time to raise the monies to pay the manufacturer and have the home delivered and set. In this letter sent sometime in May 2008, Wehr wrote that he was struggling to stay in business, that he had used some of the Owners' money for other purposes, that he no longer had sufficient money to pay for the home, and that he needed their indulgence before he got back on his feet (Preliminary Hearing, Commonwealth Exhibit 7; **see also,** N.T. 03/11/2009, pp. 22-23).

By the time the Owners received this letter, they were becoming desperate. After making the $63,800.00 payment in February 2008, for the delivery of the modular home, and being promised repeatedly by Wehr that the home would be delivered, Wehr's letter was a death knell. When they went to Wehr's place of business to obtain more information, they found that the door was locked. Still later, they discovered Wehr had gone out of business.

Although it appears apparent that Wehr was in over his head and was clearly experiencing cash flow problems, the evidence

presented does not support a finding that at the time Wehr received the Owners' payments, including the $63,800.00 payment for the home, he did not intend to perform the contract. That he in fact did not perform the contract cannot, by itself, support an inference of an intent to not perform existing at the time the funds were received. **See Bentley, supra** at 268-69, 448 A.2d at 630. Absent any other evidence of Wehr's intent to deceive at the time these payments were received, the Commonwealth has failed to prove a **prima facie** case of theft by deception. **See Commonwealth v. Gallo,** 473 Pa. 186, 189, 373 A.2d 1109, 1111 (1977).

Theft by Failure To Make Required Disposition

As to the charge of theft by failure to make required disposition of funds received, Section 3927(a) of the Crimes Code provides in relevant part:

> §3927. Theft by failure to make required disposition of funds
>
> (a) Offense defined.—A person who obtains property upon agreement, or subject to a known legal obligation, to make specified payments or other disposition, whether from such property or its proceeds or from his own property to be reserved in equivalent amount, is guilty of theft if he intentionally deals with the property obtained as his own and fails to make the required payment or disposition. The foregoing applies notwithstanding that it may be impossible to identify particular property as belonging to the victim at the time of the failure of the actor to make the required payment or disposition.

18 Pa. C.S.A. §3927(a).

"A defendant is guilty of theft by failure to make required disposition of funds received if he obtains property upon agreement or subject to a known legal obligation to make specified payment or other disposition of the property, and intentionally deals with the property as his own and fails to make the required payment or disposition." **Lagana, supra** at 615, 662 A.2d at 1130. This offense has four elements:

> 1. The obtaining of property of another;
>
> 2. Subject to an agreement or known legal obligation upon the recipient to make specified payments or other disposition thereof;

3. Intentional dealing with the property obtained as the defendant's own; and

4. Failure of the defendant to make the required disposition of the property.

Commonwealth v. Crafton, 240 Pa. Super. 12, 16, 367 A.2d 1092, 1094-95 (1976), **opinion corrected,** 410 Pa. Super. 390, 599 A.2d 1353 (1991).

This form of theft is "designed to require the actor to meet the obligation under which he undertook to collect monies or property of another." **Commonwealth v. Wood,** 432 Pa. Super. 183, 200, 637 A.2d 1335, 1344 (1994). In the context of a construction contract that does not require a specific disposition of funds, payments made to the contractor become the property of the contractor at the time of transfer. **See Commonwealth v. Bartello,** 225 Pa. Super. 277, 279-80, 301 A.2d 885, 886-87 (1973); **see also, Commonwealth v. Austin,** 258 Pa. Super. 461, 466, 393 A.2d 36, 38 (1978). Because one cannot misappropriate his own property, when a contractor misuses such payments, he cannot ordinarily be convicted of theft. Under these circumstances, the requirement that the property converted be "the property of another" has not been met. **See Commonwealth v. Robichow,** 338 Pa. Super. 348, 364, 487 A.2d 1000, 1009 (1985) (Spaeth, J., concurring), **appeal dismissed,** 510 Pa. 418, 508 A.2d 1195 (1986). Where, however, payments are received and contractually or otherwise earmarked for a specific purpose, a use inconsistent with that purpose is an appropriate basis upon which to found an embezzlement-type offense since both possession **and** title to the funds has not passed to the recipient. **See Commonwealth v. Coward,** 330 Pa. Super. 122, 127, 478 A.2d 1384, 1387 (1984).

The requirement that the defendant "'deals with [the] property as his own' does not require that the defendant actually use the property of another. Rather the word 'deals' in the context of this statute means that the actor treated the property or funds of another, designated to be used for a specific purpose, as if it were his or her own property." **Wood, supra** at 200, 637 A.2d at 1344. Further, in contrast to theft by deception, deceit is not an element of theft by unlawful disposition.

At least as to the $63,800.00 payment, Wehr accepted this money knowing and agreeing it was to be paid to the manufacturer of the modular home for its purchase and delivery to the Owners' property (Preliminary Hearing, N.T. 03/11/2009, p. 21). The receipt Wehr provided the Owners at the time of the payment expressly provided that, "This payment is to cover paying the Muncy factory for the modular home 2-14-08." (Preliminary Hearing, Commonwealth Exhibit 6; **see also,** Commonwealth Exhibit 3, Construction Contract, Paragraph 2, Draw Schedule, Item 5) In effect, Wehr was to act as an intermediary, facilitating the transfer of these monies between the Owners and the manufacturer. When combined with Wehr's letter to the Owners in May 2008, advising that he had used this money for other purposes and no longer had the funds available to pay for their home, all of the elements of this offense have been met.

CONCLUSION

For the foregoing reasons, the charge of theft by deception will be dismissed, with the Commonwealth allowed to proceed to trial on the charge of theft by failure to make required disposition of funds received.

WIGWAM LAKE CLUB, INC., Plaintiff
vs. GEORGE FETCH, Defendant

Civil Law—Status of Judgment Transferred Interstate—Amendment by Issuing Court—Authority of Transferee Court To Amend

1. Courts of Common Pleas have the inherent power to correct or amend judgments issued by them. This power continues until such time as the judgment has been discharged or satisfied.

2. A judgment may not be increased in amount on the basis of facts which occur after its entry without comporting with the requirements of due process, namely notice and an opportunity to be heard.

3. A court of common pleas to which a judgment is transferred from another court of common pleas in this Commonwealth does not have the authority to inquire into the merits of the judgment, or to amend it. In general, its authority is limited to execution and revival of the judgment.

4. Notwithstanding the transfer to another court, the court of common pleas in which a judgment is first entered, the issuing court, retains control over the judgment, including the power to correct or amend it.

5. As between courts of coordinate jurisdiction, the intrastate transfer of a judgment between courts of common pleas does not empower the trans-

feree court to modify, disregard or set aside the judgment of another court of competent jurisdiction.

NO. 08-1900

KEVIN A. HARDY, Esquire—Counsel for Plaintiff.

DAVID A. MARTINO, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—July 30, 2009

On July 24, 2008, Wigwam Lake Club, Inc. (the "Association"), as plaintiff, transferred a judgment it obtained in Monroe County against George Fetch (the "Owner") to this County. **See** Pa. R.C.P. 3002. The Association now seeks to amend that judgment pursuant to its terms and the terms of the Uniform Planned Community Act (the "Act"), 68 Pa. C.S.A. §§5101-5414. At issue is whether this Court has the authority to do so and, if so, whether the Association has met its burden of proving the amount it requests. For the reasons which follow, our decision on the first issue obviates the need to address the second.

PROCEDURAL AND FACTUAL BACKGROUND

The Owner owns property in Wigwam Lake Club, Inc., a residential subdivision in Monroe County, Pennsylvania, and is subject to its rules and regulations, including the payment of assessments made. When the Owner failed to pay these assessments, the Association filed a claim with a local magisterial district judge and obtained a judgment against the Owner in the amount of $798.67. In accordance with Pa. R.C.P.M.D.J. No. 402(D), this judgment was entered on the record of the Monroe County Prothonotary's Office on February 11, 2008, upon the filing of the magistrate's transcript.

Subsequently, on June 4, 2008, the Association petitioned the Court of Common Pleas for Monroe County to amend its judgment. That Court issued a Rule which the Owner failed to respond to, resulting in the Rule being made absolute and the motion granted. The text of the Order entered in Monroe County provides in its entirety:

ORDER

AND NOW, this 30th day of June, 2008, due to the absence of an Answer being filed by Defendant George Fetch to

Wigwam Lake Club, Inc.'s, Motion to Amend Judgment, the Rule issued by the Court is made Absolute and the Motion is GRANTED. The Judgment entered against Defendant is amended to reflect the total amount due and owing to Plaintiff as of June 2, 2008 to be $2,035.86. The Judgment is also amended to reflect that interest is to accrue at the rate of 6% from June 2, 2008 and that Defendant is responsible for all attorney's fees and costs of suit incurred subsequent to June 2, 2008, provided the attorney's fees are reasonable under the Uniform Planned Community Act.

BY THE COURT:
/s/Jerome P. Cheslock
J.

It is this judgment which was transferred to this County on July 24, 2008.

On December 3, 2008, the Association filed a motion with this Court to again amend its judgment. In this motion, the Association seeks an amendment to increase the amount of its judgment from $2,035.86 to $3,940.46 to reflect the total amount claimed to be due and owing as of December 1, 2008. This figure consists of the base judgment of $2,035.86 entered in Monroe County, plus attorney fees accrued since June 2, 2008, of $1,843.69, plus accrued interest from June 2, 2008, of $60.91.

Being unsure of our authority to amend the judgment of another court in this Commonwealth, we issued a Rule on December 5, 2008, directed to the Owner. In his answer to the Rule, the Owner alleges that he had previously paid in full the amount due the Association before the entry of the magistrate's judgment and that the judgment should be marked satisfied. He also disputes the fairness, reasonableness, and necessity of the attorney fees claimed.[1]

[1] The Association's right to claim attorney fees is not in dispute. The Uniform Planned Community Act makes attorney fees incurred in connection with the collection of assessments a self-executing recoverable cost. Section 5315(a) of the Act creates a lien against property in a planned community for any assessments made by the association and the reasonable costs and expenses, including legal fees, incurred by the association in connection with the collection of such assessments; Section 5315(f) acknowledges the association's right to commence a separate action or suit to collect those amounts subject to lien; and Section 5315(g) provides

A hearing on the motion was held on March 16, 2009.[2] At the conclusion of that hearing, we directed the parties to brief various issues. These briefs were filed by the Owner and the Association on June 3, 2009, and June 10, 2009, respectively.

DISCUSSION

Jurisdiction To Amend a Final Judgment

At the outset, we first note that the Association is not asking us to open or strike the judgment entered in Monroe County. Instead, it seeks to supplement or mold that judgment based upon additional expenses it has incurred toward the collection of the judgment since its entry in Monroe County. Neither the validity nor the integrity of the underlying judgment is being questioned.

a) **By the Issuing Court**

As to the authority a court has over a judgment entered by it, "courts have inherent power to correct their own judgments, even after expiration of the appeal period, and this power extends to the correction of obvious or patent mistakes ... ." **Smith v. Philadelphia Gas Works,** 740 A.2d 1200, 1204 (Pa. Commw. 1999). This authority is not limited to undisputed facts, or to correcting obvious or patent mistakes appearing on the face of the record. It extends to events occurring after entry of the judgment. **Cf.**

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that "a judgment or decree in any action or suit brought under this section shall include costs and reasonable attorney fees for the prevailing party." As we read these subsections, the Association is entitled to recover reasonable attorney fees and costs (68 Pa. C.S.A. §5315(g)) in its suit (68 Pa. C.S.A. §5315(f)) against the Owner for unpaid assessments (68 Pa. C.S.A. §5315(a)) provided the Association is the prevailing party. This right includes the right to collect attorney fees expended in collecting attorney fees. **See Mountain View Condominium Association v. Bomersbach,** 734 A.2d 468, 471 (Pa. Commw. 1999), **appeal dismissed,** 564 Pa. 433, 768 A.2d 1104 (2001). Further, as in **Mountain View,** any issue of entitlement appears to be foreclosed by the language in Judge Cheslock's Order holding the Owner responsible for all reasonable attorney fees incurred after June 2, 2008, thereby becoming part of the "law of the case." **See id.**

[2] On October 16, 2008, before the filing of its Motion to Amend the Judgment, the Association praeciped for the issuance of a writ of execution which was issued on the same date. In this writ, the amount due is stated to be $2,035.86, plus interest at the rate of six percent per annum from June 2, 2008, plus costs. Ownership of the property levied upon was claimed by and sustained in favor of the Owner's wife. **See** Pa. R.C.P. 3202, 3204. An objection to the sheriff's determination of ownership of property was filed by the Association on March 6, 2009. That objection was pending as of the date of the March 16, 2009, hearing.

Stephenson v. Butts, 187 Pa. Super. 55, 59, 142 A.2d 319, 321 (1958) (affirming court order modifying a judgment after its entry to reflect changed circumstances which occurred after the original judgment became final; "[C]ourts have the right to control the enforcement of a judgment, and the manner of this control is within the discretion of the Judges of the Courts of Common Pleas."). However, the power of a court to amend a judgment after its entry ceases once the judgment has been discharged or satisfied. **See Union National Bank v. Ciongoli,** 407 Pa. Super. 171, 174, 595 A.2d 179, 180-81 (1991).

After a judgment has been entered, any amendment to reflect additional charges since its entry must comport with due process. **See id.** at 176, 595 A.2d at 181-82. At a minimum, this requires notice and an opportunity to be heard. **See id.** A petition to amend the judgment, accompanied by proper service on the defendant with an opportunity to defend, meets this standard. **See e.g., Nationsbanc Mortgage Corporation v. Grillo,** 827 A.2d 489, 492 (Pa. Super. 2003) ("A mortgagee is required to petition the court and to provide notice and an opportunity to be heard to mortgagors if mortgagee wants to increase the amount of a judgment before it is satisfied.") (footnote omitted), **appeal denied,** 842 A.2d 407 (Pa. 2004). In addition, "[a] petition to modify may be regarded as an equitable application for relief where the judgment is unpaid." **Stephenson, supra** at 59, 142 A.2d at 321.

b) **By Another Court**

The inherent and equitable power of a court to amend a judgment so long as the substantive rights of the defendant are not impaired is, the Owner argues, confined to the court in which the judgment is originally obtained. As a general rule, "[t]he court to which [a judgment] is transferred has no power over it, except for purposes of execution, and cannot inquire into its validity, or make any order affecting its operation." **Nelson v. Guffy,** 131 Pa. 273, 18 A. 1073, 1074 (1890); **see also, Tabas v. Robert Development Co.,** 223 Pa. Super. 290, 296, 297 A.2d 481, 484 (1972). "The judgment may not be retried in the transferee court, except for the limited purpose of determining whether the transferor court had jurisdiction to enter the judgment and whether the judgment was obtained without derogating the judgment debtor's due process

rights." **Andrews v. Wallace,** 441 Pa. Super. 208, 214, 657 A.2d 24, 27 (1995) (Wieand, J., dissenting); **see also, Joshi v. Nair,** 418 Pa. Super. 448, 468, 614 A.2d 722, 732 (1992). Barring this exception, as well as one for judgments by confession, we have no right to inquire into the validity or merits of a final judgment transferred to this County from another court of common pleas.[3]

The rationale for this rule lies, in part, in understanding that "the judgment entered in the county to which the record is transferred does not become a 'judgment,' in the common interpretation of the word, of the county in which it is entered. It is record evidence of the existence of the judgment in the county where it was obtained." **Guffy, supra,** 18 A. at 1074.

> Such a transferred judgment is merely 'a **quasi** judgment, and that too only for limited purposes.' ... It has been held time and again that the court of the county to which the judgment is transferred has no power over it except for purposes of execution, and cannot inquire into its merits. That can be done only by the court in which it was originally obtained.

Williams v. Van Kemp, 370 Pa. 359, 364, 88 A.2d 49, 52 (1952) (citation omitted) (emphasis in original).

In **Guffy,** the Pennsylvania Supreme Court further stated:

> The court in which the judgment was entered loses none of its jurisdiction or power by the transfer, and, if the original judgment be set aside for any reason, the judgment entered in another county falls with it. It is thus apparent that the proceeding in the county to which the record is transferred is ancillary and dependent. The original power of the court in which the judgment was entered is not restrained or modified in the slightest degree by the transfer, nor by any proceedings based

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[3] The Rules of Civil Procedure distinguish between confessed judgments and other judgments transferred from one county to another. In this respect, Rule 2959(a)(1) provides:

> Relief from a judgment by confession shall be sought by petition. Except as provided in subparagraph (2), all grounds for relief whether to strike off the judgment or to open it must be asserted in a single petition. The petition may be filed in the county in which the judgment was originally entered, in any county to which the judgment has been transferred or in any other county in which the sheriff has received a writ of execution directed to the sheriff to enforce the judgment.

Pa. R.C.P. 2959(a)(1).

> upon the copy of record filed in another county. The transfer is for purposes of lien and execution only, and the judgment, when recorded in the county to which it is transferred, does not rise above its source, or confer any other power than that which the filing of the copy of record conferred. For all purposes, except execution, the original judgment continues to be the measure of the plaintiff's demand against the defendant, and the evidence of what has been passed upon by the court. All inquiries into its regularity or effect, and all applications for relief from its operations, must be made to the court that pronounced it. The derivative judgment is the basis of process in the county in which it is entered. The regularity and execution of such process must be determined by the court that issues it, but its control extends no further than its own process.

Id., 18 A. at 1074-75 (citations omitted).[4]

To the extent the Association asks us to change and increase the Monroe County judgment—to in effect open the judgment—to include recovery for new or different assessments than those ruled upon by the court in Monroe County, we have no authority to do so.[5] To the extent the Association seeks to mold the judgment to include,

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[4] **Nelson v. Guffy** was decided under the Act of April 16, 1840 (P.L. 410, Sec.1), 12 P.S. §891, since repealed by the Judiciary Act Repealer Act (JARA) in 1978. 42 P.S. §20002(a)(169). Nevertheless, the practice and procedure provided by this Act remained as part of the common law of this state to the extent not superseded by general rule. 42 P.S. §20003(b); **see also,** 42 Pa. C.S.A. §1722(b). Though general rules now exist on the topic of the intrastate transfer of judgments (**see** Pa. R.C.P. 3001-3003), thereby abolishing the former law to the extent governed by these rules, we find the reasoning of **Guffy** and other cases discussing this former law relevant and insightful in understanding the rules and their application.

[5] At the time of the hearing, the Association claimed that the current amount it was owed from the Owner was $6,249.90. This amount includes delinquent assessment charges accruing since the earlier Monroe County judgment.

For similar reasons, we also have no authority to direct that the judgment be marked satisfied, as requested by the Owner in his answer to the Rule issued on December 5, 2008, based on events which occurred prior to the entry of the judgment. Additionally, the doctrine of **res judicata** demands that we uphold the Monroe County judgment in this regard. "When a court of competent jurisdiction has determined a litigated cause on its merits, the judgment entered and not reversed on appeal is, forever and under all circumstances, final and conclusive as between the parties to the suit and their privies, in respect to every fact which might properly be considered in reaching a judicial determination

in addition to interest,[6] attorney fees incurred since the judgment was transferred to this County, the Association has provided us with no authority to do so. The case of **Noetzel v. Glasgow, Inc.,** 338 Pa. Super. 458, 487 A.2d 1372 (1985), which the Association cites to us as authority for one court to amend a judgment issued by another, is distinguishable and non-dispositive.

In **Noetzel,** the defendant's petition to strike/open a judgment for $300,000.00 rendered in West Virginia and transferred to Montgomery County, Pennsylvania, pursuant to the Uniform Enforcement of Foreign Judgments Act, 42 Pa. C.S.A. §4306, was denied by the trial court and affirmed, on appeal, by the Superior Court with one exception. In the pleadings it was admitted and undisputed that after the West Virginia judgment was entered, $218,811.54 had been collected by the plaintiff on account of the judgment. Consequently, while no defect existed justifying that the entire judgment be stricken, the Superior Court remanded to the trial court with directions that the judgment entered in Pennsylvania be amended and reduced by those amounts which were received and were to be applied against the unpaid judgment, citing the principle that "a court has an inherent power to correct the amount of a judgment and may do so on its own motion." **Noetzel, supra** at 472, 487 A.2d at 1379.

Noetzel was decided under the Uniform Enforcement of Foreign Judgments Act which appears to grant to the transferee court the same authority to act with respect to a transferred foreign (out of state) judgment as it has with respect to any judgment entered

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of the controversy, and in respect to all points of law there adjudged, as those points relate directly to the cause of action in litigation." **Noetzel v. Glasgow, Inc.,** 338 Pa. Super. 458, 466, 487 A.2d 1372, 1376 (1985), **cert. denied,** 475 U.S. 1109 (1986).

[6] The right to collect interest at the legal rate, six percent per annum, on the transferred judgment is not disputed by the Owner. **See** 42 Pa. C.S.A. §8101. This right is also recognized by case law in the entering of a revival judgment, a proper subject for inquiry by the court of the county to which a judgment is transferred. **See Bailey v. Bailey,** 338 Pa. 221, 223, 12 A.2d 577, 578 (1940) ("[I]t is firmly established that, when a judgment is revived by a writ [for] **scire facias,** the creditor has the right, in entering the revival judgment, to charge interest on the aggregate amount of principal and interest embodied in the previous judgment."). Consequently, we recognize, as does our order accompanying this opinion, the Association's right to add interest, at the legal rate, in executing on its Monroe County judgment in this County. **See** Pa. R.C.P. 3103, 3251.

by it, limited by the doctrine of res judicata, "a part of the 'national jurisprudence' by virtue of the full faith and credit clause of the federal constitution." **Id.** at 467, 487 A.2d at 1376.[7] This authority nevertheless is broader than that provided to the common pleas court in the intrastate transfer of a judgment between counties—equally bound by **res judicata**—by Rule 3003 which states:

> Rule 3003. Execution. Lien. Revival.
>
> When a judgment is transferred to another county, execution and revival of the judgment may be had in the transferee county, except that no execution may issue in the transferee county directed to the sheriff of another county.

Pa. R.C.P. 3003. More importantly, the facts in **Noetzel** were undisputed and the amendment granted acknowledged partial satisfaction of an existing judgment. From a jurisdictional standpoint, payment of a transferred judgment after its entry, whether in whole or in part, may properly be considered by the transferee county and applied in reduction of the judgment in response to a writ of revival under Rule 3003. **See Federico DiNunzio, Inc. v. DiNunzio,** 199 Pa. Super. 453, 455, 185 A.2d 637, 638 (1962).

Dramatically different, we believe, is the Association's request here seeking to amend and increase the judgment of another county on disputed facts. Central to **Guffy** on why this cannot be done is the control which the issuing court alone has over its judgments. 18 A. 1073. This control would be lost, even if only in part, if we were to amend the judgment to provide for additional attorney fees; it could conceivably result in different amounts found to be due if we set a certain figure for the disputed attorney fees claimed, and the Monroe County Court thought differently.

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[7] The Uniform Enforcement of Foreign Judgments Act provides in part:

> (b) Filing and status of foreign judgments.—A copy of any foreign judgment including the docket entries incidental thereto authenticated in accordance with act of Congress or this title may be filed in the office of the clerk of any court of common pleas of this Commonwealth. The clerk shall treat the foreign judgment in the same manner as a judgment of any court of common pleas of this Commonwealth. A judgment so filed shall be a lien as of the date of filing and shall have the same effect and be subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of any court of common pleas of this Commonwealth and may be enforced or satisfied in like manner.

42 Pa. C.S.A. §4306(b).

In **Andrews v. Wallace,** the court's authority to modify a judgment entered by another court was discussed by the dissent but not by the majority. There, the creditor on the judgment obtained a judgment in New Jersey for $3,000.00 against the debtor. The judgment was transferred to this state. The creditor filed a petition to reassess the Pennsylvania judgment to add interest and attorney fees available under New Jersey law. A default was taken for the debtor's failure to answer the petition and the Pennsylvania judgment was increased to about $6,700.00. The debtor challenged the reassessment of the original judgment, claiming that the Philadelphia Court of Common Pleas was without jurisdiction to reassess damages. **See Andrews, supra** at 210, 657 A.2d at 24-25.

A majority of the Superior Court affirmed the trial court's decision upholding the validity of the judgment entered by default. **See id.** at 213, 657 A.2d at 26. The reasoning of the majority, however, never addressed the issue here—the jurisdiction of the court to alter the amount of a judgment entered by another court—instead addressing questions of **in personam** and **in rem** jurisdiction. The dissent, dealing precisely with the issue, found a want of jurisdiction to reassess the amount of damages awarded by the judgment in New Jersey, stating: "The courts in Pennsylvania lack jurisdiction to alter the amount of a judgment which has been entered in New Jersey and transferred to Pennsylvania under the Uniform Enforcement of Foreign Judgments Act ... ." **Id.** (Wieand, J., dissenting).

The debtor's allowance of appeal in **Andrews,** relying heavily on Judge Wieand's dissent, was granted by the Pennsylvania Supreme Court but never decided, the debtor having filed a voluntary petition for bankruptcy in the Eastern District of Pennsylvania. **See Andrews v. Campbell,** 1997 WL 186322 at *1 (E.D. Pa. April 14, 1997). This notwithstanding, in addition to the open-ended result at the Supreme Court level in **Andrews,** the strength of the reasoning in **Guffy** and the following language from **King v. Nimick infra**—both decisions of our state Supreme Court, both discussing the deference accorded a judgment entered in one county and transferred to another—require us to deny the Association's Motion to Amend.

> A judgment that is transferred from one county to another, under the Act of 16th April 1840, bears a very strong analogy

> to a **testatum** execution. It is transferred only to facilitate its enforcement, but with a right to all the writs of **scire facias** that may be needed for that purpose. The primary judgment is still the principal one, and the court where that is, can alone take any action operating on the judgment itself, in any other way than by satisfaction, in the proper sense of the term. The court having the certified and secondary judgment, cannot inquire into its merits at all. And because it is a secondary judgment, it can stand only for its own costs, at the most, if the primary judgment be satisfied or set aside. And if the court having the primary judgment, order it to be satisfied, or set aside, the further process on the secondary judgment is peremptorily to be arrested, except for its own costs, in a proper case. Among equal courts, that which has the primary control of a question has the absolute control, and it alone, or its superiors, can correct its errors.

34 Pa. 297, *2 (1859). Simply stated, in this Commonwealth "[o]ne court cannot modify, disregard, or set aside the judgment of any other court of coordinate jurisdiction … ." **Lehigh & N.E.R. Co. v. Hanhauser,** 222 Pa. 248, 250, 70 A. 1089, 1090 (1908).

CONCLUSION

As a matter of deference, the practice and procedure in this Commonwealth precludes courts of coordinate jurisdiction from altering the judgments of one another. The Association chose Monroe County as the forum county to try its case and Monroe County properly assumed jurisdiction over the Association's claim. In consequence, we have neither the power nor the authority to alter the Monroe County judgment as requested by the Association.

ORDER OF COURT

AND NOW, this 30th day of July, 2009, upon consideration of the Plaintiff's, Wigwam Lake Club, Inc.'s, Motion to Amend Judgment, the Defendant's, George Fetch's, Answer thereto, the briefs of the parties, and hearing held, and in accordance with our Memorandum Opinion of this same date, it is hereby

ORDERED and DECREED that the Motion to Amend Judgment is denied, it being understood nevertheless that the Association may add interest, at the legal rate, in executing on the Monroe County Judgment in this County.

JENNY'S TAVERN, INC., Appellant vs.
PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT, Appellee

Civil Law—Liquor License—Appeal of Citation —Notice to Bar—40 Pa. Code §5.32(a)

1. The Court's review of the Liquor Control Board's imposition of a fine for violation of the Board's regulations is **de novo**.

2. A violation of Section 5.32(a) of the Liquor Control Board Regulations pertaining to the sound of music or entertainment emanating from loud speakers heard outside the licensed premises does not require a course of conduct. One instance is sufficient to constitute a violation.

3. Having independently weighed the testimony and credibility of the witnesses, and being convinced that a violation of the Liquor Code occurred, payment of a fine of $400.00 is appropriate.

NO. 09-1453

DONALD G. KARPOWICH, Esquire—Counsel for Appellant.

CRAIG A. STRONG, Esquire—Counsel for Appellee.

MEMORANDUM OPINION

NANOVIC, P.J.—December 28, 2009

Jenny's Tavern, Inc. ("Jenny's Tavern") petitions for allowance of appeal and/or review from an Order of the Pennsylvania Liquor Control Board ("Board") sustaining a citation for its alleged violation of Section 5.32(a) of the Liquor Control Board Regulations, 40 Pa. Code §5.32(a), and imposing a $400.00 fine. The primary issue before us is whether the Code was in fact violated, justifying the citation and fine.

FACTUAL AND PROCEDURAL BACKGROUND

Jenny's Tavern is a bar and restaurant business located at 1 West Oak Street, Tresckow, Carbon County, Pennsylvania. It is solely owned by Mary McAloose, and operated by her and her husband, Andrew McAloose. Jenny's Tavern has held Liquor License No. R-13156 since September 9, 2004, and has had three prior violations of the Liquor Code: (1) 40 Pa. Code §5.32(a) (use of loudspeakers or devices whereby music could be heard outside) in 2005, (2) 40 Pa. Code §5.32(a) (use of loudspeakers or devices whereby music could be heard outside) in 2007, and (3) 47 P.S. §4-493(1) (sales to a minor) in 2007.

Officer William Rosenstock of the Pennsylvania State Police, Bureau of Liquor Control Enforcement, was assigned to investigate

Jenny's Tavern on January 23, 2008. He conducted an investigation on January 25 and 26, 2008. (N.T. 07/16/2008, pp. 9, 10, 12.) The investigation was prompted by an anonymous complaint received on the Harrisburg hotline. (N.T. 07/16/2008, p. 10.)

Officer Rosenstock observed no violations on January 25, 2008. (N.T. 07/16/2008, p. 11.) He returned to the premises on January 26, 2008, at 9:20 p.m., and testified that he could hear music emanating from inside Jenny's Tavern from across the street and from approximately one hundred to one hundred and twenty feet down Oak Street in either direction. (N.T. 07/16/2008, pp. 12-14.) He then entered Jenny's Tavern and determined that the music was coming from a karaoke set up with two speakers on pedestals measuring approximately twenty by thirty-six inches each, as well as a wireless microphone. (N.T. 07/16/2008, p. 14.) Officer Rosenstock left Jenny's Tavern at 10:00 p.m. As he left, he continued to hear the music outside the building all the way to his car parked across Oak Street. (N.T. 07/16/2008, pp. 14-15.)

Mary McAloose testified that she was present at Jenny's Tavern on the evening of January 26, 2008, to ensure that the karaoke was not too loud. (N.T. 07/16/2008, p. 32.) The karaoke operator showed her that the machine was set on the lowest level. (N.T. 07/16/2008, p. 32.) She testified that she noticed Officer Rosenstock was present that evening, and that he left in a hurry. (N.T. 07/16/2008, p. 33.) She also testified that she has never received any sound-related complaints from anyone in the community. (N.T. 07/16/2008, p. 33.) Further, she opined that the anonymous tip may have been from a patron that she threw out and that people are regularly angry with her for throwing them out of the bar. (N.T. 07/16/2008, p. 58.)

Jerry Breck, operator of the karaoke entertainment on the evening of January 26, 2008, testified that he used a gauge to make sure the music could not be heard from outside Jenny's Tavern, that he did not perform the sound check until 9:30, and that the performance did not start until 9:35. (N.T. 07/16/2008, pp. 38-39.) He also testified that the patrons complained about the low volume of the music that evening. (N.T. 07/16/2008, p. 39.)

Andrew McAloose, Mary McAloose's husband, testified that the patrons that evening knew who Officer Rosenstock was, that

they were harassing him, that one man dedicated a karaoke song to him, and that Officer Rosenstock "ran out". (N.T. 07/16/2008, pp. 52-53.) He also testified that he checked to see whether music could be heard from outside Jenny's Tavern between 9:30 and 9:45 p.m. on January 26, 2008, and that it could not. (N.T. 07/16/2008, pp. 53-55.) Officer Rosenstock testified that he left the premises "for officer's safety" that evening. (N.T. 07/16/2008, p. 58.)

On March 10, 2008, the Pennsylvania State Police Bureau of Liquor Control Enforcement issued a citation to Jenny's Tavern for a violation of the Pennsylvania Liquor Code on January 26, 2008. The citation alleged a violation of 40 Pa. Code §5.32(a), which reads as follows:

> A licensee may not use or permit to be used inside or outside of the licensed premises a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, can be heard on the outside of the licensed premises.

A hearing on the citation was held on July 16, 2008, before the Honorable Felix Thau. Judge Thau issued an Adjudication dated August 27, 2008, sustaining the citation and imposing a $400.00 fine. Jenny's Tavern appealed the Adjudication on September 23, 2008, which appeal was dismissed by the Board on May 6, 2009, affirming the Adjudication. A supersedeas to delay the submission of the fine was not granted. Jenny's Tavern has now petitioned us for an allowance of appeal and/or review from the Board's Order. A **de novo** hearing was held on August 24, 2009. For the reasons that follow, the Board's Order will be affirmed in full.

DISCUSSION

Our standard of review is clear. "The trial court has the duty of receiving the record of the proceedings below, if introduced in evidence, together with any other evidence that is properly received, and then make its own findings of fact, conclusions of law and assess the appropriate penalty, if any." **Pennsylvania State Police, Bureau of Liquor Enforcement v. Kelly's Bar, Inc.,** 536 Pa. 310, 314, 639 A.2d 440, 442 (1994). In a case involving this particular Code violation, "[i]t is the court's duty to evaluate the credibility of the witnesses, weigh the testimony and, as this

proceeding is civil in nature, determine whether or not the violations charged have been established by a preponderance of the evidence." **In re Luvera,** 24 D. & C. 3d 149, 151 (1981), **affirmed,** 71 Pa. Commw. 285, 454 A.2d 236 (1983). We then may "change, alter, modify or amend the findings, conclusions and penalties imposed, of the Administrative Law Judge and the Board." **Kelly's Bar, Inc., supra** at 314, 639 A.2d at 442.

"[40 Pa. Code §5.32(a)] is clearly designed to protect neighbors, street pedestrians, and others from being subject to unwanted sounds, commonly known as 'noise pollution.'" **Appeal of Two-O-Two Tavern, Inc.,** 89 Pa. Commw. 373, 376, 492 A.2d 502, 504 (1985). Although we are mindful of the fact that citations for violation of this particular regulation are often based upon more than one incident (**see e.g., id.** at 503; **Pennsylvania State Police, Bureau of Liquor Control Enforcement v. JEK Enterprises, Inc.,** 153 Pa. Commw. 411, 413, 621 A.2d 1115, 1116 (1993), **appeal denied,** 538 Pa. 629, 646 A.2d 1182 (1994); **Pennsylvania State Police, Bureau of Liquor Control Enforcement v. R-Lounge, Ltd. t/a Rumors Lounge,** 166 Pa. Commw. 227, 228, 646 A.2d 609, 609 (1994); **Smart, Inc. v. Liquor Control Board,** 70 D. & C. 2d 535, 539 (1974)), the Code is clear that one instance is sufficient to constitute a violation.

> [40 Pa. Code §5.32(a)] seeks to protect the public outside the premises from the sound of music or entertainment emanating from loudspeakers on the premises. The language of the regulation requires that such sounds be contained within the licensed premises at all times. No course of conduct is addressed. The burden placed upon the licensee is not unreasonable. The regulation is not violated by an unexpected eruption of noise by a suddenly unruly patron with a loud voice. Instead, the licensee is merely required to control the music and entertainment he supplies or permits through loudspeakers for the pleasure of his customers to the extent that the sound of it remains within the premises.

Appeal of Sedeshe, 21 D. & C. 3d 115, 119-120 (1981) (interpreting **Hude v. Commonwealth,** 55 Pa. Commw. 1, 423 A.2d 15 (1980) to hold as much).

As we did not have the benefit of Officer Rosenstock's testimony at our **de novo** hearing, we rely upon his assertions before Judge Thau that on the evening of January 26, 2008, he heard music outside Jenny's Tavern as far away as one hundred and twenty feet and that its source was karaoke entertainment which amplified music. Officer Rosenstock's testimony was clear and discriminating, distinguishing between the two dates he was present at Jenny's Tavern. The only direct testimony presented at the **de novo** hearing by Jenny's Tavern as to what could be heard outside was from Andrew McAloose, who testified that the music was low enough so as not to be heard from outside the premises. "The question of [a witness's] credibility, as well as the sufficiency of his testimony, [are] matters for the hearing judge to determine." **Las Vegas Supper Club, Inc. Liquor License Case,** 211 Pa. Super. 385, 387, 237 A.2d 252, 253 (1967). Upon weighing the testimony and credibility of the witnesses, both before us and contained in the administrative record, we conclude that the Pennsylvania State Police Bureau of Liquor Control Enforcement has met its burden of proof and that the Code was indeed violated.

CONCLUSION

Upon careful consideration of the record before us, the decision of the Board affirming the Adjudication and dismissing the appeal of Jenny's Tavern, and ordering Jenny's Tavern to pay a fine of $400.00 and adhere to all of the conditions set forth in the Adjudication, is affirmed. Jenny's Tavern's appeal is denied.

ORDER

AND NOW, this 28th day of December, 2009, upon consideration of the Appellant's Petition for Allowance of Appeal and/or Review from an Order of the Pennsylvania Liquor Control Board, and counsels' argument and submissions thereon, and in accordance with our Memorandum Opinion of this same date, it is hereby

ORDERED and DECREED that the appeal is DENIED. The Order of the Pennsylvania Liquor Control Board dated May 6, 2009, is AFFIRMED. If not previously paid, the Licensee is directed to pay a fine of four hundred dollars ($400.00) within thirty (30) days of the entry date of this Order.

DAVID PEREIRA, Appellant vs. PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT, Appellee

Civil Law—Liquor License—Revocation—Criteria for ***Nunc Pro Tunc*** *Appeal*

1. An untimely appeal from the revocation of a liquor license is excusable **nunc pro tunc** if (1) the untimely filing was caused by extraordinary circumstances involving fraud or breakdown in the court's operation or non-negligent conduct of the appellant, appellant's attorney, or his/her staff; (2) the untimely appeal is filed within a short time after appellant or his/her counsel learns of and has the opportunity to address the untimeliness; and (3) appellee is not prejudiced by the delay.

2. The burden of proving these factors is upon the appellant. Having failed to do so, the appeal must be denied.

NO. 08-2547

STEVEN J. HARTZ, Esquire—Counsel for Appellant.

CRAIG A. STRONG, Esquire—Counsel for Appellee.

MEMORANDUM OPINION

NANOVIC, P.J.—December 29, 2009

David Pereira (hereinafter "Pereira"), appeals from the Pennsylvania Liquor Control Board's (hereinafter "the Board") denial of his **nunc pro tunc** appeal to reinstate Liquor License No. R-4968 (hereinafter "Liquor License"), subject to payment of all outstanding fines and costs and to permit Pereira to renew and to transfer the subject License conditioned on the payment of said fines, costs, and other related expenses. The primary issue before us is whether Pereira's **nunc pro tunc** appeal satisfies the factors established by the Pennsylvania Supreme Court for **nunc pro tunc** appeals in **Cook v. Unemployment Compensation Board of Review,** 543 Pa. 381, 388, 671 A.2d 1130, 1131 (1996).

FACTUAL AND PROCEDURAL BACKGROUND[1]

Pereira is an adult individual who resides at 556 Lehigh Avenue, Palmerton, Carbon County, Pennsylvania. On or about August 15, 2005, the Board approved the person-to-person transfer of the

[1] These facts are taken in part from the jointly stipulated facts of the parties and from the Board's Opinion dated August 7, 2008; we were advised by counsel that a **de novo** hearing was not necessary and that a joint stipulation of facts and respective briefs would suffice, reflected by our Order dated May 21, 2009. We have been provided with no copies of any of the documents referenced in the parties' filings and submissions.

Liquor License from Pereira's corporation to a Pennsylvania business corporation known as Paxson Entertainment, Inc. (hereinafter "Paxson"). As part of the transaction transferring the Liquor License and other assets owned by Pereira to Paxson, Paxson became indebted to Pereira in the amount of $125,000.00. This debt was secured, **inter alia,** by a perfected security interest in the Liquor License as evidenced by a Financing Statement (Form UCC-1) filed with the Pennsylvania Department of State on August 29, 2005, to File No. 2005083001546.[2] As further security for Paxson's indebtedness to Pereira, Paxson executed a limited power of attorney authorizing Pereira's attorney to transfer the Liquor License in the event of Paxson's default.

On May 22, 2006, the Appellee, Pennsylvania State Police, Bureau of Liquor Control Enforcement, issued Citation No. 06-1216 (hereinafter "Citation") against Paxson containing two counts.[3] On December 15, 2006, an administrative hearing was held before an administrative law judge (hereinafter "ALJ"), at which Paxson failed to appear. The ALJ dismissed the first count and sustained the second count of the Citation. A $1,000.00 fine was imposed to be paid within twenty days of the mailing date of the ALJ's Order. (Board Opinion, p. 2.)

When the fine was not paid, the ALJ mailed an Opinion and Order dated March 21, 2007, imposing a one-day suspension (which was deferred pending renewal of the Liquor License) and stating that if the fine was not paid within sixty days, the one-day suspension would be reevaluated and revocation of the Liquor License would be considered. (Board Opinion, p. 3.) On June 8, 2007, the ALJ mailed a Supplemental Opinion and Order, acknowledging

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[2] The Liquor Code recognizes that a security interest in a liquor license is a property right as between the licensee and the third party. **See** 47 P.S. §4-468(d).

[3] The first count charged that on October 18, November 19 and 26, and December 30, 2005, Paxson violated section 471 of the Liquor Code by operating in a noisy and/or disorderly manner. 47 P.S. §4-471. The second count charged that on February 11, 12, and 19, and March 26, 2006, Paxson violated section 499(a) of the Liquor Code by failing to require patrons to vacate that part of the premises habitually used for the service of alcoholic beverages not later than one-half hour after the required time for the cessation of the service of alcoholic beverages. 47 P.S. §4-499(a).

that Paxson failed to pay the fine and thereby revoking the Liquor License, effective July 30, 2007. (Board Opinion, p. 3.)

At some point, Paxson defaulted on its loan obligation to Pereira.[4] At the time of the loan default, Pereira contacted the Board and was orally advised that the Liquor License was in safekeeping.[5] Subsequently, on June 16, 2008, while attempting to transfer the Liquor License pursuant to the aforementioned limited power of attorney, Pereira learned that the Liquor License had been revoked.

Upon learning of the revocation, Pereira, on June 19, 2008, filed a Petition for Appeal **nunc pro tunc,** seeking reinstatement of the Liquor License and an opportunity to pay all outstanding fines assessed against Paxson. The thirty-day filing deadline for an appeal from the ALJ's Supplemental Opinion and Order, pursuant to section 471 of the Liquor Code, 47 P.S. §4-471(b), was July 8, 2007. (Board Opinion, p. 4.) On August 7, 2008, the Board denied Pereira's appeal as untimely and affirmed the revocation of the Liquor License, whereupon the instant appeal was timely filed on September 5, 2008.[6] The parties have stipulated that Pereira has standing to pursue the appeal presently before us.

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

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[4] We have not been informed as to exactly when the loan default occurred.

[5] We have also not been informed as to exactly when Pereira contacted the Board or who he spoke with.

[6] Pereira asserts in this appeal that the Board violated his due process rights under federal and state law by failing to conduct an evidentiary hearing. (Petition for Appeal, ¶14.) For purposes of this appeal, Pereira stands in the shoes of Paxson. Paxson had no right to any such hearing under Pennsylvania law.

> In the event the bureau or the person who was fined or whose license was suspended or revoked shall feel aggrieved by the adjudication of the administrative law judge, there shall be a right to appeal to the board. **The appeal shall be based solely on the record before the administrative law judge.** The board shall only reverse the decision of the administrative law judge if the administrative law judge committed an error of law, abused its discretion or if its decision is not based on substantial evidence.

47 P.S. §4-471(b) (emphasis ours). Pereira has failed to provide us with any authority evidencing such a right or that it was in fact violated.

> of law. ... The trial court must receive the record of the proceedings below, if offered, and may hear new evidence. ... 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.

Goodfellas, Inc. v. Pennsylvania Liquor Control Board, 921 A.2d 559, 565 (Pa. Commw. 2007) (citations omitted) (footnote omitted) (emphasis in original), **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).

The Pennsylvania Supreme Court has established the criteria by which to evaluate the merits of a **nunc pro tunc** appeal. **See Cook,** at 388, 671 A.2d at 1131. In **Cook,** the Court held that a delay in filing an appeal is excusable **nunc pro tunc** if the following factors are met: (1) the untimely filing was caused by extraordinary circumstances involving fraud or breakdown in the court's operation or non-negligent conduct of the appellant, appellant's attorney, or his/her staff; (2) the untimely appeal is filed within a short time after appellant or his/her counsel learns of and has the opportunity to address the untimeliness; and (3) appellee is not prejudiced by the delay.

Cook at 388, 671 A.2d at 1131. The burden of proving these factors is upon the appellant. **See id.** at 390, 671 A.2d at 1132.

Basis for Untimely Filing

In applying the **Cook** standards, it appears to us that Pereira has failed to satisfy the first factor. Specifically, he has failed to allege any facts that would tend to show fraud or a breakdown in the operation of the office of the ALJ, or that his own conduct was non-negligent. Pereira offers no explanation for why his failure to act for almost an entire year after the effective date of the ALJ's Supplemental Opinion and Order does not constitute negligence on his part.

Pereira contends that "The Board has no procedures for notifying holders of security interests in liquor licenses of disciplinary proceedings against licenses, including revocation proceedings, and in practice it does not notify secured creditors of such proceedings." (Stipulation of Facts, p. 2.) He argues that because he was not notified of the pending proceedings and revocation of the Liquor License, and because he only discovered the revocation on June 16, 2008, while attempting to transfer the Liquor License, that we should grant him **nunc pro tunc** relief. Although this may well be true, by itself it does not prove that Pereira was not negligent in monitoring the status of the Liquor License and protecting his security interest therein.[7]

We assess an individual's negligence on the basis of the "reasonable person" standard. Thus, we must evaluate Pereira's failure to actively monitor the status of his security interest in the Liquor License in light of the accepted definition of negligence: "the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or ... the absence of care according to the circumstances ... ." **Berreski v. Philadelphia Elec. Co.,** 1916 WL 4358 (Pa. Super. 1916).

We believe that a reasonably prudent person in Pereira's position would periodically seek assurance as to the good standing of the Liquor License from Paxson or the Board, and not simply rely on the statement of the Board that the Liquor License was in safekeeping without further investigation. Moreover, a period of more than one year lapsed between when the Citation was first

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[7] The issue of the reasonableness of Pereira's conduct as argued by him in this appeal is different from that of whether the Liquor Control Board can constitutionally deprive him of a property interest without notice and a hearing, an issue not raised by Pereira. **See e.g., First Pennsylvania Bank, N.A. v. Lancaster County Tax Claim Bureau,** 504 Pa. 179, 470 A.2d 938, 939 (1983) (statutory provision "which does not require either personal service or notice by mail to a record mortgagee of an impending tax sale, violates the due process rights conferred on such a mortgagee under the Pennsylvania and United States Constitutions"). It is also significant that Pereira took his security interest in the Liquor License subject to the risk that as between the Liquor Control Board and the licensee, the issuance of a license is a privilege and that that privilege could be lost. **See** 47 P.S. §4-468(d) ("The license shall constitute a privilege between the board and the licensee.").

issued to Paxson (May 22, 2006) and when the time to appeal the revocation of the Liquor License expired (July 8, 2007). Under these circumstances, "[t]here is no indication in the record that the late filing here was caused by non-negligent happenstance." **State Farm Mutual Automobile Insurance Company v. Schultz,** 281 Pa. Super. 212, 218 n.7, 421 A.2d 1224, 1227 n.7 (1980).

Promptness of Filing

Whenever extraordinary circumstances are alleged as the reason for the late filing of an appeal, a petition to file the appeal **nunc pro tunc** must be filed within a reasonable time after the occurrence of the extraordinary circumstances. **See Cook,** at 387-88, 671 A.2d at 1132. In **Bass v. Commonwealth of Pennsylvania, et al.,** 485 Pa. 256, 401 A.2d 1133 (1979), the Pennsylvania Supreme Court stated, "[w]ithout doubt the passage of any but the briefest period of time during which an appeal is not timely filed would make it most difficult to arrive at a conclusion that the failure to file was non-negligent." **Id.** at 260, 401 A.2d at 1135.

In this case, the absence of evidence to support this factor reinforces and overlaps with that which augurs against Pereira on the first factor. First, the record is silent as to exactly when Pereira discovered Paxson's default on its loan or initially contacted the Board. Pereira only contends that "when Paxson defaulted in its loan obligations, Pereira contacted the [Board] to inquire about the status of the [Liquor License] and was advised that it was in safekeeping." (Pereira Brief, p. 3.) We are not told whether Paxson defaulted on the loan or Pereira contacted the Board before or after the Citation resulting in the Liquor License's revocation was issued.

Second, we are also not told exactly how long after Pereira was told the Liquor License was in safekeeping he discovered that it had been revoked. Lastly, we are not told what, if any, efforts Pereira made to determine why the Liquor License was in safekeeping, meaning we are unable to determine whether it was reasonable for Pereira to rely upon this assertion as one not necessitating further action.

In this matter, although Pereira's appeal with the Board was filed within a few days after he learned of the revocation of the Liquor License, the appeal was nevertheless filed almost one year

after the issuance of the ALJ's Supplemental Opinion and Order. Pereira has failed to allege or prove any facts that prevented him from investigating what the Board meant when it told him that the Liquor License was in safekeeping, or from timely determining the status of the Liquor License, including its revocation. Further, as stated in the Board's Opinion, "[t]he license expired on August 31, 2006, and [Pereira] failed to determine the status of the license until twenty-two months later." (Board Opinion, p. 6.) No evidence exists of any unavoidable, unforeseeable, or extraordinary events, or of fraud or a breakdown of the court system, which has prevented Pereira from filing his appeal in a more timely manner.

Prejudice

Finally, with respect to the third **Cook** factor, we are in agreement with the Board that no harm or prejudice to the Pennsylvania State Police would result if this appeal is granted **nunc pro tunc.** (Board Opinion, p. 8.) Nonetheless, Pereira has failed to satisfy the first two prongs of the **Cook** test and therefore cannot be granted **nunc pro tunc** relief.

CONCLUSION

We are mindful of Pereira's plight and find credible his desire to satisfy all outstanding fines and to operate a reputable establishment that would benefit his community. However, our sympathy cannot be the basis under which to grant relief from a party's own oversight and resulting severe consequences. "Untimely appeals present a jurisdictional issue and must be quashed." **Moring v. Dunne,** 342 Pa. Super. 414, 493 A.2d 89, 93 (1985). Under the circumstances, Pereira's appeal will be denied.

ORDER

AND NOW, this 29th day of December, 2009, upon consideration of the Appellant's Petition for Appeal from an Order of the Pennsylvania Liquor Control Board, and counsels' submissions thereon, and in accordance with our Memorandum Opinion of this same date, it is hereby

ORDERED and DECREED that the appeal is DENIED. The Order of the Pennsylvania Liquor Control Board dated August 7, 2008, is AFFIRMED.

ERIE INSURANCE EXCHANGE, Plaintiff vs. ALLAN A. SCHIANO, LORETTA A. SCHIANO, and SHANE A. SCHIANO, Defendants

Civil Law—Underinsured Motorist Coverage/ First Party Benefits—Residency Requirement

1. The terms "domicile" and "residence" have distinct legal meanings. Domicile is the location which a person considers to be his true, fixed and permanent home; the place to which he intends to return when he is away. Residence is the location where a person is physically present and living, **albeit** on a temporary basis.

2. The term "resident relative" as defined and used in the instant automobile policy required the insureds' twenty-seven-year-old son to "physically live" in the insureds' household at the time of his accident in order to qualify for underinsured motorist and first party benefits. Sporadic visits and overnight stays does not satisfy the contractual definition of "physically live."

3. The determination of where a person physically lives is a factually intensive question dependent on the evidence presented in each individual case.

4. Based on the testimony of the claimant's former fiancée and substantial documentary evidence—including hospital records, telephone bills, credit reports, federal and state tax returns, and a workers' compensation claim—the court determined that the claimant physically lived with his fiancée rather than with his parents, the named insureds, at the time of the motor vehicle accident in which he was injured. Because of this determination, the claimant did not qualify for underinsured motorist coverage and/or first party benefits under his parents' policy.

NO. 07-0914

DAVID R. FRIEDMAN, Esquire—Counsel for the Plaintiff.

GERALD F. STRUBINGER, JR., Esquire—Counsel for the Defendants.

MEMORANDUM OPINION

NANOVIC, P.J.—December 31, 2009

FACTUAL AND PROCEDURAL BACKGROUND

On June 12, 2006, Shane A. Schiano, then twenty-seven years old, was severely injured when the vehicle in which he was a front-seat passenger struck a tree at high speed. At the time of the accident, Shane's parents, Allan A. Schiano and Loretta A. Schiano (the "Schianos"), were insured through an automobile policy issued by Erie Insurance Exchange ("Erie") under which Shane submitted a claim for underinsured motorist coverage and/or first party benefits (the "Policy"). Erie denied this claim, contending that no coverage existed since Shane was not a resident of his parents' household at the time of the accident. To resolve this dispute, Erie

commenced the present declaratory judgment action against Shane and his parents (collectively the "Defendants"). The sole issue in this litigation is Shane's residency at the time of the accident: if he was then a resident of his parents' household, coverage exists; if not, Shane is entitled to no benefits under the Policy.

Following a two-day hearing held on February 23 and 24, 2009, we found that Shane was physically residing with his fiancée, Danielle McCormick, in her apartment at 211 Gypsy Hill Gardens Apartments, Lehighton, Pennsylvania, at the time of the accident. Since the Schianos then resided at 422 South Street, Jim Thorpe, Pennsylvania, we concluded that Shane was neither covered by nor entitled to benefits under his parents' Policy. This determination formed the basis of our Decree dated February 26, 2009, ruling in favor of Erie.

The Defendants have timely filed a Motion for Post-Trial Relief seeking either judgment notwithstanding the verdict, or in the alternative, a new trial. In short, the Defendants assert either that the verdict was contrary to the evidence, warranting judgment notwithstanding the verdict, or that the weight of the evidence warrants a new trial.[1] For the reasons that follow, we deny the Defendants' Post-Trial Motion in full.

[1] In Defendants' Post-Trial Motion, Defendants raise a number of evidentiary issues previously raised **in limine** on which we ruled against Defendants' position. In consequence, we admitted evidence of Shane's address contained in his medical records dated June 12, 2006, and thereafter; of his mailing address provided in conjunction with a workers' compensation claim filed on July 3, 2006; and testimony that he was present at his fiancée's eviction from 211 Gypsy Hill Gardens Apartments on July 5, 2006. All of this evidence tended to show that Shane lived at 211 Gypsy Hill Gardens Apartments and was a resident at this location at the time of the accident.

Although Defendants contend that this evidence is irrelevant to determining Shane's residence at the time of the accident since it documents subsequent conduct and events, we found the evidence was not only recent but clearly probative of Shane's residence at the time of the accident. **See Commonwealth, Department of General Services v. U.S. Mineral Products Co.,** 927 A.2d 717, 731 (Pa. Commw. 2007) ("The admission or exclusion of evidence is within the sound discretion of the trial court ... [and] [t]o constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party."), **aff'd,** 598 Pa. 331, 956 A.2d 967 (2008). Moreover, the Defendants have failed to cite any law to support their contention that our evidentiary rulings constituted reversible error. "Where [a movant] has failed to cite any authority in support of a contention, the claim is waived." **Collins v. Cooper,** 746 A.2d 615, 619 (Pa. Super. 2000).

STANDARD FOR EVALUATING DEFENDANTS' CHALLENGES

Instantly we note that "the remedy of entry of judgment in a party's favor is proper only when a party successfully challenges the **sufficiency** of the evidence. ... On the other hand, the remedy of a new trial is proper when the verdict rendered by the trial court indicates that the trial court abused its discretion when **weighing** the evidence. ... This distinction is crucial and is repeated **ad nauseum** by the appellate courts of this Commonwealth in both civil and criminal cases." **Morin v. Brassington,** 871 A.2d 844, 851 (Pa. Super. 2005) (citations omitted; emphasis in original).

"Judgment [notwithstanding the verdict] is an extreme remedy properly entered by the trial court only in a clear case where, after viewing the evidence in the light most favorable to the verdict winner, no two reasonable minds could fail to agree that the verdict was improper." **Robertson v. Atlantic Richfield Petroleum Products Co.,** 371 Pa. Super. 49, 58, 537 A.2d 814, 819 (1987), **appeal denied,** 520 Pa. 590, 551 A.2d 216 (1988).

> In considering a challenge to the sufficiency of the evidence, [we] must view the evidence presented in a light most favorable to the verdict winner, grant that party the benefit of all reasonable inferences, and determine whether the evidence introduced at trial was sufficient to sustain the verdict. ... A party moving for judgment notwithstanding the verdict (**i.e.,** challenging the sufficiency of the evidence) contends that the evidence and all inferences deducible therefrom, viewed in the light most favorable to the verdict winner, is insufficient to sustain the verdict.

Gorski v. Smith, 812 A.2d 683, 691 (Pa. Super. 2002) (citations and quotations omitted), **appeal denied,** 856 A.2d 834 (Pa. 2004).

In reviewing a request for a new trial based on the weight of the evidence, a new trial will be granted "only where the verdict is so contrary to the evidence as to shock one's sense of justice." **Seewagen v. Vanderkluet,** 338 Pa. Super. 534, 544, 488 A.2d 21, 26 (1985). With regard to an appeal challenging the grant or refusal of a new trial, the appellate court will not reverse the trial court's action in the absence of an abuse of discretion or an error of law which controls the outcome of the case. **See Allison v. Snelling & Snelling, Inc.,** 425 Pa. 519, 521, 229 A.2d 861, 862 (1967).

DISCUSSION

At the time of the accident, the Schianos were the named insureds under the Policy. This Policy provided underinsured motorist and first-party benefits for the named insureds as well as for any resident relative of the named insurers. The term "relative" as defined in the Policy means:

> [A] resident of your household who is:
>
> 1. a person related to you by blood, marriage, or adoption, or
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> 2. a ward or another person under 21 years old in your care.

(Plaintiff's Exhibit 32, Pioneer Family Auto Insurance Policy, FAP (4/97), p. 4.) The term "resident" is further defined to mean:

> [A] person who **physically lives** with you in your household. Your unmarried, unemancipated children under age 24 attending school full-time living away from home will be considered residents of your household.

(Plaintiff's Exhibit 32, Pioneer Family Auto Insurance Policy, FAP (4/97), p. 4.) (Emphasis added.)

This language in the Schianos' policy is both clear and enforceable. In examining this same language, the Court in **Erie Insurance Exchange v. Weryha,** 931 A.2d 739 (Pa. Super. 2007), stated:

> We do not find either the term 'relative' or 'resident' is ambiguous as a matter of law. The term 'relative' refers to a blood relative or ward who is a 'resident of [the insured's] household.' ... The term 'resident' is, in turn, defined as one who 'physically lives' in the insured's household. ... The salient question then, which is apparent from the face of the litigants' briefs, is what constitutes **physically living** with another.
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> The question of whether one physically lives with another is a factually intensive inquiry and it requires the trial court to look at a host of factors in reaching a common-sense judgment. We do not find ambiguity in the phrase 'physically lives' simply because the policy does not spell out every single factor a court should look at in making this determination.

Id. at 742 (citations to record omitted; emphasis supplied), **leave to appeal granted in part,** 598 Pa. 536, 958 A.2d 493 (2008) (appeal granted to determine whether a child of divorce is **per se** considered a legal resident of both parents' households).

More generally, "[i]n determining the meaning of the word 'residence,' both its object and context must be kept in view." **Amica Mutual Insurance Co. v. Donegal Mutual Insurance Co.,** 376 Pa. Super. 109, 114, 545 A.2d 343, 346 (1988). In **Amica** the court further stated:

> The Courts of this Commonwealth have historically recognized the classical definitions of the words domicile and residence. Domicile being that place where a man has his true, fixed and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning.
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> Residence being a factual place of abode. Living in a particular place, requiring only physical presence.
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> Though the two words may be used in the same context, the word resident as used in the policy, without additional words of refinement, **i.e.,** permanent, legal, etc., would carry the more transitory meaning.

Id. at 115, 545 A.2d at 346. In **Amica,** the court construed the term "resident" to limit coverage to those family members "who actually reside in the household of the insured." **Id.; see also, Lesker Case,** 377 Pa. 411, 418, 105 A.2d 376, 380 (1954) ("[I]n strict technical terminology, a **habitation** may be defined as an abode for the moment, **residence** a tarrying place for some specific purpose of business or pleasure, and **domicile** the fixed, permanent, final home to which one always intends to return." (emphasis supplied)).

Since the familial relationship between the Schianos and Shane has never been disputed, Shane's right to receive benefits under the Policy turns on whether he was physically living with his parents at the time of the accident. On this factual question, we found against the Defendants.

At trial, we were persuaded by the evidence presented that at the time of the accident Shane physically resided and cohabited with his fiancée at 211 Gypsy Hill Gardens Apartments, Lehighton, Pennsylvania. This evidence includes:

> • The testimony of Danielle McCormick, Shane's fiancée, that he resided with her full-time from February 2006 through July 2006, applied twice to be added to her lease, had the phone bill in his name, was picked up at her apartment the day of the

accident, and only visited his parents a few times at 422 South Street during that time. (N.T. 02/23/2009, pp. 72, 73, 96, 114, 134, 147, 179, 208, 236, 237.)

• Pictures showing Shane's clothing and personal property kept at 211 Gypsy Hill Gardens Apartments. (Plaintiff's Exhibits 27A, 27B, 27C, 27D, and 27E; N.T. 02/23/2009, pp. 85, 87, 89, 90, 92.)

• The address listed for Shane and referenced on almost all documents pertaining to the accident in question, including during his hospitalization between June 12 and June 23, 2006, was 211 Gypsy Hill Gardens Apartments. (Plaintiff's Exhibits 12, 14, 15, 16, 18, 19, 22, 24, 25, 37, 38; N.T. 02/23/2009, pp. 63, 95, 99, 252, 253, 259, 262, 264; N.T. 02/24/2009, pp. 16, 19, 20, 21, 26.)

• Hospital records dated June 13, 2006, documenting statements made by Shane's father that Shane "resided with his fiancée." (Plaintiff's Exhibit 15.)

• Testimony from the project manager at Gypsy Hill Gardens Apartments that Shane resided with his fiancée at 211 Gypsy Hill Gardens Apartments at the time of the accident in question, and also that Shane's fiancée was evicted from this apartment in part because of her failure to have him properly added to her lease. (N.T. 02/23/2009, pp. 181, 184, 190, 214.)

• A credit check performed for the owner of Gypsy Hill Gardens Apartments on May 22, 2006, reflecting Shane's current address as 211 Gypsy Hill Gardens Apartments. (Plaintiff's Exhibit 34.)

• The address Shane provided to his income tax preparer in January of 2006 for purposes of being billed was 211 Gypsy Hill Gardens Apartments. (Plaintiff's Exhibit 3; N.T. 02/24/2009, p. 41.)

• The home address stated in Shane's 2005 1040A federal income tax return, as well as the amendment, both filed with the IRS, is 211 Gypsy Hill Gardens Apartments. This return also claims Shane's fiancée's daughter as a dependent. (Plaintiff's Exhibits 6 and 9; N.T. 02/23/2009, pp. 175, 232, 243, 244, 247; N.T. 02/24/2009, pp. 44, 54.)

• Shane's residence as stated in his filed 2005 Pennsylvania income tax return is 211 Gypsy Hill Gardens Apartments. Again, his fiancée's daughter is claimed as a dependent. (Plaintiff's Exhibit 7; N.T. 02/23/2009, p. 176.)

• Shane's residence as provided in his filed 2005 local income tax return is 211 Gypsy Hill Gardens Apartments; further, this was filed with Lehighton Borough, rather than Jim Thorpe Borough. (Plaintiff's Exhibit 8; N.T. 02/23/2009, p. 226; N.T. 02/24/2009, p. 53.)

• The address provided to All Staffing, Inc., Shane's employer between December 1, 2005, and February 24, 2006, and reflected on his 2005 W-2 was 211 Gypsy Hill Gardens Apartments. (Plaintiff's Exhibits 4 and 5; N.T. 02/23/2009, pp. 169, 223, 244, 255.)

• Statements by Shane's father, Allan Schiano, on or about June 26, 2006, to his insurance agent that Shane did not live at 422 South Street, that Shane stayed at his parents' home approximately three days during the past year, and that Shane was never added to or named in the Policy. (Plaintiff's Exhibits 33 and 36; N.T. 02/23/2009, pp. 23, 25, 34, 39.)

• Upon discharge from the hospital, Shane did not return immediately to his parents' home but instead chose to stay with his fiancée. (Plaintiff's Exhibits 20, 21, and 23; N.T. 02/23/2009, pp. 76, 78, 105-106, 265, 266; N.T. 02/24/2009, p. 118.)

• A workers' compensation claim form submitted by Shane's counsel approximately one month after the accident for injuries Shane sustained in the accident listed his address as 211 Gypsy Hill Gardens Apartments. The date of the accident was the first day of a new job for Shane; his employer was the driver of the vehicle in which he was injured. (Plaintiff's Exhibit 28; N.T. 02/24/2009, p. 27.)

We have no doubt that Shane remained in contact with his parents after moving in with his fiancée. Shane had previously lived at his parents' home in Jim Thorpe beginning sometime in 2004, and began living with Ms. McCormick in September 2005. The fact that he visited his parents, at times bringing his wash and occasionally spending the evening, was not unexpected. The distance

between Jim Thorpe and Lehighton is not great; Shane's parents helped him financially; and Shane's relationship with his fiancée, which his parents disapproved of, was volatile. Still, the fact remains that at all times relevant and material to the automobile accident, Shane did not live principally, or even regularly, with his parents.

In **Weryha,** the Court found that "sporadic visits and overnight stays" by a child were not enough to constitute residency under the child's father's policy and that "the terms 'residence' and 'living' require, at the minimum, some measure of permanency or habitual repetition." **Id.,** 931 A.2d at 744. Similarly, we found in the instant matter that Shane, at most, made sporadic visits and occasionally spent the night at his parents' home.[2]

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[2] Defendants' evidence included:

• The police accident report, which lists Shane's address as 422 South Street. (Defendants' Exhibit 1.)

• Shane's Pennsylvania Driver's License issued in April 2005, which lists his address as 422 South Street. (Defendants' Exhibit 18.)

• Medical records of Shane's treatment after the accident with an address of 422 South Street. (Plaintiff's Exhibits 29 and 30.)

• Mail addressed to Shane at 422 South Street, consisting of an envelope from 48 Hrs. Video postmarked June 12, 2006, a claim for benefits form from May 2005, and an undated credit card solicitation letter. (Plaintiff's Exhibit 31; N.T. 02/23/2009, pp. 66, 246; N.T. 02/24/2009, p. 133; N.T. 02/24/2009 Volume II, p. 33.)

• Testimony by the Schianos that Shane spent considerable time at 422 South Street. (N.T. 02/23/2009, p. 42; N.T. 02/24/2009, p. 130; N.T. 02/24/2009 Volume II, pp. 27, 30.)

• Testimony from a next-door neighbor of the apartment at 211 Gypsy Hill Gardens Apartments that she mostly saw Shane at his fiancée's apartment on weekends. (N.T. 02/24/2009, pp. 97, 104.)

• Testimony that Shane's fiancée has a poor reputation for telling the truth, had a motive to testify against the Defendants, suffers from both long and short term memory loss, and made prior inconsistent statements to the effect that Shane did not reside with her and that she did not even know him. (N.T. 02/23/2009, pp. 69, 70, 100, 103, 195; N.T. 02/24/2009, p. 99.)

The evidence presented by Defendants must be tempered by recognizing the relationship between Shane and his parents and the Schianos' obvious concern for their son's injuries, the Schianos' disapproval of Shane's fiancée, and an understanding that before Shane moved in with his fiancée, he in fact did live with his parents. Additionally, the evidence presented also showed that Shane failed to change the address on his driver's license for more than four months after his parents moved from Jim Thorpe to Coaldale, that the neighbor was preoccupied with taking care of young children and not particularly paying attention to what was

Viewing this evidence in the light most favorable to the Plaintiff and allowing all reasonable inferences therefrom, the evidence is more than sufficient to support our finding that Shane did not reside at 422 South Street at the time of the accident, and is not entitled to uninsured motorist coverage and/or first party benefits under the Policy. **See Robertson, supra** at 58, 537 A.2d at 819; **see also, Gehres v. Falls Township,** 948 A.2d 249, 255 (Pa. Commw. 2008) ("[judgment notwithstanding the verdict] cannot be granted if there is **any** evidence supporting the verdict" (emphasis added)); **Commonwealth, Department of General Services v. U.S. Mineral Products Co.,** 927 A.2d 717, 723 (Pa. Commw. 2007) ("Judgment notwithstanding the verdict should not be entered where the evidence is conflicting on a material fact ... ."), **aff'd,** 598 Pa. 331, 956 A.2d 967 (2008).[3]

Defendants' request for a new trial based on the weight of the evidence is equally misplaced.

> [A] new trial based on weight of the evidence issues will not be granted unless the verdict is so contrary to the evidence as to shock one's sense of justice. ... A mere conflict in testimony will not suffice as grounds for a new trial. ... In ruling on a motion for a new trial, the court must review all the evidence.

U.S. Mineral Products Co., supra, 927 A.2d at 723 (citations omitted). Here, we have reviewed all the evidence. The evidence

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happening next door, and that had Shane's fiancée acknowledged to her landlord, a provider of low income housing, that Shane resided with her, her rent would have been substantially increased. When considered in light of all the evidence presented, we are not convinced that our basic finding that Shane physically resided with his fiancée at the time of the accident was in error.

[3] The Defendants also argue that at the very least, Shane should have been found to be a dual resident of both 211 Gypsy Hill Gardens Apartments and 422 South Street. First, the Policy only accounts for dual residency as it applies to students who may be living away from home in order to attend school full-time. (Plaintiff's Exhibit 32.) Second, the case law in Pennsylvania as to dual residency for purposes of insurance policies is generally limited to those situations involving children of divorced parents. **See e.g., Erie Insurance Exchange v. Weryha,** 931 A.2d 739, 742 (Pa. Super. 2007), **leave to appeal granted in part,** 598 Pa. 536, 958 A.2d 493 (2008) (appeal granted to determine whether a child of divorce is **per se** considered a legal resident of both parents' households). Third, as explicitly set forth in the body of this Opinion, the evidence persuasively indicates otherwise. Absent contractual, precedential, or factual justification, we are not prepared to consider Shane a dual resident.

in support of the February 26, 2009, Decree is voluminous, significant, and persuasive. Under the evidence presented, we believe the Decree is appropriate and should be upheld.

CONCLUSION

For the foregoing reasons, the Defendants' Motion for Post-Trial Relief will be denied in full. Judgment notwithstanding the verdict will not be entered in the Defendants' favor, nor will a new trial be held.

ORDER

AND NOW this 31st day of December, 2009, upon consideration of the Defendants' Motion for Post-Trial Relief, the Plaintiff's Response thereto, and Counsels' submissions and argument thereon, and in accordance with our Memorandum Opinion of this same date, it is hereby

ORDERED and DECREED that the Motion is DENIED in full. Judgment is entered in favor of the Plaintiff, Erie Insurance Exchange, and against the Defendants, Allan A. Schiano, Loretta A. Schiano, and Shane A. Schiano.

JESSE S. GREEN, Plaintiff vs. SNEZANA GREEN, Defendant

Civil Law—Custody—Best Interests—Financial Circumstances of the Parties—Material Benefits—Child's Preference—Stability—Relocation

1. Unless a party is unable to provide adequately for a child, the relative wealth of the parties is irrelevant in a custody proceeding.

2. A parent's ability to care for a child must be determined as of the date of the custody hearing. Past difficulties, once corrected, and with no reason to believe a relapse will occur, should not be a basis for denying custody.

3. A child's preference, while a factor in deciding custody, is not controlling. Further, in evaluating a child's preference, the age, maturity and intelligence of the child, together with the reasons given for the preference, must be carefully considered. A preference which is neither strongly held nor based on any particular articulated basis will be given little weight.

4. Mother's employment in a gentlemen's club will not be counted against her where the child is unaware of this employment and no evidence has been presented to show that the employment has had a harmful effect on the child.

5. A stable, long continued family arrangement in which a child has done well and developed a good relationship with both parents is an important factor to be considered when deciding custody and, in an appropriate case, may be controlling.

6. Notwithstanding one parent's superior housing and financial position, where the custodial parent with whom a child has resided for over seven

years has demonstrated a long-term commitment to the child, provided stability in the child's life, encouraged and promoted contact between the child and the other parent, and has assumed, rather than shirked, parental responsibilities, making sacrifices when necessary, all with the child's best interests in mind, and from which the child has clearly benefited, the existing custody arrangement will not be lightly set aside and will not be changed when still determined to be in the best interests of the child.

7. The request of a parent having partial physical custody, who lived in New Jersey at the time of the existing custody order but who has since moved to New York, for primary custody is a relocation case and requires an analysis of the **Gruber** factors.

NO. 02-0815

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

KIM M. CHRISTIE, Esquire—Counsel for the Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—January 15, 2010

PROCEDURAL AND FACTUAL BACKGROUND

The parties to these custody proceedings, Jesse S. Green ("Father") and Snezana Green ("Mother"), were married in 1994 and divorced in 2003. They are the parents of two children: Donavan, age fifteen (D.O.B. 1/1/95) and Sean, age twelve (D.O.B. 9/19/97) ("Children"). On February 14, 2002, at a time when Donavan and Sean were respectively seven and four years of age, the parties separated. Since this time, the Children have resided with and been raised by their Father.[1]

By mutual agreement, between February 14, 2002, and November 1, 2002, Mother, on average, visited the Children every other weekend. (N.T. 11/4/09, pp. 35, 39; N.T. 11/9/09, pp. 81-82; Defendant Exhibit 10 (Interim Custody Order dated June 4, 2002).) On November 1, 2002, a shared custody agreement was reached. (N.T. 11/4/09, p. 69.) Both parties were then represented by coun-

[1] Prior to the parties' separation, Mother advised Father that she intended to return to North Carolina where the parties had once lived together and where Mother had been employed. Accepting this to be true, on February 13, 2002, Father signed a letter agreement, also signed by Mother, that the Children would remain with him for the remainder of the 2002 school year and, for that summer, would live with Mother. (N.T. 11/9/09, p. 80; Defendant Exhibit 6 (Support Order dated July 7, 2009).) Unbeknownst to Father, Mother did not intend to return to North Carolina at the time of their separation and had previously made arrangements to move to New Jersey. Accordingly, the February 13, 2002 agreement was never followed.

sel. This agreement was accepted and entered as a stipulated court order on December 4, 2002.

Pursuant to the agreed upon custody schedule, Father was awarded primary physical custody of the Children and Mother partial physical custody on alternate weekends from Friday at 8:30 P.M. through Sunday at 8:30 P.M. The order further provided for holiday visits and allowed each parent a two-week summer vacation with the Children annually. Transportation of the Children under the order was to be shared equally between the parties. At the time this order was entered, Mother resided in Clifton, New Jersey, her residence since the parties' separation. (N.T. 11/4/09, pp. 62-63.)

While in New Jersey, Mother lived at three different locations. (N.T. 11/4/09, pp. 62-65.) In 2004, Mother met and moved in with her current boyfriend, Hector Lopez, Jr., with whom she has resided for approximately five years. To date, Mr. Lopez has not proposed though Mother is hopeful this will happen some day. (N.T. 11/4/09, p. 48.)

In 2007, Mother moved to the Albany area of New York with Mr. Lopez due to a promotion he received. (N.T. 11/4/09, p. 66.) Mr. Lopez is the general manager of a gentlemen's club in Albany known as the Capital Hideaway. This is also Mother's employer. Mother works there as a dancer and bartender, and sometimes does cleaning. Her hours are flexible and she is paid well, mostly in the form of tips. (N.T. 11/4/09, pp. 50-52; N.T. 11/9/09, pp. 19-20.) For the most part, Mother works two to three days a week from roughly 6:00 P.M. until 2:00 A.M. (N.T. 11/4/09, pp. 49-50.)

Since moving to New York, Mother has lived at three locations, all close to Albany. (N.T. 11/4/09, p. 67.) Her current home, where she has lived since September of 2009, is located in Rensselaer, New York. The home has three bedrooms and is rented, apparently under Mr. Lopez' name; all of their common property is in Mr. Lopez' name, with the exception of a joint account. (N.T. 11/9/09, p. 20.) The Children know Mr. Lopez and like being with him.

On April 8, 2009, Mother filed a complaint to modify custody. Following a two-day hearing held on November 4 and November 9, 2009, we denied Mother's request for primary physical custody and continued her periods of partial physical custody on alternating weekends. In our custody order dated November 10, 2009, we also

continued, as previously, the holiday visits between the parents, provided for alternating weeks of custody between the parties during the summer months, and directed that the custody exchanges occur at a location in Milford, Pennsylvania, where Father testified the exchanges occurred since Mother moved to New York. (N.T. 11/9/09, p. 131.)

On December 7, 2009, Mother filed an appeal from this order. On December 21, 2009, a statement of the matters Mother intends to raise on appeal was filed. In this statement, Mother asserts, **inter alia,** that we erred in failing to consider the circumstances of Father's residence and living arrangements, his failure to provide basic necessities for the Children's care—food, gas, and medical care—and in disregarding the Children's preference to live with their Mother. We address these below.[2] For the reasons which follow, we believe the appeal should be denied.

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[2] Two additional issues which Mother has raised are our alleged failure to properly weigh a statement by Father's sister that it is in the best interests of the Children to live with Mother and our decision to provide for alternating weeks of shared custody between the parties during the summer months, which Mother contends is contrary to the parties' practice in the past. These two issues can be summarily disposed of here.

Father's sister to whom Mother refers in her statement of issues on appeal is Laura Pasternak. Ms. Pasternak was called as a witness for Father. At the hearing, she testified that she and Mother often socialized together when Mother came to visit the Children on weekends, that she and Mother were very close, and that at one time she told Mother that the Children would be better off in Mother's care. (N.T. 11/9/09, p. 152.) This latter statement is the statement to which Mother refers.

In explaining her statement, Ms. Pasternak stated that this occurred after she had quite a few drinks and that she made the statement because she did not want to hurt Mother's feelings. (N.T. 11/9/09, pp. 152, 155.) She further testified that she believed it was in the best interests of the Children to be with their Father and that she did not believe their best interests were with Mother. (N.T. 11/9/09, pp. 129-150, 155.) We found Ms. Pasternak's testimony to be credible.

As to the propriety of the summer schedule for custody provided in the November 10, 2009 order, notwithstanding Mother's testimony to the contrary, we believe the order properly reflects the actual custody arrangement practiced by the parties during the summer months and is in the best interests of the Children. As already stated, the previous order, that of December 4, 2002, continued Mother's alternating weekend periods of partial physical custody during the summer months and also provided both parties with a two-week summer vacation with the Children. Both Father and his sister credibly testified that the parties spent relatively equal amounts of time with the Children during the summer. (N.T. 11/9/09, pp. 118-121, 134, 144.)

DISCUSSION

The polestar in custody litigation is the best interests of the children. "This standard requires a case-by-case assessment of all the factors that may legitimately affect the 'physical, intellectual, moral and spiritual well-being' of the child[ren]." **Collins v. Collins,** 897 A.2d 466, 471 (Pa. Super. 2006), **appeal denied,** 588 Pa. 762, 903 A.2d 1232 (2006). In making this evaluation, it is inappropriate to resort to or reason by presumptions; in other words, our conclusions must be supported by competent evidence. When this is done, we believe the best interests of Donavan and Sean are served by continuing primary custody with their Father.

Financial Circumstances of the Parties

For more than seven years, Father has been the primary caretaker of the Children. This has not been easy. After Father lost his job in June of 2003 and began receiving unemployment compensation benefits, Father, together with the Children, moved into his sister's home where they lived between 2004 and 2007. When marital problems arose between his sister and her husband, Father and the Children moved temporarily to a friend's home in the summer of 2007. Father lived outside in a tent at this location for approximately two months. (N.T. 11/9/09, p. 100.) During this time he renovated and converted a garage into living quarters, which he has rented since August or September of 2007. (N.T. 11/4/09, p. 55; N.T. 11/9/09, pp. 100-101.) For part of the time that Father lived at his friend's home, the Children lived inside the house; for the remainder of this time they were with their Mother. (N.T. 11/4/09, p. 111; N.T. 11/9/09, p. 100.)

The renovated garage in which Father now resides with the Children is a one-story building approximately twenty-five by thirty feet in size. (N.T. 11/9/09, p. 83.) A wall divides this area between a bedroom and a combination kitchen/dining room area. (N.T. 11/9/09, p. 83.) There is also a bathroom area which has separate entrances from the bedroom and kitchen/dining room. (N.T. 11/9/09, p. 84.) Donavan and Sean have separate beds and sleep in the bedroom. (N.T. 11/9/09, p. 85.) Father sleeps on a couch, sometimes in a chair, in the kitchen/dining room area. (N.T. 11/9/09, pp. 85-86.) A large yard surrounds this home. (N.T. 11/9/09, p. 84; Defendant Exhibit 11 (Miscellaneous Pictures).)

Mother questions the suitability of Father's home and living arrangements for the Children. When compared with Mother's three-bedroom home, the converted garage in which Father lives is clearly less attractive. Mother also appears to be in a superior financial position to Father and has a greater capacity to provide material benefits to the Children. She earns in excess of $3,000.00 a month,[3] and is able to afford the bi-weekly expense of traveling to Pennsylvania to see the Children without apparent difficulty, to purchase groceries for Father and Children when she visits, and to save and deposit monies into separate accounts for the benefit of the Children. In contrast, because of limited resources, Father has struggled to make ends meet and has had to cut back on expenses. (N.T. 11/9/09, pp. 104-105.) He is dependent on unemployment compensation benefits, welfare (food stamps and ACCESS Plus), and help from his family.

Were material trappings determinative in a child custody case, our ruling would be different.

> However, the law in Pennsylvania has long been that custody is not to be awarded merely on the basis that a better home in physical aspects, or a higher standard of living can be provided elsewhere. ... Indeed, [i]n a custody proceeding, the sole permissible inquiry into the relative wealth of the parties is whether either party is unable to provide adequately for the child[ren]; unless the income of one party is so inadequate as to preclude raising the children in a decent manner, the matter of relative income is irrelevant.

Roadcap v. Roadcap, 778 A.2d 687, 690 (Pa. Super. 2001) (citations and quotation marks omitted). In this regard, neither Father's home nor the resources available to him are inadequate to provide for the Children's care.

Although small, and dictated by Father's financial circumstances, the home in which Father resides was described by Donavan as being cozy and comfortable. (N.T. 11/4/09, p. 109.) This descrip-

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[3] None of Mother's income appears to be reported. Although Capital Hideaway at one point reported to Domestic Relations gross income for Mother of $700.00 a week, she is not on its payroll. (N.T. 11/9/09, p. 65.) In addition, Mother receives $300.00 to $500.00 a week from sales on eBay. (N.T. 11/9/09, pp. 67-69.)

tion is supported by the pictures of the home placed in evidence. (Defendant Exhibit 11 (Miscellaneous Pictures).) Nor have Father's financial circumstances prevented him from providing necessary food, clothing, and shelter for the Children. (N.T. 11/4/09, p. 112; N.T. 11/9/09, p. 106.)[4]

Father's attentiveness to the Children's healthcare and not maintaining health insurance for the children is of greater concern. The Children do not have regularly scheduled visits with a doctor—however, yearly checkups occur at school—and Father tends to care for them with over-the-counter medication rather than taking them to a doctor. (N.T. 11/9/09, pp. 97, 108, 111, 116-117, 153.) Additionally, both Children are behind on their booster shots. (N.T. 11/9/09, pp. 108-113.)

These shortcomings are due in part to Father's lack of health insurance in conjunction with his limited resources. For almost six years, Father was unable to afford health insurance for either himself or the Children and did not qualify for assistance while residing in his sister's household. (N.T. 11/9/09, pp. 115, 150.) Fortunately, that issue has now been resolved. As of July of 2009, Father has obtained medical coverage provided through the state's ACCESS Plus program. (N.T. 11/9/09, pp. 77, 115.)[5]

We do not condone the medical care Father has provided in the past for the Children, but we believe it was caused by past financial difficulties which have been corrected.

> [A] parent's ability to care for a child must be determined as of the time of the custody hearing, not as of an earlier time. ... Moreover, unless it can be shown that the parent's conduct

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[4] For the most recent eight to twelve months, Mother drives the entire distance from New York to Father's home, rather than meeting him in Milford, and stays at Father's home during her weekends with the Children. When this occurs, Mother often purchases groceries for the family which she prepares for the Children, as well as for herself and Father. (N.T. 11/4/09, pp. 23, 90; N.T. 11/9/09, p. 107.)

[5] Contrary to Mother's assertions, the Children do have a family physician, although Father does not take the Children often. (N.T. 11/9/09, p. 96.) This has occurred in part because the Children are healthy and rarely sick. (N.T. 11/9/09, p. 111.) Most recently, however, Father's decision not to take Donavan to a doctor was not caused by the absence of medical insurance, but because both Donavan and Father were both ill with the flu. (N.T. 11/9/09, pp. 115-117.)

> has had a harmful effect on the child, it should have little weight when making the custody determination. ... Stated differently, custody cannot reasonably be granted on the basis of a parent's unsettled past unless the past behavior has an ongoing negative effect on the [child's] welfare.

Wheeler v. Mazur, 793 A.2d 929, 936 (Pa. Super. 2002) (citation and quotation marks omitted). For this reason, while we remain critical of Father's oversight of the Children's health needs, especially the lapse in updating the Children's booster shots for which no good explanation was presented (N.T. 11/9/09, pp. 112-114), we are also convinced that Father now has the means to correct this deficiency and it will be addressed. (N.T. 11/9/09, pp. 139-140.) This conviction is supported by the further knowledge that Father has recently obtained employment, now receives only partial unemployment benefits, and his finances have improved.[6] (N.T. 11/4/09, p. 112.) Finally, although it is no excuse, we also note that Mother has been aware of this neglect for some time and has done nothing to correct it. (N.T. 11/4/09, pp. 94-95; N.T. 11/9/09, pp. 13, 26-27, 139.) All in all, we do not find Father's failure in this regard to be sufficient to modify custody as Mother requests.

What is particularly troubling about Mother's position and criticism of Father's financial difficulties and its effect on the Children is its reflection on her concern for the Children. Knowing Father was struggling financially from the time of their separation and believing the Children were not being provided for adequately, Mother made no child support payments until May of 2009, notwithstanding her ability to do so. (N.T. 11/4/09, pp. 18-20, 22, 88-90.) Moreover, when Father filed for support, Mother sought to reduce the payments to which he was entitled.

Under a property settlement agreement dated the same date as their custody agreement, November 1, 2002, Father agreed not to seek child support. In consideration of this waiver, Mother agreed to deposit $25.00 a week into a restricted account for the benefit of the Children and, after the agreement was in effect for six months, to increase this amount to $50.00 a week. (Defendant

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[6] Father currently works on Monday, Thursday, Friday, Saturday, and Sunday between the hours of 9:00 A.M. and 5:00 P.M. (N.T. 11/9/09, p. 97.)

Exhibit 2, Item 4 (Property Settlement Agreement).) This has not been fully performed.[7]

The agreement further provided that if Mother filed for primary custody, Father would be permitted to file for child support. Accordingly, Father filed for child support in May of 2009, approximately one month after Mother had filed her complaint for primary custody. (N.T. 11/4/09, p. 18.) The initial support order dated June 25, 2009, directed monthly support payments of $736.00 based on a reported gross weekly income of $700.00. (Defendant Exhibit 4.) This amount was later reduced to support payments of $138.00 monthly. (Defendant Exhibit 9 (Support Order dated August 25, 2009).) Between the June 25, 2009 support order and that of August 25, 2009, Mother dramatically reduced, and likely underreported, her actual income for support purposes. (N.T. 11/9/09, p. 18.) Mother similarly concealed income in order to qualify for Medicaid in January of 2009. (N.T. 11/9/09, pp. 19-21.) She further misrepresented the true circumstances of her custody schedule during the summer months in order to have the support order inappropriately suspended from June 5 through September 1, 2009. (N.T. 11/4/09, p. 77; Defendant Exhibit 6 (Support Order dated July 7, 2009).)

Child Preference

In her statement of matters complained of on appeal, Mother argues that we erred by not deferring to the Children's wishes to live with her.

> The weight to be accorded a child's preference varies with the age, maturity and intelligence of that child, together with the reasons given for the preference. ... Moreover, [a]s children grow older, more weight must be given to the preference of the child. ... As this Court has recently reaffirmed, where the households of both parents were equally suitable, a child's pref-

[7] Mother has, however, established separate accounts for the Children. At the time of the hearing the account for Donavan had a balance of $4,826.74 and that for Sean, $4,826.29. (Plaintiff Exhibits 1 and 2 (Bank Statements).) Neither account appears to be restricted. Further, the total of these two accounts is several thousand dollars less than the total which should have been paid under the property settlement agreement. (N.T. 11/4/09, pp. 73-74.)

erence to live with one parent could not but tip the evidentiary scale in favor of that parent.

Wheeler, supra, 793 A.2d at 937-38 (citations and quotation marks omitted).

At the hearing, both Children testified that they would like to live with their Mother. (N.T. 11/4/09, pp. 115-116, 152-153, 166, 168.) We gave this testimony careful consideration but were concerned that it was influenced by Mother telling the Children for years that she wanted them to live with her and their desire to please her. (N.T. 11/4/09, pp. 133-134, 156-158.) We were also concerned that the reasons given for this preference were based more upon material benefits Mother could provide and the fun times the Children spent with their Mother than on an awareness that parental responsibilities often necessitate dealing with what is routine and commonplace, such as ensuring that a child works hard and does well in school. (N.T. 11/4/09, pp. 9-10, 129, 137-138, 166, 168, 175-176; N.T. 11/9/09, pp. 58-59.) We also determined that the Children's preference was not strongly held but appeared to be more of a whim to try something different, to see what it would be like to live with the other parent, not recognizing fully the consequences of such choice. (N.T. 11/4/09, pp. 133, 152-153, 156, 159.)[8]

A child's preference is neither dispositive nor controlling, and may be overridden by other factors. Here, such factors exist and require that custody remain with their Father. **Cf. Tomlinson v. Tomlinson,** 248 Pa. Super. 196, 202, 374 A.2d 1386, 1389 (1977) (holding that a thirteen-year-old's stated preference—"I like to be

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[8] Mother claims the Children do not know where she works. (N.T. 11/4/09, p. 85; N.T. 11/9/09, p. 9.) She also claims that in order to improve her chances of obtaining custody she last worked as a dancer at the Capital Hideaway in March or April of 2009, even though her pictures still appear on the club's website. (N.T. 11/4/09, pp. 83-84; N.T. 11/9/09, pp. 10, 16, 52.) There is no evidence to the contrary. Accordingly, we have not considered the type of work Mother performs in our evaluation of what is in the Children's best interests. Were we to do so, we would be inappropriately imposing our moral evaluation on conduct not shown to have an effect on the Children's best interests. **See McAnallen v. McAnallen,** 300 Pa. Super. 406, 412-413, 446 A.2d 918, 922 (1982). "It is the effect of the [conduct] upon the child and not the fact of the [conduct] itself which is crucial to a custody decision." **Id.** at 416, 446 A.2d at 923.

with my Father"—without more, without the underlying reasons, is of little value and, in the case, was insufficient to change custody from her mother, with whom she and her sister had lived for six years, to her Father).

Additional Factors

In this case, notwithstanding Father's financial difficulties, the Children have done well while in his care. Donavan is currently in ninth grade and Sean in sixth grade. Both like school, receive good grades, and have friends, often having sleepovers at Father's home. (N.T. 11/4/09, pp. 108-109, 121, 141-142, 149, 158, 162, 172-173; N.T. 11/9/09, p. 86; Defendant Exhibits 14 and 15 (Children's Report Cards).) Both are happy and well-adjusted. Although the Children would like to be involved in sports, particularly baseball, this has not occurred since to do so would interfere with Mother's weekend custody and Mother understandably does not want to limit her time with the Children.[9] (N.T. 11/9/09, pp. 96, 108.) Donavan also testified that his decision not to continue in Odyssey of the Mind, an extra-curricular academic competition, was because he was uncertain where he would be living given the present custody dispute and did not want to hurt his teammates. (N.T. 11/4/09, pp. 119-120.)

As between Mother and Father, we found Father to be the more responsible and reliable parent. Mother's move to New York from New Jersey was not prompted by any identified financial necessity or concern for the welfare of the Children. Instead, the move was prompted by an economic opportunity for her boyfriend and for her personal happiness; Mother left the employment she held as a bank teller in New Jersey not knowing what work she would have in New York. (N.T. 11/9/09, p. 73.) By this move, Mother more than doubled the distance she was from the Children, from an hour and a half's drive to one of three and a half to four hours. (N.T. 11/4/09, pp. 23, 63.)[10]

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[9] Donavan testified that his Father will not permit him to participate in sports because he does not have health insurance. (N.T. 11/4/09, p. 120.) Father stated this was incorrect and the reason was that which we have accepted and cited in the text. (N.T. 11/9/09, pp. 96, 107-108, 149-150.)

[10] This is a relocation case and requires an analysis of the **Gruber** factors. **See Clapper v. Harvey,** 716 A.2d 1271, 1274 (Pa. Super. 1998) (**citing Gru-**

Although Mother argues that she has been concerned about Father's treatment of the Children from the time the parties separated, for more than seven years she did nothing about these concerns.[11] Even accepting Mother's testimony that for the first two years following separation she struggled and was having difficulty providing for herself, this still leaves five years unaccounted for. (N.T. 11/4/09, pp. 44-45.) While Mother states that she was concerned that the Children did not have health insurance and about their medical care, she never questioned Father about these concerns. Accepting **arguendo** that Mother believed Father was not providing adequate housing, clothing, or food for the Children, Mother did not offer financial assistance, paid no child support, and complained when Father had difficulty, at times, in affording gas to transport the Children the greater distance to New York, even though she was the cause of this increased expense.[12] (N.T. 11/9/09, p. 105.)

In contrast, Father, while struggling, has provided adequately for the Children's needs. In part, this was done through assistance from his sister and in part by making tough choices such as not having health insurance. Throughout this time, Father did not use

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ber v. Gruber, 400 Pa. Super. 174, 583 A.2d 434 (1990)). It is, however, also a case in which a substantial modification is sought. Under the circumstances, we have taken into account the **Gruber** factors within our overall assessment of the Children's best interests. For the reasons which appear in the text, we conclude that moving the Children to New York will not substantially improve the quality of life for the Children and is not in their best interests. The material advantages Mother offers are more than offset by the other factors we have discussed. As to the parties' motives, we have concluded that both the Mother's desire to relocate the Children with her and the Father's opposition are properly motivated. With respect to the availability of realistic, substitute visitation arrangements should such a move be permitted, this is clearly feasible and would involve a reversal of the times both parents now spend with the Children. (N.T. 11/9/09, p. 104.)

[11] Mother testified that she first decided to file for a modification of custody in January of 2009 when she observed some bruises on Donavan. (N.T. 11/4/09, pp. 6, 42.) Although Mother suspected Father had abused Donavan, this was not true. Donavan and Sean were fighting with one another in their bedroom and Father pulled Donavan away from Sean. The bruises developed two days after this fight and it is unclear whether the bruises were the result of the two brothers fighting with one another or the result of Father separating them. (N.T. 11/4/09, pp. 145-146; N.T. 11/9/09, pp. 94, 123-124.)

[12] Father credibly testified this occurred at most two times since the parties separated. (N.T. 11/9/09, pp. 133-134.)

the Children as a bargaining chip to obtain money from Mother or withhold the Children from Mother. To the contrary, in the parties' property settlement agreement, Father chose to have custody of the Children at the expense of foregoing support from Mother.

At all times since the parties' separation, Father has resided in Carbon County. It is here where his parents live, whom the Children love, and whom they visit on average every other week. (N.T. 11/4/09, pp. 33, 124.) It is also here where his sister, Laura Pasternak, resides, and with whom Father resided with the Children for almost three years after the parties' separation, and who herself has two daughters the same age as the Children.[13] (N.T. 11/9/09, pp. 87-89; Defendant Exhibit 12 (List of Father's relatives).) In contrast, Mother has no close relatives in New York with whom she has contact. (N.T. 11/4/09, pp. 26-27.) **Cf. Speck v. Spadafore,** 895 A.2d 606, 613 (Pa. Super. 2006) ("The intangible benefits of interacting with extended family cannot be discounted.").

Important to our decision was the length of time the Children have lived with Father and the stability he has provided in their lives. Both Children have lived with their Father most of their lives and have done well. He has encouraged contact between the Children and their Mother, permitting her to live in his home when she visits on weekends, and he has been flexible in the custody schedule, providing her equal time during the summer months rather than restricting her visits to the alternating weekends provided for in the December 4, 2002 custody order. (N.T. 11/9/09, pp. 106, 108, 119-121.)

"There can be no question that stability is important to a child's welfare, and that in deciding who should have custody of the child it will therefore always be essential to consider how long the child has spent with the parties," and how the child has fared. **In re Custody of Temos,** 304 Pa. Super. 82, 118, 450 A.2d 111, 129 (1982). "Where the child's parents are equally fit, or nearly so, ... the fact that a stable, long-continued and happy relationship has developed between the child and one of the parents may be of

[13] Father's sister lives approximately five minutes' drive from Father's home. She is now divorced and is strongly supportive of Father and willing to help him. (N.T. 11/9/09, pp. 143, 147, 149-150.)

critical importance to the formulation of an appropriate custody decree." **Wheeler, supra,** 793 A.2d at 935. "If in the past, the primary caretaker has tended to the child's physical needs and has exhibited love, affection, concern, tolerance, discipline and a willingness to sacrifice, the trial judge may predict that those qualities will continue." **Temos, supra** at 91, 450 A.2d at 115. Although this factor is one of many to be considered, in an appropriate case it may be controlling. **See id.** at 95, 450 A.2d at 118. In this case, we found it to be the determining factor.

CONCLUSION

In sum, our decision was based on the following fundamental conclusions:

(1) Primary physical custody of the Children has been with Father since the parties' separation more than seven years ago. During this time, Father has made necessary sacrifices and difficult choices but has nevertheless been able to adequately provide for the Children's care and well-being;

(2) Under Father's care, the Children have had continuity and stability in their lives, are articulate and well-adjusted, and are performing well in school. They have developed close friendships with peers and have the benefit of Father's extended family nearby;

(3) When comparing the parties' living arrangements, Mother's life appears less stable and is dependent on her relationship with Mr. Lopez. This relationship has not progressed as she had hoped and may be in jeopardy;[14]

(4) Most, if not all, of Mother's fault with Father's care of the Children concerns past issues rather than Father's present ability. As of the time of the hearing, Father was able to adequately provide for the Children's needs;

(5) Father has been flexible in permitting and encouraging contact between Mother and Children and, in consequence, the Children have developed a good relationship with their Mother; and

(6) The Children's preference to live primarily with Mother was neither strongly held nor based on any particular articulated basis.

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[14] In March of 2009, Mother told Father's sister that Mr. Lopez was seeing another dancer. (N.T. 11/9/09, p. 151.)

While both parties' care of the Children can be questioned, most of the criticism of Father's care levied by Mother is attributable to his limited income, a condition which she has been aware of for years and which she is in part responsible for creating. (N.T. 11/4/09, p. 89.) More importantly, Father's financial situation is now improved and the basis for Mother's criticism no longer exists. What stands out most, however, has been Father's commitment to his sons, his willingness to make sacrifices, his resolve not to shirk parental responsibilities in providing for their care, and his effort in bringing security and stability to their lives, which has clearly benefited them. With this in mind, we respectfully request that Mother's appeal be denied and the custody order of November 10, 2009, be affirmed.

PANTHER VALLEY SCHOOL DISTRICT, Appellant
vs. PANTHER VALLEY EDUCATION ASSOCIATION
and ROBERT JAY THOMAS, Appellees

Civil Law—Public School Code—Grievance Arbitration—
Temporary Professional Employee—Non-Renewal
of Employment Contract—Right To Recall—Remedy

1. To be enforceable under the Public School Code, an arbitrator's award must both involve an issue encompassed by the collective bargaining agreement and rationally draw its essence from that agreement.

2. As a temporary professional employee hired to teach in the School District's alternative education program, the grievant was within the bargaining unit as defined in the Collective Bargaining Agreement and entitled to invoke its protections.

3. Under both Section 11-1108 of the Public School Code and the Collective Bargaining Agreement, with the exception of tenure, a temporary professional employee is to be viewed the same as a full-time employee, with all of the rights and privileges which accompany full-time employment, including the right to file a grievance.

4. Under the parties' Collective Bargaining Agreement, a temporary professional employee who has been furloughed, not terminated, as concluded by the arbitrator appointed in this case, is entitled to have his name placed on the District's active recall list and to be recalled for any future vacancies in accordance with the provisions of the Collective Bargaining Agreement.

5. The District violated the Collective Bargaining Agreement by failing to place the grievant's name on the active recall list and recalling him to an open position for which he was qualified.

6. A temporary professional employee who should have been recalled, but wasn't, is entitled to be reinstated, with back pay and all other emoluments for the period for which he should have been recalled, less monies earned by him during such period.

NO. 09-0206

ROBERT T. YURCHAK, Esquire—Counsel for the Appellant.

A. MARTIN HERRING, Esquire—Counsel for the Appellee.

MEMORANDUM OPINION

NANOVIC, P.J.—December 11, 2009

The Panther Valley School District ("District") appeals from an arbitrator's decision which awarded the grievant, a non-tenured teacher, the right to be recalled and reinstated to another teaching position after the program in which he was teaching was terminated by the District.

FACTUAL AND PROCEDURAL BACKGROUND[1]

For almost two years, between November 12, 2004, and August 10, 2006, Robert J. Thomas was employed by the District as a sixth grade teacher in its alternative education program. Pursuant to his employment contract, Thomas' status for his position was that of a temporary professional employee within the meaning of the Public School Code of 1949 ("Code"), 24 P.S. §§1-101 to 27-2702.[2] As such, for all purposes, except tenure status, he was considered to be a full-time employee, entitled to all the rights and privileges of regular full-time employees. **See** 24 P.S. §11-1108(d) and Exhibit "J2" (Temporary Professional Employe's Contract, Paragraph III).

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[1] Our statement of the facts relies upon the undisputed facts as admitted by the parties, the facts as found and stated by the Arbitrator in his Opinion and Award dated December 22, 2008, and the exhibits presented and referred to by the Arbitrator in that Opinion. No stenographic record of the proceedings before the Arbitrator was prepared and we understand that the parties have agreed to the foregoing upon which to base our decision.

[2] Under the Code, a "temporary professional employe" is defined as "any individual who has been employed to perform, for a limited time, the duties of a newly created position or of a regular professional employe whose services have been terminated by death, resignation, suspension or removal." 24 P.S. §11-1101. The term "professional employe" includes "those who are certificated as teachers." **Id.** At the time of his employment in the alternative education program, Thomas was certified as a health and physical education teacher; however, his certificate for this area of instruction was not permanent because of his lack of teaching experience. Arbitrator's Award, p. 4. In contrast, a "substitute" means "any individual who has been employed to perform the duties of a regular professional employe during such period of time as the regular professional employe is absent on sabbatical leave or for other legal cause authorized and approved by the board of school directors or to perform the duties of a temporary professional employe who is absent." **Id.**

During the summer of 2006, the Panther Valley School Board ("Board") decided to discontinue the alternative education program for economic reasons—"the grant to finance it was decreasing and the District determined that it could not provide the program within the District." Arbitrator's Award, p. 3. In consequence, the then-superintendent for the District, J. Christopher West, advised Thomas, by letter dated August 11, 2006, that the Board, at its meeting held on August 10, 2006, had elected not to renew Thomas' employment contract because of the "change in status" of the District's alternative education program. Exhibit "J1A".[3]

On September 13, 2006, the Panther Valley Education Association ("Association") filed a grievance on behalf of Thomas over the District's failure to recall him for an open teaching position in his area of certification, health and physical education. Specifically, in describing the date and nature of the alleged violation, the grievance states:

> September 7, 2006 Robert Jay Thomas was placed on Panther Valley Layoff and Recall List. Failure of the District to

[3] The District's superintendent at the time of the arbitration hearing, Rosemary Porembo, testified that the true reason for the Board's decision was that Thomas' most recent performance rating was unsatisfactory. Thomas was given a satisfactory rating for both semesters of the 2004-05 year and for the first semester of the 2005-06 year. However, his rating for the second semester of the latter year, for the period between January 23, 2006, and June 9, 2006, was unsatisfactory. The evaluation for this second semester is dated August 1, 2006, and was received by Thomas that same date, nine days before the Board's meeting of August 10, 2006. Exhibit "J3".

Porembo attributed the discrepancy between the true reason for the Board's action and the reason disclosed in the superintendent's August 11, 2006, letter as being to preserve the integrity of Thomas. Notwithstanding what may have been the ulterior motive of the Board's decision, it is significant that the actual motion of the Board, as quoted verbatim in the August 11, 2006, letter, was not to dismiss Thomas because of an unsatisfactory rating but to not renew his contract because of a discontinuance of the District's alternative education program.

This is consistent with the provisions of the Code. **See** 24 P.S. §11-1108(a) ("no temporary professional employe shall be dismissed unless rated unsatisfactory"). Had Thomas been dismissed, such action would be grievable. In contrast, an unsatisfactory rating of a temporary professional employee for any period except the last four months of his third or of any subsequent year of service as a temporary employee, not followed by dismissal, is incontestable. **See Young v. Littlestown Area School District,** 24 Pa. Commw. 621, 632, 358 A.2d 120, 126 (1976), as modified by 24 P.S. §11-1108(c)(2).

> recall furloughed employee according to the PVEA contract in order of area of certification in Health and Physical Education.

Exhibit "J1A".

The grievance further identified Article X, Layoff and Recall, Sections 2 and 3 of the Collective Bargaining Agreement between the District and Association as the applicable contract provisions. The District's response to this grievance provided:

> The employee's contract was not renewed by the Board of Education upon the recommendation of the Superintendent and the Solicitor. The employee was a temporary employee and was non-tenured. The employee received an unsatisfactory evaluation. These factors resulted in the termination from employment with the Panther Valley School District. The individual was granted an interview for the position in question.

Exhibit "J1A".

The matter later proceeded to mandatory arbitration in accordance with Article XIII, Grievance Procedure, Section 1, Step IV, of the Collective Bargaining Agreement. Before the Arbitrator, the District contended that Thomas was dismissed by the District as a temporary professional employee because of an unsatisfactory rating and that he failed to grieve either his unsatisfactory rating or his dismissal, and had waived the right to do so. The Arbitrator found the District misunderstood the grievance. Thomas was not grieving his unsatisfactory evaluation or his discharge as an untenured employee. Instead, Thomas contended that after his contract was not renewed, the District placed his name on its active recall list and, when it failed to recall him to an open position for which he was qualified to teach, it violated his rights under the Collective Bargaining Agreement and the Code.

The Arbitrator accepted Thomas' position and held:

AWARD

> The Grievance is sustained. The Grievant's name should be placed on the recall list. The Grievant is to be reinstated to a position he is qualified to teach in the District. In addition the Grievant shall be made whole for all wages, seniority and benefits from the date of August 11, 2006 and until the date

of reinstatement. The Arbitrator will retain jurisdiction of this matter until compliance with the Award is completed.

Arbitrator's Award, p. 11.

The District has appealed the Arbitrator's Award and asked that it be vacated. In its brief in support of its appeal, the District raises the following five issues:[4]

1. Where the arbitrator relied upon interpreting Section 11-1108 of the Pennsylvania School Code, 24 Pa. C.S. Section 11-1108, to determine that Robert Thomas was an 'employee' and therefore eligible to pursue the grievance rights for professional employees under the collective bargaining agreement, is his decision based upon the 'essence' of the collective bargaining when there are no grievance rights for temporary professional employees contained in the collective bargaining agreement?

Suggested Answer: NO

2. Where the arbitrator relied upon interpreting Section 11-1108 of the Pa. School Code, 24 Pa. C.S. Section 11-1108, to determine that Robert Thomas was an 'employee' and therefore eligible to pursue the grievance rights for professional employees under the collective bargaining agreement, did the arbitrator err as a matter of law when there are no grievance rights for temporary professional employees contained in the collective bargaining agreement?

Suggested Answer: YES

3. Whether, Robert Thomas, a Temporary Professional Employee, who had not achieved tenure status, and who was given an unsatisfactory rating for his performance as a temporary professional employee for the Spring semester of 2006 on August 1, 2006, had his contract with the Panther Valley School District 'non-renewed' in accordance with the Pennsylvania Law?

Suggested Answer: YES

4. Are there any grievance rights for challenging an unsatisfactory rating or a dismissal for a Temporary Professional

[4] These issues are stated verbatim from the District's brief in support of its appeal.

Employee either under the law of Pennsylvania or under the Collective Bargaining Agreement?

Suggested Answer: NO

5. Whether the remedy fashioned by the arbitrator in ordering the Panther Valley School District to reinstate Robert Thomas, the grievant, to a full-time teaching position, despite an unsatisfactory evaluation and despite the non-renewal of his contract with the school district, is outside the contract and in excess of any remedy to which Thomas would be entitled?

Suggested Answer: YES

For the reasons which follow, these issues are without merit.

DISCUSSION

Arbitrability of Dispute

In reviewing the propriety of a grievance arbitration award, we apply a two-pronged standard of review:

> 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.

Westmoreland Intermediate Unit #7 v. Westmoreland Intermediate Unit #7 Classroom Assistants Educational Support Personnel Association, PSEA/NEA, 595 Pa. 648, 939 A.2d 855, 863 (2007). The first prong deals with whether the dispute is arbitrable, that is, whether the terms of the collective bargaining agreement encompass the subject matter of the dispute; the second is whether the arbitrator's interpretation and application of the collective bargaining agreement to the dispute rationally draws its essence from the agreement. "That is to say, a court will only vacate an arbitrator's award where the award indisputably and genuinely is without foundation in, or fails to logically flow from, the collective bargaining agreement." **Id.** An arbitrator's award must be respected by the judiciary which is barred from substituting its judgment for that of the arbitrator if the arbitrator's "interpretation can in any rational way be derived from the agreement, viewed in

light of its language, its context, and other indicia of the parties' intention." **Id.** at 862.[5]

For all intents and purposes, the District's first two issues are identical. In each the District questions Thomas' right to file a grievance.

> Whether the dispute between [furloughed professional employees] and [the School District] is in fact a grievance that can be arbitrated under the collective bargaining agreement must, at least initially, be left to an arbitrator to decide. ... 'We have consistently held that "the question of the **scope** of the grievance arbitration procedure is for the arbitrator, at least in the first instance." ... ' Thus, pursuant to the [Public Employe Relations Act], all questions of whether a matter is arbitrable must be decided in the first instance by an arbitrator, not a trial court.

Davis v. Chester Upland School District, 567 Pa. 157, 786 A.2d 186, 188-89 (2001) (citations omitted, emphasis supplied).

The Collective Bargaining Agreement provides that the Association is the bargaining agent "for those Elementary, Middle and High School Teachers, Librarians, Guidance Counselors and Nurses, full and regular part-time para professionals, health room aides, nurse assistants, hereinafter called the Bargaining Unit, and for the employees properly included in collective bargaining for public employees." Exhibit "J1" (Collective Bargaining Agreement, Article II, Recognition, p. 3). As a temporary professional employee hired to teach in the District's alternative education program, Thomas is clearly within the Bargaining Unit. **Cf. Phillippi v. School District of Springfield Township,** 28 Pa. Commw. 185, 199, 367 A.2d 1133, 1140 (1977) (although the Code contains distinct definitions for professional employees and temporary professional employees, 24 P.S. §11-1101, when the Legislature intended that particular provisions of Article XI apply to both professional

[5] Under this standard, "a court reviewing an arbitration award shall modify or correct the award where the award is contrary to law and is such that had it been a verdict of a jury, the court would have entered a different judgment or judgment notwithstanding the verdict. 42 Pa. C.S.A. §7302(d)(2)." **Upper Merion Area School District v. Upper Merion Area Education Association,** 124 Pa. Commw. 81, 85 n.4, 555 A.2d 292, 293 n.4 (1989).

and temporary professional employees, it so stated, or used the term "teacher"). The Collective Bargaining Agreement addresses recall rights in Article X and further provides that any grievance arising out of the interpretation of the terms of the Collective Bargaining Agreement is subject to a four-step grievance process culminating in arbitration. Exhibit "J1" (Collective Bargaining Agreement, Article XIII, Grievance Procedure, Section 1, p. 29); **see also, Danville Area School District v. Danville Area Education Association, PSEA/NEA,** 562 Pa. 238, 754 A.2d 1255, 1262 (2000) (an arbitrator's determination which addresses an issue within the terms of a collective bargaining agreement and resolves the issue by applying the terms of the agreement, is rationally derived from the agreement); **Appeal of Chester Upland School District,** 55 Pa. Commw. 102, 106, 423 A.2d 437, 440 (1980) (noting that "[i]n the absence of any express provision excluding a particular grievance from arbitration, ... only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail").

Both the Code as well as Thomas' employment contract provide that a temporary professional employee such as Thomas "shall for all purposes, except tenure status, be viewed in law as full-time employes, and shall enjoy all the rights and privileges of regular full-time employes." 24 P.S. §11-1108(d); Exhibit "J2" (Temporary Professional Employe's Contract, Paragraph III). Under these circumstances we have no difficulty in finding that Thomas is a member of the bargaining unit covered by the Collective Bargaining Agreement, and that the subject of the dispute, a teacher's right to be recalled, is encompassed within Article X of this Agreement. Exhibit "J1" (Collective Bargaining Agreement, Article X, Layoff and Recall, pp. 24-26).[6]

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[6] Sections 1 and 2 of Article X state the following:

Section 1

The Pennsylvania School Code includes certain job security provisions, certification, and other regulatory provisions associated with various classes of employees. The parties hereby aver that such provisions of the School Code represent their complete agreement and that said provisions shall govern the manner in which the job security, job progression, and reduction in force practices shall be effected with respect to members of the Bargaining Unit, except suspensions and furloughs which shall be on the basis of district wide seniority in the field of one's certification and if a reduction in

Issues in Dispute

In the District's third issue, the District appears to believe that a factual dispute exists as to whether Thomas' contract was "non-renewed" in accordance with Pennsylvania law. In issue four, the District contends that Thomas has no grievance rights to challenge an unsatisfactory rating or a dismissal due to his status as a temporary professional employee.

We believe this third issue, as stated by the District, is unfounded. As an underlying fact we believe all parties are in agreement that Thomas' employment contract was not renewed because the District's alternative education program was eliminated. Thomas does not dispute that the alternative education program was properly curtailed.[7] Nor does he argue that the non-renewal of his contract is contrary to law. We do not read the Arbitrator's opinion otherwise. What is in dispute is the legal consequences of that non-renewal.[8]

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staff becomes necessary, notice of such reduction will be made to the teacher and the Panther Valley Education Association by July 1 for the succeeding school year. In all cases, the Board shall attempt by the process of attrition to avoid employee furloughs.

Section 2

Whenever the Board deems it necessary to reduce the number of teaching staff due to declining enrollments teachers shall be furloughed in the reverse order of seniority in their areas of certification. Furloughed teachers holding professional certification shall be placed on a recall list for any future vacancies in their areas of certification.

Should a vacancy occur, the district will offer the position to teachers on the recall list in writing. The teacher must notify the district within ten (10) calendar days of acceptance of the position. Failure to do so will result in removal from the recall list.

In effect, Section 1 incorporates by reference the job security provisions, certification, and other regulatory provisions associated with classes of employees of the Code into the Collective Bargaining Agreement. **Cf. Southern Tioga Education Association v. Southern Tioga School District,** 668 A.2d 260, 262-63 (Pa. Commw. 1995) (discussing a similar clause), **appeal denied,** 676 A.2d 1203 (Pa. 1996).

[7] A presumption of regularity accompanies decisions of the School Board. **See Young, supra,** at 631, 358 A.2d at 126; **see also,** 24 P.S. §11-1124(2) (Public School Code provision authorizing suspension of tenured professional employees based on curtailment of an educational program).

[8] Before the Arbitrator, the District argued that Thomas was dismissed due to his unsatisfactory rating on August 1, 2006. As previously noted, the District never formally dismissed Thomas because of an unsatisfactory rating. **See** footnote 3,

As to the fourth issue presented by the District, it is irrelevant: Thomas has not challenged his unsatisfactory rating and he was not dismissed as a temporary professional employee. **See** footnote 3, **supra, citing Young v. Littlestown Area School District,** 24 Pa. Commw. 621, 631, 358 A.2d 120, 126 (1976). As stated by the Arbitrator:

> It is evident from the recitation of the violation grieved by [Thomas] that he believed that his name was on the recall list and that the failure of the District to recall him was a violation of his rights under the Contract and the Code. He was not grieving his unsatisfactory evaluation. He was not grieving his discharge as a non-tenured employee.

Arbitrator's Award, pp. 6-7. Nor has the Arbitrator decided these issues.

To the contrary, Thomas claims that following the non-renewal of his contract, his name was to be placed on the District's active recall list and the District failed to recall him contrary to his rights under the Collective Bargaining Agreement. It is this issue which the Arbitrator decided, accepting Thomas' premise that he was entitled to have his name placed on the active recall list, then finding that because Thomas was not recalled to an open position for which he was qualified, the District violated the Agreement.

Specifically, the Arbitrator stated:

> The Grievant testified that both Superintendent West and Karen Heffelfinger, President of the Union, said that he was to be put on the recall list of teachers. The District never listed him. Regardless of this, Article X, Section 2 of the Contract provides that furloughed teachers are to be placed on the recall list. The District erred in not placing his name on the list and in not recalling him to employment.

Arbitrator's Award, p. 11.[9] Whether the District was bound by the conduct of its Board and former superintendent and whether

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supra. Instead, his contract was not renewed. Whether this non-renewal entitled Thomas to recall rights or whether the District's School Board by its conduct was bound to placing Thomas on its active recall list became the focal point of the Arbitrator's decision finding that the District violated the Collective Bargaining Agreement in not recalling Thomas to employment.

[9] According to the Arbitrator, Thomas testified that on August 2, 2006, prior to the Board's decision not to renew his contract, the District's then-superintendent of

Thomas was furloughed,[10] the basis for the Arbitrator's penultimate conclusion that Thomas was entitled to have his name placed on

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schools, J. Christopher West, advised him that his contract would not be renewed and, in response to a question posed by Thomas, further stated that "his name would have to be added to the active recall list." Arbitrator's Award, p. 4. Thomas also testified, according to the Arbitrator's Opinion, that Karen Heffelfinger, President of the Union, told him that "at the Board of Directors' meeting it was approved that his name be placed on the active recall list." Arbitrator's Award, p. 4.

As to whether the non-renewal of Thomas' contract constituted or was the equivalent of a furlough, the Arbitrator reasoned as follows:

> The Board did not dismiss [Thomas] for unsatisfactory rating ... or for no stated reason as a non-tenured teacher. ... It [the Board] failed to renew a contract because of a terminated program. Its action resulted in the reduction in 'the number of teaching staff due to declining enrollment.' (Article X of the Contract.) [Thomas] became a furloughed employee.

Arbitrator's Award, p. 10.

In light of the Arbitrator's findings and reasoning, and with no other record before us, under our limited scope of review we have no authority to find that Thomas was not entitled to recall. This conclusion, based on evidence heard and findings made by the Arbitrator, draws its essence from the Collective Bargaining Agreement, specifically Article X, Section 2. The Arbitrator's interpretation is rationally derived from the Agreement, "viewed in light of its language, its context, and any other indicia of the parties' intention." **Danville Area School District v. Danville Area Education Association, PSEA/NEA,** 562 Pa. 238, 754 A.2d 1255, 1260 (2000). **Cf. Upper Merion Area School District, supra** at 84, 555 A.2d at 294 (holding that notwithstanding a claim that Section 1125.1 of the Code does not grant continuing seniority to a temporary professional employee during periods of "suspension," where the employee's contract, as here, specifically provided that he "would be viewed for all purposes, except tenure status, as a full-time employee and would enjoy all the rights and privileges of regular full-time employees" and where the president of the school district wrote letters to the employee advising him that his seniority would continue to accrue during the periods of suspension, an arbitrator's determination that nothing contained in the Code prohibited the accumulation of seniority by a temporary professional employee and consequent award upholding the previous grant of seniority by the school board rationally derived its essence from the terms of the parties' agreement and was not violative of or inconsistent with Section 1125.1 of the Code). Consequently, under the unusual procedural posture of this case, Thomas, a temporary professional employee whose contract was not renewed, is entitled to reinstatement rights as provided under Article X, Section 2 of the Collective Bargaining Agreement.

[10] As appears in footnote 9, **supra,** the Arbitrator equates the non-renewal of a non-tenured teacher's employment contract with the suspension or furloughing of an employee because of declining enrollment. The latter is in the nature of an impermanent separation. **See Filoon v. Middle Bucks Area Vocational-Technical School,** 160 Pa. Commw. 124, 130, 634 A.2d 726, 729 (1993), **appeal denied,** 539 Pa. 658, 651 A.2d 544 (1994). In contrast, the non-renewal or termination of an employment contract signifies greater permanence.

the District's recall list, are both valid issues, but they have not been raised by the District. Accordingly, they are waived. **See Danville Area School District, supra,** 754 A.2d at 1259-60 (holding that a court may not decide a case on an issue not raised and preserved by the parties "even if the disposition [below] was fundamentally wrong").

Remedy

In its discussion of its fifth issue, the District proceeds from the premise that a temporary professional employee has no right to be recalled when his contract is not renewed based on declining enrollment or an unsatisfactory rating. Because this premise is contrary to the facts, as determined by the Arbitrator, the District's starting point is misplaced.

The Arbitrator found from the facts that Thomas was entitled to have his name placed on the recall list and to be recalled. Therefore, the more appropriate question is what relief an employee who should have been recalled is entitled to when his name is not placed on the recall list. When this occurs, the employee is entitled to be recalled and is also entitled to back pay and all other financial emoluments for the period for which he should have been recalled, less monies earned by him during that period. **See Colonial Education Association v. Colonial School District,** 165 Pa. Commw. 1, 4, 644 A.2d 211, 212 (1994). To the extent the Arbitrator's Award differs from this standard, it will be modified.

CONCLUSION

In accordance with the foregoing, we find that the findings and conclusions of the Arbitrator are binding upon the District and will be affirmed, with the Award modified as indicated below.

ORDER

AND NOW, this 11th day of December, 2009, upon consideration of the Petition for Review and Application to Vacate the Arbitrator's Award filed by the Panther Valley School District, the response of the Panther Valley Education Association and Robert Jay Thomas, the briefs of the parties, and after argument thereon, and in accordance with our Memorandum Opinion of this same date, it is hereby

ORDERED and DECREED that the School District's petition is denied and the Arbitrator's Opinion and Award is affirmed with the qualification that the award is hereby modified to make clear that any wages, seniority and benefits the Grievant is due under the Arbitrator's Award shall be reduced by any monies earned by him during the period between August 11, 2006 and his date of reinstatement.

COMMONWEALTH OF PENNSYLVANIA vs.
TERRY LEE KUEHNER, Defendant/Petitioner

Criminal Law—PCRA—Ineffectiveness of Counsel—Failure To Call Witness—Decision of Defendant Not To Testify—Juror Impartiality—Competency To Stand Trial

1. Pro se filings of a counseled defendant need not be reviewed by the Court.

2. A PCRA petitioner claiming ineffectiveness of counsel must plead and prove that (1) the underlying claim has arguable merit; (2) counsel has no reasonable basis for his action or inaction; and (3) he has been prejudiced by counsel's ineffectiveness. A petitioner establishes prejudice when he demonstrates that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

3. When raising a failure to call a potential witness claim, Defendant must prove that (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew of, or should have known, the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony of the witness was so prejudicial as to have denied the Defendant a fair trial.

4. Trial counsel's recommendation that Defendant not testify, if objectively reasonable at the time, ends the inquiry into ineffectiveness and will not be retroactively re-examined after a verdict has been rendered because of Defendant's subjective belief that the outcome would have been different had he testified.

5. A juror whose impartiality is questioned must be challenged as soon as Defendant becomes aware of the basis for challenge. Pursuant to Pa. R.Crim.P. No. 631(E)(1)(b), after the jury has been selected, challenges for cause may nevertheless be made at any time before the jury begins to deliberate. A defendant who is aware of the basis for challenge but elects not to do so for strategic purposes may not do so after the verdict has been rendered.

6. A defendant is incompetent to stand trial if he is either unable to understand the nature of the proceedings against him or to participate in his own defense. A defendant's competence is presumed; the burden of showing otherwise is upon the defendant.

NO. 637 CR 2004

JOSEPH J. MATIKA, Esquire, Assistant District Attorney—Counsel for Commonwealth.

KENT D. WATKINS, Esquire—Counsel for Petitioner.

MEMORANDUM OPINION

NANOVIC, P.J.—March 11, 2010

PROCEDURAL AND FACTUAL BACKGROUND

On November 10, 2005, at the conclusion of a jury trial, Terry Lee Kuehner ("Defendant") was convicted of three counts of Aggravated Assault (F2),[1] one count of Recklessly Endangering Another Person (M2),[2] and two counts of Simple Assault (M2).[3] He was also charged with, but not convicted of, two additional counts of Aggravated Assault (F1).[4]

The charges against the Defendant arose out of an incident which occurred on September 26, 2004, when police responded to a call of a domestic dispute at the Defendant's home in Towamensing Township, Carbon County, Pennsylvania. The Defendant was allegedly armed, intoxicated, and volatile. As police were blockading Stagecoach Road, the road in front of the Defendant's home, the Defendant fired a shot in the direction of the officers; the bullet grazed the hood of a police cruiser driven by Trooper Andrew Snyder.

On January 23, 2006, the Defendant was sentenced to an aggregate period of imprisonment of not less than eighteen months, nor more than ten years. No appeal or post-trial motions were filed, either **pro se** or through counsel. At trial, the Defendant was represented by private counsel, Attorney Eric K. Dowdle.

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[1] 18 Pa. C.S.A. §2702(a)(3) ("attempts to cause or intentionally or knowingly causes bodily injury to any of the officers, agents, employees or other persons ... in the performance of duty"); 18 Pa. C.S.A. §2702(a)(4) ("attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon"); and 18 Pa. C.S.A. §2702(a)(6) ("attempts by physical menace to put any of the officers, agents, employees or other persons ... while in the performance of duty, in fear of imminent serious bodily injury").

[2] 18 Pa. C.S.A. §2705.

[3] 18 Pa. C.S.A. §2701(a)(1) ("attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another"); and 18 Pa. C.S.A. §2701(a)(3) ("attempts by physical menace to put another in fear of imminent serious bodily injury").

[4] 18 Pa. C.S.A. §2702(a)(1) ("attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life") and 18 Pa. C.S.A. §2702(a)(2) ("attempts to cause or intentionally, knowingly or recklessly causes serious bodily injury to any of the officers, agents, employees or other persons ... while in the performance of duty").

On November 8, 2006, the Defendant filed a **pro se** petition for collateral relief pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. §§9541-9546, and requested the appointment of counsel. Attorney George T. Dydynsky of the Carbon County Public Defender's Office was appointed to represent the Defendant. Thereafter, notwithstanding the appointment of counsel, the Defendant filed a myriad of **pro se** motions, many of which are incoherent and which, in total, fail to state any legally cognizable claims which have been preserved. **See** Pa. R.Crim.P. No. 576(A)(4) and comment; **see also, Commonwealth v. Ligons,** 601 Pa. 103, 971 A.2d 1125, 1161 (2009) (Castille, C.J., concurring) and **Commonwealth v. Pursell,** 555 Pa. 233, 724 A.2d 293, 301-302 (1999) (excusing the court from reviewing **pro se** filings of a counseled defendant), **cert. denied,** 528 U.S. 975 (1999), **aff'd,** 561 Pa. 214, 749 A.2d 911 (2000).

The Defendant subsequently filed a **pro se** motion to discharge counsel on June 25, 2007, as the Defendant believed Attorney Dydynsky was not effectively representing him. We deferred decision on this motion pending determination of the Defendant's competency which had been raised in a separate matter docketed to No. 259 CR 2005. At the same time counsel agreed that we could accept and apply the determination of competency made in case No. 259 CR 2005 to the instant proceedings.

On March 6, 2008, the Defendant was found to be competent to stand trial in the proceedings docketed to No. 259 CR 2005.[5] Following this determination, on June 16, 2008, we granted the Defendant's request to discharge Attorney Dydynsky. The Defendant's present counsel, Kent D. Watkins, Esquire, was appointed standby counsel on July 9, 2008, and later appointed as the Defendant's counsel by Order dated October 16, 2008.

A hearing on the PCRA petition was held on May 1, 2009. At the time of hearing, the various issues raised in the Defendant's initial **pro se** filing were reduced to one basic issue, that of inef-

[5] In case No. 259 CR 2005, the Honorable David W. Addy declared the Defendant incompetent to stand trial by Order dated November 16, 2007, pursuant to a stipulation between the Commonwealth and the defense. Consequently, the Defendant was committed to the Norristown State Hospital for competency restoration, which was successful.

fective assistance of counsel. **See** 42 Pa. C.S.A. §9543(a)(2)(ii). The Defendant alleges that, as a result of Attorney Dowdle's ineffectiveness: (1) material witness testimony was not presented at the time of trial; (2) the Defendant did not testify in his own defense; (3) one of the jurors seated to hear the Defendant's case was biased against him; and (4) the Defendant's competency to stand trial was never questioned. (PCRA Hearing, pp. 4-6.)

DISCUSSION

To ensure a fair and just result in a criminal proceeding, an individual charged with a crime is entitled to be represented by competent counsel. In questioning the sufficiency of counsel's representation, "[a]n ineffectiveness claim ... is an attack on the fundamental fairness of the proceeding whose result is challenged." **Strickland v. Washington,** 466 U.S. 668, 697 (1984), **rehearing denied,** 467 U.S. 1267 (1984), **superseded by statute on other grounds as stated in U.S. v. Matthews,** 68 M.J. 29 (U.S. Armed Forces 2009) (referring to Antiterrorism and Effective Death Penalty Act of 1996).

> As relevant here, a PCRA petitioner will be granted relief only when he proves, by a preponderance of the evidence, that his conviction or sentence resulted from the '[i]neffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.' 42 Pa. C.S. §9543(a)(2)(ii). Generally, counsel's performance is presumed to be constitutionally adequate, and counsel will only be deemed ineffective upon a sufficient showing by the petitioner. **Commonwealth v. Dennis,** 597 Pa. 159, 950 A.2d 945, 954 (2008). To obtain relief, a petitioner must demonstrate that counsel's performance was deficient and that the deficiency prejudiced the petitioner. **Strickland v. Washington,** 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A petitioner establishes prejudice when he demonstrates 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' **Id.** at 694, 104 S.Ct. 2052; **see also, Commonwealth v. Mallory,** 596 Pa. 172, 941 A.2d 686, 702-04 (2008), **cert. denied,** ___ U.S. ___, 129 S.Ct. 257, 172 L.Ed.2d 146 (2008) ('result of the

> proceeding' is stage of proceeding at which error occurred). Applying the **Strickland** performance and prejudice test, this Court has noted that a properly pled claim of ineffectiveness posits that: (1) the underlying legal issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) actual prejudice befell the petitioner from counsel's act or omission. **Commonwealth v. Tedford,** 598 Pa. 639, 960 A.2d 1, 12 (2008) (**citing Commonwealth v. Pierce,** 515 Pa. 153, 527 A.2d 973, 975 (1987) (adopting U.S. Supreme Court's holding in **Strickland**)).

Commonwealth v. Johnson, 600 Pa. 329, 966 A.2d 523, 532-533 (2009).[6]

(1) **Failure To Call Witnesses To Testify**

At the PCRA hearing, the Defendant's neighbor, William Andrews, testified that he was in his home when the incident occurred. Mr. Andrews' home at 3940 Stagecoach Road is located approximately five hundred feet east of the Defendant's home, with one home in between, that of Clyde Strohl. (PCRA Hearing, p. 46; Trial, p. 197.) The area where the Defendant, and Mr. Andrews and Mr. Strohl, reside is rural and heavily wooded. (PCRA Hearing, Commonwealth Exhibit 7.)

According to Mr. Andrews, as it was becoming dusk he saw the vehicle driven by Trooper Snyder pass his home traveling at approximately ten miles an hour in the direction of the Defen-

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[6] Absent total abandonment by counsel, prejudice is not presumed; actual prejudice must be demonstrated. **See Commonwealth v. Johnson,** 600 Pa. 329, 966 A.2d 523, 538 n.6 (2009). "To discharge his burden of demonstrating **Strickland** prejudice, the PCRA petitioner must show 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" **Id.** at 540. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." **Strickland v. Washington,** 466 U.S. 668, 694 (1984), **rehearing denied,** 467 U.S. 1267 (1984), **superseded by statute on other grounds as stated in U.S. v. Matthews,** 68 M.J. 29 (U.S. Armed Forces 2009) (referring to Antiterrorism and Effective Death Penalty Act of 1996). "In determining whether a reasonable probability of a different outcome has been demonstrated, '[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.'" **Commonwealth v. Weiss,** 604 Pa. 573, 986 A.2d 808, 815 (2009).

dant's home. (PCRA Hearing, pp. 51-52.) When the vehicle was in front of the Strohl home, approximately seventy-five feet east of the Defendant's home, he heard a shot and then watched as Trooper Snyder rapidly drove in reverse, backing away from the Defendant's home and again passing Mr. Andrews' home. (PCRA Hearing, pp. 52-53, 63.)

At trial, Trooper Snyder testified that he was in a marked, light colored vehicle at the time of the incident. (Trial, p. 68.) Mr. Andrews testified that the vehicle he saw driven by Trooper Snyder was dark colored and unmarked. (PCRA Hearing, p. 51.) He further testified that twice, two days in a row while the trial was taking place, he observed someone trying to trace Trooper Snyder's actions the evening of the incident, but that in this recreation Trooper Snyder's vehicle was positioned closer to the Defendant's home than its actual location at the time Trooper Snyder began driving in reverse. (PCRA Hearing, pp. 55-56, 60-61.)[7]

Prior to trial, neither the police nor the defense interviewed Mr. Andrews to learn what he knew. (PCRA Hearing, p. 56.) Mr. Andrews further testified that he did not contact the defense because he was aware of the defense's position that no shot was fired and his testimony would have been to the contrary. (PCRA Hearing, pp. 61-62.) Nor did either party call Mr. Andrews to testify at the time of trial. The Defendant contends this failure to identify and call Mr. Andrews as a witness constitutes ineffectiveness of counsel.

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[7] It is unclear who performed the reconstruction Mr. Andrews observed, however, it was not done by the investigator (Frank Taylor) employed by Attorney Dowdle nor is there any evidence to show that Attorney Dowdle was aware of this reconstruction. (PCRA Hearing, pp. 85-86.) "[C]ounsel cannot be deemed ineffective for failing to investigate and introduce information he could not possibly have known about, so long as counsel's decision not to investigate was reasonable." **Commonwealth v. Tedford,** 598 Pa. 639, 960 A.2d 1, 39 (2008).

Mr. Taylor was not called at trial because, as Attorney Dowdle testified, his expert was able to recreate perfectly the trajectory of the shot from the front bedroom of the Defendant's home to the scratch on Trooper Snyder's car which the Commonwealth contended was caused by this shot. (PCRA Hearing, pp. 68-70, 85-86.) Consistent with Mr. Taylor's analysis, at trial Trooper Snyder testified that he was in front of the Defendant's home when the shot was fired. (Trial, p. 66.) Additionally, following the Defendant's surrender, the police located the Defendant's rifle with a live round still in the chamber beneath the bed in the Defendant's bedroom. (Trial, p. 138.)

In **Johnson,** the Pennsylvania Supreme Court stated:

Counsel has a general duty to undertake reasonable investigations or make reasonable decisions that render particular investigations unnecessary. **Commonwealth v. Basemore,** 560 Pa. 258, 744 A.2d 717, 735 (2000) (**citing Strickland,** 466 U.S. at 691, 104 S.Ct. 2052). Counsel's unreasonable failure to prepare for trial is 'an abdication of the minimum performance required of defense counsel.' **Commonwealth v. Brooks,** 576 Pa. 332, 839 A.2d 245, 248 (2003) (**quoting Commonwealth v. Perry,** 537 Pa. 385, 644 A.2d 705, 709 (1994)). The duty to investigate, of course, may include a duty to interview certain potential witnesses; and a prejudicial failure to fulfill this duty, unless pursuant to a reasonable strategic decision, may lead to a finding of ineffective assistance. Recently summarizing cases in **Commonwealth v. Dennis,** 597 Pa. 159, 950 A.2d 945 (2008), this Court stated that:

These cases ... arguably stand for the proposition that, at least where there is a limited amount of evidence of guilt, it is **per se** unreasonable not to attempt to investigate and interview known eyewitnesses in connection with defenses that hinge on the credibility of other witnesses. They do not stand, however, for the proposition that such an omission is **per se** prejudicial.

Id. at 960 (**citing Perry, supra; Commonwealth v. Weiss,** 530 Pa. 1, 606 A.2d 439, 442-43 (1992); **Commonwealth v. (Harold) Jones,** 496 Pa. 448, 437 A.2d 958 (1981); **Commonwealth v. Mabie,** 467 Pa. 464, 359 A.2d 369 (1976)) (emphasis omitted). Indeed, such a **per se** failing as to performance, of course, does not make out a case of prejudice, or overall entitlement to **Strickland** relief.

When raising a failure to call a potential witness claim, the PCRA petitioner satisfies the performance and prejudice requirements of the **Strickland** test by establishing that:

(1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew of, or should have known of, the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial.

> **Commonwealth v. Washington,** 592 Pa. 698, 927 A.2d 586, 599 (2007). To demonstrate **Strickland** prejudice, the PCRA petitioner 'must show how the uncalled witnesses' testimony would have been beneficial under the circumstances of the case.' **Commonwealth v. Gibson,** 597 Pa. 402, 951 A.2d 1110, 1134 (2008); **see also, Commonwealth v. Chmiel,** 585 Pa. 547, 889 A.2d 501, 546 (2005) ('Trial counsel's failure to call a particular witness does not constitute ineffective assistance without some showing that the absent witness' testimony would have been beneficial or helpful in establishing the asserted defense.').

Id., 966 A.2d at 535-536. While we find the first, second and fourth prongs of this test for failing to call a potential witness have been met, the third and fifth have not.

Stating the obvious, counsel cannot be ineffective for failing to interview or present a witness whose existence and testimony he was unaware of provided he has undertaken a reasonable investigation or made reasonable decisions that render particular investigations unnecessary. **See Commonwealth v. Malloy,** 579 Pa. 425, 856 A.2d 767, 784 (2004). The reasonableness of the investigation, in turn, can depend upon the information given to counsel by the defendant in the course of counsel's investigation. **See id.** at 788. Here, Attorney Dowdle credibly testified that he had hired an investigator to canvass the Defendant's neighborhood in a search for defense-friendly witnesses, and that he had also asked the Kuehner family, including the Defendant, for a list of any possible witnesses; Mr. Andrews' name was not on this list. (PCRA Hearing, pp. 67, 70-72.)

Even had Attorney Dowdle been aware that Mr. Andrews was a material witness to the incident and been aware of what Mr. Andrews knew, on the whole Mr. Andrews' testimony was more harmful than beneficial to the defense. At the heart of the defense was the basic premise that no shots were fired as Trooper Snyder approached the Defendant's home. (PCRA Hearing, pp. 73-74.) Mr. Andrews' testimony was diametrically opposed to this premise and instead corroborated the Commonwealth's version of what occurred, **i.e.,** that shots were in fact fired.

While some benefit may have accrued to challenging the color and markings on Trooper Snyder's car, and the point where he started to back up, the positive effects of this testimony would have been overshadowed by Mr. Andrews' testimony that a shot was fired as Trooper Snyder approached the Defendant's home. (PCRA Hearing, pp. 84-85, 92-93.)[8] Mr. Andrews' testimony on this point, if given, would have called into question the overall theory of the defense. Throughout the course of the trial, predicated on what the Defendant had told his counsel, Attorney Dowdle consistently sought to undermine and discredit the Commonwealth's evidence that the Defendant fired a shot from his home after the police arrived. Given the posture of this defense, had counsel been aware of Mr. Andrews' testimony, a decision not to call him would not only have been reasonable but would have been necessary. (PCRA Hearing, p. 96.) Only after the Defendant was convicted did he admit to Attorney Dowdle that he had in fact fired a shot. (PCRA Hearing, pp. 73-74.)[9]

(2) **Decision Not To Call the Defendant As a Witness**

At the PCRA hearing, both the Defendant and Attorney Dowdle testified to the fact that they discussed, and agreed, that it would be best for the Defendant not to take the stand on his own behalf. (PCRA Hearing, pp. 28, 79, 86-87.) Attorney Dowdle articulated that he, as well as the Defendant's family, did not think it would be wise to put the Defendant on the stand because the Defendant tended to display anger toward the police and the judicial system and, considering that the case had gone "incredibly well," he thought the risk too great to put an angry witness on the stand who was on trial for a violent crime; Attorney Dowdle did

[8] The subject of Mr. Andrews' projected testimony nevertheless was presented, in part, through Clyde Strohl, who testified at trial that the car driven by Trooper Snyder was dark in color and unmarked. (Trial, p. 200.) Mr. Strohl further testified, contrary to what the defense expected, that he heard a shot soon after observing Trooper Snyder's car on Stagecoach Road. (Trial, pp. 196-197, 200-201; PCRA Hearing, pp. 70-71.)

[9] To the extent the Defendant argues that trial counsel was ineffective in not calling his brother Dale Kuehner as a witness, we disagree. Dale Kuehner was not an eyewitness to the incident itself and was only present at the blockade after the fact. As such, the absence of Dale Kuehner's testimony at trial did not result in any prejudicial effect on the Defendant.

not want the Defendant to lose his temper on the witness stand. (PCRA Hearing, pp. 78-79.) Nevertheless, while Attorney Dowdle recommended that the Defendant not testify, the ultimate decision on this issue was left to the Defendant. (PCRA Hearing, pp. 86-87.)

"If a reasonable basis exists for the particular course chosen by counsel, the inquiry [into effectiveness] ends and counsel's performance is deemed constitutionally effective." **Commonwealth v. Abdul-Salaam,** 570 Pa. 79, 808 A.2d 558, 561 (2001), **reconsideration denied,** 2002. We find the basis and reasoning for Attorney Dowdle's recommendation to the Defendant to be inherently reasonable and therefore within the ambit of effective assistance of counsel. We also find that the Defendant's decision not to testify was an informed one made by the Defendant, not by counsel.

(3) **Juror Impartiality**

The Defendant next argues that Attorney Dowdle's failure to challenge juror Audrey Lois Larvey, a teacher at the Defendant's daughter's school with whom the Defendant claims to have had a previous disagreement, constitutes ineffective assistance of counsel.[10] The Pennsylvania Rules of Criminal Procedure mandate that,

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[10] Approximately one year prior to trial, the Defendant ran as a candidate for school board director for the Palmerton Area School District where Ms. Larvey was a teacher. The Defendant testified that one of the reasons he ran was to oppose the building of a new school; Ms. Larvey conversely was in favor of the building project. (PCRA Hearing, pp. 11-12.)

At the PCRA hearing, the Defendant acknowledged that he did not know Ms. Larvey well. (PCRA Hearing, pp. 11, 34.) This also appears to be true with respect to Ms. Larvey's knowledge of the Defendant: during **voir dire** she did not respond when the panel was asked as a group whether anyone knew the Defendant, even though she did acknowledge that she had read about the case in the papers. (Trial, **Voir Dire,** pp. 5-11, 17.) Consistent with the Defendant's limited knowledge of Ms. Larvey, during **voir dire,** when questioned by Attorney Dowdle, the Defendant advised his counsel that he neither knew nor had any problems with any of the jurors selected to hear his case. (PCRA Hearing, pp. 77, 89-90.) Moreover, only after the verdict was rendered did the Defendant's family, not the Defendant, inform Attorney Dowdle that the Defendant and Ms. Larvey were on different sides of the building issue. (PCRA Hearing, p. 77.)

Accordingly, as to this issue Attorney Dowdle cannot be found deficient for failing to act on information of which he was unaware. Attorney Dowdle was entitled to rely on prospective jurors' responses during **voir dire** and upon the information he received from his client. **See Commonwealth v. Williams,** 577

"[w]ithout declaring a mistrial, a judge may allow a challenge for cause [against one of the principle jurors] at any time before the jury begins to deliberate ... ." Pa. R.Crim.P. No. 631(E)(1)(b). Challenges for cause must be made as soon as the cause is determined. **See** Pa. R.Crim.P. No. 631(E)(2)(c).

Attorney Dowdle testified at the PCRA hearing that he first became aware of Ms. Larvey's relationship with the Kuehner family during the trial, when the Defendant's daughter told him that Ms. Larvey was one of her teachers in school. (PCRA Hearing, p. 77.) At that point, Attorney Dowdle questioned the Defendant's daughter about Ms. Larvey and decided, along with the Defendant's family and the Defendant himself, that Ms. Larvey would likely be a juror sympathetic to the Defendant—as she had indicated that she was very concerned for the Defendant's daughter's well-being—and should be kept on the panel. (PCRA Hearing, pp. 88-91.) Only after the alternate jurors had been discharged and the jury had deliberated, reached its verdict, announced its decision in open Court, and was discharged, did the Defendant first bring this issue to the Court's attention. (Trial, 11/10/05, pp. 2-5.)

The failure of trial counsel to challenge Ms. Larvey's presence on the jury earlier was not careless oversight; it was a calculated strategic move that both Attorney Dowdle and the Defendant thought would help their case. It is also by no means clear that this decision was prejudicial to the Defendant, seeing as under the jury's verdict the Defendant was acquitted of the two most serious offenses charged.

(4) **The Defendant's Competency**

The Defendant further faults Attorney Dowdle's performance by arguing that he did not raise the issue of the Defendant's competence to stand trial prior to or during trial, thus resulting in undue prejudice. As a prelude to our analysis, it must first be said that the law presumes a defendant to be competent to stand trial. **See Commonwealth v. Santiago,** 579 Pa. 46, 855 A.2d 682, 694 (2004). In order to overcome the presumption of competency, the

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Pa. 473, 846 A.2d 105, 113 (2004) ("[C]ounsel cannot be found to be ineffective for failing to introduce information uniquely within the knowledge of the defendant and his family which is not provided to counsel.").

Defendant must prove, by a preponderance of the evidence, that he was incompetent to stand trial. **See id.** "In order to prove that he was incompetent, [the Defendant] must establish that he was either unable to understand the nature of the proceedings against him or to participate in his own defense." **Id.** We note also that the Pennsylvania Supreme Court has held itself to be "bound by the PCRA court's credibility determinations where there is record support for those determinations." **Id.**

The Defendant readily admitted at his PCRA hearing that he understood what was going on and was able to assist and cooperate with his trial counsel throughout the course of the trial proceedings. (PCRA Hearing, pp. 17, 41.) **See e.g., Commonwealth v. Rainey,** 593 Pa. 67, 928 A.2d 215, 236 (2007) ("Appellant does not assert that he was unable to understand the nature of the proceedings against him. ... Therefore, even if counsel had no reasonable basis to decline to pursue a competency evaluation, Appellant fails to articulate how he was prejudiced because he cannot establish that had counsel requested an evaluation and hearing, the outcome of the guilt or sentencing phase would have changed.").

Attorney Dowdle is a seasoned criminal defense attorney who has represented many defendants at trial. At no time prior to or during trial did he doubt the Defendant's competence. (PCRA Hearing, pp. 76-77, 82, 84.) To the contrary, as has already been indicated, the Defendant participated and was consulted by Attorney Dowdle on each of the issues already discussed. Further, as stated by the United States Supreme Court, "defense counsel will often have the best-informed view of the defendant's ability to participate in his defense." **Medina v. California,** 505 U.S. 437, 450 (1992), **rehearing denied,** 505 U.S. 1244 (1992).

We do not find that Attorney Dowdle's failure to question competence was a result of ineffective assistance of counsel. The Defendant has failed to meet any of the prongs for ineffectiveness set forth in **Johnson, supra,** 966 A.2d at 533; indeed, this claim is not addressed at all in his corresponding brief. No medical or psychiatric evidence was introduced at the PCRA hearing that would demonstrate the Defendant's incompetence at the time of trial. There is no factual basis in the record which would indicate

that, had the Defendant been granted a competency hearing, the outcome of trial would have been different.

CONCLUSION

At trial, counsel has to constantly make decisions on a rapid basis. The propriety of these decisions cannot be evaluated in hindsight but must be examined in light of the circumstances at the time of trial. **See Commonwealth v. Williams,** 587 Pa. 304, 899 A.2d 1060, 1064 (2006). Nor is the propriety of these decisions determined by the verdict.

A criminal defendant is entitled to a fair trial, not a perfect one. **See Ligons, supra,** 971 A.2d at 1157. Here, the testimony of the principal witness who the Defendant claims was not called by Attorney Dowdle was not known to trial counsel beforehand and, if known, would have contradicted the defense theory; the decision for the Defendant not to testify was a reasoned one made by the Defendant after consultation with Attorney Dowdle; the juror whose impartiality has been questioned remained on the panel because both trial counsel and the Defendant had a reasonable basis to believe she would be sympathetic to the defense; and the Defendant's competency at the time of trial was never questioned, nor was there a reason to question it. For the reasons already discussed in this opinion, we find that the underlying claims of ineffectiveness made against Attorney Dowdle lack arguable merit, that defense counsel acted reasonably, and that the Defendant has not established actual prejudice.

It is clear from the record that, even well more than three years into his sentence, the Defendant still does not accept responsibility for his criminal acts. Without asserting his innocence, the Defendant asks to be relieved from bearing the burden of their consequences. We believe to grant such relief would constitute a disservice to justice. Accordingly, the Defendant's request for collateral relief will be denied.

COMMONWEALTH OF PENNSYLVANIA vs. MICAEL S. GEORGE, SR., Defendant/Petitioner

Criminal Law—Criminal Records—Expungement—Wexler *Balancing Test—Criminal History Record Information Act (CHRIA)—Identifying What Information Is Subject to Expungement*

1. Expungement has as its purpose the protection of individuals against the hardships which may result from criminal records of an arrest and prosecution.

2. The right to seek expungement is an adjunct of due process and not dependent on express statutory authority. Whether a record will be expunged depends primarily on how the prosecution ended.

3. Absent express statutory authority, there is no right to expungement when the accused was convicted of the offense charged.

4. An accused who has been acquitted of the offense charged has an automatic right to expungement.

5. When criminal charges are disposed of without verdict, expungement depends on the exercise of judicial discretion—the individual's right to be free from the harm attendant to an arrest record must be balanced against the Commonwealth's interest in preserving such records.

6. Factors to be considered and balanced when there is neither a conviction nor acquittal are: (1) strength of the Commonwealth's case against the petitioner; (2) the reasons the Commonwealth gives for wishing to retain the records; (3) the petitioner's age, criminal record, and employment history; (4) the length of time that has elapsed between the arrest and the petition to expunge; and (5) the specific adverse consequences the petitioner may endure should expungement be denied. This list is not exclusive.

7. Balancing of those factors relevant to the grant or denial of an expungement request requires that a hearing be held of which the District Attorney must be given a minimum of ten days notice. At this hearing, the burden of affirmatively justifying retention of the arrest record is upon the Commonwealth. This burden is not met by the Commonwealth's generalized concern for retention of records applicable to all defendants.

8. Where a defendant pleads guilty to some charges and other charges involving the same incident are **nolle prossed,** the trial court may in the proper exercise of its discretion expunge the record of those charges which were **nolle prossed.**

9. A **nolle prosequi** is qualitatively different from the dismissal of charges pursuant to a plea agreement. When the Commonwealth **nolle prosses** charges it implicitly admits that it cannot sustain its burden of proof.

10. The Criminal History Record Information Act provides for the "collection, compilation, maintenance, and dissemination of criminal history record information by [criminal justice agencies]." Pursuant to this Act, expungement involves the removal of some, but not necessarily all, criminal record information.

11. Criminal record information includes only: (1) identifiable descriptions; (2) dates and notations of arrests; (3) the criminal charges; and (4) dispositions. Excepted from expungement under the Act is investigative and intelligence information.

NO. 057 CR 2007

JOSEPH J. MATIKA, Esquire, Assistant District Attorney—Counsel for the Commonwealth.

GLENN M. GOODGE, Esquire—Counsel for the Petitioner.

MEMORANDUM OPINION

NANOVIC, P.J.—April 6, 2010

PROCEDURAL AND FACTUAL BACKGROUND

On October 17, 2006, the Defendant, Micael S. George, Sr., was charged with criminal conspiracy to commit aggravated assault,[1] simple assault,[2] reckless endangerment,[3] and disorderly conduct.[4] All charges were bound over to court and are contained in the filed information. This information was later amended by agreement of the parties to include an additional charge, that of criminal conspiracy to commit simple assault,[5] a lesser included offense to the existing charge of conspiracy. On May 5, 2008, as part of a negotiated plea agreement, the Defendant entered a plea to the charge of criminal conspiracy to commit simple assault with the remaining charges to be **nolle prossed.** The Defendant was immediately sentenced to two years of probation.

On June 27, 2008, the District Attorney requested and was granted leave to **nolle pross** the remaining charges contained in the information filed against the Defendant. In this request, the District Attorney stated that "it would not be in the best interest of the Commonwealth to proceed with the prosecution of th[o] s[e] matter[s]." Subsequently, after we were advised by the Adult Probation Office that the Defendant had fully complied with the conditions of his probation, on May 12, 2009, we approved the Defendant's early termination from probation. Two months later, on July 16, 2009, the Defendant filed the instant Motion for Partial Expungement which is now before us. In this motion, the Defendant requests expungement of the criminal records of his arrest and prosecution related to those charges which were **nolle**

[1] 18 Pa. C.S.A. §903(a)(1) (related to Section 2702(a)(1)).

[2] 18 Pa. C.S.A. §2701(a)(1).

[3] 18 Pa. C.S.A. §2705.

[4] 18 Pa. C.S.A. §5503(a)(1).

[5] 18 Pa. C.S.A. §903(a)(1) (related to Section 2701(a)(1)).

prossed; he does not seek expungement of the records related to the charge to which he pled guilty.

A hearing on the Defendant's motion was held before the Court on November 12, 2009. At that time, the only witness presented was the Defendant himself. The Defendant has been employed in the financial services business for more than thirty years; however, in the beginning of 2007, he was denied a promotion because of the pending criminal charges in this case and subsequently lost his job. The Defendant is bilingual and well-educated: he has a bachelor's degree in public administration and holds an MBA. The Defendant is fifty-eight years old and a man of color. Since November 2007, he has been actively seeking employment without success. Though he has been interviewed several times, once a background check is performed and the record of his felony charge surfaces, his prospects for employment end.

The Commonwealth has taken no position with respect to the Defendant's expungement request.

DISCUSSION

The law of expungement is more complicated than it at first appears, in part, because there is no single standard for expunging criminal records and, in part, because what information is expunged, and what is meant by expungement, is commonly misunderstood. Fundamentally, expungement, to some degree, is necessitated by constitutional safeguards; however, the right and extent of what is expunged is often created and delineated by statute, as well as by the rules of criminal procedure.[6]

"The purpose of expungement is to protect an individual from the difficulties and hardships that may result from an arrest on

[6] As an example, the Rules of Criminal Procedure pertaining to ARD permit expungement as soon as a participant completes the requirements of the program. Pa. R.Crim.P. 320. This is further refined in the context of ARDs related to driving under the influence charges in that, because of the ten-year lookback period for recidivism, PennDOT is statutorily authorized to maintain a record of the acceptance of ARD for a period of ten years from the date of notification. 75 Pa. C.S.A. §1534(b) ("This record shall not be expunged by order of court or prior to the expiration of the ten-year period."). Consequently, a DUI-ARD participant is prohibited from seeking expungement prior to the expiration of this ten-year period, despite his right under the Rules of Criminal Procedure to be granted expungement in advance of that date. **See Commonwealth v. M.M.M.,** 779 A.2d 1158, 1165 (Pa. Super. 2001), **appeal denied,** 793 A.2d 906 (Pa. 2002).

record including the harm to one's reputation and opportunities for advancement in life."[7] **Doe v. Zappala,** 987 A.2d 190, 194

Likewise, the Uniform Controlled Substance, Drug, Device, and Cosmetic Act provides for the automatic expungement of any records of arrest or prosecution for criminal offenses arising under the Act, excluding, **inter alia,** the expungement of records where a person was charged with PWID, when the charges are withdrawn or dismissed or when the person was acquitted of the charges. 35 P.S. §780-119. This Act further states that such expungement as a matter of right is available to any person only once. **See id.**

The expungement of juvenile records is provided for at 18 Pa. C.S.A. §9123. **See also, In re A.B.,** 987 A.2d 769, 780 (Pa. Super. 2009) (mandating the expungement of juvenile records upon satisfaction of the statutory criteria, "except upon cause shown" established by the Commonwealth).

Expungement of an indicated report of child abuse under the Child Protective Services Law upon good cause shown is provided for in 23 Pa. C.S.A. §6341. **See also, F.V.C. v. Department of Public Welfare,** 987 A.2d 223, 228 (Pa. Commw. 2010) (stating that "[t]he county agency bears the burden of proof in an action for expunction of an indicated report of child abuse, and in order to discharge this burden, it must present substantial evidence that the report is accurate.").

[7] Judge Hoffman of the Superior Court described these disabilities as follows:

> The harm ancillary to an arrest record is obvious: Information denominated a record of arrest, if it becomes known, may subject an individual to serious difficulties. Even if no direct economic loss is involved, the injury to an individual's reputation may be substantial. Economic losses themselves may be both direct and serious. Opportunities for schooling, employment, or professional licenses may be restricted or nonexistent as a consequence of the mere fact of an arrest, even if followed by acquittal or complete exoneration of the charges involved. An arrest record may be used by the police in determining whether subsequently to arrest the individual concerned, or whether to exercise their discretion to bring formal charges against an individual already arrested. Arrest records have been used in deciding whether to allow a defendant to present his story without impeachment by prior convictions, and as a basis for denying release prior to trial or an appeal; or they may be considered by a judge in determining the sentence to be given a convicted offender.

Commonwealth v. Mallone, 244 Pa. Super. 62, 68-69, 366 A.2d 584, 587-88 (1976) (citation and quotation marks omitted).

In consequence of these effects, the right to seek expungement of an arrest record "is an adjunct of due process and is not dependent upon express statutory authority." **Commonwealth v. V.A.M.,** 980 A.2d 131, 134 (Pa. Super. 2009), **appeal granted,** 2010 WL 1233808 (Pa. 2010).

> [I]t is not hyperbole to suggest that one who is falsely accused is subject to punishment despite his innocence. Punishment of the innocent is the clearest denial of life, liberty and property without due process of law. To remedy such a situation, an individual must be afforded a hearing to present his claim that he is entitled to an expungement—that is, because an innocent individual has a right to be free from unwarranted punishment, a court has

(Pa. Commw. 2009). Whether an individual charged with a crime is entitled to the protection afforded by expungement depends primarily on how the prosecution ended.

1) If the accused was convicted of the offense charged, there is no right to expunge either the conviction, or the related record, absent express statutory authorization. **See Commonwealth v. Hanna,** 964 A.2d 923, 925 (Pa. Super. 2009); **see also,** 18 Pa. C.S.A. §9122(b) (directing that expungement may occur only where the "subject of the information reaches 70 years of age and has been free of arrest or prosecution for ten years" or where that individual "has been dead for three years");

2) If the accused was acquitted, he is entitled to automatic expungement. **See Commonwealth v. D.M.,** 548 Pa. 131, 695 A.2d 770, 772 (1997) (holding that the **Wexler** balancing test, discussed below, "is unnecessary, indeed inappropriate, when a petitioner has been tried and acquitted"); **see also, Commonwealth v. B.C.,** 936 A.2d 1070, 1073 (Pa. Super. 2007) ("[T]he law offers no greater absolution to an accused than acquittal of the charges ... . [Therefore], expungement of an arrest record, after being found not guilty, is not a matter of judicial clemency."); **cf. Commonwealth v. C.S.,** 517 Pa. 89, 93, 534 A.2d 1053, 1054 (1987) (holding that expungement is required when a pardon has been granted since "[a] pardon without expungement is not a pardon");

3) If the charges were disposed of without verdict (**i.e.,** there is neither a conviction nor acquittal), the court must exercise its discretion. "In determining whether justice requires expungement, the Court, in each particular case, must balance the individual's right to be free from the harm attendant to maintenance of the arrest record against the Commonwealth's interest in preserving

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the authority to remedy the denial of that right by ordering expungement of the arrest record.

Commonwealth v. G.C., 398 Pa. Super. 458, 461-62, 581 A.2d 221, 223 (1990). Nevertheless, though "expungement affords an individual some protection from the difficulties and hardships that may result from an arrest on record, it cannot entirely protect him from the consequences of his prior actions." **Doe v. Zappala,** 987 A.2d 190, 194 (Pa. Commw. 2009); **see also, Commonwealth v. Butler,** 448 Pa. Super. 582, 587-88, 672 A.2d 806, 809 (1996) (noting that "expungement is limited to the erasure of the record and does not erase the memory of those personally involved").

such records." **Commonwealth v. Wexler,** 494 Pa. 325, 431 A.2d 877, 879 (1981).

See generally, Hanna, 964 A.2d at 925-27; **Commonwealth v. V.A.M.,** 980 A.2d 131, 134-35 (Pa. Super. 2009), **appeal granted,** 2010 WL 1233808 (Pa. 2010). Additionally, before an order can be entered expunging non-conviction data, the Court must provide a minimum of ten days' prior notice to the District Attorney of the application for expungement. 18 Pa. C.S.A. §9122(f); **Hunt v. Pennsylvania State Police,** 603 Pa. 156, 983 A.2d 627, 635 (2009) (finding that standing to challenge the merits of an expungement order has been conferred by statute upon the District Attorney who the legislature has appointed to protect the interests of the Commonwealth).

In **D.M.,** the Pennsylvania Supreme Court reiterated the authority of **Wexler** and "the balancing test approved therein as the means of deciding petitions to expunge the records of **all** arrests which are terminated without convictions except in cases of acquittals." **Id.,** 695 A.2d at 772 (emphasis added). The factors set forth in **Wexler** are neither exclusive nor exhaustive. They are: (1) the strength of the Commonwealth's case against the petitioner; (2) the reasons the Commonwealth gives for wishing to retain the records; (3) the petitioner's age, criminal record, and employment history; (4) the length of time that has elapsed between the arrest and the petition to expunge; and (5) the specific adverse consequences the petitioner may endure should expungement be denied. **See Wexler, supra** at 329-30, 431 A.2d at 879.

Balancing of the **Wexler** factors, and any relevant additional considerations presented to the Court, requires a hearing. At this hearing, "the Commonwealth bears the burden of affirmatively justifying retention of the arrest record, because it did not, could not, or chose not to bear its burden of proof beyond a reasonable doubt at trial." **Commonwealth v. Lutz,** 788 A.2d 993, 999 (Pa. Super. 2001). **See also, Commonwealth v. A.M.R.,** 887 A.2d 1266, 1268 (Pa. Super. 2005) ("[W]here the Commonwealth has dropped the charges against a petitioner or otherwise has failed to carry its burden of proof beyond a reasonable doubt, the Commonwealth must bear the burden of showing why an arrest record should not be expunged."). "Where **nolle prosse** is the reason for

a termination without conviction, the trial court is to analyze the case according to the factors set forth in a controlling statute or in **[Wexler].**" **Commonwealth v. Rodland,** 871 A.2d 216, 219-20 (Pa. Super. 2005) (footnote omitted), **appeal denied,** 923 A.2d 410 (Pa. 2007).

"[T]he Commonwealth's generalized concern for retention of records, applicable to all defendants, is not a sufficient basis for denying an expunction petition ... nor is the retention of records to inhibit further crimes of the same sort a compelling reason." **Commonwealth v. McKee,** 357 Pa. Super. 332, 337, 516 A.2d 6, 9 (1986) (citations omitted), **appeal denied,** 515 Pa. 575, 527 A.2d 537 (1987). "A judge's conclusion at the preliminary hearing that the Commonwealth had presented a **prima facie** case at that time is not dispositive of the issue to expunge." **Id.** at 337, 516 A.2d at 8. Further, a guilty plea to a lesser charge does not necessarily imply a defendant's guilt to other charges that have been dropped and does not, by itself, shift the burden of proof to the defendant. **See Lutz,** 788 A.2d at 999.[8] Moreover, beyond the particular reasons proffered by a defendant for why his criminal records should be expunged, the court may take judicial notice of the potential harm an individual may suffer as a result of the Commonwealth's retention of an arrest record. **See McKee, supra** at 339, 516 A.2d at 10.

Because the Defendant requests expungement of the record information of charges which never went to trial, the law requires that we balance the competing interests of the Commonwealth and those of the Defendant. In doing so, we note first that this case, like **Commonwealth v. Maxwell,** 737 A.2d 1243 (Pa. Super. 1999), concerns a plea agreement in which the Defendant pled guilty to some charges and the remaining charges were **nolle prossed.** In **Maxwell,** the Superior Court concluded that notwithstanding a guilty plea to related charges involving the same incident, the trial court had the authority to expunge the record of those charges which were **nolle prossed. See id.** at 1245. Because the trial court

[8] However, where a defendant pleads guilty to a greater offense and seeks to expunge the record of lesser included offenses, the result will likely be different since the plea to the greater offense necessarily implies full culpability to the lesser-included offenses. **See Commonwealth v. Lutz,** 788 A.2d 993, 1000-1001 (Pa.Super. 2001).

had not done so, the Superior Court remanded the case to the trial court for a hearing as outlined in **Wexler. See id.**

Here, the Defendant is fifty-eight years old, he has no prior criminal record and his employment history has been exemplary. The Defendant's conduct on the date of the offense was uncharacteristic: the circumstances which resulted in the charges against the Defendant arose when the Defendant decided to confront several individuals who he believed had attacked his son. Unfortunately, the situation turned violent, leading to charges against both the Defendant and his son.

Although the short period of time between his arrest and the filing of his request for expungement mitigates against expungement, **Commonwealth v. Persia,** 449 Pa. Super. 332, 337, 673 A.2d 969, 972 (1996), it is also relevant that the Defendant was successfully terminated early from probation. The Commonwealth has offered no specific reasons for retaining the criminal record nor argued against expungement. **See Wexler, supra** at 331, 431 A.2d at 880-81 (holding that the Commonwealth did not meet its burden of showing why retention of the arrest record was necessary where it failed to provide any analysis of Wexler's particular case or cite any special facts justifying retention of the record). Moreover, the Commonwealth's withdrawal of the charges by **nolle prosequi** represents an admission that there was insufficient evidence to proceed with prosecution. **See Lutz, supra,** 788 A.2d at 999-1001.[9] The Defendant's evidence further demonstrated that he has been a law-abiding citizen for more than fifty years and that his arrest record on the **nolle prossed** charges, in particular for the felony charge of criminal conspiracy, has prevented him from obtaining employment. These circumstances, together with our recognition that the Commonwealth's retention of an arrest record in and of

[9] "A **nolle prosequi** is a voluntary withdrawal by the prosecuting attorney of proceedings on a particular bill or information, which can at anytime be retracted to permit revival of proceedings on the original bill or information." **Lutz, supra,** 788 A.2d at 999. The implicit admission in a **nolle prosequi** that the Commonwealth cannot sustain its burden of proof makes a **nolle prosequi** qualitatively different from a dismissal pursuant to a plea agreement which is "most often entered into for prosecutorial or judicial economy, or due to the request of the victims." **Id.** at 1001.

itself may cause serious harm to an individual, convince us that the Defendant is entitled to have his arrest record related to the charges which were **nolle prossed** expunged.

The Defendant's motion for partial expungement requests that criminal information related to the charges **nolle prossed** be expunged pursuant to the provisions of the Criminal History Record Information Act (CHRIA or Act), 18 Pa. C.S.A. §§9101-9183. In granting this request, we believe it important to comment briefly on what this information consists of. The CHRIA provides for the "collection, compilation, maintenance and dissemination of criminal history record information by [criminal justice agencies]." 18 Pa. C.S.A. §9102 (Definitions). The Act also sets forth the process by which a person may expunge criminal record history information. 18 Pa. C.S.A. §9122 (Expungement).

Contrary to popular belief, expungement does not require the wholesale expungement of documents, regardless of what information they contain, or the destruction of documents or information. Instead, expungement involves the removal of some, not necessarily all, criminal record information. "Criminal History Record Information" is defined in the CHRIA as:

> Information collected by criminal justice agencies concerning individuals, and arising from the initiation of a criminal proceeding, consisting of identifiable descriptions, dates and notations of arrests, indictments, informations or other formal criminal charges and any dispositions arising therefrom. **The term does not include intelligence information, investigative information ... or information and records specified in Section 9104 (relating to scope).**

18 Pa. C.S.A. §9102 (emphasis added). "Expunge" is defined as:

> (1) To remove information so that there is no trace or indication that such information existed;
>
> (2) To eliminate all identifiers which may be used to trace the identity of an individual, allowing remaining data to be used for statistical purposes ... .

Id.

As is evident from its definition, "criminal history record information" expressly excepts certain types of information from

expungement, including investigative and intelligence information.[10] As recently stated by the Commonwealth Court in **Zappala:**

> [A]ll 'criminal history record information' is assembled as a result of the performance of inquiries into criminal conduct. What distinguishes 'criminal history record information' from 'investigative information' is that the former arises from the initiation of a criminal proceeding, **i.e.,** an arrest, whereas the latter is composed of information assembled as a result of the performance of an inquiry into a crime that is still under investigation.[FN8]
>
> [FN8] Thus, once there has been an arrest and the criminal proceedings have begun, information about a case becomes 'criminal history record information' to the extent that it falls within the statutory definition. In other words, the initiation of criminal proceedings does not necessarily transform all 'investigative information' into 'criminal history record information.' As indicated above, 'criminal history record information' includes only: (1) identifiable descriptions; (2) dates and notations of arrests; (3) the criminal charges; and (4) dispositions.

Id., 987 A.2d at 195 (emphasis omitted). Therefore, after the initiation of criminal proceedings, only that investigative information which falls within one of these four categories becomes criminal history record information expungeable under the CHRIA. **See id.**

The order of expungement which accompanies this opinion is intended to comply with the CHRIA. Accordingly, it does not direct the expungement or destruction of all documents pertaining to the arrest or prosecution of the Defendant for the charges **nolle prossed,** or of public records, including hearing transcripts, filed with the court,[11] but directs only the expungement of criminal his-

[10] "Intelligence information" concerns the "habits, practices, characteristics, possessions, associations or financial status of any individual compiled in an effort to anticipate, prevent, monitor, investigate or prosecute criminal activity." 18 Pa. C.S.A. §9102 (Definitions).

"Investigative information" is "assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing and may include **modus operandi** information." **Id.**

[11] **See** 18 Pa. C.S.A. §§9104, 9122(e) (relating to the scope of public records that shall not be expunged). Section 9122(e) prohibits the expungement of public

tory record information relating to the charges which were **nolle prossed. Cf. Zappala, supra** (where the court signed two standardized, pre-printed expungement orders, which, on their face, were overbroad, but were upheld on appeal because the appellant did not show that the court intended to disregard the governing statutes nor did he show that the Commonwealth did not expunge in accordance with the governing statutes); **see also,** Pa. R.Crim.P. 722 (Contents of Order for Expungement).

CONCLUSION

The presumption of innocence, as a matter of law, is perhaps the greatest protection an accused has in defending against criminal charges, yet, by itself, it is insufficient to overcome the very real disadvantages which often follow one who has been arrested and prosecuted on charges which, for a variety of reasons, do not result in a guilty verdict. Whether the person has been unjustly charged or whether an innocent person's character has been unfairly impugned is often unclear; however, in an attempt to at least set the record straight, the law, through expungement, provides a means for a person so accused to remove specific criminal information from his records. Moreover, in these proceedings, which are civil in nature, the accused enters with a decided advantage: the burden is upon the Commonwealth to establish a legitimate, compelling interest for retention of the record, failing which the record must be expunged.

In the instant case, the Commonwealth has offered no evidence. It has made no argument against expungement and has

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records listed in Section 9104(a). Section 9104(a) identifies the following public records which are exempt from expungement:

> (1) Original records of entry compiled chronologically, including, but not limited to, police blotters and press releases that contain criminal history record information and are disseminated contemporaneous with the incident.
>
> (2) Any documents, records or indices prepared or maintained by or filed in any court of this Commonwealth, including but not limited to the minor judiciary.
>
> (3) Posters, announcements, or lists for identifying or apprehending fugitives or wanted persons.
>
> (4) Announcements of executive clemency.

18 Pa. C.S.A. §9104(a).

failed to carry its burden to justify retention of the record information of the **nolle prossed** charges. Defendant, who has no obligation to prove that he has suffered any specific harm, but has done so, is, therefore, entitled to have his record expunged as requested.

ORDER

AND NOW, this 6th day of April, 2010, upon consideration of the within Petition and motion of Glenn Matthew Goodge, Esquire, Attorney for Defendant, it is hereby ORDERED and DECREED that the criminal history record information relating to the arrest(s) detailed herein, be expunged in accordance with the provisions of the Criminal History Information (C.H.R.I.) Act, 18 Pa. C.S. §§9101, **et seq.,** as directed on the reverse hereof:

Defendant's Name: Micael S. George, Sr.

Date of Birth: 12/08/51

SSN: ***-**-****

OTN: K5310063-1

DJ Docket No.: CR-0000291-06

Magisterial Dist. No.: 56-3-01

Common Pleas Docket No.: CP-13-CR-0000057-2007

Incident No.: T08-8017414

Charges: Simple Assault, Criminal Conspiracy to Commit Aggravated Assault, Reckless Endangerment of another Person and Disorderly Conduct.

Date of Filing: 10/17/06

Disposition: Negotiated guilty plea to lesser included charge of conspiracy to simple assault, for which no expungement is being sought.

Reason for Expungement: The presence of the aforesaid records in the files of those agencies hereafter stated will be harmful to Defendant's earnings and status in the community.

Clerk to Serve Order On:

X Arresting Police Agency	X PSP Central Repository
X Issuing Authority	___ Defendant or counsel
X District Attorney	_____

IT IS SPECIFICALLY ORDERED THAT:

1. The Clerk of Courts—Criminal for Carbon County shall:

a: Serve one copy of the within Order on the defendant or defendant's counsel;

b. Serve certified copies of the within Petition and Order upon the arresting police agency, the Pennsylvania State Police Central Repository, and, if this Order involves expungement of a case or cases finalized in the District Justice Courts (where there was a dismissal, discharge or other final disposition at the District Justice level, and no bind-over or appeal to, or other disposition in a court of record), one copy of the Petition and order for service upon the proper issuing authority or authorities;

c. Serve one copy of the said Petition and Order on the Attorney for the Commonwealth; and

d. Note the impingement on the records of the within case(s), if the case(s) were finally disposed of in the Court of Common Pleas.

2. The arresting police agency, upon receipt of a certified copy of the within Petition and Order from the Clerk of Courts shall:

a. Note the impingement on the records of the within case(s) maintained by their Department, and expunge from any local RAP sheets or their equivalent maintained by said police agency any reference to the within case(s); and

b. Within thirty (30) days of receipt of this Petition and order, file with the Clerk of Courts—Criminal for Carbon County, verification that paragraph 2 of this Order has been complied with.

3. The Pennsylvania State Police Central Repository, upon receipt of a certified copy of the within Petition and Order from the Clerk of Courts shall:

a. Expunge their records in accordance with this Order;

b. As required by the Criminal History Record Information Act, 18 Pa. C.S. §9122(d), "notify all criminal justice agencies which have received the criminal history record information to be expunged" of this expungement order; and

c. Within thirty (30) days of receipt of this Petition and Order, file with the Clerk of Courts—Criminal for Carbon County, a verification that paragraph 3 of this Order has been complied with.

4. The Attorney for the Commonwealth and any issuing authority, upon receipt of this Petition and Order shall note the expungement on the records of their offices, if any, relating to the case(s).

IN ACCORDANCE WITH THE C.H.R.I. ACT, NOTHING IN THIS ORDER SHALL BE CONSTRUED TO REQUIRE:

A. The expungement of public records which are exempt from expungement by 18 Pa. C.S. §9104(e), namely, "[o]riginal records of entry compiled chronologically, including but not limited to, police blotters and press releases that contain criminal history record information and are disseminated contemporaneous with the incident", "[a]ny documents, records or indices prepared or maintained by or filed in any court of the Commonwealth, including but not limited to the minor judiciary", "[p]osters, announcements, or lists for identifying or apprehending fugitives or wanted persons", or "[a]nnouncements of executive clemency." 18 Pa. C.S. §9104(a).

B. The expungement of non-criminal history record information which is exempt from expungement by 18 Pa. C.S. §9102, namely, intelligence information (defined in 18 Pa. C.S. §9102 as "[i]nformation concerning the habits, practices, characteristics, possessions, associations or financial status of any individual"), investigative information (defined in 18 Pa. C.S. §9102 as "[i]nformation assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing and may include modus operandi information), including medical and psychological information, or information specified in 18 Pa. C.S. §9104". (Other than as specified in 1, above, this includes: "[c]ourt dockets, police blotters [including any reasonable substitute therefor] and information contained therein").

C. The expungement of information required or authorized to be kept by the prosecuting attorney, the central repository and the court by 18 Pa. C.S. §9122(c), relating to diversion or pre-conviction probation programs such as Accelerated Rehabilitative Disposition.

KATHLEEN REHBEIN and the PENNSYLVANIA ASSOCIATION OF SCHOOL RETIREES, Appellants vs. PENNSYLVANIA OFFICE OF OPEN RECORDS and the PANTHER VALLEY SCHOOL DISTRICT, Appellees

Civil Law—Right-To-Know Law (RTKL)—Status of a Retired Employee's Home Address—Public Benefits/Right of Privacy—Personal Security Exception to Disclosure—Judicial Order Exception to Disclosure

1. Under the Right-to-Know Law (RTKL), the trial court's review of a final determination by the Office of Open Records (OOR) is **de novo.** The record on review consists of the request, the agency's response, the appeal filed with the OOR, the hearing transcript, if any, and the final written determination of the appeals officer, all of which may be supplemented through a hearing before the reviewing court.

2. The RTKL is remedial legislation designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions.

3. Under the RTKL, information in the possession of a Commonwealth or local agency is presumed to be a public record, accessible and available to the public, unless one of several statutory exceptions apply.

4. The personal security exception contained in Section 708(b)(1)(ii) of the RTKL, creates a privacy exception to RTKL's general rule of disclosure.

5. Under the personal security exception to disclosure, an individual's right to privacy must be balanced by the public benefits that would result from disclosure. Because the disclosure of a person's home address is not intrinsically physically harmful, where neither the requestor nor the agency presents evidence from which the Court can ascertain and balance any particular potential impairment to personal security against any legitimate public interest, the statutory presumption in favor of disclosure prevails.

6. Under the RTKL, for a person's home address to be kept confidential, evidence must be presented showing the existence and extent of potential harm which might result from disclosure, which harm must create a "substantial and demonstrable risk of physical harm to or the personal security of an individual."

7. In addition to the RTKL's personal security exception to disclosure, the RTKL further provides that information barred by judicial order or decree from being released is not a public record.

8. In construing the order of an appellate court enjoining the release of the home addresses of public school employees pursuant to the RTKL, deference to the order of a superior tribunal bars a lower court from ignoring the language of an order which one party contends is overbroad. Instead, the appellate court itself must be the source of the clarification and distinction sought.

NO. 09-3310

AMY C. FOERSTER, Esquire—Counsel for Appellants.

ROBERT T. YURCHAK, Esquire—Counsel for Appellee Panther Valley School District.

MEMORANDUM OPINION

NANOVIC, P.J.—May 5, 2010

PROCEDURAL AND FACTUAL BACKGROUND

The Pennsylvania Association of School Retirees ("Association") is a non-profit organization whose membership consists of former public school employees. Its primary purpose is to promote the interests and welfare of its members through educational and social opportunities, to improve public education, and to provide community service through member participation.

On July 31, 2009, Kathleen Rehbein on behalf of the Association filed a request under Pennsylvania's Right-to-Know Law ("RTKL"), 65 P.S. §§67.101-67.3104, with the Panther Valley School District ("District") to obtain copies of public records showing the names and addresses of all individuals who retired from the District between 2004 and the time of the request. In response, the District provided the names of twenty-nine retirees. Their home addresses were not provided because the District believed it was prohibited by a recent court order from releasing this information.

The order referred to was one entered by Senior Judge Rochelle S. Friedman of the Commonwealth Court on July 28, 2009, in the case of **Pennsylvania State Education Association, et al. v. Commonwealth, Department of Community and Economic Development, Office of Open Records, et al., infra** (hereinafter referred to as **PSEA**), No. 396 MD 2009. Therein, Judge Friedman ordered verbatim:

> (1) The release of the home addresses of all public school employees is hereby stayed until further order of this court;
>
> (2) The Office of Open Records is enjoined from directing the release of the home addresses of public school employees pursuant to the Right-to-Know Law until further order of this court; and
>
> (3) The Office of Open Records is directed to take all reasonable steps necessary to notify public school districts of the Commonwealth of the existence of this litigation and that the release of employee home addresses is stayed until further order of this court.

The order, in the form of a preliminary injunction, further stated that an opinion would follow. That opinion is reported at 981 A.2d 383 (Pa. Commw. 2009).

On August 26, 2009, the Association appealed the District's denial to the Pennsylvania Office of Open Records ("OOR") contending that the injunction in **PSEA** prohibits only "the release of home addresses for **current** public school employees, and not [the] addresses for retirees." (Petition for Review, Exhibit D (emphasis added)). The OOR, while in disagreement with the **PSEA** Court's conclusion that an employee's privacy interest in his home address outweighs the public interest in disclosure, nevertheless determined that absent clarification from the Commonwealth Court as to the meaning of the term "employees",[1] it was bound by the injunction issued by Judge Friedman. **See Rehbein v. Panther Valley School District,** OOR Dkt. AP 2009-758; **see also,** 65 P.S. §67.102 (a record is not public if its release is prohibited by judicial order or decree). On November 2, 2009, the Association filed its Petition for Review appealing the final determination of the OOR to this Court.[2] A hearing on the appeal was held on February 4, 2010.[3]

DISCUSSION

At the outset it is important that we put the issue before us in proper context. "The intent of the RTKA is to allow individuals and entities access to public records to discover information about the workings of government, favoring transparency and public access regarding any expenditure of public funds." **Pennsylvania State University v. State Employees' Retirement Board,** 594 Pa.

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[1] The OOR was unable to determine whether Judge Freidman's reference to all employees was limited only to current acting employees or also included former employees who are now retired.

[2] On November 23, 2009, we granted the Association's motion for leave to file its petition for review **nunc pro tunc.** This motion was not opposed by the appellees.

[3] In **Bowling v. Office of Open Records,** 990 A.2d 813 (Pa. Commw. 2010), the court determined that "a reviewing court, in its appellate jurisdiction, independently reviews the OOR's orders and may substitute its own findings of fact for that of the agency." **Id.** at 818. The record reviewed "consists of the request, the agency's response, the appeal filed with the OOR, the hearing transcript, if any, and the final written determination of the appeals officer." **Id.** at 816. In conducting its review, the RTKL allows the reviewing court to supplement the record through hearing, as was done here, or remand. **See id.** at 820. Accordingly, as the reviewing court in this case, our review is of the broadest scope and is independent in nature; we are not limited to the rationale set forth in the OOR's written decision. **See id.**

244, 935 A.2d 530, 533 (2007).[4] From this perspective, the broad issue is whether the RTKL provides any protection against the disclosure of sensitive personal information possessed by a public agency. The specific issue in this case is whether the RTKL requires public disclosure of a retired school employee's home address.

To answer these questions, we begin with the language of the RTKL itself. Section 102 of the RTKL defines the term "record" as:

> Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document.

65 P.S. §67.102. The RTKL further defines a "public record" as:

> A record, including financial record, of a Commonwealth or local agency that:
>
> (1) is not exempt under section 708;
>
> (2) is not exempt from being disclosed under any other Federal or State law or regulation or **judicial order or decree;** or
>
> (3) is not protected by a privilege.

65 P.S. §67.102 (emphasis added). Under the RTKL, information in the possession of a Commonwealth or local agency is presumed to be a public record, accessible and available to the public, unless one of these exemptions applies. 65 P.S. §67.305(a). The purpose of the RTKL further requires that the exemptions be construed narrowly. **See Bowling v. Office of Open Records, supra,** 990 A.2d at 824 (Pa. Commw. 2010).

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[4] The current Right-to-Know Law, 65 P.S. §§67.101-67.3104, enacted February 14, 2008, and effective January 1, 2009, repealed the former Right-to-Know Act (RTKA), 65 P.S. §§66.1-66.9. In this opinion, we distinguish between the two by referring to the current version of the statute as the RTKL, and the repealed law as the RTKA. Although **Pennsylvania State University** was decided under the former law, we believe the intent behind both statutes is the same. **See Bowling, supra,** 990 A.2d at 824 ("the [RTKL] is remedial legislation designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions").

The Section 708 Exemption

Section 708(b) of the RTKL lists thirty separate types or categories of information exempt from disclosure. 65 P.S. §67.708(b). Relevant to this discussion are the following exemptions limiting access to publicly held information:

> (1) A record, the disclosure of which:
>
> (i) ... .
>
> (ii) would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual.
>
> * * *
>
> (6) (i) The following personal identification formation:
>
> (A) A record containing all or part of a person's Social Security number, driver's license number, personal financial information, home, cellular or personal telephone numbers, personal e-mail addresses, employee number or other confidential personal identification number.
>
> (B) A spouse's name, marital status or beneficiary or dependent information.
>
> (C) The home address of a law enforcement officer or a judge.
>
> * * *
>
> (30) A record identifying the name, home address or date of birth of a child 17 years of age or younger.

65 P.S. §67.708(b)(1)(ii), (6)(i), and (30).

As is evident from the foregoing, the only express reference to protecting an individual's home address from disclosure is with respect to law enforcement officers, judges, and minors. By themselves, these express references imply the exclusion of all others thereby, in this case, favoring disclosure. **See Commonwealth v. Ostrosky,** 866 A.2d 423, 430 (Pa. Super. 2005), **affirmed,** 909 A.2d 1224 (Pa. 2006). Section 708(e) of the RTKL instructs, however, that we should not confine ourself to a single exemption but must consider and apply each exemption separately. 65 P.S. §67.708(e).

In this regard, the exemption at Section 708(b)(1)(ii), like that under the former law, creates a personal security exemption from disclosure. It is not dependent on the status of the person as

a current or former employee. Because the term "personal security" which appears in the RTKL was also used in the RTKA, and acquired a special meaning thereunder, we review the earlier cases interpreting this language for a better understanding of the present statute. **See** 1 Pa. C.S.A. §1922(4) (in ascertaining legislative intent, it is presumed that when the Pennsylvania Supreme Court has construed statutory language, and that language is not changed in subsequent versions of the statute, the legislature "intends the same construction to be placed upon such language").

In **Rowland v. Commonwealth, Public School Employees' Retirement System,** 885 A.2d 621 (Pa. Commw. 2005), the Association[5] requested the names, addresses, dates of birth, and various employment-related information with respect to every member of the Public School Employees' Retirement System ("PSERS") receiving annuity benefits. PSERS denied the request for address and date of birth information on the basis that such information was not a "public record" under the definition of that term contained in Section 1 of the RTKA, 65 P.S. §66.1. Under the RTKA, "public record" was defined to be:

> Any account, voucher or contract dealing with the receipt or disbursement of funds by an agency or its acquisition, use or disposal of services or of supplies, materials, equipment or other property and any minute, order or decision by an agency fixing the personal or property rights, privileges, immunities, duties or obligations of any person or group of persons: Provided, [t]hat the term 'public records' ... shall not include any record, document, material, exhibit, pleading, report, memorandum or other paper, access to or the publication of which is prohibited, restricted or forbidden by statute law or order or decree of court, or which would operate to the prejudice or impairment of a person's reputation or personal security ... .

65 P.S. §66.1.

In examining this definition, the Commonwealth Court observed that the language of the Act "requires disclosure of a

[5] In **Rowland,** as here, the request for information was at the behest of the Pennsylvania Association of School Retirees. Richard Rowland, whose name appears in the caption, and who also testified in the proceedings before us, is the executive director of the Association.

broad range of official information, but ... balances the need for public access to such information against the need to maintain the confidentiality of specific types of otherwise public information." **Rowland, supra,** 885 A.2d at 626. The Court further noted that the above-quoted language contains two express exceptions to the disclosure of publicly-held information. The exceptions "prohibit disclosure of any record, document or material, where disclosure is (1) prohibited by statute [or order or decree of court] or (2) would operate to the prejudice or impairment of a person's reputation or personal security." **Id.** at 627. The Court held that both exceptions barred the disclosure of the requested information on employees' addresses and dates of birth to the Association.

As to the first exception, the Court held that Section 8502(i) of the Public School Employees' Retirement Code, 24 Pa. C.S.A. §8502(i), imposes an affirmative duty on PSERS to protect its members' right to privacy and confidentiality, which includes keeping confidential their addresses and dates of birth. **See id.** at 628. More important to the issue before us, the Court also held that the personal security and reputation exception contained in the former law created "a privacy exception to the Right-to-Know Law's general rule of disclosure." **Id.** This right of privacy arises out of the "personal security" exception and is not distinct from it. **See id.** at 628 n.11; **Pennsylvania State University, supra,** 935 A.2d at 538 ("The RTKA accounts for the individual's right to privacy by excluding from the definition of 'public record' 'any record, document, material, exhibit, pleading, report, memorandum or other paper, ... which would operate to the prejudice or impairment of a person's reputation or personal security.' ").[6]

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[6] In **Whalen v. Roe,** the United States Supreme Court held that the right to privacy extends to both "the individual interest in avoiding disclosure of personal matters, and ... the interest in independence in making certain kinds of important decisions." 429 U.S. 589, 599-600 (1977) (citations omitted). Our state constitution, as well, under Article 1, Sections 1 and 8, recognizes and guarantees the right to privacy. **See Denoncourt v. Commonwealth State Ethics Commission,** 504 Pa. 191, 197, 470 A.2d 945, 948 (1983). These provisions are a factor to be taken into account in statutory construction. 1 Pa. C.S.A. §1922(3) (in ascertaining legislative intent, it is presumed that the legislature "does not intend to violate the Constitution of the United States or of this Commonwealth").

The scope of the right to privacy independently grounded in the Constitution is broader and deeper than that encompassed within the personal security

The right of privacy in the RTKA is not absolute: "When analyzing this exception we apply a balancing test, weighing the privacy interests, and the extent to which they may be invaded, against the public benefits that would result from disclosure." **Rowland, supra,** 885 A.2d at 629; **see also, Pennsylvania State University, supra,** 935 A.2d at 538 ("The appropriate question is whether the records requested would potentially impair the reputation or personal security of another, and whether that potential impairment outweighs the public interest in the dissemination of the records at issue.").[7]

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exception. In this case, however, no argument has been made that the personal security exception, as interpreted by our courts, is too narrow and, in consequence, is constitutionally invalid.

[7] In **Pennsylvania State University v. State Employees' Retirement Board,** 594 Pa. 244, 935 A.2d 530 (2007), the Supreme Court concluded its discussion with the following significant statement:

> For clarity's sake, we now hold, as stated above, that where privacy rights are raised as a bar to disclosure of information under the RTKA, our courts must determine whether the records requested would potentially impair the reputation or personal security of another, and must balance any potential impairment against any legitimate public interest. ... The issue of whether a particular disclosure is intrinsically harmful may be relevant in determining the weight of any privacy interest at stake for purposes of conducting the appropriate balancing test, as indeed intrinsic harmfulness may affect the reasonableness of any privacy expectation. Intrinsic harmfulness, however, may not be regarded as the sole determining factor in the privacy analysis. Our courts may not forgo the balancing of interests where privacy rights and public interest conflict.

Id., 935 A.2d at 541 (citation omitted). "To be intrinsically harmful, the requested record must itself operate to impair the personal security of another, and not merely be capable of being used with other information for harmful purposes." **Buehl v. Pennsylvania Department of Corrections,** 955 A.2d 488, 491 (Pa. Commw. 2008).

Under the balancing test, the court balances the public interest purpose for disclosure of personal information against the potential invasion of individual privacy. In **Buehl,** where a state inmate sought documents that would explain the Department of Correction's definition of "inclement weather" contained in Section 1 of the Prison Exercise Act, 61 P.S. §101, the public purpose was "the public interest in ensuring that the Department complies with its statutory mandate in Section 1 of the Prison Exercise Act to provide prisoners at SCI-Smithfield with two hours of outdoor yard time each day." **Id.,** 955 A.2d at 493. In **Sapp Roofing Company, Inc. v. Sheet Metal Workers' International Association, Local Union No. 12,** 552 Pa. 105, 713 A.2d 627 (1998), where a labor union requested access to the payroll records of a school district for the stated purpose of ensuring the school district's compliance with the Prevailing Wage Act, this public purpose

In applying the exception to the facts before it, the **Rowland** court began with the generally accepted premise that "a person has a privacy interest in his or her home address." **Id.,** 885 A.2d at 628. Having thus determined that the information sought implicated a privacy interest, in weighing that interest against the public benefits of disclosure the court found that all of the reasons for disclosure put forth by the Association—"that the Association offers its members, retirees and the public at large significant benefits, such as 'services, advocacy, volunteer opportunities, discounts and many other advantages'"—are benefits that ultimately inure to the members of the Association, not to the public at large. **See id.** at 629 ("The real benefit is to the Association itself, which has an interest in sustaining its own existence through recruitment of new members."). Finding that no public benefits were identified against which to balance the privacy interests of PSERS' members, and having previously noted that the burden is upon the requester to establish that the requested documents are "public records", the court held that the balance tipped "easily in favor of non-disclosure of the requested information." **Id.** at 629-30.

In the instant proceedings, the evidence of record appears similar to that which existed in **Rowland.** The Association has set forth the same reasons for disclosure as it did in **Rowland,** including its own privacy policy which limits the dissemination of information it receives. As in **Rowland,** these reasons, while beneficial to the Association, are not public benefits to be weighed as part of the balancing test.[8] Conversely, while the District has identified the

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justified the release of the wage information requested. However, other personal information contained in the payroll records (names, addresses, social security numbers, and phone numbers) bore no relationship to this public purpose, nor furthered any other public interest, and, because its release would have infringed upon the individual employees' privacy rights, was required to be redacted from the payroll records prior to their release to the labor union. **See Buehl, supra,** 955 A.2d at 493 (summarizing the holding of **Sapp Roofing**).

[8] As noted by the **Rowland** court, the private purpose for which documents will be used is irrelevant to the balancing test. **See Rowland, supra,** 885 A.2d at 629. The RTKL treats all requesters equally; if the Association is entitled to receive the information, any member of the public is likewise entitled to receive this information, regardless of the purpose for the request. **See id.; Penn State University, supra,** 935 A.2d at 537 ("When the media requests disclosure of public information from a Commonwealth agency pursuant to the RTKA, the requester then stands in the shoes of the general public, which has the right to know such information."); **see also,** 65 P.S. §§67.302(b), 67.703.

existence of a privacy interest to be balanced—the expectation of privacy in one's home address—other than pointing out that such an interest exists, it has presented no evidence that disclosure will cause, or would be likely to cause, any particular or peculiar harm to any of its retirees.

There is nothing intrinsically physically harmful in releasing the names and addresses of state retirees. **See Mergenthaler v. State Employes Retirement Board,** 33 Pa. Commw. 237, 245, 372 A.2d 944, 947-48 (1977).[9] Indeed, the names and addresses of individuals are routinely compiled and disseminated in a public telephone directory. Nor is this a case where the release of home addresses, coupled with the release of other personal information, combines to jeopardize the personal security of school retirees. **See e.g., Tribune-Review Publishing Company v. Allegheny County Housing Authority,** 662 A.2d 677, 684 (Pa. Commw. 1995), **appeal denied,** 546 Pa. 688, 686 A.2d 1315 (1996); **Buehl, supra,** 955 A.2d at 492 n.9. Instead, the District's position appears to be that absent proof to the contrary, as was the case in **Rowland,** the potential harm which might result from the release of a home address precludes its disclosure.

This position, however, ignores two significant changes in the law which exist between the RTKA and the RTKL that affect the personal security exception. First, at the time **Rowland** was decided, the burden was upon the requester to establish that the document requested was a public record. **See id.,** 885 A.2d at 627. Under the current RTKL, information possessed by a local agency is presumed to be a public record; the burden is upon the local agency to prove to the contrary. 65 P.S. §§67.305(a), 67.708(a)(1).

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[9] In **Mergenthaler v. State Employes Retirement Board,** 33 Pa. Commw. 237, 372 A.2d 944 (1977), the Court held that disclosure of the names and addresses of retired state employees would not impair the employees' personal security. At the time **Mergenthaler** was decided, personal security was considered to be distinct from personal privacy; the term personal security was then understood to mean "freedom from harm, danger, fear or anxiety." **Id.** at 242, 372 A.2d at 947. Also, unlike today, the law at the time of the **Mergenthaler** decision required that "for records to fall within the personal security exception they must be intrinsically harmful and not merely capable of being used for harmful purposes." **Id.** at 244, 372 A.2d at 947. Consequently, while **Mergenthaler** is no longer good law overall, its reasoning, given the then-accepted meaning of the personal security exception, supports the conclusion that the release of the names and addresses of retired state employees is not intrinsically physically harmful.

Second, in order to bar disclosure, the RTKL expressly requires that disclosure of the home address will likely create a "substantial and demonstrable risk of physical harm to or the personal security of [the retiree]." 65 P.S. §67.708(b)(1)(ii). Given this statutory design, where neither party presents evidence from which the court can ascertain and balance any particular potential impairment to personal security against any legitimate public interest, the statutory presumption prevails.[10]

The Judicial Order or Decree Exemption

The RTKL provides that information is not a public record if it is barred by judicial order or decree from being released. It is on this basis that both the OOR and the District denied the Association's request for the home addresses of retired public school employees.

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[10] Were the privacy interests in a person's home address sufficient **per se** to overcome this presumption, the exceptions relating to the home addresses of law enforcement, judges, and minors would be meaningless, and the need to prove the existence and extent of potential harm under the personal security exception would be eliminated. This, of course, would be contrary to fundamental principles of statutory construction, especially where good reasons are readily ascertainable in support of the exceptions. 1 Pa. C.S.A. §1922(2) (in ascertaining legislative intent, it is presumed that the legislature "intends the entire statute to be effective and certain"). Balancing must occur on a case-by-case basis, examining in each case the evidence presented and the privacy interests and public benefits at stake; it cannot occur on an **a priori,** generalized, and non-specific basis.

Nor does the conclusion we reach impugn Judge Friedman's opinion in **Pennsylvania State Education Association, et al. v. Office of Open Records, et al., supra** (hereinafter referred to as **PSEA**). Each case is dependent on its facts and the record before the court. In **PSEA,** Judge Friedman expressly noted that the "[e]mployees presented testimony establishing a privacy interest in their home addresses, whereas the Commonwealth presented no evidence regarding its interest in disclosing [e]mployees' addresses to the public." **Id.,** 981 A.2d at 386. Here, no evidence has been presented on behalf of any of the retirees whose addresses the Association seeks to obtain.

We believe it is also appropriate to note that none of the cases cited by Judge Friedman holding that the benefits of public disclosure of home addresses are outweighed by an individual's privacy interest in his or her address was decided under the RTKL. All were decided under the RTKA which places the burden of proving the public benefits of disclosure on the requester. In reversing this presumption, absent evidence to the contrary, the RTKL places the public interest in favor of disclosure over the private interest against release of such information.

Finally, as the decision of one judge, the opinion in **PSEA** is not binding upon us. 210 Pa. Code §67.55 (providing that "[a] single-judge opinion, even if reported, shall be cited only for its persuasive value, not as binding precedent.").

Judge Friedman's order of July 28, 2009, states in broad terms that "the release of the home addresses of all public school employees is hereby stayed until further order of this court" and requires that all public school districts within this Commonwealth be notified of this stay. While the Association asks that we construe this order narrowly because a preliminary injunction "must be narrowly tailored to address the wrong pled and proven," we are not aware of any authority that permits us as a trial court to narrowly interpret an order of an appellate court granting a preliminary injunction. **See** Appellants' Post-Hearing Brief, p. 4. Nor does the rationale expressed in Judge Friedman's opinion distinguish between active employees and those who are retired. Indeed, the **Rowland** case, cited by Judge Friedman to support the withholding of home addresses, involves retirees and involves the same Association with which we now deal.

The Association argues that because an "employee" is a person who works for and is subject to the control of an employer, whereas a "retiree," at the most basic level, is a person who has stopped working, Judge Friedman's order does not apply to retirees. We understand the logic of this argument, however, we cannot say with any degree of certainty that this distinction was intended by Judge Friedman. On this point, the OOR in examining Judge Friedman's order and opinion stated:

> Neither the Injunction [order] nor the Opinion specifically defines the term 'employee' except to the extent that the Opinion identifies each of the Plaintiffs collectively as 'Employees.' Nor, as suggested by the Requester, did the Injunction or Opinion specify whether the injunction was applicable only to **current** employees. PSEA is a named Plaintiff. PSEA's members include current and retired school employees. **See** PSEA website, http://www.psea.org.
>
> The injunction does not apply only to those school employees that are members of PSEA, but all school employees; therefore, the OOR finds that the injunction also applies to the release of addresses of all retired employees and not just those who are members of PSEA.

OOR Final Determination, pp. 5-6 (citation omitted).[11]

[11] We further note that a true and correct copy of the Pennsylvania State Education Association's Petition for Injunctive Relief in the Commonwealth

As a lower court, we are not free to disregard the lawful orders of a superior tribunal nor may we parse its orders, finding distinctions which may never have been intended, in order to conclude that an order means what we think it should mean. Pa. C.J.C.Canon 2(A) (requiring judges to respect and comply with the law). To do so would be not only presumptuous but an inappropriate trespass upon the province of a higher court. Instead, the Commonwealth Court must be the source of the clarification and distinction the Association asks for.[12] To do otherwise would inevitably lead to disagreement and confusion among our trial courts, each struggling to decipher an intent which is unexpressed. The deference to which Judge Friedman's order is entitled, requires that we, like the OOR, deny the Association's request on this basis.[13]

Court has been attached to the Association's Post-Hearing Brief, together with the Pennsylvania State Education Association's Petition for Review. Therein, the Pennsylvania State Education Association avers that it and the other petitioners have filed their action on behalf of themselves and on behalf of the members of the Pennsylvania State Education Association. (Petition for Review, ¶19.)

[12] **See e.g., Miller v. Berschler,** 423 Pa. Super. 405, 409-410, 621 A.2d 595, 597-98 (1993). The **Miller** court noted that if a higher court's opinion is to be narrowed, it must be done by that higher court. **See id.** at 410, 621 A.2d at 598. **Miller** was overruled on other grounds by **McMahon v. Shea,** 441 Pa. Super. 304, 311, 657 A.2d 938, 941 (1995); however, the **McMahon** court reiterated that judicial decisions are precedental authority for later cases with similar facts and similar questions of law. **See also, L.B. Foster Company v. Charles Caracciolo Steel & Metal Yard, Inc.,** 777 A.2d 1090, 1096 (Pa. Super. 2001) ("a lower tribunal may not disregard the standards articulated by a higher court"); **Commonwealth v. Crooks,** 166 Pa. Super. 242, 244, 70 A.2d 684, 685 (1950) ("It is important that trial courts do not extemporaneously define [terms material to proceedings]. ... The pronouncements of the appellate courts should be followed."); **Sherer v. St. Luke's Hospital,** 19 Monroe L.R. 111 (Pa.Com.Pl. 1957) (a subordinate court is bound by the pronouncements of superior courts, even at the risk of reversal).

[13] In its final determination, the OOR noted that it had asked the Association to extend the deadline for issuance of its final determination until after the Commonwealth Court in **PSEA** issues a decision regarding the public status of school employee home addresses. The Association denied this request. The OOR further noted that the Association, as the requester, holds the sole authority to extend the deadline for issuance of a final determination. 65 P.S. §67.1101(b)(1).

The Privilege Exemption

Finally, the RTKL excludes from the category of a public record, information which is protected by a privilege. For these purposes, privilege is defined within the RTKL as:

> The attorney-work product doctrine, the attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court interpreting the laws of this Commonwealth.

65 P.S. §67.102. No claim has been made that a retiree's home address is protected by any applicable privilege. Accordingly, this exception has no bearing on our decision.

CONCLUSION

The RTKL, like its predecessor, recognizes that when a request is made to disclose private personal information possessed by an agency, the agency is required to weigh the privacy interest involved against the public benefits that would result from disclosure. Unlike the RTKA, however, the RTKL initially presumes, until shown otherwise, that all information held by an agency should be made public. Given this presumption and absent a showing that disclosure of a retiree's home address "would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual," we find that the home address of a retired school employee is a public record under the RTKL. Notwithstanding this finding, because the RTKL provides for the denial of access to records that are exempt from disclosure under a judicial order and because the Commonwealth Court's order of July 28, 2009, appears intended to do just that, the Association's appeal to this court is denied.

COMMONWEALTH OF PENNSYLVANIA vs.
MERRICK STEVEN KIRK DOUGLAS, Defendant

Criminal Law—Post-Trial Motion for Extraordinary Relief—Ineffective Assistance of Counsel—Failure To Provide Notice of Alibi Defense—Reference to Polygraph Testing—Sufficiency of 1925 Statement To Preserve Issues on Appeal

1. An oral motion for extraordinary relief prior to sentencing under Pa. R.Crim.P. 704(B) is neither a substitute for a written post-sentence motion nor a necessary or sufficient predicate to preserve any issue for appeal. Its

use is reserved for exceptional circumstances: to correct errors so manifest and egregious that immediate relief is essential.

2. Claims of ineffective assistance of trial counsel are not the proper subject of a motion for extraordinary relief or a post-sentence motion and must ordinarily await collateral review.

3. A court acts appropriately in excluding alibi evidence from witnesses other than the defendant when proper notice of an alibi defense has not been given.

4. Reference on cross-examination to a Defendant's willingness to take a polygraph test without mention of the polygraph results or even if a polygraph test was given is not reversible error. Reversible error requires that Defendant be prejudiced by such reference and must be evaluated on a case-by-case basis.

5. A 1925(b) statement of errors complained of on appeal which claims as error that "the verdict was against the weight of the evidence" and "the evidence was insufficient to support the guilty verdict" is legally insufficient to identify and preserve any issue for appeal.

NO. 289 CR 2008

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

MARK D. SCHAFFER, Esquire and KENNETH A. YOUNG, Esquire—Counsel for the Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—June 1, 2010

PROCEDURAL HISTORY

On December 9, 2009, following a jury trial, Merrick Steven Kirk Douglas ("Defendant") was acquitted of one count of rape by forcible compulsion[1] and convicted of one count of criminal attempt of rape by forcible compulsion,[2] one count of criminal attempt of aggravated indecent assault by forcible compulsion,[3] one count of criminal attempt of aggravated indecent assault without consent,[4] one count of criminal attempt of sexual assault,[5]

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[1] 18 Pa. C.S.A. §3121(a)(1) (Rape by Forcible Compulsion).

[2] 18 Pa. C.S.A. §901(a) (Criminal Attempt); 18 Pa. C.S.A. §3121(a)(1) (Rape by Forcible Compulsion).

[3] 18 Pa. C.S.A. §901(a) (Criminal Attempt); 18 Pa. C.S.A. §3125(a)(2) (Aggravated Indecent Assault by Forcible Compulsion).

[4] 18 Pa. C.S.A. §901(a) (Criminal Attempt); 18 Pa. C.S.A. §3125(a)(1) (Aggravated Indecent Assault Without Consent).

[5] 18 Pa. C.S.A. §901(a) (Criminal Attempt); 18 Pa. C.S.A. §3124.1 (Sexual Assault).

one count of indecent assault by forcible compulsion,[6] one count of indecent exposure,[7] and one count of unlawful contact with a minor[8] for purposes of indecent assault by forcible compulsion, indecent exposure, and rape by forcible compulsion. These charges stemmed from an incident which occurred at the victim's home on July 10, 2007. On March 25, 2010, Defendant filed a Motion for Extraordinary Relief Pursuant to Pa. R.Crim.P. 704 seeking acquittal on all charges or, in the alternative, a new trial. We denied this Motion on March 26, 2010, and also sentenced Defendant on the same date to not less than seventy-two months and not more than one hundred and forty-four months of incarceration and ordered him to comply with Megan's Law as a sexual offender.[9]

We received Defendant's Notice of Appeal on April 9, 2010, and filed an Order dated April 13, 2010, giving Defendant twenty-one days within which to file a Concise Statement of the Matters Complained of on Appeal. Defendant complied by filing his Pa. R.A.P. 1925(b) statement on April 26, 2010. Defendant asserts the following complaints:

> 1. The Honorable Trial Court erred in denying the Appellant's Motion for Extraordinary Relief;
>
> 2. Trial Counsel was ineffective in representing the Appellant during pretrial matters and at trial; including but not limited to filing a Notice of Alibi Defense and by stating that the Defendant 'did not take the stand', in Trial Counsel's closing Argument;
>
> 3. The Honorable Court erred in not allowing the Defendant's mother to testify, which would have impeached the Complaining Witness in this matter in regard to the time the alleged incident occurred;
>
> 4. The Honorable Court erred in failing to grant a mistrial, when the Investigating Trooper testified to the Jury that the Defendant stated he would take a polygraph test;
>
> 5. The verdict was against the weight of the evidence; and

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[6] 18 Pa. C.S.A. §3126(a)(2) (Indecent Assault by Forcible Compulsion).

[7] 18 Pa. C.S.A. §3127(a) (Indecent Exposure).

[8] 18 Pa. C.S.A. §6318(a)(1) (Unlawful Contact with a Minor).

[9] Defendant's sentences for each convicted count are identical and are to run concurrently.

6. The evidence was insufficient to support the guilty verdict.

We shall now address these assignments of error in conformance with Pa. R.A.P. 1925(a).

DISCUSSION

1. **The Honorable Trial Court Erred in Denying the Appellant's Motion for Extraordinary Relief**

We first note that the filing of a written motion for extraordinary relief is procedurally improper. **See Commonwealth v. Askew,** 907 A.2d 624, 627 n.7 (Pa. Super. 2006), **appeal denied,** 591 Pa. 709, 919 A.2d 954 (2007). Per its plain language, Pa. R.Crim.P. 704(B) directs that a motion for extraordinary relief is to be oral. Pa. R.Crim.P. 704(B) ("(B) Oral Motion for Extraordinary Relief (1) Under extraordinary circumstances, when the interests of justice require, the trial judge may, before sentencing, hear an oral motion in arrest of judgment, for a judgment of acquittal, or for a new trial."). Here, Defendant filed of record a written motion for extraordinary relief on March 25, 2010. While not expressly prohibited, a trial court's hearing of argument on such a motion has previously been deemed "misplaced and clearly disallowed by the Rules of Criminal Procedure." **Askew, supra,** 907 A.2d at 627 n.7.

Furthermore, we note that such motions are "intended to allow the trial judge the opportunity to address only those errors so manifest that immediate relief is essential [...] for example, when there has been a change in case law, or, in a multiple count case, when the judge would probably grant a motion in arrest of judgment on some of the counts post-sentence." Pa. R.Crim.P. 704, Explanatory Comment. No such claims were raised by Defendant.[10] Moreover, it has been repeatedly held that "[t]his Rule was not intended to provide a substitute vehicle for a convicted defendant to raise matters which could otherwise be raised via post sentence motion" and is only to be employed in exceptional circumstances. **See Commonwealth v. Fisher,** 764 A.2d 82, 85 (Pa. Super. 2000), **appeal**

[10] The matters complained of in Defendant's Motion for Extraordinary Relief were as follows: (1) The Commonwealth failed to provide the defense with requested and mandatory discovery; (2) Trial counsel was ineffective in representing Defendant; (3) Trial court errors; (4) The evidence was insufficient to sustain Defendant's conviction; and (5) The verdict was against the weight of the evidence.

denied, 782 A.2d 542 (Pa. 2001); **Commonwealth v. Grohowski,** 980 A.2d 113, 115-16 (Pa. Super. 2009). This is specifically so as it pertains to claims of ineffectiveness of counsel, which Defendant raised therein. **See id.,** 980 A.2d at 116 n.7.

Lastly, we note that motions for extraordinary relief are "neither necessary nor sufficient to preserve an issue for appeal." **Commonwealth v. Woods,** 909 A.2d 372, 378 (Pa. Super. 2006) ("The failure to make a motion for extraordinary relief, or the failure to raise a particular issue in such a motion, does not constitute a waiver of any issue. Conversely, the making of a motion for extraordinary relief does not, of itself, preserve any issue raised in the motion, nor does the judge's denial of the motion preserve any issue." **Id.**), **appeal denied,** 919 A.2d 957 (Pa. 2007). The Rule itself states that "[a] motion for extraordinary relief shall have no effect on the preservation or waiver of issues for post-sentence consideration or appeal." Pa. R.Crim.P. 704(B)(3). Seeing as counsel indicated at the sentencing hearing that the Motion was filed in order to preserve issues for appeal and that rather than pursue those issues under a pre-sentence motion, the issues would be pursued post-sentence, we denied the Motion. In any event, the majority of the issues raised in the Motion for Extraordinary Relief have all been raised again in the matter presently before us and will therefore be addressed on their procedural and/or substantive merits.

2. **Trial Counsel Was Ineffective in Representing the Appellant During Pretrial Matters and at Trial; Including But Not Limited to Filing a Notice of Alibi Defense and by Stating That the Defendant "Did Not Take the Stand", in Trial Counsel's Closing Argument**

The Pennsylvania Supreme Court has expressly held that "as a general rule, a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review." **Commonwealth v. Grant,** 572 Pa. 48, 813 A.2d 726, 738 (2002). The Court further held that "a claim raising trial counsel ineffectiveness will no longer be considered waived because new counsel on direct appeal did not raise a claim related to prior counsel's ineffectiveness." **Id.** Defendant "can raise the claims of ineffectiveness [...] in a [Post-Conviction Relief Act ('PCRA')] petition, wherein the PCRA court will be in a position to ensure that [Defendant] receives an

evidentiary hearing on his claims, if necessary." **Commonwealth v. Grant,** 992 A.2d 152, 154 (Pa. Super. 2010) (declining to address the issue of ineffectiveness of counsel on direct appeal from the trial court). We therefore decline to address the merits of this claim, if any, and suggest that this is not an appropriate basis for appellate relief.

3. **The Honorable Court Erred in Not Allowing the Defendant's Mother To Testify, Which Would Have Impeached the Complaining Witness in This Matter in Regard to the Time the Alleged Incident Occurred**

Defendant's mother, Beverly Hendricks, was in fact permitted to testify. (N.T. 12/08/2009, pp. 239-41, 246-47.) Her initial testimony was stricken from the record per an agreement between counsel at sidebar. (N.T. 12/08/2009, p. 245.) This testimony, relating to the time the incident occurred, was properly stricken from the record because it constituted an alibi defense beyond mere impeachment of a Commonwealth witness, which is not permitted unless proper notice of an alibi defense has been given. Pa. R.Crim.P. 567 (Notice of Alibi Defense); **see also, Commonwealth v. King,** 287 Pa. Super. 105, 109, 429 A.2d 1121, 1123 (1981) (finding that an attempt to introduce testimony regarding the defendant's whereabouts during the asserted time the crime occurred is an alibi defense, which testimony is properly precluded by the trial court when no notice of alibi has been filed); **Commonwealth v. Lyons,** 833 A.2d 245, 257 (Pa. Super. 2003) ("Under these circumstances, the court certainly had discretion to exclude these witnesses. ... Therefore, we see no reason to disturb the trial court's decision to preclude the testimony of these witnesses."), **appeal denied,** 879 A.2d 782 (Pa. 2005). Because no notice of an alibi defense was given, it was not error to exclude a portion of Ms. Hendricks' testimony.

4. **The Honorable Court Erred in Failing To Grant a Mistrial, When the Investigating Trooper Testified to the Jury That the Defendant Stated He Would Take a Polygraph Test**

"[T]he mere mention of a polygraph test does not automatically constitute reversible error." **Commonwealth v. Watkins,** 750 A.2d 308, 315 (Pa. Super. 2000). "Whether a reference to a polygraph test constitutes reversible error depends upon the circumstances of each individual case and, more importantly, whether the de-

fendant was prejudiced by such a reference." **Id.** at 317. Trooper Eric Cinicola mentioned the word "polygraph" during questioning by defense counsel. The allegedly problematic testimony went as follows:[11]

> Q. You did not ask Mr. Douglas for any sample of DNA, correct?
>
> A. That is correct.
>
> Q. Did he not specifically say to you; I will provide you whatever you want?
>
> A. No. I think he said to me he would provide me with a polygraph test.

(N.T. 12/08/2009, p. 198.) It is certain that "the **results** of a polygraph test are inadmissible in Pennsylvania." **Leonard v. Commonwealth,** 125 Pa. Commw. 641, 558 A.2d 174, 177 (1989) (emphasis in original). Furthermore, "the Pennsylvania Supreme Court has declined to overturn convictions in criminal cases where the giving of a polygraph test had been mentioned during testimony but the results had not been given." **Id. See also, Commonwealth v. Smith,** 487 Pa. 626, 632-33, 410 A.2d 787, 790-91 (1980) (finding no manifest reason necessitating a new trial when reference to polygraph only established the defendant's willingness to take one and not that he had actually taken one). No results of any polygraph examination were proffered here; nor is this testimony indicative as to whether or not Defendant in fact took a polygraph examination.

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[11] Trooper Cinicola subsequently mentioned the word "polygraph" again while testifying during defense counsel's questioning as follows:

> Q. At the end of your report, you have left this open for investigation, right?
>
> A. Right.
>
> Q. And the next thing that comes into play, to your knowledge, is November 6, 2007?
>
> A. That is the next reporting date, November 6, 2007, but—
>
> Q. And—I am sorry. Go ahead.
>
> A. I believe I was waiting when we left off with the polygraph exam. That is what I was waiting on for Mr. Douglas to get back.
>
> Q. I didn't ask you about that. I asked you from November, nothing was done?

(N.T. 12/08/2009, pp. 214-15.) However, no objection to this testimony was preserved on the record and this second reference is in fact not complained of herein.

Some of the factors that indicate that a defendant did not suffer undue prejudice warranting a new trial from a polygraph reference include: "1) the witness' reference to the polygraph test was not prompted by the question; 2) the witness' reference did not suggest the results of the polygraph; 3) the trial court issued prompt and adequate instructions regarding the unreliability and inadmissibility of polygraph tests and cautioned the jury to disregard any testimony concerning such tests." **Watkins, supra,** 750 A.2d at 318-19. We submit that the first and second criteria have been met, and suggest that the third is not determinative of whether a new trial is warranted. **See Smith, supra** at 632-33, 410 A.2d at 790-91 (no mention of a curative instruction in denying a new trial); **Commonwealth v. Johnson,** 441 Pa. 237, 242, 272 A.2d 467, 470 (1971) (curative jury instruction was not sufficient to overcome prejudice resulting from polygraph examination testimony).

No curative instruction was requested. Indeed, the giving of a curative instruction given the testimony elicited would have highlighted and raised a question in the jury's mind not contemplated: Did Defendant, in fact, submit to a polygraph test and if so, what were the results? Moreover, not only was Defendant not prejudiced by this reference, he stood to gain from it. **See Commonwealth v. Saunders,** 386 Pa. 149, 157, 125 A.2d 442, 445-46 (1956) ("Defendant's offer [to take a polygraph examination] was merely a self-serving act or declaration which obviously could be made without any possible risk, since, if the offer [were] accepted and the test given, the result, whether favorable or unfavorable to the accused, could not be given in evidence."). We therefore find that the error complained of, if any, was harmless.

5. **The Verdict Was Against the Weight of the Evidence**

and

6. **The Evidence Was Insufficient To Support the Guilty Verdict**

Seeing as the same analysis applies to points five and six, we will consider them together. Preliminarily, we must determine whether Defendant has sufficiently identified the errors of which he complains. "Any issues not raised in a 1925(b) statement will be deemed waived." **Commonwealth v. Lord,** 553 Pa. 415, 719

A.2d 306, 309 (1998). Similarly, "a Concise Statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no Concise Statement at all." **Commonwealth v. Dowling,** 778 A.2d 683, 686-87 (Pa. Super. 2001). "[W]aiver under Rule 1925 is automatic." **Commonwealth v. Butler,** 571 Pa. 441, 812 A.2d 631, 633 (2002).

Claims which are generic, boilerplate, and all-encompassing, as well as claims which are unduly vague and imprecise, are insufficient to preserve any error for review. **See Dowling, supra,** 778 A.2d at 686-87. The purpose behind this rule is "to aid trial judges in identifying and focusing upon those issues which the parties plan to raise on appeal" thereby enabling the trial court to efficiently, accurately, and meaningfully discuss the claim of error raised, an indispensable criteria for effective and meaningful appellate review. **See id.** To require the trial court to search and frame issues the parties may have intended to raise, but of which the court is uncertain, disserves the parties and the adversarial process which is dependent on the parties framing and arguing the nuances of multifaceted issues. **See Commonwealth v. Lemon,** 804 A.2d 34, 38 (Pa. Super. 2002); **Commonwealth v. Shaw,** 564 Pa. 617, 770 A.2d 295, 304 (2001) ("Our system of jurisprudence, of course, proceeds upon the time-proven assumption that adversarial presentation in actual cases and controversies, rather than visceral reactions to academic questions discovered by the Court itself, produces the best and wisest decision-making.") (Castille, J., dissenting).

Claims which allege simply that "the evidence was insufficient to support the verdict" without specifying in what respect the evidence was insufficient, or which assert that "the verdict was against the weight of the evidence" without stating why the verdict was against the weight of the evidence, are deficient. **See Commonwealth v. Holmes,** 315 Pa. Super. 256, 259, 461 A.2d 1268, 1270 (1983) (discussing the inadequacy of "boilerplate" post-verdict motions); **see also, Lemon, supra,** 804 A.2d at 37 (Rule 1925(b) statement claiming that "[t]he verdict of the jury was against the evidence," "[t]he verdict of the jury was against the weight of the evidence," and "[t]he verdict was against the law" held to be too vague to preserve sufficiency of the evidence claim); **Commonwealth v. Seibert,** 799 A.2d 54, 62 (Pa. Super. 2002) (Rule 1925(b)

statement claiming that "[t]he verdict of the jury was against the weight of the credible evidence as to all of the charges" held to be too vague to preserve weight of the evidence claim).

With respect to both of these claims, the court is forced to speculate about the precise error claimed and in so doing is unable to analyze and focus precisely on what specific error is complained of. It is in this context that we believe the fifth and sixth assignments of error contained in Defendant's 1925(b) statement—"The verdict was against the weight of the evidence" and "The evidence was insufficient to support the guilty verdict"—are legally deficient and identify no specific error(s) we can intelligently discuss. Nevertheless, we can discern no support for either assignment of error upon our independent review of the record.

CONCLUSION

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

COMMONWEALTH OF PENNSYLVANIA
vs. JEFFREY HOSIER, Defendant

Criminal Law—Authority To Secure Premises Pending Search Warrant—Warrantless Search—Exigent Circumstances—Threat of Physical Harm—Plain View—Protective Sweep—Suppression— "Good Faith" Exception to Exclusionary Rule

1. In general, warrantless searches and seizures are unreasonable **per se,** unless conducted pursuant to a specifically established and well-delineated exception to the warrant requirement. Exigent circumstances is one such exception.

2. In the absence of an exception to the warrant requirement, if probable cause exists for the issuance of a search warrant, the temporary securing of the premises to be searched pending the receipt of a search warrant to prevent the destruction or removal of evidence is not itself an unreasonable seizure of either the dwelling or its contents.

3. Exigent circumstances justify a warrantless entry and search when police reasonably believe that a person within a structure is in need of immediate aid.

4. The burden of establishing exigent circumstances is upon the Commonwealth; the standard is clear and convincing evidence.

5. When entry is supported by exigent circumstances, any evidence in plain view during the course of legitimate emergency activities may be seized by the police.

6. Police are permitted to conduct a protective sweep of premises where they are lawfully present when reasonable suspicion exists to believe that the area to be swept harbors an individual posing a danger to the police.

7. Absent exigent circumstances or some other established and well-delineated exception to the warrant requirement, all evidence seized under a search warrant which issues upon information obtained from an illegal entry must be suppressed as the fruits of an illegal entry and search.

8. The privacy guarantees embodied in Article I, Section 8 of the Pennsylvania Constitution, allow for no "good faith" exception to the exclusionary rule.

NOS. 106 CR 2009, 110 CR 2009

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

PAUL J. LEVY, Esquire—Counsel for the Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—June 15, 2010

PROCEDURAL AND FACTUAL BACKGROUND

On October 3, 2008, between 8:00 and 9:00 P.M., John Doucette, the Chief of Police for Weissport Borough, received a call from the Borough's Mayor reporting a disturbance at the Defendant's home located at 316 Bridge Street. Within minutes, Chief Doucette was at the Defendant's home and heard the voice of one person screaming in a detached garage building located approximately twenty-five to thirty feet from the rear of the home. Chief Doucette was familiar with the Defendant, having previously responded to this property on approximately five to six occasions during the prior two years, and was also aware that the state police had similarly responded on approximately five to six occasions during this same period.[1] Chief Doucette recognized the voice of the person screaming as that of the Defendant.

The Chief immediately went to the garage, knocked on the door, and identified himself as a police officer. Initially the Defendant refused to open the door, stating only that his son, Dietrik,

[1] It is significant that almost all of these disputes to which the police responded were between the Defendant and his son, Dietrik. (Suppression Hearing, pp. 17-18, 41.) Other than the disputes between the Defendant and Dietrik, on one occasion the Weissport police responded to a loud argument between the Defendant and his neighbors (Preliminary Hearing, p. 26), and on a couple of occasions the Pennsylvania State Police responded to arguments between Dietrik and his brother. (Suppression Hearing, pp. 41-42.)

was not there. When advised that if he did not open the door he would be arrested, the Defendant opened the door.

Chief Doucette advised the Defendant he was investigating a disturbance at the property and wanted to know where Dietrik was. In response, the Defendant told the Chief that Dietrik was in the house packing his clothes and was leaving. This was, in fact, an accurate statement. Approximately five minutes before the police arrived, the Defendant and Dietrik had been arguing outside in the backyard between the Defendant's home and garage. The Defendant requested that his son move out.

When Chief Doucette questioned who was in the garage, the Defendant identified only his girlfriend, Donna Delabar, who stepped forward within the Chief's view. At this point, wanting to see if anyone else was present, Chief Doucette entered the garage without seeking permission or receiving any. Once inside the garage, the Chief heard a noise coming from the second floor loft and requested whoever was there to come down. At this point, a third person, a man who resembled the Defendant's brother, Berle, came running down the stairs and immediately ran past the Chief and out of the garage without identifying himself.[2]

Because the Defendant had only moments prior to this unidentified person running out of the garage denied that anyone else was also present, for officer safety, Chief Doucette decided to examine for himself if anyone else was present in the loft. **See Commonwealth v. Crouse,** 729 A.2d 588, 598 (Pa. Super. 1999) (holding that police may conduct a protective sweep of the premises where they are lawfully present when reasonable suspicion exists to believe "that the area to be swept harbors an individual posing a danger to the police"), **appeal denied,** 747 A.2d 364 (Pa. 1999).[3] When the Chief went towards the steps to go upstairs, the Defendant stepped in front of him and blocked his way. The Defendant told

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[2] At the time of this incident, other than the Defendant and his son, Dietrik, the other residents of the household were the Defendant's girlfriend, Donna Delabar, his mother, Linda Sperlbaum, and his brother, Berle. (Suppression Hearing, pp. 5, 57.)

[3] While Chief Doucette was able to observe that no one else was present on the first floor, a portion of the loft area was hidden and could not be viewed from the first floor. (Preliminary Hearing, pp. 13-14, 49.)

the Chief he had no right to be there, and wanted him to leave. A shoving match between the two then ensued with the Chief trying to climb the stairs and the Defendant denying him access. As this was occurring, Chief Doucette told the Defendant he was under arrest. (Suppression Hearing, pp. 50-51.)

At about this same time, the Defendant ran from the garage, and the Chief, together with Officer Medoff who had accompanied the Chief to the Defendant's residence, gave chase. As the Defendant was running away, he directed Ms. Delabar to lock the garage door.

After approximately ten to fifteen minutes of attempting to catch the Defendant, the Defendant returned to his home where he was apprehended and arrested. Chief Doucette then returned to the garage and tried to enter. The door was locked. At first, Chief Doucette attempted to kick the door open, and when this failed, he ordered Ms. Delabar to unlock it. She did so, whereupon Chief Doucette entered the garage, went to the second floor, and checked whether anyone else was present. No one was there; however, during his view, Chief Doucette observed three to five clotheslines hanging with several bushels of a green leafy substance which he suspected was marijuana.

Both the garage and the Defendant's home were secured until Chief Doucette could obtain a search warrant. **See Segura v. United States,** 468 U.S. 796, 810 (1984) ("[S]ecuring a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents."). This warrant was obtained and a later search of the garage and home led to the seizure of marijuana in both locations, as well as various suspected items of drug paraphernalia and a blackjack, a prohibited offensive weapon. A copy of the search warrant and an inventory of the items seized were provided to the Defendant by Chief Doucette at the Carbon County prison where the Defendant had been taken following his arraignment before Magistrate Homanko who, at that time, had also issued the search warrant.

In his Omnibus Pretrial Motion filed on August 27, 2009, the Defendant seeks to have the charge of resisting arrest docketed

to No. 110 CR 2009 dismissed for insufficient evidence and the evidence obtained from the search warrant pertaining to the drug-related offenses docketed to No. 106 CR 2009 suppressed as the product of an illegal search and seizure. The Commonwealth has conceded in its brief responsive to the issues raised that a **prima facie** case has not been established with respect to the resisting arrest charge and this case will be dismissed. **See Commonwealth v. Eberhardt,** 304 Pa. Super. 222, 225, 450 A.2d 651, 653 (1982) (holding that attempt to escape officers' control and fleeing, without "aggressive assertion of physical force by [the Defendant] against the officers," does not constitute resisting arrest); **see also, Commonwealth v. Wertelet,** 696 A.2d 206, 210 (Pa. Super. 1997) (holding that a lawful arrest is an essential element of the crime of resisting arrest).

As to the drug-related offenses docketed to No. 106 CR 2009, the Defendant contends that the Commonwealth failed to establish exigent circumstances sufficient to justify Chief Doucette's entry into the garage and observation of the suspected marijuana. The Defendant argues it was the information Chief Doucette obtained from this illegal entry and search that provided the probable cause for the subsequent search warrant obtained, thereby requiring suppression of all evidence seized under the warrant as the fruits of an illegal search.

DISCUSSION

As a general rule, "[w]arrantless searches and seizures are ... unreasonable **per se,** unless conducted pursuant to a specifically established and well-delineated exception to the warrant requirement." **Commonwealth v. Bostick,** 958 A.2d 543, 556 (Pa. Super. 2008) (brackets and ellipsis supplied) (emphasis added), **appeal denied,** 987 A.2d 158 (Pa. 2009). One such exception is that which exists for exigent circumstances. Among these is the threat of physical harm or danger to police or other persons inside or outside a structure.

> Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. [...] The need

> to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.

Mincey v. Arizona, 437 U.S. 385, 392 (1978) (footnotes omitted). Furthermore:

> The burden is on the Commonwealth to present clear and convincing evidence that the circumstances surrounding the opportunity to search were truly exigent ... and that the exigency was in no way attributable to the decision by the police to forego seeking a warrant. Moreover, [a]ll decisions made pursuant to the exigent circumstances exception must be made cautiously, for it is an exception which by its nature can very easily swallow the rule unless applied in only restricted circumstances.

Bostick, supra, 958 A.2d at 556-57 (quotations omitted). Additionally, "the police may seize any evidence that is in plain view during the course of their legitimate emergency activities. [...] But a warrantless search must be strictly circumscribed by the exigencies which justify its initiation." **Mincey, supra,** 437 U.S. at 393 (quotations and citations omitted); **see also, Commonwealth v. Davis,** 743 A.2d 946, 952 (Pa. Super. 1999) ("[E]vidence may be seized by the police when it is in 'plain view' **only** if the police observe the evidence from a vantage point [at] which they are legally entitled to be.") (emphasis in original).

Here, the Commonwealth contends that the Defendant's home was surrounded by a history of violence, that Chief Doucette was aware of this history at the time he arrived to investigate the disturbance at the Defendant's property, and that Chief Doucette had the right to enter the second floor of the Defendant's garage to make sure no one was present, injured, and in need of treatment. To support this position, the Commonwealth relies on Chief Doucette's familiarity with previous disturbances at the Defendant's home to which he, as well as the Pennsylvania State Police, responded; the Defendant's obvious attempts to keep Chief Doucette away from the upstairs of the garage; and Chief Doucette's repeated testimony that the reason he wanted to view the garage loft was to assure that no one was there, injured, and in need of help. We do not believe the evidence supports the warrantless entry by Chief Doucette.

For perceived danger to a potentially injured person to constitute exigent circumstances sufficient to justify a warrantless search, the danger must be evidenced by articulable facts and inferences giving rise to a reasonable belief that a person has been injured, is in need of immediate aid, and is located within the building, or secured area, to which entry is sought. A mere assertion of danger is insufficient. The evidence must assure that the police have acted reasonably, not arbitrarily, and that the reasons given are not a pretext for an evidentiary search, an end run around the Constitution. The burden is upon the Commonwealth to establish that exigent circumstances exist and this burden is a heavy one. **See Commonwealth v. Roland,** 535 Pa. 595, 596, 637 A.2d 269, 270-71 (1994).

The Commonwealth's reliance on a history of violence at the Defendant's home appears, on more careful review of the evidence, to be both exaggerated and unreliable. While we find that multiple disturbances occurred at the Defendant's home during the previous two years, investigated by both the local and state police, no specific evidence was presented that anyone was ever hurt or in need of medical attention. The Commonwealth presented no evidence of any specific incidents of past violence, who was involved, what type of injuries, if any, were sustained, or that medical treatment was ever necessary. To the extent Chief Doucette claimed personal knowledge of physical violence at the Defendant's home, it was between the Defendant and Dietrik. (Preliminary Hearing, p. 10; Suppression Hearing, p. 64.) In response, the Defendant denied that he was ever physically violent with his son, and Dietrik, while admitting that he and his father often argued, never testified that these arguments were physical. (Suppression Hearing, pp. 40-41, 49.)

In none of the incidents were charges ever filed against the Defendant. (Suppression Hearing, pp. 17, 49.) In none, at least with respect to those reported to the Weissport Police, were weapons ever involved. (Preliminary Hearing, p. 56.) Further, when told early on by the Defendant at the time Chief Doucette first arrived to investigate the disturbance at the Defendant's property that Dietrik was in the home, the Chief made no effort to check on Dietrik's condition.

Chief Doucette's testimony that he believed someone might have been injured, might be in need of treatment, and might be on the second floor of the garage, appears to be little more than speculation without any objective, tangible evidence to support it. No evidence was presented that the Chief or anyone else observed any signs of a physical struggle at the Defendant's property or of any injuries to anyone including the Defendant. Chief Doucette further admitted that after the Defendant was chased down and in custody, and the Chief was again standing in the Defendant's backyard before he entered the garage and went upstairs, there were no cries for help or other noises coming from the garage. (Preliminary Hearing, pp. 53-54.)

This case is unlike either **Commonwealth v. Miller,** 555 Pa. 354, 724 A.2d 895 (1999), **cert. denied,** 528 U.S. 903 (1999), or **Commonwealth v. Silo,** 509 Pa. 406, 502 A.2d 173 (1985) where in both, a person was missing and believed to be injured and in need of treatment. In **Miller** the victim was the wife of the defendant who had recently been released from prison for aggravated assault of her and who, while in prison and on the day of his release, expressed a desire to kill her. The victim was last seen with the defendant at a local tavern where they used illegal drugs and where the defendant was visibly angry with her. The victim and the defendant did not appear the following morning to pick up their children, as planned, and after the victim was missing for two days, a missing person's report was filed with the Pennsylvania State Police. Given the history of drug abuse of both the defendant and the victim, the defendant's history of spousal abuse towards the victim, and the prolonged absence of both the defendant and victim, particularly when they failed to pick up their children, as well as the right of the children to gain entry to their own home, the Court upheld the police troopers' forced entry into the defendant's home "in response to the urging of [the defendant's] family and based upon a reasonable belief that the [defendant and the victim] were inside the residence and in need of assistance." **Miller, supra,** 724 A.2d at 900.

In **Silo,** the Court likewise held that sufficient evidence existed to justify the warrantless entry by police into the victim's home

where the police had reason to believe that the victim was in the home and in need of help. There,

> [t]he victim had last been observed by her neighbors at her home where she was heard arguing with [the defendant, her son]. In the ensuing twenty-four hours she was not seen by anyone, could not be reached by telephone, and did not report for work. She was not observed leaving her home for work, and she did not visit her son in the hospital [where he had been taken the day following the argument for treatment of chest pains].

Id. at 410, 502 A.2d at 176. Here, the Commonwealth has failed to identify any person who was missing who could reasonably be expected to be on the second floor of the garage in need of help.

CONCLUSION

Under the facts of this case, to sanction the search of the garage loft by Chief Doucette would "unjustifiably [expand] the scope of exigent circumstances." **Commonwealth v. Perry,** 568 Pa. 499, 798 A.2d 697, 724 n.5 (2002) (Nigro, J., dissenting). As Chief Doucette did not legally enter the second floor of the garage and as the issuance of the search warrant is unsustainable absent Chief Doucette's observations while on the second floor, we conclude that all of the evidence seized under the warrant must be suppressed as the fruits of an illegal entry and search.[4]

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[4] In reaching our decision, we do not question that Chief Doucette acted in good faith in wanting to investigate the garage loft. The Defendant's persistence in keeping Chief Doucette from climbing the steps and viewing the loft area, the quick departure of an unidentified person from the loft when the police were present, and the Defendant's direction to his girlfriend to lock the garage as he ran away, all evidence that the Defendant was concealing something. In finding that exigent circumstances did not exist after the Defendant was in custody and the garage could be secured pending a warrant, we note that no good faith exception exists to the exclusionary rule. **See e.g., Commonwealth v. Edmunds,** 526 Pa. 374, 375, 586 A.2d 887, 888 (1991) (concluding that a "good faith" exception to the exclusionary rule in Pennsylvania would frustrate the privacy guarantees embodied in Article I, Section 8 of the Pennsylvania Constitution).

IN RE: PRIVATE CRIMINAL COMPLAINT OF SMITRESKI

*Criminal Law—Private Criminal Complaint—Disapproval by District Attorney—Court Review—Standard of Review—*De Novo *vs. Abuse of Discretion*

1. The basis of the district attorney's decision not to approve a private criminal complaint determines the standard by which the court reviews that decision.

2. If a district attorney disapproves the filing of a private criminal complaint on purely legal grounds, the court reviews that decision on a **de novo** basis: did the district attorney reach a proper legal conclusion. Legal reasons include that the complaint does not state a **prima facie** case or that the evidence is insufficient to sustain a conviction.

3. If a district attorney disapproves the filing of a private criminal complaint as a matter of policy, or on a hybrid of both legal and policy reasons, the court reviews that decision against an abuse of discretion standard. The term "policy reasons" most often refers to a determination that, although a complaint has legal merit, prosecuting it would not serve the public interest. A decision not to prosecute because the likelihood of conviction is minimal and/or the likelihood of acquittal is great, or because the victim has adequate civil remedies available to him, is policy-based.

4. Under the abuse of discretion standard, a court must defer to the district attorney's prosecutorial discretion absent bad faith, fraud or unconstitutionality on the district attorney's part. This differential standard reflects the separation between the executive and judicial branches of government.

5. Affirming the district attorney's disapproval of private criminal complaint where **pro se** petitioner failed to allege facts or present evidence to support charges of harassment, disorderly conduct, official oppression and intimidating a victim.

NO. MD 300 2009

JOSEPH J. MATIKA, Esquire, Assistant District Attorney—Counsel for Commonwealth.

EDWARD J. SMITRESKI—Pro se.

MEMORANDUM OPINION

NANOVIC, P.J.—June 24, 2010

In this case, Edward J. Smitreski asks the Court to reverse the District Attorney's disapproval of his private criminal complaint.

PROCEDURAL AND FACTUAL BACKGROUND

On September 11, 2009, Mr. Smitreski ("Smitreski") forwarded a private criminal complaint to the Carbon County District Attorney's Office for approval of criminal charges against Joseph M. Piosa. Therein, Smitreski claimed he had been harassed by Piosa on September 8, 2009, and, in addition, accused Piosa of disorderly conduct, official oppression, and intimidating a victim.

The incident of which Smitreski complained occurred at work between two employees: Smitreski is a Park Ranger I and Piosa is a Park Maintenance Supervisor. Both work at Beltzville State Park in Carbon County, Pennsylvania.

On October 9, 2009, Assistant District Attorney Cynthia Hatton disapproved the complaint designating it a "civil matter." Pursuant to Pa. R.Crim.P. 506, Smitreski sought review of this decision by the Court. A hearing on Smitreski's request was held on January 8, 2010.[1] At this hearing, Attorney Hatton testified that she reviewed Smitreski's complaint, reviewed with the person who had investigated the incident, Park Ranger II Duarte, the results of his investigation, and also spoke with Chief Thomas Beltz of Franklin Township, the municipality where the incident occurred.

On the day of the incident, both Chief Beltz and the Pennsylvania State Police responded to the park office and met with Smitreski. At that time, Smitreski explained what had happened and requested that charges be filed against Piosa. The state police advised Smitreski that they had already been in contact with the Park's manager, Tony Willoughby, and that he asked that the matter be handled internally, with Park Ranger IIs at Beltzville conducting the investigation. Park Ranger II Duarte then took written statements from Smitreski, Piosa, and two maintenance workers who were at the scene. Smitreski further gave Duarte the contact information he had obtained from Lawrence Kelly, a park patron who approached him about the incident, and asked that he interview and obtain a written statement from him. In addition, on the same date Smitreski reported the incident to the Department of Conservation and Natural Resources' personnel office in Harrisburg and requested that disciplinary action be taken against Piosa.

At the hearing, Attorney Hatton testified that she discussed with Duarte the statements he had obtained and that Duarte also informed her that he had attempted to obtain a statement from

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[1] "Under Rule 506 and settled case law, the private criminal complainant has no right to an evidentiary hearing in connection with the trial court's review of the district attorney's decision to disapprove the private criminal complaint." **In re Private Criminal Complaint of Wilson,** 879 A.2d 199, 212-13 (Pa. Super. 2005) **(en banc).** In order to better understand the respective positions of the parties and to offer each an opportunity to create a record, a hearing was held on Smitreski's challenge to the District Attorney's denial of his complaint.

Mr. Kelly, but that Kelly never responded. After considering the information contained in Smitreski's complaint and that which she received from her investigation, and following her review of the law, Attorney Hatton concluded that there was insufficient evidence to support criminal charges and that the complaint lacked legal merit. Both Ranger Duarte and Chief Beltz concurred in this decision.[2]

DISCUSSION

The basis of the District Attorney's decision not to prosecute determines the standard of our review of that decision. If the decision is based on legal grounds, our review is **de novo.** If on policy reasons, or for a hybrid purpose, we review on an abuse of discretion basis. In **Commonwealth of Pennsylvania ex. rel. Guarrasi v. Carroll,** 979 A.2d 383 (Pa. Super. 2009), the Superior Court stated the relevant legal principles as follows:

> A district attorney ('D.A.') has the authority to approve or disapprove private criminal complaints. Pa.R.Crim.P. 506(A). If the D.A. decides to disapprove a private complaint, the D.A. must advise the affiant of the reasons for the disapproval. **Id.** at (B)(2). A disapproval may be based on purely legal grounds (**e.g.,** the complaint does not state a **prima facie** case or, even if it does so, the D.A.'s investigation into the matter reveals there is no evidentiary merit to the complaint). **In re Private Criminal Complaint of Wilson,** 879 A.2d 199, 211-12 (Pa. Super.2005). Alternatively, the choice to disapprove a complaint may be a matter of policy (**e.g.,** even if the case has legal merit, prosecution thereof would not serve the public interest). **Id.** at 212. Finally, the disapproval of a private complaint may be a hybrid of both legal and policy reasons. **Id.**
>
> If a D.A. disapproves a private criminal complaint, the private affiant may appeal that disapproval to the Court of Common Pleas. Pa.R.Crim.P. 506(B)(2). In such an appeal, the court must first correctly identify the nature of the D.A.'s reason(s) for disapproving the complaint. **Wilson,** 879 A.2d at 212. If the D.A.'s decision was based on legal grounds, the court undertakes **de novo** review to determine whether the

[2] According to Attorney Hatton, Duarte, in his capacity as a Park Ranger II, has the authority to file criminal charges. In her discussions with Duarte, he explained to Attorney Hatton why he felt charges were inappropriate.

> D.A. reached a proper legal conclusion. **Id.** However, if the D.A. based the disapproval on policy reasons, the court applies an abuse of discretion standard, deferring to the D.A.'s decision absent bad faith, fraud or unconstitutionality on the latter's part. **Id.** Lastly, if the D.A. relied on a hybrid of legal and policy bases, the court reviews the D.A.'s decision for an abuse of discretion. **Id.**

Id. at 385. The deferential standard which applies to policy or other like discretionary decisions made by the district attorney "recognizes the limitations on judicial power to interfere with the district attorney's discretion in these kinds of decisions." **In re Ullman,** 995 A.2d 1207, 1213 (Pa. Super. 2010).

A private criminal complaint must set forth a **prima facie** case of criminal conduct. **See In re Private Criminal Complaint of Wilson,** 879 A.2d 199, 211 (Pa. Super. 2005) **(en banc).** If it fails to do so, the district attorney is entitled to deny the complaint on its face. **See Commonwealth v. Muroski,** 352 Pa. Super. 15, 24, 506 A.2d 1312, 1317 (1986) **(en banc).** If the complaint puts forward a **prima facie** case, "[t]he district attorney must [then] investigate the allegations of the complaint to permit a proper decision whether to approve or disapprove the complaint." **Ullman, supra,** 995 A.2d at 1213. If after investigation, the district attorney determines there is insufficient evidence to establish a **prima facie** case, he is duty bound not to prosecute. **See Wilson, supra,** 879 A.2d at 211-12.

Both the sufficiency of the complaint to make out a **prima facie** case and the sufficiency of the evidence to support a **prima facie** case are legal assessments regarding which the district attorney's decisions are subject to **de novo** review by the court. **See id.** at 214, 216-17. "This is to be distinguished from the prosecutorial discretion not to bring prosecution even if a **prima facie** case may be established from the evidence available." **Commonwealth v. Benz,** 523 Pa. 203, 565 A.2d 764, 767 (1989); **see also, Wilson, supra,** 879 A.2d at 217.[3] Such a decision is reviewed to determine whether the district attorney abused his discretion. **See id.** at 218.

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[3] In **In re Ullman,** the Court stated:

> The district attorney is permitted to exercise sound discretion to refrain from proceeding in a criminal case whenever he, in good faith, thinks that the prosecution would not serve the best interests of the state. This decision

In his criminal complaint, Smitreski alleges that when he reported to work on September 8, 2009, the day after Labor Day, Piosa asked him to empty the trash can in the employees' restroom of the first aid station. Smitreski states he indicated he would do so, but then Piosa "began to berate [him] with humiliating insults using the word 'fuck' in every sentence." (Private Criminal Complaint.) These insults, according to Smitreski, were made in a loud voice which could be heard by park patrons between 50 and 100 feet away, one of whom, Lawrence Kelly, commented to Smitreski afterwards that "in thirty years of working, I never seen a supervisor treat a worker that way." (Private Criminal Complaint.) When this verbal attack ended, Smitreski states that he told Piosa he would be filing charges against him at the magistrate's office.

Smitreski admits in the criminal complaint that the trash can in the employees' restroom was overflowing, the toilet needed scrubbing, and the sink was dirty. He also acknowledges that some of Piosa's comments directed toward him concerned the cleanliness of the first aid station. Smitreski further admits that when he advised Piosa he intended to file criminal charges, Piosa responded that he could do so but that he was acting like a child and that by letting the trash can overflow, he had not done his job.

Shortly after this first encounter on September 8, after Smitreski had gone to the first aid station and noted its condition, Smitreski again saw Piosa. In this second encounter, Piosa told Smitreski that Smitreski had refused to obey a direct order of his (**i.e.,** to empty the trash can); that when the Park Manager (Tony Willoughby) was absent, he, Piosa, was in charge; and that Smitreski was forbidden from leaving the park during work hours to file charges at the magistrate's office. Smitreski replied that he would then call the state police from the park office. This was done and, as previously indicated, both the state police and Chief Beltz from Franklin Township responded. At no point in his complaint does Smitreski acknowledge having performed the work requested by Piosa.

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not to prosecute may be implemented by the district attorney's refusal to approve the private criminal complaint at the outset.

Id. 995 A.2d 1207, 1214 (Pa. Super. 2010).

The criminal complaint submitted by Smitreski claims violations of 18 Pa. C.S.A. §§5301(1) and (2) (official oppression), 4952(a)(1) (intimidation of victims), 2709(a)(2), (3), and (4) (harassment), and 5503(a)(3) and (4) (disorderly conduct). Each of these offenses requires proof that the defendant acted intentionally, knowingly, or willfully. The Assistant District Attorney found from her review of the complaint and Duarte's investigation that all counts of the complaint failed for different reasons to set forth the necessary elements of a **prima facie** case and that, for each count, the evidence was insufficient to show criminal intent. As a consequence, the Assistant District Attorney determined that all charges lacked legal merit. Because this decision is based on legal conclusions, our review of that decision is **de novo.**[4]

Official Oppression

The offense of official oppression (18 Pa. C.S.A. §5301(1) and (2)) requires, **inter alia,** that the victim be mistreated by the defendant who was acting or purporting to act in an official capacity and who knows that his conduct is illegal. Nowhere is it asserted in Smitreski's complaint that Piosa, who claimed that Smitreski failed to perform his job and disobeyed a direct order, knowingly acted illegally in his criticism and conduct directed at Smitreski. **See Commonwealth v. Eisemann,** 308 Pa. Super. 16, 21, 453

[4] Contrary to the District Attorney's assertion in its post-hearing memorandum, a decision not to prosecute based on the insufficiency of the evidence to sustain a conviction, is a decision based on the law, not on policy. "[F]or the purposes of reviewing the propriety of rejecting a private complaint, the term 'policy reasons' most often refers to a determination that, although a complaint has legal merit, prosecuting it would not serve the public interest." **Commonwealth ex rel. Guarrasi v. Carroll,** 979 A.2d 383, 386 (Pa. Super. 2009). A claim, as here, that the district attorney "has a policy of not accepting private criminal complaints that lack legal merit does not transform the law-based rejection of such a complaint into a public policy decision or a hybrid of legal and public policy reasons." **Id.** If this were the case, "the [district attorney's] decisions to reject private complaints would never be subject to **de novo** review even though the law requires that standard of review for rejections based on lack of legal merit." **Id.** Also, at the time of hearing, the Assistant District Attorney explained that when she initially denied the complaint, designating it a civil matter, this was her way of indicating that there was no evidence of criminal intent. In contrast, a decision not to prosecute because "the likelihood of conviction is minimal and/or the likelihood of acquittal is great" or because "the victim has adequate civil remedies available to him" is policy-based. **Wilson, supra,** 879 A.2d at 217.

A.2d 1045, 1048 (1982) (equating the term "knowing" to acting in "bad faith").

We also question whether the offense of official oppression is intended to address conduct undertaken in an employment relationship. In substance, Smitreski's complaint alleges that he was berated and demeaned by a superior while at work. The official oppression statute is "intended to protect the **public** from an abuse of power by public officials, and to punish those officials for such abuse." **D'Errico v. DeFazio,** 763 A.2d 424, 430 (Pa. Super. 2000) (emphasis added), **appeal denied,** 782 A.2d 546 (Pa. 2001).

Intimidation of Victims

The offense of intimidation of victims with which Smitreski seeks to charge Piosa (18 Pa. C.S.A. §4952(a)(1)) requires, **inter alia,** that the defendant, with the intent to or knowledge that his conduct will obstruct the administration of justice, intimidates or attempts to intimidate the victim of a crime from reporting the commission of the crime to law enforcement personnel. Here, while Piosa allegedly forbid Smitreski to leave the park during working hours to file a complaint with the magistrate, he did not prevent or attempt to prevent Smitreski through intimidation from contacting the police or filing charges. To the contrary, according to the allegations of Smitreski's complaint, when Smitreski advised Piosa he would be filing charges against him, Piosa, in effect, told Smitreski that was his right, and when Smitreski later told Piosa that he was headed to the park office to call the state police, Piosa took no action to threaten or dissuade Smitreski.

Harassment

To prove Piosa guilty of harassment as charged by Smitreski (18 Pa. C.S.A. §2709(a)(2), (3), and (4)), it must be shown that "with the intent to harass, annoy or alarm another," Piosa: (1) followed Smitreski in or about a public place or places; (2) engaged in a course of conduct or repeatedly committed acts which served no legitimate purpose; or (3) communicated to or about Smitreski any lewd, lascivious, threatening, or obscene words or language. Here, the circumstances described by Smitreski evidence a person in a supervisory position, upset with the performance of an employee, criticizing that performance in blunt terms. While we do not con-

done Piosa's conduct, as described by Smitreski in his complaint, the facts, as alleged, do not show that Piosa was following Smitreski around or that the language used by Piosa was other than protected speech under the First Amendment. **See Commonwealth v. Zullinger,** 450 Pa. Super. 533, 676 A.2d 687 (1996) (holding that the words "fuck you" appearing on a T-shirt worn in a district justice's office were protected under the First Amendment and could not form the basis for a charge of summary harassment). Nor do the facts alleged support a course of conduct engaged in by Piosa which served no legitimate purpose.

Disorderly Conduct

Finally, as to the charge of disorderly conduct set forth by Smitreski (18 Pa. C.S.A. §5503(a)(3) and (4)), to be guilty, it must be shown that Piosa "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof," used obscene language or created a hazardous or physically offensive condition which served no legitimate purpose. For the reasons already discussed, the language used by Piosa is constitutionally protected. **See generally, Zullinger, supra,** 450 Pa. Super. 533, 676 A.2d 687. Nor, can it fairly be said that Piosa's verbal and personal attack against Smitreski created a "hazardous or physically offensive condition" within the meaning of the statute. **See Commonwealth v. Williams,** 394 Pa. Super. 90, 96, 574 A.2d 1161, 1164 (1990) (detailing what constitutes a "hazardous or physically offensive condition").

CONCLUSION

For the foregoing reasons, we affirm the refusal of the District Attorney to prosecute Smitreski's private criminal complaint.

DUANE SCHLEICHER and LAVONA SCHLEICHER, Appellants vs. BOWMANSTOWN BOROUGH ZONING HEARING BOARD, Appellee, BOWMANSTOWN BOROUGH, Intervenor

Civil Law—Zoning—Interpreting Terms in a Zoning Ordinance—Special Exception Use (Solid Waste Transfer Facility) —Objective vs. Subjective Requirements—Shifting Burdens of Proof

1. As a general proposition, undefined terms used in an ordinance must be given their common and approved usage. Such usage takes into account the

context in which the words are used, the subject matter dealt with and the intention of the legislative body.

2. The interpretation of terms in an ordinance is a question of law. When ambiguity exists in the meaning of terms within a zoning ordinance, the Pennsylvania Municipalities Planning Code requires that language be interpreted broadly in favor of the property owner's use of property.

3. As applied to the processing of solid waste within a solid waste transfer facility, the term "processing" in the Bowmanstown Zoning Ordinance refers to the transfer of waste from short haul trucks, which collect and bring garbage to the transfer facility, to long haul trucks, which transport the consolidated loads to a landfill.

4. As a category of use, a use allowed by special exception in a zoning ordinance is a conditionally permitted use subject to review by the zoning hearing board.

5. To gain approval as a special exception use, the use must, at a minimum, satisfy all objective conditions and standards set forth in the zoning ordinance.

6. The applicant for a special exception has the initial burden of presenting evidence and persuading the zoning hearing board that the proposed use is in compliance with the objective standards of the zoning ordinance. If this burden is not met, the use is not permitted and the application must be denied.

7. A requested special exception use which satisfies the objective standards of a zoning ordinance is presumed to be consistent with the health, safety and welfare of the community, absent evidence to the contrary.

8. If a special exception use is shown to comply with the objective standards of the zoning ordinance, those opposing the use have the burden of presenting evidence which establishes to a high probability that the specific use proposed will generate adverse impacts not normally generated by such use, and that these impacts will pose a substantial threat to the health and safety of the community.

9. The burden of rebutting the presumption that a planned special exception use is consistent with the public health, safety and welfare is upon those opposing the proposed use. Ordinarily, this burden encompasses both the burden of going forward with evidence and the burden of persuasion. However, while the burden of presenting evidence against the presumption is always upon the objectors, the burden of persuasion may be placed upon the applicant by the terms of the particular zoning ordinance under review.

10. An applicant for a special exception use must demonstrate that the express standards and criteria of the zoning ordinance will be complied with, not that they can be complied with. Accordingly, while a zoning hearing board has the discretion to grant a special exception with reasonable conditions and safeguards, it is under no duty to do so, even if it is evident from the plan submitted that the plan can be revised to meet the requirements of the ordinance.

11. Zoning hearing board decision denying special exception application for solid waste transfer facility affirmed. Application fails to satisfy objective standards regarding fencing, buffer yards and off-site odors set forth in the zoning ordinance.

NO. 09-0441

STEPHEN A. STRACK, Esquire—Counsel for Appellants.

MICHAEL D. MUFFLEY, Esquire—Counsel for Appellee.

JAMES F. PRESTON, Esquire—Counsel for Intervenor.

MEMORANDUM OPINION

NANOVIC, P.J.—August 13, 2010

Duane and Lavona Schleicher ("Schleichers") appeal from the decision of the Bowmanstown Borough Zoning Hearing Board ("Board") denying their application for a special exception to use property owned by them in the Borough of Bowmanstown ("Borough") as a solid waste transfer facility. For the reasons that follow, we affirm the Board's decision.

PROCEDURAL AND FACTUAL BACKGROUND

On March 20, 2008, the Schleichers submitted an application to the Borough's zoning officer requesting a special exception to develop their property at 700 Lehigh Street ("Property") as a solid waste transfer facility.[1] The Property is located in an I/C (Industrial/

[1] The application also requested that the Property be used for recycling. It was unclear, however, whether the request for recycling was as a principal use, which is permitted by right in an I/C zoning district, or as a necessary and permitted accessory use to a solid waste transfer facility. The Zoning Ordinance permits two principal uses on a property, provided the requirements for each are separately met. **See** Zoning Ordinance, Section 801.B.

This confusion has persisted throughout these proceedings, with the Board expressly denying the principal use of the Property as a recycling collection center since the Schleichers failed to establish the necessary requirements for such a use under Section 402.29 of the Zoning Ordinance. (Board Decision, Conclusion of Law ("C.O.L.") No. 11.) While we believe this decision was correct, we also note that during the hearings before the Board, the Schleichers acknowledged the insufficiency of their evidence to support this use and, in fact, appeared to concede that the size of the Property was insufficient to accommodate both principal uses. (N.T. 5/21/08, p. 119; N.T. 8/13/08, pp. 481-82; N.T. 9/17/08, pp. 612-15; N.T. 10/1/08, pp. 726, 799, 815, 835-40, 859-61, 866-68; N.T. 10/20/08, pp. 895, 903-906, 954.)

To the extent the Board's decision might be construed as denying any recycling activity on the Property in conjunction with its use as a transfer facility, assuming the Schleichers are able to meet the standards and criteria set by the Zoning Ordinance for operating a solid waste transfer facility, such decision would be contrary to law. As defined in the Zoning Ordinance, the operation of a solid waste transfer facility encompasses the separation of recyclables from solid waste. **See** Zoning Ordinance, Section 202 (Definition of Solid Waste Transfer Facility). Further, the Pennsylvania Department of Environmental Protection requires, as

Commercial) zoning district under the Borough's Zoning Ordinance of 1997 ("Zoning Ordinance"). Section 306.B of the Zoning Ordinance permits a solid waste transfer facility to be located in an I/C district by special exception. **See** Zoning Ordinance, Section 306.B. The Schleichers' Property is the only site within the Borough zoned for and viable for use as a solid waste transfer facility. (N.T. 10/1/08, p. 843; N.T. 10/20/08, p. 957.)

The Property is 5.29 acres in size, pie-shaped, and bounded on each side by a state highway: Route 248 on the North, Route 895 (a/k/a Lehigh Street) on the West, and Bank Street on the South and East. The I/C zoning district within which the Schleichers' Property is located is completely surrounded by a district zoned for commercial use. Moreover, all but one of the adjoining properties are used for commercial purposes.

Under the Schleichers' proposed use, municipal solid waste[2] would be collected curbside, primarily from residential house-

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an ancillary feature of any approved solid waste transfer facility, that a certain minimum number of recycling bins be provided on site for the general public to deposit recyclable material. 25 Pa. Code §279.272. Finally, Section 202 of the Zoning Ordinance defines an accessory use as "a use customarily incidental and subordinate to the principal use or building and located on the same lot with such principal use." **See Aldridge v. Jackson Township,** 983 A.2d 247, 255-56 (Pa. Commw. 2009) (discussing the meaning of the phrase "customarily incidental" as commonly used in zoning ordinance definitions of the term "accessory use"). Hence, providing limited recycling (here, a proposed 25 by 18 foot area for bins) is not only customarily incidental to a solid waste transfer facility, it is a necessary and inseparable subordinate use.

Parenthetically, we note that not until the fifth day of hearing (**i.e.,** 9/17/08), did the Schleichers' evidence disclose for the first time that a waste hauling operation was also being considered. No application has been made, original or amended, or public notice given for this use and it will not be addressed further in this opinion.

[2] The facility is being designed solely to handle municipal waste. (N.T. 5/21/08, p. 97.) Municipal waste is

> any garbage, refuse, industrial lunchroom or office waste and other material including solid, liquid, semisolid or contained gaseous material resulting from operation of residential, municipal, commercial or institutional establishments and from community activities and any sludge not meeting the definition or [sic] residual or hazardous waste hereunder from a municipal, commercial or institutional water supply treatment plant, waste water treatment plant, or air pollution control facility.

35 P.S. §6018.103.

holds, and transported by dump trucks (a/k/a short haul trucks) to a building on the Property where the contents would be unloaded, combined with other loads, and transferred onto larger trucks (a/k/a long haul trucks) for transportation to a regulated Department of Environmental Protection ("DEP") landfill. The location of this building, as depicted on site plans submitted by the Schleichers, would be a minimum of 150 feet from all public streets, exterior lot lines, and waterways, and a minimum of 300 feet from any residential structure. (Exhibit A-1.) The entire process of transferring waste from incoming short haul trucks to outgoing long haul trucks will occur within this building and will be fully enclosed, except for where the trucks enter and leave.[3] The building will have an impervious concrete floor which will be washed daily. All leachates and fluids will be drained to a holding tank to be monitored and emptied off-site in accordance with DEP regulations.

The facility proposed has been designed to process 1,200 tons of garbage a day. (N.T. 9/17/08, p. 700; N.T. 10/1/08, p. 736.) Based on these numbers, Robert Cox, the engineer who designed the site layout for the Schleichers, projected that approximately 95 trucks will be entering and leaving the Property on a daily basis. This number appears low. A more realistic estimate based on the

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As proposed, the waste collected for transfer on the Property would involve primarily residential household garbage as well as refuse collected from trash dumpsters at office buildings and construction sites. Thomas G. Pullar, an expert presented by the Schleichers, testified as follows:

> The largest percentage [of municipal solid waste] is actually paper, based on [Environmental Protection Agency] studies. Paper is about a third of the waste, about 33 percent. Then yard waste and food waste are about 12 percent each. Then there's plastics, metal and textiles. Those would be less than 10 percent each. Then you get down to the smaller fractionals where you get wood and other miscellaneous.

(N.T. 7/16/08, p. 358.) There will be no liquids or sludge, and no infectious or hazardous waste accepted. (N.T. 7/16/08, p. 351.) There will be no burning or incineration of trash. (N.T. 8/13/08, p. 387.)

[3] The building proposed as a transfer station has yet to be built, and its exact dimensions need to be determined. During the hearings before the Board, the size of this building was downsized from that shown in the original application, approximately 10,625 square feet (85 feet by 125 feet), to 3,281 square feet. (N.T. 6/18/08, p. 174.) The reason for this reduction was to comply with the 150 and 300 feet setback requirements of the Zoning Ordinance. (N.T. 5/21/08, pp. 128-29; N.T. 7/16/08, p. 348); **see also,** Zoning Ordinance, Section 402.34(a) and (b).

testimony of Pete Nowlan, a concerned citizen who works for a firm that provides services to waste management facilities and testified in opposition to the application, is a minimum of 150 trucks per day.[4]

The proposed facility is expected to employ between six to ten people. (N.T. 8/13/08, pp. 431-32; N.T. 10/1/08, p. 717.) Although the days of operation were not stated, the maximum hours of proposed operation are from 7:00 A.M. until 9:00 P.M. (N.T. 9/17/08, p. 677.) An employee would be on duty at all times.

The site plan presented by the Schleichers depicts two access points: Access A and Access B. Access A on Bank Street will be the primary access. The second, Access B on Route 895, will be "severely restricted" because of its proximity to the entrance and exit ramps to Route 248. (N.T. 8/13/08, p. 500; N.T. 9/17/08, pp. 569, 574, 604, 620.)[5]

As trucks enter or leave the facility, they will be weighed.[6] At the scale, incoming trucks will be examined. If a load is leaking fluid or contains radioactive materials, the truck will be diverted and sequestered pending directions from the DEP. (N.T. 7/16/08, pp. 353-54; N.T. 8/13/08, pp. 406, 443-44.) If the load is accepted for further handling, the truck will be directed into the processing building where the waste will be emptied onto the floor, then transferred into a long haul truck. (N.T. 7/16/08, pp. 354-56.)

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[4] Mr. Nowlan's estimate is based on 1,200 tons of garbage being brought to the site daily. Mr. Nowlan testified that long haul trucks on average haul 40 tons of trash which equates to 30 trucks to carry 1,200 tons. Because the load for short haul trucks averages between 6 and 10 tons each, a minimum of 120 trucks would be required to deliver 1,200 tons. The total number of trucks on a daily basis, using these numbers, is 150. (N.T. 10/20/08, p. 996.)

[5] Trucks traveling north on Route 895 would be permitted to make a right-hand turn to enter the facility and trucks leaving the facility at this point would be allowed to make a right-hand turn to gain access to Route 248. No left-hand turns will be permitted from Route 895 to enter the facility or from the facility onto Route 895. (N.T. 9/17/08, pp. 579-80.)

A gate is to be placed at the bottom of the entrance from Bank Street. Trucks which arrive prior to opening hours will be permitted to line up in the area between the gate and Bank Street. (N.T. 10/1/08, pp. 739-40.)

[6] The Schleichers intend to use the scales which already exist on the Property and which were used by the previous owner, Prince Manufacturing Company. These scales are located on the northern side of the Property, near Route 248, and will not be enclosed by the processing building. They are within 150 feet of the property line and within 300 feet of a dwelling not owned by the Schleichers.

The Property where the transfer facility is proposed was formerly owned and used by Prince Manufacturing Company ("Prince") for over fifty years in its manufacturing operations. (N.T. 6/18/08, p. 157.) Prince manufactured pigments from inorganic ores and also made mineral mixes for animal feeds. (N.T. 7/16/08, p. 272.) Its operations utilized heavy equipment and machinery, depended on the use of large trucks for deliveries and shipments, and often resulted in complaints about dust, odors, and noise related to the operation of the plant. (N.T. 6/18/08, pp. 217-26; N.T. 7/16/08, pp. 274, 287-89, 311-12, 327, 341.)

Prince was open daily, sometimes on weekends, and employed between 54 and 57 employees. (N.T. 6/18/08, p. 215; N.T. 7/16/08, pp. 274-76.) After Prince ceased its operations in August 2006, the Property was dormant. (N.T. 6/18/08, pp. 191-92; N.T. 7/16/08, pp. 270, 309-10.) The buildings that Prince used still exist and for the most part are intended to be kept intact, in part to block from view the activities which will come about if the Property is used as a solid waste transfer facility.

Between May 21, 2008, and November 10, 2008, eight hearings were held before the Board on the Schleichers' application.[7] During these hearings, the Schleichers presented four expert witnesses: Robert Cox, a civil engineer who developed the site plan and analyzed the projected traffic flow for the project; Thomas G. Pullar, an environmental engineer who designed the operational components of the project and explained the operations of the proposed facility; John Kuller, the Fire Chief for the Lehighton Borough Volunteer Fire Department, which has a mutual aid agreement with Bowmanstown, and who testified to the accessibility of the site in the event of fire; and Eric Conrad, who served with the Pennsylvania DEP for twenty-five years, the last three years as Deputy Secretary for field operations responsible for reviewing and citing all landfills, transfer stations, and recycling programs in the Commonwealth of Pennsylvania. Mr. Conrad testified as to the applicable DEP regulations governing the use of property

[7] These hearings were held on Wednesday, May 21, 2008; Wednesday, June 18, 2008; Wednesday, July 16, 2008; Wednesday, August 13, 2008; Wednesday, September 17, 2008; Wednesday, October 1, 2008; Monday, October 20, 2008; and Monday, November 10, 2008.

as a solid waste transfer facility to ensure its operation in a safe, environmentally sound manner and the suitability of the Property for these purposes. The Borough presented the testimony of Paul Pendzick, a civil engineer, whose firm represents the Borough as Borough engineer.

Legal argument was heard before the Board on December 8, 2008. On January 14, 2009, the Board voted to deny the application. This was followed by written Findings of Fact, forty-five in number, and Conclusions of Law ("C.O.L."), twenty-two, wherein the Board concluded that the Schleichers' plan failed to meet the specific requirements for a solid waste transfer facility set forth in Section 402.34 of the Zoning Ordinance, failed to comply with the general requirements for special exceptions set forth in Section 116.C of the Zoning Ordinance, and failed to satisfy the requirements of Section 803.D of the Zoning Ordinance, pertaining to buffer yards.

On February 20, 2009, the Schleichers appealed the Board's decision to this Court and the Borough filed a notice of intervention. The issues were briefed and argued on October 14, 2009. No new evidence was presented to the Court.

DISCUSSION

To receive approval for a special exception use, applicants must demonstrate compliance with the specific conditions and standards set forth in the Zoning Ordinance. As the reviewing court, where no new evidence is taken, our review is limited to determining whether the Board clearly abused its discretion or committed an error of law. **See Elizabethtown/Mt. Joy Associates, L.P. v. Mount Joy Township Zoning Hearing Board,** 934 A.2d 759 (Pa. Commw. 2007), **appeal denied,** 953 A.2d 542 (Pa. 2008).

> A conclusion that the [Zoning Hearing Board ('ZHB')] abused its discretion may be reached only if its findings are not supported by substantial evidence. ... Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. ... Questions of credibility and evidentiary weight are solely within the province of the ZHB as fact finder, and the ZHB resolves all conflicts in testimony.

Id., 943 A.2d at 763-64 n.5 (citations omitted).

> Assuming the record demonstrates the existence of substantial evidence, the Court is bound by the Board's findings which are the result of resolutions of credibility and conflicting testimony rather than a capricious disregard of evidence. ... The Board, as fact finder has the power to reject even uncontradicted testimony if the Board finds the testimony to be lacking in credibility.

Vanguard Cellular System, Inc. v. Zoning Hearing Board of Smithfield Township, 130 Pa. Commw. 371, 380, 568 A.2d 703, 707 (1989) (citations omitted), **appeal denied,** 527 Pa. 620, 590 A.2d 760 (1990); **see also,** 2 Pa. C.S.A. §754(b) (setting forth the proper scope of review on appeal from an agency's decision).[8]

The Zoning Ordinance for Bowmanstown contains certain general requirements applicable to all special exception uses and additional requirements for each specific principal use, as well as general requirements, some applicable for certain districts only and some applicable for all districts. Section 116.C provides, as to all special exception uses:

> **Approval of Special Exception Uses.** The Zoning Hearing Board shall approve a proposed special exception use if the Board finds adequate evidence that any proposed use will comply with specific requirements of this Ordinance and all of the following standards:
>
> 1. Other Laws. Will not clearly be in conflict with other Borough Ordinances or State or Federal laws or regulations known to the Board.
>
> 2. Traffic. The applicant shall show that the use will not result in or substantially add to a significant traffic hazard or significant traffic congestion.

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[8] In **In re Appeal of Thompson,** 896 A.2d 659 (Pa. Commw. 2006), the Commonwealth Court further stated:

> A reviewing court must accept the credibility determinations made by the municipal body which hears the testimony, evaluates the credibility of the witnesses and serves as fact finder. ... The reviewing court is not to substitute its judgment on the merits for that of the municipal body. ... Assuming the record demonstrates the existence of substantial evidence, the court is bound by the municipal body's findings which are the result of resolutions of credibility and conflicting testimony.

Id., 896 A.2d at 668 (citations omitted), **appeal denied,** 591 Pa. 669, 916 A.2d 636 (2007).

3. Safety. The applicant shall show that the use will not create a significant hazard to the public health and safety, such as fire, toxic or explosive hazards.

4. Storm Water Management. Will follow adequate, professionally accepted engineering methods to manage storm water.

(1) Stormwater shall not be a criteria of a decision under this Ordinance if the application clearly would be subject to a separate engineering review and an approval of storm water management under another ordinance.

5. Neighborhood. Will not significantly negatively affect the desirable character of an existing residential neighborhood, such as causing substantial amounts of heavy truck traffic to travel through a residential neighborhood, or a significant odor or noise nuisance or very late night/early morning hours of operation.

6. Site planning. Will involve adequate site design methods, including plant screening, berms, site layout and setbacks as needed to avoid significant negative impacts on adjacent uses.

Specific to solid waste transfer facilities, Section 402.34 provides:

ADDITIONAL REQUIREMENTS FOR SPECIFIC PRINCIPAL USES. Each of the following uses shall meet all of the following requirements for that use:

Solid Waste Transfer Facility.

a. All solid waste processing and storage shall be kept a minimum of 150 feet from all of the following features: public street right-of-way, exterior lot line or creek or river.

b. All solid waste processing and storage shall be kept a minimum of 300 feet from any dwelling that the operator of the Transfer Facility does not own.

c. The applicant shall prove to the Zoning Hearing Board that the use: a) will have adequate access for firefighting purposes, and b) will not routinely create noxious odors detectable off of the site.

d. The use shall not include any incineration or burning.

e. All solid waste processing and storage shall occur within enclosed buildings or enclosed containers. All unloading and

loading of solid waste shall occur within an enclosed building, and over an impervious surface that drains to a holding tank that is adequately treated.

f. The use shall be surrounded by a secure fence and gates with a minimum height of 8 feet.

g. The use shall have a minimum lot area of 5 acres, which may include land extending into another municipality.

h. The use shall be operated in a manner that prevents the attraction, harborage or breeding of insects, rodents or other vectors.

i. An attendant shall be on duty all times of operation and unloading.

j. Under the authority of Act 101 of 1988, the hours of operating shall be limited to 7 a.m. and 9 p.m.

k. Tires—see 'Outdoor Storage' in Section 403.

l. No radioactive, chemotherapeutic, infectious or toxic materials shall be permitted on-site.

A solid waste transfer facility is defined in the Zoning Ordinance as:

> **Solid Waste Transfer Facility.** Land or structures where solid waste is received and temporarily stored, at a location other than the site where it was generated, and which facilitates the bulk transfer of accumulated solid waste to a facility for further processing or disposal. Such facility may or may not involve the separation of recyclables from solid waste. Such facility shall not include a junkyard, leaf composting, clean fill or septage or sludge application.

Zoning Ordinance, Section 202.[9]

Finally, Section 401.A of the Zoning Ordinance provides that the requirements for specific principal uses set forth in Section

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[9] This definition is narrower than that appearing in the Solid Waste Management Act, 35 P.S. §§6018.101-6018.1003, and the regulations promulgated thereunder, which define a "transfer facility" as

> [a] facility which receives and processes or temporarily stores municipal or residual waste at a location other than the generation site, and which facilitates the transportation or transfer of municipal or residual waste to a processing or disposal facility. The term includes a facility that uses a method or technology to convert part or all of such waste materials for offsite reuse. The term does not include a collection or processing center that is only for

402 are in addition to "the sign, parking, environmental and other general requirements of this Ordinance and the requirements of each District" which also apply. This includes Section 803.D under Article 8, General Regulations, which pertains to buffer yards and is discussed further in this opinion.

The Board in denying the Schleichers' application to operate a solid waste transfer facility on their Property found the following criteria required by Section 116.C were not met:

> A. The evidence presented was not sufficient to establish that the increased truck traffic would not cause significant traffic hazards or congestion.
>
> B. The evidence presented was not sufficient to establish that the proposed use would not negatively affect the desirable character of the existing residential neighborhood with regards to the creation of significant odors beyond the boundary of the property.
>
> C. Applicants' site plan did not contain any specifics with regards to plant screenings.

(Board Decision, C.O.L. No. 13.) With respect to the requirements of Section 402.34, the Board found the Schleichers' proposed use did not comply with the following:

> A. Solid waste will be processed within 150 feet of a public right-of-way and exterior lot line.
>
> B. Solid waste will be processed within 300 feet of a dwelling.
>
> C. Insufficient evidence was presented that would establish that noxious odors would not be detectable off of the site.
>
> D. In so much as the scales are not enclosed, all solid waste processing will not occur within an enclosed building.
>
> E. No evidence was presented that the scales were on an impervious surface or that they drain into an adequately treated holding tank.

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source-separated recyclable materials, including clear glass, colored glass, aluminum, steel and bimetallic cans, high-grade office paper, newsprint, corrugated paper and plastics.

35 P.S. §6018.103 (Definitions); **see also,** 25 Pa. Code §271.1 (Definitions). The Solid Waste Management Act, also known as Act 101 of 1988, is the same statute referred to in Section 402.34(j) of the Zoning Ordinance.

> F. While the testimony established that gates would be established at the entrance on the access road from Bank Street, no testimony was presented regarding the type of fencing that would be erected.

(Board Decision, C.O.L. No. 19.) Finally, the Board found that the Schleichers' evidence was insufficient to determine whether the requirements of Section 803.D (Buffer Yards) would be met in relation to the overnight parking of tractor-trailer trucks on the Property. (Board Decision, C.O.L. Nos. 20-22.)

Legal Standard—Special Exceptions

Before deciding whether the Board properly denied the application for these reasons, or abused its discretion and committed legal error, as the Schleichers contend, the shifting burden of persuasion that applies when examining compliance with the conditions and criteria for granting a special exception must be understood. To begin, a special exception is a conditionally permitted use under a zoning ordinance. "A special exception is neither special nor an exception, but a use expressly contemplated that evidences a legislative decision that the particular type of use is consistent with the zoning plan and presumptively consistent with the health, safety and welfare of the community." **Greth Development Group, Inc. v. Zoning Hearing Board of Lower Heidelberg Township,** 918 A.2d 181, 188 (Pa. Commw. 2007), **appeal denied,** 593 Pa. 743, 929 A.2d 1163 (2007). "If an applicant makes out a **prima facie** case, the application must be granted unless the objectors present sufficient evidence that the proposed use has a detrimental effect on the public health, safety, and welfare." **Id.**

In **Manor Healthcare Corporation v. Lower Moreland Township Zoning Hearing Board,** 139 Pa. Commw. 206, 590 A.2d 65 (1991), the Court stated:

> A special exception is not an exception to the Zoning Ordinance, but rather a use which is expressly permitted, absent a showing of a detrimental effect on the community. ... The applicant for the special exception has both the duty of presenting evidence and the burden of persuading the Zoning Hearing Board that the proposed use satisfies the objective requirements of the ordinance for grant of special exception. ...

> Once the applicant has met his burden of proof and persuasion, a presumption arises that it is consistent with the health, safety and general welfare of the community. ... The burden then normally shifts to the objectors of the application to present evidence and persuade the Zoning Hearing Board that the proposed use will have a generally detrimental effect on health, safety and welfare or will conflict with the expressions of general policy contained in the ordinance. ...
>
> However, the Zoning Ordinance may, as here, place the 'burden of proof' on the applicant as to the matter of detriment to health, safety and general welfare. ... Such a provision in the Zoning Ordinance however, merely places the persuasion burden on the applicant. The objectors still retain the initial presentation burden with respect to the general matter of the detriment to health, safety and general welfare.

Id., at 215-16, 590 A.2d at 70 (citations omitted) (footnote omitted); **see also, Elizabethtown/Mt. Joy Associates, supra,** 934 A.2d at 764.

The objective requirements which must be met include "specific requirements applicable to such kind of use even when not a special exception—**e.g.,** setback limits or size maximums or parking requirements applicable to that type of use whenever allowed, as a permitted use or otherwise." **Sheetz, Inc. v. Phoenixville Borough Council,** 804 A.2d 113, 115 (Pa. Commw. 2002), **appeal denied,** 573 Pa. 669, 820 A.2d 706 (2003). "The function of the board when an application for an exception is made is to determine that such specific facts, circumstances and conditions exist which comply with the standards of the ordinance and merit the granting of the exception." **Greth Development Group, supra,** 918 A.2d at 186 (**quoting Broussard v. Zoning Board of Adjustment of City of Pittsburgh,** 831 A.2d 764, 769 (Pa. Commw. 2003)).

In consequence of the foregoing, in reviewing the Board's findings, we must distinguish between those criteria which are specific and objective, and those which are general and subjective, and must also account for language in the Zoning Ordinance which places the burden of persuasion on the applicant. As part of this evaluation, it is necessary first that we interpret the meaning of

the word "processing" as used in Section 402.34, setting specific standards to be applied in granting or denying a special exception for use of property as a solid waste transfer facility. This is purely a question of law.

1). **Meaning of the Term "Processing"**

Underlying the Board's findings that solid waste will be processed within 150 feet of a public right-of-way and exterior line, within 300 feet of a dwelling,[10] and will occur outside of an enclosed building, is a fundamental disagreement between the parties as to what constitutes the "processing" of solid waste. The term is not defined in the Zoning Ordinance, nor is its intended meaning clear from the face of the Zoning Ordinance.

As a general proposition, "[u]ndefined terms used in an ordinance must be given their common and approved usage." **In re Appeal of Thompson,** 896 A.2d 659, 669 (Pa. Commw. 2006), **appeal denied,** 591 Pa. 669, 916 A.2d 636 (2007). Similarly, the Borough's Zoning Ordinance provides:

> Any word or term not defined in this Ordinance shall have its plain and ordinary meaning **within the context of the Section.** A standard reference dictionary shall be consulted.

Zoning Ordinance, Section 201.F (emphasis added); **see also,** 1 Pa. C.S.A. §1903 (words and phrases in a statute shall be construed in accordance with their common and accepted usage).

All of this begs the essential question: What is the "common and approved usage" or the "plain and ordinary meaning" when used in the context of processing solid waste? **See Broussard v. The Zoning Board of Adjustment of City of Pittsburgh,** 589 Pa. 71, 907 A.2d 494, 500 (2006) ("[Z]oning ordinances should receive a reasonable and fair construction in light of the subject matter dealt with and the manifest intention of the local legislative body."). In tracking this meaning, "[w]here a court needs to define a term, it may consult definitions found in statutes, regulations

[10] Although we deal in this appeal only with zoning issues, we note that the Zoning Ordinance requirement that all solid waste processing and storage be kept a minimum of 300 feet from any dwelling is separate and apart from the DEP's regulations which require that the entire facility be a minimum of 300 feet from an occupied dwelling. **See** Zoning Ordinance, Section 402.34(b); 25 Pa. Code §279.202(a)(3).

or the dictionary for guidance, although such definitions are not controlling." **Manor Healthcare, supra** at 212, 590 A.2d at 68.

Taking "process" to mean "a method of doing something, with all the steps involved" as defined in **Webster's New World Dictionary,** the Board concluded that "[t]he weighing of vehicles containing solid waste as vehicles enter and exit the property is a part of the solid waste processing." (Board Decision, C.O.L. Nos. 17, 18.) In response, the Schleichers argue that in the context of its use within the Zoning Ordinance—in reference to a solid waste transfer facility as well as how the Zoning Ordinance defines this type of use—and its usage within the industry, the processing of solid waste vis-à-vis the Schleichers' intended use is limited to the transfer of waste from short haul trucks, which collect and bring garbage to the transfer facility, to long haul trucks, which transport the consolidated loads to a landfill.[11] (N.T. 8/13/08 pp. 435-38, 443-44, 462; N.T. 11/10/08, pp. 1108, 1131, 1154.) Because both meanings are plausible, the term, at a minimum is ambiguous. **See Aldridge v. Jackson Township,** 983 A.2d 247, 253 (Pa. Commw. 2009) ("An ambiguity exists when language is subject to two or more reasonable interpretations and not merely because two conflicting interpretations may be suggested.").

The question then becomes: Should we defer to the Board's interpretation? Absent an abuse of discretion or an error of law, the Board's interpretation of the Zoning Ordinance should be given

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[11] The regulations which implement the Solid Waste Management Act define "processing" as:

> [t]echnology used for the purpose of reducing the volume or bulk of municipal or residual waste or technology used to convert part or all of the waste materials for offsite reuse. Processing facilities include, but are not limited to, transfer facilities, composting facilities and resource recovery facilities.

25 Pa. Code §271.1. Processing in this sense will not occur at the proposed facility. Although the waste is compacted to some extent when collected and transported in short haul trucks, the Schleichers' expert specifically denied that compacting will occur at the solid waste facility. (N.T. 7/16/08, p. 352; N.T. 8/13/08, pp. 509-10.) Instead, the waste is to be consolidated with other waste for bulk shipment to a landfill. This end result is wholly consistent with the Zoning Ordinance's definition of a solid waste transfer facility as a location which "facilitates the bulk transfer of accumulated solid waste to a facility for further processing or disposal." Zoning Ordinance, Section 202.

great weight and deference and should not be substituted by the judgment of the trial court. **See Thompson, supra,** 896 A.2d at 669; **see also, Broussard, supra,** 907 A.2d at 500 ("[C]ourts ordinarily grant deference to the zoning board's understanding of its own ordinance because, as a general matter, governmental agencies are entitled 'great weight' in their interpretation of legislation they are charged to enforce.").

The Schleichers argue, however, that if we accept the Board's definition, it leads to an absurdity: since all steps in the handling of solid waste at a transfer facility (**i.e.,** its receipt, weighing, sequestration, unloading and reloading, storage, and shipping out) would be a part of processing, the requirements of the Zoning Ordinance as they apply to the "processing" of solid waste would be either impossible or impractical to meet. How, for instance, could any facility comply with the setback requirement from a public street or boundary line if the delivery of solid waste, its receipt into the facility, is itself part of processing? (N.T. 8/13/08, p. 461.) Further, the Schleichers assert that the requirement that all processing occur within an enclosed building or enclosed container would require, under the Board's interpretation, that the entire site be enclosed.[12] "An interpretation of an ordinance which produces an absurd result is contrary to the rules of statutory construction." **Thompson, supra,** 896 A.2d at 669; **see also,** 1 Pa. C.S. §1922(1) (in ascertaining legislative intent it is presumed that the general assembly did not "intend a result that is absurd, impossible of execution or unreasonable").

In addition, we find the Board's construction is inconsistent with the rules of statutory construction set forth in the Pennsylvania

[12] In its Conclusions of Law, the Board found that because the weighing scales are not enclosed, all solid waste processing would not occur within an enclosed building. (Board Decision, C.O.L. No. 19(D).) Implicit in this conclusion is the Board's belief, not only that the temporary containment of waste within the body of a truck for transportation purposes is not storage, with which we agree, but also that such containment does not meet Section 402.34(e)'s requirement that all processing of solid waste occur within an enclosed building or enclosed container.

The interpretation of the word "processing" as found by the Board blurs any distinction between the processing of solid waste and the management of solid waste of which processing is only one phase. Under the Solid Waste Management Act, "management" is defined as "[t]he entire process, or any part thereof, of storage, collection, transportation, processing, treatment, and disposal of solid wastes by any person engaging in such process." 35 P.S. §6018.103 (Definitions).

Municipalities Planning Code, 53 P.S. §§10101-11202.[13] As between two viable meanings, restrictions imposed by a zoning ordinance are to be interpreted broadly in favor of the property owner's use of property. **See Aldridge, supra,** 983 A.2d at 257-58.

> Permissive terms in [a] zoning ordinance must be construed expansively, so as to afford the landowner the broadest possible use and enjoyment of his land. ... Conversely, '[R]estrictions on a property owner's right to free use of his property must be strictly construed and all doubts resolved in his favor.'

Manor Healthcare, supra at 214, 590 A.2d at 69. "It is an abuse of discretion for a zoning hearing board to narrow the terms of an ordinance and further restrict the use of property." **Greth Development Group, supra,** 918 A.2d at 189 n.7.

Contrary to the meaning ascribed by the Board, we find that the object of a "solid waste transfer facility" as defined in the Zoning Ordinance and the requirements of the Zoning Ordinance which apply to this use make it clear that the term "processing" does not include the ingress or egress of vehicles, or the weighing, sequestration, or transportation of vehicles containing waste. In defining "processing" as it did, we conclude the Board committed legal error and its interpretation is erroneous.[14]

Since it is undisputed that the location of the building where processing will occur meets the setback requirements of the Zoning Ordinance for processing, the Board's Conclusions of Law, Nos. 19(A) and (B), constitute errors of law. It also follows from our interpretation of "processing" that the Board's Conclusions 19(D) and 19(E) are erroneous as well.[15]

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[13] Section 603.1 of the Municipalities Planning Code provides that "[i]n 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.

[14] Because of our disposition of this issue, we do not address the Schleichers' precautionary validity challenge to the Zoning Ordinance as **de facto** exclusionary and violative of the law under constitutional grounds. **See Procito v. Unemployment Compensation Board of Review,** 945 A.2d 261, 266 (Pa. Commw. 2008) ("[W]hen faced with a case raising constitutional and non-constitutional grounds, a court must decide the matter on non-constitutional grounds and avoid constitutional questions if possible.").

[15] Under the Zoning Ordinance, the processing and storage of solid waste must occur within an enclosed building or an enclosed container. As interpreted

2). **Specific Criteria**

In its Conclusions of Law, numbers 19(F) and 22, the Board cites two express standards and criteria of the Zoning Ordinance which the Schleichers failed to meet: Section 402.34(f) (Fencing) and Section 803.D (Buffer Yards). **See also,** note 20 **infra.** The applicant for a special exception has the initial burden of showing compliance with the objective requirements of the Zoning Ordinance. Unless and until the applicant meets this burden, there is no obligation on the objectors to present evidence that the plan is contrary to the public health, safety and welfare. **See Thompson, supra,** 896 A.2d at 670.

(a) **Fencing**

Section 402.34(f) requires with respect to a solid waste transfer facility that "[t]he use shall be surrounded by a secure fence and gates with a minimum height of 8 feet." This requirement is mandatory and not advisory. **See** Zoning Ordinance, Section 201.C (Definition of "shall").

Neither the Schleichers' site plan nor the testimony presented show that the Property will be surrounded by the required fencing and gates. (N.T. 8/13/08, p. 458; N.T. 10/20/08, p. 984.) On this issue Mr. Pullar testified only that such fencing and gates "will be part of the design. It will either be a fence or the building that will prevent access to the site." (N.T. 8/13/08, pp. 429-30.) Mr. Pullar further stated that the building "will act as a fence." (N.T. 8/13/08, pp. 430, 458.) This evidence is insufficient to show compliance with the Zoning Ordinance.[16]

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by this Court, the weighing of solid waste, before unloading, involves neither the processing nor storage of solid waste. In addition, the Zoning Ordinance requires only that the unloading and loading of solid waste occur over an impervious surface that drains into a holding tank that is adequately treated. **See** Zoning Ordinance, Section 402.34(e). There is no Zoning Ordinance requirement that the scales where trucks containing waste are weighed be on an impervious surface or drain into a holding tank. Nevertheless, the Schleichers' evidence showed that any leakage at the scales would be collected and directed to the holding tank into which liquids in the processing building will drain. (N.T. 8/13/08, pp. 484-85.)

[16] On several occasions when the Schleichers failed to demonstrate full compliance with the Zoning Ordinance, their witnesses testified that the details of the plan were still being worked on and would be finalized at later stages of

(b) **Buffer yards**

The Schleichers' site plan, Exhibit A-7, depicts 29 parking spaces for the overnight parking of both short haul and long haul trucks on the south side of the site. (N.T. 9/17/08, pp. 608-612

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the permitting and approval process, promising that the final plan would conform with the requirements of the Zoning Ordinance. While there is truth to what the Schleichers say—that ordinarily the details of the design of a proposed land use occur later in the land development process—the applicant must nevertheless demonstrate that the express standards and criteria of a zoning ordinance that relate specifically to a special exception will be complied with, not that they can be complied with. On this point, the Court in **Elizabethtown/Mt. Joy Associates L.P. v. Mount Joy Township Zoning Hearing Board,** 934 A.2d 759 (Pa. Commw. 2007), **appeal denied,** 953 A.2d 542 (Pa. 2008) stated:

> Even if an applicant demonstrates that it can comply with the ordinance requirements and promises to do so, the ZHB does not err in denying the application. Simply put, a concept plan is insufficient to warrant the granting of a special exception; rather, to be entitled to receive a special exception, the applicant must come forward with evidence detailing its compliance with the necessary requirements. 'Evidence is not a "promise" that the applicant will comply because that is a legal conclusion the [ZHB] makes once it hears what the applicant intends to do and then determines whether it matches the requirements set forth in the ordinance.'

Id., 934 A.2d at 768 (citation omitted).

A zoning hearing board has the discretion to grant a special exception, with reasonable conditions and safeguards; however, it is under no duty to do so. **See Elizabethtown/Mt. Joy Associates,** 934 A.2d at 768 n.14; **see also,** 53 P.S. §10912.1. This is true even though it is evident from the plan submitted that the property is sufficient and/or that the plan can be revised to meet the requirements of the applicable zoning ordinance. **See Appeal of Baird,** 113 Pa. Commw. 637, 641, 537 A.2d 976, 977-78 (1988), **appeal denied,** 521 Pa. 613, 557 A.2d 344 (1989). As further stated in **Elizabethtown/Mt. Joy Associates:**

> The proper function of conditions is to reduce the adverse impact of a use allowed under a special exception, not to enable the applicant to meet his burden of showing that the use which he seeks is one allowed by the special exception. ... Where, as here, the applicant fails to meet all of the ordinance requirements for a special exception, we have long held that the ZHB properly denies the application.

Id., 934 A.2d at 768 (citations omitted) (footnote omitted); **see also, Lafayette College v. Zoning Hearing Board of the City of Easton,** 138 Pa. Commw. 579, 586, 588 A.2d 1323, 1326 (1991) (holding that the proper function of a condition imposed upon a special exception is to reduce the adverse impact of that permitted use, and not to enable the applicant to meet its burden of showing compliance with the express standards of the ordinance); **Broussard v. Zoning Board of Adjustment of the City of Pittsburgh,** 589 Pa. 71, 907 A.2d 494, 502 (2006) (holding that "where the plan, as submitted, addresses all of the ordinance's

(showing separate locations for the parking of 13, 7, and 9 trucks).) The location of these spaces is within 250 feet of the right-of-way for Bank Street.

Section 803.D of the Zoning Ordinance provides that a buffer yard, a minimum of 10 feet in width with evergreen screening, is required along side and rear lot lines of a newly developed area routinely used for the keeping of three or more tractor-trailer trucks or trailers of a tractor-trailer combination if visible from and within 250 feet of a public street or dwelling.[17] The plan as submitted by the Schleichers and the evidence presented does not address this

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prerequisites for the special exception sought, and reasonably shows that the property owner is able to fulfill them in accordance with the procedures set forth by the zoning code (as reasonably interpreted by the board), a reviewing court should not reverse the grant of such an exception on the sole basis that some of the items described in the plan may be completed at a later date"; noting further that the **Lafayette College/Baird** line of cases had as their distinctive feature that the property owner failed to include in his submissions before the zoning board any indication of an intention to fulfill the conditions associated with the special exception at issue).

[17] Section 803.D(1) of the Zoning Ordinance states:

> **Buffer Yards.** Buffer yards and screening complying with the following standards shall be required under the following situations:
>
> 1. **Buffer Yard Width, When Required.** Buffer yards shall have a minimum width of 10 feet, unless a larger width is required by another provision of this Ordinance. Buffer yards shall include evergreen screening and shall be required in the following situations, or where otherwise required by this Ordinance:

Buffer Yard to be Provided by the Following:	When the Use Providing the Screen and Buffer is:
1. Along side and rear lot lines of any newly developed or expended principal commercial or industrial use, other than along a "street".	Abutting or across from a primary residential use within a residential district.
2. Along side and rear lot lines of any newly developed or expanded portion of: a) an industrial storage or loading area (other than within an enclosed building), or b) an area routinely used for the keeping of 3 or more: tractor-trailer trucks or trailers of a tractor-trailer combination.	Visible from and within 250 feet of a public street or dwelling.

requirement of the Zoning Ordinance. (N.T. 10/20/08, p. 986); **see also, Sheetz, supra,** 804 A.2d at 115.[18]

3). **General Criteria**

Finally, the Board found that the Schleichers' plan failed to show that the proposed use would not result in increased traffic causing significant traffic hazards or congestion, would not cause significant or noxious odors adversely affecting surrounding properties, and would not have significant negative impacts on adjacent uses because specifics with regard to plant screenings were not provided.[19] These standards, while clearly related to the public interest, are not objectively measurable.[20] The Zoning Ordinance,

[18] In **Thompson,** the court succinctly summarized the **Sheetz** decision on this point, as follows:

> In **Sheetz,** the applicant sought a conditional use permit for construction of a service station. The application was denied by borough council on the grounds that the applicant failed to demonstrate compliance with requisite standards of a 'service conditional use.' The application did not show the required 40-foot buffer zone or planted buffer screen, which were required for the conditional use for a service station. The borough council reasoned that the applicant was not entitled to approval of its application by allowing them to establish compliance later in the context of a land development plan application. Thus, the applicant failed in its burden of establishing its application's compliance with the necessary requirements as a precondition to approval. We opined, the applicant 'is not permitted to evade these requirements because a service station is a conditional use, and upon review, Borough Council properly denied the application.' [**Sheetz, Inc. v. Phoenixville Borough Council,** 804 A.2d 113, 115 (Pa. Commw. 2002), **appeal denied,** 573 Pa. 669, 820 A.2d 706 (2003).]

Id., 896 A.2d at 671.

[19] It is unclear from the Board's decision if this last deficiency refers to plant screenings in buffer yards, or screenings in some other location. If intended to reinforce the deficiency under Section 803.D, that issue has already been discussed. If intended to impose a general site design requirement, incapable of precise measurement, the ensuing discussion pertaining to local concerns relating to the general public health, safety, and welfare applies.

[20] With one caveat: Section 402.34(c)'s requirement that the use not routinely create noxious odors detectable off of the site is an express objective standard distinguishable, we believe, from the subjective standard for odors set forth in Section 116.C(5) of the Zoning Ordinance. As such, the initial burden of proving that noxious odors will not routinely be detectable offsite was upon the Schleichers. The Board found that the Schleichers' evidence was insufficient to meet this burden. (Board Decision, C.O.L. 19(C).)

While the Schleichers presented significant and substantial evidence directed to this issue, we conclude we would be usurping the Board's fact-finding authority

for instance, contains no traffic counts or odor levels which are not to be exceeded. They are instead subjective measurements of the public health, safety, and welfare which are presumed to be met once compliance with the specific objective requirements of the Zoning Ordinance has been demonstrated, absent evidence to the contrary.

Provided the applicant for a special exception convinces the Board that the proposed use meets the objective requirements of the Zoning Ordinance, a presumption arises that the proposed use is consistent with the general health, safety, and welfare of the neighboring community. The burden then shifts to the municipality and any objectors to rebut this presumption by proving "a high probability that the use will generate adverse impacts not normally generated by this type of use, and that these impacts will pose a substantial threat to the health and safety of the community." **Freedom Healthcare Services, Inc. v. Zoning Hearing Board of the City of New Castle,** 983 A.2d 1286, 1291 (Pa. Commw. 2009), **appeal denied,** 995 A.2d 355 (Pa. 2010); **see also, Thompson, supra,** 896 A.2d at 679. This is so even if the ordinance places the burden of proving that there will be no harmful effects upon the applicant, as it does here with respect to traffic and odor conditions, since such a provision shifts only the burden of persuasion, not the burden of production. **See Freedom Healthcare Services, supra,** 983 A.2d at 1291. Not until the Borough satisfies this burden of production does the burden of persuasion shift to the Schleichers to show that the harmful effect claimed will not occur. **See Manor Healthcare, supra** at 216, 590 A.2d at 70.[21]

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were we to find otherwise, in effect overriding the Board's resolutions of credibility and conflicting testimony. On this point, the Board could legitimately find from circumstantial evidence—the odors which accompany short haul trucks hauling waste and the proximity of the scales on which these trucks will be weighed to Route 248—that noxious odors will be routinely detectable offsite. In this context, we further note that notwithstanding the Schleichers' testimony that the DEP regulations referable to transfer facilities prohibit offsite odors, the regulations are more circumspect and require only that the operator control and minimize conditions which create odors. 25 Pa. Code §§279.107, 279.219(b). Accordingly, the standard imposed by Section 402.34(c) of the Zoning Ordinance is stricter than that imposed by the regulations.

[21] Our discussion of this issue is not intended in any manner to imply that the Schleichers have demonstrated compliance with the express standards and criteria of the Zoning Ordinance: they have not. We do so to complete our analysis of the shifting burdens presented in this case.

Before the Board, the Schleichers' expert testimony established that the impact of the proposed solid waste transfer facility would be no greater than that of any similarly situated solid waste transfer facility. (N.T. 8/13/08, p. 422; N.T. 11/10/08, p. 1121.) The Schleichers' witnesses repeatedly reminded the Board that all aspects of solid waste management are highly regulated under the law—including but not limited to 25 Pa. Code Chapters 271 (Municipal Waste Management—General Provisions), 279 (Transfer Facilities) and 285 (Storage, Collection and Transportation of Municipal Waste)—to ensure the safe, sanitary, and sound operation of a solid waste transfer facility.[22]

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[22] This testimony included:

1. Solid waste transfer facilities may only accept waste from licensed hauling operations. (N.T. 11/10/08, pp. 1117-18);

2. Trucks hauling municipal waste must be dedicated to hauling waste, and cannot be used for other purposes. (N.T. 11/10/08, pp. 1122-23); **see also,** 25 Pa. Code §285.219;

3. Trucks hauling municipal waste to and from a transfer facility in Pennsylvania are required to be licensed by DEP and must be regularly inspected. (N.T. 7/16/08, p. 367; N.T. 10/1/08, p. 723; N.T. 11/10/08, p. 1116); **see also,** 25 Pa. Code §285.215(c);

4. Trucks hauling municipal waste are gasketed and sealed to prevent the leaking of leachate, must be regularly maintained in a road worthy condition which is required to be documented in maintenance logs, are subject to random inspections, and must further maintain manifests to show what, when, and where waste was picked up, transported, and deposited. Each vehicle must also be bonded as a part of a licensed hauling operation. (N.T. 7/16/08, p. 367; N.T. 8/13/08, p. 516; N.T. 11/10/08, pp. 1118-20, 1125); **see also,** 25 Pa. Code §§285.213(a)(2), (b), (c) and 285.217;

5. Transfer facilities must log in every vehicle and report the weight and origin of waste for each truck. (N.T. 7/16/08, p. 370; N.T. 8/13/08, p. 395; N.T. 11/10/08, p. 1121); **see also,** 25 Pa. Code §§279.214(a), 279.251;

6. All processing of waste at a transfer facility must occur indoors on an impervious floor which is washed down daily. (N.T. 6/18/08, p. 166; N.T. 7/16/08, pp. 361-62; N.T. 8/13/08, pp. 395-96, 435-38; N.T. 11/10/08, p. 1159); **see also,** 25 Pa. Code §§279.215(a), 279.216(b), and 285.214(a);

7. All leachate and fluids from the processing of waste and the washing down of the transfer station floor, and the vehicles and equipment involved in this processing, will be collected, drained into a holding tank, and emptied according to DEP regulations at a site that will not be situate in Bowmanstown—there will be no pollution running to the watershed or to the municipal waste water treatment plant or water supply. (N.T. 7/16/08, pp. 358-62, 370; N.T. 8/13/08, pp. 456-57); **see also,** 25 Pa. Code §§285.114(d), 285.122;

The residents of Bowmanstown who appeared before the Board and opposed the application, while legitimately concerned about the effect of having this type of facility in their neighborhood and naturally wary of the Schleichers' assurances, presented no competent, substantive evidence that the Schleichers' intended use was abnormal, would pose a substantial threat to the environment or to the health or safety of the community, or would create an adverse impact not normally generated by the type of use proposed. Notably absent was any expert or other bona fide evidence that there was a high probability that the Schleichers' use of the Property will generate traffic or create odors not normally associated with such use or that the traffic or odors created would substantially threaten the public welfare.

In addressing similar concerns to a request to construct a skilled nursing home in a residential district, the Commonwealth Court stated the following, in language which is equally apropos here:

> The objectors, when presenting evidence, must 'raise specific issues concerning the proposal's general detrimental effect on the community before the applicant is required to persuade the fact finder that the intended use would not violate the health, safety and welfare of the community.' ... The objectors cannot meet their burden by merely speculating as to possible harm, but instead must show 'a high degree of probability that it will [substantially] affect the health and safety of the community.' ...

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8. Waste must be removed within 24 hours of its receipt. (N.T. 7/16/08, p. 361; N.T. 8/13/08, p. 403; N.T. 10/1/08, pp. 728, 743); **see also,** 25 Pa. Code §279.217(b);

9. All transfer stations must have a litter control plan, including fencing to prevent litter from leaving the site. (N.T. 8/13/08, p. 404; N.T. 9/17/08, p. 605; N.T. 11/10/08, pp. 1123-24); **see also,** 25 Pa. Code §279.221;

10. Trucks containing waste will not be parked outside overnight. (N.T. 8/13/08, pp. 522-24; N.T. 9/17/08, p. 611; N.T. 10/1/08, p. 718); and

11. The Property, although located in a floodplain, is approvable by DEP for use as a solid waste transfer facility. (N.T. 8/13/08, pp. 449-50; N.T. 11/10/08, pp. 1110-11, 1127.) The floor of the building where waste is to be transferred will be above the high water mark for the 100-year floodplain, thereby protecting against unloaded waste on the floor of the building from becoming wet. The facility can be and will be, designed to conform with all applicable laws and regulations. (N.T. 6/18/08, p. 171; N.T. 7/16/08, pp. 363-65); **see also,** 25 Pa. Code 279.202(a)(1).)

> The trial court found that at most, the objectors' testimony amounted to allegations of mere possibilities and fell far short of the 'high degree of probability' standard necessary to sustain the objectors' burden of production. ... After a review of the relevant testimony we agree with the trial court and find that substantial evidence does not exist to support the Zoning Hearing Board's findings.
>
> Most of the evidence presented by the Township consisted of the testimony of nine neighbors who testified as to the possibility that traffic problems could result from the increased traffic generated by the facility. ... The objectors testified that major traffic problems already exist. ... The Township did not present any testimony from its Township planner or any other individual qualified on this issue. We find that such speculative testimony from concerned neighbors is insufficient to establish a 'high degree of probability' of specific detrimental consequences to the public welfare.
>
> An increase in traffic alone is insufficient to justify the refusal of an otherwise valid land use. ... The objectors must show a high probability that the proposed use will generate traffic patterns not normally generated by this type of use and that this abnormal traffic will pose a substantial threat to the health and safety of the community. ... Moreover, 'the fact that a proposed use would contribute to projected traffic congestion primarily generated by other resources is not a sufficient basis for denying a special exception.'

Manor Healthcare, supra at 217-18, 590 A.2d at 71 (citations omitted); **see also, Freedom Healthcare Services, supra** (methadone clinic); **Zoning Hearing Board of Upper Darby Township v. Konyk,** 5 Pa. Commw. 466, 472, 290 A.2d 715, 719 (1972) (gasoline service station) (stating "[w]hile these questions may be of valid interest and concern to the neighborhood, they assume the posture of suggestions to meet a potential danger rather than positive evidence of a present injurious effect. This being so, they are appropriate when submitted to the legislative body while it considers regulatory ordinances."). We understand the very real concerns residents of the Borough have raised in this case, however, neither the Borough nor these residents have met their burden of

proving to a high degree of probability—and not just speculation of possible harms—that the proposed use would substantially affect the health and safety of the community to a greater extent than what is normally expected for a solid waste transfer facility.

CONCLUSION

"A special exception is a conditionally permitted use, legislatively allowed where specific standards and conditions detailed in the ordinance are met." **Agnew v. Bushkill Township Zoning Hearing Board,** 837 A.2d 634, 637 (Pa. Commw. 2003), **appeal denied,** 852 A.2d 313 (Pa. 2004). When the specific criteria for a special exception have not been met, as here, the burden never shifts to those opposing the application to show the applicant's proposed use will have an adverse effect on the general public and the Board is within its right to deny the requested use. It has no duty, as suggested by the Schleichers, to conditionally approve the application and to provide the applicant an opportunity to correct these deficiencies.

Accordingly, we affirm the Board's decision denying the Schleichers' application for a special exception to use the Property as a solid waste transfer facility.

ORDER

AND NOW, this 13th day of August 2010, upon consideration of the Appellants' Land Use Appeal, and Counsels' argument and submissions thereon, and in accordance with our Memorandum Opinion of this same date, it is hereby

ORDERED and DECREED that Appellants' appeal from the decision of the Bowmanstown Borough Zoning Hearing Board is DENIED.

COMMONWEALTH OF PENNSYLVANIA
vs. FRANCINE B. GEUSIC, Defendant

Criminal Law—Speedy Trial Rights—Sixth Amendment—Rule 600—Thirty-Two Month Delay—Motion To Dismiss

1. Pa. R.Crim.P. 600 is intended to protect an accused's speedy trial rights. In doing so, it presumptively fixes the time period by which a case should normally be prosecuted.

2. Rule 600(A)(3) requires the trial of a criminal case to begin within 365 days of the date when the criminal complaint was filed. This deadline is known as the mechanical run date.

3. The mechanical run date is adjusted or extended by adding to this date any excludable time attributable to a defendant under Rule 600(C). The mechanical run date, as so modified, becomes an adjusted run date.

4. If trial does not commence before the adjusted run date, unless such additional delay is attributable to circumstances beyond the Commonwealth's control and despite its due diligence pursuant to Rule 600(G), the defendant, upon application prior to the commencement of trial, is entitled to have the charges dismissed and to be discharged from further prosecution.

5. Due diligence requires that the Commonwealth make reasonable efforts to move the case forward to ensure compliance with Rule 600. The duty to adhere to Rule 600 is upon the Commonwealth, not the defendant.

6. Where a thirty-two month delay exists between the filing of the complaint and Defendant's arrest because of the Commonwealth's failure to exercise reasonable efforts to locate and timely prosecute Defendant, Rule 600 has been violated and Defendant is entitled to have all charges dismissed.

7. The right to a speedy trial guaranteed by the Sixth Amendment to the United States Constitution is triggered by a formal criminal prosecution (**i.e.,** arrest, indictment or other official accusation). In contrast, a challenge on due process grounds permits a defendant to challenge delay both before and after official accusation.

8. In determining whether a violation of a defendant's Sixth Amendment rights to a speedy trial has been proven, a minimum of four factors must be examined: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant.

9. Unlike Rule 600 which is administrative in nature and does not require a finding of prejudice to be violated, a speedy trial claim ordinarily will fail absent some evidence of prejudice, albeit, under certain circumstances, prejudice will be presumed.

10. For purposes of an accused's Sixth Amendment right to a speedy trial, courts have held that post-accusation delays approaching one year are "presumptively prejudicial." Where there exists a thirty-two month delay after the complaint is filed and before arrest, the reasons for the delay are attributable to the Commonwealth, and Defendant has promptly asserted her Sixth Amendment right upon learning of the prosecution, a failure to establish actual prejudice, in the absence of persuasive evidence to the contrary, is not essential to the successful assertion of Defendant's Sixth Amendment claim.

NO. 796 CR 2009

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

GREGORY L. MOUSSEAU, Esquire—Counsel for the Defendant.

MEMORANDUM OPINION

NANOVIC, P.J. —September 15, 2010

Pending before us is Defendant, Francine B. Geusic's, Motion to Dismiss all charges filed against her on the grounds of untimely

prosecution—a delay of almost three years between the filing of the complaint and her arrest. This delay, Defendant argues, is in violation of her rights to a speedy trial safeguarded by both the Sixth Amendment of the United States Constitution, as well as by Rule 600 of the Pennsylvania Rules of Criminal Procedure.

PROCEDURAL AND FACTUAL BACKGROUND

Defendant was involved in a three-car motor vehicle accident on October 31, 2006, in Mahoning Township, Carbon County, Pennsylvania. Defendant was driving west on Blakeslee Boulevard Drive East when her vehicle crossed into the eastbound lane and struck an oncoming vehicle driven by Robert Speshok. The Speshok vehicle in turn struck a third vehicle.

The investigating officer, Audie Mertz of the Mahoning Township Police Department, determined that Defendant was driving under the influence. As part of his investigation, Officer Mertz secured and sent a sample of Defendant's blood to the state police crime lab for testing. The results of this testing, which Officer Mertz received on November 14, 2006, showed a blood alcohol content of .22%.

On November 28, 2006, a criminal complaint was filed in the office of Magisterial District Judge Edward Lewis. Therein, Defendant was charged, **inter alia,** with two misdemeanor counts of driving under the influence,[1] and aggravated assault while driving under the influence, a felony of the second degree.[2] A warrant for Defendant's arrest was issued by Judge Lewis on December 5, 2006. **See** Pa. R.Crim.P. 509(2)(a) (requiring the issuance of a warrant of arrest, and not a summons, when one or more of the offenses charged is a felony or murder).

Not until August 19, 2009, after Defendant unexpectedly learned that a warrant was outstanding for her arrest and made arrangements to voluntarily appear at Judge Lewis' office, was the warrant executed and service of the complaint made on Defendant. On this same date, Defendant was arraigned before Judge Lewis and bail was set at $10,000 unsecured. The reason for and the ef-

[1] 75 Pa. C.S.A. §3802(a)(1), (c).

[2] 75 Pa. C.S.A. §3735.1(a). Mr. Speshok allegedly sustained serious bodily injuries in the accident.

fects of the thirty-two month delay between when the complaint was filed and when Defendant was arrested are at the heart of Defendant's challenge.

Defendant's preliminary hearing, initially scheduled for August 26, 2009, was continued several times until December 9, 2009, when the hearing was waived. Thereafter, on January 4, 2010, Defendant filed an omnibus pretrial motion which included the instant Motion to Dismiss. The Motion was heard on March 23, 2010. At this hearing, Officer Mertz testified that sometime between December 5, 2006, the date the warrant was issued, and April 4, 2008, when he was injured and began disability leave,[3] he contacted Chief Strauss of the Lansford Borough Police Department to arrest Defendant and effect service of the complaint. Officer Mertz did not know the date of this contact, or whether he provided Chief Strauss with a copy of the arrest warrant and complaint. According to Officer Mertz, he heard nothing further from Chief Strauss on the matter and made no further attempt to contact Chief Strauss. In contrast, Defendant testified that Chief Strauss was a personal friend of hers, that he had been in her home on several occasions since the accident, that he knew where she lived and how to reach her, and that he never mentioned that a criminal complaint had been filed against her or that a warrant was outstanding for her arrest.

The only other efforts to locate Defendant about which Officer Mertz testified were his entry of Defendant's name on the National Crime Information Center database on July 19, 2007, identifying Defendant as a wanted person, and a check he made of Defendant's driver's license on February 11, 2008, confirming that Defendant's address was the same as that listed in the criminal complaint. Defendant's home, where she has resided continuously since 1995 until the present time, is in Lansford, Carbon County, Pennsylvania. No evidence was presented that Officer Mertz or anyone else ever attempted service on Defendant at her home. Likewise, although Defendant's telephone number is publicly listed in the phone directory, no evidence was presented that Officer Mertz or anyone else ever attempted to call Defendant at her home.

[3] Officer Mertz returned from disability in January 2009.

DISCUSSION

Rule 600

Rule 600 provides in pertinent part:

[(A)](3) Trial in a court case in which a written complaint is filed against the defendant, when the defendant is at liberty on bail, shall commence no later than 365 days from the date on which the complaint is filed.

* * *

(C) In determining the period for commencement of trial, there shall be excluded therefrom:

(1) the period of time between the filing of the written complaint and the defendant's arrest, provided that the defendant could not be apprehended because his or her whereabouts were unknown and could not be determined by due diligence;

(2) any period of time for which the defendant expressly waives Rule 600;

(3) such period of delay at any stage of the proceedings as results from:

(a) the unavailability of the defendant or the defendant's attorney;

(b) any continuance granted at the request of the defendant or the defendant's attorney.

* * *

(G) For defendants on bail after the expiration of 365 days, at any time before trial, the defendant or the defendant's attorney may apply to the court for an order dismissing the charges with prejudice on the ground that this rule has been violated. A copy of such motion shall be served upon the attorney for the Commonwealth, who shall also have the right to be heard thereon.

If the court, upon hearing, shall determine that the Commonwealth exercised due diligence and that the circumstances occasioning the postponement were beyond the control of the Commonwealth, the motion to dismiss shall be denied and the case shall be listed for trial on a date certain. If, on any successive listing of the case, the Commonwealth is not prepared

> to proceed to trial on the date fixed, the court shall determine whether the Commonwealth exercised due diligence in attempting to be prepared to proceed to trial. If, at any time, it is determined that the Commonwealth did not exercise due diligence, the court shall dismiss the charges and discharge the defendant.

Pa. R.Crim.P. 600.

As provided by Rule 600, trial must commence by the mechanical run date, which is calculated by adding 365 days to the date on which the criminal complaint was filed. The mechanical run date is then adjusted or extended by adding to this date any "excludable" time attributable to a defendant under Rule 600(C).[4] The mechanical run date, as so modified, becomes an adjusted run date. If trial begins before the adjusted run date, there is no violation and no need for further analysis. However, if a defendant's trial is delayed until after the adjusted run date, it becomes necessary to determine if the delay is "excusable," that is due to circumstances beyond the Commonwealth's control and despite its due diligence pursuant to Rule 600(G).[5]

> Due diligence is a fact-specific concept that must be determined on a case-by-case basis. Due diligence does not require perfect vigilance and punctilious care, but rather a showing by the Commonwealth that a **reasonable** effort has been put forth. Due diligence includes, among other things, listing a case for trial prior to the run date, preparedness for trial within the run date, and keeping adequate records to ensure compliance with Rule 600.

Commonwealth v. Tickel, 2 A.3d 1229, 1234 (Pa. Super. 2010) (emphasis in original) (**quoting Commonwealth v. Ramos,** 936

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[4] "Excludable time" is defined in Rule 600(C) as "the period of time between the filing of the written complaint and the defendant's arrest, ... 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; [and] (b) any continuance granted at the request of the defendant or the defendant's attorney." Pa. R.Crim.P. 600(C).

[5] "Excusable delay," while not expressly defined in Rule 600, is that delay "which occur[s] as a result of circumstances beyond the Commonwealth's control and despite its due diligence." **Commonwealth v. Brown,** 875 A.2d 1128, 1135 (Pa. Super. 2005), **appeal denied,** 891 A.2d 729 (Pa. 2005).

A.2d 1097, 1102 (Pa. Super. 2007) **(en banc)**); **see also, Commonwealth v. Meadius,** 582 Pa. 174, 870 A.2d 802, 807 (2005) **(en banc)** (the exercise of "due diligence" requires the Commonwealth to do everything reasonably within its power to guarantee that a trial begins on time).

Instantly, the Commonwealth filed its complaint against Defendant on November 28, 2006. Therefore, the initial Rule 600 mechanical run date was November 28, 2007. Defendant's arrest, however, was not effected until August 19, 2009, almost two years after the mechanical run date. For this period to constitute excludable time and be added to the mechanical run date, it must meet the requirements of Rule 600(C)(1).

On this point, we are not convinced that the Commonwealth exercised "due diligence" in locating Defendant and bringing this case to trial on time. As previously stated, Defendant has resided at the same address in the same county where the incident giving rise to the charges occurred since 1995, is known in her community by the local chief of police, and has a public telephone number. Defendant made no effort to avoid service.[6] More importantly, no reasonable effort was made by the Commonwealth to contact Defendant at her home, either in person or by telephone, to advise her of the charges. Nothing prohibited Officer Mertz himself from making personal service notwithstanding that Defendant's residence is beyond the territorial limits of his primary jurisdiction. 42 Pa. C.S.A. §8953(a)(1); **see also, Commonwealth v. England,** 474 Pa. 1, 11, 375 A.2d 1292, 1297 (1977), **affirmed,** 497 Pa. 429, 441 A.2d 1214 (1982).

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[6] The fact that Defendant testified that after the accident she expected criminal charges to be filed does not extend the time for trial or excuse the delay. As stated by the Court in **Commonwealth v. Bradford:**

> The duty to adhere to Rule 600 rested with the Commonwealth, not [Defendant]. [Defendant] did not have an obligation to tell the Commonwealth that the Commonwealth was not proceeding with its case against [her].

Id., 2 A.3d 628, 633 (Pa. Super. 2010); **see also, Barker v. Wingo,** 407 U.S. 514, 527 (1972) (stating, in reference to the Sixth Amendment right to a speedy trial, "A defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process."). Moreover, Defendant testified that she first became aware of the charges and the warrant for her arrest approximately one week prior to when she turned herself in at Judge Lewis' office.

In accordance with the foregoing, none of the delay which occurred between the filing of the complaint and Defendant's arrest is excludable time attributable to Defendant. Nor is this delay excusable pursuant to Rule 600(G). The Commonwealth did not act with due diligence in locating and apprehending Defendant. The circumstances why this occurred were not beyond the Commonwealth's control. [7]

In concluding that all charges must be dismissed because Rule 600 has been violated, we understand and recognize that Rule 600 serves two equally important functions: (1) the protection of the accused's speedy trial rights, and (2) the protection of society.

> In determining whether an accused's right to a speedy trial has been violated, consideration must be given to society's right to effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it. ... [T]he administrative mandate of Rule [600] was not designed to insulate the criminally accused from good faith prosecution delayed through no fault of the Commonwealth.
>
> So long as there has been no misconduct on the part of the Commonwealth in an effort to evade the fundamental speedy trial rights of an accused, Rule [600] must be construed in a manner consistent with society's right to punish and deter crime. In considering [these] matters ..., courts must carefully factor into the ultimate equation not only the prerogatives of the individual accused, but the collective right of the community to vigorous law enforcement as well.

Tickel, supra, 2 A.3d at 1233 (**quoting Ramos,** 936 A.2d at 1100-1101). While being cognizant of the societal interest inherent in Rule 600, it is because we specifically find that the Commonwealth has not acted with the necessary due diligence and attentiveness appropriate to the circumstances, that we cannot condone the continued prosecution of Defendant and will dismiss the charges.

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[7] Significantly, the complaint against Defendant was previously approved for filing by the District Attorney's office on November 27, 2006, pursuant to Pa. R.Crim.P. 507(A). **Cf. Bradford, supra,** 2 A.3d at 637 (attributing to the Commonwealth delay which occurred after the District Attorney was aware of the charges).

Sixth Amendment

The Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial ... ."[8] This amendment, which among others protects a criminal defendant's interest to a fair adjudication, is triggered by a formal criminal prosecution—arrest, indictment, or other official accusation. **See Doggett v. United States,** 505 U.S. 647, 654-55 (1992); **United States v. Marion,** 404 U.S. 307, 320 (1971) (the Sixth Amendment right to a speedy trial does not apply until "either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge").[9]

In assessing whether a violation of an accused's Sixth Amendment right to a speedy trial exists, four factors must be examined, together with such other circumstances as may be relevant: "[l]ength of delay, the reason for the delay, the defendant's assertion of his

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[8] In **Barker,** the United States Supreme Court stated:

> The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.

Id., 407 U.S. at 522 (**quoting Beavers v. Haubert,** 198 U.S. 77, 87 (1905)). In general, if the Commonwealth has pursued a defendant with reasonable diligence from indictment to arrest, his speedy trial claim will fail regardless of the length of the delay (**e.g.,** legitimate investigative delay), unless the defendant can show specific prejudice to his defense. **See Doggett v. United States,** 505 U.S. 647, 656 (1992).

[9] In contrast, a defendant may invoke due process to challenge delay both before and after official accusation. **See Doggett, supra,** 505 U.S. at 655 n.2; **see also, Commonwealth v. Scher,** 569 Pa. 284, 803 A.2d 1204, 1215-16 (2002) (finding twenty-year delay in filing murder charges and arresting defendant not **per se** violative of defendant's rights to due process under the law). In order to prevail on a due process claim based upon delay between the commission of the offense and the initiation of prosecution,

> the defendant must first show that the delay caused him actual prejudice, that is, substantially impaired his or her ability to defend against the charges. The court must then examine all of the circumstances to determine the validity of the Commonwealth's reasons for the delay. Only in situations where the evidence shows that the delay was the product of intentional, bad faith, or reckless conduct by the prosecution, however, will we find a violation of due process. Negligence in the conduct of a criminal investigation, without more, will not be sufficient to prevail on a due process claim based on pre-arrest delay.

Scher, supra, 803 A.2d at 1221-22 (footnote omitted).

right, and prejudice to the defendant." **Barker v. Wingo,** 407 U.S. 514, 530, 533 (1972). Here, all four factors support Defendant's claim, as does the violation of Rule 600, which itself presumptively fixes the time period in which a case should normally be prosecuted.

The delay is in excess of one year,[10] is attributable to minimal efforts extended by the police to locate and apprehend Defendant, and was asserted promptly by Defendant after her arrest, there being no evidence that Defendant knew of the complaint earlier than one week before she reported to Judge Lewis' office.[11] Although actual prejudice has not been established,[12] the "affirmative proof of particularized prejudice is not essential to every speedy trial claim." **Doggett, supra,** 505 U.S. at 655. Instead, common sense dictates that the greater the delay, the greater "the possibility that the accused's defense will be impaired by dimming memories and loss of exculpatory evidence" and the greater the possibility that the reliability of the trial itself will be compromised "in ways that neither party can prove or, for that matter, identify." **Doggett, supra,** 505 U.S. at 654-55. Although such presumed prejudice

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[10] In general, courts have held that post-accusation delays approaching one year are "presumptively prejudicial." **Doggett, supra,** 505 U.S. at 652 n.1. As used as a triggering mechanism, the term "presumptively prejudicial" "does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the **Barker** enquiry." **Id.; see also, Barker, supra,** 407 U.S. at 530.

[11] Were this not the case, and had it been shown that Defendant was aware of the charges years earlier, **Barker's** third criteria would weigh heavily against Defendant. **See Doggett, supra,** 505 U.S. at 653.

[12] Defendant's claim of prejudice on the basis that she has been deprived of the opportunity to independently test the blood sample drawn following her accident is unavailing. This sample was destroyed by the lab once thirty days passed from testing. Such destruction would have occurred in the ordinary course of even a timely prosecution and is not attributable to any excessive delay for which the Commonwealth can be held accountable. As stated in **Scher,**

> These claims more properly relate to a due process claim based on police failure to preserve evidence. The United States Supreme Court has made clear, however, that the police do not violate a defendant's due process rights by failing to preserve potentially useful evidence unless the defendant can show that the police acted in bad faith. **Arizona v. Youngblood,** 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). There has been no showing of bad faith on the part of the police with respect to the loss of evidence in these instances.

Scher, supra, 803 A.2d at 1223 n.17.

cannot alone sustain a Sixth Amendment claim, when combined with the other **Barker** criteria, each of which weighs against the government, a delay of almost three times that sufficient to trigger judicial review, with no extenuating circumstances nor persuasive evidence to the contrary, entitles Defendant to relief. **See Doggett, supra,** 505 U.S. at 658.[13]

CONCLUSION

For the reasons discussed, the delay which occurred in this case between the filing of the criminal complaint and Defendant's arrest violates the rights afforded an accused to a speedy trial and fair adjudication as provided by Rule 600 of the Pennsylvania Rules of Criminal Procedure and the Sixth Amendment. In consequence, Defendant is entitled to have the charges dismissed and to be discharged from further prosecution.

[13] We expressly do not find any intentional misconduct or bad faith by the Commonwealth. Instead, we believe the delay is attributable to a failure to exert reasonable diligence, that is, simple negligence. In weighing whether prejudice exists, any delay caused by intentional misconduct or official bad faith is weighed heavily against the government. **See Doggett, supra,** 505 U.S. at 656.

ANN CASTRO and DAVID CASTRO, Her Husband, Plaintiffs v. KAILASH MAKHIJA, M.D., DR. MAKHIJA & ASSOCIATES, and KANWAL S. KHAN, M.D., Defendants

Civil Law—Medical Malpractice—Punitive Damages—Vicarious Liability

1. For punitive damages to be imposed, Defendant's conduct must be not only unreasonable, it must be outrageous. Outrageous conduct is that undertaken with a bad motive, with a willingness to inflict injury, or with a conscious indifference to whether injury is caused.

2. Conduct subject to the imposition of punitive damages is different not only in degree but in kind from conduct which is negligent, evincing a different state of mind on the part of the tort-feasor. For punitive damages to exist, Defendant's conduct must be willful, wanton, or in reckless indifference to the rights of others.

3. Willful misconduct is characterized by an intent to cause harm; wanton misconduct by conduct that is knowingly done; and reckless misconduct (necessary to support an award of punitive damages) by conduct that displays a conscious indifference to the consequences.

4. Two types or forms of reckless misconduct exist, each exhibiting a different state of mind: (1) where the actor knows, or has reason to know, of facts which create a high degree of physical harm to another, and deliberately

proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk; (2) 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. Only the first form of reckless misconduct, where the Defendant subjectively appreciates the risk of harm to which the Plaintiff is exposed and acts, or fails to act, in conscious disregard of that risk, will support an award of punitive damages.

5. Whether the evidence is sufficient to support an award of punitive damages and should be submitted to the jury is, in the first instance, a question of law for the court.

6. In the context of professional liability claims, absent facts evidencing outrageous conduct obvious even to a layperson, expert testimony is necessary to establish whether the professional's conduct is outrageous.

7. Where medical malpractice has been alleged, and Plaintiff's experts identify a risk of which the Defendant physician was aware (here the presence of an abdominal abscess) and opined that the failure to provide certain treatment (here the administration of antibiotics and drainage) is a substantial deviation from the standard of professional care owed to the Plaintiff, exhibiting a conscious or reckless disregard of the risk of further infection, Defendant's motion for partial summary judgment as to Plaintiff's claim for punitive damages will be denied.

8. For one professional to be subject to the payment of punitive damages attributable to the willful, wanton or reckless misconduct of another professional, the agent must not only be subject to the principal's control or right of control with respect to the work to be done and the manner of performing, but such work must be performed on the business of the principal or for his benefit. Were the latter element not a prerequisite, the right to supervise the work and the manner of performance alone would subject a supervisory employee to liability for the negligent act of another employee even though he is neither the superior nor master of that employee.

9. Absent unusual circumstances, a primary care physician who consults with a specialist concerning a patient's care is not the agent of the specialist who neither controls nor has the right to control the care provided by the primary care physician.

10. Absent unusual circumstances, where one specialist covers for another, with the covering physician free to use his own discretion, knowledge and skill in the patient's care, without any control, interference or input from the treating physician, the relationship between the two is that of an independent contractor. Hence, no liability is imposed on the treating specialist for the conduct of the covering physician.

11. With respect to the imposition of punitive damages, Section 505(c) of the MCARE Act creates a vicarious liability standard which is more demanding than that set forth in the common law. Under the MCARE Act, before vicarious liability for punitive damages may be imposed upon a principal, there exists an element of scienter: the principal must have known of and allowed the conduct by its agent that resulted in the award of punitive damages.

NO. 06-2746

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JOHN R. HILL, Esquire—Counsel for Dr. Makhija and Dr. Makhija & Associates.

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MEMORANDUM OPINION

NANOVIC, P.J.—October 26, 2010

In 2004, Ann Castro's life was changed forever, because, she contends, of the medical care she received while a patient at the Gnaden Huetten Memorial Hospital. Liability of the Defendant, Kailash Makhija, M.D., for professional medical malpractice is premised upon principles of both direct and vicarious liability. Dr. Makhija is a trained physician, board certified in gynecology and obstetrics. Mrs. Castro (hereinafter referred to as "Plaintiff")[1] claims as well that Dr. Makhija is liable for punitive damages both for his own conduct and that of other physicians allegedly acting subject to his control and for his benefit. Plaintiff's claim for punitive damages is the subject of Dr. Makhija's instant motion for partial summary judgment.

PROCEDURAL AND FACTUAL BACKGROUND

On August 21, 2004, Ann Castro appeared at the emergency room of the Gnaden Huetten Memorial Hospital with complaints of abdominal pain. A CAT scan of her abdomen and pelvis showed a lobulated lesion in the right lower quadrant suspicious for an ovarian cyst. The following day, Dr. Makhija operated on Plaintiff, performing a diagnostic laparoscopy, which was converted to a formal laparotomy, followed by lysis of adhesions, a partial omentectomy, and a bilateral oophorectomy. Plaintiff was discharged home on August 26, 2004.

Within hours of her discharge, Plaintiff was readmitted to the hospital complaining of right lower quadrant pain. A repeat CAT scan on August 26, 2004, revealed an irregular shaped fluid collection in the right lower quadrant. This collection was initially thought to be a hematoma; it did not appear to contain gas.

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[1] For ease of discussion, Ann Castro is identified in this Opinion as the Plaintiff since the principal claims are those of Mrs. Castro. For completeness, we note here that Mrs. Castro's husband, David Castro, is also a named Plaintiff. His claim for loss of consortium is derivative from that of his wife's.

Given the possibility of an infection, Plaintiff was placed on antibiotics. This was increased to triple broad-spectrum antibiotics on August 27, 2004. The plan was for bed rest and to continue antibiotics and fluids, with a repeat CAT scan in several days. Dr. Kanwal Khan, an associate of Dr. Makhija's who was assisting Dr. Makhija in his treatment of Plaintiff, suggested percutaneous drainage if the fluid collection persisted on the repeat CAT scan.

During the next several days, Plaintiff's signs and symptoms varied. At times her white blood cell count was normal or near normal, she was afebrile, and her clinical evaluation was good. At other times, she exhibited signs of intra-abdominal sepsis as shown by fevers and a rise in her white blood cell count. That an abscess should be considered given Plaintiff's increased white blood cell count and fever was noted in Plaintiff's progress notes of August 28, 2004, by Dr. Deborah Smith, a family doctor covering for Dr. Patrick Hanley, Plaintiff's family physician.

A CAT scan of Plaintiff's abdomen and pelvis taken on August 30, 2004, suggestive of developing abscesses, depicted a focal fluid attenuation with air fluid level in the right lower posterior abdomen, extending into the right pelvis, and a second focal fluid collection with air bubbles in the posterior of the midline of the pelvis. Close follow-up was recommended. The radiologist report noted that Dr. Makhija was consulted.

The standard of care for the treatment of intra-abdominal abscesses, according to Plaintiff's experts, requires drainage of the abscesses in addition to the administration of triple antibiotics.[2] No drainage took place during the period between August 26 and August 30, 2004, and none occurred between August 30, 2004, and Plaintiff's hospital discharge on September 5, 2004.[3] In

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[2] According to Plaintiff, abscesses are not effectively treated using triple antibiotics alone since antibiotics cannot penetrate the capsule of the abscess which is avascular. Therefore, in order for the antibiotics to reach the abscess, surgical drainage is necessary to remove the abscess cavity fluid (pus).

[3] Prior to this discharge, Dr. Makhija last saw Plaintiff on the morning of September 2, 2004. Dr. Richard Miller, an experienced gynecologist/obstetrician who was covering for Dr. Makhija over the weekend of September 3 through September 5, 2004, cleared Plaintiff for gynecologic discharge on Saturday, September 4, 2004. Dr. Miller began covering on the evening of September 3, 2004, sometime after 4:00 P.M., and covered for Dr. Makhija until Monday morning

consequence, Plaintiff contends, the infection in her abdomen and pelvis went unchecked, advancing such that surgical intervention became mandatory by the time Plaintiff was again readmitted to the hospital on September 9, 2004, after experiencing a sudden onset of bloody vaginal discharge and abdominal pain.

A laparotomy was performed the same date as Plaintiff's readmission by Dr. Michael Martinez, a general surgeon, to drain what he suspected were intra-abdominal and pelvic abscesses. By this time inflammation and infectious changes within the peritoneal cavity, complicated by significant preexisting adhesions, made dissection during the surgery extremely difficult, leading to vascular and bowel injury. On account of an injury to the proximal superior mesenteric artery, devascularization of a significant portion of the bowel occurred, which subsequently necessitated a massive small bowel resection. As a result, the Plaintiff today suffers from short gut syndrome, short bowel syndrome, recurrent dehydration, intractable diarrhea, anemia, B-12 deficiency, malnutrition, chronic pain, lethargy, weakness, and depression.

Plaintiff contends that Dr. Makhija breached the standard of care in failing to timely drain the abdominal and pelvic abscesses and that this negligence was the cause of the complications which followed. Plaintiff further contends this delay exhibited willful, wanton, or reckless indifference to Plaintiff's care warranting the award of punitive damages under Section 505 of the Medical Care Availability and Reduction of Error (MCARE) Act, 40 P.S. §1303.505 (2002). Before us is Dr. Makhija's motion for partial

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at 8:00 A.M. Plaintiff was discharged from an overall medical standpoint by Dr. Hanley, her family physician, on September 5, 2004.

Dr. Hanley is a board certified physician in internal medicine. He was the admitting physician on August 26, 2004, and oversaw Plaintiff's general medical care while in the hospital. Dr. Hanley deferred to Dr. Makhija and Dr. Miller with respect to her gynecological care.

In his progress notes of September 2, 2004, Dr. Hanley contemplated ordering a CAT scan the following morning depending on the results of lab studies still to be taken. When those studies showed an improvement in Plaintiff's condition, Dr. Hanley decided a further CAT scan was unnecessary. As evidenced by Dr. Makhija's progress notes on September 2, 2004, Dr. Makhija erroneously interpreted Dr. Hanley's September 2, 2004 progress notes as ordering a CAT scan for September 3, 2004, rather than what Dr. Hanley wrote: to consider the possibility of a repeat CAT scan after the results of further lab studies were known.

summary judgment asking us to reconsider our prior decision allowing Plaintiff's claim for punitive damages to stand.

DISCUSSION

Punitive Damages Generally

"As the name suggests, punitive damages are penal in nature and are proper only in cases where the defendant's actions are so outrageous as to demonstrate willful, wanton or reckless conduct." **Hutchison v. Luddy,** 582 Pa. 114, 870 A.2d 766, 770 (2005). "Punitive damages are awarded only for outrageous conduct, that is, for acts done with a bad motive or with a reckless indifference to the interests of others." **Chambers v. Montgomery,** 411 Pa. 339, 344, 192 A.2d 355, 358 (1963). It is this mental state which justifies the award of damages whose purpose is to punish the defendant and deter the reoccurrence of similar conduct in the defendant and others. Punitive damages are not compensatory. "Punitive damages may not be awarded for [conduct] which constitutes ordinary negligence such as inadvertence, mistake and errors of judgment." **Martin v. Johns-Manville Corporation,** 508 Pa. 154, 170, 494 A.2d 1088, 1097 (1985) (plurality opinion), **abrogated on other grounds, Kirkbride v. Lisbon Contractors, Inc.,** 521 Pa. 97, 555 A.2d 800 (1989) (overturning rule that punitive damages must bear reasonable relationship to compensatory damages). Moreover, "punitive damages are an 'extreme remedy' available in only the most exceptional matters." **Phillips v. Cricket Lighters,** 584 Pa. 179, 883 A.2d 439, 445 (2005).

The reprehensibility of the type of conduct required to support an award of punitive damages is best understood by examining what is meant by willful and wanton misconduct, or reckless indifference to the rights of others. In **Evans v. Philadelphia Transportation Company,** 418 Pa. 567, 212 A.2d 440 (1965) the Pennsylvania Supreme Court stated:

> [W]ilful misconduct means that the actor desired to bring about the result that followed, or at least that he was aware that it was substantially certain to ensue. This, of course, would necessarily entail actual prior knowledge of [another's] peril.

Id. at 574, 212 A.2d at 443. As defined in **Evans,** "the term 'willful misconduct' is synonymous with the term 'intentional tort.'"

See King v. Breach, 115 Pa. Commw. 355, 367, 540 A.2d 976, 981 (1988).

The **Evans** court further distinguished "wanton misconduct" from "willful misconduct" by stating:

> Wanton misconduct, on the other hand, 'means that the actor has intentionally done an act of an unreasonable character, in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to the consequences ... .'

Id. at 574, 212 A.2d at 443. It is not necessary for the tort-feasor to have actual knowledge of the other person's peril to constitute wanton misconduct.

> [I]f the actor realizes **or** at least has knowledge of sufficient facts to cause a reasonable man to realize the existing peril for a sufficient period of time beforehand to give him a reasonable opportunity to take means to avoid the accident, then he is guilty of wanton misconduct if he recklessly disregards the existing danger.

Id. at 574, 212 A.2d at 444. "Negligence consists of inattention or inadvertence, whereas wantonness exists where the danger to the plaintiff, though realized, is so recklessly disregarded that, even though there be no actual intent, there is at least a willingness to inflict injury, a conscious indifference to the perpetration of the wrong." **Lewis v. Miller,** 374 Pa. Super. 515, 520, 543 A.2d 590, 592 (1988).

Finally, with respect to "reckless indifference" the degree of culpability required to sustain an award of punitive damages was considered in **Martin, supra** at 170, 494 A.2d at 1097. There, the Supreme Court first noted that Section 500 of the Restatement (Second) of Torts sets forth two different states of mind requisite for reckless indifference: "(1) 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;' and (2) 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, supra** at 171, 494 A.2d at 1097 (quoting Restatement (Second) of Torts §500 (1965) Comment a).[4] The first state of mind "demonstrates a higher degree of culpability than the second on the continuum of mental states which range from specific intent to ordinary negligence. An 'indifference' to a known risk under Section 500 is closer to an intentional act than the failure to appreciate the degree of risk from a known danger." **Id.** The second is premised on a "reasonable man standard."

Only the existence of the first state of mind described is sufficient to create a jury question on the issue of punitive damages. Only if a defendant is conscious of the risk and appreciates it can he be deterred from such conduct. **See id.** at 171 n.12, 494 A.2d at 1098 n.12. "Therefore, an appreciation of the risk is a necessary element of the mental state required for the imposition of such damages." **Id.** at 172 n.12, 494 A.2d at 1098 n.12. As a consequence, "in 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." **See Hutchison, supra,** 870 A.2d at 772 (summarizing and following the rationale of **Martin**).

"[W]hen assessing the propriety of the imposition of punitive damages, '[t]he state of mind of the actor is vital. ...'" **Hutchison, supra,** 870 A.2d at 770. As defined, conduct which is willful, wanton, or in reckless indifference to the rights of others, is different not only in degree but in kind from conduct which is negligent, or even grossly negligent, evincing a different state of mind on the part of the tort-feasor. **See Kasanovich v. George,** 348 Pa.

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[4] Section 500 of the Restatement (Second) of Torts defines "Reckless Disregard of Safety" as follows:

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Restatement (Second) of Torts §500 (1965).

199, 203, 34 A.2d 523, 525 (1943). Each marks a deviation from the standard of care so egregious that there exists, at a minimum, a subjective willingness to inflict injury. For punitive damages to be imposed, the conduct must be not only unreasonable, it must be outrageous.[5]

Direct Liability

The facts presented by Plaintiff do not support a finding that Dr. Makhija intended to cause Plaintiff harm or that he knew to a virtual certainty that harm would result from his treatment of Plaintiff.[6] Dr. Makhija did not act maliciously or with evil motive. His conduct cannot fairly be said to be willful. Nor does Plaintiff contend it was.

With respect to the state of mind necessary to impose punitive damages for wanton misconduct or behavior which exhibits reckless

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[5] This requirement for punitive damages in medical malpractice cases has been codified by statute. Section 505 of the MCARE Act, Punitive Damages, provides in pertinent part as follows:

> (a) Award.—Punitive damages may be awarded for conduct that is the result of the health care provider's willful or wanton conduct or reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the health care provider's act, the nature and extent of the harm to the patient that the health care provider caused or intended to cause and the wealth of the health care provider.
>
> (b) Gross negligence.—A showing of gross negligence is insufficient to support an award of punitive damages.

40 P.S. §1303.505 (2002). "This language tracks the test for punitive damages discussed in the case law." **Scampone v. Grane Healthcare Company,** 11 A.3d 967, 992 (Pa. Super. 2010). Both Section 505 of the MCARE Act and case law emphasize that "a showing of mere negligence, or even gross negligence, will not suffice to establish" a claim for punitive damages. **Phillips v. Cricket Lighters,** 584 Pa. 179, 883 A.2d 439, 445 (2005).

[6] Whether the facts are sufficient to permit an award of punitive damages is a question of law. **See Martin v. Johns-Manville Corp.,** 508 Pa. 154, 174, 494 A.2d 1088, 1098 (1985) (plurality opinion) ("[T]he trial judge must determine whether the plaintiff has presented sufficient evidence to support a punitive damages claim, **i.e.,** facts from which the jury might reasonably conclude that the preponderance of the evidence establishes outrageous conduct by the defendant."), **abrogated on other grounds, Kirkbride v. Lisbon Contractors, Inc.,** 521 Pa. 97, 555 A.2d 800 (1989) (overturning rule that punitive damages must bear reasonable relationship to compensatory damages); **see also, Lazor v. Milne,** 346 Pa. Super. 177, 179, 499 A.2d 369, 370 (1985) ("It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous so as to permit recovery.").

indifference,[7] Plaintiff's evidence most favorably viewed permits the inference that Dr. Makhija was aware that Plaintiff likely had an abdominal abscess, that it had not responded to conservative treatment with antibiotics, and that drainage, in addition to the continued use of antibiotics, was the recommended course of treatment to avoid the further spread of infection. Dr. Makhija was aware, at least as of August 30, 2004, when he had received the radiologist's report of the same date and spoken with the radiologist regarding that report, that Plaintiff's most likely diagnosis was an abscess. By then the fluid collection, first observed on August 26, 2004, had progressed from being irregularly shaped, without gas, to being two separate circumscribed fluid collections, with air, a clear sign of infection. Dr. Makhija was also familiar with the textbook "Berek & Novak's Gynecology," which he recognized as authoritative, and which provides that the "[s]tandard therapy for intra-abdominal abscess is evacuation and drainage, combined with appropriate parenteral administration of antibiotics." Jonathan S. Berek, **Berek & Novak's Gynecology,** 698 (14th ed., Wolters Kluwer Health 2006).

The critical question in this case is whether Dr. Makhija consciously or recklessly disregarded the risk posed by an abdominal abscess in his treatment of Plaintiff. More specifically, Plaintiff contends that the failure to begin drainage by August 30, 2004,

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[7] Wanton misconduct, as already stated, does not require actual knowledge of the other's danger if the risk is "so obvious that [the defendant] must be taken to have been aware of it ... ." **Evans v. Philadelphia Transportation Co.,** 418 Pa. 567, 574, 212 A.2d 440, 443 (1965); **see also, Weaver v. Clabaugh,** 255 Pa. Super. 532, 536, 388 A.2d 1094, 1096 (1978) ("[T]here are some dangers which are so obvious or well known that all adults of normal intelligence will be charged with their knowledge."). The law permits "an inference to be drawn that one who looks cannot say that he did not see that which he must have seen." **Evans, supra** at 577, 212 A.2d at 445.

Wanton misconduct is usually accompanied by either a conscious indifference to the consequences or a reckless disregard of a danger which was or should have been realized from the known facts. **See id.** at 573, 212 A.2d at 443-44. By incorporating recklessness into the equation for wanton misconduct, the distinction between what is reckless conduct sufficient to support an award of punitive damages and what is wanton misconduct is hopelessly blurred. As noted in **Evans,** the conduct described in Section 500 of the Restatement (Second) of Torts is often called "wanton or willful misconduct" in judicial opinions. **Id.** at 574 n.5, 212 A.2d at 444 n.5.

if not earlier, was inexcusable. In essence, Plaintiff contends that Dr. Makhija not only breached the applicable standard of care, but that such breach was an extreme, substantial deviation from the standard of professional care which he owed to Plaintiff. With respect to the evidentiary basis required before a fact-finder can intelligently evaluate whether a physician has acted in accordance with the requisite standard of care, in the absence of that which is obvious even to a layperson, we believe such determination requires expert testimony. **Cf. Winschel v. Jain,** 925 A.2d 782, 789 (Pa. Super. 2007), **appeal denied,** 940 A.2d 366 (Pa. 2008).

Here, the evidence before us indicates that Plaintiff's symptoms, at times, worsened while she was receiving antibiotics, and also, at times, showed improvement. The evidence also shows that the medication Plaintiff was receiving can mask the signs of an infection. Of particular significance, the CAT scans taken on August 26, 2004 and August 30, 2004, showed a marked worsening of Plaintiff's condition: from a single irregular shaped fluid collection, without gas, to two separate focused collections, each with gas.

Dr. Paul Gryska, a general and laparoscopic surgeon presented by Plaintiff, in his report dated February 10, 2010, states that "an intra-abdominal abscess cannot be treated with IV antibiotics alone, but requires drainage. Failure to recognize this is indeed well beneath the standard of care." Later in his report, Dr. Gryska states: "While IV antibiotics can contain initial growth and forestall worsening symptoms, there is no acceptable treatment course except for drainage. Failure to act here is beneath the standard of care and is reckless given Mrs. Castro's presentation." Dr. Gryska next observes that "all of the information mandating drainage of the abscesses was known or readily available to ... Dr. Makhija," yet, "Dr. Makhija took no steps to pursue drainage which was the most important procedure for treating [Plaintiff's] abscesses." Near the end of his report, Dr. Gryska concludes that Dr. Makhija "recklessly failed to act on [the August 30, 2004 CAT scan], despite the fact that these abscesses mandated drainage."

Given the complexities of the human body and the challenges in interpreting divergent data, we have no doubt Dr. Makhija faced difficult decisions in his treatment of Plaintiff. Nevertheless, un-

der the standard by which we must judge a motion for summary judgment, examining the record in the light most favorable to the nonmoving party and resolving all doubts against the moving party, the evidence is sufficient here to show not only that Dr. Makhija appreciated the risk of intra-abdominal abscesses, but that he either consciously or recklessly disregarded this risk and the relevant standard of care in his treatment of Plaintiff.

Vicarious Liability

Our discussion does not end here since Plaintiff further claims that both Dr. Hanley and Dr. Miller are agents of Dr. Makhija for whose conduct Dr. Makhija is responsible. Although not parties to this suit, to the extent Plaintiff claims Dr. Hanley's and Dr. Miller's conduct was willful, wanton, or reckless, Plaintiff argues Dr. Makhija is subject to the payment of punitive damages.

"A principal may be held vicariously responsible for the acts of his agent where the principal controls the manner of performance and the result of the agent's work." **Strain v. Ferroni,** 405 Pa. Super. 349, 360, 592 A.2d 698, 704 (1991).

> In determining whether a person is the servant of another it is necessary that he not only be subject to the latter's control or right of control with regard to the work to be done and the manner of performing it but that this work is to be performed on the business of the master or for his benefit. [Citation omitted.] Actual control, of course, is not essential. It is the right to control which is determinative. On the other hand, the right to supervise, even as to the work and the manner of performance, is not sufficient; otherwise a supervisory employee would be liable for the negligent act of another employee though he would not be the superior or master of that employee in the sense the law means it. [Citations omitted.]

Id. at 361, 592 A.2d at 704 (citations omitted in original) (**quoting Yorston v. Pennell,** 397 Pa. 28, 39, 153 A.2d 255, 259-60 (1959)). The principle of vicarious liability which binds a principal for the acts of his agent extends equally to the recovery of punitive damages provided the actions of the agent were within the course and scope of the agency relationship. **See Shiner v. Moriarty,** 706 A.2d 1228, 1240 (Pa. Super. 1998), **appeal denied,** 729 A.2d 1130 (Pa. 1998).

Under this standard, Dr. Makhija is not responsible for Dr. Hanley's conduct. Dr. Hanley was Plaintiff's family physician overseeing her general care while in the hospital. Dr. Hanley readily and understandably admitted in his depositions that he had not been trained as a gynecologic specialist, had never served a residency in gynecology, and that as an internist he was not trained to manage post-operative complications arising from gynecological surgery.

As between the two, Dr. Makhija was the specialist regarding Plaintiff's gynecological care and Dr. Hanley the primary care physician concerning her general care. Without question, Dr. Hanley exchanged information with Dr. Makhija, discussing her condition and treatment with him. However, it was Dr. Makhija and his associate, Dr. Khan, who were primarily responsible for treating Plaintiff for the complications of her surgery on August 22, 2004, and it was Dr. Miller, who was covering for Dr. Makhija, who discharged Plaintiff on September 4, 2004, from a gynecologic standpoint.

There is no evidence that Dr. Makhija controlled, or had the right to control or supervise, Dr. Hanley's care of Plaintiff. The nature of the relationship which existed between the two, that of a general practitioner and a specialist with whom he consults, is not the type of arrangement contemplated by the cases which deal with principal-agency law. **See Winschel, supra,** 925 A.2d at 796-97 (discussing the relationship between specialists and family doctors with specialists being held to a higher standard of care as a matter of law).

The relationship between Dr. Makhija and Dr. Miller was of a different type than that which existed between Dr. Makhija and Dr. Hanley. Here, both were specialists in the same field, with Dr. Miller covering for Dr. Makhija in Dr. Makhija's absence. Ordinarily, this arrangement would not impose any liability on Dr. Makhija for Dr. Miller's decisions. Dr. Miller, the covering doctor, would be free to use his own discretion, knowledge, and skill in the care of Plaintiff, without any control, interference, or input from Dr. Makhija. Under such circumstances, Dr. Makhija would be neither Dr. Miller's "employer" nor "supervisor." Instead, the relationship would be one of an independent contractor with no liability attributed to Dr. Makhija for Dr. Miller's conduct. **Cf. Strain, supra** at 362, 592 A.2d at 705.

The facts in this case do not make such a clear-cut differentiation. Dr. Miller testified that Dr. Makhija, as the treating physician, provided him with a detailed plan for Plaintiff's care and had the right to tell him what to do and how to treat his patients. Moreover, Dr. Miller was not paid for his services. All billing for Plaintiff's gynecological treatment of Plaintiff, including that provided by Dr. Miller, went through Dr. Makhija's office, as part of Dr. Makhija's business. Given these facts, we cannot say as a matter of law that Dr. Miller was not acting on Dr. Makhija's behalf, subject to his control, and for the financial benefit of Dr. Makhija's business or medical practice.

Nevertheless, for two reasons Dr. Miller's conduct does not subject Dr. Makhija to punitive damages. First, there is an absence of evidence that Dr. Miller acted willfully, wantonly, or with reckless indifference to Plaintiff's care. Dr. Miller first saw Plaintiff on September 4, 2004. Sometime in advance of this meeting, Dr. Makhija reviewed Plaintiff's medical condition and treatment with Dr. Miller and provided Dr. Miller with a treatment plan. There is nothing to suggest that Dr. Miller acted contrary to this plan. Further, because Dr. Hanley decided against having an additional CAT scan taken on the morning of September 3, 2004, there was no new CAT scan report for Dr. Miller to review. Moreover, at the time of Dr. Miller's gynecological discharge, Plaintiff's symptoms were improved: she was afebrile, her white blood cell count was down, and her pain was much less than it had been before. These facts do not evidence a clear violation of the standard of care Dr. Miller owed to Plaintiff, nor has Plaintiff presented any expert opinion that Dr. Miller breached the relevant standard of care or that such breach, if any, was so substantial as to be egregious or in utter and reckless disregard of Plaintiff's well-being. **See e.g., Medvecz v. Choi,** 569 F.2d 1221, 1227-30 (3d Cir. 1977) (abandoning a patient on the operating table for a lunch break without securing a suitable replacement sufficient to state a claim for punitive damages); **Hoffman v. Memorial Osteopathic Hospital,** 342 Pa. Super. 375, 383, 492 A.2d 1382, 1386-87 (1985) (concluding that a viable claim for punitive damages existed against a physician who refused to assist a patient with neurological paralysis who had fallen to the floor following an examination, and who also directed hospital

staff not to provide assistance, causing the patient to be without assistance and to remain on the floor for two hours).

In addition, Dr. Makhija anticipated and expected that a follow-up CAT scan would be taken on the morning of September 3, 2004, before any decision was made to discharge Plaintiff. There is no evidence that Dr. Makhija knew that Dr. Hanley had decided against a repeat CAT scan or that Dr. Miller would discharge Plaintiff without the benefit of an updated CAT scan. As Judge Nealon observed in **Wagner v. Onofrey:**

> Athough Sections 505(a) and (b) of the MCare Act are consistent with well established Pennsylvania case law, Section 505(c) creates a vicarious liability standard which is more demanding than that set forth in the common law. Under Pennsylvania decisional law, 'there is no requirement that an agent commit a tortious act at the direction of his principal, nor must the principal ratify the act, in order for punitive damages to be imposed on [the principal].' **Shiner v. Moriarty,** 706 A.2d 1228, 1240 (Pa.Super. 1998), **app. denied,** 556 Pa. 711, 729 A.2d 1130 (1998). In contrast, Section 505(c) of the MCare Act provides that '[p]unitive damages shall not be awarded against a health care provider who is only vicariously liable for the actions of its agent that caused the injury unless it can be shown by a preponderance of the evidence that the party knew of and allowed the conduct by its agent that resulted in the award of punitive damages.' 40 P.S. § 1303.505(c). Thus, by virtue of this statutory provision '... and its injection of a **scienter** element into the **respondeat superior** equation, a health care provider may not be vicariously liable for exemplary damages unless it had actual knowledge of the wrongful conduct of its agent and nevertheless allowed it to occur.' **Dean [v. Community Medical Center],** 46 D. & C. 4th [334] at 344 [(2000)] (analyzing identical language in 40 P.S. § 1301.812-A(c)**(repealed)**).

2006 WL 3704801, at *4 (Lackawanna Co. 2006).

CONCLUSION

The facts of this case present a jury question on whether Dr. Makhija acted wantonly or recklessly in his care of Plaintiff. The evidence, if believed, supports a finding either that Dr. Makhija

knew Plaintiff had an abdominal abscess, or that such knowledge can be imputed to him from the facts and information of which he was aware, and that Dr. Makhija recklessly disregarded fundamental principles of treatment in failing to drain the abscess to protect Plaintiff against the spread of infection. In contrast, the evidence is insufficient to charge Dr. Makhija with vicarious liability for punitive damages. Accordingly, we have denied Dr. Makhija's Motion for Partial Summary Judgment on the issue of punitive damages.

COMMONWEALTH OF PENNSYLVANIA vs. POSTELL RAHEEM GOGGANS, Defendant

Criminal Law—Search Warrant—Finding of Probable Cause—Staleness—Reliability of Confidential Source—Custodial Statements—Suppression—Redacting Tainted Information From Affidavit of Probable Cause

1. A magistrate's finding of probable cause to support the issuance of a search warrant is to be afforded deference by the reviewing court. In making his determination, the function of the magistrate is simply to make a practical, commonsense decision whether the information contained in the affidavit sets forth a fair probability that contraband or evidence of a crime will be found in a particular location.

2. Because probable cause must exist at the time a search warrant is issued, "stale" information will not support a finding of present probable cause. Whether information is stale takes into account not simply the passage of time, but also the nature of the crime and the type of evidence involved.

3. Where an affidavit of probable cause recites a history of continuing criminal activity for drug dealing, the time delay between the most recent reported incident for possessing an illegal controlled substance and the issuance of a warrant is less likely to support a finding of staleness as compared to an affidavit evidencing a single isolated incident of drug usage.

4. In determining probable cause to support the issuance of a search warrant, the veracity and basis of knowledge of persons supplying hearsay information must be examined. An informant's tips may support a finding of probable cause where the police independently corroborate specific facts demonstrating "inside information" provided by an anonymous source, where the informant has provided accurate information of criminal activity in the past, or where the informant himself participated in the criminal activity.

5. Absent being advised of his **Miranda** rights, statements given by an accused while in custody are presumptively involuntary and must be suppressed. This extends to custodial statements given in response to police conduct which is reasonably likely to elicit incriminating information albeit not involving direct questioning.

6. A search warrant issued on the basis of a probable cause affidavit which contains tainted information—here, an incriminating custodial statement

made without benefit of **Miranda** warning—is not invalid where, if the illegally obtained information is redacted, the remaining, untainted information supplies the necessary probable cause to validate the search.

NO. 549 CR 2008

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

BRIAN J. COLLINS, Esquire—Counsel for the Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—December 30, 2010

Before us is Defendant Postell Raheem Goggans' Omnibus Pretrial Motion. In this Motion, Defendant seeks to suppress approximately 66 grams of "crack" cocaine found in the engine compartment of the vehicle he was operating at the time of his arrest. This vehicle was searched pursuant to a warrant which the Defendant claims was improperly issued because (1) it relied upon information from a confidential informant which was stale; (2) it relied upon information from an unidentified informant with no history of reliability; and (3) it relied upon incriminating information taken from the Defendant in response to an unlawful custodial interrogation. For the following reasons, we deny Defendant's motion to suppress physical evidence and grant his motion to suppress the statement made while Defendant was in custody.

PROCEDURAL AND FACTUAL BACKGROUND

For more than a year prior to August 1, 2008, the date on which Defendant was arrested on the present charges,[1] Agents Kirk F. Schwartz and Aaron T. Laurito of the Pennsylvania Office of Attorney General, Bureau of Narcotics Investigation and Drug Control (the "Bureau"), have been investigating cocaine trafficking in Carbon County. As part of this investigation, Agents Schwartz and Laurito learned from a trusted confidential informant that a black male known as Raheem Mills a/k/a Marcus,[2] transports and

[1] Defendant has been charged with possession of a controlled substance, 35 P.S. §780-113(a)(16), a misdemeanor; possession of a controlled substance with intent to deliver, 35 P.S. §780-113(a)(30), a felony; and conspiracy to possess with intent to deliver, 18 Pa. C.S.A. §903 (a)(1), a felony.

[2] Agent Schwartz testified at the omnibus hearing that Defendant has many aliases.

sells cocaine in Carbon County. The reliability of this informant is not in dispute in these proceedings.[3]

The confidential informant described Defendant as a black male, approximately twenty-five years of age, of stocky build, and balding. The confidential informant further advised Agents Schwartz and Laurito that Defendant travels to the Lehighton area several times a month to sell cocaine, that he drives both a white-colored Mercedes Benz and a red-colored Jaguar, and that he places the cocaine inside of a black-colored sock kept under the hood of his vehicle while traveling. The confidential informant also stated that Defendant uses an apartment located on East Alley in Lehighton, Carbon County, and the residence of Travis Solomon located on Main Road in Weissport, Carbon County, to sell cocaine. Both locations were kept under surveillance by the Agents who observed a white and grey colored Mercedes parked in a public parking lot adjacent to the Main Road address on numerous occasions. In addition, the confidential informant informed the Agents that Defendant kept numerous Pennsylvania and New Jersey vehicle registration plates in the trunk of both the Jaguar and Mercedes.

During the four- to six-week period preceding August 1, 2008, the confidential informant reported that he had observed Defendant with substantial quantities of cocaine on numerous occasions. On June 16, 2008, the Agents arranged for the confidential informant to make a controlled purchase of cocaine from Defendant at the East Alley apartment. This purchase was monitored by the Agents who observed Defendant's red Jaguar parked in the rear parking lot of the property. The Jaguar was noted to have Pennsylvania plates with license number GXJ-7955.

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[3] The affidavit in support of the search warrant avers that this informant has worked with the Bureau for eight years and that the information he has provided has led to the arrest of at least five subjects, all of whom were convicted or pled guilty to narcotics-related offenses, as well as the seizure of substantial quantities of controlled substances, firearms, United States currency and vehicles. As recited in the affidavit in support of the search warrant, the confidential informant has previously made purchases of cocaine, marijuana, and other controlled substances, with Agents Schwartz and Laurito, as well as other law enforcement officers and agents, and the information provided by the informant in this investigation has been independently verified through other investigative techniques, including surveillance and controlled purchases of cocaine.

On August 1, 2008, Agent Schwartz was with Jeffrey Aster, another agent of the Bureau, when Agent Aster received information from a confidential source[4] that a person by the name of Marcus would be arriving in the Lehighton area at approximately 6:00 A.M. operating a white and gray Mercedes and that he would be in possession of a large amount of cocaine and possibly an assault weapon. That same day, Agents Schwartz and Aster were again contacted by the confidential source who told them that Defendant had arrived in the Lehighton area at approximately 5:50 A.M. operating a white and grey Mercedes, that he was accompanied by his cousin "T" and two unknown black females, and that Defendant was in possession of a large quantity of powder and crack cocaine. The confidential source was uncertain whether Defendant possessed an assault weapon. The confidential source further told the Agents that for

[4] At the time of the suppression hearing, this confidential source was identified as Travis Solomon, the occupant of the Main Road property in Weissport previously identified by the confidential informant in conjunction with Defendant's sales of cocaine in Carbon County. Near midnight on July 31, 2008, Solomon came in person to the Franklin Township Police Station where he reported to the on-duty officer, Officer Lorah, that Defendant would be coming to his home early the next morning with a large quantity of drugs and possibly weapons. Solomon was scared and told Officer Lorah that Defendant had been using his home from which to deal drugs. At the suppression hearing, Officer Lorah testified that although he knew Solomon beforehand, Solomon had never previously provided the police with information on Defendant.

After hearing what Solomon had to say, Officer Lorah contacted Agent Aster, who, in turn, instructed Officer Lorah to begin surveillance at the Main Road address and to be on the lookout for a white Mercedes. At this point Officer Lorah also had Solomon speak directly with Agent Aster about what he was told.

Early on August 1, 2008, Agents Aster and Schwartz met and interviewed Solomon. Prior to this meeting, Officer Lorah again contacted Agent Aster and reported that the white Mercedes had arrived at approximately 6:00 A.M. When Solomon met with the Agents, he identified the Mercedes as Defendant's car, told the Agents that Defendant had a substantial amount of cocaine which he kept under the hood in a black sock while traveling and related that Defendant had arrived with his cousin and two females.

Solomon's identity as the confidential source is not disclosed in the affidavit, nor is much of the information stated in this footnote. To the extent such information is not within the four corners of the affidavit it may not be considered by us in determining whether the warrant was supported by probable cause. **Commonwealth v. James,** 12 A.3d 388, 392 (Pa. Super. 2010); **see also,** Pa. R.Crim.P. 203(B), (D). Nevertheless, the affidavit is clear that the confidential source is a different person from the confidential informant who is separately referred to in the affidavit.

several months Defendant had been using a house on Main Road in Weissport from which to sell cocaine and that the Defendant secretes the cocaine he transports in a black sock under the hood of his vehicle while traveling. The Agents drove to this location where they observed the white and grey Mercedes parked unattended in a public parking lot adjacent to the property. The Mercedes carried Pennsylvania license plate with Registration Number GXJ-7955.

While at this location the Agents again received information from the confidential source that Defendant would be leaving the Main Road address within minutes and would be taking the cocaine which he had brought with him. Within minutes of receiving this information, the Agents observed Defendant, a second unidentified black male, and two unidentified black females exit the Main Road address and enter the Mercedes. After a short pause, Defendant popped open the hood of the vehicle, exited the vehicle, and then removed an item from his front pants pocket which he placed in an unknown location in the engine compartment of the vehicle. At this point, after Defendant was back in the car, Defendant and his three passengers were arrested. A search of Defendant revealed no cocaine on his person.

Defendant was taken to the Franklin Township Police Station. While there, and before he was read his **Miranda** rights, in response to a comment from Agent Schwartz that he believed Defendant had placed cocaine under the hood of the Mercedes, Defendant stated, "That shit ain't mine. That belongs to Trav." This exchange between Agent Schwartz and Defendant was contained in the affidavit used to obtain the search warrant, as was the other information contained in the foregoing text. It is this statement which Defendant seeks to suppress. As previously indicated, a subsequent search of the Mercedes produced the 66 grams of cocaine which Defendant also seeks to suppress.

DISCUSSION

"Where a motion to suppress has been filed, the burden is on the Commonwealth to establish by a preponderance of the evidence that the challenged evidence is admissible." **Commonwealth v. Ruey,** 586 Pa. 230, 892 A.2d 802, 807 (2006); **see also,** Pa. R.Crim.P. 581(h). This burden is not met by simply offering

the search warrant and affidavit at a suppression hearing with no supporting testimony. **Commonwealth v. Ryan,** 268 Pa. Super. 259, 265, 407 A.2d 1345, 1348 (1979). Instead, the Commonwealth must present evidence which the defendant is entitled to cross-examine. **Id.**

In **Illinois v. Gates,** 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed.2d 527 (1983), the United States Supreme Court defined the standards for issuing and reviewing a search warrant. Therein the Court stated:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for ... conclud[ing]' that probable cause existed.

Id., 238-39, 103 S.Ct. 2317 (citation omitted), quoted with approval in **Commonwealth v. Housman,** 604 Pa. 596, 986 A.2d 822, 843 (2009). Furthermore, in its review, the reviewing court is to afford deference to the magistrate's finding of probable cause. **Id.**

Staleness

Because probable cause in support of a search warrant must exist at the time the warrant is issued, "stale" information will not support a finding of present probable cause. **Commonwealth v. Nycz,** 274 Pa. Super. 305, 308, 418 A.2d 418, 420 (1980); **see also, Sgro v. United States,** 287 U.S. 206, 210 (1932). Defendant claims that the information provided by the confidential informant is stale and will not support a finding of probable cause. Specifically, Defendant argues that the controlled purchase from Defendant occurred almost six weeks prior to Defendant's arrest and that no specific dates have been provided for when the confidential informant claims to have witnessed Defendant's possession of cocaine during the four- to six-week period preceding his arrest. **Cf. Commonwealth v. Novak,** 233 Pa. Super. 236, 238-39, 335 A.2d 773, 774 (1975) ("Generally when the courts are forced to

make an assumption as to when transactions occurred 'within' a given period, for purposes of determining probable cause, it must be assumed that the transactions took place in the most remote part of the given period.").

Whether information is stale is not simply a question of the passage of time. The nature of the crime and the type of evidence must be examined. **United States v. Harvey,** 2 F.3d 1318, 1322 (1993). For instance, when a search warrant is grounded on information concerning the possession of child pornography obtained online through the use of a computer, the information is less likely to become stale since not only are pedophiles known to retain child pornography for long periods of time, but also, even if such information had been deleted or not even downloaded by the defendant, it can be retrieved from a defendant's computer by any trained forensic examiner. **Commonwealth v. Gomolekoff,** 910 A.2d 710, 714 (Pa. Super. 2006).

With respect to the sale or use of narcotics, ordinarily a delay of thirty days is considered too long. **See Commonwealth v. Novak, supra** at 240, 335 A.2d at 775. Indeed, "[i]f the issuing officer is presented with evidence of criminal activity at some prior time, this will not support a finding of probable cause as of the date the warrant issues, unless it is also shown that the criminal activity continued up to or about that time." **Nycz, supra** at 309, 418 A.2d at 420; **Commonwealth v. Shaw,** 444 Pa. 110, 114, 281 A.2d 897, 899 (1971).

In **Commonwealth v. Montavo,** 439 Pa. Super. 216, 653 A.2d 700 (1995), the Pennsylvania Superior Court further stated:

> While the information obtained from the confidential informants related to events occurring more than a month before the search warrant was requested, as the information indicates continuous drug activity, this passage of time becomes less significant. **See Commonwealth v. Ryan,** 300 Pa.Super. 156, 170, 446 A.2d 277, 284 (1982) ('Properly recited facts indicating activity of a protracted and continuous nature make the passage of time less significant') (citation omitted).

Id. at 222, 653 A.2d at 703; **see also, Commonwealth v. Klinedinst,** 403 Pa. Super. 605, 610, 589 A.2d 1119, 1122 (1991) ("a

showing that the criminal activity is likely to have continued up to the time of the issuance of the warrant will render otherwise stale information viable."), **appeal denied,** 529 Pa. 618, 600 A.2d 534 (1991).

Here, the affidavit in support of the warrant cited that Defendant had been traveling to the Lehighton area several times per month over a one-year period for the sole purpose of selling cocaine. Defendant did not live in Carbon County; he came here solely to deal drugs. In addition to the controlled purchase which occurred approximately six weeks prior to execution of the warrant, the confidential informant reported having observed Defendant with substantial quantities of cocaine on numerous occasions during the four- to six-week period immediately preceding the issuance of the warrant. That Defendant was still dealing drugs was also confirmed by the information received from the confidential source which itself was sufficient to overcome a staleness challenge. When considered as a whole, a fair reading of the affidavit supports a finding of continuing criminal conduct over a sustained period of time up until and including the time when the warrant issued. **Commonwealth v. Housman, supra,** 986 A.2d at 843 (noting that an affidavit in support of a search warrant "must be viewed in a common sense, nontechnical, ungrudging and positive manner"). As such, all incidents of Defendant's drug trafficking disclosed in the affidavit are relevant to a finding of probable cause. **See Nycz, supra** at 315, 418 A.2d at 423-24.

Reliability of Confidential Source

Defendant also contends that the affidavit submitted to the magistrate failed to establish that the confidential source was reliable and that his information was credible. Consequently, Defendant contends that the information in the affidavit attributable to the confidential source was not sufficient to establish probable cause for issuance of a search warrant.

> A determination of probable cause based upon information received from a confidential informant depends upon the informant's reliability and basis of knowledge viewed in a common sense, non-technical manner. ... An informant's tip may constitute probable cause where police independently corroborate the tip, or where the informant has provided ac-

> curate information of criminal activity in the past, or where the informant himself participated in the criminal activity.

Commonwealth v. Luv, 557 Pa. 570, 735 A.2d 87, 90 (1999).

"Unlike information obtained from a known informant whose reputation can be assessed and who can be held responsible if his allegations prove to be fabricated, information from an anonymous source can only be considered reliable if it provides specific facts, which are sufficiently corroborated by the officer." **Commonwealth v. Zhahir,** 561 Pa. 545, 751 A.2d 1153, 1165 (2000) (Zappala, J., dissenting). The nature of the corroboration required was further elaborated upon in **In Interest of O.A.,** 552 Pa. 666, 717 A.2d 490 (1998) as follows:

> Since the time of **Draper** and **Gates,** the Court has expanded upon what it intended by 'corroboration of detailed and accurate predictions' first introduced in **Gates.** When police are relying on an informant's tip, it is important that the tip provide information that demonstrates 'inside information,' a special familiarity with the defendant's affairs. ... If the tip provides inside information, then police corroboration of this inside information can impart additional reliability to the tip. ... If the facts that are supplied by the tip itself are no more than those easily obtained, then the fact that the police corroborated them is of no moment. It is only where the facts provide inside information, which represent a special familiarity with a defendant's affairs, that police corroboration of the information imparts indicia of reliability to the tip to support a finding of probable cause. Thus, police corroboration of an informant's tip enhances the indicia of reliability and thereby strengthens the determination that the facts and circumstances surrounding the tip warrant a finding of probable cause.

Id., 717 A.2d at 498 (plurality opinion) (citations omitted) (footnote omitted); **see also, Commonwealth v. Whitters,** 805 A.2d 602, 606 (Pa. Super. 2002), **appeal denied,** 814 A.2d 677 (Pa. 2003).

In the instant case, the confidential source's statements were corroborated in several respects. First, the source told the Agents in advance that Defendant would be arriving in the Lehighton area on August 1, 2008, operating a white and grey Mercedes with a large amount of cocaine and later, on the same date, contacted the

Agents after Defendant arrived and told them where the Defendant was, that he was accompanied by his cousin and two unknown black females, that he was in possession of a large quantity of cocaine, and that when he traveled, he placed the cocaine in a black sock under the hood of his vehicle. The Agents went to the designated location and observed a white and grey Mercedes parked unattended in a public parking lot adjacent to the given address. While at this location, the confidential source again contacted the Agents and told them that within minutes the Defendant would be leaving and would be in possession of the cocaine he brought with him to sell. As stated, within minutes of receiving this information, the Agents observed Defendant with an unidentified black male and two unidentified black females exit the property and, after opening the hood of the Mercedes, place an item from his pants pocket into an unknown location in the engine compartment of the vehicle.

The information the Agents received from the confidential source was not only predictive and verified, it was so recent it could only come from someone with a special knowledge and familiarity with Defendant's affairs. The information was further corroborated, or at least reinforced, in that the information provided coincided strongly with that which the Agents had received from the confidential informant, a source whose reliability has not been questioned, and the license number which the Agents observed on the Mercedes on August 1, 2008, was the same license number which had been observed on the red-colored Jaguar during the week of June 15, 2008.

Statements

Statements made during a custodial interrogation are presumptively involuntary, unless the accused is advised of his **Miranda** rights prior to the making of the statement. **Commonwealth v. DiStefano,** 782 A.2d 574, 579 (Pa. Super. 2001), **appeal denied,** 806 A.2d 858 (Pa. 2002). A custodial interrogation occurs when "questioning is 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." **Miranda v. Arizona,** 384 U.S. 436, 444 (1966). "Interrogation occurs [when] the police ... know that their words or actions are reasonably likely to elicit an incriminating response from the suspect." **Commonwealth v. Ingram,** 814 A.2d 264, 271 (Pa. Super. 2002).

Here, there is no dispute that Defendant was in custody and had not been advised of his **Miranda** rights prior to the statement which he now seeks to suppress. Further, following his arrest, Defendant made clear to Agent Aster that he did not want to give a statement. Instead, whether intentionally or knowingly, the police obtained by indirection what they could not do directly: the solicitation of information from Defendant. Such conduct is prohibited and the statement must be suppressed. **Rhode Island v. Innis,** 446 U.S. 291 (1980).

Although this statement was included in the affidavit offered in support of the search warrant, it was not critical to a finding of probable cause. "In deciding whether a warrant issued in part upon information obtained through exploitation of illegal police conduct is valid, [the reviewing court] must consider whether, absent the information obtained through the illegal activity, probable cause existed to issue the warrant." **Commonwealth v. Shaw,** 476 Pa. 543, 555, 383 A.2d 496, 502 (1978). When Defendant's statement is so redacted from the affidavit, the remaining, untainted information supplies the necessary probable cause to validate the search. Accordingly, since this statement can be severed from the affidavit without destroying the validity of the issuance of the search warrant, the search warrant is independently valid notwithstanding the inclusion of the statement. **Commonwealth v. West,** 937 A.2d 516, 529-30 (Pa. Super. 2007), **appeal denied,** 947 A.2d 737 (Pa. 2008); **Commonwealth v. Hernandez,** 594 Pa. 319, 935 A.2d 1275, 1283-84 (2007).

CONCLUSION

The test used to determine if probable cause exists for issuing a warrant is whether under the totality of the circumstances "there is a fair probability that contraband or evidence of a crime will be found at a particular place." **Commonwealth v. Glass,** 562 Pa. 187, 754 A.2d 655, 661 (2000). Similarly, probable cause to arrest exists when "the facts and circumstances which are within the knowledge of the officer at the time of the arrest, and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that the suspect has committed or is committing a crime." **Commonwealth v. Williams,** 2 A.3d 611, 616 (Pa. Super. 2010) (en banc). Absent some statutory provision to the contrary, a warrantless arrest must

be supported by probable cause to believe that "(1) a felony has been committed; and (2) the person to be arrested is the felon." **Id.** at 624 (Bender, J., dissenting). Because probable cause existed both to arrest Defendant and to support the issuance of the search warrant, Defendant's contention that the issuance of this warrant was unlawful is without merit.

Moreover, there is no basis for Defendant to contend that his car was unconstitutionally seized without a warrant when it was impounded by the police following his arrest pending the issuance of a search warrant. "It is reasonable ... for constitutional purposes for police to seize and hold a car until a search warrant can be obtained, where the seizure occurs after the user or owner has been placed into custody, where the vehicle is located on public property, and where there exists probable cause to believe that evidence of the commission of a crime will be obtained from the vehicle." **Commonwealth v. Holzer,** 480 Pa. 93, 103-104, 389 A.2d 101, 106 (1978). Such a detention of the vehicle is permissible because of the mobile nature of vehicles and the possibility that a co-conspirator or acquaintance could move the vehicle and thus the evidence be lost or tampered with. **See id.** at 104, 389 A.2d at 107. Although an arresting officer may secure such a vehicle, no search should be made until a warrant is obtained. **See id.** This is exactly what was occurred here. **Cf. Commonwealth v. Williams, supra,** 2 A.3d at 618 (discussing different outcome when vehicle seized from private property).

In accordance with the foregoing, Defendant's motion to suppress the physical evidence seized from the search of his vehicle will be denied. His motion to suppress the statement given while in police custody will be granted.

ORDER

AND NOW, this 30th day of December, 2010, upon consideration of the Defendant's Omnibus Pretrial Motion and after hearing, and in accordance with our Memorandum Opinion of this same date, it is hereby

ORDERED and DECREED as follows:

1. Defendant's motion to suppress the physical evidence is hereby DENIED and DISMISSED.

2. Defendant's motion to suppress his statement is hereby GRANTED.

NEIL A. CRAIG and ROSALEE T. CRAIG, Plaintiffs vs. JAMES DULCEY and KATHLEEN DULCEY, Defendants

Civil Law—Real Estate—Adverse Possession—Fee Versus Easement Rights—Requirement of Tacking—Extinguishing Easement Rights by Adverse Usage—Prayer for General Relief

1. An easement is a right in the owner of one parcel of land by reason of such ownership to use the land of another for a special purpose not inconsistent with a general property in the owner. Consequently, while one party's occupation of another's land by the placement of fill varying in height from eight feet to the surface level, upon which the party constructs a driveway used adversely for a period in excess of twenty-one years, will not qualify as an easement, it may result in the acquisition of a fee interest in the occupied property.

2. The acquisition to title ownership of property by adverse possession requires that the property be possessed adversely for a period in excess of twenty-one years. This period may be met by the tacking of the periods of adverse possession by previous owners provided such owners have included in their deed a grant of any inchoate rights acquired by incompleted adverse possession.

3. The acquisition of easement rights in another's property by adverse usage requires such usage for a period in excess of twenty-one years. Unlike the tacking of periods of adverse possession for the acquisition of fee ownership which requires an express grant of any inchoate rights acquired by incompleted adverse possession, easements pass by conveyance of the estates to which they are appurtenant.

4. For purposes of adverse usage in the acquisition of an easement, a use which begins as permissive becomes adverse when continued by the purchasers of property from the person to whom permission was given.

5. To extinguish another's easement interest in property owned by the servient owner, the owner, and/or his predecessors in title, must demonstrate a visible, notorious and continuous adverse hostile use of the disputed area which is inconsistent with the use made and rights held by the easement holder, not merely possession which is inconsistent with another's claim of title.

6. The construction of an above-grade driveway on top of an abandoned railroad bed in which another has acquired easement rights, which construction prohibits any passage or travel over the area of the railroad bed occupied by the driveway, will extinguish the easement holder's right to passage and travel in the area occupied by the driveway, provided the other requirements for extinguishing an easement interest by adverse usage have been met.

7. A chancellor sitting in equity has the power to shape and render a decree which accords with the equities of the case when the complaint includes a prayer for general relief.

NO. 09-1880

JAMES A. SCHNEIDER, Esquire—Counsel for the Plaintiffs.

GRETCHEN D. STERNS, Esquire—Counsel for the Defendants.

MEMORANDUM OPINION

NANOVIC, P.J.—February 1, 2011

Ironically, at issue in this case, is the location of one means of access, Plaintiffs' driveway, which blocks and prohibits, in part, the use of another means of access, a former railroad bed, by Defendants. We must decide whether Plaintiffs, Neil A. Craig and Rosalie T. Craig, are entitled to keep and maintain their above-grade driveway on the railroad bed or whether Defendants, James Dulcey and Kathleen Dulcey, are entitled to have this encroachment removed.

FACTUAL AND PROCEDURAL BACKGROUND

In 1979, Mark Gerhard subdivided approximately 55 acres of property owned by him in Packer Township, Carbon County, Pennsylvania into three separate parcels designated as Parcels 1, 2 and 3.[1] These parcels are each rectangular in shape, lie parallel to one another and run lengthwise from south to north. The northern boundary of each is the Quakake Creek.

Parcel 1, the westernmost parcel, is 20.077 acres in size; Parcel 2, the middle parcel, is 15.220 acres in size; and Parcel 3, the easternmost parcel, is 20.150 acres in size. Each parcel slopes downward from south to north and each is bisected by an abandoned railroad bed, 50 feet in width, running generally from west to east across the entire Gerhard property. Approximately 75 percent of each parcel lies on the south side of the railroad bed, with the balance bounded between the railroad bed and Quakake Creek on the north side. Each parcel has easement rights in the railroad bed as a means of ingress and egress.

By deed dated May 14, 1979, Gerhard sold what is now Plaintiffs' property, Parcel 3, to Michael J. Bove and his future wife, Helen L. Jacobs. Within a year of this purchase, the Boves built a home on that portion of their property south of the railroad bed and also constructed a driveway leading from their home to the

[1] The subdivision plan, Plaintiffs' Exhibit 4, was revised in March 1979 to include Parcel 3. Previously, the plan as originally prepared in 1977 included only Parcels 1 and 2. **See** Plaintiffs' Exhibit 4.

For illustrative purposes, an Appendix has been attached to this opinion showing the relative location of the properties involved in this litigation. This Appendix is not to scale.

railroad bed. The driveway was built first, beginning in the summer and ending in the fall of 1979.

At the point where the driveway intersects with the southern boundary line for the railroad bed is an embankment with a drop-off of approximately eight feet. In order to compensate for this height difference, the Boves placed fill on top of the railroad bed which gradually tapers to the surface of the railroad bed. This built-up area on which the driveway is located and which extends into the railroad bed runs at an oblique angle to the southern boundary of the railroad bed and encroaches on the railroad bed a distance of approximately 86.10 feet along its length and, at its maximum point, approximately 23.61 feet toward its center. In consequence, the area of the railroad bed covered by the driveway, the disputed area, is no longer useable or passable by vehicular traffic on the railroad bed. However, the balance of the width of the railroad bed, approximately 26.39 feet, is open and unobstructed.

Plaintiffs purchased Parcel 3 from Carolyn Keil in 1992. Their deed dated October 20, 1992 is recorded in the Office of the Recorder of Deeds of Carbon County in Deed Book 559 at page 192. The property had previously been purchased by Miss Keil from the Boves in 1985. Since the driveway was first constructed by the Boves on top of the railroad bed in 1979 until the present time, it has remained in the same location as originally constructed.

Defendants claim to have acquired fee ownership of the railroad bed for its entire length through Parcels 1, 2 and 3 from Mark Gerhard, as Executor of his mother's estate, by Deed dated October 12, 2007. In contrast, Plaintiffs claim ownership of that portion of the railroad bed encompassed within the metes and bounds description of their deed. This description for Parcel 3 has remained constant in the chain of title from Mark Gerhard to the Plaintiffs.

Subsequent to their receipt of the October 12, 2007 deed, Defendants sent a series of letters to Plaintiffs claiming ownership of the railroad bed beginning on May 7, 2008, and culminating in a letter dated June 23, 2009, advising that Defendants intended to remove the driveway encroachment from the railroad bed "at [their] discretion after June 30, 2009 without further notice." In response, on July 2, 2009, Plaintiffs commenced the present action by complaint. An amended complaint containing two counts,

each seeking an injunction restraining Defendants from removing or interfering with their driveway as located on the railroad bed, in addition to a claim for general relief, was filed on August 19, 2009. Count 1 claims a prescriptive easement by adverse use of the disputed area for a period of twenty-nine years. Count 2 alleges the existence of an easement implied by necessity attributable to the steepness of their property in the vicinity of the railroad bed and the consequent need to encroach on the railroad bed. In Defendants' answer filed on February 12, 2010, Defendants deny Plaintiffs' claims and, asserting a right to free and open use of their property, affirmatively counterclaim for an order directing Plaintiffs to remove the driveway encroachment from the railroad bed.

DISCUSSION

Before addressing the issues raised by the parties, two observations must be made. First, the law is no substitute for the facts. Second, the only facts which we can consider are those on the record before us. Both are key to the decision in this case.

As to the first, we begin with the deed from the parties' common grantor, Mark Gerhard, to the Boves. (Plaintiffs' Exhibit 1, Deed dated May 14, 1979 from Mark J. Gerhard to Michael J. Boves and Helen L. Jacobs.) This deed on its face conveys fee title to a 20.150-acre parcel. Included within the description for Parcel 3 is the section of the railroad bed lying between the width of this property, a distance of approximately 400 feet. **See Witman v. Stichter,** 299 Pa. 484, 490, 149 A. 725, 727 (1930) ("[W]hen one legally purchases a tract of land, in accordance with the metes and bounds set forth in the deed of conveyance, he takes title to the entire area, unless otherwise properly covenanted in the deed."). The Bove deed further "excepts and reserves" to Mark Gerhard, his heirs, successors and assigns, an easement interest only in that portion of the railroad bed located to the west of Parcel 3. (**See** Plaintiffs' Exhibit 1 and Exhibit 4, Plot of Survey—Gerhard Tract; this area is designated by single hatching on the Appendix.) This deed also grants the Boves an easement from a public road, identified as T-459, to the western end of the described railroad bed. (This area is designated by cross-hatching on the Appendix.) Subsequently, in the deed from Carolyn Keil to Plaintiffs, Plaintiffs have been granted an express easement to use that section of

the railroad bed previously excepted and reserved by Gerhard for easement purposes (**i.e.,** the single hatched area in the Appendix) which connects the western boundary of Parcel 3 with the separate easement (**i.e.,** the cross-hatched area in the Appendix) providing access to Route T-459. (Plaintiffs' Exhibit 3, Deed dated October 20, 1992 from Carolyn Keil to Neil A. Craig and Rosalie T. Vitro.) This express easement in the railroad bed, according to the Keil deed, has been granted to Plaintiffs by Gerhard in a deed of easement also dated October 20, 1992.

Defendants argue that Gerhard did not have title to the railroad bed at the time of the Bove conveyance and, therefore, could not convey title to this property to the Boves. The record does not support this contention. To the contrary, Defendants' deed from Gerhard in his capacity as executor of his mother's estate recites that title to the railroad bed was conveyed to Wallace O. Gerhard and Betsy K. Gerhard, his wife, by deed dated February, 1972. (Plaintiffs' Exhibit 16, Deed dated October 12, 2007 from Mark J. Gerhard, as Executor of the Estate of Bessie K. Gerhard, Deceased, to James Dulcey and Kathleen Dulcey.) The recital in the Bove deed identifies as the source of Gerhard's ownership of Parcel 3 a deed dated September 15, 1977 from Betsy E. Gerhard, **individually** and as Executrix of the Last Will and Testament of Wallace O. Gerhard, Jr. Neither party has placed in evidence a copy of this 1977 deed, however, the chronology of events evidences that Gerhard's mother obtained title to the railroad bed prior to her conveyance of that property of which Parcel 3 was a part to Gerhard and was therefore able to convey title to the railroad bed to her son.[2] Accordingly, the facts in the record before us support the finding that Plaintiffs' predecessor in title, the Boves, acquired title to the disputed section of the railroad bed prior to whatever title Gerhard may have granted to the Defendants in the estate deed of October 12, 2007.

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[2] Nor have Defendants presented us with a title abstract or other documentation showing that Gerhard did not own the railroad bed at the time of his conveyance to the Boves. **Cf.** Pa. R.C.P. 1054(b) (requiring the parties in an action in ejectment to "set forth in the complaint or answer an abstract of the title upon which the party relies at least from the common source of the adverse titles of the parties").

This finding, that Plaintiffs are the fee owners of the disputed area of the railroad bed on which their driveway is located, nullifies Plaintiffs' claims that they acquired prescriptive rights or an easement by necessity in this same area.[3] Likewise, Defendants' claim to remove the driveway predicated on their alleged ownership of the railroad bed is precluded. What remains is Defendants' claim as the holder of an easement interest in the railroad bed to free and unobstructed use of this right-of-way.

On this issue, the question to be determined is whether Plaintiffs' conduct, and that of their predecessors, extinguished Defendants' easement rights in the disputed area by adverse possession. To do so, such conduct "must demonstrate a visible, notorious and continuous adverse and hostile use of [the disputed area] which is inconsistent with the use made and rights held by the easement holder, not merely possession which is inconsistent with another's claim of title." **Estojak v. Mazsa,** 522 Pa. 353, 361, 562 A.2d 271, 275 (1989).

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[3] Were this not the case, Plaintiffs' claim to a prescriptive easement would nevertheless fail.

> An easement is a liberty, privilege, or advantage which one may have in the lands of another without profit. ... It may be merely negative ... and may be created by a covenant or agreement not to use land in a certain way ... . **But it cannot be an estate or interest in the land itself, or a right to any part of it.** ... **Slegel v. Lauer,** 148 Pa. 236, 240, [23 A. 996, 997, 15 L.R.A. 547.] An easement is a right in the owner of one parcel of land by reason of such ownership to use the land of another for a special purpose **not inconsistent with a general property in the owner.**

Clements v. Sannuti, 356 Pa. 63, 65-66, 51 A.2d 697, 698 (1947) (citations and quotation marks omitted) (emphasis in original). Here, the use Plaintiffs and their predecessors have made of the railroad bed is wholly inconsistent with the rights of the owner, being in effect a claim to a fee since it requires the permanent, actual and exclusive possession of the disputed area. Consequently, such use does not qualify as an easement.

Nor would Plaintiffs be successful had they set forth a claim of adverse possession to title ownership of the portion of the railroad bed occupied by the extended driveway. Plaintiffs have not in their own right used this area for a period in excess of twenty-one years and, while the periods of adverse possession of prior owners may be tacked onto the period of possession of a present owner, for this to occur the previous owners must have included in their deed a grant of any inchoate rights acquired by incompleted adverse possession. **Baylor v. Soska,** 540 Pa. 435, 439, 658 A.2d 743, 746 (1995). The deeds of neither the Boves nor Carolyn Keil purport to convey any rights acquired by adverse possession of the area in dispute.

In the present case, we believe these standards have been met. The driveway extension constructed on the railroad bed was in existence, unchanged, for almost thirty years prior to the commencement of litigation. Its presence has been actual, continuous and visible for more than twenty-one years. We also find that the nature of the obstruction and its effect on prohibiting any travel over the area of the railroad bed occupied by the driveway extension establishes the requisite adverse, notorious and hostile possession inconsistent with the easement rights claimed by Defendants.[4]

CONCLUSION

For the reasons given, Plaintiffs' claims to an easement as the source of their right to maintain the extended driveway constructed on the railroad bed are nonsustainable, as is the basis given by Defendants for seeking the removal of the encroachment. Nevertheless, because the facts support Plaintiffs' right to maintain this driveway, as a court of equity, we find Plaintiffs are entitled to the issuance of an injunction restraining and enjoining the Defendants from interfering with or obstructing Plaintiffs' driveway and access to the former railroad as a means of ingress and egress to their property. **Salisbury Township v. Vito,** 446 Pa. 200, 204, 285 A.2d 529, 531 (1971) (recognizing the power of a chancellor to shape and render a decree which accords with the equities in the case when, as here, the complaint includes a prayer for general relief).

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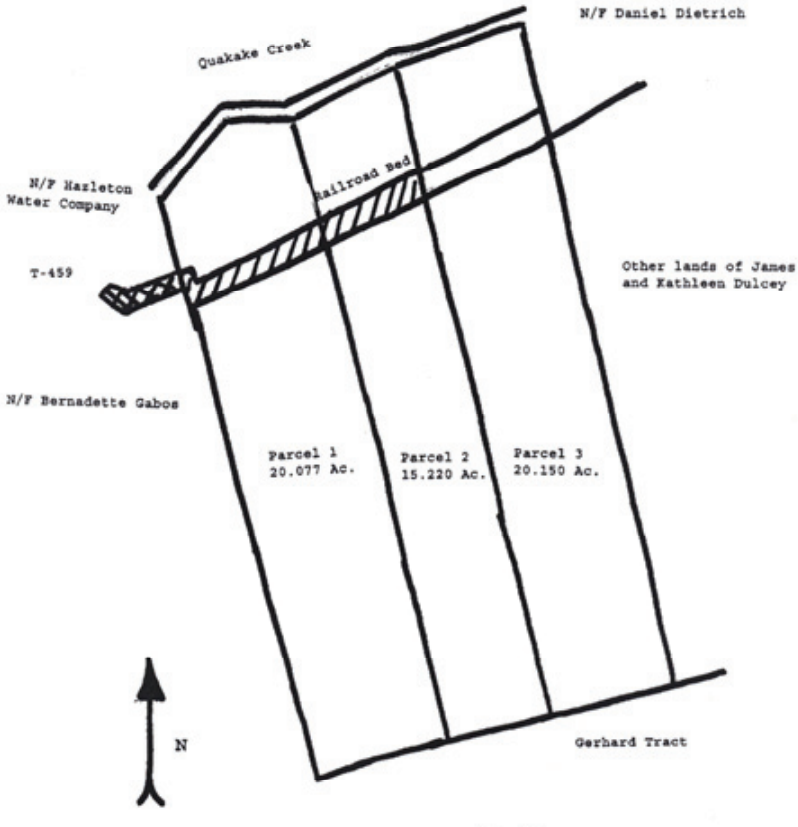
[4] Contrary to Defendants' request, we find that the Boves' construction of the driveway on the railroad bed in 1979 was not permissive. Permission was neither obtained nor sought from Mark Gerhard or his mother. Moreover, even had we found to the contrary, such permission being personal to the Boves would have been revoked upon the Boves' conveyance of Parcel 3 to Carolyn Keil; her continued use of the extended driveway for ingress and egress to her property after her purchase from the Boves would be adverse. **Orth v. Werkheiser,** 305 Pa. Super. 576, 581-82, 451 A.2d 1026, 1029 (1982) (holding that a use which begins as permissive becomes adverse when continued by the purchasers of property from the person to whom permission was given). Such use by Miss Keil and the Plaintiffs existed for twenty-four years prior to the commencement of Plaintiffs' suit. Nor is tacking an impediment to Plaintiffs' claim, as would be the case with the acquisition of a fee interest by adverse possession, since such does not apply to easements. **Predwitch v. Chrobak,** 186 Pa. Super. 601, 604, 142 A.2d 388, 389 (1958) (holding that easements pass by conveyance of the estates to which they are appurtenant).

APPENDIX



Appendix

DECREE NISI

AND NOW, this 1st day of February, 2011, after hearing and upon consideration of the record and the submissions by the parties, and in accordance with our Memorandum Opinion of this same date, it is hereby ORDERED and DECREED:

1. The Plaintiffs, Neil A. Craig and Rosalie T. Craig, shall be permitted to keep and maintain that section of their driveway now located on the former railroad bed. The area effected is that depicted on Plaintiffs' Exhibit 15, a copy of which is attached hereto;

2. In conjunction therewith, the Defendants, James Dulcey and Kathleen Dulcey, are enjoined from removing or threatening to remove Plaintiffs' driveway as it is presently located on the former railroad bed;

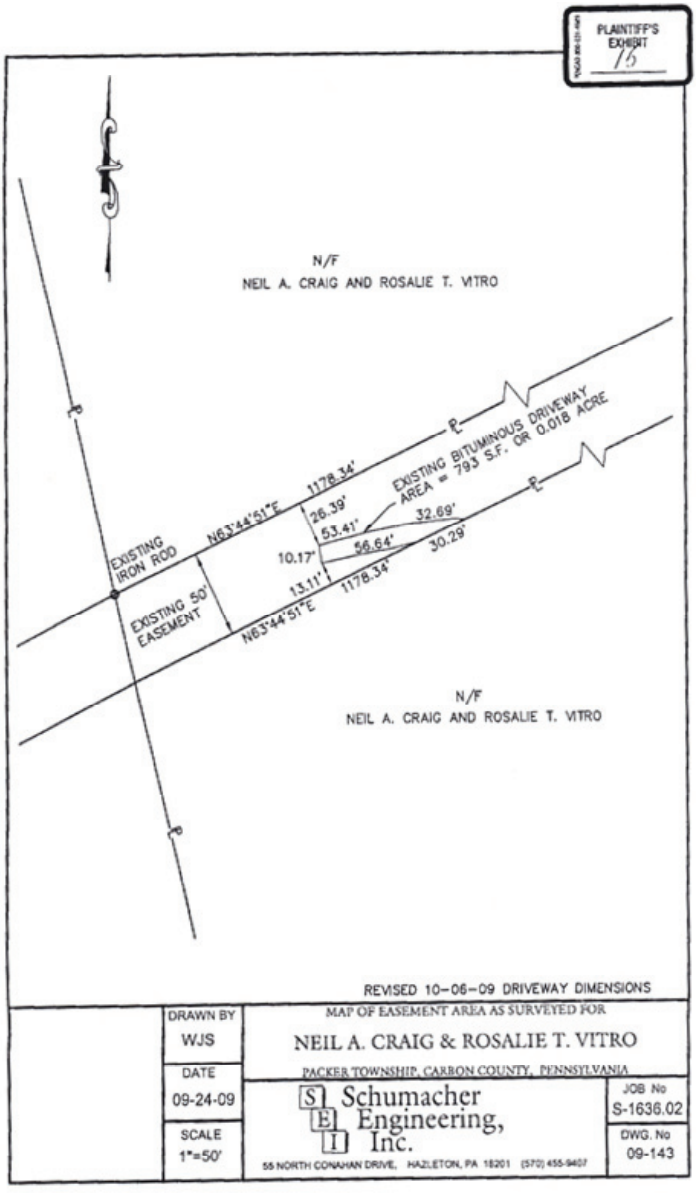
3. Plaintiffs' request for the imposition of an easement is denied;

4. Defendants' claim sounding in ejectment and for removal of the driveway is denied;

5. The costs of these proceedings shall be borne equally between the Plaintiffs, Neil A. Craig and Rosalie T. Craig, and the Defendants, James Dulcey and Kathleen Dulcey; and

6. The Prothonotary shall, unless a motion for post-trial relief is filed within ten days, upon praecipe of either of the Plaintiffs or the Defendants enter this Decree Nisi as a Final Decree.

PLAINTIFF'S EXHIBIT 15



COMMONWEALTH OF PENNSYLVANIA vs. WAHEEB GIRGIS, Defendant

Criminal Law—Motion To Sever Commonwealth's Joinder of Defendants—Standard by Which Determined—Distinguishing Between the Proper Function of a Bill of Particulars and That of Discovery

1. Pa. R.Crim.P. 582 permits criminal defendants to be tried together if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.

2. Pa. R.Crim.P. 583 authorizes the court to order separate trials of multiple defendants if it appears that any party may be prejudiced by offenses or defendants being tried together.

3. Pa. R.Crim.P. 582 and Pa. R.Crim.P. 583 complement one another: they limit the joinder of offenses and defendants charged in separate informations relative to the nature of the evidence adduced and the number of criminal acts or transactions alleged.

4. A tripartite test exists to determine whether to sever the Commonwealth's joinder of two or more defendants charged in separate informations: (1) whether the evidence of each of the offenses would be admissible in a separate trial for the other; (2) whether such evidence is capable of separation by the jury so as to avoid danger of confusion; and, if the answers to these inquiries are in the affirmative, (3) whether the defendant would be unduly prejudiced by the consolidation of offenses.

5. Under this tripartite test, the court must first determine if the evidence of each of the offenses would be admissible in a separate trial for the other. Where the crimes charged against each defendant do not concern the same act or transaction, or the same series of acts or transactions, constituting an offense or offenses, a separate basis for admission of evidence of other crimes must exist before a defendant can be bound to a trial in which evidence of criminal activity having nothing to do with the defendant is admitted.

6. Evidence of other crimes is admissible to demonstrate: (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme, plan or design embracing the commission of two or more crimes so related to each other that proof of one tends to prove the others; or (5) the identity of the person charged with the commission of the crime on trial. In addition, evidence of other crimes may be admitted where such evidence is part of the history of the case and forms part of the natural development of the facts.

7. A defendant pawnbroker's knowing receipt of stolen property from individual members of a burglary ring, whose existence the defendant is unaware of, and use of the monies borrowed from the defendant by a drug ring, whose existence he is also unaware of, to purchase illegal drugs is not part of the same act or transaction, or series of acts or transactions, out of which the charges of burglary and drug trafficking arise against members of the alleged burglary and drug rings. Nor is the evidence of such separate and distinct criminal activities of which defendant is unaware admissible against defendant as other crimes evidence where defendant has been charged with receiving stolen property, criminal conspiracy to receive stolen property, deal-

ing in the proceeds of unlawful activity, and corrupt organizations, charges which relate solely to defendant's receipt of stolen property.

8. A bill of particulars is intended to give notice to the accused of the offenses charged in the information so that he may prepare a defense, avoid surprise, or intelligently raise pleas of double jeopardy and the statute of limitations. It is not a substitute for discovery and the Commonwealth's evidence is not a proper subject to which a petition for a bill may be directed.

9. A request for discovery disguised as a bill of particulars may be properly denied by the trial court. When such occurs, defendant's proper remedy is to request discovery pursuant to Pa. R.Crim.P. 573.

NO. CR 345-2010

JOSEPH JUDE MATIKA, Esquire—Counsel for the Commonwealth.

PATRICK J. REILLY, Esquire and ANDREW H. RALSTON, JR., Esquire—Counsel for the Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—January 13, 2011

The Defendant, Waheeb Girgis, together with twelve other co-defendants have been separately charged, **inter alia,** with conspiracy and with violating the Corrupt Organizations Act. In his Omnibus Pretrial Motion now before us, Defendant requests that we sever the trial of his case from that of the other co-defendants and that we direct the Commonwealth to provide detailed information in response to Defendant's request for a bill of particulars.

PROCEDURAL AND FACTUAL BACKGROUND

The criminal complaint filed by the Commonwealth in this matter describes three levels of related criminal activity alleged to have been ongoing in and around Carbon, Lehigh, Northampton and Schuylkill Counties for more than two years: (1) a burglary ring which entered property to steal items to pawn; (2) a middle level of pawnbrokers used to convert stolen property into cash; and (3) a drug-trafficking ring which used the cash obtained from pawning stolen property to purchase heroin and/or cocaine for distribution and resale in Carbon County. According to the Commonwealth, Frank Munoz, and at least four others (Robert Cesanek, Edward Cesanek, Kira Cesanek and Wayne Thorpe) committed a series of residential and commercial burglaries in Carbon, Lehigh, Northampton and Schuylkill Counties to obtain stolen property. This property was pawned for cash with one of three pawnshop

owners/operators, namely Defendant, Daniel Eremus, or Donald Dorward, Sr. The monies received in exchange for the items pawned were used by Munoz and others to fund the purchase of heroin and/or cocaine from three independent dealers located in Lehigh and/or Northampton Counties. The controlled substances were then transported to Carbon County where they were distributed and sold by Munoz and others, either directly or through a network of at least four subdealers (Zach Lienhard, Amanda Rogers, Jon Maury, and John Alekiejczyk).

Defendant has been charged with one count of corrupt organizations,[1] one count of criminal conspiracy to receive stolen property,[2] three counts of dealing in the proceeds of unlawful activity,[3] and one count of receiving stolen property.[4] In substance, the Commonwealth claims Defendant conspired with individual members of the burglary ring to pawn and did pawn stolen property and that, by this illegal conduct, Defendant was associated with and participated in the burglary ring's affairs through a pattern of racketeering activity.[5] On October 6, 2010, the Commonwealth

[1] 18 Pa. C.S.A. §911(b)(3).

[2] 18 Pa. C.S.A. §903(a)(1).

[3] 18 Pa. C.S.A. §§5111(a)(1), (2) and (3).

[4] 18 Pa. C.S.A. §3925(a).

[5] Defendant has been charged with having violated Subsection (b)(3) of the Corrupt Organizations Act, which states in pertinent part:

> It shall be unlawful for any person employed by or associated with any enterprise to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.

18 Pa. C.S.A. §911(b)(3). Under this Act, an enterprise is defined as "any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity, engaged in commerce and includes legitimate as well as illegitimate entities and governmental entities." 18 Pa. C.S.A. §911(h)(3). For these purposes, the enterprise identified in the information filed by the Commonwealth is that "group of individuals associated in fact, although not a legal entity, engaged in commerce and consisting of Frank Munoz, Robert Cesanek, Edward Cesanek, Wayne Thorpe and/or others." (Information, Count 1.) The named individuals in this group are alleged members of the burglary ring and perhaps, although this is unclear from the affidavit of probable cause attached to the criminal complaint, may also be members of the drug ring. Munoz is alleged to be the head of both the burglary and drug rings.

It is unclear in exactly what respect the Commonwealth claims Defendant was "employed by or associated with" this enterprise, however, the Commonwealth asserts Defendant conducted or participated, "directly or indirectly, in the conduct

filed its notice of consolidation for trial of Defendant's case with that of twelve other co-defendants.[6]

In his Omnibus Pretrial Motion, Defendant asserts and the Commonwealth admits that Defendant was not involved in the conspiracy to burglarize homes to steal items or in the conspiracy to use the proceeds of the sale of the stolen items to purchase and resell drugs, and that Defendant has not been charged with either conspiring to commit burglary or conspiring to sell and/or purchase illegal drugs. (Omnibus Pretrial Motion and Answer, paragraphs 9, 13-15.) The Commonwealth notes instead that Defendant's involvement in a corrupt organization relates to his direct involvement in actively facilitating the disposition of stolen property, whether or not Defendant had any knowledge of the burglary ring or what use was being made of the monies Defendant provided for the pawned items. (Omnibus Pretrial Motion and Answer, paragraphs 6-9, 12, 34.) The Defendant further contends that even if the Commonwealth's suspicions as to his involvement in pawning stolen items is accurate, which he disputes, he would be unfairly prejudiced if required to stand trial with other defendants who are facing

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of the affairs of the enterprise through a pattern of racketeering activity consisting of multiple acts of criminal conspiracy to commit violations of the Pennsylvania Crimes Code relating to theft and related offenses." (Information, Count 1.) In this regard, it is important to note that the Commonwealth does not contend that the relevant enterprise for purposes of analyzing the corrupt organizations charge is Defendant's pawnbroker business. **Cf. Commonwealth v. Dellisanti,** 583 Pa. 106, 876 A.2d 366, 370 (2005) (holding that a business owner who engages in a pattern of racketeering activity (**i.e.,** selling drug paraphernalia) from a legitimate business entity (**i.e.,** a retail store) owned by him, can be convicted of violating the Corrupt Organizations Act since the retail store meets the statutory definition of an "enterprise" and defendant's ownership of the store satisfies the statutory requirement that defendant be "associated with" the enterprise in question). Unlike in **Commonwealth v. McCurdy,** 943 A.2d 299 (Pa. Super. 2008), the Commonwealth does not claim that Defendant was part of an underlying enterprise whose affairs were intentionally or knowingly promoted by the Defendant's racketeering activity, only that Defendant's racketeering activity had the effect of benefiting and facilitating the enterprise, here the burglary ring, in the conduct of its business.

[6] In addition to Defendant, the other co-defendants named in the Commonwealth's notice of consolidation are Frank Munoz, Janet Munoz, Robert Cesanek, Edward Cesanek, Kira Cesanek, Wayne Thorpe, Daniel Eremus, Donald Dorward, Sr., Zach Lienhard, Amanda Rogers, Jon Maury and John Alekiejczyk.

charges for burglary and drug-trafficking offenses with which he is not involved. In the requested bill of particulars, Defendant requests detailed factual information regarding all aspects of all crimes charged, such as specific times, places, associations and actions leading to the charges.

DISCUSSION

Severance

The standards for joining and severing offenses or defendants are set forth in the Pennsylvania Rules of Criminal Procedure. With respect to joinder, Rule 582 states:

> Rule 582. Joinder-Trial of Separate Indictments or Informations
>
> (A) Standards
>
> (1) Offenses charged in separate indictments or informations may be tried together if:
>
> (a) the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion; or
>
> (b) the offenses charged are based on the same act or transaction.
>
> (2) Defendants charged in separate indictments or informations may be tried together if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.

Pa. R.Crim.P. 582(A)(1), (2). As to severance, Rule 583 states:

> Rule 583. Severance of Offenses or Defendants
>
> The court may order separate trials of offenses or defendants, or provide other appropriate relief, if it appears that any party may be prejudiced by offenses or defendants being tried together.

Pa. R.Crim.P. 583. These rules complement one another. When read together, they "limit the joinder of offenses and defendants charged in separate indictments relative to the nature of the evidence adduced and the number of criminal acts or transactions alleged." **Commonwealth v. Brookins,** 10 A.3d 1251, 1255 (Pa. Super. 2010).

In **Commonwealth v. Collins,** 550 Pa. 46, 703 A.2d 418 (1997), the Pennsylvania Supreme Court found that these rules set up a three-part test for deciding a motion to sever:

> Where the defendant moves to sever offenses not based on the same act or transaction that have been consolidated in a single indictment or information, or opposes joinder of separate indictments or informations, the court must therefore determine: [1] whether the evidence of each of the offenses would be admissible in a separate trial for the other; [2] whether such evidence is capable of separation by the jury so as to avoid danger of confusion; and, if the answers to these inquiries are in the affirmative, [3] whether the defendant will be unduly prejudiced by the consolidation of offenses.

Id., 703 A.2d at 422 (**quoting Commonwealth v. Lark,** 518 Pa. 290, 302, 543 A.2d 491, 496-97 (1988)). Under this test, "a court must first determine if the evidence of each of the offenses would be admissible in a separate trial for the other." **Id.**

As acknowledged by the Commonwealth in its answer to Defendant's Omnibus Pretrial Motion, the Commonwealth has no evidence to suggest that Defendant participated in burglaries or in the purchase or resale of drugs. (Omnibus Pretrial Motion and Answer, paragraph 34.) At worst, Defendant is alleged to have conspired to receive and to have engaged in receiving stolen property and thereby participated, either directly or indirectly, in the conduct of a corrupt organization through a pattern of racketeering activity. **See** 18 Pa. C.S.A. §911(h)(1)(i) Chapter 39 (Theft and Related Offenses). Such association, however, does not render admissible the evidence of burglary and drug distribution which the Commonwealth would inevitably seek to present against the co-defendants and which has absolutely nothing to do with Defendant. As stated in **Collins, supra:**

> Evidence of crimes other than the one in question is not admissible solely to show the defendant's bad character or propensity to commit crime. **Commonwealth v. Newman,** 528 Pa. 393, 598 A.2d 275 (1991); **Lark.** However, evidence of other crimes is admissible to demonstrate (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common

> scheme, plan or design embracing the commission of two or more crimes so related to each other that proof of one tends to prove the others; or (5) the identity of the person charged with the commission of the crime on trial. **Id.** Additionally, evidence of other crimes may be admitted where such evidence is part of the history of the case and forms part of the natural development of the facts. **Lark.**

Id., 703 A.2d at 422-23.

In **Commonwealth v. Brookins,** the defendant was charged and convicted of possession with intent to deliver (PWID), criminal conspiracy, and corrupt organizations, 35 P.S. §780-113(a)(3), 18 Pa. C.S.A. §§903, 911 (respectively). Factually, the Commonwealth contended that Brookins and 21 others purchased drugs from Shannon McKeiver for their own use and for resale. Although charged by separate informations, all cases were joined for trial, the Commonwealth's theory of liability being that Brookins and the others who purchased drugs from McKeiver for resale participated in a drug trafficking ring headed by McKeiver and another co-defendant, Kevin Jordan.

In addition, the Commonwealth charged McKeiver, Jordan and Derrick Thompson, in a plan to rob and kidnap a wealthy drug dealer. These charges were joined for trial with the case against Brookins, the Commonwealth contending that the evidence of robbery and kidnapping was admissible against all defendants, as McKeiver and Jordan planned those offenses to obtain money and drugs which were necessary to keep the drug trafficking enterprise in operation. Thus, according to the Commonwealth, each robbery-related offense was admissible in the trial of the criminal enterprise/drug trafficking offenses, and vice versa. Brookins was not charged with either the kidnapping or robbery offenses.

Brookins' request to sever her case from the charges of kidnapping and robbery involving co-defendants McKeiver, Jordan and Thompson was denied by the trial court. In reversing her conviction and awarding a new trial, the Superior Court found the joinder of Brookins' charges, which were limited to PWID, conspiracy, and corrupt organizations, untenable to the extent that it compelled the determination of Brookins' guilt in view of evidence germane only

to the robbery and kidnapping charges levied against McKeiver, Jordan and Thompson. **Brookins, supra,** 10 A.3d at 1256. Noting that the PWID, conspiracy and corrupt organization charges against Brookins arose only from her participation in the drug distribution ring operated by McKeiver and Jordan, and finding it significant that Brookins' conduct appeared to bear no relationship to the planning and execution of the attempted kidnapping and robbery with which McKeiver, Jordan and Thompson were charged, the Court found no basis on which the attempted robbery and kidnapping was admissible against Brookins either as the same act(s) or transaction(s) or as "other crimes" evidence. **Id.** at 1257; **see also,** Pa. R.E. 404(b)(2).

Similarly, here, Defendant's only connection to the burglary and drug-trafficking rings is his receipt of stolen property from individual members of the burglary ring and the use of cash received from the property pawned to purchase drugs by another ring. The Commonwealth has conceded that Defendant was not involved in either a conspiracy to commit burglary or a conspiracy to sell and/or purchase drugs, and it does not know whether Defendant was even aware or had any knowledge that a burglary ring existed or of what use the co-defendants made of the proceeds of the pawned items. Nor has Defendant been charged with any burglary or drug-related offenses. Because Defendant's conduct appears to bear no intended or knowing relationship to the planning and execution of either the burglary or drug rings, even though each may have directly or indirectly benefited from such conduct, as in **Brookins,** it cannot be said that proof of the co-defendants' involvement in either ring connects Defendant to either enterprise, as distinct from proving only the existence of the enterprise. Consequently, if joinder were permitted, it can be anticipated that the majority of the evidence the Commonwealth intends to present in support of burglary and drug trafficking would be solely relevant to the other co-defendants and have absolutely nothing to do with the Defendant.

In addition, joinder pursuant to Rule 582(A)(2) of different defendants charged in separate informations requires that all charges against all defendants arise out of the same "act or transaction" or "series of acts or transactions." The alleged criminal activities of Defendant are distinct and separate from the burglary and drug-

trafficking charges facing the other defendants. Absent proof of Defendant's agreement to promote or facilitate, or intent to participate in the conduct of, either alleged enterprise, which the Commonwealth concedes it is unable to present, there is no basis to conclude that Defendant's knowing receipt of stolen property is part of the same "act or transaction" out of which the charges of burglary and drug trafficking arise as required by Rule 582. By itself, a defendant's contact with another defendant for one purpose, or even a common point of contact between two separate defendants, does not make the defendant criminally liable for all other criminal activities in which the other may be involved. **Brookins, supra,** 10 A.3d at 1256-58.

Lastly, even if evidence of the co-defendants' burglary and drug trafficking were admissible in separate trials of the Defendant and his co-defendants, it would be prejudicial.[7] In **Brookins,** the court noted three factors which courts recognize as persuasive in determining whether prejudice suffered by the defendants on trial is sufficient to warrant severance:

> (1) Whether the number of defendants or the complexity of the evidence as to the several defendants is such that the trier of fact probably will be unable to distinguish the evidence and apply the law intelligently as to the charges against each defendant; (2) Whether evidence not admissible against all the defendants probably will be considered against a defendant notwithstanding admonitory instructions; and (3) Whether there are antagonistic defenses.

Brookins, supra, 10 A.3d at 1256 (**quoting Commonwealth v. Tolassi,** 258 Pa. Super. 194, 200, 392 A.2d 750, 753 (1978)). Here,

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[7] In discussing the prejudice referred to in former Rule 1128, now Rule 583, the Pennsylvania Supreme Court in **Commonwealth v. Lark,** 518 Pa. 290, 543 A.2d 491 (1998) stated:

> The 'prejudice' of which Rule 1128 speaks is not simply prejudice in the sense that appellant will be linked to the crimes for which he is being prosecuted, for that sort of prejudice is ostensibly the purpose of **all** Commonwealth evidence. The prejudice of which Rule 1128 speaks is, rather, that which would occur if the evidence tended to convict appellant only by showing his propensity to commit crimes, or because the jury was incapable of separating the evidence or could not avoid cumulating the evidence.

Id. at 307-308, 543 A.2d at 499.

at a minimum, the nature and volume of the evidence regarding burglary and drug trafficking which would otherwise be inadmissible against the Defendant would be overwhelming and would deprive the Defendant of a fair and objective trial. **Cf. Brookins, supra,** 10 A.3d at 1258 n.3.

Bill of Particulars

The remainder of Defendant's Motion consists of a request for a bill of particulars. In this request Defendant seeks specific information, such as dates, times, actions, and particular evidence in regard to each charge which the Defendant faces.

"A bill of particulars is intended to give notice to the accused of the offenses charged in the indictment so that he may prepare a defense, avoid surprise, or intelligently raise pleas of double jeopardy and the statute of limitations. ... [It] is not a substitute for discovery and the Commonwealth's evidence is not a proper subject to which a petition for a bill may be directed." **Commonwealth v. Dreibelbis,** 493 Pa. 466, 472-73, 426 A.2d 1111, 1114 (1981) (citation omitted); **see also,** Pa. R.Crim.P. 572 (Comment) ("The traditional function of a bill of particulars is to clarify the pleadings and to limit the evidence which can be offered to support the information."). A request for discovery disguised as a request for a bill of particulars may be properly denied by the trial court. **See Commonwealth v. Davis,** 470 Pa. 193, 196, 368 A.2d 260, 261 (1977).

If the requested information is beyond the scope of a bill of particulars, the Commonwealth is justified in refusing to respond to the request; but if it does so respond, the Commonwealth is bound by its answer, meaning, for example, that the Commonwealth may not introduce evidence at trial concerning admissions made by the accused if they were not disclosed in its answer to the bill, even if it was not technically required to answer the request for the bill. **See Dreibelbis, supra** at 472-73, 426 A.2d at 1114.

The use of a bill of particulars is within the discretion of the trial court. **See Commonwealth v. Scott,** 469 Pa. 258, 265, 365 A.2d 140, 143 (1976); **see also, Commonwealth v. Mercado,** 437 Pa. Super. 228, 254, 649 A.2d 946, 959 (1994); Pa. R.Crim.P.

572(D) (Bill of Particulars) ("When a motion for relief is made, the court may make such order as it deems necessary in the interests of justice."). "The appropriate remedy to be applied 'in the interests of justice' when the Commonwealth fails to provide a full bill of particulars has been left to the discretion of the trial court. ... The Superior Court will reverse the trial judge's decision in such matters only in the face of a 'flagrant abuse of discretion.' " **Commonwealth v. Montalvo,** 434 Pa. Super. 14, 28-29, 641 A.2d 1176, 1183 (1994) (citations omitted).

Relief may be appropriately denied where it appears that the defendant will not suffer prejudice without such relief. **See id.** at 35, 641 A.2d at 1187. When the defendant has actual notice of the theories the Commonwealth intends to pursue at trial and when it does not appear that the result of the defendant's trial will be different "but for" failure of the Commonwealth to provide a written answer to the defendant's request for a bill of particulars, relief may be denied. **See id.** at 36, 641 A.2d at 1187.

It is also appropriate to deny relief when the information requested in the bill of particulars is available in the affidavit of probable cause, the criminal complaint, the information, the discovery provided pursuant to other rules, and a habeas corpus hearing, and where it does not appear that the Commonwealth is violating its discovery obligations. **See Mercado, supra** at 255, 649 A.2d at 960. "Absent allegations of exceptional circumstances, we will uphold the trial court's denial of relief where there is no indication that the Commonwealth deliberately withheld either exculpatory evidence or evidence otherwise favorable to the defense, where the defendant did receive information from the Commonwealth's compliance with other rules of procedure, and where the accused possessed adequate information on which to prepare a proper defense." **Montalvo, supra** at 29, 641 A.2d at 1183-84. In **Commonwealth v. Judd,** 897 A.2d 1224, 1230 (Pa. Super. 2006), **appeal denied,** 912 A.2d 1291 (Pa. 2006), the Superior Court held that without evidence or argument that the Commonwealth withheld favorable evidence, exceptional circumstances existed, or surprises occurred at trial, there was no abuse of discretion in denying the defendant's request for a bill of particulars.

In the instant case, the Defendant's request for a bill of particulars contains mostly inappropriate requests for discovery.[8] The request goes far beyond a request for clarification of the nature of the offenses charged or to resolve ambiguities in describing what Defendant is accused of.

In objecting to the form of the request, the Commonwealth's Answer further refers Defendant to the affidavit of probable cause, criminal complaint, information, discovery,[9] and the preliminary hearing for the information requested. Much, if not all, of what Defendant seeks can presumably be found in these records. Significant also is the absence of any evidence that the Commonwealth is withholding any information necessary for a fair trial, which would be cause for the granting of a bill of particulars.

Under the circumstances, we believe Defendant's requests are more appropriately allowed as discovery pursuant to Pa. R.Crim.P. 573. To the extent Defendant claims critical information necessary to prepare his defense and to avoid surprise and prejudice has not been produced, Defendant may file a motion for pretrial discovery—to which the Commonwealth will be provided an opportunity to respond—identifying that information whose disclosure Defendant contends is necessary in the interests of justice. **See** Pa. R.Crim.P. 573(B)(2)(a)(iv). Such approach will require Defendant to identify specific information requested rather than the wholesale discovery presently sought in Defendant's requested bill of particulars and, in so doing, will protect the interests of both the Commonwealth and the Defendant.

CONCLUSION

When acting on a request to sever the Commonwealth's joinder of two or more defendants charged in separate informations, we focus on the two basic and fundamental tests of the admissibility of evidence: relevance and prejudice. First, material evidence as to the offenses must be relevant and admissible against all defendants. If it

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[8] **See e.g., U.S. v. Cheatham,** 500 F. Supp.2d 528, 533 (W.D. Pa. 2007) ("[A] request for the 'when, where and how' of any overt acts not alleged in the indictment is tantamount to a request for 'wholesale discovery of the Government's evidence,' which is not the purpose of a bill of particulars ... .").

[9] At the time of argument, the Commonwealth represented that it has produced voluminous materials to Defendant in response to discovery.

is not, the defendants should not all be tried together. Second, even if the evidence is relevant, if it would be unduly prejudicial to one or more defendants, the trial of those defendants should be severed from the trial of the others. For the reasons already discussed, we find neither test has been met and grant Defendant's motion to sever the trial of his case from the trial of the other co-defendants named in the Commonwealth's notice of joinder.

As to the Defendant's request for a bill of particulars, the Defendant's request confuses the purpose of a bill of particulars with a request for discovery. While both seek information and, to that extent, share a common bond, they are not the same. The primary function of a bill of particulars is to clarify the complaint such that the defendant knows the nature of the offenses charged and, by so doing, limits the evidence to be introduced at trial. Conversely, the function of discovery is to provide detailed factual information with respect to both evidence and the sources of evidence relevant to the proceedings. Because the information sought by Defendant in his request is primarily evidentiary in nature, with some of this information—according to the Commonwealth—having already been provided, we have denied Defendant's request and refer him to the rules of discovery which provide for specific mandatory and discretionary subjects of discovery, including, when appropriate, the opportunity to specifically identify evidence sought which has not been produced and to show that its disclosure would be in the interests of justice.

COMMONWEALTH OF PENNSYLVANIA
vs. TRACEY HICKS, Defendant

Criminal Law—Prosecutorial Misconduct—Closing Argument—Expressions of Personal Opinion—Time To Object

1. Immediate objection at the time of prosecutorial misconduct made during closing arguments is not necessary to preserve the issue for review. Instead, an appropriate objection and request for mistrial based thereon is properly preserved if made at the conclusion of the prosecutor's closing argument.

2. As a general rule, it is improper and inappropriate for a prosecutor to assert his personal belief as to the Defendant's guilt or innocence, or to express his own opinion regarding the credibility of any witness—including the Defendant. A prosecutor must base his arguments on the evidence presented, not on personal beliefs or private opinions.

3. During closing arguments, the prosecuting attorney is permitted and expected to base his argument on the evidence of record and all favorable

and reasonable inferences therefrom. Prosecutorial misconduct will not be found where the prosecutor's comments are based on the evidence, or proper inferences therefrom, or for only oratorical flair. Under this standard, the prosecutor is free to argue that the evidence proves the Defendant guilty as charged.

4. The comments of the prosecutor must be examined in the context in which made, including whether they are responsive to defense counsel's conduct. If defense counsel has attacked the credibility of witnesses in closing, the prosecutor is entitled to respond. In doing so, the prosecutor may question the credibility of witnesses and urge the jury to make a fair inference from the facts adduced at trial. A prosecutor's assertion that a witness has lied does not warrant a new trial when the statement is a fair inference from irrefutable evidence and not a broad statement directed indiscriminately at all of the defense witnesses.

5. In examining a prosecutor's comments, the court must distinguish between those statements which permissibly comment on the evidence, albeit in the first person, and those which impermissibly communicate the prosecuting attorney's personal opinion of Defendant's credibility. A qualitative difference exists between a prosecutor who tells a jury what he thinks about a witness' testimony and one who tells the jury what he thinks the evidence shows.

6. Not all inappropriate comments by a prosecuting attorney merit a new trial. Whether a new trial, or other corrective action, is required is within the discretion of the trial judge who was present and observed the atmosphere and context in which the comments were made. Cautionary instructions may be appropriate and sufficient where the remarks do not have the unavoidable effect of prejudicing the jury to the point that they cannot fairly weigh the evidence.

7. Prosecutorial misconduct is evaluated under a harmless error standard. Only where the unavoidable effect of the prosecutor's comments is to prejudice the jury, forming in their minds a fixed bias and hostility against the Defendant incapable of being cured by cautionary instructions, is a new trial required.

NO. CR 672-2008

JAMES LAVELLE, Esquire, Assistant District Attorney—Counsel for the Commonwealth.

PAUL LEVY, Esquire—Counsel for the Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—March 9, 2011

On June 11, 2010, the Defendant, Tracey Hicks, was convicted of robbery, receiving stolen property, and conspiracy to receive stolen property.[1] In her post-sentence motion, now before us, De-

[1] 18 Pa. C.S.A. §§3701(a)(1)(iv), 3925(a) and 903, respectively. Defendant was acquitted on the charge of conspiracy to commit robbery (threat or fear of imminent bodily injury). 18 Pa. C.S.A. §903.

fendant seeks a new trial premised on prosecutorial misconduct: the prosecutor's expression of personal beliefs and opinions during closing arguments concerning the testimony and evidence presented. Following our review of the record, we deny Defendant's motion.

FACTUAL AND PROCEDURAL BACKGROUND

On October 16, 2008, Defendant drove her husband, Jack Ensel, to a small strip mall in Nesquehoning, Carbon County, Pennsylvania. At the western end of the mall is a CVS pharmacy. In order, proceeding eastward from the pharmacy, is a campus of the Lehigh Carbon Community College, a Chinese restaurant and an auto parts store. All four businesses share a common parking lot at the front of the mall.

Defendant arrived at the mall, with Ensel, shortly after 4:00 P.M., in broad daylight. Defendant parked her vehicle in the parking lot near the front of the Community College. The temperature was warm, approximately 75 degrees. Ensel exited the vehicle wearing a hooded flannel jacket with the hood pulled up, and headed toward the pharmacy. As he entered the pharmacy, Ensel pulled the hood further forward and masked his face with a bandanna, such that only his eyes were visible.

Ensel walked directly to the pharmacy counter near the rear of the store, stepped beyond a swinging gate which separated the pharmacy proper from the rest of the store and, with one hand in his pocket intimating he possessed a weapon, stated "give me the Oxycontin and no one will get hurt." In response, the pharmacist on duty unlocked the narcotics safe, pulled out a tray filled with Oxycontin and Oxycodone bottles, and handed it to Ensel. The tray was white in color, approximately a foot and a half by a foot in size, and contained twenty-six bottles of Oxycontin and Oxycodone. The retail value of this medication was $11,982.50.

Upon receipt of this tray, Ensel returned to the front entrance and exited the pharmacy with his head and face still concealed by the hood and mask. (N.T., 6/10/10, p. 32.) As he exited the pharmacy, he walked west, in the opposite direction from which he had originally entered the pharmacy. Defendant, who was waiting in her vehicle watching for Ensel to exit, immediately drove in his direction, stopping several feet in front of where he was walking.

Ensel first placed the tray with the Oxycontin and Oxycodone onto the rear passenger seat and then climbed into the back seat himself. As this was occurring, the store manager recorded the license plate number of Defendant's vehicle. This, together with the make and model of the vehicle, was directly reported to the 911 Communications Center.

Defendant and Ensel were apprehended by the police approximately five to ten minutes later as they pulled up to their home in Lansford, Carbon County, Pennsylvania. At the time of their apprehension, Defendant was in the driver's seat and Ensel was in the rear passenger seat. The tray taken from the pharmacy was on the seat beside Ensel, however, some of the pill bottles were observed to be on the car seat and some on the rear floor. (N.T., 6/10/10, pp. 81-82.) Also on the seat beside Ensel was his hooded jacket. A subsequent search of the vehicle located two bandannas on the rear floor behind the driver's seat and an empty bottle of Oxycodone HCL in the front passenger seat with Ensel's name on it. (N.T., 6/10/10, p. 164.)

After their arrest, on the same day, both Defendant and Ensel were taken to the Nesquehoning Police Station where they were separately questioned, after being **Mirandized** by Officer Wuttke of the Nesquehoning Police Department. Officer Wuttke first questioned Ensel. After next questioning Defendant, he again questioned Ensel and then Defendant again. A period of approximately forty to forty-five minutes separated Officer Wuttke's first and second questioning of Defendant.

When first questioned by Officer Wuttke about the events of that day, Defendant stated that she awoke at approximately 2:30 P.M. when her daughter came home from school; that she went outside for a cigarette; that while outside she spoke with her husband who asked if she would go with him to the store; that at the store her husband asked her to wait outside in the parking lot and to pull up and pick him up when he exited; that this was often the case when she accompanied her husband to the store and that the manner in which she picked her husband up on this occasion was not out of the ordinary; that she wasn't sure what her husband was carrying when he left the store; that it was something white, like a

bag; that her husband got in the back seat, which he normally does; that she was then medicating with Oxycodone 30 but was being weaned from it and was experiencing withdrawal sickness; and that she believed her husband had taken the Oxycontin and Oxycodone because he was depressed over their financial circumstances, that they had recently lost their home to foreclosure. Defendant denied that she knew her husband intended to rob the pharmacy at the time he went inside.

During the second interview with Defendant on October 16, 2008, Defendant told Officer Wuttke that her husband woke her up before they left for the store; that before leaving, her husband told her he was going to hit a pharmacy but that she believed this was idle talk and, after speaking with her husband, that he had no intent of following through; that her husband did not ask her to accompany him to the pharmacy; and that later, when they were at the pharmacy and she was waiting for her husband to return, she did not find it peculiar that the same day her husband said he intended to hit a pharmacy, they were at a pharmacy and she was waiting to pick him up as soon as he exited.

At trial, Defendant testified that she first woke up at 5:30 A.M. on October 16, 2008, to get her children ready for school; that sometime between 5:30 A.M. and 7:00 A.M. her husband mentioned he planned to hit a pharmacy, but she spoke against it and thought that was the end of it; that she went back to bed; that she again woke up about 2:30 in the afternoon, and went outside for a cigarette; that her husband was not the one to wake her; that while outside her husband asked if she would go to the store with him for gas and cigarettes; that they drove to a gas station in Nesquehoning, rather than in Lansford, because the gas and cigarettes were cheaper there; that they were able to get gas but not cigarettes because the station was sold out of the brand of cigarettes they smoked; that while there she asked if they could go to the Chinese restaurant in town; that they did this, but once there she remembered she didn't like the way this restaurant prepared what she intended to order; that they did not enter the restaurant; that before leaving her husband decided to enter the pharmacy to get cigarettes and told her to wait for him; that she did so and when she saw him leaving the pharmacy she drove over to pick him up; that when he exited

the store, his face was not covered and his hood was not up; that she thought he was carrying a white bag; that he got in the back seat because the hinge for the front passenger door had broken off; that she never saw the tray or bottles of Oxycontin and Oxycodone after her husband entered the car and before they were stopped by the police; that her husband mentioned nothing about robbing the pharmacy as they drove home; that both she and her husband were using Oxycodone at the time but she was being weaned off of it; and that she first learned of the robbery when she and her husband were confronted by the police in front of their home.

In closing arguments, the Assistant District Attorney frequently used the first person in discussing the evidence and characterized parts of Defendant's testimony as being ridiculous, being incredible, and being a lie. Specifically, Defendant takes issue with the following nine statements made by the Assistant District Attorney:

> One of the versions to you or Officer Wuttke was a lie. That is the only conclusion you can draw.

(N.T., 6/11/2010, p. 41.)

> I think it is a ridiculous explanation. I don't think that is any way that people normally act when they are going to the store with their spouse. I think inescapably what it points to is that she knew that he was going to be coming out of that store with oxycontin. She was hoping he would do it. She was ready and there to assist him when he came out. Again that is proof of the agreement. That is the only logical explanation.

(N.T., 6/11/2010, p. 47.)

> There's no explanation for that. You cannot reconcile those two things.

(N.T., 6/11/2010, p. 50.)

> I don't think it is an amazing coincidence. I think it is part of her motive. I think she was addicted to oxycontin. I think she wanted to acquire some.

(N.T., 6/11/2010, p. 55.)

> I know she testified she didn't know the pills were there. But come on, how likely is that to be true? ... It is a ridiculous notion.

(N.T., 6/11/2010, p. 58.)

> How reasonable is it to believe that? It is not reasonable at all. I was struck yesterday at the racket these things make as well. I am not going to belabor it. They are in their evidence bags. But I can't believe in a traveling car that you wouldn't hear them a little bit, or a lot. ... It is incredible to me that she would be able to remain ignorant.

(N.T., 6/11/2010, p. 59.)

> She was aware of them. She is lying to you when she said she wasn't. Just like she is fooling around with the story that she gave to Officer Wuttke. She is changing her story. You cannot trust her. You cannot believe her. Look at her as a witness. She has incentive to lie to you.

(N.T., 6/11/2010, p. 59.)

> She, again, stands to benefit if you believe her lies.

(N.T., 6/11/2010, p. 60.)

> I think the story itself, just standing on its own, is a ridiculous one ... . that story is not something I believe. I would encourage you to disbelieve it as well, just on its face.

(N.T., 6/11/2010, p. 60.)

At the close of the Commonwealth's argument, defense counsel objected to the Assistant District Attorney characterizing the Defendant as a liar and asked for a mistrial.[2] (N.T., 6/11/2010, p. 39.) In denying this request, the following exchange occurred at sidebar:

> THE COURT: I am not aware of any case that I have read that says that the Commonwealth using the term liar to describe

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[2] Strictly speaking, Defendant's objection at trial and in her post-sentence motion is limited to being called a liar. Not until Defendant filed a brief in support of her post-sentence motion did Defendant question the propriety of the other comments previously quoted in the text. Consequently, while we believe these other grounds for a mistrial have been waived, we have elected nevertheless to review their merits. **Commonwealth v. Mollett,** 5 A.3d 291, 313 (Pa. Super. 2010) (finding waiver on failure to object to particular statement made in closing argument).

We also note that the basis of Defendant's grounds for a mistrial was not waived by Defendant waiting until the close of the Commonwealth's argument before making her objection. On this point, the Pennsylvania Superior Court in **Commonwealth v. Judy,** 978 A.2d 1015 (Pa. Super. 2009) stated:

> We note that issues relating to the objection and request for mistrial on the ground of prosecutorial misconduct are properly preserved notwithstand-

a witness's testimony is inappropriate. Obviously, it is very strong language, but I am not sure if it is legally inappropriate and would justify a mistrial. So, I am going to deny the request.

I will be instructing the jury that they have to make their own determination of the facts and they have to determine whether a person is truthful or not truthful. It is not counsel's determination, but it is their determination.

MR. LEVY: Understood.

THE COURT: So, I will make sure they are aware of that.

MR. LEVY: Judge, for the record, I understand that. I assume that would have been in your instructions. I just feel under the circumstances, it is a cautionary instruction that may not be—regardless of how many times you emphasize it—may not be sufficient. It may wind up doing the reverse, because it winds up almost emphasizing it. So, I am not asking you to point out he referred to her as a liar.

THE COURT: Quite honestly, generically, within my credibility instructions, that's implicit in them. If you want me to specifically refer to the fact that counsel at times used strong language but ultimately they have to determine what the facts are, I can certainly do that.

MR. LEVY: Judge, if you can use what you just indicated, that counsel at times used strong language, that would cover it.

THE COURT: Okay. I will do so.

MR. LEVY: But again, because you are doing that, I am still not removing my objection.

THE COURT: I realize you are not waiving your objection.

MR. LEVY: Thank you. That is what I was looking for.

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ing the fact that counsel waited until the end of the assistant district attorney's closing to lodge the objection and move for a mistrial. **Commonwealth v. Rose,** 960 A.2d 149, 154-155 (Pa.Super.2008). While the lack of a request for a contemporaneous curative instruction constitutes a waiver of any claim of error based upon the failure to give such curative instruction, the objection coupled with the request for the remedy of a mistrial preserves denial of the mistrial for appellate review. **Commonwealth v. Robinson,** 543 Pa. 190, 670 A.2d 616, 622 n.9 (1995).

Id., 978 A.2d at 1018.

THE COURT: Thank you.

MR. LAVELLE: Thank you.

(N.T., 6/10/2010, pp. 39-41.)

In our general charge to the jury, we instructed the jury that the jurors are the sole judges of the facts and the credibility of the witnesses; and that the closing statements of counsel are not evidence, but that such arguments may be considered as a factor in deliberations. In addition, we stated the following:

> Now, I also want to say that counsel in speaking to you at times can use extremely strong language. Counsel made[3] comment on the testimony of witnesses and whether or not it should be believed or disbelieved. But I caution you, regardless of counsel's opinions, regardless of how counsel described the testimony of witnesses and the credibility, it is you, and you alone, who make that decision as to which witnesses should be believed and which witnesses should not be believed. You, and you alone, make the decision as to what testimony you heard is the accurate testimony and what testimony is not accurate. It is not up to counsel to make that decision for you. You should consider, again, counsels' positions in what they argue to you. You alone make the determinations of who to believe and not to believe.

(N.T., 6/11/2010, pp. 83-84.) At the conclusion of our charge, on specific inquiry by the Court, neither counsel had any further comment on this issue or the Court's cautionary instructions. (N.T., 6/11/2010, p. 87.)

DISCUSSION

As a general rule,

> a prosecutor is free to argue the reasonable inferences supported by the record. ... A prosecutor may not, however, interject his personal opinion regarding the credibility of any witness, including the accused, nor may he argue facts which may be within his personal knowledge but which are not of record.

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[3] In the original transcript of the proceedings this word appeared as "may" rather than "made." In the preparation of this opinion, this portion of the transcript, as well as the tape of the trial, was reviewed with the stenographer, and corrected to reflect the actual word used.

> ... Although the prosecutor may not assert his personal belief as to the guilt or innocence of the accused, ... the prosecutor may argue that **the evidence** proves the defendant guilty as charged.

Commonwealth v. Gunderman, 268 Pa. Super. 142, 148, 407 A.2d 870, 873 (1979) (internal citations omitted) (footnote omitted) (emphasis in original). Consequently, while "a prosecutor must limit his statements to the facts introduced at trial and the legitimate inferences therefrom, and may not inject his personal opinion of a defendant's credibility into evidence," he "is free to argue that the evidence leads to guilt, and is permitted to suggest all favorable and reasonable inferences that arise from the evidence." **Commonwealth v. Stafford,** 749 A.2d 489, 499 (Pa. Super. 2000) (citations and quotation marks omitted). "[P]rosecutorial misconduct will not be found where comments were based on the evidence or proper inferences therefrom or were only oratorical flair." **Commonwealth v. Judy,** 978 A.2d 1015, 1020 (Pa. Super. 2009) (citation and quotation marks omitted).

"[A] prosecutor has considerable latitude during closing arguments and his arguments are fair if they are supported by the evidence or use inferences that can reasonably be derived from the evidence." **Judy, supra,** 978 A.2d at 1020 (citation and quotation marks omitted). Further,

> [i]n determining whether the prosecutor engaged in misconduct, we must keep in mind that comments made by a prosecutor must be examined within the context of defense counsel's conduct. It is well settled that the prosecutor may fairly respond to points made in the defense closing. ... If defense counsel has attacked the credibility of witnesses in closing, the prosecutor may present argument addressing the witnesses' credibility.

Id.

> In reviewing prosecutorial remarks to determine their prejudicial quality, comments cannot be viewed in isolation but, rather, must be considered in the context in which they were made. Generally, comments by the district attorney do not constitute reversible error unless the unavoidable effect of such comments would be to prejudice the jury, forming in

their minds fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict.

Commonwealth v. Sampson, 900 A.2d 887, 890 (Pa. Super. 2006) (citation and quotation marks omitted), **appeal denied,** 907 A.2d 1102 (Pa. 2006). "Prosecutorial misconduct is evaluated under a harmless error standard." **Judy, supra,** 978 A.2d at 1020 (citation and quotation marks omitted).[4] Ultimately, "an allegation of prosecutorial misconduct requires us to evaluate whether a defendant received a fair trial, not a perfect trial." **Id.** at 1019.

In examining the statements made by the Assistant District Attorney which the Defendant questions, we must distinguish between those statements which permissibly comment on the evidence, albeit in the first person, and those which impermissibly communicate the prosecuting attorney's personal opinion of Defendant's credibility. This latter bar does not prohibit the prosecutor from questioning the credibility of a witness provided his comments are tied to the evidence. **Judy, supra,** 978 A.2d at 1020. Moreover, "[i]f defense counsel has attacked the credibility of witnesses in closing, the prosecutor may present argument addressing the witnesses' credibility." **Id.** (citation and quotation marks omitted).

The prosecuting attorney is entitled to argue issues of credibility and in doing so may "urge the jury to make a fair inference from the facts adduced at trial." **Stafford, supra,** 749 A.2d at 499 (citation and quotation marks omitted). The Commonwealth is not prohibited from arguing inconsistencies in the evidence, improbabilities, or implausible explanations. Nor is the Commonwealth prohibited from questioning the Defendant's motives or incentive

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[4] Harmless error exists where: (1) the error did not prejudice the defendant or the prejudice was **de minimis;** (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict.

Commonwealth v. Chmiel, 585 Pa. 547, 889 A.2d 501, 521 (2005) (citation and quotation marks omitted). "The burden of establishing that the error was harmless rests upon the Commonwealth." **Id.,** 889 A.2d at 528.

to lie when on the witness stand. The fact that the Commonwealth uses the first person in making such arguments does not undermine their propriety or validity if grounded in the evidence rather than as an expression of counsel's personal belief or opinion as to the truth or falsity of such testimony. **See Gunderman, supra** at 149, 407 A.2d at 873. ("Though the prosecutor used the first person [**i.e.,** 'I think'] in this part of his argument, the inferences he was urging were to be based strictly upon the evidence.").

On the other hand, "a prosecutor cannot intrude upon the exclusive function of the jury to evaluate the credibility of witnesses by broadly [and indiscriminately] characterizing the testimony of a witness as a 'big lie' "). **Judy, supra,** 978 A.2d at 1023 (citation and quotation marks omitted); **Commonwealth v. Kuebler,** 484 Pa. 358, 364, 399 A.2d 116, 119 (1979); **see also, Commonwealth v. Cherry,** 474 Pa. 295, 303, 378 A.2d 800, 804 (1977) (stating that improper statements by a prosecutor during argument are of special concern because of the effect such statements may have on the jury due to the prestige associated with his position and because of the assumed fact-finding facilities available to a prosecutor). However, "a prosecutor's assertion that a witness had lied does not warrant a new trial when the statement was a fair inference from irrefutable evidence rather than a broad characterization." **Judy, supra,** 978 A.2d at 1023-24 (citation and quotation marks omitted); **see also, Commonwealth v. Johnson,** 527 Pa. 118, 123, 588 A.2d 1303, 1305 (1991) (holding that a prosecutor's comments stating that a defendant had lied were neither unfair nor prejudicial when given in response to the comments of defense counsel in relation to the credibility of witnesses, and when they were supported by the evidence). Further, "[a] prosecutor's contention that a defendant lied is neither unfair nor prejudicial when the outcome of the case is controlled by credibility, the accounts of the victim and the defendant conflict, and defense counsel suggests that the victim is fabricating." **Judy, supra,** 978 A.2d at 1024.

In all but one instance, we find the prosecutor's comments to be arguments based on the evidence and not on his personal opinion. The first statement was directed at the inconsistencies in the two statements Defendant gave Officer Wuttke following her arrest and those made at trial regarding when she got up on October 16,

2008 and who got her up. The next statement evaluated the likelihood that the reason Defendant pulled up when her husband left the pharmacy was because this is what she always does in contrast to the inference that such conduct indicated she knew what her husband was doing in the pharmacy and she was there to pick him up to assist in his getaway. The third comment concerns the implausibility of Defendant waiting and watching for her husband to leave the pharmacy, being able to clearly identify him when he did so, and yet not noticing that he was carrying a tray one and a half by one foot in size filled with bottles of medication.

In the fourth comment, the Assistant District Attorney noted that it was not mere coincidence that Defendant was taking Oxycodone herself, and being weaned from it at the time of the robbery, that her addiction supplied a motive for her to assist her husband in obtaining Oxycontin from the pharmacy. The next two comments are in reference to Defendant's disclaimer that she was unaware that her husband was carrying a tray full of medication when he entered her car. During trial, when the Assistant District Attorney picked up and carried the medication it rattled. Given this noise, the number of bottles, and the shape and size of the tray, the Assistant District Attorney legitimately questioned how Defendant could not know what her husband had taken from the pharmacy. In this same context, the Assistant District Attorney in his seventh comment claimed, in effect, that Defendant must be either deaf, dumb and blind or must be lying when she denied being aware of the pills before reaching Lansford, an inference supported by the record. In addition, in the seventh and eighth comments, the Assistant District Attorney appropriately commented on why Defendant would change her stories and deny any knowledge of what her husband had done: she had a motive to lie, to save herself. Such comments were not intended to inflame, distract or mislead the jury.

The ninth and final comment which the Defendant questions is the Assistant District Attorney's characterization of Defendant's explanation for being at the shopping mall—that she was there to get Chinese food which she later decided not to get because, once there, she realized she did not like their food, rather than that she was there to help her husband escape—as ridiculous and a story which he did not believe. The characterization of Defendant's story

as ridiculous was fair comment given the contradiction inherent in Defendant's desire to get Chinese food from a restaurant whose food she did not like, an explanation not previously disclosed to Officer Wuttke on October 16, 2008, when she was asked why she and her husband were at this pharmacy on the same day her husband had threatened to hit a pharmacy. **Cf. Gunderman, supra** at 148, 407 A.2d at 873 (holding that a prosecutor's comment that "I think you should find [defense witnesses' story] absolutely incredible" did no more than argue an inference based upon the evidence before the jury). This comment was also in response to defense counsel's argument that if Defendant was lying, "I am sure" she could have come up with a better lie. (N.T., 6/11/10, pp. 37-38.) At most, this was oratorical flair.

However, the final aspect of this comment, that the Assistant District Attorney did not believe her story and encouraged the jury to likewise disbelieve her, overreached the bounds of permissible argument. In this comment, the Assistant District Attorney was clearly expressing his personal opinion of the believability of Defendant's story, not simply arguing inconsistencies and implausibilities. While we cannot condone this statement, neither do we find it "... so [persuasive] or deliberate so that the unavoidable effect thereof was to prejudice the jury to the point that they could not fairly weigh the evidence." **Sampson, supra,** 900 A.2d at 891 (citation and quotation marks omitted).

In acting on a request for mistrial, we "must discern whether misconduct or prejudicial error actually occurred, and if so, ... assess the degree of any resulting prejudice." **Judy, supra,** 978 A.2d at 1019.

> Not all inappropriate comments by the Commonwealth merit a new trial. '[C]omments by a prosecutor do not constitute reversible error unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds a fixed bias and a hostility toward the defendant such that they could not weigh the evidence objectively and render a true verdict.' **Commonwealth v. Speight,** 544 Pa. 451, 677 A.2d 317, 324 (1996). Even if the prosecutor makes improper remarks, the action to be taken is within the discretion of the trial court because it has the opportunity to see the atmosphere

and context in which the comments were made. **See Commonwealth v. Silvis,** 445 Pa. 235, 284 A.2d 740, 741 (1971). **Stafford, supra,** 749 A.2d at 498.[5]

In denying Defendant's motion for a mistrial we note first that the Assistant District Attorney's personal opinion of Defendant's credibility was immediately juxtaposed with his comment that Defendant's story was ridiculous, a permissible inference. Moreover, in the same breath, the Assistant District Attorney urged the jury to exercise its independent judgment in assessing the explanation Defendant offered for being at the pharmacy, and to disbelieve it. Second, the Assistant District Attorney was responding, at least in part, to defense counsel himself having personally, and impermissibly, vouched for the Defendant's credibility.[6] Finally, we do not find the Assistant District Attorney's remarks to have been so intrusive of the jury's exclusive function of evaluating the credibility of witnesses and so inflammatory as to be incapable of being cured by our cautionary instructions. When the prosecution's remarks are viewed in the context of the argument then being made and our instructions to the jury concerning the opinions of counsel and who determines credibility, the Assistant District Attorney's words were not so prejudicial that the jury became incapable of exercising its independent judgment and rendering a true verdict. **See also, Commonwealth v. Chmiel,** 585 Pa. 547, 889 A.2d 501, 534, 543-45 (2005) (finding prosecutor's comments to be permissible when defense counsel repeatedly called the prosecution's witnesses liars and had vouched for the credibility of the defense's witnesses; also noting the presumption that juries follow instructions given by the trial court).

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[5] This follows from the standard of review for the denial of a motion for mistrial: "A motion for a mistrial is addressed to the discretion of the court. It is primarily within the trial court's discretion to determine whether defendant was prejudiced by the misconduct. On appeal, [the appellate court's] standard of review is whether the trial court abused that discretion." **Commonwealth v. Stafford,** 749 A.2d 489, 500 (Pa. Super. 2000) (citation and quotation marks omitted).

[6] This occurred twice during defense counsel's closing arguments: first when counsel corroborated Defendant's testimony that gas prices are cheaper in Nesquehoning than in Lansford, thus supporting Defendant's reason for being in Nesquehoning, and next when counsel stated that Defendant's testimony was the truth. (N.T., 6/11/10, pp. 32, 38.)

CONCLUSION

Legally and substantively a distinction exists between a prosecutor who tells the jury what he thinks about a witness' testimony and one who tells the jury what he thinks the evidence shows. The first is prohibited by law as usurping the function of the jury. The second, while often frowned upon and sometimes misleading, is allowed provided the distinction between personal opinion and arguing the evidence is maintained.

In the case at bar, while the Assistant District Attorney frequently couched his closing arguments in the first person, the context in which these comments were given, together with the evidence used to support them, demonstrates the Assistant District Attorney's intent not to divert the jury from the evidence, but instead to urge the jury to make credibility determinations based upon the evidence. In doing so, the Assistant District Attorney argued not that the jury should disbelieve the Defendant because he disbelieved her; rather, he argued that Defendant should be disbelieved because the evidence supported this inference. This is within the bounds of proper argument.

In one instance, however, we find the Assistant District Attorney exceeded what is allowable. In arguing that Defendant's explanation for being at the pharmacy is a story he did not believe, the Assistant District Attorney went beyond the evidence to a pure statement of personal belief. While improper, we have concluded that the context in which this belief was expressed, tempered by our cautionary instructions, prevented this isolated comment from uncorrectably prejudicing the jury against Defendant, causing the jury to abandon its responsibility to weigh the evidence objectively and to be unable to arrive at a true verdict. Ultimately, we do not find that Defendant was unfairly prejudiced by the Assistant District Attorney's comments or that Defendant was denied a fair trial.

NEIL A. CRAIG and ROSALIE T. CRAIG, Plaintiffs vs. JAMES DULCEY and KATHLEEN DULCEY, Defendants

Civil Law—Real Estate—Post-Trial Motion—Judicial Notice of Public Documents—Disputed Chains of Title

1. Pursuant to Pa. R.E. 201(b), for judicial notice to be taken of an adjudicative fact, the fact must be one not subject to reasonable dispute.

2. A court may take judicial notice of public documents. Whether it does so, depends, at least in part, upon the object of and purpose for the request.

3. A request for judicial notice of the contents of public documents made in a post-trial motion, after trial has concluded, will not be granted where the effect would be to open the trial record to challenge findings of fact relied upon by the court in its decision.

4. Nor will judicial notice of the contents of public documents be taken to determine which of two chains of title is paramount, where to do so would require the court to conduct its own search and examination of the public records.

NO. 09-1880

JAMES A. SCHNEIDER, Esquire—Counsel for the Plaintiffs.

GRETCHEN D. STERNS, Esquire—Counsel for the Defendants.

MEMORANDUM OPINION

NANOVIC, P.J.—April 27, 2011

FACTUAL AND PROCEDURAL BACKGROUND

The Defendants, James Dulcey and Kathleen Dulcey, have appealed from our Final Order dated February 22, 2011, granting the Plaintiffs, Neil A. Craig and Rosalie T. Craig, the right to maintain a portion of their driveway on a former railroad bed and denying the Dulceys' counterclaim for ejectment. In their appeal, the Dulceys raise one issue: that we erred in determining that title to the portion of the railroad bed in question on which the Craigs' driveway is located is held by the Craigs and not the Dulceys.

The Craigs are the owners of a 20.150-acre tract of ground in Packer Township upon which their home is constructed and which is bisected by the former railroad bed. The railroad bed similarly divides two other lots in the subdivision plan of which the Craigs' property is a part and serves as an access route to all three properties. Because of the steep terrain of the Craigs' property, sloping downward from their home towards the railroad bed, the Craigs' driveway is approximately eight feet above the surface of the railroad bed at the point within the boundary lines of the Craigs' property where the two intersect and gradually tapers to the level

of the railroad bed. Because of this height differential, that portion of the railroad bed on which the driveway is located is impassable to motor vehicles.[1]

The Dulceys claim we erred in denying their claim for ejectment in that they own title to the railroad bed. It is the Dulceys' position that this title was acquired by way of a separate and distinct chain of title from that through which the Craigs' predecessors in title acquired ownership of what is now the Craigs' property and that, consequently, having never held title, the Craigs' predecessors in title were unable to convey ownership of the railroad bed to the Craigs.

Previously, in our Memorandum Opinion of February 1, 2011, we explained the basis for our decision. A copy of that opinion may be found at 18 Carbon L.J. 417. As to the precise issue the Dulceys intend to raise on appeal, its success depends on the introduction of evidence which was not presented at the time of trial but which the Dulceys requested be judicially noticed in a post-trial motion.

DISCUSSION

The Craigs' property is part of a three-lot subdivision prepared in 1979 by Mark Gerhard. What is now the Craigs' property was first conveyed by Mr. Gerhard to Michael Boves and Helen L. Jacobs (the "Boves") by deed dated May 14, 1979. (Plaintiffs' Exhibit 1.) The recital in this deed states that the premises being conveyed is a part of the same premises "which Bessie E. Gerhard, individually, and as Executrix of the Last Will and Testament of Wallace O. Gerhard, Jr., by Deed dated September 15, 1977, and recorded in the office for the recording of deeds in and for the County of Carbon in Deed Book 384, Page 555, granted and conveyed to Mark J. Gerhard, Grantor herein." Encompassed within the legal description of the Boves' deed, now the Craigs' property, is the area where the disputed railroad bed is located.

[1] This does not affect access to the other two lots in the subdivision which are to the west of the Craigs' property, the direction from which access is obtained, but does affect, to a certain extent, the Dulceys' access to other property they own east of the Craigs. The railroad bed is approximately fifty feet wide and the driveway, at its furthest intrusion into the width of the railroad bed, extends approximately halfway to the center, leaving an unobstructed width for travel of more than twenty-five feet.

The deed upon which the Dulceys base their claim to ownership of the railroad bed is that dated October 12, 2007, from Mark J. Gerhard, as Executor of the Estate of Bessie K. Gerhard, Deceased to the Dulceys. (Plaintiffs' Exhibit 16.) The recital in this deed identifies the source of title in the grantor as "being a part of the same premises conveyed to Wallace O. Gerhard and Bessie K. Gerhard, his wife, by deed from Hazleton City Authority dated February 1972 and recorded February 13, 1980, in Carbon County Deed Book 370 at Page 496 and Deed Book 410, Page 850. The said Bessie K. Gerhard died on July 23, 2000 and her estate is filed to No. 01-9033 in the Office of the Register of Wills of Carbon County. The said Mark J. Gerhard was appointed as the Executor of the estate."

From the foregoing, we concluded that since title to the railroad bed was conveyed to Bessie Gerhard and her husband by deed dated February 1972, at the time Bessie Gerhard conveyed the premises of which the Craigs' property is a part to her son, Mark Gerhard, on September 15, 1977, she was the sole owner of the portion of the railroad bed in dispute, her husband (as evidenced in the recital of the Boves' deed) having died sometime prior to this date. Consequently, at the time of the September 15, 1977 conveyance, Bessie Gerhard in her individual capacity had the power to convey title of the railroad bed to her son.

The September 15, 1977 deed was never placed in evidence by either of the parties. However, the legal description which appears in the Boves' deed not only encompasses the section of the railroad bed now in dispute but further excepts and reserves to Mr. Gerhard, his heirs, successors, and assigns, an easement interest in this same railroad bed, thus implying that Mr. Gerhard was the owner of the railroad bed at the time of conveyance.[2] It

[2] While an exception is distinct from a reservation, both imply ownership in the grantor. **See** Ladnor Pennsylvania Real Estate Law, Section 16.05(k) (5th Edition 2006) which states:

> There is a fundamental distinction between a reservation and an exception. An exception is always a part of the thing which, but for the exception, would have been conveyed with the grant. **Mandle v. Gharing,** 256 Pa. 121 (1917); **Whitaker v. Brown,** 46 Pa. 197 (1863); **Bicking v. Florey's Brick Works,** 53 Pa.Super. 358 (1913). It is the withholding from the operation of the deed something in existence that otherwise the deed would pass to the grantee. **Lacy v. Montgomery,** 181 Pa.Super. 640 (1956). On the other hand, a reservation in a deed is the creation of a right or interest

should also be noted that the deed making the conveyance from Mr. Gerhard to the Boves was executed by Bessie Gerhard on her son's behalf as his attorney-in-fact. The foregoing facts clearly support the inference that the Craigs, as the successors in interest to the Boves, are the owners of that portion of the railroad bed upon which their driveway is located, subject to the easement interest reserved by Mr. Gerhard.

In their proposed findings of fact and conclusions of law submitted to the Court after the non-jury trial was concluded, the Dulceys erroneously represented that the source of title of the property conveyed from Bessie Gerhard to her son, Mark Gerhard, was solely that in her capacity as Executrix of the Estate of Wallace Gerhard when, as previously stated, the recital in the May 14, 1979 deed from Mark Gerhard to the Boves indicates the source of title to be from Bessie Gerhard both individually and in her capacity as Executrix of the Estate of Wallace Gerhard. (Defendants' Proposed Findings of Fact, paragraph 3, footnote 1.) In this same submission, the Dulceys inappropriately sought to rely upon evidence not of record, namely the contents of the 1977 deed from Bessie Gerhard, individually and as Executrix of the Estate of Wallace Gerhard to Mark Gerhard.

Additionally, in their Post-Trial Motion filed on February 11, 2011, the Dulceys again sought to rely upon the contents of the 1977 deed. (Defendants' Post-Trial Motion, Paragraph 10, Exhibit "C".) In doing so, the Dulceys for the first time asked that we take judicial notice of the contents of this deed, citing as authority **Penstan Supply v. Traditions of American L.P.,** 9 D. & C. 5th 567 (Pa. C.P. 2010). (Defendants' Post-Trial Motion, paragraph 11.)

We have not taken judicial notice, as requested by the Dulceys, for two reasons. First, the request was belated: our decision had

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that had no prior existence as such in the thing or part of the thing granted. **Lauderbach-Zerby Co. v. Lewis,** 283 Pa. 250 (1925); **Mandle v. Gharing,** 256 Pa. 121 (1917). It follows that an exception requires no words of inheritance, because title to the excepted part is already in the grantor and never passes from him. But a reservation does require words of inheritance, since it creates a new right or interest that had no previous existence; and without words of inheritance the reservation is personal to the grantor and ceases upon his death. **Mandle v. Gharing,** 256 Pa. 121 (1917); **Hobaugh v. Philadelphia Co.,** 67 Pa.Super. 407 (1917).

See also, Herr v. Herr, 957 A.2d 1280 (Pa. Super. 2008).

already been rendered and was a matter of record. Ownership of the railroad bed was a disputed issue of fact at the time of trial and it was incumbent upon the Dulceys at that time to either present evidence in support of their position or to request the taking of judicial notice. (N.T., 5/7/10, pp. 63-69.) In effect, the Dulceys impermissibly seek to open the trial record to admit documentary evidence available to them but which they elected not to produce. The risk of failing to do so, falls upon the Dulceys.

Second, we do not believe the information which the Dulceys ask to be judicially noted can stand on its own as a statement of undisputed fact for the purposes proffered. To be sure, the existence of the deed itself is not in question. But whether its effect is what the Dulceys contend—that title to the railroad bed was not conveyed to Mark Gerhard in the 1977 deed from his mother—requires reference to even other documents not in evidence (**e.g.,** the deed from James Dietrich to Wallace O. Gerhard, Jr., referred to in the recital of this deed). (**See** Defendants' Post-Trial Motion, paragraph 10, Exhibit "C".)

Pa. R.E. 201(b) governs judicial notice of adjudicative facts:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

While we do not disagree that the court may take judicial notice of public documents, **Bykowski v. Chesed, Co.,** 425 Pa. Super. 595, 599 n.1, 625 A.2d 1256, 1258 n.1 (1993), whether it should do so, depends, at least in part, upon the object of and purpose for the request. This is especially true when the purpose for which judicial notice is sought cannot be determined simply by examining the document which is the object of the request but must, by necessity, be determined by an examination of other documents bearing on the subject at issue.[3]

[3] This is further complicated in this case by the discrepancies between the boundary description of the railroad bed described in the Dulceys' deed (Plaintiffs' Exhibit 16; Defendants' Exhibit 2) and the survey provided by their surveyor, Dennis Evans. (Defendants' Exhibit 1; **see also,** Plaintiffs' Exhibit 15 and N.T., 5/7/10, pp. 115-16, 124-25.)

To grant the Dulceys' request would literally open up a can of worms requiring review of innumerable other documents of public record—in effect, a title search which neither party has apparently done—in order to ascertain record ownership of the railroad bed. The burden of proving ownership of this property was upon the Dulceys by virtue of their counterclaim in ejectment. This burden was not met by the Dulceys at the time of trial and cannot be met, after the fact, by a request for judicial notice unaccompanied by the information necessary to make the request self-evident given the tenor of the matter to be noticed. **See** Pa. R.E. 201(d) ("A court shall take judicial notice if requested by a party and supplied with the necessary information.").

CONCLUSION

The decision from which the Dulceys appeal is based upon the evidence of record and, we believe, is supported by that evidence. Accordingly, for the foregoing reasons, we respectfully ask the Superior Court to affirm that decision and deny the appeal.

COMMONWEALTH OF PENNSYLVANIA
vs. RALPH E. FAHRINGER, Defendant

Criminal Law—Competence To Stand Trial—Mental Health Procedures Act—Effect of Amnesia or Inability To Recall Events on Which Charges Are Based

1. In order to be competent to stand trial, a defendant must be able to consult with counsel with a reasonable degree of rational understanding, and he must have a rational understanding of the nature and object of the proceedings against him. This standard set by common law exists equally under Section 402(a) of the Mental Health Procedures Act.

2. The burden of establishing incompetence to stand trial is upon the defendant; the standard of proof is by a preponderance of the evidence.

3. A defendant's competency is an absolute and basic condition of a fair trial, and conviction of a legally incompetent defendant violates his constitutionally guaranteed due process rights.

4. The inability of a criminal defendant to recall what happened is a separate and distinct issue from the question of competency to stand trial. While such inability unquestionably affects the defendant's competency as a witness to testify to such events, it is only where the loss of memory affects or is accompanied by a mental disorder impairing the defendant's ability to intelligently comprehend his position or to responsibly cooperate with counsel that his guaranties to a fair trial and effective assistance of counsel are threatened.

NOS. 133, 134 CR 08

JOSEPH J. MATIKA, Esquire, Assistant District Attorney—Counsel for the Commonwealth.

GREGORY L. MOUSSEAU, Esquire—Counsel for the Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—May 13, 2011

The Defendant, Ralph Fahringer, a thirty-two-year-old man accused of having intercourse with a fourteen-year-old minor girl, claims he is incompetent to stand trial pursuant to Section 402(a) of the Mental Health Procedures Act, 50 P.S. §7402(a). Specifically, Defendant claims he does not have the mental capacity to understand the nature and object of the proceedings against him, and to participate and assist in his defense. For the reasons which follow, we agree and order a further evaluation by a court-appointed psychiatrist.

FACTUAL AND PROCEDURAL BACKGROUND

Between December 26, 2007 and January 9, 2008, Defendant is charged with engaging in sexual intercourse with a fourteen-year-old female on six separate occasions. The relationship was allegedly consensual. The victim was a knee-high cheerleader coached by Defendant's wife and who also helped in watching Defendant's two children, ages five and seven.

Previously, on December 7, 1998, Defendant sustained head injuries in a head-on collision with another vehicle. These injuries were initially believed to consist primarily of severe facial lacerations and a broken nose. Although no cognitive deficits were noted at the time, shortly after the accident Defendant began experiencing severe headaches with increasing difficulty concentrating and functioning. Nevertheless, following the accident Defendant returned to work and began dating his future wife, whom he married on February 14, 2000. Defendant ceased working in 2002. This same year he was awarded social security disability benefits. At the time, he was diagnosed with post-concussion syndrome, organic brain syndrome and major depressive disorder due to a serious motor vehicle accident.

Defendant was prescribed medication which alleviated, to some extent, the problems he experienced after the accident. Unfortunately, Defendant was involved in a second motor vehicle

accident in August 2007, following which he stopped taking the medication previously prescribed. Defendant, who was then unemployed and spent most of his time at home, was not using this medication at the time of the crimes charged. He exhibited difficulty concentrating, performing simple tasks and appeared to have little insight or understanding of the consequences of his actions. In addition, both Defendant's remote and recent memory were in question: he appeared to have little recollection of significant events in his life and his working memory was impaired.

Nevertheless, the extent to which these difficulties actually affected Defendant's ability to meet the demands of every day living and to deal with his basic needs is unclear. An individual with borderline intellectual functioning is not automatically incapable of comprehending and making rational decisions. For example, the evidence indicates Defendant was able to drive a motor vehicle and served as an assistant coach for young children playing flag football.

Moreover, Defendant's complaints are primarily subjective. The extent of Defendant's closed head injury has never been documented by imaging studies or other objective measures. A CAT scan of Defendant's head taken in 1998 to evaluate the injuries he sustained in the motor vehicle accident that year was normal. Additionally, other than minimal inflammatory changes in the left maxillary and right anterior ethmoid air cells, an MRI of Defendant's brain taken on March 16, 2002 was also normal.

Defendant's conduct was first reported to the police by the minor and her mother in mid-January 2008. In separate statements given by Defendant to both the Mahoning Township and Lehighton Police, Defendant admitted to having oral and vaginal intercourse with the minor, and being aware of her age. Two police departments were involved since four of the alleged incidents occurred at Defendant's home in Mahoning Township and two at the victim's home in Lehighton. Charges were filed on February 4 and February 11, 2008, respectively.[1]

[1] For each incident, Defendant has been charged with one count of involuntary deviate sexual intercourse with a person less than sixteen years of age, 18 Pa. C.S.A. §3123(a)(7); one count of statutory sexual assault, 18 Pa. C.S.A. §3122.1; one count of aggravated indecent assault of a person less than sixteen years of age, 18 Pa. C.S.A. §3125(a)(8); and one count of indecent assault of a person less than sixteen years of age, 18 Pa. C.S.A. §3126(a)(8). In addition, for the incidents alleged to have occurred in Mahoning Township and for each of the

On July 7, 2008 Defendant filed notice of a defense of insanity or mental infirmity pursuant to Pa. R.Crim.P. 568. Therein, Defendant contends that at the time of the incidents he could not distinguish between right and wrong, and that he did not and could not comprehend the criminality of his actions due to mental disease or infirmity. On May 26, 2010 Defendant filed a petition under the Mental Health Procedures Act, 50 P.S. §§7101-7503, for a hearing to determine his competency to stand trial. In this petition, Defendant alleges that he "is not mentally competent to proceed, does not know the functions of the principal participants in the courtroom and does not have the ability to work rationally with his attorney in preparing his defense." (Petition to Determine Competency, Paragraph 6.) After numerous continuances, a hearing on this petition was held on April 7, 2011.

At the April 7, 2011 hearing, Dr. Frank M. Dattilio, a clinical and forensic psychologist, testified that he had reviewed Defendant's medical records, conducted a number of psychological tests, and was of the opinion preliminarily that Defendant sustained brain damage localized to the frontal lobe region, that he has little or no memory of the events forming the basis of the criminal charges, and that he was not competent to stand trial. Dr. Dattilio cautioned, however, that "more extensive neuropsychological testing needs to be conducted in order to render a more precise diagnosis of his neuropsychological deficits." (Defense Exhibit 4, Dattilio Report dated December 22, 2008, p. 11.)

Dr. Robert Sadoff, a forensic psychiatrist, also testified at the competency hearing on Defendant's behalf. Dr. Sadoff testified that he had examined Defendant, and reviewed and relied upon the psychological test results taken by Dr. Dattilio. Dr. Sadoff accepted Dr. Dattilio's summation of Defendant's medical records; he did not personally examine these records. Dr. Sadoff further testified that the information contained in Dr. Dattilio's report clearly established that Defendant had significant cognitive deficits and was not a malingerer. After explaining the results of his own

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incidents in Lehighton, Defendant has been charged with corruption of minors, 18 Pa. C.S.A. §6301(a)(1).

examination, and the limitations and disabilities he observed, Dr. Sadoff concluded:

> Assuming that he has no memory of what happened and cannot, as a result, work with his attorney in preparing a rational defense, it is my opinion, within reasonable medical certainty, that Ralph Fahringer is currently not mentally competent to proceed. He does not know the functions of the principal participants in the courtroom and does not have the ability to work rationally with his attorney in preparing his defense.

(Defense Exhibit 3, Sadoff Report dated May 6, 2009, p. 6.) However, Dr. Sadoff also cautioned that Defendant required outpatient treatment, with medication, and recommended a repeat evaluation. (Defense Exhibit 3, Sadoff Report, p. 6.)

Finally, Dr. Timothy J. Michals, also a forensic psychiatrist, testified on behalf of the Commonwealth. In addition to his own examination of Defendant, Dr. Michals reviewed the reports of Dr. Dattilio and Dr. Sadoff. Dr. Michals did not accept the premise that Defendant sustained traumatic brain damage in the December 7, 1998 motor vehicle accident, asserting that there was insufficient evidence to support this conclusion; contended that the tests administered by Dr. Dattilio were dependent on the accuracy of Defendant's self reporting and not conclusive; and opined that Defendant was either feigning or exaggerating his disability. Neither Defendant nor his wife testified at the competency hearing.

DISCUSSION

At this time, we address only whether Defendant is competent to stand trial, not whether his mental and cognitive impairments provide a legal defense.[2] "In order to be competent to stand trial,

[2] The standards relative to competency to stand trial and those necessary to establish insanity are distinct. **Commonwealth v. Hughes,** 581 Pa. 274, 865 A.2d 761, 788 n.29 (2004). Both the relevant time periods and tests to be applied differ. "Competency to stand trial pertains to the time of the trial or other legal proceedings, while sanity concerns the time of the commission of the offense." **Commonwealth v. Appel,** 547 Pa. 171, 187 n.8, 689 A.2d 891, 899 n.8 (1997). Further, while competency involves an assessment of a defendant's ability to consult with counsel, participate in his defense, and understand the nature of the proceedings, the defense of insanity is the M'Naghten "right or wrong" test: whether the defendant, at the time of the offense, understood the nature and quality of his actions or whether he knew that his actions were wrong. **See** 18 Pa. C.S.A. §315(b).

a defendant must be able to consult with counsel with a reasonable degree of rational understanding, and he must have a rational understanding of the nature and object of the proceedings against him." **United States v. Vanasse,** 48 Fed. Appx. 30, 32 (3rd Cir. (Pa.) 2002) (citation omitted). Likewise, Section 402(a) of the Mental Health Procedures Act provides that a defendant is legally incompetent if he is "substantially unable to understand the nature or object of the proceedings against him or to participate and assist in his defense." 50 P.S. §7402(a). Stated similarly, "the relevant question is whether the defendant has sufficient ability at the pertinent time to consult with counsel with a reasonable degree of rational understanding and have a rational as well as a factual understanding of the proceedings." **Commonwealth v. Appel,** 547 Pa. 171, 188, 689 A.2d 891, 899 (1997) (citations and quotation marks omitted).

"A defendant's competency is an absolute and basic condition of a fair trial, and conviction of a legally incompetent defendant violates his constitutionally guaranteed due process rights." **Appel, supra** at 187, 689 A.2d at 898. "[A]n incompetent defendant who lacks the ability to communicate effectively with counsel may be unable to exercise rights deemed essential to a fair trial, **e.g.,** whether to plead guilty or to proceed to trial, whether to waive the privilege against compulsory self-incrimination, whether to waive the right to a jury trial when applicable, and whether to waive the right to confront one's accusers by declining to cross-examine prosecution witnesses." **Commonwealth v. Tizer,** 454 Pa. Super. 1, 10, 684 A.2d 597, 602 (1996). "[A]n erroneous determination of competence threatens a fundamental component of our criminal justice system—the basic fairness of the trial itself." **Cooper v. Oklahoma,** 517 U.S. 348, 364, 116 S. Ct. 1373, 1382, 134 L. Ed. 2d 498 (1996) (citation and quotation marks omitted). Neverthe-

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In the instant case, the evidence at the April 7 hearing was confined to psychological/psychiatric testimony as it relates to competency and did not address the separate issue of Defendant's criminal responsibility. As an aside, we note that the Mental Health Procedures Act authorizes a trial court, in its discretion, "to make a broad inquiry into a defendant's criminal responsibility, and to make a pretrial **factual** determination concerning a defendant's criminal responsibility." **Commonwealth v. Scott,** 396 Pa. Super. 339, 349-50, 578 A.2d 933, 938 (1990); **see also,** 50 P.S. §7404(a). "Such a determination may be made only in conjunction with a pre-trial [sic] competency examination and hearing." **Id.** at 348, 578 A.2d at 937.

less, because a defendant is presumed competent, the burden of showing otherwise is upon the defendant. **Commonwealth v. duPont,** 545 Pa. 564, 681 A.2d 1328, 1330 (1996). This burden is met by a preponderance of the evidence. **Id.**

Further, a "defendant's fundamental right to be tried only while competent outweighs the State's interest in the efficient operation of its criminal justice system." **Cooper, supra** at 367, 116 S. Ct. at 1383 (stating also that "the State may detain the incompetent defendant for the reasonable period of time necessary to determine whether there is a substantial probability that he will attain [competence] in the foreseeable future"). If found to be incompetent, trial must be stayed for so long as such incapacity persists. 50 P.S. §7403(b). If there is no substantial probability that capacity will be regained in the foreseeable future, the defendant must be discharged. 50 P.S. §7403(d). "In no instance, except in cases of first- and second-degree murder, shall the proceedings be stayed for a period in excess of the maximum sentence of confinement that may be imposed for the crime or crimes charged or ten years, whichever is less." 50 P.S. §7403(f).

At the competency hearing, Defendant presented a **prima facie** case of incompetency. Both Dr. Dattilio and Dr. Sadoff testified that Defendant's full-scale IQ score of 77 places him in the borderline range of intellectual functioning and that Defendant functions at a primitive level. His thinking is simplistic, hollow and extremely concrete, with little depth of understanding, and he is unable to appreciate the consequences of his actions. He has difficulty in concentrating and maintaining a chain of thought, and his ability to store and retrieve information is poor. All may indicate brain damage.

Both of Defendant's experts also testified that Defendant has no true understanding of the criminal charges lodged against him, that he does not understand what the charges mean or their seriousness or the potential consequences if he is found guilty, and that he neither understands nor appreciates the respective roles or functions of the prosecutor, his counsel, the court or himself. Moreover, with one exception, during the hearing Defendant appeared inattentive and disinterested. **Cf. Commonwealth v. McGill,** 545 Pa. 180, 680 A.2d 1131 (1996) (trial court's observations of defendant during colloquies and throughout trial supported the conclusion

that defendant was competent to stand trial). All of this points to Defendant being incompetent to proceed.[3]

Dr. Michals, in contrast, focused his opinions and conclusions as to Defendant's competency solely on whether Defendant remembers and can recall what happened between him and the victim. Specifically, Dr. Michals opined that Defendant's "claim of having no memory of what happened is volitional in nature and self-serving, rather than the result of a psychiatric disorder." (Commonwealth Exhibit 3, Dr. Michals Report dated January 18, 2010, p. 3.) To some extent, Dr. Sadoff's opinion that Defendant is not mentally competent is also based on whether or not Defendant can recall what actually happened. (Defense Exhibit 3, Sadoff Report, p. 6.)

To the extent Dr. Michals and Dr. Sadoff base their opinions of Defendant's competency to stand trial solely on whether he can recall what happened, this is error. While such inability unquestionably affects Defendant's competency as a witness to testify to such events, by itself, it does not determine his competency to stand trial.

> Absent evidence of a mental disability interfering with the defendant's faculties for rational understanding, it is settled that mere vacuity of memory is not tantamount to legal incompetency to stand trial. It is only where the loss of memory effects [sic] or is accompanied by a mental disorder impairing the amnesiac's ability to intelligently comprehend his position or to responsibly cooperate with counsel that the accused's guaranties to a fair trial and effective assistance of counsel are threatened and therefore incapacity to stand trial may be demonstrated. **See Commonwealth v. Barky,** 476 Pa. 602, 383 A.2d 526 (1978).

Commonwealth v. Epps, 270 Pa. Super. 295, 298, 411 A.2d 534, 536 (1979); **see also, Commonwealth v. Kotzman,** 7 D. & C. 3d 209, 213 (Pa. Com. Pl. 1978).

In addition, Dr. Michals failed to address Defendant's ability to work with counsel and assist in his defense. **Commonwealth v. Powell,** 293 Pa. Super. 463, 466, 439 A.2d 203, 205 (1981) ("If

[3] In addition to Defendant's cognitive deficits, which Defendant's experts attribute to traumatic brain damage, Defendant's experts also testified that Defendant is mildly bipolar. While by itself not disabling, this mental illness appears to compound Defendant's difficulties and limitations.

a person is incapable of co-operating [sic] with his counsel in his defense of a criminal charge because of mental illness, then he is incompetent to stand trial."); **cf. Commonwealth v. Banks,** 513 Pa. 318, 521 A.2d 1 (1987) (defendant's ability to cooperate and not whether he is actually cooperating is essential to the determination of legal competency to stand trial).

While Defendant has presented a **prima facie** case of incompetency and is entitled, on a preliminary basis, to this finding, such finding is not without qualification. The only testimony presented was that of expert witnesses. Neither the defendant, his wife, nor anyone familiar with Defendant's functioning in the real world testified. In this respect, Judge Spaeth astutely observed the following in **Commonwealth v. Smith,** 227 Pa. Super. 355, 367, 324 A.2d 483, 489 (1974):

> To the extent that psychiatric testimony is utilized, however, it should be descriptive of the defendant's condition rather than conclusory. Like criminal responsibility, incompetency is a legal question; the ultimate responsibility for its determination must rest in a judicial rather than a medical authority. In relying on conclusory psychiatric testimony, often expressed in the same terms as the ultimate incompetency question, the courts shift responsibility for the determination to psychiatrists who have no special ability to decide the legal issue. Indeed, there is repeated evidence that psychiatrists often misunderstand the test of incompetency and confuse it with the test of criminal responsibility. Medical opinion about the defendant's condition should be only one of the factors relevant to the determination. A defendant's abilities must be measured against the specific demands trial will make upon him, and psychiatrists have little familiarity with either trial procedure or the complexities of a particular indictment.

In addition to being denied direct evidence of Defendant's interrelationships and functioning during a typical day, many unanswered questions exist concerning the precise limitations of Defendant's capacity to comprehend and participate in these proceedings. For instance, after the December 7, 1998 motor vehicle accident and before Defendant was awarded social security benefits in 2002, the evidence established that Defendant held at least four separate jobs. Although this employment appeared to be

at entry levels and unskilled, the mental demands of these jobs was never inquired into. Moreover, not only was the exact determination of Defendant's social security disability never identified, the standard for receipt of social security disability benefits is distinct and different from that required to establish incompetency for trial purposes. It is also likely that even before the 1998 motor vehicle accident Defendant was functioning within the low to average range of intelligence. As is the case for setting the standards for mental retardation in capital cases, a low IQ, by itself, does not establish incompetency for trial purposes. **Cf. Commonwealth v. Miller,** 585 Pa. 144, 888 A.2d 624, 631 (2005) ("[W]e do not adopt a cutoff IQ score for determining mental retardation in Pennsylvania, since it is the interaction between limited intellectual functioning and deficiencies in adaptive skills that establish mental retardation.").

In addition, during the period between the motor vehicle accident and Defendant's social security disability award, Defendant was able to intermingle and socialize with other individuals; it was during this period that Defendant met, dated and married his wife. Further, there is no indication in the record that Defendant is confined to home or needs supervision. To the contrary, at the time of the offenses with which Defendant is charged, Defendant was coaching flag football and, in response to the police's investigation of the charges, Defendant was able to recall and communicate to the police what happened. Medication which Defendant has resumed taking since the date of the alleged offenses has enhanced his functioning and may continue to do so. In addition, at the time of hearing, Defendant appeared to be athletic and in good physical condition; he was reported to be able to take care of his basic needs and was also able to drive a motor vehicle. While Defendant stays home watching TV most of the day, the types of programs he watches were never identified. Also, at one point during the proceedings, when questioned by his counsel at the counsel table, Defendant appeared able to focus and to respond to counsel's inquiries.

CONCLUSION

After taking into account the evidence that was presented, as well as the gaps in such evidence, and the preliminary nature of the evaluations performed by Dr. Dattilio and Dr. Sadoff, we have sufficient reservation about Defendant's competency to stay these

proceedings pending further evaluation of Defendant's capacity to stand trial. It is also our intent to order an incompetency evaluation by a court-appointed psychiatrist in accordance with Sections 7402(d) and (e) of the Mental Health Procedures Act, 50 P.S. §§7402(d) and (e).

IN RE: JAMES MURPHY, Petition for Appointment of Board of Viewers To Layout and Open a Private Road Over Property of Towamensing Trails Property Owners' Association, Inc.

Civil Law—Private Road Act—Measure of Damages for Private Take of Right-of-Way—Assessing Loss to Owner of the Grant of Easement To Use a Right-of-Way and Used by More Than 4,000 Other Users

1. The proper measure of damages for the taking of a private access is the difference in market value of the condemned property before the taking and as unaffected by it, and its market value immediately after the taking, as affected by it, the so-called "before-and-after" value.

2. Damages for acquiring the private right to use an existing right-of-way do not include the recoupment of previously expended monies for construction and engineering costs of the right-of-way, nor do they include nuisance damages separate and independent from the before-and-after value.

3. Where both the condemnor and condemnee have failed to present competent evidence sufficient to support a claim of damages, presumptions and burdens decide the outcome.

4. On appeal of a board of viewers' decision to the court of common pleas, the burden of proving damages is upon the condemnee. When this burden has not been met, absent contrary evidence of actual damages, nominal damages will be presumed.

NO. 90 MD 2006

ANTHONY ROBERTI, Esquire—Counsel for the Petitioner.

DAVID J. WILLIAMSON, Esquire—Counsel for the Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—May 16, 2011

What is the value of a private road? More precisely, by what amount does that value diminish if one more user is added. That is the issue in this case—one over which the parties are in total disagreement.

PROCEDURAL AND FACTUAL BACKGROUND

Towamensing Trails, a private residential development located in Penn Forest Township, Carbon County, has 4,064 building lots on which more than 2,250 homes have been built. The Towamensing Trails Property Owners' Association, Inc. ("Association") is the owner of more than 52 miles of roadway within the subdivi-

sion which the lot owners, by virtue of their property ownership, have the right to use and an obligation to maintain through the payment of annual assessments. Previously, we determined that James Murphy, the owner of landlocked property which adjoins Towamensing Trails, is entitled under the Private Road Act, 36 P.S. §§1781-2891, to a right-of-way over existing development roads as a means of access to his property.[1] The assessment of damages for the use of this right-of-way was remanded to the Board of Viewers for determination.

On remand, the courses and distances of the right-of-way over the Association's roads were stipulated to by the parties. The course starts at the main entrance of Towamensing Trails on Pennsylvania Route 903, traverses over Towamensing Trail to Teddyuscung Trail, then to Whitman Lane, and finally to Lovelace Drive. The distance is 6,229.6 feet. The parties further stipulated that the width of the right-of-way, 25 feet, is to be measured from the center line of the existing cartway, 12 1/2 feet on either side.

In its report filed on August 24, 2009, the Board of Viewers determined the damages to be $62,296.00. By order dated November 16, 2009, we confirmed **nisi** the Board's report. On November 30, 2009, Murphy appealed the Board's award. This appeal as to damages only was heard **de novo** by us on July 16, 2010. At this trial, Murphy presented evidence which, if believed, calculated the damages to be de minimis, less than one cent. In contrast, the Association's evidence, if accepted, computed the damages to be $401,500.00.

At trial, Murphy presented the testimony of an appraisal expert who opined that the size of the property in dispute is approximately three and a half acres (**i.e.,** 25 feet by 6,229.6 feet), that the prop-

[1] Our Opinion, dated December 12, 2008, can be found at 17 Carbon Co. L.J. 529 (2008). Since that time, the Pennsylvania Supreme Court in **In re Opening a Private Road for Benefit of O'Reilly,** 607 Pa. 280, 5 A.3d 246 (2010), vacated the Commonwealth Court's 2008 decision upholding the constitutionality of the Private Road Act. In doing so, the court noted that the Commonwealth Court "neither supplied a sufficient rationale to support its theory of a statewide incorporeal burden nor put into application the prevailing standard governing takings." **Id.,** 5 A.3d at 258. Consequently, Murphy's contention that the Association has no right to further compensation on the basis that six percent of additional land for the use of roads was included free of charge in all original conveyances from the proprietors or the Commonwealth is untenable.

erty is unbuildable because of its dimensions and dedication as a right-of-way, that property which is unbuildable has a fair market value of a thousand dollars per acre, that the proportionate value of the property taken per lot owner before the take was $0.8612 (**i.e.,** $3,500.00 divided by 4,064.00), that the proportionate value of the property taken per lot owner after the take is $0.8610 (**i.e.,** $3,500.00 divided by 4,065.00) and that the difference between the before-and-after value per lot owner is less than one cent.

The Association countered that the before-and-after value should be based upon construction costs; that the cost to construct the road at current rates is $743,000.00; that the Association is one owner and that, after the take, Murphy will be a second owner; and that, therefore, the loss in value to the Association is $371,500.00. In addition, the Association's real estate expert testified to nuisance damages of $30,000.00 attributable to increased traffic and loss of privacy due to Murphy's, his invitees', heirs' and assigns' use of the road as a non-member of the Association.

DISCUSSION

The proper measure of damages for the taking of a private access is the same as that for the taking of a public road: the difference in market value of the condemned property before the taking and as unaffected by it, and its market value immediately after the taking, as affected by it, hereafter called the "before-and-after" value. 36 P.S. §§1881, 2736; **see also, In re Brinker,** 683 A.2d 966, 969 n.9 (Pa. Commw. 1996) and **Brown v. Commonwealth,** 399 Pa. 156, 158, 159 A.2d 881, 882 (1960). Neither party's evidence conforms to this standard.[2]

Murphy, in effect, valued a joint ownership interest in vacant, unbuildable land. This is contrary to the facts. Murphy is not acquiring an ownership interest, but a right to use; the property is not vacant, but improved with a road and is being used for that purpose

[2] The parties' failure to properly measure damages is difficult to understand. In our Memorandum Opinion of December 12, 2008, we explicitly noted that the appropriate measure of damages is the difference between the fair market value of the entire property immediately before and immediately after the taking, **citing Benner v. Silvis,** 950 A.2d 990 (Pa. Super. 2008), and expressly remanding the matter to the Board of Viewers for the computation of damages in accordance with this standard. **See** Memorandum Opinion, pp. 17-20, including footnote 10.

to the benefit of thousands of property owners; the incremental difference in value of an ownership interest between 4,064 owners and 4,065 owners is not a comparison between the before-and-after value of the existing road.

The Association's approach is equally invalid. Murphy will not be one of two owners of the road, but one of 4,065 lot owners who have a right to use the road. Further, the price to build a road at current rates does not measure the before-and-after value attributable to one additional user. What the Association has measured is the savings to Murphy of not having to build a new road, not the loss to the Association of having one additional user.

The damages under the Private Road Act for acquiring access across another's property are prescribed as follows:

> The damages sustained by the owners of the land through which any private road may pass shall be estimated in the manner provided in the case of a public road.

36 P.S. §2736. Section 2736's reference to public roads is to the provisions for opening a public road found at 36 P.S. §1781 **et seq.,** including 36 P.S. §2151, specifically authorizing appeals from the award of damages by the Board of Viewers in public road cases. **Mattei v. Huray,** 54 Pa. Commw. 561, 565, 422 A.2d 899, 901 (1980).[3] Such damages do not include the recoupment of previously expended monies for construction and engineering costs. **Benner v. Silvis,** 950 A.2d 990, 995 (Pa. Super. 2008). Nor does the statute provide for the recovery of nuisance value as requested by the Association. **See Brown, supra** (holding that evidence of particular items of damage, separate from the fair market value of the land, should be excluded).

[3] Although a split in authority exists between the Commonwealth and Superior Courts concerning the applicability of the Eminent Domain Code to private road condemnations, both courts agree that the measure of damages is the before-and-after value. **Benner, supra** at 993 n.1. Further, the Superior Court has acknowledged 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)." **Id.** at 993. We therefore follow the Commonwealth Court's lead that "the provisions of the Eminent Domain Code ... are not applicable, except by analogy or perhaps, necessity, to private condemnations." **Mandracchia v. Stoney Creek Real Estate Corp.,** 133 Pa. Commw. 510, 513 n.1, 576 A.2d 1181, 1182 n.1 (1990).

We are faced then with a case where neither party has presented evidence sufficient to support a claim for damages.[4] Under such circumstances, the law does not permit a stalemate. One party must prevail; a tie cannot exist.

In the absence of evidence, presumptions and burdens decide the outcome. On appeal before the Court of Common Pleas, as here, the burden of proving damages is upon the condemnee, not the condemnor. **Glider v. Commonwealth, Department of Highways,** 435 Pa. 140, 146, 255 A.2d 542, 545 (1969); **see also, Morrissey v. Department of Highways,** 424 Pa. 87, 91, 225 A.2d 895, 897-98 (1967). Having failed to meet this burden and absent contrary evidence of actual damages, nominal damages will be presumed. **Weinberg v. Comcast Cablevision of Philadelphia, L.P.,** 759 A.2d 395, 403 (Pa. Super. 2000) ("Absent evidence of specific damages bearing on the market value of the property, a nominal damage award in the amount $1.00 was appropriate.").

CONCLUSION

In a case such as this when an interest in another's property has been condemned, but the evidence fails to establish the actual loss sustained by the condemnee, nominal damages will be awarded. For purposes of our verdict, these damages have been set at $100.00.[5]

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[4] As a matter of law, where the fact-finder views the property, it may disregard the testimony of experts and arrive at its own fair market value and damage amount. **Hughesville-Wolf Township Joint Municipal Authority v. Fry,** 669 A.2d 481, 486 (Pa. Commw. 1995) (view by the trial judge); **Tedesco v. Municipal Authority of Hazle Township,** 799 A.2d 931, 938 (Pa. Commw. 2002) (view by a jury). We have not viewed the property, nor has either party requested that we do so. Accordingly, it would be inappropriate for us to independently value the taking separate from the evidence presented at the time of trial. **Borough of Jefferson v. Bracco,** 160 Pa. Commw. 681, 693, 635 A.2d 754, 760 (1993).

[5] This amount is in addition to the amount of $1,500.00 for the right-of-way acquired by Murphy over the unopened portion of Lovelace Drive and $500.00 for attorney and appraisal fees previously stipulated to by the parties. In addition, as also stipulated to by the parties, Murphy is subject to the assessment by the Association of 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. **See also, Glen Onoko Estates v. Neidert,** 17 Carbon Co. L.J. 322 (2006) (allocating the costs for repair, upkeep and maintenance of private development roads equitably among all users of the roads).

ANGELINA M. INGRASSIA, Plaintiff vs.
ERIE INSURANCE EXCHANGE, Defendant

Civil Law—Fire Loss—Homeowner's Insurance—
One-Year Suit Limitation Clause—Replacement Cost Versus
Functional Replacement Cost—Insurance Bad Faith

1. An insurance policy's suit limitation clause is not a statute of limitation imposed by law; it is a contractual undertaking between the parties and the limitation on the time for bringing suit is imposed by the parties to the contract. Suit limitation clauses are valid and enforceable and, in the case of fire insurance policies, are statutorily required.

2. An insurer's defense under a policy's suit limitation clause, like a statute of limitations, is an affirmative defense properly raised in new matter.

3. An insured's claim that the insurer has waived or is estopped from raising the affirmative defense of a suit limitation clause must be properly pled. If not, these defenses are waived.

4. Conceptually, waiver and estoppel are distinct issues. Waiver implies the voluntary and intentional abandonment or relinquishment of a known right; estoppel, which sounds in equity, recognizes that an informal promise implied by one's words, deeds or representations which leads another to rely justifiably thereon to his own injury or detriment may be enforced in equity.

5. Traditional replacement cost insurance coverage insures against the amount to repair or replace the owner's property using materials of like kind and quality, without deduction for depreciation. In contrast, functional replacement cost insurance insures against the amount to repair or replace the damaged property using less expensive, more modern and state-of-the-art materials which are functionally equal to obsolete, antique or custom construction materials and methods used in the original construction of the building.

6. In response to the homeowner's request for full restoration of an eighty-two-year-old pipe organ, which sustained smoke and soot damage, but which was also in need of major restoration work which predated and was wholly unrelated to the fire, at a cost of $101,450.00, and replacement of original stained glass windows, installed more than a century earlier, with stained glass windows of like kind and quality, at a cost of $95,620.00, the insurance carrier offered to repair and replace the stained glass windows under the functional replacement cost endorsement with clear, thermal-pane, glass panels and to replace the organ with a functionally equivalent new electric organ. This offer was reasonable and consistent with the language of the policy in issue which contained a functional replacement cost endorsement issued in place of traditional replacement cost coverage to save money on policy premiums due to the age and unique features of the building. The home in this case was a former church at the time the stained glass windows and pipe organ were installed, both custom made for the building, with the pipe organ, a fixture, extending from floor to ceiling.

7. Disputes subject to appraisal in a homeowner's policy refer to those where the amount of loss is in dispute, with the appraisal process being a contractually agreed upon form of resolution. In contrast, a dispute as to how damages are to be measured, in this case whether by replacement cost or functional

replacement cost, is a question of coverage, not one of valuation, and is not the proper subject of resolution by appraisal.

8. A claim for insurance bad faith premised upon 42 Pa. C.S.A. §8371 is not barred by a policy's one-year suit limitation clause.

9. For statutory bad faith to exist, the insured must establish that the insurer did not have a reasonable basis for denying benefits under the policy and that the insurer knew of or recklessly disregarded its lack of reasonable basis in denying the claim.

10. Bad faith must be established by clear and convincing evidence. Consequently, an insured's burden in opposing a motion for summary judgment is commensurately high since the court must view the evidence presented in light of the insured's substantive burden at trial.

11. Negligence or bad judgment will not support a bad faith cause of action. An insurer who acts reasonably in its application and interpretation of policy provisions, even if erroneously, will not be found responsible for statutory bad faith. In this case, the insurer's application and interpretation of the policy's functional replacement cost endorsement to the insured's damage claim for stained glass windows and a pipe organ, and the insurer's subsequent refusal to proceed to appraisal to resolve this dispute in coverage, were reasonable and objectively based on the language of the policy.

NO. 08-1758

ALAN C. MILSTEIN, Esquire—Counsel for the Plaintiff.

ROBERT M. RUNYON, III, Esquire—Counsel for the Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—June 16, 2011

On July 1, 2006, a fire damaged Plaintiff Angelina M. Ingrassia's ("Ingrassia") home located at 233 Center Street, Jim Thorpe, Carbon County, Pennsylvania (the "Property"). The Property is the site of an Episcopal church, built in 1867, and used as a church for more than a century. Ingrassia has resided in the former church building since 1999 and is either the second or third residential occupant since the church closed in 1984.

Ingrassia's claims for loss of use and personal property damage have previously been resolved with Defendant Erie Insurance Exchange ("Erie"), the insurer of the Property. In these proceedings, Ingrassia seeks additional compensation for damage to the building. The only remaining dispute between the parties centers on two unique features of the church, its stained glass windows and a pipe organ, custom built in 1929 and installed as a fixture. Both were damaged in the fire.

Ingrassia seeks full restoration of the eighty-two-year-old pipe organ and replacement of the stained glass windows with stained glass windows of like kind and quality to those custom made for the church before the fire; Erie contends these items are subject to repair and replacement in accordance with the insurance policy's Functional Replacement Cost ("FRC") provision. This coverage, according to Erie, allows the stained glass windows and pipe organ to be replaced and/or repaired with less expensive, more modern state-of-the-art work, such as replacement of the stained glass windows with clear, thermal-pane, glass panels and a new electric organ in place of the pipe organ which, Erie contends, had exceeded its useful life and was in need of major restoration work even before the fire. Having precedence to this question of coverage is whether Ingrassia's claim is barred by the one-year suit limitation clause contained in her insurance policy. Also at issue is whether Erie engaged in bad faith insurance practice. Pending before us is Erie's Motion for Summary Judgment on both counts of Ingrassia's Complaint: Count I, for breach of contract, and Count II, for statutory bad faith.

PROCEDURAL AND FACTUAL BACKGROUND

In November of 2003, Ingrassia applied for and received a homeowner's insurance policy, policy number Q59 1408158 A, issued by Erie (the "Policy"). The Policy includes an FRC Loss Settlement Endorsement which contains the following definitions:

> 'functional actual cash value' means we will deduct for depreciation on the amount which it would cost to repair or replace the damaged building with less costly common construction materials and methods which are functionally equal to obsolete, antique or custom construction materials and methods used in the original construction of the building.
>
> 'functional replacement cost' means the amount which it would cost to repair or replace the damaged building with less costly common construction materials and methods which are functionally equal to obsolete, antique or custom construction materials and methods used in the original construction of the building.

(Insurance Policy, Functional Replacement Cost Loss Settlement Endorsement.) This endorsement was selected by Ingrassia over traditional replacement cost insurance to save money on her policy

premiums due to the age and unique features of the building. Ingrassia's insurance agent, William Fernald, used the following example in explaining this form of coverage to her: if the building burned down and it had plaster walls, Ingrassia would be entitled to drywall to replace the walls, not plaster. (Erie Exhibits B (Ingrassia Deposition), pp. 123-24 and G (Fernald Deposition), p. 33.)[1] The Policy also includes the following limitation on filing suit:

> SUIT AGAINST US
>
> We may not be sued unless there is full compliance with all the terms of this policy. Suit must be brought within one year (Maryland—three years) after the loss or damage occurs.

(Insurance Policy, p. 16.)

On Saturday, July 1, 2006, a fire damaged the Property and its contents. Erie received Ingrassia's claim that same date and the Property was inspected on July 4, 2006. At first, because of what was observed during the initial inspection and what Ingrassia told the property specialist assigned to the claim, Erie questioned whether the Property was being used for business purposes, an antique internet sales business, and whether Ingrassia's claim for contents damage included business property held for sale. (Erie Exhibit E (letter dated July 11, 2006).)

On July 11, 2006, Erie sent Ingrassia a Reservation of Rights letter stating that business personal property may not be covered under her Policy, or may be subject to limited coverage, and noted the Policy's $2,500.00 limitation for business property. (Erie Exhibit E (letter dated July 11, 2006).) This letter further advised Ingrassia of both the one-year suit limitation and the FRC provisions of the Policy. After Ingrassia expressed some concern over mold on the Property, Erie sent a supplemental Reservation of Rights letter dated July 13, 2006, discussing the Policy's provisions applicable to mold.

Ingrassia retained Young Adjustment Company, Inc. ("Young") to act as her public adjuster and agent in recovering for her loss. Young sent Ingrassia a letter dated July 21, 2006, in which it also informed her of the Policy's suit limitation period. (Erie Exhibit M.)

[1] Unless otherwise indicated, the exhibits identified in this opinion refer to those attached to Erie's Motion for Summary Judgment and Ingrassia's Answer to that Motion.

In addition to the Property's unique structure and fixtures, several factors complicated and delayed the investigation and adjustment of Ingrassia's claim. When it was learned early in Erie's investigation of the claim that the Property was used, to some extent, for business purposes and might contain items held for sale, Erie requested further information about the nature and extent of this business, including when it began in reference to Ingrassia's application for insurance, and sought to determine, in light of the coverage ceiling for business property, which items, if any, at the Property were business property and which were Ingrassia's personal property, many of which, like the items offered for sale in the business, were also antiques. (Erie Exhibits B (Ingrassia Deposition), pp. 78, 85-87, 96; E (letter dated July 11, 2006); and H (Erie Claim Log Notes dated July 4, 5 and 6, 2006).) These inquiries were appropriate since Ingrassia had represented in her application for the Policy that "no business pursuits are conducted at the premises." (Erie Exhibit E (Insurance Application), p. 2, question (g).)

Erie, through its counsel, attempted to secure Ingrassia's examination under oath by letter dated August 9, 2006, in order to investigate her claim further, in part to delineate her personal from her business property. (Erie Exhibit N.) This letter again reserved all of Erie's rights under the Policy, as did follow-up letters dated October 4, 2006, October 10, 2006, February 8, 2007, February 19, 2007 and March 2, 2007, which Erie's counsel sent to Ingrassia related to scheduling the examination and obtaining documentation. (Erie Exhibit N.) Similar letters also reserving Erie's rights were sent from Erie's counsel to Ingrassia's counsel on March 8, 2007,[2] March 12, 2007, March 19, 2007 and March 28, 2007. (Erie Exhibit N.)

Following Ingrassia's examination under oath on April 12, 2007, Erie's counsel requested additional documentation, as well as a signed errata sheet, and again reserved all of Erie's rights under the Policy by letters dated April 18, 2007, May 2, 2007 and June 28, 2007. (Erie Exhibit N.) On July 20, 2007, Erie sent Ingrassia's counsel a letter which advised that it had concluded its investiga-

[2] Ingrassia's counsel first formally notified Erie's counsel of his representation of Ingrassia on or about March 8, 2007. (Erie Motion, ¶27.)

tion into the items of personal property in dispute, had decided to extend coverage for those items, was in the process of adjusting the loss, and would be in contact to discuss the specifics once it had determined the fair value of the items. (Ingrassia Exhibit H.) The personal property portion of Ingrassia's claim was paid by Erie by checks dated August 28, 2007 and October 30, 2007, in the amounts of $159,997.00 and $48,505.00, respectively. (Erie Exhibit J.)

Prior to extending coverage for Ingrassia's personal property claim, on November 7, 2006, Erie provided Young with a detailed estimate of the building damage prepared in accordance with the FRC endorsement. This estimate was accompanied by a $184,351.77 payment for the undisputed functional actual cash value, less the deductible. (Erie Exhibits I (letter dated January 11, 2010), p. 5 and S.) In this estimate, Erie estimated the damages to the windows at $13,948.35 and provided no figure for the organ.

On August 14, 2007, Young sent Erie its estimate of damages dated January 4, 2007. (Erie Exhibits I (letter dated January 11, 2011), p. 5 and U.) This estimate includes a figure of $95,620.00 for damage to the stained glass windows and estimates the cost to restore the organ at $101,450.00. (Erie Exhibit U, p. 20.) This latter figure relies upon an estimate prepared by Patrick Murphy, an outside consultant, who inspected and assessed the damage to the organ.[3] None of Young's estimates provide a functional replacement cost evaluation of the covered loss and damage.

Erie took the position that both the stained glass windows and pipe organ were subject to the Policy's FRC endorsement, and that

[3] Although no direct fire damage occurred to the organ, damage was sustained from smoke and soot. Erie proposed having the organ professionally cleaned by a service familiar with fire restoration cleaning, however, this was refused by Ingrassia who demanded that the organ be fully restored. This notwithstanding that the organ had a useful life of approximately sixty-five to seventy years, had not been maintained for many years prior to the fire, and had significant deterioration which existed and was wholly unrelated to the fire. In an effort to resolve this portion of the claim, Erie offered $9,000.00 toward the purchase of an electric organ that was functionally equivalent. (Erie Exhibits D (letter of Schantz Organ Company dated November 25, 2009) and I (letter dated January 11, 2010).)

The estimate prepared by Mr. Murphy included not only cleaning those areas of the organ damaged by smoke and soot, but also restoration work which included repair or replacement of portions of the organ that had deteriorated long before the fire and were not related to it, such as the leather diaphragm valves, the heart of the organ. (Erie Exhibits D and DD (Murphy Deposition), pp. 58-59.)

this coverage limited its obligation to replacing the stained glass windows with clear, thermal-pane, glass panels and replacing the pipe organ with a functionally equivalent new electric organ. This was unacceptable to Ingrassia who insisted that Erie was obligated to fully refurbish the pipe organ and replace the stained glass windows with stained glass windows. When the parties were unable to agree upon the application and interpretation of the FRC endorsement as it pertains to the stained glass windows and pipe organ, Ingrassia, on January 3, 2008, demanded that this damage issue be submitted for appraisal under the Policy. (Erie Exhibit CC.)[4]

Erie rejected this demand by letter dated January 15, 2008, on the basis that "[t]he appraisal process is not the forum to argue coverage interpretation nor determination of the scope of the loss." (Erie Exhibit CC.) In this same letter, Erie agreed to submit the damage issue to the appraisal process, if agreement was first able to be reached on the scope of the building damages to be appraised. By letter dated April 17, 2008, Erie summarized the impasse over the issue of damages to the windows and organ as "primarily due to the fact that [Young's] estimate does not take into account the provisions found in the Functional Replacement Cost Loss Settle-

[4] The Policy contains the following provision pertaining to appraisal:

(2) APPRAISAL

If you and we fail to agree on the **amount of loss,** on the written demand of either, each party will choose a competent appraiser and notify the other of the appraiser's identity within 20 days after the demand is received. The appraisers will select a competent and impartial umpire. If the appraisers are unable to agree upon an umpire within 15 days after both appraisers have been identified, you or we can ask a judge of a court of record in the state where your residence premises is located to select an umpire.

The appraisers shall then set the **amount of loss.** If the appraisers submit a written report of an agreement to us, the amount agreed upon shall be the **amount of loss.** If they cannot agree, they will submit their differences to the umpire. A written award by two will determine the **amount of loss.**

Each party will pay the appraiser it chooses, and equally bear expenses for the umpire and all other expenses of the appraisal. However, if the written demand for appraisal is made by us, we will pay for the reasonable cost of your appraiser and your share of the cost of the umpire.

We will not be held to have waived any rights by any act relating to the appraisal.

(Insurance Policy, p. 14) (emphasis added).

ment Endorsement." (Ingrassia Exhibit K (letter dated April 17, 2008), p. 2.)[5]

To date, Erie has paid Ingrassia $429,353.77 on her claim. The date, purpose and amount of these payments are as follows:

DATE	PURPOSE	AMOUNT
July 6, 2006	Advance payment	$3,000.00
July 7, 2006	Advance payment	$4,000.00
July 21, 2006	Advance payment	$500.00
July 26, 2006	Advance payment	$10,000.00
October 4, 2006	Advance payment	$10,000.00
November 7, 2006	Building actual cash value, less deductible payment	$184,351.77
November 20, 2006	Agreed upon balance for alternative living expenses	$9,000.00
August 28, 2007	Partial payment—contents	$159,997.00
October 30, 2007	Additional payment—contents	$48,505.00

(Erie Exhibit I (letter dated January 11, 2010), p. 4.)

At no time prior to July 1, 2007, the date one year after the date of loss, did Ingrassia request or receive an extension of the suit limitation period; nor did she file suit. Ingrassia's suit against Erie was commenced by complaint filed on July 11, 2008.

The Complaint contains two counts: Count I is for breach of contract and Count II is for statutory bad faith. Both counts center on Erie's application and interpretation of the Policy's FRC endorsement to Ingrassia's damage claim for the stained glass

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[5] In her complaint, Ingrassia incorrectly stated the date of this letter to be April 17, 2007, failed to accurately state its contents, and failed to attach a copy, notwithstanding basing a portion of her claim on this writing. (Complaint, ¶14; Ingrassia Answer to Erie Motion, ¶43.) In consequence, there has been unnecessary confusion over whether the document existed and what it provides. (Erie Motion, ¶¶61-64.)

The letter of April 17, 2008 lists seventeen separate items totaling $118,231.16 which the parties had reached agreement on. The letter also listed ten items on which the parties had not agreed. At this time, the only remaining two items in dispute are the stained glass windows and pipe organ. (Complaint, ¶15; Ingrassia Answer to Erie Motion, ¶¶46 and 73.)

windows and pipe organ, and Erie's subsequent refusal to proceed to appraisal to resolve this dispute.

Erie filed its Answer and New Matter on January 22, 2009, to which Ingrassia filed a Reply on February 12, 2009. Erie previously filed a Motion for Judgment on the Pleadings which was denied by Order dated August 31, 2009. Now before us is Erie's Motion for Summary Judgment. In this Motion, Erie argues that Ingrassia's cause of action is barred by the Policy's one-year limitation on the filing of lawsuits, that Erie has not breached the terms of the policy, and that there is no factual basis for Ingrassia's claim of bad faith conduct.

DISCUSSION

1) **Standard**

In Pennsylvania, a party may move for summary judgment after the pleadings are closed in two situations. First, when there is no genuine issue of material fact that could be established by additional discovery, and second, after discovery, if an adverse party bearing the burden of proof has failed to produce evidence of essential facts so as to warrant the submission of the issue to a jury. Pa. R.C.P. 1035.2; **Fazio v. Fegley Oil Company, Inc.,** 714 A.2d 510, 512 (Pa. Commw. 1998).

The burden of proving that there exists no genuine issue of material fact is upon the moving party. **Butterfield v. Giuntoli,** 448 Pa. Super. 1, 11, 670 A.2d 646, 651 (1995), **appeal denied,** 683 A.2d 875 (Pa. 1996). Where a motion for summary judgment has been properly supported with corroborating documentation, the non-moving party must demonstrate by specific facts contained within its depositions, answers to interrogatories, admissions or affidavits that there is a genuine issue of material fact for trial. **Sovich v. Shaughnessy,** 705 A.2d 942, 944 (Pa. Commw. 1998) (**citing Marks v. Tasman,** 527 Pa. 132, 135, 589 A.2d 205, 206 (1991)). To meet this hurdle, the non-moving party may not rely solely upon the averments contained in its pleadings, but must demonstrate that there is a genuine issue for trial. **Accu-Weather, Inc. v. Prospect Communications, Inc.,** 435 Pa. Super. 93, 98-99, 644 A.2d 1251, 1254 (1994).

To be deemed a material fact, the fact must be both material in the sense of bearing on an essential element of the plaintiff's claim

and genuine in the sense that a reasonable jury could find in favor of the non-moving party. **U.S. ex rel. Cantekin v. University of Pittsburgh,** 192 F.3d 402, 408 (3d. Cir. 1999) (**citing Anderson v. Liberty Lobby, Inc.,** 477 U.S. 242, 248-51 (1986)). A fact is material if it directly affects the disposition of the case. **See Ryan v. Furey,** 437 Pa. 96, 102, 262 A.2d 305, 308-309 (1970). In ruling upon a motion for summary judgment, we are not to decide issues of fact, but rather determine whether there exists a genuine issue of material fact to be tried. **Ritmanich v. Jonnel Enterprises, Inc.,** 219 Pa. Super. 198, 203, 280 A.2d 570, 573 (1971) ("all doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for summary judgment").

"Bold unsupported assertions of conclusory accusations cannot create genuine issues of material fact." **McCain v. Pennbank,** 379 Pa. Super. 313, 318-19, 549 A.2d 1311, 1313-14 (1988). Furthermore, any assertion of fact made by a party that is not supported by the record is to be ignored by the court. **Erie Indemnity Company v. Coal Operators Casualty Company,** 441 Pa. 261, 265, 272 A.2d 465, 466 (1971).

"Summary judgment is appropriate only when, after examining the record in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." **Guy M. Cooper, Inc. v. East Penn School District,** 903 A.2d 608, 613 (Pa. Commw. 2006), **appeal denied,** 918 A.2d 748 (Pa. 2007). It is appropriate only when the moving party's "right to succeed is certain and the case is so free from doubt that trial would be a fruitless exercise." **Id.** at 613 n.6. On appeal, a trial court's grant of summary judgment will only be overturned if an error of law was committed or the trial court abused its discretion. **See id.**

2) **Breach of Contract**

Count I of Ingrassia's Complaint is a claim for breach of contract. Ingrassia claims that Erie breached its duty to appraise the amount of loss for the stained glass windows and pipe organ once requested by her. Before addressing this issue, however, we must first determine whether Ingrassia's suit was timely filed under the terms of the Policy.

"Interpretation of an insurance policy is a question of law that a court may resolve on a motion for summary judgment." **Har-**

leysville Insurance Companies v. Aetna Casualty and Surety Insurance Company, 568 Pa. 255, 795 A.2d 383, 385 (2002). "When interpreting an insurance policy, a court must ascertain the intent of the parties as manifested by the language of the written agreement. When the policy language is clear and unambiguous, the court must give effect to the language of the contract." **Id.,** 795 A.2d at 386. "[T]he standard for interpreting insurance policies does not allow us to focus solely on the nature of the policy and ignore the plain meaning of the policy terms. To the contrary, [t]he polestar of our inquiry ... is the language of the insurance policy." **Id.,** 795 A.2d at 386-87 (internal quotation marks omitted).

An insurance policy's suit limitation clause "is not a statute of limitation imposed by law; it is a contractual undertaking between the parties and the limitation on the time for bringing suit is imposed by the parties to the contract." **Lardas v. Underwriters Insurance Co.,** 426 Pa. 47, 51, 231 A.2d 740, 741-42 (1967). The legality and enforceability of such provisions is well established. **General State Authority v. Planet Insurance Company,** 464 Pa. 162, 165, 346 A.2d 265, 267 (1975) ("The law is clear that such a clause, setting time limits upon the commencement of suits to recovery on a policy, is valid and will be sustained."). As previously stated, Ingrassia's policy contains a one-year limitation on filing suits against Erie after the loss or damage occurs. In fact, one-year suit limitation clauses are statutorily mandated to be included in all fire insurance policies issued in this Commonwealth. **See** 40 P.S. §636(2).

Here, there is no question that Ingrassia's suit was filed more than one year after the loss. Ingrassia's loss occurred on July 1, 2006, and suit was commenced on July 11, 2008, more than two years later. Because a "one-year suit limitation clause [is] valid and enforceable absent waiver or estoppel," **Petraglia v. American Motorists Insurance Company,** 284 Pa. Super. 1, 8, 424 A.2d 1360, 1364 (1981), **affirmed,** 498 Pa. 32, 444 A.2d 653 (1982), unless Erie has waived or, by its conduct, is estopped from enforcing the Policy's contractual limitations, Ingrassia's claim is untimely and cannot proceed. That Erie may not be prejudiced by allowing a suit more than one year after the suit limitation clause is irrelevant to this determination. **Id.** at 6-7, 424 A.2d at 1363-64.

Unfortunately, Ingrassia, in her pleadings, has not preserved this question for our review. "The affirmative defense of a suit limitation clause is properly raised in new matter." **Prime Medica Associates v. Valley Forge Insurance Company,** 970 A.2d 1149, 1156 (Pa. Super. 2009). Erie has done so. (**See** Answer and New Matter, ¶36.)

"Even when properly pled, a suit limitation clause can be subject to the defenses of waiver and estoppel. Pa. R.C.P. 1029(b)." **Id.** These defenses, however, were required to be raised in Ingrassia's reply to new matter.

> A party waives all defenses and objections which are not presented either by preliminary objection, answer or reply, except a defense which is not required to be pleaded under Rule 1030(b), the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, the objection of failure to state a legal defense to a claim and any other nonwaiveable defense or objection. Pa. R.C.P. 1032(a). **Defenses to the statute of limitations, such as estoppel, agreement, agency, apparent authority, fraud, or concealment are waiveable defenses and must be raised in a reply to new matter asserting the statute of limitations as an affirmative defense.**

Id. (emphasis added) (**quoting Devine v. Hutt,** 863 A.2d 1160, 1168-69 (Pa. Super. 2004). This Ingrassia failed to do. (**See** Ingrassia's Answer to Erie Motion, ¶49.) Therefore, neither defense has been properly preserved. **See** Pa. R.C.P. 1032(a).[6]

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[6] Were we to substantively decide this issue, there is no evidence of waiver under a strict contractual analysis.

> Waiver is the voluntary and intentional abandonment or relinquishment of a known right. ... Waiver may be established by a party's express declaration or by a party's undisputed acts or language so inconsistent with a purpose to stand on the contract provisions as to leave no opportunity for a reasonable inference to the contrary.

Prime Medica Associates v. Valley Forge Insurance Company, 970 A.2d 1149, 1156-57 (Pa. Super. 2009) (citations and quotation marks omitted).

> The question of estoppel, we believe, is a much more difficult one.
>
> Equitable estoppel is a doctrine that prevents one from doing an act differently than the manner in which another was induced by word or deed to expect. A doctrine sounding in equity, equitable estoppel recognizes that an informal promise implied by one's words, deeds or representations which

3) **Application and Interpretation of FRC Endorsement; Propriety of Request for Appraisal**

In its evaluation of Ingrassia's claim, Erie concluded that clear, thermal-pane, glass panels were functionally equivalent to the stained glass windows damaged at the time of the fire and that replacement of the pipe organ with a functionally equivalent electric organ was appropriate. This reading of the FRC endorsement is consistent with well-established principles of contract construction: "When a written contract is clear and unequivocal, its meaning must be determined by its contents alone. It speaks for itself and a meaning cannot be given to it other than that expressed." **O'Connor-Kohler v. United States Automobile Association,** 883 A.2d 673, 679 (Pa. Super. 2005) (**quoting Steuart v. McChesney,** 498 Pa. 45, 49, 444 A.2d 659, 661 (1982) (citation omitted)).

The FRC endorsement in Ingrassia's policy replaced the Policy's standard replacement cost settlement provisions with one,

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leads another to rely justifiably thereon to his own injury or detriment may be enforced in equity. ...

The party asserting estoppel bears the burden of establishing estoppel by clear, precise and unequivocal evidence. ... [M]ere silence or inaction is not a ground for estoppel unless there is a duty to speak or act.

Id. at 1157 (citations and quotation marks omitted).

Ingrassia contends that she was induced by Erie's actions to delay bringing suit. Specifically, Ingrassia argues that her suit is "not barred by the suit limitation clause because she was allowed to rely on the insurer's continued negotiations over the amount of the loss." (Ingrassia Brief contra Erie's Motion, p. 14.) When viewed most favorably to Ingrassia, there is support in the record for this assertion.

Final decisions on neither Ingrassia's contents claim nor building claim were made within one year of the loss. Not until July 20, 2007, did Erie confirm that it was accepting coverage of various items of personal property that had been in dispute, whose status Erie wanted to determine as being either Ingrassia's personal property or business items held for sale. Likewise, with respect to the building claim, while Erie's initial estimate was dated November 7, 2006, and Ingrassia's August 14, 2007, the record supports that the parties continued to negotiate over their differences and continued to make progress in reconciling these differences in the process. In Erie's letter of April 17, 2008, Erie expressly noted those areas in which the parties had reached agreement and those still in dispute, at the same time urging Ingrassia to review and revise her estimate of the items in dispute to take into account the FRC endorsement. This is not a letter terminating negotiations but one seeking to reach final agreement on the items still in dispute.

The law of this Commonwealth holds insurers "to high standards of fairness in their dealings with their insureds." **Brooks v. St. Paul Insurance Company,**

at a lower premium, which modified the coverage to allow for the replacement of obsolete, antique or custom construction materials and methods with less costly, commonly available, but functionally equivalent, construction materials and methods. Functional replacement cost allows replacement of expensive and obsolete items with less expensive, more modern, and state-of-the-art work. (Erie's Exhibit V, Dudley, Paul O., "Functional Replacement Cost: History and Application of Available Coverages," Adjusting Today, p. 3.)

The distinction between traditional replacement cost insurance and that provided under a functional replacement cost endorsement is made clear in the following Massachusetts Office of Consumer Affairs and Business Regulation:

> Replacement Cost is the amount to repair or replace the damaged property using materials of like kind and quality, without deduction for depreciation. Depreciation is the loss of value that develops as an item ages or wears. Actual Cash Value is the replacement cost of an item, less the amount for depreciation. A new option available to consumers is modified or functional replacement cost. At the time of a loss, modified

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264 Pa. Super. 157, 164-65, 399 A.2d 714, 718 (1979) (Spaeth, J., dissenting). "Where the insurer affirmatively misleads the insured about the possibility of settlement, dissuades him from filing suit or induces him to believe that it will not enforce the limitations period, courts construe this conduct as violative of the insurer's duty of utmost good faith and fair dealing." **Pini v. Allstate Ins. Co.,** 499 F. Supp. 1003, 1004 (E.D. Pa. 1980), **aff'd,** 659 F.2d 1070 (3d. Cir. 1981). In this regard, while the record does not support that Erie deliberately misled Ingrassia into delaying suit, by the same token the record does support a finding that both were negotiating in good faith and that Ingrassia had "reasonable grounds for believing that the time limit would be extended or that such provision would not be strictly enforced. ..." **Petraglia v. American Motorists Insurance Company,** 284 Pa. Super. 1, 9, 424 A.2d 1360, 1364 (1981) (**quoting McMeekin v. Prudential Insurance Co.,** 348 Pa. 568, 572, 36 A.2d 430, 432 (1944)), **affirmed,** 498 Pa. 32, 444 A.2d 653 (1982).

This is not a case, as in **Lardas v. Underwriters Insurance Company,** 426 Pa. 47, 231 A.2d 740 (1967), where the parties' negotiations broke off eight months after the loss, with four months still remaining for Lardas to commence suit and still be within the policy's one-year period of limitations. Likewise, in **Petraglia,** the insured had a reasonable period of time after contact between the insured and insurer ceased (**i.e.,** almost five months) before the running of the one-year suit limitation provision during which to file his claim. To the contrary, in this case, during the course of the parties' ongoing negotiations the period of limitations contained in the Policy expired.

> replacement cost will restore the home to a functional condition. This may mean that unique features in your home prior to a loss will be replaced with items that serve the same function, but are not aesthetically the same.

See Massachusetts Office of Consumer Affairs & Business Regulation, http://www.mass.gov/?pageID=ocaterminal&L=4&L0=Home&L1=Consumer&L2=Insurance&L3=Homeowners+Insurance&sid=Eoca&b=terminalcontent&f=doi_Consumer_css_homeowners_qa&csid=Eoca#q2 (last visited June 15, 2011).

Both the stained glass windows and pipe organ were custom made for the building in which Ingrassia's home is located. The windows proposed by Erie have neither the beauty, nor the inspirational nor artistic value of those which existed prior to the fire, but they do serve the same functional purpose: protection from the elements, ventilation and allowing day light to enter. (Erie Exhibit I (letter dated January 11, 2010), p. 7.) Similarly, the organ proposed, while not physically the same size as the antique pipe organ built to match the gothic style church of which it is a part, matches the musical capacity of that organ: a two-manual, twelve stop instrument. (Erie Exhibit D (letter dated November 25, 2009).)

Significantly, this dispute between Erie and Ingrassia over Erie's interpretation and application of the FRC endorsement to Ingrassia's claim for replacement of the stained glass windows and pipe organ raises a question of insurance coverage, not one of valuation. A dispute over the standard by which a loss is to be measured is conceptually different than a dispute over the measurement of that loss under an agreed upon standard. Although we have not found a case which interprets the language of the FRC Endorsement found in Ingrassia's Policy, we believe Erie's interpretation to be reasonable. **See e.g., Brown v. Progressive Insurance Company,** 860 A.2d 493, 505 (Pa. Super. 2004) ("We also note that insurers should not be faulted for taking a reasonable legal position when the state of the law in a particular area is unclear or in flux."), **appeal denied,** 872 A.2d 1197 (Pa. 2005). Based on this interpretation, Erie was not obligated to pay Ingrassia the cost to install new stained glass windows or refurbish the pipe organ.

Moreover, because the dispute between Erie and Ingrassia centers on a question of coverage, the scope of the loss rather than the amount of loss, the dispute is not the proper subject of resolution

by appraisal as requested by Ingrassia. An appraisal proceeding is both conceptually and procedurally distinct from a dispute submitted to arbitration or to the court for resolution. Disputes subject to appraisal are narrowly limited to determining the amount of the loss, whereas those which are the subject of arbitration "seek to substitute tribunals other than courts to determine an entire controversy." **Ice City, Inc. v. Insurance Company of North America,** 456 Pa. 210, 217 n.12, 314 A.2d 236, 240 n.12 (1974).

A condition precedent to appraisal is the admission of liability and a dispute only as to the dollar amount of the loss. **Banks v. Allstate Ins. Co.,** 1992 WL 102885, *2 (E.D. Pa. 1992) (interpreting **Ice City, Inc. v. Ins. Co. of North America, supra** and **Mentz v. Armenia Fire Ins. Co.,** 1876 WL 13778 (Pa. 1875)). "Both **Ice City** and **Mentz** require that liability be admitted before appraisal can be demanded." **Id.** Conversely, where the type of coverage is in dispute, where the parties fundamentally disagree on how the damages are to be computed—in contrast to what they are—liability is in issue and the question is not one for appraisal.

4) **Bad Faith**

Count II of Ingrassia's Complaint is a claim for bad faith, which is not barred by the Policy's one-year suit limitation clause. **See March v. Paradise Mutual Insurance Company,** 435 Pa. Super. 597, 600, 646 A.2d 1254, 1256 (1994), **appeal denied,** 540 Pa. 613, 656 A.2d 118 (1995). It can, nonetheless, be decided on a motion for summary judgment when there are no genuine issues of material fact as to whether Erie exhibited bad faith in processing Ingrassia's claim. **See e.g., Johnson v. Progressive Insurance Company,** 987 A.2d 781, 783-84 (Pa. Super. 2009). **Johnson** is instructive:

> Common law does not provide for a bad faith cause of action against an insurance company, but § 8371, actions on insurance policies, creates a statutory remedy for such conduct. It states:
>
> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
>
> (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.

(2) Award punitive damages against the insurer.

(3) Assess court costs and attorney fees against the insurer.

42 Pa.C.S.A. § 8371.

While the statute itself does not include a definition of bad faith, this Court has had occasion to interpret that term. In **Condio v. Erie Insurance Exchange,** 899 A.2d 1136, 1142 (Pa.Super.2006), we observed that bad faith is present if 'the insurer did not have a reasonable basis for denying benefits under the policy and ... the insurer knew of or recklessly disregarded its lack of reasonable basis in denying the claim.' **Id.** (quoting **O'Donnell v. Allstate Insurance Co.,** 734 A.2d 901, 906 (Pa.Super.1999)). 'Bad faith conduct also includes "lack of good faith investigation into facts, and failure to communicate with the claimant."' **Condio, supra** at 1142 (quoting in part **Romano v. Nationwide Mutual Fire Insurance Company,** 435 Pa.Super. 545, 646 A.2d 1228, 1232 (1994)). Bad faith must be established by clear and convincing evidence. **Condio, supra.**

As we noted in **Condio,** bad faith is not present merely because an insurer makes a low but reasonable estimate of an insured's damages. Negligence or bad judgment will not support a bad faith cause of action. **Id.** Rather, the insured must demonstrate that the insurer 'breached its duty of good faith through some motive of self-interest or ill-will.' **Id.** at 1143 (quoting **Brown v. Progressive Insurance Co.,** 860 A.2d 493, 501 (Pa.Super.2004)).

Id.[7]

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[7] **See also, O'Donnell ex rel. Mitro v. Allstate Insurance Company,** 734 A.2d 901, 910 (Pa. Super. 1999) (citing: **D'Ambrosio v. Pennsylvania Nat'l Mut. Cas. Ins. Co.,** 494 Pa. 501, 507, 431 A.2d 966, 971 (1981) (observing that "those jurisdictions which have recognized a cause of action for bad faith conduct have cautioned that '[i]f the claim is "fairly debatable," no liability in tort will arise.'"), **superseded by** 42 Pa. C.S.A. §8371 (creating private cause of action for the bad faith conduct of insurers); **Horowitz v. Federal Kemper Life Assur. Co.,** 57 F.3d 300, 307 (3d Cir. 1995) (interpreting section 8371 and finding no bad faith where insurer had reasonable basis to deny claim); and **Jung v. Nationwide Mut. Fire Ins. Co.,** 949 F. Supp. 353, 360 (E.D. Pa. 1997) (granting summary judgment on section 8371 bad faith claim, reasoning that in absence of evidence revealing dishonest purpose, it is not bad faith for insurer to aggressively investigate and protect its interests).

The burden is upon the insured to evince through clear and convincing evidence, and not mere insinuation, that "the [insurer] did not have a reasonable basis for denying benefits under the policy and that [the insurer] knew [of] or recklessly disregarded its lack of reasonable basis in denying the claim." **Terletsky v. Prudential Property and Casualty Insurance Company,** 437 Pa. Super. 108, 125, 649 A.2d 680, 688 (1994), **appeal denied,** 540 Pa. 641, 659 A.2d 560 (1995). An insured's burden in opposing a motion for summary judgment is consequently "commensurately high because the court must view the evidence presented in light of the substantive burden at trial." **Northwestern Mutual Life Ins. Co. v. Babavan,** 430 F.3d 121, 137 (3d.Cir. 2005).[8]

In reviewing the record in the light most favorable to Ingrassia as the non-moving party, there are no facts suggesting Erie failed to make a fair and objective investigation of the claim. Under the language of the Policy, Erie could reasonably conclude that the FRC endorsement applied to Ingrassia's claim over the stained glass windows and organ, that under this provision she was not entitled to new stained glass windows or complete refurbishment of the original organ, and that the parties' dispute concerning the proper application and interpretation of the endorsement did not entitle Ingrassia to proceed to appraisal.

Erie's retention of counsel to assist it in resolving Ingrassia's claim is not evidence of bad faith as Ingrassia asserts; it in fact lends support to the reasonableness of Erie's actions. **See e.g., Terletsky, supra** at 128-29, 649 A.2d at 690. Ingrassia points to the length of time Erie spent investigating the extent of the business it suspected she was conducting from the Property as evidence of its alleged bad faith in handling her claim and states that "Erie delayed the claim for almost ten months exploring this issue." (Ingrassia Brief contra Erie's Motion, p. 18.) However, the record belies this assertion by showing that Erie paid Ingrassia $17,500.00 within one month of the loss: $3,000.00 of this amount was paid just five days after the loss, on July 6, 2006, and another $4,000.00 on July 7, 2006. (Erie

[8] The stringent "clear and convincing" standard requires a showing by Plaintiffs that the evidence "is so clear, direct, weighty and convincing as to enable a clear conviction, without hesitation, about whether or not the defendants acted in bad faith." **Bostick v. ITT Hartford Group,** 56 F. Supp.2d. 580 (E.D. Pa. 1999) (citing **Stafford v. Reed,** 363 Pa. 405, 411, 70 A.2d 345, 348 (1950)).

Exhibit I (letter dated January 11, 2010), p. 4.) Further, Erie had a reasonable basis for inquiring about the use of Ingrassia's property for business purposes and about whether personal items on the property at the time of the fire were business related. In addition, much of the delay in obtaining the information Erie requested was attributable to Ingrassia. This hardly evidences an intentional delay in handling the claim.

Erie's rejection of Ingrassia's demand for appraisal was not because she failed to make that demand prior to the one-year deadline, as Ingrassia argues. (Ingrassia Brief contra Erie's Motion, p. 19.) Ingrassia's demand was instead rejected on the basis that "[t]he appraisal process is not the forum to argue coverage interpretation nor determination of the scope of the loss." (Erie Exhibit CC.) Moreover, there are no facts suggesting Erie denied the claim for its own benefit or out of ill will, particularly as Erie paid out nearly half a million dollars to Ingrassia, despite the fact that Ingrassia was to some extent conducting a business out of the Property, which may have been grounds to deny the claim in its entirety.

The types of conduct which point toward evidence of bad faith on an insurer's part include lack of timely or good faith investigation into the facts of the claim, failure to communicate or to communicate promptly with the insured, misrepresenting information such as the amount of coverage at issue to the insured, refusing without basis to accept evidence submitted by the insured, and an arbitration award nearly thirty times the size of the insurer's settlement offer. **See e.g., Johnson,** 987 A.2d at 784-85. Ingrassia's allegation of bad faith insurance practices against Erie is unfounded; there is no genuine issue of material fact over whether Erie displayed bad faith in the processing of Ingrassia's claim, much less any clear and convincing evidence tending to show that it did. Ingrassia has not proven that Erie: (1) did not have a reasonable basis for its claim decisions, and (2) recklessly disregarded its lack of reasonable basis. At worst, Erie's decision to deny Ingrassia new stained glass windows or complete refurbishment of the original organ could be viewed as bad judgment, but certainly not of the sort which would rise to the level of bad faith. Under the facts of record, Erie is entitled to summary judgment in its favor on Ingrassia's claim for bad faith.

CONCLUSION

In accordance with the foregoing, we find that Ingrassia's claim for breach of contract, Count I of the Complaint, is barred by the Policy's one-year suit limitation clause. We further find that Ingrassia has not established a breach of the policy by Erie and that, as a matter of law, Ingrassia cannot recover for statutory bad faith, Count II of the Complaint. Therefore, Erie's Motion for Summary Judgment will be granted.

ORDER OF COURT

AND NOW, this 16th day of June, 2011, upon consideration of Defendant's Motion for Summary Judgment, Plaintiff's response thereto, and counsels' submissions and argument thereon, and in accordance with our Memorandum Opinion of this same date, it is hereby

ORDERED and DECREED that Summary Judgment is GRANTED on Count I (breach of contract) of Ingrassia's Complaint, this claim being time barred and Ingrassia having further failed to establish such a breach, and on Count II (bad faith) of the Complaint, there being insufficient evidence to support a finding of bad faith pursuant to 42 Pa.C.S.A. §8371. Summary Judgment is hereby entered in favor of the Defendant, Erie Insurance Exchange, and against the Plaintiff, Angelina M. Ingrassia, on all counts of the Plaintiff's Complaint.

PETER W. HUKKA, Plaintiff/Petitioner vs. SHELLY JAYE WEYHENMEYER, Defendant/Respondent

Civil Law—Divorce—Common-Law Marriage—Burden of Proof

1. Proof of a common-law marriage requires an exchange of words in the present tense spoken with the specific purpose of creating the legal relationship of husband and wife.

2. The burden of establishing a common-law marriage is upon the proponent, the standard being that of clear and convincing evidence.

3. Under the standard of clear and convincing evidence, the testimony must be so clear, direct, weighty and convincing as to enable the fact-finder to come to a clear conviction, without hesitancy, of the truth of the precise facts at issue. Notwithstanding the submission of a common-law marriage affidavit executed by the parties for purposes of receiving health insurance benefits, this standard has not been met where one party disputes the marriage and where the other has alleged three possible dates of the marriage,

two of which are legally impossible, and the third is contradicted by numerous documents executed or adopted by the proponent which identifies the proponent as a single person.

NO. 09-3409

CYNTHIA S. RAY, Esquire—Counsel for Plaintiff/Petitioner.

NICHOLAS J. MASINGTON, III, Esquire—Counsel for Defendant/Respondent.

MEMORANDUM OPINION

NANOVIC, P.J.—June 24, 2011

In these divorce proceedings, Shelly Jaye Weyhenmeyer ("Defendant"), denies that the parties ever married. Since it is axiomatic that there must be a marriage before there can be a divorce, this issue was heard at a hearing held on January 18 and January 25, 2011. As a result, we address one fundamental question: Was there a common-law marriage? The answer, as discussed below, is no.

FACTUAL AND PROCEDURAL BACKGROUND

In 1996, Plaintiff and Defendant began living together in a romantic relationship. At the time Defendant was married. The relationship, which ended in November 2008, produced two children: Jake, born December 13, 1997 and Sage, born October 26, 2000.

Plaintiff testified that "somewhere after March 1997," while in their bedroom, the parties said to one another, "This is the beginning of our new life together as husband and wife." He then put a toe ring on Defendant and she attempted to do the same to Plaintiff, but the ring was too small. Thereafter, the couple celebrated the event by drinking wine and having sex in a candlelit hot tub. Defendant denied this testimony.

As a preliminary matter, Plaintiff has requested that we determine the parties' marital status.

DISCUSSION

The burden of proving a common-law marriage is on the party alleging the marriage. **Staudenmayer v. Staudenmayer,** 552 Pa. 253, 714 A.2d 1016, 1020 (1998). This burden is a "heavy" one and the claim must be reviewed with "great scrutiny." **Id.** As a matter of law, a common-law marriage is disfavored. **Baker v. Mitchell,** 143 Pa. Super. 50, 17 A.2d 738, 741 (1941).

To prove a common-law marriage the proponent must prove an exchange of words in the present tense spoken with the specific purpose of creating the legal relationship of husband and wife. **Staudenmayer, supra,** 714 A.2d at 1020.[1] "[W]here the parties are available to testify regarding **verba in praesenti,** the burden rests with the party claiming a common law [sic] marriage to produce clear and convincing evidence of the exchange of words in the present tense spoken with the purpose of establishing the relationship of husband and wife... ." **Id.** at 1021. When direct evidence presented by the parties of the marriage is disputed, as here, "the party claiming a common law [sic] marriage may introduce evidence of constant cohabitation and reputation of marriage in support of his or her claim." **Id.** Notwithstanding such circumstantial evidence, "if a putative spouse who is able to testify and fails to prove, by clear and convincing evidence, the establishment of the marriage contract through the exchange of **verba in praesenti,** then that party has not met its 'heavy' burden to prove a common law [sic] marriage ... ." **Id.**

In the instant case, the only words spoken were, "This is the beginning of our new life together as husband and wife." Standing alone, these words appear to be more appropriately spoken after an exchange of vows has occurred rather than being the exchange of vows. Although these words, when coupled with the partial exchange of toe rings, might be sufficient to prove a marriage if so intended by the parties, we are not convinced this exchange occurred. **Id.** at 1020. ("The common law [sic] marriage contract does not require any specific form of words, and all that is essential is proof of an agreement to enter into the legal relationship of marriage at the present time.").

In his original divorce complaint filed on November 10, 2009, Plaintiff averred that the parties have been common-law married since 1995. (Complaint, ¶4.) If this date is accurate, the marriage would be invalid since Defendant was not divorced from her husband until May 30, 1997. (Defendant Exhibit 20.) **See International Painters and Allied Trades Industry Pension Fund v. Calabro,** 312 F. Supp. 2d 697, 702 (E.D. Pa. 2004) (recognizing

[1] The Pennsylvania Legislature statutorily abolished common-law marriages entered after January 1, 2005. However, common-law marriages entered prior to that date are considered valid. **See** 23 Pa. C.S.A. §1103.

that one whose previous marriage has not been dissolved is incapable of contracting to marry another). Later, in a motion filed on February 22, 2010, to set aside several documents, Plaintiff averred that the parties' common-law marriage occurred on May 30, 2005. (Motion, ¶5.) Pursuant to 23 Pa. C.S.A. §1103, a common-law marriage on this date would be invalid. Finally, in answers to interrogatories dated April 23, 2010, Plaintiff stated the marriage occurred sometime during 1997. (Defendant Exhibit 37, No. 1.)

On May 25, 2005, for purposes of Defendant receiving health insurance benefits through Plaintiff's employer, Plaintiff and Defendant executed a common-law marriage affidavit claiming they were common-law husband and wife. (Plaintiff Exhibit A.) Significantly, the date of the common-law marriage is not stated in this affidavit. Regardless, the overwhelming number of documents, many filed of public record, evidence that the parties were not married. These documents include deeds, tax returns, the parties' wills prepared in 2006 and various employment, medical, financial and insurance records. In addition, in an agreement between the parties, dated June 11, 2009, in which the parties divide the property they acquired together, they identify themselves as former boyfriend and girlfriend.

Although Defendant has at times been inconsistent in describing her marital status, often times Plaintiff himself has claimed he is single, whereas he now claims he was not. In official tax returns filed for the years 2001 and 2004 through 2008, under penalty of perjury, Plaintiff identified himself as a single person.[2] Overall, neither party has much to extol in their relationship with one another, which even under Plaintiff's version was at best an open marriage.

In the end, however, the ultimate question is whether Plaintiff has proven by clear and convincing evidence that the parties entered into an agreement for marriage. **PPL v. Workers' Compensation Appeal Board (Rebo),** 5 A.3d 839, 845-46 (Pa. Commw. 2010). By this standard—that the testimony be so clear, direct, weighty and convincing as to enable the fact-finder to come to a clear conviction, without hesitancy, of the truth of the precise facts at issue—Plaintiff has not met his burden.

[2] Plaintiff's tax returns for the years 2002 and 2003 were not presented at the time of hearing.

CONCLUSION

In that Plaintiff has not proven by clear and convincing evidence the existence of a common-law marriage, Plaintiff's complaint in divorce will be dismissed.

BARRY L. KATZ, Appellant vs. KIDDER TOWNSHIP ZONING HEARING BOARD, Appellee

Civil Law—Zoning Appeal—Dimensional Variance—Lot Size—Hardship—Quantum of Proof

1. In evaluating an application for a variance from the provisions of a zoning ordinance, it matters whether a use or dimensional variance is sought. By definition, a dimensional variance seeks a variance from dimensional criteria of the ordinance while using the property for a permitted use; a use variance seeks a use of the property different from that permitted by the ordinance. Since the effect of a use variance is ordinarily greater than that of a dimensional variance, the quantum of proof to establish the requisite hardship for a dimensional variance is correspondingly less.

2. Notwithstanding the lesser quantum of proof of hardship to be sustained, a request for a dimensional variance must involve no more than a technical and superficial departure from the provisions of the zoning ordinance, which departure is necessary and reasonable in order to utilize the property in a manner consistent with the ordinance.

3. A request for variance from the lot size requirements of a zoning ordinance to permit the subdivision of an existing nonconforming undersized lot on which two single family homes are presently located, into two separate lots, each to be owned separately in the future, was properly denied by the zoning hearing board. The subdivision, if approved, would result in the creation of two new lots, each less than 25 percent of the lot size requirements of the ordinance, with no change in use. This variance request is neither necessary to the continued use of the property with two separate homes, the same being grandfathered, nor a mere technical or superficial departure from the ordinance requirements.

4. When the trial court takes no additional evidence, the court on review has no authority to substitute its judgment for that of the zoning hearing board provided the board's decision is supported by substantial evidence and is not contrary to the applicable law.

NO. 10-0838

CAROLE J. WALBERT, Esquire—Counsel for Appellant.

CYNTHIA S. RAY, Esquire—Counsel for Appellee.

MEMORANDUM OPINION

NANOVIC, P.J.—July 1, 2011

On November 30, 2009, Barry L. Katz (hereinafter "Katz"), the Appellant in these proceedings, filed an application for a variance

from the dimensional requirements of the Kidder Township Zoning Ordinance (hereinafter "Ordinance"). The application was heard by the Township Zoning Hearing Board ("Board") on January 25, 2010, and denied that same date. From the Board's written decision dated March 5, 2010, Katz appeals to this court.

PROCEDURAL AND FACTUAL BACKGROUND

Katz purchased the property which is the subject of this appeal, 142 North Lake Drive, on May 11, 2009, for $555,000.00. The property on its southern end contains a 50-foot frontage along Lake Harmony and, on its northern end, a 50-foot frontage on North Lake Drive (hereinafter "Property"). The Property is located in an R-2 zoning district, which is a medium density residential district allowing for single-family and two-family homes. Two homes, which predate the Ordinance, are located on the Property. The Property contains 13,771 square feet and, except for a slight irregularity in width, is 50 feet wide by 280.5 feet in length.

The Property does not conform with the Ordinance in various respects. In an R-2 District, no more than one principal building or use is permitted on a lot, and lots with on-lot water and central sewage, applicable to the Property, must contain a minimum of 30,000 square feet and be no less than 100 feet wide. (Zoning Ordinance Section 180-55(D) and Table 1 (Schedule of District Dimensional Regulations).) Additionally, while the Ordinance requires a minimum setback for side yards of 10 feet and a maximum impervious surface coverage ratio of thirty-five percent, the Property complies on only one side (the east side) and the percentage coverage for the Property is forty percent.

Katz proposes to subdivide the Property into two lots, with each home sitting on a separate lot.[1] Each will be 50 feet in width. Lot No. 1 (the roadside lot) will be a 50-foot by 150-foot parcel, and Lot No. 2 (the lakeside lot) will be 50 feet by 130.5 feet. Thus, Lot No. 1 would be 7,500 square feet and Lot No. 2 would be 6,271 square feet. The proposal would require a variance from the front yard setback for Lot No. 2, in that the proposed dividing line between the two lots would result in Lot No. 2 being nine feet short of the required forty-foot front yard setback.

[1] Before seeking approval for this subdivision, Katz sought to obtain the dimensional variances at issue.

Katz currently uses one of the homes for his family and rents the other for single-family use. He wants to subdivide the Property for estate planning purposes or, alternatively, to enable him to separately sell one of the parcels in the future. He does not seek to erect any additional structures or alter any existing conditions.

In denying Katz' requested variances for minimum lot size;[2] width; front, rear and side yard setbacks; and maximum lot coverage for an R-2 District, the Board concluded:

> (1) There are no unique physical circumstances or conditions peculiar to the Property which create an unnecessary hardship, inasmuch as Katz knew at the time he purchased the Property that the lot and buildings thereon were not in conformance;
>
> (2) A variance is not necessary to enable the reasonable use of the Property, inasmuch as the Property is being reasonably used in its present condition and has been so used for years;
>
> (3) Any hardship that may exist has been created by Katz, inasmuch as he purchased the Property knowing of its nonconformities and that any economic hardship he now claims would have been known to him at the time of purchase;
>
> (4) The essential character of the neighborhood in which the Property is located would be altered by granting the variance, thus being detrimental to the public welfare, inasmuch as Katz seeks to drastically increase the level of nonconformity; and
>
> (5) No relief is necessary, inasmuch as the Property is presently being used in conformity with the Ordinance.

Katz challenges each of these conclusions.

Both parties filed briefs in support of their respective positions. Argument was held on October 27, 2010. No additional testimony or evidence was taken, and we are now ready to rule on Katz' appeal.

DISCUSSION

Where the trial court takes no additional evidence, as here, the standard for review of a decision of a zoning hearing board is limited to determining whether the board abused its discre-

[2] Given our disposition of this specific request, the focus of the discussion which follows, the remainder of Katz' request is moot.

tion or erred as a matter of law. To be valid, the board's decision must be supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. **Hertzberg v. Zoning Board of Pittsburgh,** 554 Pa. 249, 721 A.2d 43, 46 (1998). And while "[d]eterminations as to the credibility of witnesses and the weight to be given to evidence are matters left solely to the [ZHB] in the performance of its factfinding [sic] role," the board may not capriciously disregard material, competent evidence. **Pennsy Supply, Inc., v. Zoning Hearing Board of Dorrance Township,** 987 A.2d 1243, 1248 (Pa. Commw. 2009); **Leon E. Wintermyer, Inc. v. Workers Compensation Appeal Board (Marlowe),** 571 Pa. 189, 812 A.2d 478, 487 (2002). Finally, Pennsylvania courts are not "super zoning [hearing boards] nor [master planners] of last resort"; rather, the task of the court is to review the merits of the appeal based only on the findings of the municipal hearing board. **Schelley v. Zoning Board of Adjustment,** 8 Pa. Commw. 169, 171, 302 A.2d 526, 527 (1973). "[A]n appellate tribunal is not to substitute its judgment for that of the lower tribunal and the standard 'is not to be applied in such a manner as would intrude upon the agency's fact-finding role and discretionary decision-making authority.' " **Pennsy Supply, supra** at 1252.

A variance may be granted where the provisions of the zoning ordinance would otherwise inflict unnecessary hardship on the applicant. For a hardship to support a variance all of the following must be shown where relevant:

(1) unique physical circumstances or conditions peculiar to the property, rather than the operation of the ordinance generally, have created an unnecessary hardship;

(2) because of such physical characteristics, the property cannot be developed in strict conformity with the provisions of the zoning ordinance and the authorization of a variance is therefore necessary to enable the reasonable use of the property;

(3) the applicant did not create the unnecessary hardship;

(4) the grant of a variance will not be detrimental to the public welfare; and

(5) the variance sought is the minimal variance that will afford relief and the least deviation from the ordinance provision at issue.

53 P.S. §10910.2; **see also,** Zoning Ordinance, Section 180-68. These criteria apply whether a use or dimensional variance is sought. **Schomaker v. Zoning Hearing Board of the Borough of Franklin Park,** 994 A.2d 1196, 1199-1200 (Pa. Commw. 2010).

The burden is upon the applicant to establish the need for a variance. **Northeast Pennsylvania SMSA Limited Partnership v. Scott Township Zoning Hearing Board,** 18 A.3d 1272, 1276 (Pa. Commw. 2011). However, in the case of a dimensional variance, a lesser quantum of proof of hardship is required.[3] **Hertzberg, supra,** 721 A.2d at 47-48. In either case, a variance is appropriate only if the property, not the person, is subject to hardship. **Yeager v. Zoning Hearing Board of the City of Allentown,** 779 A.2d 595, 598 (Pa. Commw. 2001).

Katz argues that because the variance requested is dimensional, the Board erred in a strict application of traditional variance standards to his request. On this point, Katz quotes the following language from **Hertzberg**:

> The issue here involves a dimensional variance and not a use variance—an important distinction ignored by the Commonwealth Court. When seeking a dimensional variance within a permitted use, the owner is asking only for a reasonable adjustment of the zoning regulations in order to utilize the property in a manner consistent with the applicable regulations. Thus, the grant of a dimensional variance is of lesser moment than the grant of a use variance, since the latter involves a proposal to use the property in a manner that is wholly outside the zoning regulation.
>
> * * *
>
> In addition, we now hold that in determining whether unnecessary hardship has been established, courts should examine whether the variance sought is use or dimensional. To justify the grant of a dimensional variance, courts may consider multiple

[3] "A dimensional restriction deals with restrictions caused by the size of the lot, not, ... , by conditions of the lot." **Schomaker v. Zoning Hearing Bd.,** 994 A.2d 1196, 1201 n.5 (Pa. Commw. 2010) (citation omitted).

> factors, including the economic detriment to the applicant if the variance was denied, the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements and the characteristics of the surrounding neighborhood.

Hertzberg, supra, 721 A.2d at 47 and 50.

As is evident from this language, under **Hertzberg** multiple factors are to be considered in determining whether an unnecessary hardship exists and whether a dimensional variance should be granted, including the economic consequences of a decision. **Hertzberg,** however, does not stand for the proposition that "a variance must be granted from a dimensional requirement that prevents or financially burdens a property owner's ability to employ his property **exactly as he wishes,** so long as the use itself is permitted." **Yeager, supra** at 598 (emphasis in original). In easing the standards for granting a dimensional variance, **Hertzberg** did not make

> dimensional requirements ... 'free-fire zones' for which variances could be granted when the party seeking the variance merely articulated a reason that it would be financially 'hurt' if it could not do what it wanted to do with the property, even if the property was already being occupied by another use. If that were the case, dimensional requirements would be meaningless—at best, rules of thumb—and the planning efforts that local governments go through in setting them to have light, area (side yards) and density (area) buffers would be a waste of time.

Society Created To Reduce Urban Blight v. Zoning Board of Adjustment, 771 A.2d 874, 877-78 (Pa. Commw. 2001), **appeal denied,** 786 A.2d 992 (Pa. 2001).

At a minimum, **Hertzberg** does not permit "more than a **technical** and **superficial**" departure from the zoning ordinance and requires that this adjustment be reasonable "in order to utilize the property in a manner consistent with the applicable regulations." **Hertzberg, supra,** 721 A.2d at 47, including note 7; **Schomaker, supra** at 1203. Nor does **Hertzberg** "alter the [basic] principle that a substantial burden must attend **all** dimensionally compliant uses of the property, not just the particular use the owner chooses." **Yeager, supra** at 598 (emphasis in original).

In **Yeager,** the dimensional regulations at issue were well-suited to the permitted purpose for which the applicant desired to use the property, as a car dealership, and in no way burdened that usage of the property. Instead, it was because of the specific requirements of the type of franchise (Land Rover) which the applicant desired to operate pertaining to the location and size of the sales and service building, and the need for an off-road demonstration course, that dimensional variances were sought. In this context, in affirming the trial court's denial of the variance, the Court found that **Hertzberg** "did not alter the [basic] principle that a substantial burden must attend **all** dimensionally compliant uses of the property, not just the particular use the owner chooses." This bears emphasis: the focus of a variance analysis is a hardship arising out of the proposed characteristics of the property, not out of the personal circumstances of the owner. **Id.**

In the instant case, Katz seeks relief from the minimum lot size requirements of the Ordinance not to use the Property for a permitted purpose, but in order to subdivide the Property for estate planning or future sale. Katz also argues that to grant this variance would bring the Property into compliance with Section 180-55 of the Ordinance: that no lot or tract shall contain more than one principal building or use for the required minimum lot area in the district where the lot is located. Neither reason withstands analysis under the legal standards for the grant of a dimensional variance.

"A foundational prerequisite to a request for a dimensional variance is a determination that the proposed use for the property is itself permissible, and such permitted use is, in turn, the benchmark from which the entitlement to a dimensional variance must be assessed." **Hertzberg, supra,** 721 A.2d at 53 (Saylor, J., dissenting). Here, the proposed use is the existing use: two homes each used for residential purposes. No change in use is contemplated by Katz. This, however, is a necessary threshold to the grant of a dimensional variance under **Hertzberg**: "When seeking a dimensional variance within a permitted use, the owner is asking only for a reasonable adjustment of the zoning regulations in order to utilize the property in a manner consistent with the applicable regulations." **Id.** at 47.

Nor is the adjustment Katz seeks a "mere technical and superficial deviation from ... space requirements" of the Ordinance. **Id.** at 47 n.7. Under the Ordinance, properties situated like Katz' are required to have a minimum of 30,000 square feet. The Property as it exists is only forty-six percent of this size. Lot No. 1, as proposed by Katz, will be twenty-five percent of the required lot size, and Lot No. 2, as proposed, only twenty-one percent of this size.

The lot size requirements set by the Kidder Township Supervisors in an R-2 District serve, in a significant manner, to control the density of development in that area of the Township. Pursuant to Section 180-3A of the Ordinance, the Ordinance's purposes include "coordinated and practical community development and proper density of the population," and pursuant to Section 180-3B, "to prevent ... overcrowding of land." With specific reference to the R-2 District, the purpose of the District is "to provide for single-family and two-family dwellings at medium densities in areas already developed in this manner and in areas where similar development is desirable." (Ordinance, Section 180-14A.) Katz seeks, in effect, to eviscerate this exercise of a legislative prerogative by the Township Supervisors on the relatively specious argument that to do so will bring the Property into conformity with Section 180-55, with no corresponding benefit to the public interest.

To the extent the Board concluded the hardship of which Katz complains was self-created and the grant of the variance would change the essential character of the neighborhood, we disagree. Notwithstanding that Katz knew of the Property's nonconformities at the time of purchase and purchased with the intent of subdividing—the property was purchased by Katz on May 11, 2009, and the variance application was filed on November 30, 2009—"mere knowledge alone of an impediment to building under the terms of a zoning ordinance is insufficient to deny a variance." **Sombers v. Stroud Township Zoning Hearing Board,** 913 A.2d 306, 312 (Pa. Commw. 2006), **appeal denied,** 934 A.2d 1280 (Pa. 2007).

With respect to the impact on neighboring properties if the variance were granted, the record does not support an adverse effect. The development of the area where the Property is located —which predates the Ordinance—consists primarily of lots 50 feet by 200 feet in size. Most are nonconforming. Many have existing

homes and several have been previously subdivided. The subdivision Katz intends will change neither the physical characteristics of the Property nor the density of the development. Given these facts, Katz' variance request, if granted, would not change the character of the neighborhood. **See Upper Leacock Township Supervisors v. Zoning Hearing Board of Upper Leacock Township,** 481 Pa. 479, 483, 393 A.2d 5, 7 (1978) (finding that the essential character of the neighborhood will not be altered where owner seeks to continue a preexisting use rather than develop a new one).

CONCLUSION

Under **Hertzberg** to establish that unnecessary hardship will result from the denial of a requested dimensional variance, the party seeking the variance bears the burden of proving that "the zoning requirements work an unreasonable hardship in the owner's pursuit of a **permitted** use." **Hertzberg, supra,** 721 A.2d at 47. This, Katz has failed to do.

Katz' evidence shows that a variance is not necessary to enable the reasonable use of the Property. Here, the Property is being used in accordance with the Ordinance, as a legal nonconforming use, and its use is reasonable: as a home for Katz and his family, and as a rental home for a second family. **Hertzberg** neither authorizes nor requires the grant of a variance on property whose use is unaffected by the dimensional requirements of the Ordinance: where the planned use of the Property after the grant of the requested variance will be identical to that existing before the variance grant, with no changes to be made in the physical characteristics of the Property. **Cf. Cardamone v. Whitpain Township Zoning Hearing Board,** 771 A.2d 103 (Pa. Commw. 2001) (upholding denial of dimensional variances requested to enable subdivision of property into two lots); **see also, Township of East Caln v. Zoning Hearing Board of East Caln Township,** 915 A.2d 1249 (Pa. Commw. 2007) (denying dimensional variance in pertinent part because a reasonable use was already being made of the property, and based on that fact, the applicant failed to demonstrate a burden associated with the property).

To the extent Katz argues that denial of the variance will limit his ability to subdivide the Property for estate planning purposes or

to separately sell one of the parcels in the future, the law is against Katz. "Economic and personal considerations in and of themselves are insufficient to constitute hardship" for purposes of obtaining a zoning variance. **McNally v. Bonner,** 165 Pa. Commw. 186, 191, 645 A.2d 287, 289 (1994), **appeal denied,** 540 Pa. 585, 655 A.2d 516 (1995).

Absent a showing of hardship, Katz is entitled to no variance.

SOUTHWEST CAPITAL INVESTMENTS, LLC, Plaintiff vs. CLARENCE GIMBI, JR. and SHARON ANN GIMBI, Defendants

Civil Law—Mortgage Foreclosure—Standing of Assignee—Act 6 and Act 91—Notice Requirements—Effect of Hearsay Admissions

1. In a mortgage foreclosure proceeding where the plaintiff is the assignee of the original mortgage, for standing to exist the foreclosing party must also be the holder of the note secured by the mortgage.

2. A precondition to the commencement of a mortgage foreclosure action on residential property is the service of notice pursuant to the provisions of Act 6 (41 P.S. §101 **et seq.**) and Act 91 (35 P.S. §1680.401c **et seq.**). Act 6 relates to the foreclosure of residential mortgages, and Act 91 deals with state-funded emergency assistance to homeowners who are facing foreclosure on their mortgages.

3. Act 160 of 1998 authorizes a combined Act 6/91 notice. Provided the new mortgagee complies with the notice requirements of the statute, actual receipt of notice is not required.

4. A mortgage debtor is not entitled to notice under Act 91 where the mortgage is delinquent in excess of twenty-four months. 35 P.S. §1680.403c(f)(1).

5. Notice under Act 6 is required to be sent to the homeowner's last known residence by regular and either registered or certified mail, and if different, at the residence which is the subject of the residential mortgage.

6. Written notice pursuant to Act 6 must be sent to the mortgage debtor at least thirty days in advance of commencing an action in mortgage foreclosure. The timing of this notice is mandatory and is to be strictly enforced.

7. The burden of proving notice in compliance with the service requirements of Act 6 is upon the foreclosing party. Where this burden has not been met, the action is defective and will be dismissed, without prejudice.

8. Hearsay evidence, admitted without objection, is accorded the same weight as evidence legally admissible as long as it is relevant and material to the issues in question.

NO. 063560

JILL M. WINEKA, Esquire—Counsel for Plaintiff.

WILLIAM SCHWAB, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—July 18, 2011

In this suit in which Plaintiff seeks to foreclose on a residential mortgage, the Defendant, Clarence Gimbi, Jr., contends that the owner of the mortgage has failed to establish the following: (1) his execution of the underlying note secured by the mortgage; (2) its standing as the current holder of the note entitling it to begin these mortgage foreclosure proceedings; (3) its compliance with the pre-foreclosure notice statutes in effect prior to the commencement of suit; and (4) his failure to make monthly mortgage payments due since December 9, 2001, until the present time. In all but one instance, we rule against these contentions.

PROCEDURAL AND FACTUAL BACKGROUND

On June 5, 1995, the Defendants, Clarence Gimbi, Jr. and Sharon Ann Gimbi (referred to collectively as "the Gimbis"), borrowed $31,500.00 from Keystone State Mortgage Corporation, mortgaging their home in Beaver Meadows, Carbon County, Pennsylvania, as security. This property was acquired by the Gimbis, as husband and wife, by deed dated March 21, 1988. Through a series of assignments, three in number, the mortgage and underlying note were assigned to the Plaintiff, Southwest Capital Investments, LLC, on October 15, 2002.

On November 1, 2006, Plaintiff filed a complaint in mortgage foreclosure against the Gimbis alleging, **inter alia,** the mortgage was in default for failing to pay all monthly mortgage payments beginning with the payment due October 9, 2006, that the unpaid principal balance due was $23,635.87, and that the total amount then due and owing—consisting of the unpaid principal balance, accumulated interest and late charges, and attorney fees—was $38,907.54. Default judgment in this amount for failing to file an answer was entered against the Defendant, Sharon Ann Gimbi ("Wife"), on June 8, 2007.

On December 1, 2008, Plaintiff petitioned pursuant to Pa. R.C.P. 2056(b) to have a guardian ad litem appointed for the Defendant, Clarence Gimbi, Jr., ("Husband"), as an alleged incapacitated person. Following a hearing held on February 17, 2009, William G. Schwab, Esquire was appointed guardian ad litem for Husband. Thereafter, the complaint was reinstated and served

upon Attorney Schwab, preliminary objections were filed, and an amended complaint was filed to which Husband responded. Husband's answer admitted only his current residence at St. Luke Manor,[1] the appointment of Attorney Schwab as guardian ad litem, his co-ownership with Wife of the mortgaged premises, and that he was not an active member in the United States military. All other averments were denied. A non-jury trial on Plaintiff's claim against Husband was held on December 18, 2010.

At trial, Plaintiff called two witnesses: Cheryl Winschuh, the notary for the mortgage, and Ronald C. Hester ("Hester"), Vice President of Default Servicing for InSource Financial Services, LLC, the servicing agent for Plaintiff. Ms. Winschuh testified that Husband personally appeared before her on June 5, 1995, provided proof of his identity, and that she notarized his execution of the mortgage. Hester explained that Plaintiff purchases non-performing assets—loans in default—and that InSource is employed by Plaintiff, **inter alia,** to collect and foreclose on these loans.

According to Hester, InSource began servicing Defendants' loan for Plaintiff in May 2006. Previously, Select Portfolio Servicing, Inc. had been the servicing agent. Payment histories during the period Select Portfolio was servicing the loan (**i.e.,** August 15, 2000 through June 20, 2006) and thereafter, from July 18, 2006 until the date of trial, when InSource was servicing the loan, were identified by Hester and marked as exhibits. (Plaintiff Exhibits 12 and 17, respectively.) Using these two exhibits, Hester testified, without objection, that the mortgage was in default, that the most recent mortgage payment made by the Gimbis was credited to the payment due on November 9, 2001, that the next mortgage payment due from the Gimbis was the December 9, 2001 payment, that no payments were received after the payment credited to November 9, 2001, and that the unpaid principal balance remaining due after the last payment by the Gimbis was $23,635.87. Hester further testified that the payoff amount of the Gimbis' loan as

[1] In the original complaint filed on November 1, 2006, the last known address for each Defendant was alleged to be Box 457, 126 Route 93, Beaver Meadows, PA 18216. In the amended complaint filed on April 28, 2009, Husband's then current address was identified as St. Luke Manor, 1711 East Broad Street, Hazleton, PA 18201.

of December 8, 2011 was $57,803.27, with a per diem of $7.15, computed as follows:

Unpaid principal balance	$23,635.87
Interest from 11/9/01 through 12/8/10	$23,713.71
Late Fees	$1,884.78
Property Inspection Fees	$50.00
Attorney's Fees[2]	$7,777.50
Legal Costs	$741.41
Total	$57,803.27

(N.T. 12/8/10, pp. 41-42.)

In addition, Hester testified that the written notice requirements of Act 6 (41 P.S. §101 **et seq.**) and Act 91 (35 P.S. §1680.401c **et seq.**) were complied with and that, in accordance with Act 160 of 1998, a written notice combining the requisite notice requirements of Act 6 and Act 91, was sent to Husband, at his last known residence, by both regular and certified mail.[3] (Plaintiff Exhibits 13 and 14, respectively.) The notice by certified mail was returned to Plaintiff, marked by the United States Postal Department as having been refused. (Plaintiff Exhibit 16.)

Husband objected that notwithstanding Hester's identification of the notices which he claimed were sent to Husband, the evidence which Plaintiff presented to show the actual date of mailing of these notices to Husband by regular and certified mail—Plaintiff Exhibit 15—failed to prove either mailing: that with respect to the service by certified mail, only the receipt for the notice sent by certified mail to Wife was post-marked, not the receipt for certified mail to Husband; and that with respect to the service by regular mail, the certificate of mailing for the notices sent by first-class mail improperly combined in one certificate proof of mailing for the separate notices claimed by Plaintiff to have been sent to Husband and Wife, and contained a single postage paid amount of $1.90, which Husband argued, according to its placement on the

[2] The reasonableness and necessity of this amount was stipulated to by Husband. (N.T. 12/8/10, p. 40; Plaintiff Exhibits 18, 19, 20 and 24.)

[3] "Act 6 relates to the foreclosure of residential mortgages, and Act 91 deals with state-funded emergency assistance to homeowners who are facing foreclosure on their mortgages." **Bennett v. Seave,** 520 Pa. 431, 554 A.2d 886 (1989).

certificate, evidenced only that postage was paid for the notice to Wife. (N.T. 12/8/10, pp. 62-64, 67-76.) Husband's objections were overruled and Plaintiff's Exhibit 15 was admitted.[4]

After Plaintiff's witnesses completed their testimony, Plaintiff moved for the admission of Plaintiff's Exhibits 12 and 17, the history of the Gimbis' loan payments as maintained by Select Portfolio and Plaintiff, respectively. Husband objected. Specifically, Husband contended that the business record exception to hearsay (Pa. R.E. 803(6)) had not been met with respect to the payment history prepared by Select Portfolio,[5] and that the payment history prepared by Plaintiff was objectionable because it relied upon and carried forward the unpaid principal ending balance from Select Portfolio's payment history. Husband's objection to Exhibit 12 was sustained and that to Exhibit 17 overruled.

Neither Defendant testified nor was present at the trial. Nor did Husband present any evidence or witnesses on his behalf.

DISCUSSION

In Husband's post-trial memorandum, Husband raises two issues which merit discussion: (1) whether Plaintiff complied with the written notice requirements of Act 6 and Act 91 prior to the

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[4] Plaintiff Exhibit 15 contains two U.S. Postal Service form "Receipts for Certified Mail"—one addressed to Wife, which is post-marked, and one addressed to Husband, which contains no postmark, and corresponds to the written notice addressed to Husband which has been marked as Plaintiff Exhibit 14. Exhibit 15 also includes a certificate of mailing—purporting on its face to conform with U.S. Postal Service Form 3817—offered to support the mailings of the combined Act 6/91 notices to each Defendant by first-class mail. As pertains to Husband, this certificate of mailing corresponds to the written notice marked as Plaintiff Exhibit 13.

In reviewing the written transcript of the trial with respect to Exhibit 15, the certificate of mailing was expressly admitted (N.T. 12/8/10, p. 70), however, while discussed, no ruling was made on the two receipts for certified mail. Also, no rulings were made at the time of trial with respect to Plaintiff Exhibits 8 (settlement statement) and 16 (the actual envelope and its contents sent to Husband by certified mail, stamped refused). To close this unintended gap in the record, each of these exhibits is hereby formally admitted.

[5] On cross-examination, Hester admitted that he did not know how Select Portfolio or previous servicers of the Gimbis' loan created or maintained their business records and that he could not vouch for the accuracy of any of the information appearing in these records prior to the time InSource became the servicing agent.

institution of this foreclosure action, and (2) whether Plaintiff proved by competent evidence that Husband was in default on the loan.[6] Because the answer to the second issue has a bearing on whether Act 91 notice was required, we discuss it first.

Default

Contrary to Husband's argument, the evidence is sufficient to find, and we so find, that Husband is in default as of December 9, 2001, on the loan originally taken with Keystone State Mortgage Corporation.

Hester testified not only that no payments have been received since InSource began servicing the loan in May 2006, but also that no payments have been received since the payment due November 9, 2001, and that the unpaid principal balance of $23,635.87 has remained the same since December 9, 2001, until the present. While Hester may very well have not been competent to testify with respect to the payment history as reported by Select Portfolio and the unpaid principal balance derived from that payment history,

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[6] Husband has also raised two additional issues which require little discussion: (1) that Plaintiff failed to prove the underlying note, which is secured by the mortgage, was executed by Husband, and (2) that Plaintiff failed to prove it is the current holder of the note and, therefore, entitled to foreclose on the mortgage. **See** 13 Pa. C.S. §3301; **see also, Deutsche Bank National Trust Co. v. Smith,** No. 08-3089 (C.P. Delaware Co. July 22, 2010) (holding that standing to foreclose in other than the original mortgagee exists provided the foreclosing party is the holder of the mortgage note and that the mortgage has been assigned to it); and **Girard Trust Company v. Philadelphia,** 369 Pa. 499, 503, 87 A.2d 277, 279 (1952) (noting that because a mortgage which secures an accompanying note or bond serves primarily as collateral for such underlying debt, the mortgage is not independently enforceable).

As to the first of these two issues, at trial the original note was identified by Hester and admitted into evidence without objection. (N.T. 12/8/10, pp. 23, 57-58; Plaintiff Exhibit 7.) This note is dated the same date as the mortgage and contains a signature very similar to Husband's signature which appears in both the mortgage and in Ms. Winschuh's notary book. Husband has presented no evidence to the contrary. Finding no reason to dispute the authenticity of Husband's signature on the note, we find Plaintiff has met its burden as to this issue.

As to whether Plaintiff is the current holder of the note and mortgage, this fact was stipulated to at trial. (N.T. 12/8/10, pp. 21-22.) Further, the original note was produced by Plaintiff at the time of trial and made part of the record. The original note, on its face, has been assigned by Keystone State Mortgage Corporation to Contimortgage Corporation, and both Contimortgage's assignment to Manufacturers and Traders Trust Company, as trustee, and Manufacturers and Traders Trust Company's assignment to Plaintiff expressly include an assignment of the note, as well as the mortgage.

Commonwealth Financial Systems, Inc. v. Smith, 15 A.3d 492 (Pa. Super. 2011), the fact remains he did, without objection. **Jones v. Spidle,** 446 Pa. 103, 106, 286 A.2d 366, 367 (1971) ("[H]earsay evidence, admitted without objection, is accorded the same weight as evidence legally admissible as long as it is relevant and material to the issues in question."); **see also, Commonwealth v. Foreman,** 797 A.2d 1005, 1012, 1015-16 (Pa. Super. 2002) (recognizing that a fact-finder may make findings of fact based upon unobjected hearsay).

Notice

With respect to the first issue, Husband does not challenge the sufficiency of the contents of the combined Act 6/91 Notice. Rather, Husband's challenge is to whether Plaintiff complied with the service requirements of Act 6 and Act 91 for each notice.

Act 6 provides that before a mortgagee commences a legal action against the grantor of a residential mortgage, it must first send written notice, by registered or certified mail, to the mortgagor at his last known address and, if different, at the residence which is the subject of the residential mortgage. 41 P.S. §403(b). Act 91 requires a mortgagee who intends to foreclose to send written notice to the mortgagor at his last known address. 35 P.S. §1680.403c(a). The Act 91 notice is to be sent by regular mail and documented by a certificate of mailing obtained from the United State Postal Service, if notice is to be deemed to have been received on the third business day following the date of mailing. 35 P.S. §1680.403c(e); **cf. Donegal Mutual Insurance Company v. Insurance Department,** 719 A.2d 825 (Pa. Commw. 1998) (discussing the "mailbox rule"). The written notice sent under the combined Act 6/91 provisions of Act 160 of 1998 is required to be sent to the homeowner's last known residence by regular and either registered or certified mail, and to the mortgaged premises, if different. 12 Pa. Code §31.203(a)(1).[7]

[7] As a matter of law, the need to comply with the service requirements of Act 91 is misleading in this case. A mortgage debtor is not entitled to an Act 91 notice where the mortgage is delinquent in excess of twenty-four months. 35 P.S. §1680.403c(f)(1). Since the Gimbis' delinquency occurred with their failure to make the December 9, 2001 payment, as of September 21, 2006, the date the notices are claimed to have been mailed by Plaintiff, almost five years had passed from the date of default. For this reason, the statutory notice provided by Act 91 was not required to be sent. Accordingly, we concentrate our discussion primarily on whether the requirements of Act 6 were met.

The combined Act 6/91 notice of intention to foreclose was sent to Husband by first-class mail at RR 93, Box 457, Beaver Meadows, Pennsylvania 18216 on September 21, 2006. The notice to Husband by certified mail was addressed to the same address. This address is virtually identical to that which appears in Husband's deed for the property (Plaintiff Exhibit 5), as well as that in the mortgage (Plaintiff Exhibit 1), the note (Plaintiff Exhibit 7), the settlement statement for Husband's financing of the mortgage (Plaintiff Exhibit 8), Husband's loan application (Plaintiff Exhibit 10) and the address given by Husband to the mortgage notary, Cheryl Winschuh (Plaintiff Exhibit 6).[8] This address was both the property address and Husband's residence at the time of the loan.

The certificate of mailing evidencing service of the Act 6/91 notice on Husband by first-class mail combined in one document a certificate of mailing for both Husband and Wife. Without offering any authority to support his position that the use of a single certificate of mailing certifying to the separate mailing of the same notice to two different people at the same address is prohibited, Husband asks us to place form over substance. This we will not do. We further take judicial notice that at the time of this mailing the postal rates for one certificate of mailing was $0.95 and for two, $1.90.

As to service of the certified mail, while Husband is correct that only the receipt for the certified mail addressed to Wife is post-marked by the United States Postal Service, the evidence nevertheless shows that the notice was in fact also sent to Husband by certified mail. Plaintiff placed in evidence the actual envelope and its contents sent to Husband by certified mail. (Plaintiff Exhibit 16.) This notice was returned to Plaintiff with a red postal stamp stating the mail had been refused.[9] Still, Plaintiff's evidence does not show when this certified mail was sent to Husband.

[8] The only difference is that in several of these documents, in addition to the box number, the street address is given as 126 Route 93, rather than simply RR 93.

[9] Neither Act 6 nor Act 91 requires that the certified mail be sent restricted delivery. Therefore, it is impossible to determine whether this mailing was refused by Husband, by Wife, or by some third party. Regardless, provided the mortgagee complies with the notice requirements of the statute, which—with the one exception about to be discussed—we find Plaintiff has, actual receipt of notice is not required. **Second Federal Savings and Loan Association v. Brennan,** 409

Act 6 requires that the written notice be sent to the mortgage debtor by registered or certified mail at least thirty days in advance of commencing an action in mortgage foreclosure and that the debtor be provided this time to cure the default and avoid foreclosure. 41 P.S. §§403(a) and 404(c). This Section 403 notice is mandatory. **See General Electric Credit Corporation v. Slawek,** 269 Pa. Super. 171, 175-76, 409 A.2d 420, 422 (1979); **see also, Potter Title & Trust Company v. Berkshire Life Insurance Company,** 156 Pa. Super. 1, 5, 39 A.2d 268, 270 (1944) ("Where notice in a specific manner is prescribed by statute, that method is exclusive."), and **Ertel v. Seitzer,** 31 D. & C. 3d 332, 333 (1982) ("The service requirements of Act 6 must be strictly construed.").

The notices of intent to foreclose sent to Husband informed him of the amount in delinquency and Plaintiff's intention to begin foreclosure proceedings unless the default was cured within thirty days. Unfortunately, we cannot tell from Plaintiff's evidence when this notice was sent and therefore how much time Husband was given to cure the default.

The burden of strictly complying with the service requirements of Act 6—service by registered or certified mail at least thirty days in advance of commencing an action—was upon Plaintiff. Plaintiff's failure to establish when the certified mail was sent to Husband is critical to its case, an omission which we regard as crucial and inexcusable given "the need to strictly construe the requirements of

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Pa. Super. 581, 587-88, 598 A.2d 997, 1000 (1991); **Beneficial Mutual Savings Bank v. Kertis,** 36 D. & C. 3d 33, 36-37 (1985).

To the extent Husband contends he may have no longer been living at the property address at the time the notices were sent and if this were the case, notice should also have been sent to his place of residence, Husband argues in the subjunctive without any evidentiary support. As is evident from the filing date of the original complaint, the notices were sent prior to November 1, 2006. Not until receipt of the sheriff's return dated June 26, 2007, with respect to service of the reinstated complaint on Husband—indicating Husband was residing at St. Luke Manor, a nursing home in Luzerne County—did Plaintiff have any reason to believe that Husband was no longer living at the property. Husband presented no evidence as to when he began residing at St. Luke Manor or why. As previously indicated, the address Plaintiff used was that which appeared in all the loan documents it acquired upon its purchase of the Gimbis' loan and the certified mail it addressed to Husband at this address was returned because it was refused, not because it was unclaimed.

the [A]ct so as to more fully protect the debtor." **Kennedy Mortgage Company v. Washington,** 12 D. & C. 3d 476, 480 (1979).

One of the signal purposes of Act 6 is to provide protective safeguards to borrowers before a mortgage foreclosure action on a residential mortgage may be instituted. **Slawek, supra** at 175, 409 A.2d at 421-22. As stated by the Superior Court in **Ministers & Missionaries Benefit Board v. Goldsworthy:**

> A principal function of Section 403 notice is to make the mortgagor aware of the existence of a default and his right to cure it; he is not to be cursed by an inadvertent delinquency. After receipt of this notice, the mortgagor can prevent foreclosure and avoid acceleration by tendering the appropriate amount or performance specified in Section 404(b). Once the default is cured, a necessary element permitting acceleration and foreclosure is no longer present.

Id., 253 Pa. Super. 321, 332, 385 A.2d 358, 364 (1978), **overruled on other grounds by Marra v. Stocker,** 532 Pa. 187, 615 A.2d 326 (1992); **Slawek, supra** at 179, 409 A.2d at 424. This cannot occur however if the debtor has been deprived, by time, of the opportunity to cure the default.

CONCLUSION

In accordance with the foregoing, we find Plaintiff has met its burden of proving default in Husband's payment obligation under the mortgage. However, we also find that Plaintiff has failed to comply with the mandatory notice provisions of Section 403 of Act 6. For this reason, Plaintiff's suit against Husband will be dismissed, without prejudice.

SUSAN GREENFIELD, Plaintiff vs.
JAMES C. GREENFIELD, Defendant

Civil Law—Divorce—Equitable Distribution—Determination of Marital Assets—Valuation and Division of Marital Assets—Recognition, Treatment and Computation of Fair Rental Value of Marital Home Occupied by One Spouse—Effect on Equitable Distribution of the Support Guidelines, the Existence of Non-Marital Assets, and the Use of Non-Marital Assets To Improve Marital Property and Pay Marital Debt—Tax Implications—Staleness of Valuation Data—Effect of Uncontradicted Expert Testimony

1. As a general rule, a dispossessed spouse is entitled to a credit for the fair rental value of the marital home, jointly owned by the parties, and in the exclusive possession of the other. This credit, when allowed, is to be adjusted for payments made to maintain the property by the party in possession on behalf of the dispossessed spouse. Such credit is not a marital asset, but is to be applied in the distribution of marital assets.

2. Inherent in the support guidelines is the assumption that a spouse occupying the marital residence will be solely responsible for the primary mortgage payments, real estate taxes and homeowners' insurance. Where such payments have not been made fully by the occupying spouse, but in part by the dispossessed party, and where payment of the household expenses assumed by the guidelines is determined to offset any rental credit to which the dispossessed party would otherwise be entitled for the occupying spouse's use and possession of the home, it is appropriate to provide full credit for the payments made by the dispossessed party upon equitable distribution of marital assets.

3. By definition, marital assets are those assets acquired after marriage and prior to final separation, excluding, **inter alia,** inherited property. A party who uses a non-marital asset, here property acquired by inheritance, to purchase property titled in both names and to pay marital debt prior to the parties' separation, converts the non-marital asset into a marital one. Nevertheless, the use of non-marital assets to acquire, improve, maintain and preserve marital assets is relevant and to be taken into consideration in the equitable distribution of marital property.

4. Although the existence and nature of marital property is to be determined as of the date of separation, the valuation of marital property is ordinarily to be determined as of the date of distribution.

5. The Divorce Code lists thirteen factors to be considered in determining the distribution and allocation of marital assets between the parties. This list is non-exclusive. Ultimately, the test is one of economic fairness between the parties.

6. While the increase in value of non-marital property during the marriage and prior to separation is a marital asset, any such increase is to be adjusted and offset by losses sustained in the value of other non-marital assets.

7. In distributing marital assets, the potential tax implications to both parties are to be considered. In this consideration, it is appropriate for the court to determine whether the tax implications of the divorce or equitable distribution of property will be direct and immediate, or are more remote and uncertain, in weighing whether such potentialities should be applied in equitably dividing the marital estate.

8. In those circumstances where there is reason to believe that the length of the delay between the date of the master's hearing and the date the equitable distribution award is to be effectuated may have affected the reliability of the valuation data upon which the award is based, the court must balance the likelihood of such effect against the benefits of finality in determining whether the record should be re-opened and supplemented with updated valuation evidence prior to a final award of equitable distribution.

9. The award of post-divorce alimony is a secondary remedy under the Divorce Code. Alimony should be awarded only where economic justice and the reasonable needs of the parties cannot be achieved by way of an equitable distribution award and development of an appropriate employable skill.

10. A fact-finder need not accept the uncontradicted opinion of a valuation expert. However, in such cases the fact-finder should explain the reason for rejecting the expert's opinion.

NO. 07-3600

ALLEN I. TULLAR, Esquire—Counsel for the Plaintiff.

BARRY C. SHABBICK, Esquire—Counsel for the Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—August 31, 2011

Susan Greenfield, ("Wife") and James C. Greenfield ("Husband") married on June 16, 1990 and, in or about October 2007, separated. Why, is not important. Their differences are irreconcilable and each has established new relationships.[1] In dispute is the equitable distribution of property and Wife's claim for alimony.

PROCEDURAL AND FACTUAL BACKGROUND

Husband is a primary care physician. He is forty-five years old and in good health. Wife is a registered nurse. She is forty-four years old and also in good health.

Husband graduated from the Philadelphia College of Osteopathic Medicine the year following the parties' marriage. He completed his residency in Philadelphia in 1994 and, that same year, began his career as a doctor in Michigan. There, through a program for medically underserviced rural areas, the State of Michigan paid Husband's outstanding medical education loans of approximately $60,000.00 to $70,000.00.

Wife received her Bachelor of Nursing Degree in 1994. For the next eight years she was a full-time homemaker busy raising three children, the first of whom was born in 1994. The next two children were born in 1996 and in 1998. The parties' youngest child, their fourth, was born on April 2, 2007.

In July of 2002, the parties moved to Carbon County and purchased a four-bedroom home. Husband had secured employment

[1] Both parties have executed affidavits of consent and are in agreement to the entry of a no-fault divorce pursuant to Section 3301(c) of the Divorce Code, 23 Pa. C.S.A. §3301(c).

with a local hospital and was in charge of a family care center. That same year, Wife began employment, part-time, in a school cafeteria. In 2004, after taking a nursing refresher course, Wife began part-time employment as a nurse with her current employer.

Husband is currently engaged in the general practice of medicine. He receives a salary of approximately $156,000.00 per year. Husband's employment includes health and retirement benefits. Wife is employed as a registered nurse in an OB-GYN practice. She works part-time, an average of thirty hours per week at $22.50 per hour. Unfortunately, full-time employment is not available through Wife's current employer; nor does she receive any health or retirement benefits. Nevertheless, because Wife is capable of full-time employment and has chosen not to seek a full-time position elsewhere, by agreement, she was assessed a net monthly income of $1,310.00 in separate support proceedings. (Husband's Exhibit 29, Order dated July 11, 2008.)[2]

Husband's father died on July 18, 2000. Husband was the sole beneficiary of his father's estate whose gross value was approximately a million dollars. Of this amount, $141,436.00 was used to purchase and improve the marital home. An additional $29,995.00 was used to purchase an adjacent unimproved lot. The home has a current fair market value of $280,000.00 and is encumbered by a purchase money mortgage with an unpaid principal balance of $73,383.79 and a home equity loan bearing an unpaid principal balance of $45,500.85.

In addition to the marital home and adjacent lot, other property acquired during the marriage included retirement benefits, timeshares, and motor vehicles which are mentioned briefly below. On October 26, 2007, after seventeen years of marriage, Wife began these divorce proceedings.

Hearings before the Master were held on February 9, 2009, and August 18, 2009. An initial report was issued by the Master on March 23, 2010, to which both parties filed exceptions. On the same

[2] In the support proceedings, Husband's net monthly income was set at $7,660.06. The order awards Wife total monthly support in the amount of $2,751.00: $1,360.00 attributable to spousal support and $1,391.00 for child support. Throughout most of these divorce proceedings, the parties have had a 50/50 custodial arrangement with respect to their four children. Pursuant to the support order, the amount for spousal support terminated on December 23, 2009.

date as her exceptions, Wife also filed a request for reconsideration due to the Master's failure to rule on her claim for alimony. By Orders dated April 9, 2010, both parties' exceptions were denied, without prejudice, and the matter was remanded to the Master for reconsideration to address Wife's claim for alimony and its effect on equitable distribution, and with leave granted to the parties to present further testimony if deemed necessary. Neither party elected to submit additional evidence or to otherwise supplement the record with more current information.

An Amended Master's Report was filed on September 16, 2010. Therein, the Master recommended a 60/40 division of martial assets favoring Wife and denial of Wife's claim for alimony. Both parties have filed exceptions to this report which are now before us for decision.[3] At issue are challenges to the valuation and distribution of the marital estate and the denial of Wife's claim for alimony.

DISCUSSION

Allocating Fair Rental Value, Debt Payments and Expenses Related to the Marital Residence

Following the parties' separation, Wife continued to reside in the marital residence. This was agreed to by Husband—who at first moved to a rental property and later purchased a second home with money from his father's estate—and confirmed by Court Order dated February 1, 2008, granting Wife exclusive use and possession of the marital home during the pendency of this action. Husband has not resided in the marital home since the parties' separation.

Beginning on March 1, 2008, Husband agreed to pay the amount owed on a home equity loan on the marital residence. This agreement was reached during the course of support proceedings when Wife informed Husband she was unable to afford the monthly payments. In consideration of Husband paying the home equity loan, the parties further agreed that Husband's payments would be taken into account at the time Wife's claim for equitable distribution was decided rather than to be factored in the computation of a support amount.

[3] This having been said, we also recognize that "the court of common pleas is entitled to deviate from the recommendation of the master regardless of whether an issue was raised by the parties in exceptions." **Trembach v. Trembach,** 419 Pa. Super. 80, 84, 615 A.2d 33, 35 (1992).

Husband has paid $700.00 per month towards the home equity loan—an amount totaling $13,300.00 since March 1, 2008, through September of 2009 (Husband's Exhibit 31)—and also paid $6,416.20 toward the 2008 real estate taxes on the marital home and adjacent lot. (Husband's Exhibit 32.) Husband excepts to the Master's failure to give him any credit for these payments and failure to attribute a fair rental value to Wife's use of the marital home. Wife paid the monthly amounts owed on the primary mortgage—$619.30—and the premium for homeowners' insurance.

Wife received a guideline support order and Husband, as agreed, received no credit against his support obligation for the home equity loan payments he made. "The guidelines assume that the spouse occupying the marital residence will be solely responsible for the mortgage payments, real estate taxes, and homeowners' insurance." Pa. R.C.P. 1910.16-6(e). Under these guidelines, while "the term 'mortgage' shall include first mortgages, real estate taxes and homeowners' insurance," it does not necessarily include "any subsequent mortgages, home equity loans and any other obligations incurred during the marriage which are secured by the marital residence." **Id.**

Intertwined with Husband's request that a fair rental value be assessed for Wife's use of the marital home are Wife's payments of the principal mortgage, real estate taxes and homeowners' insurance. In deciding whether to award rental credit, the Superior Court in **Trembach v. Trembach,** stated:

> First, the general rule is that the dispossessed party is entitled to a credit for the fair rental value of jointly held marital property against a party in possession of that property, provided there are no equitable defenses to the credit. ... Second, the rental credit is based upon, and therefore limited by, the extent of the dispossessed party's interest in the property. ... Generally, in regard to the marital home, the parties' [sic] have an equal one-half interest in the marital property. It follows, therefore, that in cases involving the marital home that the dispossessed party will be entitled to a credit for one-half of the fair rental value of the marital home. Third, the rental value is limited to the period of time during which a party is dispossessed and the other party is in actual or constructive possession of the property. ... Fourth, the party in possession is entitled to a

> credit against the rental value for payments made to maintain the property on behalf of the dispossessed spouse. ... Generally, in regard to the former marital residence, payments made on behalf of the dispossessed spouse will be one-half of the expenses including debt service on the property. This is so because equity places a presumption upon the dispossessed spouse of responsibility for expenses to the extent of her/his ownership interest which is generally one-half. Finally, we note that whether the rental credit is due and the amount thereof is within the sound discretion of the court of common pleas.

Id., 419 Pa. Super. 80, 87-88, 615 A.2d 33, 37 (1992) (citations omitted).[4]

Here, while Wife's occupancy of the marital home clearly had value, neither party ascribed a dollar figure to that value nor was that value compared to the expenses Wife assumed under the support guidelines for payment of the primary mortgage, real estate taxes and homeowners' insurance. **Twilla v. Twilla,** 445 Pa. Super. 86, 99, 664 A.2d 1020, 1027 (1995) (finding waiver where spouse claiming entitlement to one-half of the rental value of the marital residence presents insufficient evidence of what this value is); **Gaydos v. Gaydos,** 693 A.2d 1368, 1377 (Pa. Super. 1997) (upholding deductions from rental value awards for the non-possessing spouse's share of expenses related to preserving the marital residence (**i.e.,**

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[4] In **Butler v. Butler,** the Superior Court discussed the manner in which a credit for the fair market rental value of the marital residence should be applied. Therein, the court stated:

> The fair market rental value of the marital residence cannot be considered a marital asset subject to equitable distribution as it represents revenues that were foregone by the marital estate due to the wife's residence in the property after the parties separated. Therefore, the fair market rental value of the marital home was improperly deemed a marital asset by the trial court, thereby artificially inflating the value of the marital estate. As the wife's share of these foregone potential revenues, which would have been part of the aggregate marital estate, were consumed during her tenure in the marital home; she is not entitled to receive any portion of these foregone revenues. Accordingly, the proper methodology for granting the husband a credit for his share of the foregone fair market rental value of the marital residence is to deduct his share of the foregone revenues from the wife's ultimate distribution of the marital estate.

Id., 423 Pa. Super. 530, 547-48, 621 A.2d 659, 668-69 (1993), **reversed on other grounds,** 541 Pa. 364, 371 n.6, 663 A.2d 148, 152 n.6 (1995).

mortgage, insurance, taxes, maintenance)). Absent evidence to the contrary, we find payment of the household expenses assumed by the guidelines offsets any rental credit to which Husband might otherwise be entitled.

In accordance with the foregoing, because Wife was obligated under the guidelines to pay the 2008 real estate taxes paid by Husband, we believe it appropriate to give Husband full credit for this payment. We also believe it appropriate to allocate Husband's post-separation payments of the home equity loan in the same proportion as the equitable distribution award. **Duff v. Duff,** 510 Pa. 251, 507 A.2d 371 (1986) (between divorcing parties, debts which accrue to them jointly prior to separation are marital debts subject to equitable distribution). This follows from the relative income of the parties and Husband's superior financial position to make payments from which both parties benefit.

Accounting for the Pre-Separation Use of Non-Marital Assets To Purchase and Improve Marital Assets, and To Pay Marital Debt

Husband's next set of exceptions centers on the reasons for and their effect on equitable distribution of using non-marital assets—namely Husband's inheritance—to purchase property titled in both names and in paying marital debt prior to the parties' separation. Specifically, Husband argues that the lot adjacent to the marital home was purchased by him for investment purposes with money from his father's estate with the intent of maintaining this investment as an asset of the estate. According to Husband, it was titled in both parties' names on the advice of his attorney in order to shield it from creditors in the event of personal liability attaching from his professional practice. Husband also claims that he used money from his father's estate to help purchase and improve the marital home, and to pay outstanding amounts owed on the purchase of and annual maintenance for two time-shares owned by him and his wife.

The adjacent lot was purchased in 2003 for $29,995.00 with money Husband received from his father's estate and was titled in his and his wife's name. In doing so, Husband converted a non-marital asset to a marital asset. **Brown v. Brown,** 352 Pa. Super. 267, 507 A.2d 1223 (1986) (property acquired prior to marriage

that is transferred into property in joint names during marriage becomes marital property unless contrary intent is shown, according to **Sutliff, infra,** by a preponderance of the evidence). That Husband did this to shield the property from future creditors is of no moment. Husband cannot have it both ways. He cannot say that for purposes of divorce the property was his alone because he intended it so, yet for purposes of execution it is owned by the entireties and therefore exempt from execution on a judgment entered solely against him. **Sutliff v. Sutliff,** 518 Pa. 378, 387 n.1, 543 A.2d 534, 539 n.1 (1988).

The same reasoning applies to Husband's use of non-marital assets to purchase and improve the marital home, and to pay down debt incurred in the financing of the two time-shares. As to both, the effect was to transform a non-marital asset into a marital one.[5] Nevertheless, the use of non-marital assets to acquire, improve and preserve marital assets is relevant to the equitable distribution of marital property. 23 Pa. C.S.A. §3502(a)(7).

We do agree, however, that the most recent date of valuation of the adjacent lot—January 29, 2009 (Wife's Exhibit 4)—is more appropriate to use for the valuation date than its purchase price in 2003 for $29,995.00. **Sutliff, supra** at 381, 543 A.2d at 536 ("It is implicit ... in the statutory provisions governing equitable distribution that a valuation date reasonably proximate to the date of distribution must, in the usual case, be utilized."). Moreover, the

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[5] Both time-shares were acquired prior to separation and are therefore marital property. **Teodorski v. Teodorski,** 857 A.2d 194, 197 (Pa. Super. 2004) ("Only property acquired 'prior to the date of final separation' is marital property and therefore subject to equitable distribution. 23 Pa.C.S.A. §§3501-02.").

In **Butler v. Butler,** the court further stated:

> Our courts distinguish the date for identifying marital property from the date by which to place a value on marital assets for equitable distribution. **See Adelstein v. Adelstein,** 381 Pa.Super. 221, 553 A.2d 436 (1989); **Sergi v. Sergi,** 351 Pa.Super. 588, 506 A.2d 928, 930-31 (1986). The Divorce Code mandates [that] our courts examine the parties' property as of the date of final separation in order to identify which assets are marital property. **See** 23 Pa.C.S.A. § 3501. In the same vein, this Court has stated that the '[e]xistence and nature of marital property are determined as of the date of separation.' **Adelstein, supra,** 381 Pa.Super. at 225, 553 A.2d at 438. Although marital property is identified at the date of separation, the value of the property is determined at the date of distribution. **Adelstein, supra; Sutliff v. Sutliff,** 518 Pa. 378, 543 A.2d 534 (1988).

Butler, supra at 538-39, 621 A.2d at 664.

only evidence presented of the current value of this property was that presented by Wife's real estate expert. **See Gaydos, supra** (observing that although a fact-finder need not accept the uncontradicted opinion of a valuation expert, if he does not do so, the fact-finder should offer some explanation of the basis on which he sets value where that value varies from the only value given in evidence). Accordingly, in making equitable distribution we value this property at $48,500.00.

Propriety of a 40/60 Division of Marital Assets

Husband's final exception, to which Wife has also excepted, concerns the percentage division of marital assets by the Master between Husband and Wife. Section 3502(a) of the Divorce Code sets forth thirteen factors to be considered when making a decree of equitable distribution. 23 Pa. C.S.A. §3502(a). This list is non-exclusive. Nor is there any defined mathematic weight assigned each factor. Ultimately, the test is one of economic fairness between the parties. **Smith v. Smith,** 439 Pa. Super. 283, 294, 653 A.2d 1259, 1264 (1995). Moreover, in distributing marital assets, the court has "the authority to divide the award as the equities presented in the particular case may require." **Teodorski v. Teodorski,** 857 A.2d 194, 199 (Pa. Super. 2004) (**quoting Anzalone v. Anzalone,** 835 A.2d 773, 785 (Pa. Super. 2003)).

Here, as analyzed by the Master, many of the factors are outcome neutral, neither benefitting nor harming either party.[6] What stands out are the relative incomes and earning capacities of both, the extent of Husband's use of non-marital assets to benefit marital assets, and the substantial inheritance of Husband which has retained its status as a non-marital asset.[7]

[6] In addition to Husband's premarital debt already discussed, at the time of marriage Wife owed approximately $20,000.00 in school loans. This debt was paid during the marriage by monies both parties earned. In addition, Wife began a graduate women's health nurse practitioner program at the University of Pennsylvania in 2004 which she attended one day a week for two semesters. Wife claims that the cost of this program was paid through two loans she obtained, one, a PHEAA loan cosigned by Husband. The other, Wife claims, was paid off by her mother, for which she owes her mother $8,700.00. Wife did not complete the program. Because the Master determined that the amount and terms of these loans were vague and not documented, they were not considered further by the Master. Wife has not excepted to this finding.

[7] Only the increase in value of non-marital property which occurs prior to separation is a marital asset. **Litmans v. Litmans,** 449 Pa. Super. 209, 230, 673

The total value of the marital estate is $399,945.87.[8] Husband's contribution to this estate from non-marital assets—$171,431.00—represents approximately 43 percent of the aggregate net value of the marital estate.[9] That Husband has done so is a factor to be considered in his favor in dividing marital assets. **Lee v. Lee,** 978 A.2d 380, 384-85 (Pa. Super. 2009). On the other hand, Husband's non-marital assets—his separate inheritance—to which Wife has no claim, is significant relative to the value of marital assets: more than double this value.[10] Wife has no comparable separate resource from which to draw. This factor, as well as the marked disparity in the parties' incomes—Husband's net monthly income is almost six times Wife's—argues for a greater division of marital assets to Wife.

A.2d 382, 393-94 (1996). Although the Master determined that this increase in value for real estate which Husband inherited from his father was $81,000.00, because this amount was more than offset by a $117,000.00 loss on investment accounts which Husband also inherited, none of the change in value of this inherited property was subject to equitable distribution. **See** 23 Pa. C.S.A. §3501(a.1).

[8] Contrary to Husband's exception, the Master did not err in not assigning a value of $15,000.00 for household furnishings and goods in his computation of the value of the marital assets. At the time of hearing, Husband readily admitted that the $15,000.00 figure which he placed on these items was speculative and that included in this figure was the value of items owned by Wife prior to marriage. (N.T. 8/18/09, pp. 171-72.) Since this was the only evidence presented on this issue, neither party sustained its burden of proving value, and this personal property, as well as that removed from the marital home by Husband, should remain as distributed by the parties. **See Smith v. Smith,** 439 Pa. Super. 283, 299, 653 A.2d 1259, 1267 (1995), **appeal denied,** 541 Pa. 641, 663 A.2d 693 (1995) (stating if one party disagrees with the other party's valuation, it is his burden to provide the court with an alternative valuation).

[9] This percentage is admittedly a rough estimate since it is unlikely that some of Husband's contributions have retained their original value (**e.g.,** household appliances purchased for $3,899.00; the children's playset purchased for $5,000.00; an outdoor shed purchased for $8,000.00; and $4,500.00 paid to pave the driveway) and also likely that some have increased in value (**e.g.,** $20,450.00 used as a down payment on the marital home). In addition, some of these monies spent by Husband did not accrue directly to the value of the marital estate (**e.g.,** closing costs of $39,587.00; the payment of a $60,000.00 bridge loan). The $171,431.00 figure represents $141,436.00 paid by Husband from his inheritance estate for the purchase and improvements to the marital home and $29,995.00 for the purchase of the adjacent lot.

[10] The most current value of Husband's non-marital assets is $910,540.90. This consists of real estate in Wayne County, Pennsylvania with an appraised value as of March 12, 2009 of $463,000.00, a PNC bank account with a balance of $77,639.39, and two Raymond James accounts with values of $237,614.84 and $159,286.87 respectively.

The Master recommended a 60/40 division of marital assets in favor of Wife. We believe a more equitable division is 65/35 in Wife's favor. This is the first marriage for both parties, and it is one of long duration. While it is true that Husband, who worked continuously during the parties' life together, was the primary means of financial support during the marriage, it is also true that Wife's contributions as a homemaker, spouse and mother cemented the family relationship. In their own way, these contributions to the marriage equally balance that made by Husband. What sets the parties apart is their post-divorce financial circumstances which is to Husband's decided economic advantage. This difference requires an unequal division of marital assets.

The marital assets, their values, and the division of these assets between the parties as determined in our equitable distribution order is set forth in Appendix A to this opinion.[11]

Request for Alimony

Wife claims error because the Master failed to award post-divorce alimony.[12] On this issue, the Master stated:

> The relative needs of [Wife] were not quantified. There was no income and expense statement filed on behalf of [Wife]; there was no itemization of living expenses that would indicate

[11] In anticipation that Wife will likely need to sell or refinance the marital home and adjacent lot in the near future, we also find that the Master correctly reduced the value of both properties by 3.5 percent representing the cost of sale (**i.e.,** one-half of a six percent realtor's commission and a one percent transfer tax). **See** 23 Pa. C.S.A. §3502(a)(10.2). While we agree with Husband's contention that the potential tax implications to both parties are to be **considered** in the equitable division of marital assets regardless of whether the tax ramifications will be direct and immediate as a result of the divorce or equitable distribution of property, or can reasonably be predicted to occur at some future date, the precise language of Section 3502(a)(10.1) of the Divorce Code does not require that a fixed tax liability be computed and **applied** when equitably dividing the marital estate. Here, the expenses which the Master credited to Wife are relatively fixed transactional expenses, rather than, as with Husband's retirement and pension benefits, projected penalties for early withdrawal, which may or may not occur, and an income tax liability which will vary depending on factors such as Husband's gross income, tax bracket and tax rates at the time of withdrawal. Under the circumstances, we are convinced that the deductions made by the Master are fair and just. **See Balicki v. Balicki,** 4 A.3d 654, 663-64 (Pa. Super. 2010).

[12] Wife also contends that by the time of the Master's Amended Report the valuation evidence was stale and should have been supplemented with updated figures. As to this issue, although given the opportunity to present additional testimony at the time the case was remanded to the Master for reconsideration,

an inability to meet her needs on present income. There was no testimony as to the specific needs of [Wife]. However, the Master does note that [Wife] had expensive elective cosmetic surgery.[13]

Although [Husband] clearly had income in excess of [Wife's], [Wife] has an earning capacity at $22.50 per hour that renders her capable of self support. [Wife's] direct testimony is direct and unambiguous; she was not seeking to obtain other employment or better employment but was focused on maintaining her existing employment because she enjoyed the work and the job.

Further, the Master notes that the award of equitable distribution provides a greater share of the marital estate to

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Wife failed to do so. Nor has Wife requested an evidentiary hearing before the Court or alleged any significant change in the parties' circumstances since the master's hearing. Further, notwithstanding the inevitable fluctuation in the value of assets over time, for finality to exist, the record must close at some point in time.

In this case, approximately fifteen months elapsed between the date of the last hearing before the Master and the date Wife's exceptions to the Amended Master's Report were filed. While additional time has again passed since the filing of these exceptions, given that the market risk in owning real estate would likely affect both parties similarly (**i.e.,** Wife with respect to the marital home and adjacent lot, and Husband with respect to the real estate he inherited from his father located in Wayne County, Pennsylvania); that the current volatility in the stock market would likely decrease the value of the non-marital investment accounts Husband inherited from his father (a pre-separation loss in the value of these assets was noted by the Master in his report); that the values Wife seeks to update center on Husband's non-marital assets, to which Wife, at best, would be entitled to claim as a marital asset the increase in value prior to the date of separation—values already of record; and that the overall delay which has occurred since the most recent Master's hearing is approximately two years, rather than a more extensive period; the benefit of finality, contrasted with the minimum likelihood of any appreciable difference in the outcome, counsels against re-opening the record. **Cf. McNaughton v. McNaughton,** 412 Pa. Super 409, 603 A.2d 646 (1992) (finding a four-year delay between the master's hearing and the trial court's decision on equitable distribution required a remand and reevaluation); **Solomon v. Solomon,** 531 Pa. 113, 125-26, 611 A.2d 686, 692-93 (1992) (noting wife's failure to attempt to update the values of marital assets during the pendency of the matter before the trial court and that any potential benefits from revaluing marital assets would be outweighed by the benefits of concluding the matter, supported the exercise of discretion by the Superior Court in refusing to remand the case to the trial court for determination of revised valuations of marital assets).

[13] At the time of hearing, Wife testified to having breast augmentation surgery for which she borrowed $10,000.00.

> [Wife]. In addition to the greater share of value, the character of the assets comprising the award must be considered: [Wife's] award included assets that were easily convertible to cash. The award of the residence, the separate residential building lot are not subject to penalty or income tax upon liquidation. [Husband's] award consisted of tax deferred assets that could only be liquidated at a tax and penalty to [Husband]. Based upon the totality of the circumstances the Master concludes that [Wife] has sufficient assets to provide for her reasonable needs and she is capable of self-support through appropriate employment.

Master's Amended Report, pp. 15-16.

An award of alimony is a secondary remedy under the Divorce Code. It is not intended as a substitute for or a supplement to equitable distribution when the division of marital assets between the parties will itself effectuate economic justice. If this does not occur, an award of alimony may be appropriate. **Teodorski, supra** at 200.

In **Teodorski,** the court stated:

> '[T]he purpose of alimony is not to reward one party and to punish the other, but rather to ensure that the reasonable needs of the person who is unable to support himself or herself through appropriate employment, are met.' Alimony 'is based upon reasonable needs in accordance with the lifestyle and standard of living established by the parties during the marriage, as well as the payor's ability to pay.' Moreover, '[a]limony following a divorce is a **secondary remedy** and is available only where economic justice and the reasonable needs of the parties cannot be achieved by way of an equitable distribution award and development of an appropriate employable skill.'

Id., (emphasis in original). "An award of alimony should be made to either party only if the trial court finds that it is necessary to provide the receiving spouse with sufficient income to obtain the necessities of life." **Balicki v. Balicki,** 4 A.3d 654, 659 (Pa. Super. 2010).

> In determining whether alimony is necessary, and in determining the nature, amount, duration and manner of payment of alimony, the court must consider numerous factors including the parties' earnings and earning capacities, income sources, mental and physical conditions, contributions to the earning power of the other, educations, standard of living during the

marriage, the contribution of a spouse as homemaker and the duration of the marriage.

Teodorski, supra (**quoting Anderson v. Anderson,** 822 A.2d 824, 830-31 (Pa. Super. 2003)). "Necessity is the only requirement in determining the propriety of an alimony award and that necessity is judged by numerous considerations only some of which have to do with the rehabilitation of the recipient spouse." **Zullo v. Zullo,** 395 Pa. Super. 113, 122 n.3, 576 A.2d 1070, 1075 n.3 (1990), **aff'd,** 531 Pa. 377, 613 A.2d 544 (1992).

Here, the parties did not have an extravagant lifestyle. They have four children which itself is an expense and for which Wife receives child support of $1,391.00 per month. While Husband makes a good living, he is not wealthy. At times the parties had difficulty making ends meet and, to some extent, the parties lived beyond their means. They were able to do so because of Husband's inheritance. Neither party, however, presented evidence of extraordinary expenses or needs.

In her brief in support of her exceptions, Wife readily admitted that her separate income supports her needs. (Wife Brief, p. 9.) Wife has a net monthly earning capacity of $1,310.00 and receives $1,391.00 monthly in child support payments. When we consider these circumstances, together with the assets Wife is to receive in equitable distribution, we conclude, as did the Master, that Wife has sufficient assets to provide for her reasonable needs and she is capable of self-support through appropriate employment.

CONCLUSION

Based upon the foregoing analysis we find no abuse of discretion and we accept the Master's recommendation in: (1) denying a fair rental credit to Husband for Wife's use of the marital home; (2) determining that the Husband's pre-separation use of non-marital assets from his inheritance to purchase, improve, maintain and preserve property held by the entireties was a gift to the marriage; (3) denying placing a value of $15,000.00 on the household furnishings and goods retained by Wife and not assigning this amount to Wife for purpose of equitable distribution; (4) reducing the value of the marital home and adjacent lot by the estimated transactional expenses for the sale or refinancing of these properties; and (5) denying Wife's claim for post-divorce alimony. We further find that the lot adjacent to the marital home should be valued at the

most recent value given, that Husband is entitled to full credit for the 2008 real estate taxes paid by him on the marital home and adjacent lot, that a fairer division of marital assets and marital debt is 65/35 in Wife's favor, and that the period of delay between the Master's hearings and this decision does not warrant further hearing to revalue either marital or non-marital assets.

APPENDIX "A"

SUMMARY OF MARITAL ESTATE AND SCHEME OF DISTRIBUTION ORDERED

	ASSET			VALUE FOR EQUITABLE DISTRIBUTION	ASSET DISTRIBUTION	
1	Marital Residence				WIFE	HUSBAND
		FMV	$280,000.00			
		Mortgage*	$ 73,382.79			
		Home Equity*	$ 45,500.85			
		Sale Costs (3.5%)	$ 9,800.00	$151,316.36	$151,316.36	
2	Vacant Lot					
		FMV	$ 48,500.00			
		Sale Costs (2.5%)	$ 1,697.50	$ 46,802.50	$ 46,802.50	
3	Pension (H)	Shuerer Hosp. Value	$ 72,934.84	$ 72,934.84		$ 72,934.84
4	Pension (H)	St. Luke's Hosp. Value	$ 32,767.00	$ 32,767.00		$ 32,767.00
5	NW Ins. (H)			$ 15,589.89		$ 15,589.89
6	NW Ins. (H)			$ 7,901.50		$ 7,901.50
7	NW Ins. (H)			$ 9,995.24		$ 9,995.24
8	IRA (W)			$ 15,640.27	$ 15,640.27	
9	R. James (W)			$ 1,725.26	$ 1,725.26	
10	Team One C.U.			$ 222.15		$ 222.15
11	Phil. FCU		$ 7,383.62			
			$ 664.92	$ 8,048.54		$ 8,048.54
12	PHC (H)			$ 6,658.43		$ 6,658.43
13	NW Ins. Amanda			$ 1,136.69		$ 1,136.69
14	NW Ins. Timothy			$ 1,415.20		$ 1,415.20
15	NW Ins. Matthew			$ 921.00		$ 921.00
16	2002 Chrysler Town & Country Van			$ 2,535.00	$ 2,535.00	
17	2002 VW Jetta			$ 4,225.00		$ 4,225.00
18	Disney Time-Share		$ 9,116.00	$ 9,116.00		$ 9,116.00
19	FantaSea Flagship Time-Share		$ 9,995.00	$ 9,995.00		$ 9,995.00
20	Utility Trailer			$ 1,000.00		$ 1,000.00
21	Healthy Solutions			$0.00		$0.00
22	Healthy Initiatives, Inc.			$0.00		$0.00
	TOTAL			$399,945.87	$218,019.39**	$181,926.48

* The unpaid principal amount on this debt shall be paid by Wife.

** Husband is entitled to be reimbursed from Wife 35 percent of the payments made by him since March 1, 2008 towards the home equity loan. For the period between March 1, 2008 and

September 2009, this amount totals $4,655.00 (**i.e.,** 35 percent of $13,300.00). Also to be added to this amount is $6,416.20 attributable to Husband's payment of the 2008 real estate taxes on the marital home and adjacent lot.

DECREE

AND NOW, this 31st day of August, 2011, Susan Greenfield, Plaintiff and James C. Greenfield, Defendant are divorced from the bonds of matrimony.

The Court enters the following Order with respect to economic claims made:

a. Equitable Distribution

I. Plaintiff is awarded the following assets:

1. Residence situate at 705 Mill Run Road, Lehighton, Pennsylvania and adjacent lot, subject to the existing mortgage and home equity loan. Plaintiff shall pay said obligations as they come due and she shall indemnify and hold Defendant harmless on the account thereof, including all reasonable counsel fees incurred by Defendant resulting from the breach of this obligation by Plaintiff. Plaintiff shall obtain the release of Defendant from the mortgage and home equity loan secured by the property by refinance, release or sale of the property within 120 days from the date of this Decree.

2. Plaintiff's IRA-Raymond James #********.

3. Plaintiff's Raymond James Account #********.

4. 2002 Chrysler van.

5. The balance due Plaintiff of $41,945.43[14] shall be offset by an amount equal to $6,416.20 for Defendant's payment of the 2008 real estate taxes on the marital home and adjacent lot and 35 percent of those monies paid by Defendant since March 1, 2008, for the home equity loan. Defendant shall substantiate the sum(s) paid within thirty days of the date of this Decree. If the offset does not exceed the sum due Plaintiff, Defendant shall remit the sum due within ninety days of the

[14] This figure represents the difference between 65 percent of the total value of marital assets for equitable distribution (**i.e.,** $399,945.87) and the value of those assets identified in Appendix "A" of our Memorandum Opinion of this same date to be distributed to Wife.

date that Defendant tenders to Plaintiff proof of payment(s). If the offset due Defendant is in excess of the sum due to Plaintiff, then the Plaintiff shall remit to the Defendant the sum due to Defendant within ninety days of the date she receives the substantiation of claimed offset.

II. Defendant is awarded all assets identified in Appendix A of our Memorandum Opinion of this same date not specifically herein reserved to Plaintiff.

Each party shall, within ten days of the demand to do so, execute all documents necessary to implement the distribution herein ordered and/or deliver property awarded to the other party.

b. Contribution to counsel fees and costs.

Plaintiff's claim for contribution to counsel fees and costs is denied.

c. Alimony.

Plaintiff's claim for alimony is denied.

d. Record costs/stenographic fees.

Record costs and stenographic fees are allocated as previously ordered.

COMMONWEALTH OF PENNSYLVANIA vs. ALBERT EDWARD BROOKE, Defendant

Criminal Law—Special Probation—Technical Violations—Revocation—Jurisdiction of Sentencing Court To Hear and Decide—Resentencing—Challenge to Discretionary Aspects of Sentencing

1. As a matter of due process, a criminal defendant must be provided prior written notice of the violations alleged before his probation can be revoked.

2. When a defendant is charged with violating the terms of special probation supervised by the Pennsylvania Board of Probation and Parole following a state sentence, the Pennsylvania Code provides for defendant's detention in a county prison and a recommendation by the Board which may result in the revocation of probation and the imposition of a sentence.

3. Notwithstanding that special probation following a state sentence is supervised by the Pennsylvania Board of Probation and Parole, the trial court retains the power, authority, and jurisdiction to assess whether the defendant violated his special probation, to revoke it, and to re-sentence the defendant following a revocation.

4. A defendant subject to special probation may have his probation revoked on technical grounds which occur before the probationary period of defendant's sentence begins.

5. The scope of review in an appeal following a sentence imposed after probation revocation is limited to the validity of the revocation proceedings and the legality of the judgment of sentence.

6. A defendant who challenges a discretionary aspect of sentencing must raise a substantial question with respect to the propriety of the sentence, one which advances a colorable argument that the sentencing court's actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process.

NO. 129 CR 03

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

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

MEMORANDUM OPINION

NANOVIC, P.J.—September 15, 2011

FACTUAL AND PROCEDURAL BACKGROUND

The Defendant, Albert Edward Brooke, has appealed the sentence we imposed on April 25, 2011, following a **Gagnon II** revocation hearing. Defendant was sentenced to not less than one nor more than three years in a state correctional facility with the following special conditions: (1) that he successfully complete the Sexual Offenders Treatment Program offered by the State before being eligible for parole; (2) that he provide a blood sample for DNA testing; (3) that he comply with Megan's Law; and (4) that Defendant's existing sentences for corruption of minors and endangering the welfare of children run consecutive to this sentence as previously provided. In response to our 1925(b) order, Defendant identifies two issues he intends to raise on appeal: (1) that revocation of his probation was not an available remedy and was an abuse of discretion; and (2) that the sentence imposed was unduly harsh and was an abuse of discretion.

On August 11, 2004, Defendant pled **nolo contendere** to one count of aggravated indecent assault, three counts of corruption of minors and three counts of endangering the welfare of a child, all related to the sexual abuse of his stepdaughter and stepson. Under the parties' plea agreement, Defendant was sentenced to an aggregate term of imprisonment in a state correctional facility of four to eight years, followed by four consecutive five-year periods of special probation: five years of special probation for Count 16 (corruption of minors) with an effective date of February 22, 2011;

five years of special probation for Count 17 (corruption of minors) with an effective date of February 22, 2016; five years of special probation for Count 18 (endangering the welfare of children) with an effective date of February 22, 2021; and five years of special probation for Count 19 (endangering the welfare of children) with an effective date of February 22, 2026. The first of these five-year periods of probation was the subject of the revocation proceeding.

The petition to revoke Defendant's probation was filed by the Commonwealth on February 15, 2011. Following the waiver of his **Gagnon I** hearing, Defendant's **Gagnon II** hearing was held on March 31, 2011. Based upon the evidence received, the Court found a violation of Condition 5(c) (requiring that Defendant refrain from assaultive behavior) that occurred on June 26, 2009, and also that Defendant had refused an order and failed to stand count, a misconduct, that occurred on July 31, 2010. (Commonwealth Exhibit 1, Conditions Governing Special Probation/Parole, Condition 5(c)); **see also,** 37 Pa. Code §65.4 (referring to "General Conditions Governing Special Probation and Parole")).

The other violations which the Commonwealth asserted in its revocation petition, thirty-four misconducts, including seven for assaultive behavior, were denied because they occurred prior to the date when Defendant was advised of the conditions of his special probation. Also denied was the alleged violation of Condition 8, that Defendant failed to comply with the requirements associated with lifetime registration under Megan's Law, in that Defendant had not yet been released from prison and had no approved residence to which to move. **See Commonwealth v. Wilgus,** 975 A.2d 1183 (Pa. Super. 2009) **appeal granted,** 605 Pa. 313, 989 A.2d 340 (2010) which held that a homeless person could not be held to have violated the mandate to register under Megan's Law because he had no residence at which to register. In making this latter finding the Court made clear that it was apparent that Defendant had failed to attend and successfully complete the Sexual Offenders Treatment Program, an express condition imposed in the sentencing orders of November 18, 2005, however, Defendant had not been charged with this violation. (N.T. 4/25/11, pp. 14-15.) **See Commonwealth v. DeLuca,** 275 Pa. Super. 176, 183, 418 A.2d 669, 673 (1980) (requiring as a matter of due process that

the defendant be provided prior written notice of the violations). Accordingly, the Court granted the Commonwealth's petition for revocation and imposed the sentence previously stated.

DISCUSSION

Probation As a Remedy

That revocation is available as a remedy when the terms and conditions of probation have been violated is clear. 42 Pa. C.S.A. §9771(b) (providing authority to revoke probation upon proof of violation of specified conditions); Pa. R.Crim.P. 708 (describing the procedure to be followed when a defendant has violated a condition of probation and probation is revoked). To be sure, the scope of review in an appeal following a sentence imposed after probation revocation is limited to the validity of the revocation proceedings and the legality of the judgment of sentence. **Commonwealth v. Gheen,** 455 Pa. Super. 499, 501, 688 A.2d 1206, 1207-1208 (1997). Moreover, when the terms of special probation supervised by the Pennsylvania Board of Probation and Parole are at issue, as they are here, the Pennsylvania Code provides for defendant's detention in a county prison and a recommendation by the Board which may result in the revocation of probation and the imposition of a sentence. 37 Pa. Code §65.3.[1]

Following hearing and receipt of briefs from counsel, we found Defendant violated the terms of probation in two respects, as charged: engaging in assaultive behavior on June 26, 2009, and refusing an order and failure to stand count on July 31, 2010. (N.T. 4/25/11, p. 14.) This finding was supported by the record. (N.T. 3/31/11, pp. 35-36); Commonwealth Exhibit 3.) The testimony also established that because of Defendant's failure to attend and refusal to participate in the Sexual Offenders Program offered by the State, he was removed from the program. (N.T. 3/31/11, p. 39; Commonwealth Exhibit 2.) Defendant was required by both the special conditions of his probation and the sentencing order to

[1] Special probation following a state sentence is authorized by 61 Pa. C.S.A. §6133(a). Although this section provides for probation supervised by the Pennsylvania Board of Probation and Parole, the trial court nevertheless retains the power, authority, and jurisdiction to assess whether the defendant violated his "special" probation, to revoke it and to re-sentence the defendant following a revocation. **Commonwealth v. Mitchell,** 955 A.2d 433, 440-41 (Pa. Super. 2008).

undergo a sexual offender evaluation and follow whatever course of treatment was recommended. (Commonwealth Exhibit 1, Conditions Governing Special Probation/Parole, Condition 8; Sentencing Order, Special Provision No. 2.)

The violations of probation with which Defendant was charged were technical violations. Although they occurred prior to Defendant beginning his term of probation, while Defendant was still incarcerated, the timing of this conduct does not preclude revocation of probation. **Commonwealth v. Hoover,** 909 A.2d 321 (Pa. Super. 2006) (upholding judgment of sentence following revocation of probation on technical grounds which occurred before the probationary period of defendant's sentence began). Moreover, revocation of probation is particularly appropriate when to do so "would not be in subservience to the ends of justice and the best interests of the public, or the defendant. ..." **Id.** at 323 (**quoting Commonwealth v. Wendowski,** 278 Pa. Super. 453, 456, 420 A.2d 628, 630 (1980)). Here, the Court specifically found, based upon the Court's knowledge of the offenses Defendant had committed and his difficulty with sexual matters, that the need for Defendant to successfully complete the Sexual Offenders Program was critical. (N.T. 4/25/11, p. 43.) We would also note that Defendant was previously found by this Court to be a sexually violent predator under Megan's Law. (**See** Order dated October 20, 2005.)

Propriety of Sentence

The offense with which Defendant was found to have violated probation, corruption of minors, is graded as a misdemeanor of the first degree. 18 Pa. C.S.A. §6301(a)(1). As such, the maximum penalties that can be imposed are a period of imprisonment not to exceed five years and a fine not to exceed $10,000.00. 18 Pa. C.S.A. §§1101(4) and 1104(1). Moreover, the sentencing guidelines are inapplicable for sentences imposed as a result of violating the terms and conditions of probation. 204 Pa. Code §303.1(b).

The sentence we imposed, one to three years, is within the statutory confines. It concerns a discretionary aspect of sentencing and violates no rule or fundamental principles of sentencing of which we are aware. **Commonwealth v. Phillips,** 946 A.2d 103, 112 (Pa. Super. 2008) (noting that when challenging the discretionary aspect of a sentence, the defendant must raise a substantial

question with respect to the propriety of the sentence, one which "advances a colorable argument that the sentencing judge's actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process."). The sentence was appropriate and just and, most importantly, seeks to have Defendant successfully complete the Sexual Offenders Program which this Court believes is critical to Defendant's rehabilitation and the safety of the public.

CONCLUSION

Our decision to revoke Defendant's probation and to re-sentence him to a period of imprisonment is based upon the evidence of record and is appropriate under the circumstances. Accordingly, for the reasons stated, we respectively ask the Superior Court to affirm that decision and deny the appeal.

IN RE: ESTATE OF EARL L. MILLER, DECEASED

Civil Law—Decedent's Estate—Prenuptial Agreement—Enforceability of Waiver of Spousal Right To Elect Against Will—Use of Jointly-Owned Assets—Failure of Consideration—Burden of Proof

1. A surviving spouse's waiver of her right to take against her husband's will contained in a prenuptial agreement must be supported by valuable consideration to be valid and enforceable.

2. Where the consideration supporting a surviving wife's waiver of her statutory right to elect against decedent's will is decedent's promise to provide her with the sum of $20,000.00 through jointly-owned property upon his death, the source of the monies or funds used in the acquisition of such jointly-owned property must be from the decedent. Were this is not the case, reliance on jointly-owed assets alone to fulfill decedent's promise would result in a failure of consideration.

3. A surviving spouse under a prenuptial agreement with the decedent, pursuant to which the decedent has assumed certain obligations which the surviving spouse claims have not been performed, is a creditor of the decedent's estate, and not an heir.

4. When the surviving wife claims decedent failed to perform his obligations under the parties' prenuptial agreement by failing to provide wife with the consideration contemplated and bargained for in the prenuptial agreement—here, the existence at the time of death of jointly-owned property having a value of $20,000.00 funded by husband—the burden of proving a failure of consideration—in this case, the source of funding for the jointly-owned property—is upon the wife.

NO. 06-9200

EDMUND J. HEALY, Esquire—Counsel for Executor.
VANCE E. MEIXSELL, Esquire—Counsel for Objector.

MEMORANDUM OPINION

NANOVIC, P.J.—September 12, 2011

In these estate proceedings, the surviving spouse of Earl L. Miller sought initially to void the parties' prenuptial agreement and to take against her husband's will. Having previously ruled that the prenuptial agreement was facially valid and enforceable, and that enforcement of the agreement was not barred for failure of consideration, the remaining issue before us is whether the testator performed his obligations under the prenuptial agreement prior to his death.

FACTUAL AND PROCEDURAL BACKGROUND

Earl L. Miller ("Decedent"), died on May 12, 2006, survived by his wife, Doris E. Miller ("Wife"), and two sons from a former marriage. Prior to their marriage on November 12, 1994,[1] Decedent and Wife executed a prenuptial agreement dated September 16, 1994 (hereafter referred to as both the "Prenuptial Agreement" and "Agreement"). Therein, both agreed to waive, release and relinquish any and all rights to share in the other's property as a surviving spouse, or otherwise, including but not limited to the right as a surviving spouse to take against the other's will. In further consideration, the Agreement provided, **inter alia:**

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

(Prenuptial Agreement, Paragraph 9.)

Decedent's Last Will and Testament was executed on February 20, 2002 and probated on June 8, 2006. The Fifth Clause of this Will provides:

> I direct that my executor(s) distribute the sum of Twenty Thousand Dollars ($20,000.00) to Doris E. Snyder Miller who is my wife. Said sum may come from jointly-owned property

[1] This was the second marriage for each.

> and/or from the assets of my Estate so long as the total amount of property she receives upon my death is worth Twenty Thousand Dollars ($20,000.00).

(Decedent's Last Will and Testament, Fifth Clause.) On August 11, 2006, pursuant to 20 Pa. C.S.A. §2203 (Right of Election; Resident Decedent), Wife filed an election to take a one-third share of Decedent's Estate.

On February 4, 2008, the Executors of the Estate, Decedent's two sons, who are also the primary beneficiaries under the Will, filed a First and Final Formal Account on behalf of the Estate. Therein, the Executors claimed that Wife's election filed against the Will constituted a violation and breach of the provisions of the Prenuptial Agreement. The Account presented by the Executors set forth various property jointly owned by the Decedent and Wife at the time of Decedent's death which was claimed to be in satisfaction of Decedent's obligations under Paragraph 9 of the Prenuptial Agreement.

Wife filed objections to the Estate Account on April 2, 2008 and supplemental objections on April 4, 2008. These objections, which consisted of twelve counts and eighty-one numbered paragraphs, have all been resolved with the exception of one: whether Decedent fulfilled the terms of the Prenuptial Agreement by providing Wife with the sum of $20,000.00 through jointly-owned property at the time of his death.[2] The jointly-owned property and date of death values listed in the Executors' Account are as follows:

[2] **See** orders dated January 13, 2009 (narrowing the issues to the validity and enforceability of the Prenuptial Agreement, together with the parties' respective claims for the award of attorney fees thereunder, and a question whether certain property was a fixture, and therefore part of the residential real estate belonging to the Estate, or personal property to which Wife was entitled); June 26, 2009 (denying Wife's challenge to the facial validity of the Prenuptial Agreement, **citing Simeone v. Simeone,** 525 Pa. 392, 403, 581 A.2d 162, 167 (1990) (holding that where a prenuptial agreement states that each party has made full disclosure to the other, the agreement is presumptively valid with the burden upon the challenging party to rebut the presumption by an assertion of fraud, or misrepresentation or otherwise)); and July 20, 2010 (documenting that the issue of whether certain property was either a fixture or personal property was no longer in question and that the sole remaining issue was whether the Decedent had fulfilled his obligation under Paragraph 9 of the Prenuptial Agreement).

2005 Subaru Forester XS SUV Automobile	$17,230.00
AIG Income Funds of America Class C	$ 4,270.95
AIG Capital Income Builder Class C	$ 4,396.75
AIG Cash Management Trust of America Class A	$ 3,047.48
M&T Bank Class Checking Account	$ 6,874.03
Total	$35,819.21

(**See** First and Final Account, Statement of Proposed Distribution, p. 3.)[3] That this jointly-owned property existed at the time of death is not in dispute.

The Estate claims in its proposed schedule of distribution which accompanied the First and Final Account that these properties satisfy Decedent's obligation under Paragraph 9 of the Prenuptial Agreement. To fulfill this obligation, however, the Court has previously determined that not only must the jointly-owned property have been acquired or created after the parties' marriage, but also that the source of the monies or funds used in the acquisition of such jointly-owned property must be from the Decedent. (Court Order dated July 20, 2010.)[4] Wife concedes that at the time of

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[3] Pursuant to Paragraph 3 of the Prenuptial Agreement, non-titled personal property acquired by the parties after marriage is presumed to be joint marital property not subject to the terms of the Agreement. Included in this category is that jointly-owned personal property described in the First and Final Account of the Estate as having a value of $6,230.00. (First and Final Account, Statement of Proposed Distribution, p. 4.) Accordingly, this amount has not been counted by us in deciding Decedent's performance under Paragraph 9 of the Agreement.

[4] Were this not the case, reliance on the jointly-owned assets alone would result in a failure of consideration. **Cf. Levine Estate,** 383 Pa. 354, 118 A.2d 741 (1955). The facts and holding in **Levine Estate** were summarized by the Superior Court in **Harrison Estate,** as follows:

> [W]hen a party to an antenuptial agreement fails to perform his promises, consideration for the agreement fails, and the survivor may claim her statutory rights. The agreement there provided that Mrs. Levine would waive all rights in her husband's estate in return for his promise to leave her, by will, one-half of a checking account maintained in his name. Following her husband's death, the widow elected to take against the will even though it left her one-half of the account. This Court held that because half of the funds in the account were derived from property owned individually by Mrs. Levine, there was a failure of consideration.
>
> 'Since Flora Levine did not receive the consideration contemplated and bargained for in the agreement of December, 1949, she is released from any assumed obligation owing from her in that same agreement; and she is thus not barred from electing to take against her husband's will.'

Id. 456 Pa. 356, 360-61, 319 A.2d 5, 7-8 (1974).

signing the Prenuptial Agreement there were no jointly-owned assets and has stipulated that such assets became jointly-owned after the parties' marriage. (Objections to Account, Paragraph 47; N.T. 5/7/10, pp. 11, 13-14.) Therefore, resolution of the question whether Decedent has fulfilled his obligation under Paragraph 9 of the Prenuptial Agreement through the creation of jointly-owned property is dependent on the source of the funds used to acquire and create these assets.

DISCUSSION

Ultimately, the basic question we must decide is whether Wife is entitled to be paid $20,000.00 from probate assets. If the jointly-owned property identified in the Estate accounting was funded by Decedent, then the obligation imposed on Decedent under Paragraph 9 of the Prenuptial Agreement has been satisfied and Wife is entitled to no further payment. If, however, this property was not funded by Decedent, then pursuant to the Fifth Clause of Decedent's Will, Wife is entitled to be paid $20,000.00 by the Estate.

At the time of the hearing scheduled on October 25, 2010, specifically to address this issue, neither party was prepared to present any evidence as to who funded the jointly-owned property. (**See** Order dated July 20, 2010.) Both contended that the burden of proof was upon the other and requested that we decide this issue before rescheduling the matter for hearing. We agreed to do so.

Procedurally, this case is closely aligned with that in **In re Estate of Hess,** 425 Pa. Super. 280, 624 A.2d 1073 (1993). In **Hess,** the decedent's will was duly probated, his widow filed an election to take against the will, and both the executor of the decedent's estate and the beneficiaries under his will filed a petition to vacate this election because of a postnuptial agreement wherein the surviving spouse waived her statutory rights in the estate. In the instant case, Decedent's will was probated, Wife filed an election to take against the will, and the Estate filed a petition for adjudication and distribution in the form of a first and final formal account raising the Prenuptial Agreement as a bar to this election. **See** 20 Pa. C.S.A. §762 (Accounts). That **Hess** involved a postnuptial agreement and the present case concerns an antenuptial agreement is of no moment: both claims are premised on the law of contracts. **Simeone v. Simeone,** 525 Pa. 392, 400, 581 A.2d 162, 165 (1990)

(antenuptial agreement); **Levine Estate,** 383 Pa. 354, 356-57, 118 A.2d 741, 742-43 (1955) (postnuptial agreement).

In **Hess,** the bargained-for exchange of the spouse's waiver of her statutory right to inherit included decedent's purchasing and maintaining a life insurance policy, with a minimum death benefit of $50,000.00, with his wife as beneficiary. Such a policy was purchased and maintained, however, at the time of decedent's death the insurance company refused to honor the policy claiming that decedent's physical and mental health was misrepresented in the application. Rather than litigate the insurer's denial of coverage, wife elected to claim against her husband's will asserting that due to the insurance company's refusal to pay, the post-nuptial agreement was unenforceable for failure of consideration.[5]

In **Hess,** after discovery was completed, both the estate and decedent's widow moved for summary judgment. The trial court denied the widow's motion and granted that of the estate. In reversing and remanding for further proceedings, the Superior Court held that there existed an unresolved issue of material fact which prevented the grant of summary judgment in favor of either party: the court could not determine from the record before it whether decedent had in fact defrauded the insurance company, thereby rendering the policy void and resulting in a failure of consideration, as claimed by wife, or whether the policy was properly secured by decedent and enforceable against the insurance company, thereby providing the consideration bargained for in the parties' post-nuptial agreement. Until the validity of the policy was litigated,

[5] In **In re Estate of Hess,** the court distinguished between a failure of consideration and a lack of consideration as follows:

> When the consideration for a promise wholly fails, the promise is held not judicially enforceable. As stated by Professor Corbin, a failure of the consideration does not mean lack of consideration; nor does it often mean that the promise, now unenforceable, was never a valid contract. It does mean, on the other hand, that a performance for which the promisor bargained has not been rendered; in many cases, though not in all, that failure is a good legal excuse for his refusal to perform his own promise ... .

Id. 425 Pa. Super. 280, 283, 624 A.2d 1073, 1074-75 (1993). As noted in **Hess,** the Pennsylvania Supreme Court held in **Harrison Estate, supra,** that "when a party to an antenuptial agreement fails to perform the promises agreed upon, there is a failure of consideration, and the surviving spouse need not accept a substituted performance by the executor but may assert her claims against the decedent's estate." **In re Estate of Hess, supra** at 282-83, 624 A.2d at 1074.

whether in a separate action or in the estate proceedings, the court was unable to decide, as a matter of law, whether there was or was not a failure of consideration. Significantly, albeit in **dicta,** the court stated that if the issue were litigated in the estate proceedings, the burden of proving a failure of consideration would be on the widow. **Id.** at 284, 624 A.2d at 1075.

The instant case does not involve a failure of consideration since, in the event the jointly-owned property was not funded by Decedent, Decedent's Will provides alternatively for payment of the amount owed to Wife out of probate assets which are more than sufficient to meet this obligation. Nevertheless, with respect to the burden of proving the source of funding for the jointly-owned property, we see no distinction between this and the burden imposed on Hess' widow to show that the policy was fraudulently obtained. Here, even more so than in **Hess,** Wife is in a better position than the Estate to know and prove the source of the payments for these properties. **Barrett v. Otis Elevator Company,** 431 Pa. 446, 452-53, 246 A.2d 668, 672 (1968) ("If the existence or non-existence [sic] 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.").[6]

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[6] On the issue of allocating the burden of proof, in **O'Neill v. Metropolitan Life Insurance Company,** the Pennsylvania Supreme Court stated:

> The fundamental principle is that the burden of proof in any cause rests upon the party who as determined by the pleadings or the nature of the case asserts the affirmative of an issue, ... One alleging a fact which is denied has the burden of establishing it. ... The affirmative of an issue, as thus used, includes any negative proposition which the person asserting the affirmative may have to show.

Id., 345 Pa. 232, 239, 26 A.2d 898, 902 (1942). In the same opinion, the court further stated:

> It is often said that the burden is upon the party having in form the affirmative allegation. But this is not an invariable test, nor even always a significant circumstance; the burden is often on one who has a negative assertion to prove; **a common instance is that of a promisee alleging non-performance of a contract.** Another example is found in actions for malicious prosecution where a plaintiff must show want of probable cause for his having been prosecuted.

Id. at 241, 26 A.2d at 903 (emphasis added) (quotation omitted). As applied to the instant proceedings, it was Wife who initially filed her election against Decedent's Will, in effect claiming the Prenuptial Agreement was non-binding on her, and Wife who now claims Decedent did not fund the jointly-owned property to which she succeeded on Decedent's death.

Moreover, Wife's status in this litigation is that of a creditor. **Matter of the Estate of Barilla,** 369 Pa. Super. 213, 222, 535 A.2d 125, 130 (1987) ("An antenuptial agreement establishes the surviving spouse as a creditor of the deceased spouse's estate rather than as an heir."); **see also, In Re Estate of Blumenthal,** 812 A.2d 1279, 1290 (Pa. Super. 2002) (stating that when "a testator in his will gives specified property or a share of his estate in exact or substantial compliance with the terms of his obligations under an inter vivos property settlement [or antenuptial agreement] made with his wife, **that wife is a creditor** of his estate and not a legatee under his will."). As a creditor claiming non-payment, the burden of production is upon Wife to show that the jointly-owned assets she received were not funded by Decedent. **East Texas Motor Freight Diamond Division v. Lloyd,** 335 Pa. Super. 464, 473, 484 A.2d 797, 801 (1984) ("The burden of proof in a contract action is upon the party alleging breach or default.").

CONCLUSION

In this case, Decedent agreed to make provisions in either his Will or through jointly-owned property to provide Wife with the sum of $20,000.00 upon his death. While this obligation has been met one way or another, because the source of funding for the jointly-owned assets created after the parties' marriage is in dispute, we are unable to determine whether the obligation has been fulfilled through jointly-owned assets, through Decedent's Will, or through a combination of both. As to this issue, the burden of establishing that Decedent was not the source of the funds for that property jointly owned by Decedent and his Wife at the time of Decedent's death is upon Wife.

TODAY'S HOUSING, INC., Plaintiff vs. SCHLEICHER'S MOBILE HOME SALES, INC., Defendant

Civil Law—Creditor's Rights—Claim for Exemption—Employee's Wages—42 Pa. C.S. Section 8127

1. As a general rule, Section 8127(a) of the Judicial Code provides that "[t]he wages, salaries, and commissions of individuals shall while in the hands of the employer be exempt from any attachment, execution or other process" with enumerated exceptions.

2. The purpose of the exemption provided by Section 8127(a) of the Judicial Code is to protect an employee's earnings from execution to secure to the workman and his family the monies to which he is entitled.

3. Monies deposited in an employer's business checking account for the payment of wages and salaries due and owing its employees are exempt from attachment under Section 8127 of the Judicial Code. This exemption is not limited to attachment by creditors of the employee but applies equally to attachment by creditors of the employer of monies due the employee which are still in the hands of the employer.

NO. 08-0491

JAMES E. GAVIN, Esquire—Counsel for Plaintiff.

STEPHEN A. STRACK, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—September 16, 2011

Today's Housing, Inc., Plaintiff, has appealed our decision granting Schleicher's Mobile Home Sales, Inc.'s ("Employer") Claim for Exemption under 42 Pa. C.S. §8127. This statute shelters from attachment an employee's wages while in the hands of the employer.

FACTUAL AND PROCEDURAL HISTORY

On March 10, 2011, a judgment in the amount of $18,411.77, plus interest at the legal rate of six percent per annum from November 23, 2005 until September 21, 2010 was entered against Employer and in favor of Today's Housing. This judgment which resulted from a breach of contract was obtained following a non-jury trial held on September 16, 2010. A verdict in Today's Housing's favor was entered on September 21, 2010.

Subsequently, a writ of execution was issued on April 6, 2011 seeking, **inter alia,** to attach any of Employer's property in the possession of First Niagara Bank ("Bank"), as garnishee. This writ was served on the Bank on or about April 6, 2011. On April 13, 2011, Employer filed a claim for exemption with respect to a checking account in its name at the Bank with a balance of $9,722.82. Specifically, Employer argued that this account contained monies due and owing its employees for wages earned and that such funds are exempt from attachment under 42 Pa. C.S. §8127.

A hearing on Employer's claim was held on April 18, 2011. At the hearing, Employer's bookkeeper and administrative assistant testified that Employer maintains a business checking account at the Bank and that the then current balance was $9,722.82. Employer's corporate payroll is deposited into and paid out of this

account with the most recent deposit for payroll purposes made on April 6, 2011, in the amount of $9,300.00. This deposit was intended to cover the pay period ending April 10, 2011. While this account is not used exclusively for payroll purposes, Employer's witness further testified that of the balance in the account at the time of attachment, $8,645.05 was deposited and reserved for the payment of wages and salaries earned by its employees.[1] No evidence was offered to the contrary. It is these monies which are claimed to be exempt by Employer pursuant to 42 Pa. C.S.§8127.

An order granting the exemption was entered on April 20, 2011. This order exempted from attachment only those monies in the account to be paid as wages to employees, $8,645.05, with the balance to be paid to Today's Housing.

On May 9, 2011, Today's Housing filed its appeal. In response to our 1925(b) order, Today's Housing identified the following issue on appeal:

> WHETHER THIS HONORABLE TRIAL COURT ERRED BY GRANTING DEFENDANT'S CLAIM FOR EXEMPTION FROM EXECUTION PURSUANT TO 42 PA.C.S.A. 8127(A), IN THAT SUCH EXEMPTION APPLIES ONLY TO PROTECT THE EMPLOYEE DEBTOR, AND IS INAPPLICABLE WHERE THE DEBTOR IS AN EMPLOYER?

DISCUSSION

At the hearing, Today's Housing claimed that Section 8127(a) applies as an exemption from attachment only when an employee is the judgment debtor. Today's Housing further contends that the exemption does not apply when the employer is the judgment debtor as in the instant case. These contentions notwithstanding, the restrictions Today's Housing seeks to impose on the exemption claimed do not appear in the statute.

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[1] The manner in which this figure was computed by the witness, while unclear from the record, is the figure Employer's bookkeeper testified was the amount owed by Employer to its employees for services rendered. (N.T. 4/18/11, pp. 13, 15.) It is important to note, however, that the accuracy of this figure is neither the issue on appeal, nor the issue argued to the court at the time of hearing. Rather, Today's Housing's position at the time of hearing, as it is on appeal, is that "Section 8127 applies in a situation where [the] judgment debtor is an employee. It does not apply when the judgment debtor is the employer, [as] in this case." (N.T. 4/18/11, p. 21.)

As a general rule, Section 8127(a) provides that "[t]he wages, salaries, and commissions of individuals shall while in the hands of the employer be exempt from any attachment, execution or other process" with enumerated exceptions. The obvious purpose of this exemption is to protect earnings from execution to secure to the workman and his family the monies to which he is entitled. **See Jefferson Bank v. J. Roy Morris and Scanforms, Inc.,** 432 Pa. Super. 546, 552, 639 A.2d 474, 477 (1994), **appeal denied,** 538 Pa. 658, 648 A.2d 789 (1994); **see also, State Farm Mut. Auto. Ins. Co. v. Am. Rehab. & Physical Therapy, Inc.,** 2009 WL 2096274 *6 (E.D. Pa. 2009) (holding that the exemption operates "to secure to the laborer the earnings of his own personal labor"), **affirmed,** 376 Fed. Appx. 182 (3d Cir. (Pa.) 2010). None of the exceptions to this basic premise which appear in Section 8127(a) limit the general rule in the manner requested by Today's Housing.

The principal objective of statutory interpretation is to ascertain and effectuate the intention of the legislature. 1 Pa. C.S. §1921(a). "The basic tenet of statutory construction requires a court to construe words of the statute according to their plain meaning." **Commonwealth v. Heberling,** 451 Pa. Super. 119, 122, 678 A.2d 794, 795 (1996). "When the words of a statute are clear and unambiguous, a court cannot disregard them under the pretext of pursuing the spirit of the statute." **Id.** A statute which is clear and unambiguous on its face is to be construed by what it says, not by what one or more of the parties believe it was intended to say or should have said.

We respectfully submit that the plain language of the statute and case law interpreting the statute show that the purpose of this exemption is to protect the wages of employees. The statute makes no distinction between whether the debt owed and being executed upon is that of the employee or of the employer. Nor has Today's Housing provided any case law holding contrary to our understanding of the statute. Contrary to Today's Housing's position, we read the statute as giving priority to the payment of wages, salaries and commissions which are due and payable to an employee for services rendered from monies set aside for this purpose before the payment of other creditors of the employer. The statute does not simply protect an employee against the attachment of wages by his creditors. **Cf. Eastern Lithography Corp. v. Silk,** 203 Pa.

Super. 21, 198 A.2d 391 (1964) (noting that the main purpose of the Act is to protect compensation for labor).[2]

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[2] Although **Eastern Litho.** was decided under a former wage exemption statute since repealed—Section 5 of the Act of April 15, 1845, P.L. 459, 42 P.S. §886—the language in the proviso of this prior statute was similar to the language which now appears in 42 Pa. C.S. §8127(a). The former statute provided:

> If the garnishee in his answers admits that there is in his possession or control property of the defendant liable under said act to attachment, then said magistrate may enter judgment specially, to be levied out of the effects in the hands of the garnishee, or so much of the same as may be necessary to pay the debt and costs: **Provided however, That the wages of any laborers, or the salary of any person in public or private employment, shall not be liable to attachment in the hands of the employer.**

(Emphasis added.) Under this statute, two closely related questions were involved: "(1) [w]hether the money in the hands of the garnishee falls within the legislative designation of monies exempt from attachment; and (2) whether the garnishee may properly be considered the employer of the defendant." **Eastern Lithography Corp. v. Silk,** 203 Pa. Super. 21, 24, 198 A.2d 391, 393 (1964).

In contrast, under the language of the present statute, the two questions involved are: (1) whether the money which is the subject of attachment constitutes wages or salaries within the meaning and objectives of the statute; and (2) whether such monies are "in the hands of the employer." In this case, we do not believe the first question is in dispute, nor has the second been raised as an issue. Although we are unaware of another court of this Commonwealth deciding a case similar to this, monies deposited in a bank account in the employer's name remain subject to the control of the employer and are, in a figurative sense, if not literally, "in the hands of the employer."

In **Wagner-Taylor Co. v. McDowell,** 137 Pa. Super. 425, 9 A.2d 144, 145 (1939), the court stated that "[i]n interpreting the Act of 1845, 42 P.S. §881 **et seq.,** the courts have been uniform in extending its provisions to protect and assist the wage earner in obtaining the fruits of his labor without interference from creditors." There, in construing the phrase "in the hands of the employer" in favor of an employee and against a creditor of the employee seeking to attach monies from the estate of a shareholder of the corporate employer by whom the employee was employed—at the time a shareholder was personally liable as a guarantor for the payment of an insolvent corporation's employees' salaries and wages—the court stated:

> We believe that the words as set forth in the Act of 1845, 'in the **hands** of the **employer'**, are placed there solely to limit the **exemption** to those cases only in which the employe has not as yet received his wages or they have not come under his control. If those words were not in the statute a workman might obtain payment of his wages, deposit the same in his **bank account**, and contend that the moneys so deposited were **exempt** from attachment by the creditor by reason of the provisions of the Act of 1845.

Id. at 146. Since in **McDowell,** the wages due the employee had never reached his hands, they were held exempt from attachment under the Act of 1845. The court reasoned as follows: "If, therefore, for the purpose of enabling the wage earner to obtain his wages, the stockholder is considered the employer, the wages due [the employee] are still 'in the hands of the employer.'" **Id.** at 146. In

CONCLUSION

The interpretation and application of a statute is a question of law. Here, the statute upon which Employer bases its claim for exemption is clear and unambiguous in giving priority to an employee of the payment of his wages, salary and commission above that of other creditors. It is these wages, salaries and commissions which were exempted in our order of April 19, 2011. Accordingly, we respectfully ask that our decision be affirmed and the appeal denied.

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so holding, the court further stated that "the Act of Assembly exempting wages from attachment should not be construed so as to defeat the manifest intention of the legislature." **Id.** at 145.

NICOLE L. FINK, Plaintiff vs. JOSHUA J. FINK, Defendant

Civil Law—Child Custody—Uniform Child Custody Jurisdiction and Enforcement Act—Subject Matter Jurisdiction—Intercounty Application—Waiver—Contempt

1. As between different states, Section 5421 of the Uniform Child Custody Jurisdiction and Enforcement Act, 23 Pa. C.S.A. §5421, concerns subject matter jurisdiction, that is "the competency of a given court to determine controversies of a particular class or kind to which the case presented for its consideration belongs."

2. Section 5471 of the Uniform Child Custody Jurisdiction and Enforcement Act, 23 Pa. C.S.A. §5471, incorporates the interstate jurisdictional provisions of Section 5421 and applies them to the allocation of jurisdiction and functions between and among the courts of common pleas of this Commonwealth. In doing so, Section 5471 establishes and defines subject matter jurisdiction for the counties of this Commonwealth to hear and decide child custody matters.

3. Subject matter jurisdiction is beyond the control of the parties and cannot be acquired by estoppel, waiver or consent.

4. Under the Uniform Child Custody Jurisdiction and Enforcement Act, home jurisdiction has exclusive priority over and is not merely preferable to other forms of jurisdiction. The Uniform Child Custody Jurisdiction and Enforcement Act expressly provides that jurisdiction based on "significant contacts" can only be exercised if another county does not have "home county" jurisdiction, or if such jurisdiction exists, the home county has declined to exercise its jurisdiction.

5. Where an issuing court is without subject matter jurisdiction, a party may not be held in contempt of court for ignoring an order or decree of that court.

NO. 11-0477

CICI STAFIUC, Esquire—Counsel for the Plaintiff.

STEVEN R. MILLS, Esquire—Counsel for the Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—October 18, 2011

Nicole L. Fink ("Mother") and Joshua J. Fink ("Father") are the parents of two children ("Children"): a daughter ("Daughter"), age 7 (DOB 9/12/04), and a son ("Son"), age six (DOB 8/18/05). Mother filed a complaint for primary custody of the Children in this county on February 28, 2011. At issue is whether this Court has jurisdiction to decide the Mother's claim and, if not, whether the jurisdictional issue has been waived by Father.

PROCEDURAL AND FACTUAL BACKGROUND

Mother and Father separated in January 2010. At the time, Mother and Father were living with the Children at a home in Bath, Northampton County, Pennsylvania, owned by Father's grandmother. Father's grandmother and great-grandmother were also living in this home. Upon separation, Father remained with Son at his grandmother's home, and Mother moved with Daughter to the maternal grandmother's home, also in Northampton County.

Between January 2010 and October 2010, the Children continued living in Northampton County: at first, Son with Father and Daughter with Mother (January 2010 through March 2010); at times, both with Mother (March 2010 until the summer of 2010); later, on alternating weeks between Mother and Father (summer of 2010); and then, both with Father (August 2010 through October 2010). On or about October 8, 2010, Daughter was again living with Mother who now resided in Allentown, Lehigh County, Pennsylvania, with Mother's half-sister and the maternal grandmother. Father and Son continued living with Father's grandmother in Bath. However, in late October, early November 2010, Father moved to Honesdale, Wayne County, Pennsylvania, to live with his girlfriend. When this occurred, Son remained with Father's grandmother at her home in Northampton County, where he lived—except for approximately three weeks which were spent with Father in Wayne County—until late March 2011, when he rejoined Mother, Daughter and maternal grandmother who, by this time, were living in Carbon County. Around this same time, Father returned from Wayne County and again began living in Northampton County with his grandmother at her home.

Mother, Daughter and maternal grandmother moved to Nesquehoning, Carbon County, Pennsylvania, from Lehigh County in early February 2011.[1] By the end of March 2011, both Children were enrolled and attending school in the Panther Valley School District. In May 2011, a dispute arose between Mother and maternal grandmother, and Mother moved to Lehighton, Carbon County, Pennsylvania. On May 23, 2011, Mother arranged for the Children to temporarily reside with Father at his grandmother's home while she readied her new home for the Children. Since then, Father has refused to return the Children to Mother. On July 21, 2011, Mother moved to Lansford, Carbon County, Pennsylvania, where she presently resides with her girlfriend. The maternal grandmother continues to live in Nesquehoning.

On April 18, 2011, a conciliation conference was held on Mother's custody complaint. Neither party was represented by counsel. Following this conference, an interim order dated April 19, 2011, was entered on the recommendation of the hearing officer. Under this interim order, primary physical custody of both Children was placed with Mother, with Father having partial periods of physical custody every other weekend during the school year. During the summer months, custody was to alternate weekly between the parents. In this order, a custody hearing before the Court was set for August 10, 2011.

On July 5, 2011, Mother filed a petition seeking to hold Father in contempt of the April 19, 2011 interim order. In her petition, Mother alleged Father failed to return the Children following his partial period of physical custody which ended on May 25, 2011. A hearing on this petition, as well as a second petition for contempt filed by Mother on July 12, 2011, was scheduled for August 10, 2011.

[1] Previously, Mother and Father lived in Lansford, Carbon County, Pennsylvania, together with the Children, for approximately one year, between January 2008 and January 2009. During this time, Daughter was enrolled in the Head Start Program in Coaldale, Schuylkill County, Pennsylvania, and the family began using—and still uses—Dr. Gajula, whose office is located in Carbon County, as the Children's pediatrician. In addition, at some time before the Children's birth, Mother and Father lived in Summit Hill, Carbon County, Pennsylvania. Although not asked directly, Mother appears to have been raised in Carbon County and also has a number of relatives living in this county.

On July 11, 2011, Father, now represented by counsel,[2] filed a petition to modify the interim custody order, asserting that Mother had dropped the Children off with him on May 23, 2011, and abandoned them. On the same date, July 11, 2011, Father also filed a petition to relocate, alleging that he had relocated to his grandmother's home in Bath on or before May 23, 2011. Both petitions were scheduled for hearing on August 10, 2011.

At the hearing on August 10, 2011, the above-referenced dates and residences of the parties and Children were first brought to the attention of the Court.[3] When it became apparent during the course of this proceeding that a jurisdictional issue existed, the Court **sua sponte** raised this question and provided both parties with an opportunity to fully develop the record on this question. The Court also requested the parties brief the issue which has been done.

DISCUSSION

The question of which county has jurisdiction over these proceedings is complicated. While the parties' Son lived in Northampton County during the six-month period immediately preceding the commencement of these proceedings, much of this time was spent with his paternal great-grandmother since Father was living in Wayne County. Similarly, while Daughter lived in Northampton County in September 2010 with her Father and brother, for the next four months she lived in Lehigh County with Mother, before moving to Carbon County in February 2011. None of the parties or their Children lived in Lehigh County at the time this action was commenced.

We begin our analysis by reference to Section 5421 of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), 23 Pa. C.S.A. §§5401-5482, and the definition of home state contained in that statute. Section 5421 states:

> (a) **General rule.**—Except as otherwise provided in section 5424 (relating to temporary emergency jurisdiction), a court of this Commonwealth has jurisdiction to make an initial child custody determination only if:

[2] Counsel for Mother entered her appearance on August 3, 2011.

[3] Other than the residences of the Children at the time the complaint was filed, Mother's custody complaint did not distinguish between the different locations at which the parties' children had separately resided, or the dates when Father lived in Wayne County separate from his Son.

(1) this Commonwealth is the home state of the child on the date of the commencement of the proceeding or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this Commonwealth but a parent or person acting as a parent continues to live in this Commonwealth;

(2) a court of another state does not have jurisdiction under paragraph (1) or a court of the home state of the child has declined to exercise jurisdiction on the ground that this Commonwealth is the more appropriate forum under section 5427 (relating to inconvenient forum) or 5428 (relating to jurisdiction declined by reason of conduct) and:

(i) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this Commonwealth other than mere physical presence; and

(ii) substantial evidence is available in this Commonwealth concerning the child's care, protection, training and personal relationships;

(3) all courts having jurisdiction under paragraph (1) or (2) have declined to exercise jurisdiction on the ground that a court of this Commonwealth is the more appropriate forum to determine the custody of the child under section 5427 or 5428; or

(4) no court of any other state would have jurisdiction under the criteria specified in paragraph (1), (2) or (3).

(b) **Exclusive jurisdictional basis.**—Subsection (a) is the exclusive jurisdictional basis for making a child custody determination by a court of this Commonwealth.

(c) **Physical presence and personal jurisdiction unnecessary.**—Physical presence of or personal jurisdiction over a party or a child is not necessary or sufficient to make a child custody determination.

23 Pa. C.S.A. §5421 (initial child custody jurisdiction). The term "home state" is defined as

[t]he state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In

> the case of a child six months of age or younger, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

23 Pa. C.S.A. §5402 (definitions). Finally, Section 5471 of the UCCJEA provides:

> §5471. Intrastate application.
>
> The provisions of this chapter allocating jurisdiction and functions between and among courts of different states shall also allocate jurisdiction and functions between and among the courts of common pleas of this Commonwealth.

23 Pa. C.S.A. §5471.

With respect to the parties' Daughter, Daughter lived in no single county for at least six consecutive months immediately prior to the commencement of this action on February 28, 2011. Instead, she lived in Northampton County for one month (September 2010), Lehigh County for four months (October 2010 through January 2011) and Carbon County for one month (February 2011). Consequently, no single county was Daughter's home county at the time Mother filed her custody complaint. Nevertheless, Section 5421(a)(1) establishes custody jurisdiction in a county if that county was the home county of the child within six months of the commencement of the action. **R.M. v. J.S.,** 20 A.3d 496, 503-504 (Pa. Super. 2011). On this alternative basis, Northampton County, where Daughter lived for at least six consecutive months immediately prior to October 2010 has jurisdiction.

As to the parties' Son, Son was living in Northampton County at the time Mother filed this action and had been living in that county for at least six consecutive months before Mother's suit was commenced. We view the three-week period which Son spent with Father in Wayne County as a temporary absence. Similarly, although clearly of greater duration, given the length of time Father resided at his grandmother's home, his frequent returns to this home as his predominate residence and the tentative nature of his move to Wayne County, we also consider the five months Father lived in Wayne County with his girlfriend as having been a temporary relocation not intended to be permanent. **R.M. v. J.S., supra**

at 507. During this period, Father was seeking new employment, experimenting with a new relationship while married to Mother, from whom he is separated, and uncertain of his plans, ultimately deciding to return to his grandmother's home.[4]

In accordance with the foregoing, while Carbon County has a jurisdictional claim based on significant contacts among the parties under Section 5421(a)(2), Northampton County is the county in which the custody complaint should have been filed under Section 5421(a)(1). This, however, does not end our inquiry since Mother contends Father waived jurisdiction by his active participation in the proceedings filed in Carbon County and his failure to timely object. On this issue, there is no question that Father failed to file a timely objection to the custody complaint under Pa. R.C.P. 1915.5 and that Father actively participated in these proceedings by the filing of his petitions to modify the interim custody order and for relocation.[5] The question is whether the objection is non-waivable as Father contends.

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[4] As to Father's argument that his grandmother qualifies as "a person acting as parent" for establishing home county jurisdiction in Northampton County, she does not. **R.M. v. J.S.,** 20 A.3d 496, 504 (Pa. Super. 2011). The UCCJEA defines a "person acting as a parent" as:

> A person, other than a parent, who:
>
> (1) has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child custody proceeding; and
>
> (2) has been awarded legal custody by a court or claims a right to legal custody under the laws of this Commonwealth.

23 Pa. C.S.A. §5402 (definitions). Under the evidence, Father's grandmother has had neither physical custody of the Children for six consecutive months nor has she been awarded or claimed a right to legal custody under the laws of this Commonwealth.

[5] Rule 1915.5 provides in pertinent part as follows:

> A party must raise any question of jurisdiction of the person or venue by preliminary objection filed within twenty days of service of the pleading to which objection is made or at the time of hearing, whichever first occurs. No other pleading shall be required, but if one is filed it shall not delay the hearing.

Pa. R.C.P. 1915.5(a). Moreover, "[i]t is settled law that the right to raise the objection of venue is a mere personal privilege belonging to the defendant which may be waived by that defendant; and that, unlike the question of subject matter jurisdiction, it is generally held that the court on its own motion may not order a change of venue, nor may it dismiss for improper venue." **Wolf v. Weymers,** 285 Pa. Super. 361, 367, 427 A.2d 678, 680-81 (1981).

We agree with Father that as between different states Section 5421 of the UCCJEA defines subject matter jurisdiction, that is "the competency of a given court to determine controversies of a particular class or kind to which the case presented for its consideration belongs." **Wolf v. Weymers,** 285 Pa. Super. 361, 366, 427 A.2d 678, 680 (1981); **Simpkins v. Disney,** 416 Pa. Super. 243, 249-50, 610 A.2d 1062, 1065 (1992) ("If a child custody case does not fit within the jurisdictional parameters of the [Uniform Child Custody Jurisdiction Act, 23 Pa.C.S. §§ 5341-5366 (repealed June 15, 2004), the immediate predecessor to the UCCJEA], the court does not have subject matter jurisdiction to decide custody."); **see also,** Uniform Law Comment to Section 5421, note 2 ("It should also be noted that since jurisdiction to make a child custody determination is subject matter jurisdiction, an agreement of the parties to confer jurisdiction on a court that would not otherwise have jurisdiction under this Act is ineffective."). And, it is black letter law that "[s]ubject matter jurisdiction is beyond the control of the parties and cannot be acquired by estoppel, waiver or consent." **Id.** at 250, 610 A.2d at 1065. The real question, however, is whether in its intrastate application, as provided for in Section 5471 of the UCCJEA, the allocation of jurisdiction between and among the courts of this Commonwealth is one of subject matter jurisdiction or one of venue.[6] This issue, to our knowledge, has not been directly addressed by the courts.

In **Wolf v. Weymers, supra,** cited by Mother, Sharon Wolf (mother), a resident of Missouri, filed for custody of the parties' two children in Allegheny County. At the time Arthur Weymers (father), who was a resident of Pennsylvania, resided with both children in Beaver County. The courts of Allegheny County heard the case and awarded custody of the children to father.

In a subsequent appeal, mother argued that the Court of Common Pleas of Allegheny County did not have jurisdiction to make a child custody determination because, at the time the action was filed, none of the parties resided or was domiciled in Allegheny County. In denying the mother's appeal, the Superior Court first

[6] In this respect, it must be noted that 23 Pa. C.S.A. §5471 is not part of the UCCJEA and was enacted to provide intrastate application of the Act. **See** 23 Pa. C.S.A. §5471 (Jt.St.Govt.Comm. Comment).

noted that it was clear under the Uniform Child Custody Jurisdiction Act that Pennsylvania was the children's home state and therefore Pennsylvania was invested with jurisdiction to determine custody. **Id.** at 365-66, 427 A.2d at 680. As to whether Allegheny County properly acted in deciding custody, the court stated:

> The mother contends that only the courts of Beaver County had jurisdiction to decide this case because that is where the father lived when this action was filed. The mother in this argument confuses the meaning of jurisdiction with that of venue. This distinction was addressed by the Supreme Court in the case of **In re Estate of R.L.L.,** 487 Pa. 223, ... 409 A.2d 321, 322 n.3 (1979), wherein the Court said:
>
> Frequently, the terms jurisdiction and venue are used interchangeably although in fact they represent distinctly different concepts. Subject matter jurisdiction refers to the competency of a given court to determine controversies of a particular class or kind to which the case presented for its consideration belongs. Venue is the place in which a particular action is to be brought and determined and is a matter for the convenience of the litigants. **Smith Estate,** 442 Pa. 249, 275 A.2d 323 (1971); **County Const. Co. v. Livengood Const. Corp.,** 393 Pa. 39, 142 A. 9 (1928). Jurisdiction denotes the power of the court whereas venue considers the practicalities to determine the appropriate forum. **McGinley v. Scott,** 401 Pa. 310, 164 A.2d 424 (1960); **Hohlstein v. Hohlstein,** 223 Pa.Super. 348, 296 A.2d 886 (1972).
>
> It is clear that the 'jurisdictional' objections raised by appellant are in fact questions of venue. **All of the courts of common pleas within this Commonwealth have subject matter jurisdiction over custody of children and guardianships over the persons of minors.** Since there is no question as to the effectiveness of the service, **i.e.,** jurisdiction over the person, appellant's jurisdictional complaints will be considered as venue complaints. (Emphasis added.)
>
> Therefore, as the Supreme Court made clear, the question of which county within this state should decide a particular custody case, when that case is properly within the jurisdiction of this Commonwealth, is a venue question.

Id. at 366-67, 427 A.2d at 680.

At the time **Wolf** was decided, an analogous provision to Section 5471 of the UCCJEA did not exist. The Uniform Child Custody Jurisdiction Act (UCCJA), June 30, 1977, P.L. 29, No. 20, effective July 1, 1977, 11 P.S. §§2301-2325, which did exist, dealt solely with interstate and international custody disputes. Not until the enactment of the Commonwealth Child Custody Jurisdiction Act, April 28, 1978, P.L. 108, No. 47, effective June 28, 1978, 11 P.S. §§2401-2424, which was patterned after the UCCJA, was the concept of jurisdiction introduced on an intrastate basis. However, the operative facts in **Wolf** predated the effective date of the Commonwealth Child Custody Jurisdiction Act and were therefore governed by the law in effect at the time the proceeding was initiated. Consequently, **Wolf** was decided on venue principles alone.

The 1977 version of the UCCJA was reenacted with revisions by the Act of October 5, 1980, P.L. 693, No. 142, §201(a), effective December 4, 1980, 42 Pa. C.S.A. §§5341-5363 and 5365-5366, also known as the Uniform Child Custody Jurisdiction Act. At the same time, the Act of October 5, 1980, P.L. 693, No. 142, §208(a), 42 Pa. C.S.A. §5364, which replaced the Commonwealth Child Custody Jurisdiction Act, essentially incorporated the terms of the newly revised Uniform Child Custody Jurisdiction Act and applied them to intercounty disputes. Codified at 42 Pa. C.S.A. §5364, it provided, with several exceptions not applicable here, the following general rule:

> Except as otherwise provided in this section, the provisions of this subchapter [referring to 42 Pa.C.S.A. § 5341 **et seq.**] allocating jurisdiction and functions between and among courts of different states shall also allocate jurisdiction and functions between and among the courts of common pleas of this Commonwealth.

42 Pa. C.S.A. §5364(a).

In **Bem v. Bem,** 316 Pa. Super. 390, 463 A.2d 16 (1983), the court applied the 1980 Uniform Child Custody Jurisdiction Act to an intercounty dispute pursuant to 42 Pa. C.S.A. §5364. There, Chester County had "home county" jurisdiction, while Cambria County had jurisdiction based on "significant contacts." As between the two, the court found Cambria County, the county in which the action was first filed, to be the "more appropriate forum to protect the best interests of the child." **Id.** at 394-95, 463 A.2d at 18.

Bem has factual and procedural similarities to the instant case, including father's failure therein to file timely objections to the custody complaint filed in Cambria County, thereby submitting to the jurisdiction of that court. **Id.** at 395, 463 A.2d at 18. More importantly, however, are the differences in the jurisdictional provisions of the Uniform Child Custody Jurisdiction Act at issue in **Bem**[7]

[7] Section 5344 of the Uniform Child Custody Jurisdiction Act, as it then existed, provided:

Jurisdiction.

(a) General rule.—A court of this Commonwealth which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(1) this Commonwealth:

(i) is the home state of the child at the time of commencement of the proceeding; or

(ii) had been the home state of the child within six months before commencement of the proceeding and the child is absent from this Commonwealth because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this Commonwealth;

(2) it is in the best interest of the child that a court of this Commonwealth assume jurisdiction because:

(i) the child and his parents, or the child and at least one contestant, have a significant connection with this Commonwealth; and

(ii) there is available in this Commonwealth substantial evidence concerning the present or future care, protection, training, and personal relationships of the child;

(3) the child is physically present in this Commonwealth, and:

(i) the child has been abandoned; or

(ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent;

(4) (i) it appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraph (1), (2) or (3), or another state has declined to exercise jurisdiction on the ground that this Commonwealth is the more appropriate forum to determine the custody of the child; and (ii) it is in the best interest of the child that the court assume jurisdiction; or

(5) the child welfare agencies of the counties wherein the contestants for the child live, have made an investigation of the home of the person to whom custody is awarded and have found it to be satisfactory for the welfare of the child.

(b) Physical presence insufficient.—Except under subsection (a)(3) and (4), physical presence in this Commonwealth of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this Commonwealth to make a child custody determination.

(c) Physical presence unnecessary.—Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

and those under the current UCCJEA. Rather than providing five independent and concurrent bases for jurisdiction, with "home" jurisdiction being preferable, the UCCJEA expressly provides that jurisdiction based on "significant contacts" can only be exercised if another county does not have "home county" jurisdiction, or if such jurisdiction exists, the home county has declined to exercise its jurisdiction for the reasons stated in Section 5421(a)(2) of the UCCJEA. **R.M. v. J.S., supra** at 506; **see also, Wagner v. Wagner,** 887 A.2d 282, 288 (Pa. Super. 2005) (Pennsylvania courts will not assume jurisdiction under "significant connections" test unless it appears that no other state may assume jurisdiction under the "home state" test). Since neither of these two scenarios applies, we are without jurisdiction to issue a custody decree. **See Commonwealth v. Ryan,** 459 Pa. 148, 157, 327 A.2d 351, 355 (1974) ("Where matters of jurisdiction are concerned, the courts must enforce the letter of the law.").[8]

CONCLUSION

Accordingly, this matter will be transferred to Northampton County for appropriate proceeding. **See Wagner v. Wagner, supra** at 291 (directing the trial court in a custody dispute to transfer the case to a court of competent jurisdiction in Florida since "significant connections," sufficient to justify the exercise of jurisdiction in this Commonwealth under the UCCJEA, did not exist).[9]

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[8] Because "a party may not be held in contempt of court for ignoring an order or decree which is void for want of jurisdiction in the issuing court," **Commonwealth v. Ryan,** 459 Pa. 148, 159, 327 A.2d 351, 356 (1974), Mother's petitions for contempt will be dismissed.

[9] In **Wagner v. Wagner,** 887 A.2d 282 (Pa. Super. 2005), after concluding that no state satisfied the test for "home state" jurisdiction, the court evaluated whether jurisdiction was properly exercised by either Pennsylvania or Florida under the "significant connections" test. In applying this test to the facts before it, the court found that the current test under the UCCJEA—**see** 23 Pa. C.S.A. §5421(a)(2)(i)-(ii)—may properly be characterized as requiring **maximum** rather than **minimum** contact with the state. **Id.** at 289. On this alternative basis, were it to be determined that Northampton County does not qualify as the "home county," we would find that as between Carbon and Northampton, Carbon County lacks maximum "significant connections" to justify the exercise of its jurisdiction under Section 5421(a)(2)(i) of the UCCJEA.

MAR-PAUL COMPANY, INC., Plaintiff vs. JIM THORPE AREA SCHOOL DISTRICT and POPPLE CONSTRUCTION, INC., Defendants vs. HAYES LARGE ARCHITECTS, LLP, Additional Defendant vs. PATHLINE INC. and UNITED INSPECTION SERVICES, INC., Additional Defendants

Civil Law—Champerty—Contribution—Indemnity—General Release—Recognition and Assertion of Cause of Action Under Section 552 of the Restatement (Second) of Torts

1. Champerty is a bargain by a stranger with a party to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subject sought to be recovered.

2. To invalidate an assignee's litigation of an assigned claim on the basis of champerty, three elements must exist: (1) the assignee must have no legitimate interest in the suit; (2) he must expend his own money in prosecuting the suit; and (3) he must be entitled by the bargain to share in the proceeds of the suit.

3. The principle of contribution refers to the allocation of the payment of damages by and between two or more joint tortfeasors. Consequently, where the liability of one party is based solely upon breach of contract, a claim for contribution by that party cannot exist.

4. Indemnification is available under Pennsylvania law in only two instances: (1) pursuant to a contractual provision, or (2) by operation of law.

5. The right of indemnity by operation of law rests upon a difference between the primary and secondary liability of two persons each of whom is made responsible by the law to an injured party. It is a right which enures to a person who, without active fault on his own part, has been compelled, by reason of some legal obligation, to pay damages occasioned by the initial negligence of another and for which he himself is only secondarily liable. Secondary as distinguished from primary liability rests upon a fault that is imputed or constructive only.

6. A release given to a particular individual and "any and all other persons ... whether known or unknown" is applicable to all tortfeasors despite the fact that they are not specifically named and did not contribute consideration to their release.

7. Section 552 of the Restatement (Second) of Torts entitled "Information Negligently Supplied for the Guidance of Others" sets forth the parameters of a duty owed when one supplies information to others, for one's own pecuniary gain, where one intends or knows that the information will be used by others in the course of their own business activities.

NO. 04-2595

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MEMORANDUM OPINION

NANOVIC, P.J.—November 17, 2011

Herein, Additional Defendant, Hayes Large Architects, LLP ("Hayes"), moves for summary judgment on the claims made in the joinder complaint filed against it by the Jim Thorpe Area School District ("District"), all of which have been assigned to Popple Construction, Inc. ("Popple"). For the reasons which follow, we deny this Motion to the extent it requests summary judgment in full.

PROCEDURAL AND FACTUAL BACKGROUND

In 2002, the District began constructing an elementary school in Kidder Township, Carbon County, Pennsylvania, for kindergarten through eighth grade. Mar-Paul Company, Inc. ("Mar-Paul") was the general contractor for the project; Popple was Mar-Paul's subcontractor for the project site work. Moisture-laden soil caused construction delays, which resulted in both Mar-Paul and Popple claiming they were owed additional payments from the District beyond the base contract rate.

On August 6, 2004, Mar-Paul filed suit against the District and Popple. Mar-Paul's complaint included claims for monies due it directly, as well as pass-through claims on behalf of Popple.

The District joined Hayes, the District's architect on the project, as an additional defendant against which it sought indemnification and/or contribution. By agreement dated February 26, 1996, the District contracted for Hayes' architectural services for the project. The District also claimed direct liability for any amounts Mar-Paul recovered (for itself and on behalf of Popple) against it because of Hayes' failure to comply with Hayes' contractual obligations to the District. The District further sought recovery against Hayes for costs to correct defective work related to the construction of a shingled roof over the media center at the project, in the event this work was necessitated by design defects attributable to Hayes.

Hayes, in turn, joined Pathline, Inc. ("Pathline"), the District's clerk-of-the-works for the project, as an additional defendant. A separate agreement entered in 1999 between the District and Pathline provides for Pathline to furnish these services. In its joinder complaint, Hayes likewise sought indemnification and/or contribution from Pathline for any monies Hayes may be required to pay the District. Additionally, Hayes claimed Pathline was negligent in the information it supplied regarding the suitability of soil conditions at the project site, which was intended to be relied upon and was in fact relied upon by Hayes to its detriment.

In late 2009, Mar-Paul, the District and Popple reduced to writing the terms of settlement of their respective claims against one another. All parties executed a Mutual Release, Assignment of Claims and Settlement Agreement ("Agreement") reflecting the agreed upon terms. Pursuant to this Agreement, the District is to pay certain monies to Mar-Paul (**i.e.,** $285,422.00) and Popple (**i.e.,** $275,000.00), and to assign all of its right, title and interest in those claims asserted in its joinder complaint against Hayes to Popple. The Agreement further provides that the first $25,000.00 of any monies recovered by Popple are to be retained by Popple, with the balance to be paid 65 percent to Popple and 35 percent to the District, less Popple's pro rata share of attorney's fees and costs in pursuing these claims. The Agreement also recites that Popple's claims against the District total $358,698.80.

Before us now is Hayes' motion for summary judgment in which it asserts first, that the District's assignment to Popple of its claims against Hayes violates public policy and is unenforceable in that it constitutes champerty, and second, that there exist no valid claims for contribution or indemnity that the District could assign to Popple.

DISCUSSION

Champerty

Champerty is:

> [a] bargain by a stranger with a party to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subject sought to be recovered.

Black's Law Dictionary 209 (5th ed. 1979). At its essence champerty seeks to bar a party from speculating and profiting in litigation

in which he has no legitimate interest. **Fleetwood Area School District v. Berks County Board of Assessment Appeals,** 821 A.2d 1268, 1273-74 (Pa. Commw. 2003). To invalidate an assignee's litigation of an assigned claim, three elements must exist:

> 1) The assignee must have no legitimate interest in the suit;
>
> 2) He must expend his own money in prosecuting the suit; and
>
> 3) He must be entitled by the bargain to share in the proceeds of the suit.

Belfonte v. Miller, 212 Pa. Super. 508, 511, 243 A.2d 150, 152 (1968). "A champertous agreement is one in which a person having otherwise no interest in the subject matter of an action undertakes to carry on the suit at his own expense in consideration of receiving a share of what is recovered." **Id.** at 512, 243 A.2d at 152 (**quoting Richette v. Pennsylvania R.R.,** 410 Pa. 6, 187 A.2d 910 (1963)).

In this case, the second and third elements of champerty have been met because Popple, pursuant to the Agreement, will expend its own monies in prosecuting the District's claims against Hayes and it is entitled to share in the proceeds of any recovery. In dispute is the first element: whether Popple has any legitimate interest in the instant suit independent of the Agreement. For the following reasons, we find Popple's interest to be legitimate: (1) Popple was involved in this litigation from the outset, before any agreement was reached, and does not come to this litigation as an outsider; (2) the subject matter of the Agreement is the very litigation in which Popple was an original defendant; (3) the amount of damages claimed by Popple in the underlying litigation exceeds the amount paid to it by the District; and (4) the public policy of this Commonwealth favors settlement and allows for the assignment of non-personal injury claims. Popple is no stranger to the litigation and, as such, is not barred by champerty from pursuing the claims against Hayes which have been assigned to it by the District.

Viability of the District's Claims Assigned to Popple

To the extent that the District's joinder complaint against Hayes asserts a claim for contribution, Hayes is correct in stating that such a claim cannot exist. The underlying claims brought by Mar-Paul and Popple against the District are in contract. At the most basic level, Mar-Paul and Popple claim that the District's actions were a

breach of the parties' contract and caused damages. There are no tort claims. Accordingly, since the principle of contribution refers to the allocation of the payment of damages by and between two or more joint tortfeasors, and there being no claim that the District was a tortfeasor, its request for contribution against Hayes must fail. **See** 42 Pa. C.S.A. §8324(a) (providing for contribution only between joint tortfeasors); **Carson v. Driscoll,** 2006 WL 2009047 *6 (CCP Phil. 2006) ("Contribution is not a proper claim where the underlying claims sound in contract"). Popple does not dispute this conclusion.

Nor does the District have a claim for indemnity against Hayes. Indemnification is available under Pennsylvania law in only two instances: (1) pursuant to a contractual provision, or (2) by operation of law. **City of Wilkes-Barre v. Kaminski Brothers, Inc.,** 804 A.2d 89 (Pa. Commw. 2002). "An agreement to indemnify is an obligation resting upon one person to make good a loss which another has incurred or may incur by acting at the request of the former, or for the former's benefit." **Szymanski-Gallagher v. Chestnut Realty Company,** 409 Pa. Super. 323, 329, 597 A.2d 1225, 1228 (1991) (**quoting Potts v. Dow Chemical Co.,** 272 Pa. Super. 323, 415 A.2d 1220, 1221 (1980)). No such contractual obligation has been alleged in the instant proceedings.

With respect to indemnity by operation of law

> [t]here is ... a fundamental difference between indemnity and contribution. The right of **indemnity** rests upon a difference between the primary and secondary liability of two persons each of whom is made responsible by the law to an injured party. **It is a right which enures to a person who, without active fault on his own part, has been compelled, by reason of some legal obligation, to pay damages occasioned by the initial negligence of another and for which he himself is only secondarily liable.** The difference between primary and secondary liability is not based on a difference in **degrees** of negligence or on any doctrine of comparative negligence. ... It depends on a difference in the **character** or **kind** of the wrongs which cause the injury and in the nature of the legal obligation owed by each of the wrongdoers to the injured person. Secondary liability exists, for example, where

> there is a relation of employer and employee, or principal and agent. ... Without multiplying instances, ... **the important point to be noted in all the cases is that secondary as distinguished from primary liability rests upon a fault that is imputed or constructive only,** being based on some legal relation between the parties, or arising from some positive rule of common or statutory law or because of a failure to discover or correct a defect or remedy a dangerous condition caused by the act of the one primarily responsible. ...

Kemper National P & C Companies v. Smith, 419 Pa. Super. 295, 299-300, 615 A.2d 372, 376-77 (1992) (**quoting Vattimo v. Lower Bucks Hospital, Inc.,** 502 Pa. 241, 250-51, 465 A.2d 1231, 1236 (1983)) (emphasis in original).

As already discussed, this is not a case involving claims of tortious misconduct against or between two or more parties for which equitable division or apportionment of responsibility is sought. More importantly, the relationship between two parties bound by contract (here, the District and Hayes) sets forth neither the type nor the status of relationship upon which secondary liability is imposed on one against the other by operation of law.

Instead, Popple argues that a fair reading of the facts pled in the District's joinder complaint sets forth a claim for direct contractual liability against Hayes for breach of the February 26, 1996 architectural agreement between the District and Hayes. Specifically, Popple alleges that Hayes breached its duty to exercise professional care in the design of the project and in the preparation of contract documents for bidding and award, to advise and consult with the District concerning the progress of the project work, to evaluate and make recommendations to the District with respect to the contractors' work and requests for change orders, and to examine and evaluate for approval the sequence and manner in which fill material was to be spread and compacted. On these bases, the District has set forth facially viable claims against Hayes for breach of contractual obligations Hayes owed directly to the District which breach, at least in part, is alleged to be the cause of the damages claimed by Mar-Paul and Popple against the District. As such, Hayes' request for summary judgment **in toto** will be denied.

CONCLUSION

Having found that Hayes cannot be liable to Popple on the District's assigned claims for contribution and indemnification, Hayes' Motion for Summary Judgment as to these claims will be granted. However, as to the District's direct claim against Hayes for breach of contract, the Motion is denied.[1]

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[1] In a separate motion, Pathline claims that Mar-Paul and Popple have released all claims against the District, as well as against its agents and employees, by virtue of the general release provisions in the Agreement. The Agreement provides for the release by Popple and Mar-Paul of the District and its "representatives ... employees, agents ... consultants ... and their successors or assigns, from any and all suits, debts, claims, demands, judgments, actions, charges and causes of action of any nature whatsoever of any and every kind" which Popple and/or Mar-Paul "ever had, now has, or may in the future have arising out of or relating to the project." Under the 1999 agreement between the District and Pathline for the employment of Pathline as the District's clerk of the works, Pathline was hired "to serve as the agent of the [District] at the [Project] site." As the District's agent, the Agreement releases Pathline from any obligation to pay any monies due Popple by way of contribution or indemnification. **See Buttermore v. Aliquippa Hospital,** 522 Pa. 325, 561 A.2d 733 (1989) (holding that a release given to a particular individual and "any and all other persons ... whether known or unknown" was applicable to all tortfeasors despite the fact that they were not specifically named and did not contribute consideration to the release).

The claims asserted in Hayes' joinder complaint against Pathline are "only for contribution and indemnification in the event Popple is successful in its claim as assigned by the School District." (Hayes' answer to Pathline's Motion for Summary Judgment, Paragraph 28.) As to indemnification, Hayes concedes the relationship between it and Pathline—that of architect and clerk of the works, respectively, each having a contract with the District, but not with one another—is not one which creates liability between them differentiated on principles of primary and secondary liability. However, with respect to contribution, Hayes argues Pathline is a proper party to these proceedings in order to determine whether Pathline is a joint tortfeasor with it and, if so, the allocation of damages by and between them. **Davis v. Miller,** 385 Pa. 348, 351, 123 A.2d 422, 424 (1956); **National Liberty Life Insurance Co. v. Kling Partnership,** 350 Pa. Super. 524, 529-32, 504 A.2d 1273, 1276-77 (1986). While initially appearing to have merit, because the District's claims against Hayes are founded on the contract which exists between them and not in tort—any allegations in the District's joinder complaint notwithstanding (**see Mirizio v. Joseph,** 4 A.3d 1073, 1079 (Pa. Super. 2010) (the gist of the action doctrine precludes plaintiffs from recasting ordinary breach of contract claims into tort claims))—Hayes and Pathline cannot be joint tortfeasors.

Moreover, unlike the contractual relationship which exists between the District and Hayes, Hayes has no contractual relationship with Pathline and thus no direct claim for breach of contract is available to it: Pathline's contract is with the District, not Hayes. Nevertheless, Hayes' joinder complaint alleges a direct cause of action against Pathline for negligent misrepresentation under Section

552 of the Restatement (Second) of Torts entitled "Information Negligently Supplied for the Guidance of Others." This section "sets forth the parameters of a duty owed when one supplies information to others, for one's own pecuniary gain, where one intends or knows that the information will be used by others in the course of their own business activities." **Bilt-Rite Contractors, Inc. v. The Architectural Studio,** 581 Pa. 453, 866 A.2d 270, 285-86 (2005).

Here, the contract between the District and Pathline requires Pathline to perform all of its duties "in cooperation with [Hayes]." (Article 2.3.2.) In particular, Pathline is responsible, **inter alia,** for "conducting on-site observations" (Article 2.3.12) and for reporting to Hayes whenever the work does "not meet the requirements of any inspection, test or approval required to be made." (Article 2.3.13.) Given that the District's claims against Hayes include a claim for failure to timely and/or accurately provide information relative to the water content of the soils being excavated and/or compacted, and that Hayes claims it was relying on the information about the suitability of soils, as well as the testing thereof and the overall quality of the work as observed and required to be reported to it by Pathline, which reports Hayes contends were false and/or misleading with respect to site conditions and the work conducted by the prime contractors to eliminate ground moisture, Hayes has stated a viable cause of action against Pathline under Section 552 of the Restatment (Second) of Torts. Accordingly, Pathline's motion for summary judgment on its joinder by Hayes is denied.

MICHAEL CATALDO t/d/b/a CATALDO BUILDERS, Plaintiff vs. KAREN ALTOBELLI and STEPHEN JAMES, Defendants

Civil Law—Post-Trial Motion—Timeliness—Inconsistent Verdict—Molding the Verdict—Compromise Verdict—Building Contracts—Measure of Damages—Cost of Repairs v. Diminution in Value—Unfair Trade Practices and Consumer Protection Law—Statutory Damages—Attorney Fees

1. An untimely post-trial motion should be entertained by the court, absent prejudice, provided a reasonable, non-negligent basis exists for the late filing.

2. Inconsistency in a jury verdict must be challenged before the jury is dismissed in order to preserve the error for review. An inconsistent verdict is one which is attributable to improper, erroneous or ambiguous jury instructions or interrogatories; it is not one which the court or one or more of the parties believes is against the weight of the evidence.

3. A verdict which is clear and unambiguous, even if problematic, troublesome or disappointing, is not inconsistent. The court may not, in follow-up instructions, inject itself into credibility determinations made by the jury, or into the deliberative process of the jury, thereby encouraging a basic change in the intended verdict of the jury.

4. A jury verdict may be molded by the court only if to do so clearly reflects what the jury intended. A verdict, even if unwise, should not be molded to reflect what the court thinks the verdict should have been.

5. Where the evidence is conflicting and the resulting verdict is low, the verdict may be regarded as a compromise verdict, **i.e.,** one where the jury,

in doubt as to defendant's fault or plaintiff's freedom from fault, brings in a verdict for the plaintiff but in a smaller amount than it would have if these questions had been free from doubt.

6. If a low verdict can be explained by viewing it as a compromise verdict, then it should not be disturbed on appeal. Compromise verdicts are favored in the law and are valid.

7. In building contracts, for the cost of repairs to be the basis of damages for incomplete or defective construction, such costs may not be clearly disproportionate to the probable loss in value to the owner as measured by the difference between the value that the property would have had without the defects and its value with the defects. The burden of proving this difference is upon the owner.

8. The Unfair Trade Practices and Consumer Protection Law creates a private cause of action pursuant to which triple damages and reasonable attorney fees may be awarded for actual damages caused by fraudulent or deceptive conduct in the sale or lease of goods or services primarily for personal, family or household purposes.

9. There exists no authority under the Unfair Trade Practices and Consumer Protection Law for an award of statutory damages, even if nominal, where the claimant suffers no ascertainable loss as a result of conduct prohibited by the statute.

10. An award of attorney fees under the Unfair Trade Practices and Consumer Protection Law must be linked to the amount of damages sustained from a violation of the statute. Where the statute has been violated, but there is no resulting ascertainable loss, there is no basis to award attorney fees.

NO. 05-0732

MICHAEL CATALDO—Pro se.

DAVID A. KLEIN, Esquire—Counsel for Defendants.

MEMORANDUM OPINION

NANOVIC, P.J.—December 27, 2011

In May 2003, the Plaintiff, Michael Cataldo t/d/b/a Cataldo Builders ("Contractor"), and the Defendants, Karen Altobelli and Stephen James ("Homeowners"), entered an agreement for Contractor to build a home on Homeowners' property located at Lot 51, Dogwood Drive, Bear Creek Lakes, Carbon County, Pennsylvania. The agreed-upon price for this construction, as modified by agreement dated September 2003, was $185,909.00. Construction of the home began in October 2003 and was substantially completed by December 2004.

In December 2004, Contractor submitted a final billing in the amount of $16,064.63, which Homeowners refused to pay. Previously, Homeowners had paid Contractor the sum of $179,294.00. The amount of Contractor's final billing consisted of $6,615.00,

representing the unpaid balance of the original contract price, and an additional $9,449.63 for extras and costs in excess of allowances which Contractor contended Homeowners had agreed to. (Plaintiff Exhibit No. 16.)

Homeowners denied that any further monies were due and owing. Instead, Homeowners alleged that the home was not built in accordance with the architectural plans they had provided to Contractor, and that the work performed was defective and incomplete. Homeowners contended that the home was structurally unsound; and that the cost of remediating the structural defects plus the cost of correcting and completing work already begun would total $109,350.00.

At the conclusion of a four-day jury trial, the jury found Contractor was entitled to $12,631.95 on his claim for the unpaid balance of the contract price and extra work. The jury further found Homeowners were entitled to $12,631.95 for Contractor's breach of contract in constructing the home. Presently before us is Homeowners' Motion for Post-Trial Relief.

FACTUAL AND PROCEDURAL BACKGROUND

Contractor commenced this action by filing a complaint on April 14, 2005. The complaint contained one count for breach of contract and claimed damages in the amount of $14,764.63.[1] Homeowners' answer to the complaint contained counterclaims for the following: breach of contract; common-law fraud and misrepresentation; consumer fraud premised upon alleged violations of the Unfair Trade Practices and Consumer Protection Law; punitive damages; and negligence. After several rounds of preliminary objections, these claims were reduced to one count of breach of contract and one count of consumer fraud. By Order dated January 7, 2008, the consumer fraud count was further limited to include only those claims predicated upon charges made by Contractor for materials which were allegedly never supplied and/or labor which was allegedly never performed.

[1] The difference between this figure and the amount of Contractor's final billing, $1,300.00, is attributable to the addition of a window in the garage which Contractor had agreed to install at no extra cost in exchange for the elimination of brick piers on the exterior of the home. (N.T. 02/09/10, p. 188.) In his final bill, Contractor billed for both items. At the time of trial, Contractor agreed that the correct amount of this claim was $14,746.63. (N.T. 02/15/10, pp. 803-804.)

Trial commenced on Monday, February 8, 2010, and was delayed two days—Wednesday and Thursday—due to snow. The jury was permitted to take notes. On February 15, 2010, after approximately two hours of deliberation, the jury returned its verdict. A copy of the Verdict Slip has been reproduced and is attached to this Opinion as Appendix 1.

As reflected by the Verdict Slip, the jury awarded both the Contractor and the Homeowners $12,631.95, in effect, nullifying the verdict for each against the other. After the verdict was returned, the Court inquired as to whether either counsel had any motion to present before the jury was discharged. After both parties indicated there were none, the jury was discharged. (N.T. 02/15/2010, p. 991.) The verdict was filed with the Prothonotary's Office the same day it was reached.

On Monday, March 1, 2010, Homeowners filed the instant Post-Trial Motion. Therein, Homeowners request that the verdict on their counterclaim be molded to provide for an increased damages award or, in the alternative, that a new trial be ordered limited to damages. Homeowners also request that statutory damages and counsel fees be awarded pursuant to the Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 P.S. §201-1 **et seq.**[2] The Motion does not challenge the verdict on Contractor's complaint.

Contractor, acting **pro se,** filed an answer to the Motion on October 21, 2010.[3] Argument on the Motion was held October 27, 2010, at which time Contractor's trial counsel was permitted to withdraw her representation, and Contractor thereafter represented himself. We now address the merits of the Motion.

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[2] The Homeowners' Motion also references the admission into evidence of photographs which they allege were taken by virtue of the Contractor trespassing upon their property. Homeowners have failed to elaborate how this constitutes an error or what prejudice, if any, they sustained. As such, the issue will be addressed no further. **See Rothrock v. Rothrock Motor Sales, Inc.,** 53 D. & C.4th 411, 422 (Pa. Com. Pl. 2001) (issues not briefed and argued for purposes of post-trial motion are waived), **affirmed,** 584 Pa. 297, 883 A.2d 511 (2005).

[3] Contractor, in his response to Homeowners' Motion, objected to the late filing of the Motion. In order to be timely, the Motion should have been filed no later than Thursday, February 25, 2010. **See** Pa. R.C.P. 227.1(c)(1). However, snow again intervened, and the Homeowners claim this delayed their filing of the Motion. Rather than denying the Motion on this basis, we will consider its merits.

DISCUSSION

1. **Molding the Verdict**

Homeowners request that we award damages on their counterclaim for breach of contract over and above the $12,631.95 awarded by the jury. Homeowners claim the amount of this award has no rational relationship to the proof of damages they presented.

With respect to this issue, Contractor argues first that Homeowners' counsel was required to object to the jury's verdict at the time it was rendered in order to preserve the issue for review. We disagree.

In **Picca v. Kriner,** 435 Pa. Super. 297, 645 A.2d 868 (1994), **appeal denied,** 539 Pa. 653, 651 A.2d 540 (1994), the court held that whenever a jury returns a verdict which is objectionable for any reason, the right to move for a new trial or otherwise claim error because of problems in the verdict is waived, unless the litigant objects before the jury is dismissed. This rule was subsequently clarified in **King v. Pulaski,** 710 A.2d 1200, 1204 (Pa. Super. 1998) to apply only

> to cases in which a litigant's failure to object to improper or ambiguous jury instructions or interrogatories causes an inconsistent verdict. The waiver rule should not be applied to cases in which the verdict is clear and unambiguous, albeit problematic, troublesome or disappointing.

Homeowners have not questioned the propriety of the jury charge, nor have Homeowners pointed to any ambiguity or inaccuracy in the charge or verdict slip which affected the verdict. Rather, as in **King,** the verdict

> while arguably inadequate, problematic, and disappointing to the [Homeowners], nonetheless clearly and unambiguously reflected the jury's fact-finding and credibility determinations. There was no flaw in the verdict in the sense that the jury misunderstood the applicable law, received an ambiguous jury charge, or answered poorly worded interrogatories in a confusing manner.

Id.

See Carlos R. Leffler, Inc. v. Hutter, 696 A.2d 157, 165-67 (Pa. Super. 1997) (finding trial court abused its discretion in failing to entertain post-trial motion which had been filed one day late due to inclement weather, absent showing of prejudice).

Under the circumstances of the instant case, it would have been inappropriate for us to attempt to determine why the jury did what it did. To have done so would have been to question the jury's credibility and fact-finding determinations, and suggest that the jury make a substantive change in its findings. A trial judge may not, in follow-up instructions, "inject itself into the deliberation and encourage a basic change in the intended verdict of the jury." **Id.** (**quoting Fillmore v. Hill,** 445 Pa. Super. 324, 665 A.2d 514, 517 (1995); **see also, Gorski v. Smith,** 812 A.2d 683, 707 (Pa. Super. 2002) ("A trial judge is not at liberty to suggest to the jury that the weight of the evidence did not support its damage award.") (citation and quotation marks omitted), **appeal denied,** 856 A.2d 834 (Pa. 2004)). Because no basis existed for Homeowners to object to the verdict and request further deliberations by the jury on this issue, we address Homeowners' request to mold the verdict on its merits.

"The change of a jury's verdict after it has been received and recorded is rarely asked for and even more rarely permitted." **Maize v. Atlantic Refining Company,** 352 Pa. 51, 58, 41 A.2d 850, 854 (1945). The jury's verdict is what determines the rights of the parties. **See id.** If we were to amend the verdict, the amendment must not be what we think the verdict ought to have been, but rather what the jury intended it to be. **See id.** at 61, 41 A.2d at 855. Here, the jury clearly intended that the parties stand where they were, that neither recover anything further from the other. Whether this intent should be sustained is a different question which we address next in this opinion. For the moment, we will not "under the guise of amending the verdict, invade the exclusive province of the jury or substitute [our] verdict for theirs." **Id.** (**citing Acton v. Dooley,** 16 Mo. App. 441, 449 (St. Louis Court of Appeals, Missouri 1885)).

2. **Awarding a New Trial**

As an alternative to molding the verdict, Homeowners request a new trial limited to damages on their claim for breach of contract. It is well-settled that "the decision whether to grant a new trial, in whole or in part, rests in the sound discretion of the trial court." **Mendralla v. Weaver Corporation,** 703 A.2d 480, 485 (Pa. Super. 1997).

> [A] new trial may not be granted merely because the jury could have awarded greater damages. Instead, the movant

> must demonstrate that the verdict reached was palpably and grossly inadequate. ... As this Court long ago held, '[t]he mere fact that the court below would have been more generous to [the movant] does not justify ousting the jurors and moving into their seats.'

Id. at 487 (citations omitted).[4]

In essence, Homeowners argue that the verdict bears no reasonable relationship to their evidence on damages and was, therefore, against the weight of that evidence. However, to state that a damage award must be supported by the evidence of record if it is to be upheld, is not the same as stating that the amount of the award, its precise figure and manner of computation, must be able to be replicated by the court to withstand challenge. This is especially true when, as here, there is reason to believe that the verdict is the product of a compromise. **Guidry v. Johns-Manville Corporation,** 377 Pa. Super. 308, 314, 547 A.2d 382, 385 (1988).

At trial, Homeowners chose to present their evidence in the form of lump sum damages: $85,850.00 for structural defects and $23,500.00 for non-structural defects. (N.T. 02/12/10, pp. 545-47; Defendant Exhibit Nos. 23 and 24.) Although the work to be done was itemized, no separate values were assigned to each item. In effect, as a matter of tactics, Homeowners asked the jury to accept their evidence as to damages in its entirety, or to reject it, with no in-between. The jury decided otherwise. By awarding Homeowners damages for Contractor's incomplete and/or defective work in an amount equal to that which they found Homeowners owed Contractor, the jury effectively determined not only that Homeowners

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[4] **See also, Commonwealth v. Hunter,** which states:

> A motion for new trial on the grounds that the verdict is contrary to the weight of the evidence, concedes that there is sufficient evidence to sustain the verdict. Thus, the trial court is under no obligation to view the evidence in the light most favorable to the verdict winner. An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. A new trial should not be granted because of a mere conflict in testimony or because the judge on the same facts would have arrived at a different conclusion. ... Trial judges ... do not sit as the thirteenth juror. Rather, the role of the trial judge is to determine that 'notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice.'

Id., 768 A.2d 1136, 1143 (Pa. Super. 2001) (citations omitted).

were not entitled to recover damages, but also that they were not liable for any damages to Contractor. We believe this result was within the province of the jury to decide and can be explained as the jury's attempt to compromise Homeowners' claim.

"The duty of assessing damages is for the fact-finder, whose decision should not be disturbed ... unless the record clearly shows that the amount awarded was the result of caprice, partiality, prejudice, corruption, or some other improper influence." **Lesoon v. Metropolitan Life Insurance Company,** 898 A.2d 620, 628 (Pa. Super. 2006), **appeal denied,** 912 A.2d 1293 (Pa. 2006); **see generally, Spang & Company v. United States Steel Corporation,** 519 Pa. 14, 26-27, 545 A.2d 861, 866-67 (1988) (discussing broad discretion of trial court to fashion fair estimate of damages in contract cases where specific amount of damages cannot be precisely determined, provided the evidence establishes to a fair degree of probability a basis for the assessment of damages); **see also, Siegel v. Struble Bros., Inc.,** 150 Pa. Super. 343, 28 A.2d 352, 355 (1942). Here the verdict rendered, while low in comparison to the amount sought by Homeowners, was "certainly not a nominal verdict such as would give rise to an inference of mistake or partiality by the jury." **Elza v. Chovan,** 396 Pa. 112, 115, 152 A.2d 238, 240 (1959) (citation and quotation marks omitted). Moreover, the amount, offsetting to the penny what was awarded to the Contractor, demonstrates that the jury knew exactly what it was doing.

"The fact that a verdict is low, standing alone, does not indicate that the verdict is inadequate. ... If the low verdict can be explained by viewing it as a compromise verdict, then it should not be disturbed on appeal. ... Where the evidence is conflicting and the resulting verdict is low, the verdict may be regarded as a compromise verdict, **i.e.,** 'one where the jury, in doubt as to defendant's [fault] or plaintiff's freedom from [fault], brings in a verdict for the plaintiff but in a smaller amount than it would have if these questions had been free from doubt.'" **Guidry, supra** at 314, 547 A.2d at 385 (citations omitted).

"There is no magic in amounts but only in the circumstances, and compromise verdicts are both expected and allowed ... . The compromise may arise out of damages or [liability], or the balance of evidence concerning either or both, and the grant of a new trial

may be an injustice to the defendant rather than an act of justice to the plaintiff." **Elza, supra** (citations omitted). Indeed, granting a new trial is a "gross abuse of discretion" in a case where "the result [of granting a new trial] is to overturn the verdict of a jury reached on dubious evidence of damages." **Id.** at 118, 152 A.2d at 241.

Compromise verdicts are favored in the law. **Austin v. Harnish,** 227 Pa. Super. 199, 323 A.2d 871 (1974). Only where the verdict is so low "as to present a case of clear injustice," should the verdict be set aside. **Campana v. Alpha Broadcasting Co., Inc.,** 239 Pa. Super. 39, 41, 361 A.2d 708, 709 (1976). This is not such a case.[5]

3. **Awarding Damages and Counsel Fees Pursuant to the Pennsylvania Unfair Trade Practices Act and Consumer Protection Law**

Homeowners pray that we award statutory damages and counsel fees as permitted by the Unfair Trade Practices and Consumer Protection Law. Under Section 201-9.2 of the UTPCPL,

> [a]ny person who purchases or leases **goods or services** primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or

[5] Although raised by neither party, it is worth noting that the cost of repairs may not be the proper measure of Homeowners' damages. In building contracts, for the cost of repairs to be the basis of damages for incomplete or defective construction, such costs may not be clearly disproportionate to the probable loss in value to the owner as measured by the difference between the value that the property would have had without the defects and its value with the defects. **Freeman v. Maple Point, Inc.,** 393 Pa. Super. 427, 433, 574 A.2d 684, 687 (1990); **Gloviak v. Tucci Construction Company, Inc.,** 415 Pa. Super. 123, 129, 608 A.2d 557, 560 (1992). The burden of proving this difference is upon the owner, "although it need not be shown with exactitude." **Freeman, supra** at 432, 574 A.2d at 687. This is particularly true in a case such as the instant one where the cost of repairs presented by the Homeowners' experts, $109,350.00, represents almost 59 percent of the original construction costs. "[T]here must be some reasonable basis for determining reduction in value, before a judgment may be made that the cost of repairs is a proper measure of damages, where the required repairs to a new house represent a high percentage of the cost of the house." **Id.** at 432-33, 574 A.2d at 687. Without this information it is impossible to determine whether the cost of repairs sought will result in a windfall to the Homeowners, such as would occur in the present case were it determined, using the Homeowners' figures, that repair costs are $109,350.00, but the diminution in value is closer to $15,000.00. Because Homeowners presented no information as to this reduction in value, it cannot be intelligently determined whether the $12,631.35 in damages found by the jury is in fact low when measured against the true measure of damages provided for by law.

> personal, as a result of the use or employment by any person of a method, act or practice declared unlawful by section 3 of this act,[6] may bring a private action to recover actual damages or one hundred dollars ($100), whichever is greater. The court **may,** in its discretion, award up to three times the actual damages sustained, but not less than one hundred dollars ($100), and may provide such additional relief as it deems necessary or proper. The court **may** award to the plaintiff, in addition to other relief provided in this section, costs and reasonable attorney fees.

73 P.S. §201-9.2 (emphasis added).[7] This section of the UTPCPL not only authorizes the filing of a private action but also provides that the claimant therein may sue for either actual or nominal damages (the latter being set at $100.00), whichever is greater.

In this case, Homeowners elected to sue for actual damages, never seeking a nominal amount. On this claim, the jury found that Contractor "committed ... unfair, fraudulent, or deceptive acts or practices ... with respect to the services it agreed to provide to the [Homeowners] in this matter," but that Homeowners did not "suffer any ascertainable loss of money or property as a result of any unfair, fraudulent, or deceptive act or practice committed by [Contractor]."

As to Homeowners' claim that we should award $100.00 in non-compensatory damages (**i.e.,** "punitive damages"), the plain language of the UTPCPL allows that we award no further damages: "The court **may,** in its discretion, award up to three times the actual damages sustained, but not less than one hundred dollars

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[6] The UTPCPL enumerates twenty-one specific acts of prohibited conduct, the twenty-first being a catchall: "Any other fraudulent or deceptive conduct which creates a likelihood of confusion or misunderstanding." **See** 73 P.S. §§201-2, 201-3.

[7] In **Gabriel v. O'Hara,** 368 Pa. Super. 383, 388-92, 534 A.2d 488, 491-93 (1987), the Pennsylvania Superior Court held, based on policy considerations, that this section of the UTPCPL extends to real estate transactions notwithstanding its language which, on its face, authorizes a private action only to those persons who purchase or lease "goods or services" primarily for personal, family or household purposes. As noted by the Pennsylvania Supreme Court in **Schwartz v. Rockey,** 593 Pa. 536, 932 A.2d 885, 897 n.15 (2007), this interpretation has been criticized as being inconsistent with the plain terms of the statute. Nevertheless, because Contractor has not challenged the validity of Homeowners' standing to invoke the statute, nor the soundness of **Gabriel,** this issue is not before us.

($100) ... .” 73 P.S. §201-9.2 (emphasis added). Here, with respect to the UTPCPL claims submitted to the jury, we do not find Contractor’s conduct to have been either “intentional or reckless, wrongful conduct, as to which an award of treble damages would be consistent with, and in furtherance of, the remedial purposes of the UTPCPL.” **Schwartz v. Rockey,** 593 Pa. 536, 932 A.2d 885, 898 (2007).[8] Such claims were primarily, if not exclusively, claims for breach of contract, the terms of which were heavily disputed.

Further, since the jury found Homeowners did not suffer any ascertainable loss as the result of conduct prohibited by the UTPCPL, and given the qualifying phrase permitting the award of nominal damages, which appears to apply only if actual damages have been proven, the award of non-compensatory damages is not appropriate. **See Equitable Gas Company v. City of Pittsburgh,** 507 Pa. 53, 60, 488 A.2d 270, 273 (1985) (“[W]e must adhere to the accepted principle of English grammar, 1 Pa.C.S. § 1903(a), which states that unless plainly meant otherwise, a modifying clause operates only upon the phrase preceding it. This has long been the mode of statutory construction in this jurisdiction.”).

We next consider Homeowners’ prayer for counsel fees under the UTPCPL.

> In a case involving a lawsuit which include[s] claims under the UTPCPL ... the following factors should be considered when assessing the reasonableness of counsel fees: (1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the case; (2) The customary charges of the members of the bar for similar services; (3) The amount involved in the controversy and the benefits resulting to the clients from the services; and (4) The contingency or certainty of the compensation.
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> ***

[8] In order to establish a violation of the catchall provision of the UTPCPL, a plaintiff must establish either fraud or deception. **Burkholder v. Cherry,** 414 Pa. Super. 432, 440, 607 A.2d 745, 749 (1992) (“[I]t is not enough to establish a violation of the [UTPCPL] that [Contractor] failed to fulfill the [owner’s] expectations regarding the quality of his work.”); **see also, Skurnowicz v. Lucci,** 798 A.2d 788, 794 (Pa. Super. 2002) (noting that to succeed on a cause of action for fraudulent misrepresentation, “[t]he key inquiry is not whether there was an intent to injure, but whether there was an intent to deceive.”).

> [Further]: (1) there should be a sense of proportionality between an award of damages [under the UTPCPL] and an award of attorney's fees, and (2) whether plaintiff has pursued other theories of recovery in addition to a UTPCPL claim should [be] given consideration in arriving at an appropriate award of fees.

Neal v. Bavarian Motors, Inc., 882 A.2d 1022, 1030-31 (Pa. Super. 2005) (citations and quotation marks omitted), **appeal denied,** 907 A.2d 1103 (Pa. 2006). Moreover,

> [a] court in awarding attorney fees under the UTPCPL must link the attorney fee award to the amount of damages a plaintiff sustained under that Act, and eliminate from the award of attorney fees the efforts of counsel to recover on non-UTPCPL theories. ... [T]here is 'no statutory authority for awarding attorney's fees for time spent pursuing [non-UTPCPL] counts.' ... '[A]n effort should be made to apportion the time spent by counsel on the distinct causes of action.'

Id. at 1031-32 (citations omitted). Since, as determined by the jury, Homeowners established only a violation of the UTPCPL, but no resulting harm, an award of counsel fees is not warranted on this record.[9]

[9] The stock plans and specifications which Homeowners originally presented to Contractor to obtain an estimated cost for construction depicted nineteen masonry piers at various locations in the crawlspace to provide support. These masonry piers were replaced in the home, as built by Contractor, by ten beam pockets in the poured concrete foundation and ten six-by-six pressure treated solid wooden posts. The parties heavily disputed whether these changes in construction were agreed upon and whether the structural integrity of the home was compromised thereby. These differences accounted for the majority of Homeowners' breach of contract claim related to the structural soundness of the home.

To the extent Homeowners assert that we abused our discretion in not submitting to the jury a claim for consumer fraud based upon Contractor's alleged misrepresentation as to the structural integrity of the residence with the changes made by Contractor, this claim was not a part of Homeowners' initial counterclaim, first amended counterclaim, second amended counterclaim, or third amended counterclaim. This claim was raised for the first time on the final day of trial. (N.T. 02/15/10, pp. 804-807.) We found that to have permitted Homeowners to present this claim at that time would have been contrary to our Order dated January 7, 2008, would have been highly prejudicial to Contractor given the timing of the request, and was untimely. Moreover, the claim, at its core, is one of contract—whether Contractor failed to perform its work in a good and workmanlike manner—and not one of fraud. **See eToll, Inc. v. Elias/Savion**

CONCLUSION

We have carefully examined the evidence submitted and testimony given at trial in this case. Homeowners' evidence as to defects and cost of repairs was hotly contested, with Contractor adamantly disputing that the work was substandard or structurally unsound. **See Davis v. Steigerwalt,** 822 A.2d 22, 30 (Pa. Super. 2003) (contrasting the situation where the claimant's evidence as to damages is uncontroverted).[10] As to these disputes, the jury was free to accept or reject, in whole or in part, the evidence of either side. Although Homeowners are clearly disappointed in the outcome, we are nevertheless unable to discern a valid, legal reason as to why we should upset the decision of the jury. In accordance with our order directly following this opinion, we therefore deny Homeowners' Motion for Post-Trial Relief.

Advertising, Inc., 811 A.2d 10, 14 (Pa. Super. 2002) (Under Pennsylvania law, the gist of the action doctrine "precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims.").

In addition, Homeowners' brief does not discuss the elements of fraud nor do Homeowners provide us with any authority supporting their assertion that this claim should have gone to the Jury. **See supra** footnote 2 (regarding waiver); **see also, Commonwealth v. Brookins,** 10 A.3d 1251, 1255 (Pa. Super. 2010) (defining the standard for finding an abuse of discretion, including the burden upon the movant to establish resulting prejudice).

[10] Nor was the Homeowners' evidence as to damages uncontested, even accepting Homeowners' evidence alone. An example of this was the combined estimate Homeowners presented at trial to remediate the claimed structural and non-structural defects. This estimate totaled $109,350.00, yet previously Homeowners had obtained another estimate from another contractor to make the same repairs. That estimate totaled $65,220.00. (N.T. 02/09/10, pp. 344-47; Plaintiff Exhibit Nos. 27 and 28.) To this can be added that the contractor Homeowners called to establish their damages was not employed primarily in the building business and had limited experience: Homeowners' expert had built a total of four homes, none in Pennsylvania and none in the last twenty years, and most of his work involved small jobs. (N.T. 02/12/10, pp. 532, 563-64, 573.) In addition, this expert had no cost information to back up his estimates and was unable to provide any breakdown of the cost to repair any specific item which Homeowners claimed was defective. (N.T. 02/12/10, pp. 551-52, 561.) In this same vein, since no breakdown was given of the cost to repair any specific item, in the event the jury found that even one of the complaints Homeowners made was invalid, the jury would have been within their authority to deny Homeowners' claim in its entirety on that category of damages.

ORDER OF COURT

AND NOW, this 27th day of December, 2011, upon consideration of the Motion for Post-Trial Relief filed by the Defendants, Karen Altobelli and Stephen James, Plaintiffs' response thereto, after argument thereon, and in accordance with our Memorandum Opinion of this same date, it is hereby

ORDERED and DECREED that the Motion is denied and dismissed, and judgment is hereby entered in favor of the Plaintiff, Michael Cataldo t/d/b/a Cataldo Builders, and against Defendants, Karen Altobelli and Stephen James, in the sum of $12,631.95 on Plaintiffs' complaint. Judgment is further entered in favor of the Defendants, Karen Altobelli and Stephen James, and against the Plaintiff, Michael Cataldo t/d/b/a Cataldo Builders, in the sum of $12,631.95 on Defendants' counterclaim.

APPENDIX 1

IN THE COURT OF COMMON PLEAS
OF CARBON COUNTY, PENNSYLVANIA
CIVIL ACTION

MICHAEL CATALDO, t/d/b/a	:	
CATALDO BUILDERS,	:	
Plaintiff	:	
v.	:	No: 05-0732
KAREN ALTOBELLI and	:	
STEPHEN JAMES,	:	
Defendants	:	
Carole J. Walbert, Esquire		Counsel for Plaintiff
David Alan Klein, Esquire		Counsel for Defendants

VERDICT SLIP

QUESTION 1:

Do you find that the Defendants breached their contract with Cataldo?

Yes ____X____ No _____

If you answer Question 1 "Yes," please proceed to Question 2. If you answer Question 1 "No," please proceed to Question 4.

QUESTION 2:

Do you find that the Defendants' breach of contract caused a loss for which Cataldo is entitled to recover monetary damages?

Yes X No _____

If you answer Question 2 "Yes," please proceed to Question 3. If you answer Question 2 "No," Cataldo cannot recover and you should proceed to Question 4.

QUESTION 3:

State the amount of damages you award to Cataldo.

$12,631.95

QUESTION 3 CONTINUED:

With respect to the amount stated in your answer to this interrogatory, please state what portion of this amount is allocated to each of the following claims made by Cataldo:

1.	The claim for extras identified In Exhibits P-16 and D-7 (lines 1 and 2)	$6,615.00
2.	Excavation costs in excess of the claimed $14,000.00 allowance	$4,919.50
3.	Lumber costs in excess of the claimed $22,000.00 allowance	$_____
4.	For additional gas lines, connections and parts	$1,097.45
5.	For additional hardwood flooring	$_____
	Total	$12,631.95

This total should equal the total amount of damages you have awarded under Question 3.

QUESTION 4:

Do you find that Cataldo breached his contract with the Defendants?

Yes X No _____

If you answer Question 4 "Yes," please proceed to Question 5. If you answer Question 4 "No," please proceed to Question 7.

QUESTION 5:

Do you find that Cataldo's breach of contract caused a loss for which Defendants are entitled to recover monetary damages?

Yes ____X____ No _____

If you answer Question 5 "Yes," please proceed to Question 6. If you answer Question 5 "No," please proceed to Question 7.

QUESTION 6:

State the amount of damages you award to the Defendants for Cataldo's breach of contract.

$12,631.95

QUESTION 7:

Do you find that Cataldo committed any unfair, fraudulent, or deceptive acts or practices as those terms were defined for you by the Court with respect to the services it agreed to provide to the Defendants in this matter?

Yes ____X____ No _____

If you answer Question 7 "Yes," please proceed to Question 8. If you answer Question 7 "No," please return to the Courtroom.

QUESTION 8:

Did the Defendants suffer any ascertainable loss of money or property as a result of any unfair, fraudulent, or deceptive act or practice committed by Cataldo?

Yes _____ No ____X____

If you answer Question 8 "Yes," please proceed to Question 9. If you answer Question 8 "No," please return to the Courtroom.

QUESTION 9:

State the amount of actual damages you award to the Defendants as a result of any unfair, fraudulent, or deceptive act or practice committed by Cataldo.

If you answer Question 9 "Yes," please proceed to Question 10. If you answer Question 9 "No," please return to the Courtroom.

$_____

QUESTION 10:

If you have awarded actual damages to the Defendants in your answer to Question 9, state what dollar amount of this loss, if any, is included in any damages awarded in your answer to Question 6.

$_____

Date: February 14, 2010[11] Foreperson: /s/ Chris

[11] Although the verdict slip is dated February 14, 2010, the verdict was rendered on February 15, 2010.

COMMONWEALTH OF PENNSYLVANIA
vs. PAUL G. HERMAN, Defendant

Criminal Law—Search and Seizure—Suppression—Spousal Consent—Voluntariness—Conclusiveness of Third-Party Consent Where Defendant Physically Present and Opposed—Searches and Seizures by Private Parties—State Action—Third Party Acting As Agent or Instrumentality of the State

1. As a general rule, when police officers obtain the voluntary consent to search of a third party who has the authority to give consent, they are not required to obtain a search warrant based upon probable cause.

2. The constitutional sufficiency of a co-inhabitant's consent to enter and search rests on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right.

3. A spouse's consent to search a defendant's home in response to a police officer's statement that a search warrant will be obtained if consent is not given is neither coerced nor involuntary, if at the time the officer had a good faith and legal basis to obtain a warrant.

4. A warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident.

5. The proscriptions of the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution apply only to governmental searches and seizures, not to searches and seizures conducted by private individuals.

6. For the conduct of a third party to be deemed state action subject to the exclusionary rule: (1) the third party must be acting on behalf of the state at the time of the conduct in question, and (2) either the conduct of the state or a party acting on its behalf must be unlawful.

7. The critical factor for purposes of determining whether state action is involved is whether the private individual, in light of all the circumstances, must be regarded as having acted as an instrument or agent of the state.

NO. 013 CR 10

JAMES M. LAVELLE, Esquire, Assistant District Attorney—Counsel for Commonwealth.

STEPHEN P. ELLWOOD, Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—January 18, 2012

The Defendant, Paul G. Herman, has been charged with two counts of possession of a firearm in violation of 18 Pa. C.S.A. §6105(a)(1),[1] one count of simple assault under 18 Pa. C.S.A. §2701(a)(1), and one count of harassment under 18 Pa. C.S.A. §2709(a)(1). Herein, Defendant seeks to suppress two guns obtained from his home and brought to the police station by his wife, as well as two statements made by Defendant following the delivery of these weapons. For the reasons which follow, we deny Defendant's Motion to Suppress.

FACTUAL BACKGROUND

On January 3, 2010, at approximately 7:13 P.M., Officer John Donato of the Jim Thorpe Police Department was dispatched by the Carbon County Communications Center to 319 South Street in the Borough of Jim Thorpe to investigate a domestic disturbance call. The dispatch advised that weapons were present. The call was made by Defendant's wife, Jolaine Herman, who together with Defendant's minor daughter and son, also resided at this location.

Upon his arrival, Officer Donato looked in the front window, observed Defendant's wife and daughter, and then knocked on the door. Defendant's daughter answered. Officer Donato stepped inside and asked to speak to Defendant. At this point, Defendant entered the room from an upstairs area and indicated he and his daughter had been arguing.

In order to better assess the situation, Officer Donato asked Defendant to step outside. Defendant was patted down and a pocket knife removed from his possession. After speaking with Defendant, Officer Donato asked Defendant to remain outside in the officer's patrol car while he re-entered Defendant's home to

[1] Defendant is a convicted felon which status prohibits him from possessing a firearm in this Commonwealth. Defendant's conviction was for voluntary manslaughter.

speak further with Defendant's wife and daughter. Inside the home, Officer Donato was told that Defendant had struck and kicked his daughter. Officer Donato also examined Defendant's daughter's upper chest and neck where he observed red marks consistent with the assault described. To further document their answers, Defendant's wife and daughter agreed to meet with the officer at the police station and give a formal statement. In the meantime, Officer Donato went outside, placed Defendant under arrest and transported him to the police station.

The police station is located a short distance from Defendant's home. At the police station, Defendant was placed in a holding cell, given **Miranda** warnings, and asked if he wanted to make a statement. Defendant declined to speak without an attorney. This occurred at approximately 8:20 P.M. (Commonwealth Exhibit 1.)

Shortly after Defendant and Officer Donato arrived at the station, Defendant's wife and daughter also arrived and were taken to a conference room. Officer Donato again spoke with Defendant's wife and daughter about what had happened. During this time, Officer Donato told Defendant's wife that he had conducted a background check on Defendant and knew he was a convicted felon.[2] Officer Donato further asked if there were any guns in the house. In response, Defendant's wife confirmed that Defendant was a convicted felon and that there were two long guns in the home. Upon learning of the presence of these guns, Officer Donato asked Defendant's wife if she would return to the home and bring these weapons to the police station. Officer Donato also told Defendant's wife that if necessary he would obtain a search warrant to have the guns located. Upon hearing this, Defendant's wife agreed to voluntarily bring the guns to the station.

Defendant's wife then left the police station. When she returned, she handed a 12-gauge shotgun (loaded) and a .22 caliber

[2] Prior to speaking with Defendant's wife at the station, and after Defendant had been arrested, Officer Donato made a request to obtain Defendant's prior criminal record. The results of this request were faxed to Officer Donato at approximately 8:21 P.M. Although Officer Donato could not recall at the time of hearing whether he was aware of this fax or had examined its contents prior to meeting with Defendant's wife and daughter at the police station, it is clear from wife's testimony that Officer Donato was aware of her husband's criminal history when he spoke with her at the station.

rifle (unloaded) to Officer Donato. Defendant's wife further agreed to provide, and did provide, a written statement about these weapons. (Commonwealth Exhibit 6.) In this statement, Defendant's wife confirms that the guns she retrieved from the home were Defendant's and that the guns were located in their bedroom, on Defendant's side of the room. There is no time indicated as to when the statement was given.

When Defendant's wife returned to the station, Defendant saw his wife carrying the guns and asked to speak with her. This was not permitted. However, after his wife had left the station, Defendant told Officer Donato that he now wanted to make a statement. At approximately 8:38 P.M., Defendant executed a form waiving his **Miranda** rights. (Commonwealth Exhibit 2.) This was followed by two written statements from Defendant, one describing the circumstances of his possession of the guns and the second giving his version of the domestic dispute with his daughter. (Commonwealth Exhibits 3 and 4.) Neither statement provides the time it was given. On the second statement, the time of the dispute between Defendant and his daughter is indicated to have occurred at 7:10 P.M.

In his Motion to Suppress, Defendant claims the police illegally coerced his wife to admit to the presence of weapons in their home and improperly pressured her to agree to bring the weapons to the police station by threatening to obtain a search warrant if she failed to do so—stating that if she didn't retrieve the guns, he would rip the home apart to have them located—when there was no basis to obtain a search warrant. Defendant also claims that the reason he gave the two written statements was because he saw his wife at the station with the guns.[3] Following hearing on Defendant's Motion, Defendant also argued that because he was present in the police

[3] In his Motion to Suppress, Defendant further contends that at the time these statements were made he was injured and in need of medical attention which, he claims, was refused by the police and that, in consequence, the statements he gave were not knowingly, voluntarily and intelligently made. We find Defendant's description of his medical condition exaggerated and its effect on his decision making incredulous.

While in the holding cell at the station, Defendant complained of a headache, possibly a concussion. This occurred after Defendant had given the two written statements. Officer Donato called to have an ambulance dispatched, and emergency medical personnel did in fact arrive and examine Defendant. Defendant however, refused any medical treatment. (Commonwealth Exhibit 5.)

station when his wife's consent to retrieve the guns from their home was obtained, the failure to also obtain his consent vitiated the effectiveness of any consent given by his wife.

DISCUSSION

Voluntariness of Wife's Consent

As to the first issue, we reject the factual basis on which it is premised: that Officer Donato unlawfully induced Defendant's wife to turn over his weapons in violation of Defendant's rights. We accept as credible Officer Donato's testimony that after being alerted to the presence of weapons in the initial dispatch, he inquired of Defendant's wife if there were weapons. We also believe it entirely natural under the circumstances—a physical altercation between Defendant and the parties' daughter, witnessed by Defendant's wife, which resulted in Defendant's wife calling 911 for emergency assistance—for wife to confirm that there were weapons and that she wanted them removed from the home.

That Officer Donato mentioned the possibility of obtaining a search warrant (that he was aware of Defendant's prior record and would seek a warrant if consent was not provided) and that Defendant's wife wanted to avoid a search of her home for fear of what might be discovered since her teenaged son was also living in the home—facts to which wife testified—does not change our finding as to the voluntariness of wife's consent. The fact remains that given the information both known and available to Officer Donato at the time, there was a factual basis for a search warrant[4] and any subjective compulsion wife may have felt to consent due to the potential for criminal liability of her son was neither known nor caused by Officer Donato.

Necessity of Defendant's Consent

As to the second issue, whether Defendant's consent was required to legitimize his wife's consent, Defendant relies on the

[4] Having found that Officer Donato indicated his intent to obtain a search warrant if Defendant's wife refused to return to the parties' home and retrieve the firearms, this does not render the consent involuntary. **See Commonwealth v. Woods,** 240 Pa. Super. 72, 78-79, 368 A.2d 304, 306-307 (1976) (statement of intent to obtain a search warrant does not vitiate consent if the officer had a good faith and legal basis to obtain a warrant); **cf. Bumper v. North Carolina,** 391 U.S. 543 (1968) (holding that there can be no valid consent where access is given by police representing they have a search warrant when they have none).

United States Supreme Court's decision in **Georgia v. Randolph,** 547 U.S. 103 (2006). Before discussing this case, we note first that as a general rule "[w]hen police officers obtain the voluntary consent of a third party who has the authority to give consent, they are not required to obtain a search warrant based upon probable cause." **Commonwealth v. Hughes,** 575 Pa. 447, 836 A.2d 893, 900 (2003). The constitutional sufficiency of a co-inhabitant's consent to enter and search "rests ... on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right ... ." **United States v. Matlock,** 415 U.S. 164, 171 n.7 (1974). Hence, Defendant's wife, as a resident of the home, had the requisite authority to consent to the search. **See Commonwealth v. Garcia,** 478 Pa. 406, 387 A.2d 46 (1978) (holding that a mother, who had joint access or control over her son's bedroom, could validly consent to the search and seizure of items contained therein as son had no reasonable or legitimate expectation of privacy as against his mother's consent).

In **Randolf, supra,** the police were called to a domestic dispute. On arrival, they found a husband and wife involved in a dispute over custody. Both parties accused the other of using illegal substances. Wife informed the police that they could find evidence of her husband's drug use if they searched the house. The police asked husband for permission to search but he refused. The police then asked wife. Wife consented, going so far as leading the police to an upstairs bedroom, which she identified as husband's, where evidence of drug use was in plain view. This evidence, together with other evidence discovered after execution of a search warrant obtained on the basis of what the police had observed, was seized. Husband moved to suppress the evidence.

In granting husband's motion, the Supreme Court held that "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." **Id.,** at 120. The court specifically noted it was drawing a fine line:

> [I]f a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential

> objector, nearby but not invited to take part in the threshold colloquy, loses out.
>
> ... So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it.

Id. at 121.

In drawing this line, the court explicitly recognized that there is a distinction between a co-tenant who is physically present and objecting to the search and a co-tenant who has an interest in objecting to the search, but, because he may be a short distance away, is not invited to take part in the threshold colloquy, citing **Matlock**[5] and **Illinois v. Rodriguez,** 497 U.S. 177 (1990).[6] **Randolf, supra** at 121. In both of these cases, the court upheld the reasonableness of the search to which consent was given, notwithstanding that the police were aware of the identity of the potential defendant and his nearby presence. As to the qualification in **Randolf,** that the police not "have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection," Defendant's presence in the holding cell was not to prevent him from objecting to a search of the home, but rather occurred as a result of the assault on his daughter which was the basis of his subsequent arrest. **Cf. Commonwealth v. Yancoskie,** 915 A.2d 111, 115 (Pa. Super. 2006) (noting that obtaining defendant's wife's consent to search at a time when police knew defendant planned to be away and would not be home, did not amount to removal of defendant from entrance of his home under **Randolph**); **appeal denied,** 927 A.2d 625 (Pa. 2007).

Moreover, the factual distinctions between **Randolph** and the present case, and their legal implications, are even more fun-

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[5] In **Matlock,** the defendant was in custody in a police car outside of the house in which he resided with his girlfriend and others when his girlfriend gave police her consent for a search of the bedroom she shared with the defendant.

[6] In **Rodriguez,** the defendant was asleep in another room of the apartment when his girlfriend, whom the police believed to have authority, gave consent for a police search of the apartment.

damental. Here, the search of Defendant's home (assuming wife's return to the home, unaccompanied by police, and retrieval of guns which wife knew were present and openly visible in her own bedroom, can properly be characterized as a search) was conducted by Defendant's wife, not by the police. This is significant since the proscriptions of the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution apply only to governmental searches and seizures, not to searches and seizures conducted by private individuals. **Commonwealth v. Harris,** 572 Pa. 489, 817 A.2d 1033, 1047 (2002).

Even if we were to accept Defendant's argument that "when [his wife retrieved the guns] and then handed them over to the police, she was acting as an 'instrument' of the officials, complying with a 'demand' made by them," and therefore, Defendant "was the victim of a search and seizure within the constitutional meaning of those terms," this would not change the outcome we have reached. **Coolidge v. New Hampshire,** 403 U.S. 443, 487 (1971), **overruled on other grounds** by **Horton v. California,** 496 U.S. 128 (1990). For the conduct of a third party to be deemed state action subject to the exclusionary rule: (1) the third party must be acting on behalf of the state at the time of the conduct in question, and (2) either the conduct of the State or a party acting on its behalf must be unlawful. **Cf. Commonwealth v. Corley,** 507 Pa. 540, 547, 491 A.2d 829, 832 (1985) (setting forth a two-part analysis in determining whether a private party's conduct in making an arrest is state action).

"[T]he fruits of an illegal search by an individual not acting for the state are not subject to exclusion by reasons of the Fourth Amendment. ... At the core of the reasoning underlying this refusal to extend application of the exclusionary rule to private searches is the concept of 'state action,' the understanding that the Fourth Amendment operates only in the context of the relationship between the citizen and the state." **Id.** at 545-46, 491 A.2d at 831 (citations omitted); **see also, United States v. Jacobsen,** 466 U.S. 109, 113 (1984) (the Fourth Amendment proscribes "only governmental action;" it is inapplicable to searches, even unreasonable ones, "effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any govern-

mental official"). "The critical factor for purposes of determining whether state action is involved is whether the private individual, in light of all the circumstances, must be regarded as having acted as an 'instrument' or agent of the state." **Commonwealth v. Price,** 543 Pa. 403, 410, 672 A.2d 280, 283 (1996).

The acts of a third party do not become state action "merely because they are in turn relied upon and used by the state in furtherance of state objectives." **Corley, supra** at 547, 491 A.2d at 832. "The mere use by police and prosecutors of the results of an individual's actions does not serve to 'ratify' those actions as conduct of the state." **Id.** "Where, however, the relationship between the person committing the wrongful acts and the State is such that those acts can be viewed as emanating from the authority of the State, the principles established in **Corley** dictate a finding of state action." **Price, supra** at 411, 672 A.2d at 284.

In this case, wife had every right as a co-inhabitant of the home with Defendant, her husband, to be in the home, and to seek and remove items located there. There is no illegality in her conduct. **Cf. Commonwealth v. Pinkins,** 514 Pa. 418, 428, 525 A.2d 1189, 1193-94 (1987) (upholding defendant's mother's right to search her home for a revolver owned by her, which was found in her son's bedroom and which had been used in a murder in which her son was involved). Nor, as previously discussed, did Officer Donato act unlawfully in seeking Defendant's wife's cooperation in retrieving the two guns.

That wife chose to cooperate with the police, with police knowledge, does not necessarily make her actions those of the police for purposes of the Fourth and Fourteenth Amendments, the question being one that can only be resolved "in light of all the circumstances of the case." **Coolidge v. New Hampshire, supra** at 487.

As stated in **Coolidge**

> In a situation like the one before us there no doubt always exist forces pushing the spouse to cooperate with the police. Among these are the simple but often powerful convention of openness and honesty, the fear that secretive behavior will intensify suspicion, and uncertainty as to what course is most

> likely to be helpful to the absent spouse. But there is nothing constitutionally suspect in the existence, without more, of these incentives to full disclosure or active cooperation with the police. The exclusionary rules were fashioned 'to prevent, not to repair,' and their target is official misconduct. They are 'to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' But it is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals. If, then, the exclusionary rule is properly applicable to the evidence taken from the [Herman] house on the night of [January 3, 2010], it must be upon the basis that some type of unconstitutional police conduct occurred.

Id. at 487-88.[7]

The facts of the present case strongly suggest that wife was acting primarily for her own self-interest and out of concern for the safety of her daughter. It was wife who called the police in the first instance and it was wife who decided to retrieve the guns herself, rather than have the police search for them, in order to protect her son. At the same time, unlike in **Coolidge,** here the police made an explicit request for wife to get Defendant's guns and bring them to the police station. While this distinction is indeed significant and supports a finding that wife was acting at the behest of the police when she retrieved Defendant's guns, absent some type of unconstitutional police conduct or illegality committed by wife—of which we have found none—Defendant's request to

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[7] In **Coolidge,** the defendant was suspected of murder. While a polygraph was administered to him at the police station, police visited his home and interviewed his wife. During the course of this interview, defendant's wife provided the police with four guns belonging to her husband, and some clothes that she thought her husband might have been wearing on the evening of the murder. Specifically, in response to the police's question whether her husband owned any guns, wife replied, "Yes, I will get them in the bedroom." The police then accompanied wife to the bedroom where wife took four guns out of the closet and handed them to the police. At a suppression hearing, wife testified that she did so in an attempt to clear her husband of suspicion. While acknowledging that defendant's wife did not act wholly on her own initiative, the court ultimately held that given the totality of the circumstances, she was not acting as an instrument or agent of the State and that the Fourth Amendment was not implicated. **Id.** at 486-90.

suppress his guns must fail. **Cf. Commonwealth v. Borecky,** 277 Pa. Super. 244, 419 A.2d 753 (1980) (holding that where a police informant, with the knowledge and concurrence of the police, surreptitiously searches and takes marijuana from defendant's home, without defendant's knowledge or consent, the unauthorized and illegal activities of the informant are fairly imputed to the Commonwealth and require that the contraband seized, as well as all evidence seized pursuant to a subsequent warrant issued on the basis of such contraband, be suppressed).

CONCLUSION

In accordance with the foregoing, Officer Donato's actions did not violate Defendant's right to be free from unreasonable searches and seizures under the United States and Pennsylvania Constitutions. Officer Donato was under no obligation to obtain Defendant's consent. Furthermore, Defendant's wife's retrieval of the guns was neither unlawful nor violated the protections afforded Defendant by the state and federal constitutions against unreasonable searches and seizures.

MELO ENTERPRISES, LLC, Plaintiff vs. FOX FUNDING, LLC, Defendant vs. 1400 MARKET STREET, LLC, Intervenor

Civil Law—Validity and Enforcement of Mortgage Given by Party With No Interest in Property—Mortgage Foreclosure—Sheriff's Sale—Quality of Title Conveyed by Sheriff's Deed—Discharge of Second Mortgage—Reformation

1. A purchaser of land at sheriff's sale buys at his own risk and acquires only that interest in the property held by the defendant whose property has been foreclosed upon, and no more.

2. As an instrument providing security for a debt, a mortgage is a conveyance of land conditionally granting title to the mortgagee. When the mortgagor holds neither title nor any other legal interest in the property at the time the mortgage is given, there can exist no valid and enforceable mortgage.

3. A sheriff's deed issued in execution on a mortgage foreclosure judgment taken against a mortgagor who never held title or any other legal interest in the property foreclosed upon conveys nothing.

4. A sheriff's deed issued in execution on a mortgage foreclosure judgment taken against a mortgagor who never held title or any other legal interest in the property foreclosed upon cannot discharge a valid and enforceable "second" mortgage given by the true owner of the property.

5. The right, in equity, to reformation when there has been a mutual mistake is well-settled in the absence of intervening rights of innocent third parties or other considerations which would make reformation inequitable. This right extends to reformation of a mortgage to correct the identity of a mortgagor

entered by mutual mistake from one who is a stranger to title to the true owner of the property and borrower of the funds intended to be secured by the mortgage.

6. Whether a mortgage can be reformed after the entry of judgment and execution thereon, and following the delivery of a sheriff's deed, or whether the sheriff's sale acts to extinguish the mortgage and prohibits its subsequent reformation, are issues which are not before the court and have not been decided.

NO. 10-3538

ANTHONY ROBERTI, Esquire—Counsel for Plaintiff.

SCOTT M. ROTHMAN, Esquire—Counsel for Intervenor.

Fox Funding, LLC—Unrepresented.

MEMORANDUM OPINION

NANOVIC, P.J.—February 15, 2012

In real estate conveyancing, the language of a document is often critical, and the consequences of making an error far-reaching. This case illustrates such consequences, with one error compounding another, and little attention being paid to the most basic of detail—the correct name of a mortgagor.

FACTUAL AND PROCEDURAL BACKGROUND

The facts of this case begin on October 21, 2005, when Dennis and Elsie Waselus (the "Waseluses"), husband and wife, transferred title to property owned by them located along the Maury Road in Penn Forest Township, Carbon County, into the name of Fox Funding, LLC, a New Jersey limited liability company. To finance this purchase and to make anticipated improvements to the property, Fox Funding, LLC ("Owner"), borrowed $1,075,000.00 from The Town Bank ("Bank").[1] This amount was to be secured by a first lien

[1] Fox Funding, LLC, in fact, borrowed $1,300,000.00 from The Town Bank to purchase and improve property being acquired from both the Waseluses and another party. Before closing, it was agreed to split this amount into two loans: one for $1,075,000.00, secured by a first lien on both the property being purchased from the Waseluses and that being purchased from the other party, and one for $225,000.00. A mortgage to secure this second loan was to be a third lien on the Waseluses' property, behind a $372,000.00 purchase money mortgage taken back by the Waseluses, and a second lien against the remainder of the property being purchased by Fox Funding, LLC.

Because the existence of this additional collateral and the division of the loan proceeds received from the Bank do not affect the issues before us, they are not considered further in this opinion. We do note, however, that the $225,000.00 mortgage was also executed by Fox Funding PA, LLC and not Fox Funding, LLC, the true borrower and entity to which title was transferred.

mortgage on the property from the Owner to the Bank. Instead, both the note evidencing this debt and the mortgage securing its repayment were executed under the name of Fox Funding PA, LLC. Fox Funding PA, LLC is a Pennsylvania limited liability company which exists separate and apart from Fox Funding, LLC. James Harrison, who owned and controlled both limited liability companies, executed the note and mortgage in his capacity as the managing member of Fox Funding PA, LLC.

The deed from the Waseluses to the Owner is dated October 21, 2005, as is the mortgage from Fox Funding PA, LLC to the Bank (the "Bank mortgage"). Also dated this same date and secured by the same property described in the Waseluses' deed is a mortgage from the Owner to the Waseluses in the amount of $372,000.00 (the "Waselus mortgage"). This second mortgage expressly states that it is "under and subject, in both lien and payment, to a construction and purchase loan mortgage to secure the payment of the principal sum of $1,075,000.00 given by [Owner] to Town Bank dated October 21, 2005, and intended to be recorded forthwith." All three documents—the deed from the Waseluses to the Owner, the mortgage from Fox Funding PA, LLC to the Bank, and the mortgage from the Owner to the Waseluses—were recorded on October 25, 2005, in the sequence just mentioned. Significantly, the Bank mortgage was indexed by the Recorder of Deeds Office under the Owner's name, and not that of Fox Funding PA, LLC.

On January 2, 2009, the Bank commenced a mortgage foreclosure action naming Fox Funding PA, LLC, the designated mortgagor in the Bank mortgage, as the defendant. This action is docketed to No. 09-0006 in the Carbon County Court of Common Pleas. Judgment was taken on August 31, 2009, and a writ of execution was issued on September 1, 2009. On November 6, 2009, the property was sold at sheriff's sale to 1400 Market Street, LLC (the "Buyer"), to whom the Bank's loan, note, mortgage and judgment were assigned on November 3, 2009, three days before the sheriff's sale. No objections or petitions to set aside the sheriff's sale of the mortgaged property to Buyer were asserted or filed at any time. A sheriff's deed dated November 30, 2009, and purporting to convey title to the property to Buyer, was recorded on December 7, 2009.

On December 3, 2010, Melo Enterprises, LLC (the "Plaintiff") commenced the present action in mortgage foreclosure against the Owner seeking to foreclose on the Waselus mortgage. Plaintiff acquired this mortgage from the Waseluses by assignment dated November 8, 2010, and recorded on November 12, 2010. By agreement of the parties, Buyer was permitted to intervene as an interested party pursuant to Pa. R.C.P. 2327(4).

Buyer claims ownership of the property both by virtue of the sheriff's deed dated November 30, 2009, and a quitclaim deed from the Owner dated November 29, 2010 (recorded December 27, 2010), and further claims that the Waselus mortgage on the property was extinguished by the sheriff's sale held on November 6, 2009. It is undisputed that the Waseluses received notice of this sale in accordance with Pa. R.C.P. 3129.2 and filed no objections. In response, Plaintiff claims the Bank mortgage was void **ab initio** having been given by a party, Fox Funding PA, LLC, who held no title to the property and, therefore, foreclosure on this mortgage cannot serve as the basis for transferring title of the property to Buyer. Plaintiff further claims that because the Bank mortgage has been the subject of foreclosure and execution proceedings, it has been extinguished in the process, and that Buyer is without recourse to resurrect or reform this mortgage.

The above facts are not in dispute. They form the basis of both Buyer's motion for summary judgment and Plaintiff's cross-motion for summary judgment, which are now before us for disposition.

DISCUSSION

At its most basic level, Buyer argues that the foreclosure proceedings on the Bank mortgage, a first mortgage, discharged the Waselus mortgage, a second and junior mortgage, and hence, Plaintiff's complaint for mortgage foreclosure is premised upon a mortgage which no longer exists. The strength of this argument hinges on the validity of the Bank mortgage, which Plaintiff claims was invalid from its inception since Fox Funding PA, LLC possessed no legal interest in the property upon which to grant a mortgage. Plaintiff acknowledges that if the Bank mortgage created a valid first mortgage lien, its mortgage has been divested. **See** 42 Pa. C.S.A. §§8141, 8152; **Irwin Union National Bank and Trust**

Company v. Famous, 4 A.3d 1099, 1103 n.3 (Pa. Super. 2010) ("A junior lienholder's rights are divested when a senior lienholder sells the property at sheriff's sale."), **appeal denied,** 20 A.3d 1212 (Pa. 2011).

As to the validity of the Bank mortgage, we agree with Plaintiff's position that Fox Funding PA, LLC had neither the power nor the authority to grant this mortgage. Fox Funding PA, LLC held neither title nor any other legal interest in the property at the time the mortgage was given. As such, it was a stranger to title and without the capacity to convey or encumber property owned by another. **Cf. Pines v. Farrell,** 577 Pa. 564, 848 A.2d 94 (2004) (holding that a mortgage is a conveyance of land, granting title to the mortgagee). Nor is this a case where the name of the claimed intended mortgagor—Fox Funding, LLC—was misspelled, or where the mortgagor actually named—Fox Funding PA, LLC—was a non-existent entity, such that it can be fairly said that Fox Funding, LLC and Fox Funding PA, LLC are one and the same; Fox Funding PA, LLC did in fact exist and was a separate, independent entity from Fox Funding, LLC.

In its simplest terms, the Bank mortgage was not executed by either the real or record owner of the property. Further, the **in rem** judgment which the Bank sought to obtain in its mortgage foreclosure action against Fox Funding PA, LLC was against an entity which never held an interest in the property. It necessarily follows that the sheriff's deed which issued upon execution on this judgment and which purported to convey such title in the property as was held by Fox Funding PA, LLC to Buyer, in reality conveyed nothing. A sheriff's deed can convey no better title than that held by the judgment debtor. **Tonge v. Radford,** 103 Pa. Super. 131, 156 A. 814, 815 (1931) ("A purchaser of land at sheriff's sale buys at his own risk and acquires only the interest which the defendant in the execution had, and no more.") (construing **Weidler v. Farmer's Bank of Lancaster,** 11 Serg. & Rawle 134 (Pa. 1823)). Consequently, the Waselus mortgage, which was properly executed and recorded, was not extinguished in the sheriff's sale and remains as an open, viable lien on the property.

We do not disagree with Buyer's argument that had reformation of the mortgage between Fox Funding PA, LLC and the Bank been sought on grounds of mutual mistake prior to the

sheriff's sale, it likely would have been granted. **Radnor Building & Loan Assn. v. Scott,** 277 Pa. 56, 60, 120 A. 804, 806 (1923) ("[T]he right to reformation in equity, if mutual mistakes appear, is unquestionable."); **see also, Zurich American Insurance Company v. O'Hanlon,** 968 A.2d 765, 770-71 (Pa. Super. 2009). The Waseluses were not innocent third parties to this transaction: The Waselus mortgage on its face recited it was subordinate and secondary to the intended mortgage from the Owner to the Bank, and the Waseluses indisputably were provided prior notice of the sheriff's sale and did nothing. (Plaintiff's Brief, p. 6.) Nor is Plaintiff an innocent third-party purchaser of that mortgage: Plaintiff paid $1,000.00 for a mortgage with a face value of $372,000.00 and an amount owed at the time of the assignment in excess of $360,000.00. Why? Because Plaintiff knew of the title issues and was hoping to take advantage of this error by purchasing and then foreclosing on the Waselus mortgage, rather than purchasing the property directly from Buyer.[2] **See Uniontown Savings & Loan Company v. Alicia Land Company,** 338 Pa. 227, 230, 13 A.2d 65, 66 (1940) ("The right, in equity, to reformation ... when there has been a mutual mistake ... is well settled in the absence of intervening rights of innocent third persons or other considerations which would make reformation inequitable."). Nevertheless, the fact remains that Buyer did not seek to reform the Bank mortgage

[2] Moreover, under the Recording Act, 21 P.S. §357, a party acquiring an interest is charged with constructive notice of the contents of those instruments within the record chain of title. **First Citizens National Bank v. Sherwood,** 583 Pa. 466, 879 A.2d 178, 181 (2005) (holding that a purchaser may be deemed to have constructive notice of the existence of a mortgage when the mortgage was properly recorded, even if defectively indexed); **see also, Department of Public Assistance v. Reustle,** 358 Pa. 111, 115, 56 A.2d 221, 223 (1948) ("Where there is enough to put an ordinarily prudent person upon guard, inquiry becomes a duty, and if an investigation, reasonably pursued, would disclose the identity of the judgment debtor, the subsequent lienor is bound by notice of the previous judgment even though inaccurately recorded"). Here, as previously stated, the Bank mortgage was indexed under the name of the actual owner of the property, Fox Funding, LLC, and not that of Fox Funding PA, LLC.

In addition, prior to commencing its mortgage foreclosure action, Plaintiff made an agreement with Buyer to purchase the property for $580,000.00. Sometime before closing, Plaintiff claims to have learned of the alleged defects in title with respect to the Bank's foreclosure proceedings and determined that Buyer was unable to pass good and marketable title. In depositions, Plaintiff's principal testified he was then willing to purchase the property from Buyer for $220,000.00 (**i.e.,** the original price of $580,000.00, less the $360,000.00 debt secured by the Waselus mortgage, which Plaintiff had purchased for $1,000.00).

and this mortgage, which forms the basis of the sheriff's sale upon which Buyer premises its claim to good and marketable title unencumbered by the Waselus mortgage, was executed by a party who had no interest to give.

CONCLUSION

Whether there exists any right at this time (**i.e.,** after a sheriff's sale) to reform either the Bank mortgage or the sheriff's deed to the Buyer, or both, as Buyer claims, is an interesting question, but one which is not before us and which we do not decide.[3] Neither has occurred and the sheriff's sale, notwithstanding its ineffectiveness to convey title to the Buyer, remains intact. Accordingly, on the undisputed facts presented and the law applicable thereto, Buyer's Motion will be denied, as will Plaintiff's cross-motion.[4]

[3] Buyer has not requested reformation in these proceedings. However, in a supplemental letter brief following argument, Buyer indicated it was filing a separate action seeking a decree in equity to correct and reform the deed issued by the sheriff to conform to the undisputed intentions of the Bank and Owner. Cf. **Armstrong County Bldg. & Loan Ass'n of Ford City v. Guffey,** 132 Pa. Super. 19, 200 A. 160 (1938) (extending the right to reformation to a purchaser at sheriff's sale) and **Trachtenberg v. Glen Alden Coal Co.,** 354 Pa. 521, 47 A.2d 820 (1946) (holding, in a case where property was foreclosed upon and sold at sheriff's sale in a mortgage foreclosure proceeding, that after the sheriff's deed was acknowledged and delivered, the deed could no longer be reformed to include property which was not expressly included in the mortgage and was not included in the sheriff's advertisement of the property to be sold); **see also, Petrovich Appeal,** 155 Pa. Super. 138, 38 A.2d 709 (1944) (holding that after delivery of a sheriff's deed, a sheriff's sale may not be set aside, except for fraud or want of authority to make the sale and, if such can be proven, then only by an action of ejectment or bill in equity to cancel it) and **Mortgage Electronic Registration Systems, Inc. v. Ralich,** 982 A.2d 77 (Pa. Super. 2009) (delivery of a sheriff's deed divests the court of the authority to set aside a sheriff's sale unless the sale is challenged for fraud which vitiates the transaction or a lack of authority to make the sale), **appeal denied,** 992 A.2d 889 (Pa. Super. 2010). It is at least arguable that the sheriff's sale was without legal authority in that the legal and real owner of the property—Fox Funding, LLC—to whose interest Buyer has since succeeded, was not joined therein.

[4] In its answer to the complaint, Buyer has denied, and thus placed in issue, a number of material facts regarding the Waselus mortgage and its alleged breach, which have not been addressed in depositions, answers to interrogatories, requests for admissions, or affidavits. Consequently, the entry of summary judgment is inappropriate. Moreover, although Fox Funding, LLC's quitclaim deed has now transferred title of the mortgaged property to Buyer, Plaintiff's failure to either serve Fox Funding, LLC with the complaint or release it from the liability of the debt secured by the Waselus mortgage, precludes the entry of summary judgment in Plaintiff's favor. **See** Pa. R.C.P. 1144(b).

ORDER

AND NOW, this 15th day of February, 2012, upon consideration of the Motion for Summary Judgment of the Intervenor, 1400 Market Street, LLC, review of the parties' legal submissions, and after argument thereon, it is hereby

ORDERED and DECREED that the Motion is denied.

ORDER

AND NOW, this 15th day of February, 2012, upon consideration of Plaintiff's Cross-Motion for Summary Judgment, review of the parties' legal submissions, and after argument thereon, it is hereby

ORDERED and DECREED that the Plaintiff's cross-motion for summary judgment is denied.

PAUL and LINDA STOSS, Individually and As H/W, Plaintiffs vs. SINGER FINANCIAL CORPORATION and PAUL SINGER, Individually, Defendants

Civil Law—Federal Court—Dismissal of Pendent State Claims—Transfer to State Court—Promptness Requirement—Statute of Limitations

1. A civil action which has been dismissed by a federal court for lack of jurisdiction may, pursuant to Section 5103(b) of the Judicial Code, be transferred to a court of this Commonwealth "by filing a certified transcript of the final judgment of the United States court and the related pleadings" with the state court.

2. Although no specific time has been set by the legislature or the courts for transferring a case after its dismissal in federal court for want of jurisdiction, pursuant to case law, the transfer must be made promptly after its dismissal in order to preserve the original federal filing date as the date the suit was commenced for purposes of the statute of limitations.

3. The transfer of a civil claim or cause of action from federal to state court, made eight months, two weeks and two days after its dismissal by a federal court does not meet the promptness requirements created by the case law of this Commonwealth.

NO. 10-0559

MATTHEW B. WEISBERG, Esquire—Counsel for Plaintiffs.

SCOT M. WISLER, Esquire—Counsel for Defendants.

MEMORANDUM OPINION

NANOVIC, P.J.—February 29, 2012

By order dated February 24, 2010, the United States District Court for the Eastern District of Pennsylvania (District Court) dis-

missed Plaintiffs' claims against Defendants for predatory lending. Whether Plaintiffs timely transferred their pendent state claims in the federal action to this court, and whether the facts averred will sustain such claims are the issues before us.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs, Paul and Linda Stoss, began this suit by the filing of an eight-count complaint in the District Court on December 24, 2008. On June 6, 2009, in response to a motion to dismiss, the complaint was amended (First Amended Complaint) and reduced to three counts: Count I—Civil RICO; Count II—Fraud; and Count III—Wrongful Use of Civil Proceedings under 42 Pa. C.S.A. §8351. In response to a second motion to dismiss, on February 24, 2010, the District Court dismissed Counts I and II of the amended complaint with prejudice, and further dismissed Count III, without prejudice, for lack of subject matter jurisdiction.[1]

On March 8, 2010, Plaintiffs filed a certified copy of the complaint originally filed in the federal district court, together with a praecipe to transfer, with this court. This praecipe, directed to the Carbon County prothonotary's office, requested the transfer

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[1] To succeed in a cause of action for wrongful use of civil proceedings, a plaintiff must allege and prove the following three elements: 1) that the underlying proceedings were terminated in their favor; 2) that defendants caused those proceedings to be instituted without probable cause; and 3) that the proceedings were instituted for an improper purpose.

Bannar v. Miller, 701 A.2d 242, 247 (Pa. Super. 1997), **appeal denied,** 723 A.2d 1024 (Pa. 1998).

The underlying proceedings upon which Plaintiffs base this claim are a mortgage foreclosure complaint and confession of judgment, both filed by the Defendant Singer Financial Corporation against Plaintiffs on August 17, 2007. The mortgage foreclosure action was discontinued by Singer, with prejudice, on September 19, 2007. The judgment confessed was marked satisfied, also on September 19, 2007. The mortgage and note which were the subject of the underlying proceedings evidenced a $400,000.00 loan by Singer secured by Plaintiffs' farm.

In essence, Plaintiffs aver in the First Amended Complaint that on the same date both proceedings were commenced, Plaintiffs' property was sold at a price sufficient to cover any monies due Singer and there was no need to bring suit. Plaintiffs also contend that the loan made by Singer to Plaintiffs was predatory, one which Defendants knew Plaintiffs could not afford, and that the fees and interest charged by Defendants were exorbitant, deceptive and confiscatory. The individual Defendant Paul Singer is averred to be an officer and principal of Singer Financial Corporation, whom Plaintiffs contend was instrumental in securing the loan.

of Plaintiffs' case against Defendants "from the Eastern District of Pennsylvania Federal Court to the Carbon County Court of Common Pleas."

Defendants filed objections to this purported transfer on March 29, 2010. In these objections, Defendants contended that because the only pleading Plaintiffs filed with this court was the original federal complaint, rather than the First Amended Complaint, the latter being the subject of the District Court's dismissal order, Plaintiffs failed to file all of the related and requisite pleadings from the United States Court as required by 42 Pa. C.S.A. §5103. In their objections, Defendants further questioned the adequacy of the First Amended Complaint to set forth a cause of action for wrongful use of civil proceedings. In response to these objections, Plaintiffs filed a Second Amended Complaint on April 20, 2010.

Defendants filed their objections to the Second Amended Complaint on May 10, 2010. In these objections, Defendants argued that the filing of the Second Amended Complaint did not satisfy Section 5103(b)'s requirement that all of the related pleadings in the federal court be filed with this court to effect transfer, namely the First Amended Complaint, and further, that both the First Amended and Second Amended Complaints failed to aver the essential elements of a cause of action for wrongful use of civil proceedings. Thereafter, on May 24, 2010, Plaintiffs filed for the second time a praecipe to transfer, together with a certified copy of the same original federal complaint which had previously been filed with this court on March 8, 2010.

By order dated October 13, 2010, we granted Defendants' objections to the Second Amended Complaint and ordered this complaint stricken. The legal sufficiency of the First Amended Complaint was not addressed since a copy of that complaint had yet to be filed with this court. We further permitted Plaintiffs thirty days from the date of entry of our order "within which to comply with the requirements of 42 Pa. C.S.A. §5103(b)(2) in order to perfect the transfer of any claim raised by them which was dismissed by the United States Court for lack of jurisdiction."

On November 12, 2010, Plaintiffs filed a praecipe to transfer "the attached Amended Civil Action Complaint and the Order and Opinion from the Eastern District of Pennsylvania Federal Court to the Carbon County Court of Common Pleas." Certified copies

of the First Amended Complaint as well as the District Court's memorandum opinion and order dated February 24, 2010, dismissing the case, accompanied this filing.[2]

Preliminary objections to the First Amended Complaint were filed by Defendants on November 19, 2010. In these objections, in addition to averring that Plaintiffs had failed to file a copy of the First Amended Complaint when first seeking to transfer Plaintiffs' state claims to this court, Defendants also averred that Plaintiffs had failed to promptly transfer the case from the federal court to this court pursuant to Section 5103(b) after the claims in the federal action were dismissed for lack of jurisdiction, and that the First Amended Complaint was legally insufficient to sustain a cause of action for wrongful use of civil proceedings.

Defendants' objections to the First Amended Complaint were followed by the filing of Plaintiffs' Third Amended Complaint on December 10, 2010, to which Defendants filed preliminary objections on December 23, 2010. In these objections, Defendants pursued their previous claim that Plaintiffs had failed to promptly transfer the case pursuant to Section 5103(b), the First Amended Complaint not having been filed with this court until eight months, two weeks and two days after the District Court's Order dated February 24, 2010, dismissing the First Amended Complaint for lack of jurisdiction. Defendants also contended that the Third Amended Complaint, which consisted of one count and which, for the first time, identified two causes of action—wrongful use of civil proceedings and abuse of process—was legally insufficient to support either claim. Finally, with respect to the claim for abuse of process, Defendants argued that this was a new claim not previously raised and that it was barred by the statute of limitations. It is these objections to Plaintiffs' Third Amended Complaint which are now before us.

DISCUSSION

Compliance with 42 Pa. C.S.A. §5103

Section 5103 provides, in relevant part, as follows:

> § 5103. Transfer of erroneously filed matters
>
> (a) General rule.—If an appeal or other matter is taken to or brought in a court or magisterial district of this Common-

[2] A copy of the District Court's memorandum opinion and order dated February 24, 2010 may be found at 2010 WL 678115 (E.D. Pa. 2010).

wealth which does not have jurisdiction of the appeal or other matter, the court or magisterial district judge shall not quash such appeal or dismiss the matter, but shall transfer the record thereof to the proper tribunal of this Commonwealth, where the appeal or other matter shall be treated as if originally filed in the transferee tribunal on the date when the appeal or other matter was first filed in a court or magisterial district of this Commonwealth. ...

(b) Federal Cases.—

(1) Subsection (a) shall also apply to any matter transferred or remanded by any United States court for a district embracing any part of this Commonwealth. In order to preserve a claim under Chapter 55 (relating to limitation of time), a litigant who timely commences an action or proceeding in any United States court for a district embracing any part of this Commonwealth is not required to commence a protective action in a court or before a magisterial district judge of this Commonwealth. Where a matter is filed in any United States court for a district embracing any part of this Commonwealth and the matter is dismissed by the United States court for lack of jurisdiction, any litigant in the matter filed may transfer the matter to a court or magisterial district of this Commonwealth by complying with the transfer provisions set forth in paragraph (2).

(2) ... [S]uch transfer may be effected by filing a certified transcript of the final judgment of the United States court and the related pleadings in a court or magisterial district of this Commonwealth. The pleadings shall have the same effect as under the practice in the United States court, but the transferee court or magisterial district judge may require that they be amended to conform to the practice in this Commonwealth. ...

42 Pa. C.S. §5103(a)-(b)(2).

On its face, Section 5103(b)(2) does not provide any time period within which the transfer to state court is to be effected after dismissal by the federal court for lack of jurisdiction. In order to fill this void, the Superior Court in **Williams v. F.L. Smithe Machine Company, Inc.,** 395 Pa. Super. 511, 577 A.2d 907 (1990),

appeal denied, 527 Pa. 650, 593 A.2d 422 (1991), created a general promptness requirement. Therein, the court stated:

> [F]or benefit of both bench and bar, we now emphasize that in order to protect the timeliness of an action under 42 Pa. C.S.A. § 5103, a litigant, upon having his case dismissed in federal court for lack of jurisdiction, must promptly file a certified transcript of the final judgment of the federal court and, at the same time, a certified transcript of the pleadings from the federal action. The litigant shall not file new pleadings in state court.

Id. at 516-17, 577 A.2d at 910.

The **Williams'** court thus held that "if a matter is originally filed within the statute of limitations in federal court but is dismissed for lack of jurisdiction, a litigant may effect transfer of the action to a state court by complying with the provisions of 42 Pa.C.S. § 5103(b), and the state court will treat the matter as if it were originally filed in the state court, despite the fact that the federal court took no action to transfer the case or take any other action." **Collins v. Greene County Memorial Hospital,** 419 Pa. Super. 519, 523, 615 A.2d 760, 762 (1992), **aff'd,** 536 Pa. 475, 640 A.2d 379 (1994). Stated differently, provided the requirements of Section 5103(b)(2) are met, "[t]he date of the federal filing becomes the date of the state filing for purposes of the applicable statute of limitations." **Chris Falcone, Inc. v. Insurance Company of State of Pennsylvania,** 907 A.2d 631, 636 (Pa. Super. 2006), **appeal denied,** 917 A.2d 312 (Pa. 2007).

"Section 5103 allows a party to transfer a case dismissed by a federal court on jurisdictional grounds to an appropriate state court, bringing with the case its federal filing date for purposes of the statute of limitations." **Kelly v. Hazleton General Hospital,** 837 A.2d 490, 493 (Pa. Super. 2003). "The stated policy behind this section is to preserve a claim or cause of action timely filed in federal court on the ground that the claimant[s] should not lose [their] opportunity to litigate the merits of the claim simply because [they] erred regarding federal jurisdiction." **Id.** at 494 (quoting **Commonwealth v. Lambert,** 765 A.2d 306, 320 (Pa. Super. 2000)). To have this protection, however, the case must be promptly transferred following its dismissal by the federal court.

The promptness requirement is "consistent with the policy of avoiding stale claims, making the processes of justice as speedy and efficient as possible, and preventing the possibility of the plaintiff retaining exclusive control over the action for a period in excess of the statute of limitations." **Collins, supra** at 525, 615 A.2d at 762. If "a litigant fails to promptly transfer the action to the appropriate court, then the litigant abuses [Section 5103(b)'s protection from the bar of the statute of limitations], ... subverts the policies underlying the statute of limitations, and undermines the speedy and efficient processes of justice." **Id.** at 525, 615 A.2d at 763. When a litigant fails to meet the promptness requirement of 42 Pa. C.S.A. §5103, the complaint does not relate back to the federal court filing date and may be barred by the statute of limitations.

"[T]he promptness requirement under the statute is measured from the date the federal court dismisses the case for lack of jurisdiction." **Chris Falcone, Inc., supra** at 640. "Once the federal court dismisses a case for lack of jurisdiction, it is then incumbent upon the litigant to take further action under the statute to move the case to state court." **Id.** at 637 (citation and quotation marks omitted). "The plain language in Section 5103, in conjunction with the case law interpreting that section, allocates to the transferring litigant the affirmative duty to protect the federal filing date." **Id.** at 638.

In this case, the transfer Plaintiffs purported to make on March 8, 2010, did not comply with Section 5103's filing requirements. This filing was not accompanied by either a certified transcript of the final order of the federal court dismissing the case or a certified transcript of the related pleadings from that case, most particularly the First Amended Complaint which was the subject of the District Court's February 24, 2010 order. Not until November 12, 2010, when Plaintiffs filed certified copies of the First Amended Complaint and the District Court's order and memorandum opinion of February 24, 2010, were Plaintiffs for the first time in compliance with the filing requirements of Section 5103. This filing, however, was eight months, two weeks and two days after the federal court's dismissal of Plaintiffs' federal suit. Whether this delay meets the promptness requirements created by the case law of this Commonwealth is the specific issue we must decide.

Furthermore, the answer to this question is critical to Plaintiffs' claims for wrongful use of civil proceedings and abuse of process. Both have a two-year statute of limitations. **See** 42 Pa. C.S.A. §5524(1). Accepting the best case scenario for Plaintiffs, the running of the statute began when the underlying claims against them were discontinued by Defendant Singer Financial Corporation on September 19, 2007. Plaintiffs commenced their federal suit on December 24, 2008, within the statutory period, and the federal court dismissed the suit on February 24, 2010, outside this statutory period. Hence, Plaintiffs' claims are timely only if promptly transferred to this court within the meaning of Section 5103 so as to preserve the original federal filing date.

On this narrow issue, the case law is against Plaintiffs. **See Williams, supra** (allowing transferred case to go forward in state court, despite seven-month delay in filing a certified transcript of the final judgment of the United States court and related federal pleadings following dismissal by the federal court; court granted a one-time exception to the court-created promptness requirement due to the then existing dearth of case law interpreting the time within which a transfer under 42 Pa. C.S.A. §5103 must be effected); **Collins, supra** (holding seven-month delay between dismissal from federal court and filing requisite paperwork to transfer case to state court did not comply with promptness requirement under the transfer statute; defendant's preliminary objections to transfer granted and affirmed on appeal); **Ferrari v. Antonacci,** 456 Pa. Super. 54, 689 A.2d 320 (1997), **appeal denied,** 698 A.2d 594 (Pa. 1997) (holding one-year delay between dismissal from federal court and taking any action in state court did not comply with promptness requirement of the transfer statute; defendant's preliminary objections, which questioned whether the transfer was promptly taken, were granted and affirmed on appeal); **Kelly, supra** (holding nine-month delay between dismissal from federal court and complying with filing requirements of Section 5103(b), notwithstanding earlier filing of a new complaint in state court, did not comply with promptness requirement under the transfer statute; defendant's motion for judgment on the pleadings granted and affirmed on appeal); **Chris Falcone, Inc., supra** (holding ten-month delay between dismissal from federal court and complying with filing requirements of Sec-

tion 5103(b), notwithstanding earlier filing of a new complaint in state court, did not comply with the promptness requirement under the transfer statute; defendant's motion for summary judgment granted and upheld on appeal).

In **Collins,** the trial court noted that the time and effort to file in state court pursuant to the transfer statute would likely be less than that required for filing an amended pleading or filing a responsive pleading after the disposition of preliminary objections, for which the Pennsylvania Rules of Civil Procedure allot twenty days. **Collins, supra** at 521, 615 A.2d at 760-61. In the same case, the Superior Court suggested that the Legislature set a specific time requirement of thirty days to effect transfer. **Id.** at 525, 615 A.2d at 763. Although neither the Legislature nor the courts have ever set a specific number of days by which the transfer must be effected, **Kelly, supra** at 496, the settled case law cited in the preceding paragraph makes clear that eight months is too long. **Cf. Ferrari, supra** (holding that the trial court correctly relied on the provisions of 42 Pa. C.S.A. §5103, as interpreted by the courts of this Commonwealth, in finding as a matter of law, without the need for a fact-finding determination, that a one-year delay was untimely) and **Kelly, supra** (holding that notwithstanding the filing of a new complaint in state court sixteen days after dismissal by the federal court, a nearly nine-month delay in filing documents required for a Section 5103(b) transfer was untimely).[3]

[3] Plaintiffs' contention in their briefs filed with this court and at the time of oral argument that the delay and defect in filing the proper paperwork was attributable to the federal court is difficult to reconcile with the case law imposing the burden of prompt filing on Plaintiffs. In any event, factual statements made by counsel in briefs are not undisputed facts which we may consider in ruling on Defendants' preliminary objections. In contrast, the chronology of when documents were filed and upon which we have based our decision is not in dispute. Under this timeline, Plaintiffs did not conform to the statutory requirements until more than eight months after the federal court case was dismissed. Along this same vein, notwithstanding Plaintiffs' claim that Defendants have not been prejudiced by this delay, the issue is not whether Defendants have been prejudiced, but whether Plaintiffs have complied with the promptness requirement. **Chris Falcone, Inc. v. The Insurance Company of the State of Pennsylvania,** 907 A.2d 631, 640 (Pa. Super. 2006).

Finally, contrary to Plaintiffs' assertions that our October 13, 2010 order excused any late filing and is now the law of the case, Plaintiffs misread the meaning and import of that order. The issue then before us was what was filed, not whether it was timely. As was made clear in our footnote to that order, the

CONCLUSION

It is never easy to dismiss a claim for reasons other than a resolution on its merits. Nor, do we do so lightly here. Nevertheless, we find the delay of eight and a half months between the District Court's dismissal of Plaintiffs' federal claims and the required filing in this court of certified transcripts of the final judgment of the federal court and the related pleadings of that court to be inexcusable and contrary to the rationale underlying the court-imposed promptness requirement. **See Kelly, supra** at 496 (noting that as between two innocent parties, attorney error, if it occurred, should be borne by the party who accredited that attorney). Consequently, Defendants' motion for dismissal will be granted.[4]

ORDER OF COURT

AND NOW, this 29th day of February, 2012, upon consideration of Defendants' preliminary objections to Plaintiffs' Third Amended Complaint, review of the briefs filed by the parties in support of their respective positions, and following argument and in accordance with our memorandum opinion of this same date, it is hereby

ORDERED and DECREED that the preliminary objections are sustained and that the Plaintiffs' Third Amended Complaint is dismissed with prejudice.

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order was intended to address the absence of material filings to perfect a transfer under Section 5103—the failure of Plaintiffs to file a certified transcript of the federal district court judgment and the related federal pleadings with this court, and not the timeliness of such filings. At the time, we did not have copies of the First Amended Complaint or the District Court's memorandum opinion and order to review. The question of timeliness was first raised in Defendants' preliminary objections filed on November 19, 2010, to the First Amended Complaint which Plaintiffs filed with this court on November 12, 2010. This was after the issuance of the October 13, 2010 order.

[4] Given this disposition, we do not address Defendants' demurrer to the Third Amended Complaint or assertion that Plaintiffs' claim for abuse of process is a new claim barred by the statute of limitations.

PATRICK J. LYNCH and DIANE R. LYNCH, Plaintiffs vs. U.S. BANK, N.A., As Trustee, Defendant.

Civil Law—Res Judicata—*Frivolous Litigation*—Pro Se *Plaintiff*—*Pa. R.C.P. 233.1*—*Motion To Dismiss*

1. **Res judicata** bars relitigation of a dispute between the same parties previously decided by final court order.

2. **Res judicata** requires identity of the subject sued upon, the cause of action forming the basis of the suit, the person or persons involved, and the capacities of such persons or parties.

3. **Res judicata** applies not only to claims that were made but also to claims that could have been made.

4. Similarly, Pa.R.C.P. 233.1 seeks to bar frivolous litigation of **pro se** claimants repetitious of previous litigation already decided.

NO. 11-0143

PATRICK J. LYNCH—Pro se.

DIANE R. LYNCH—Pro se.

LINDA A. MICHLER, Esquire—Counsel for the Defendants.

MEMORANDUM OPINION

NANOVIC, P.J.—March 6, 2012

Patrick J. Lynch and Diane R. Lynch, Plaintiffs in the above-captioned matter, have appealed our order dated December 30, 2011, which dismissed, with prejudice, the claims filed by the Lynches against U.S. Bank, N.A., As Trustee ("Bank").[1] This opinion is filed in accordance with Pa. R.A.P. 1925(a)(1).

PROCEDURAL AND FACTUAL BACKGROUND

The present case was commenced by complaint filed on January 20, 2011. Preliminary objections which were filed by the Bank on February 14, 2011, were denied by order dated June 16, 2011. In essence, we found the nature of the preliminary objections to be premature and more appropriately the subject of affirmative defenses.

On April 25, 2011, prior to our ruling on the Bank's preliminary objections, the Bank filed a motion to dismiss pursuant to Pa. R.C.P. 233.1 (frivolous litigation). At the time the preliminary objections were argued on June 16, 2011, we advised the parties

[1] In their complaint, the Lynches identified the Defendant as U.S. Bank, N.A., rather than as U.S. Bank, N.A., in its capacity as Trustee. Given the history of prior litigation between the parties, the subject of that litigation being the same loan transaction at issue here, and the documented capacities in which the parties acted, it is clear that the conduct of the Bank of which the Lynches complain was that taken in the Bank's capacity as trustee, and that the Lynches' naming of the Bank in their complaint was incomplete. Were this not the case, then, as the recitation of the procedural and factual background evidences, the Lynches' claims, if not barred by **res judicata,** would be barred by collateral estoppel and the principles which underlie Pa. R.C.P. 233.1.

that we would not be deciding the motion to dismiss until after the pleadings had been closed.

Our order denying the preliminary objections permitted the Bank twenty days from the entry of the order in which to file an answer to the complaint. Prior to the passage of this time, on June 20, 2011, the Lynches unilaterally filed a first amended complaint. On July 7, 2011, the Bank filed an answer, with affirmative defenses, which was responsive to the first amended complaint. The Lynches' reply to this new matter was filed on July 19, 2011. Argument on the motion to dismiss was held on July 25, 2011.

The complaint originally filed by the Lynches, as well as the first amended complaint, seeks to relitigate issues that have previously been decided in former proceedings. The history of these former proceedings are set forth in the Bank's motion to dismiss and form the basis for that motion. This history must be reviewed in order to understand the reason why we dismissed the Lynches' current suit.

On July 12, 2006, the Bank, as Trustee for the registered holders of the Asset Backed Securities Corporation, Home Equity Loan Trust 2004-HE6, Asset Backed Pass-Through Certificates, Series 2004-HE6, by its attorney-in-fact and servicing agent, Ocwen Loan Servicing, LLC, as successor to Ocwen Federal Bank (hereinafter abbreviated to Trustee) filed a complaint in mortgage foreclosure against the Lynches with respect to property owned by them at 1414 Sweet Briar Lane, Jim Thorpe, Carbon County, Pennsylvania. In paragraph 4 of this complaint, the Bank averred that it was the assignee of the mortgage being foreclosed upon and, as such, had standing to commence the foreclosure proceedings.[2] When no answer was filed to the complaint, a default judgment was taken against the Lynches on August 21, 2006, in the amount of $190,081.53. No appeal was taken from that judgment. The mortgage foreclosure proceedings are docketed to No. 2223 CV 2006 of this court.

[2] The complaint further averred that the assignment was in the process of being recorded. (Mortgage foreclosure complaint, paragraph 4.) Since the averments of the complaint made clear that the Bank was the holder of the mortgage, as the legal owner and the real party in interest, the Bank's standing was evident. **See U.S. Bank, N.A. vs. Mallory,** 982 A.2d 986, 994 (Pa. Super. 2009) ("[T]he recording of an assignment of the mortgage was not a prerequisite to [the Bank] having standing to seek enforcement of the mortgage via a mortgage foreclosure action.").

Following a sheriff's sale of the Lynches' property, the Bank, as Trustee, commenced an ejectment action to have the Lynches evicted from the premises. This action was docketed to 0467 CV 2007 of this court. In that case, by order dated July 16, 2007, the Honorable David W. Addy granted the Bank's motion for summary judgment and ordered the Lynches to vacate the premises at 1414 Sweet Briar Lane, Jim Thorpe, Pennsylvania 18229. No appeal was taken from this judgment.

On February 4, 2008, the Lynches filed multiple motions and claims all docketed to the docket number for the mortgage foreclosure proceedings at 2223 CV 2006, and all directed to the Bank as Trustee. These consisted of a motion to set aside and vacate the judgment in mortgage foreclosure, a motion to strike the default judgment taken in the mortgage foreclosure action, and a document entitled "Informal Counterclaim or, in the Alternative, a Complaint for Defrauding the Court with Fraudulent Claims of Recording Assignment." All had as a common thread that the Bank was not the true holder of the mortgage upon which the mortgage foreclosure action was based; that, in consequence, this court was without subject matter jurisdiction to hear the matter; and that all proceedings which occurred in and which grew out of the mortgage foreclosure action were a nullity.

Following a hearing held on March 19, 2008, the Honorable David W. Addy by three separate orders dated May 27, 2008, denied and/or dismissed each of the Lynches' post-judgment motions and claims. Specifically, the motion to set aside and vacate the judgment, to the extent it sought to strike the judgment in mortgage foreclosure and to set aside the subsequent sheriff's sale, was denied and, to the extent it sought monetary and equitable relief, was dismissed as procedurally improper. The informal counterclaim and the motion to strike the default judgment, the latter to the extent not previously addressed by the court's ruling on the motion to set aside and vacate, were dismissed. No appeal was taken from any of these orders.

On August 15, 2008, the Lynches commenced a new action against the Bank, as Trustee, docketed to No. 2332 CV 2008. In this suit, the Lynches contended, **inter alia,** that the original promissory note was never validly assigned; that the Bank was without standing to commence the mortgage foreclosure action without

being assigned this note; that the allegations of assignment of the mortgage in paragraph 4 of the mortgage foreclosure complaint were fraudulent; and that they were entitled to monetary damages for the loss of their home, for damage to their credit history, and for punitive purposes in an aggregate amount in excess of $1,000,000.00. The Lynches further requested the production of all banking records to support the assignment of the original mortgage and promissory note to the Bank. By order dated December 22, 2008, the Honorable David W. Addy dismissed, with prejudice, the Lynches' complaint on the basis, **inter alia,** that the action was barred by the doctrine of **res judicata** and/or collateral estoppel. The Lynches' request for reconsideration was denied, and no appeal was taken.

In the present suit, the Lynches seek to enforce a discovery request allegedly made to the Bank on December 3, 2010, for information establishing the validity of the mortgage and its assignment to the Bank (Count I), again challenge the validity of any assignment of the mortgage to the Bank (Count II), and further challenge the validity of the entire loan transaction (Count III). In addition to monetary damages, the Lynches request that the judgment of foreclosure taken on August 21, 2006, be stricken. In the Lynches' concise statement of matters complained of on appeal, the Lynches openly admit that the object of this action is to question and challenge whether the Bank was the true owner and holder of the mortgage which was the subject of the mortgage foreclosure action, whether the debt claimed by the Bank in those proceedings was valid, and whether this court possessed subject matter jurisdiction to dispose of those issues.

DISCUSSION

As is evident from the foregoing background, this is the fourth in a series of separate suits in which the validity of the mortgage, the Bank's standing to enforce the mortgage, and the question of this court's jurisdiction to hear the matter has been litigated or could have been litigated. The three prior suits are the mortgage foreclosure action docketed to No. 2223 CV 2006, the ejectment action docketed to No. 0467 CV 2007, and the action filed to 2332 CV 2008. In addition, are the three post-judgment motions the Lynches filed to the mortgage foreclosure action.

At all times, the Lynches have represented themselves in these proceedings. The motion to dismiss filed by the Bank is premised upon Pa. R.C.P. 233.1. That Rule provides, in relevant part, as follows:

> Rule 233.1. Frivolous Litigation. Pro Se Plaintiff. Motion to Dismiss.
>
> (a) Upon the commencement of any action filed by a **pro se** plaintiff in the court of common pleas, a defendant may file a motion to dismiss the action on the basis that
>
> (1) the **pro se** plaintiff is alleging the same or related claims which the **pro se** plaintiff raised in a prior action against the same or related defendants, and
>
> (2) these claims have already been resolved pursuant to a written settlement agreement or a court proceeding.

Under the principle of **res judicata,** an action is barred if it shares with a prior action a concurrence of four elements:

(1) an identity of the thing sued upon;

(2) an identity of the cause of action;

(3) an identity of the person and parties to the action; and

(4) an identity of the quality or capacity of the parties suing or sued.

In re Estate of Hillegass, 322 Pa. Super. 139, 144, 469 A.2d 221, 223 (1983). As further stated in **Stuart v. Decision One Mortgage Company, LLC,** 975 A.2d 1151 (Pa. Super. 2009):

> The fundamental principle upon which [res judicata] is based is that a court judgment should be conclusive as between the parties and their privies in respect to every fact which could properly have been considered in reaching the determination and in respect to all points of law relating directly to the cause of action and affecting the subject matter before the court. ... 'The essential inquiry is whether the ultimate and controlling issues have been decided in a prior proceeding in which the present parties had an opportunity to appear and assert their rights.' ... When a judgment by default becomes final, all the general rules in regard to conclusiveness of judgments apply. ... A default judgment is res judicata with regard to transactions occurring prior to entry of judgment.

Id. at 1153 (citations omitted).

Res judicata requires identity of the thing sued upon, the cause of action forming the basis of the suit, the person or persons involved, and the capacities of such persons or parties. Without question, both in this action and in the mortgage foreclosure action, the Lynches and the Bank are the same parties and positioned in the same capacities. As to the subject matter or purpose of the suits, both involve the same loan transaction, entail a determination of the validity of that transaction, and call into question the parties' rights **vis-a-vis** the mortgage and underlying loan. **Cf. Stuart, supra** at 1154 (**citing R.G. Financial Corp. v. Pedro Vergara-Nunez,** 446 F.3d 178, 183-84 (1st Cir. 2006)). Both contain an identity of the same common nucleus of facts forming the cause of action and, in both, the object of the suit is the same—the identical debt owed by the Lynches as evidenced and secured respectively by the same promissory note and mortgage.

The Lynches in this litigation seek to attack the very transaction upon which the foreclosure judgment was based and the facts which form the basis of that attack have not changed. As a practical and very real matter, the whole object of the Lynches' suit is to undermine the validity of the mortgage foreclosure action and the subsequent execution proceedings.

While it is true, neither the mortgage nor its assignment were challenged directly in the foreclosure action, the Lynches clearly had the right to make that challenge. That they chose not to do so, or to raise any other defense, instead allowing a default judgment to be taken, does not somehow invalidate the application of **res judicata.** To the contrary, it re-enforces both it and the principle of finality upon which it is based. "**Res judicata** applies not only to claims that **were** made but also to claims that **could have** been made." **Id.** at 1152.

In addition to the bar imposed by the foreclosure action, the Lynches face a second bar with respect to Judge Addy's order docketed to No. 2332 CV 2008 denying, with prejudice, the Lynches' claims. Again, **res judicata** bars the action. To this consideration must also be added the post-judgment motions and claims made by the Lynches which were denied by Judge Addy and never appealed from. Those motions and claims dealt with the same issues the Lynches seek to raise again in these proceedings.

Pa. R.C.P. 233.1(a) on its face was intended to deal with the exact scenario before us: a **pro se** claimant making repeated claims which are the same or so closely related to those previously made that matters essential to recovery in the later proceedings have been determined in the earlier proceedings, such that the latter claims have themselves been previously decided, either explicitly or implicitly, in the prior proceedings. In sum: frivolous litigation.

CONCLUSION

As outlined above, the Lynches have had ample opportunity to challenge the validity of the foreclosure sale of their property. The underlying issues have been decided multiple times. Finality demands an endpoint which has now been reached. The Lynches have no legitimate basis for their current suit and it has been appropriately dismissed.

IN RE: ESTATE OF NICHOLAS L. PANTAGES, DECEASED

Civil Law—Decedent's Estate—Election Against Will—Time Period Within Which To Make Election—Actual Fraud As Basis for Filing Election Nunc Pro Tunc*—Express Waiver of Statutory Right To Elect Against Will—Voiding Waiver—Estate's Duty of Full Disclosure—Need for Due Diligence in Making Election*

1. The statutory period for a surviving spouse to elect against a decedent's will is within six months of either decedent's death or the date of probate, whichever is later. This statutory period may be extended where actual fraud either induced an election or was the cause of the delay in filing the election.

2. Proof of actual fraud, sufficient to relieve a surviving spouse of the mandatory time period within which to file an election, requires proof of an intent to deceive on the part of the person or persons whose misrepresentations or misstatements of either fact or law were the cause of the delay. The burden of proving actual fraud is upon the surviving spouse; the evidence necessary to meet this burden must be clear, precise and convincing in nature.

3. There is no absolute duty on the part of the executor of an estate or its counsel to inform a surviving spouse of her right to claim an elective share of an estate. However, in those instances where the executor of an estate affirmatively requests the surviving spouse to waive her right to elect against the will shortly after decedent's death, for the waiver to be valid and enforceable, the executor has the burden of proving that before the waiver was signed, the surviving spouse was fully and accurately informed of the circumstances of the estate—its character, extent and value—such that the surviving spouse could fairly and intelligently determine the value of what she would receive if she elected against the will versus what she would receive if she accepted the terms of the will.

4. Actual fraud sufficient to excuse an untimely election against the will is not proven where a surviving spouse, though having second thoughts about her execution of a waiver of her statutory rights at a time when she was not fully informed of the character, extent and value of her husband's estate, nevertheless unreasonably delays and fails to exercise due diligence in the filing of an election against the will within the statutory period for reasons separate and apart from any misconduct or misstatement attributable to the estate or its counsel.

NO. 07-9402

JOHN M. GALLAGHER, Esquire—Counsel for the Estate of Nicholas L. Pantages.

LARRY R. ROTH, Esquire and CHARLES J. FONZONE, Esquire—Counsel for Beverly Pantages.

MEMORANDUM OPINION

NANOVIC, P.J.—March 29, 2012

Two questions are presented in the petition now before us of Decedent's surviving spouse to void her previously signed waiver of right to elect against Decedent's will and accept, **nunc pro tunc,** the untimely filing of her election against that will: whether Decedent's surviving spouse has established in the first instance a factual basis upon which to void the waiver of her statutory right to elect against Decedent's will and, if so, whether such request, when made after the statutory time to make an election has expired, entitles the surviving spouse to make a new election to take against the will **nunc pro tunc.** We address both issues in this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

The Decedent, Nicholas L. Pantages, died testate on August 9, 2007, a resident of Lake Harmony, Carbon County, Pennsylvania, leaving to survive his wife, Beverly Pantages, and son, Louis Pantages. Louis Pantages is an only child of both Decedent and Wife (hereinafter, Decedent and Wife are referred to jointly as "the parties").

The bulk of Decedent's estate consists of two operating restaurants located at Lake Harmony, Shenanigan's and Nick's Lake House, and real estate located in the City of Hazleton where a former restaurant, the Blue Comet, had previously operated. In his last will and testament dated September 15, 2006, the Decedent specifically devised and bequeathed all of his interest in

these properties to the parties' son, together with all of his tangible personal property. Under this will, the residue of the estate is to be transferred to the trustee of an Agreement of Trust, also dated September 15, 2006, pursuant to which there is to be funded a Qualified Terminal Interest Property (Q-TIP) marital deduction trust in which Wife holds a lifetime interest entitling her to all income, together with discretionary distributions of principal for her health, support and maintenance, with any remainder, upon her death, to be distributed to the parties' son.[1]

Decedent's will was probated on October 31, 2007 and, on the same date, letters testamentary were granted to the parties' son, one of two co-executors named in Decedent's will.[2] Attorney Martin D. Cohn, Esquire was employed by the parties' son to represent both himself as executor and the estate. Attorney Cohn, who had known Decedent for more than thirty-five years, was also the scrivener of Decedent's will and the agreement of trust.

Prior to the probate of Decedent's will, Wife met twice with her son and Attorney Cohn in Attorney Cohn's office: once in mid-September 2007, and a second time on October 22, 2007. At both meetings Wife was asked to sign a waiver of her spousal right to elect and take against the will. Attorney Cohn prepared the waiver after being assured by the parties' son that Wife would not be taking against the will. At the second meeting, Wife executed the waiver.

By late February 2008, Wife was having second thoughts about the waiver she had signed in Attorney Cohn's office. Upon the advice of an attorney, she requested a copy of the trust agreement from Attorney Cohn. This was sent to her on April 22, 2008, however, it appears that the copy sent was incomplete.

Wife next asked to meet with Attorney Cohn. This occurred on June 12, 2008. In that meeting, Wife explained her misgivings about signing the waiver and stated that she had changed her mind. This

[1] The trust agreement itself divides property held by the trustee into two categories: the marital deduction trust to be funded by "the smallest amount of the principal needed to reduce the federal estate tax falling due because of Settlor's death to the lowest possible figure"; the balance to be distributed outright to the parties' son.

[2] The co-executor named in the will, PNC BANK, N.A., filed a renunciation of its right to serve as an executor of the estate. PNC also declined to serve as trustee under the Agreement of Trust. To date, no substitute trustee has been appointed.

meeting was confirmed by Attorney Cohn by letter dated June 17, 2008. Enclosed with the letter was a copy of the executed waiver and copies of the filed federal estate tax and Pennsylvania inheritance tax returns for the estate. The letter further indicated that as counsel to the executor and the estate Attorney Cohn could not provide Wife with legal advice, urged her to seek other counsel, and stated that under the statute her rights must be exercised within one year of Decedent's death.

On August 11, 2008, Wife executed and filed an election to take against Decedent's will. This was followed on May 19, 2010, with the filing of Wife's petition to void her previously signed waiver of right to elect against the will and to accept, **nunc pro tunc,** the filing of her election against the will. In her petition, Wife contends that the waiver should be voided because of fraud.

DISCUSSION

The statutory period for a surviving spouse to elect to take against a decedent's will is within six months of either the decedent's death or the date of probate, whichever is later. 20 Pa. C.S.A. §2210(b). Given that Decedent's will was probated on October 31, 2007, and Wife's election was not filed until August 11, 2008, the election was late. Ordinarily, this would end the discussion, since an untimely filing is "deemed a waiver of the right of election." **Id.** An exception exists, however, where either actual fraud induced the election and no laches appears, or where the delay in filing was caused by fraud. **See DiMarco Estate,** 435 Pa. 428, 433, 257 A.2d 849, 852 (1969) ("This time requirement is **mandatory** and cannot be extended except upon proof that the surviving spouse, **by actual fraud,** has been induced or misled to delay the election."); **see also, Daub's Estate,** 305 Pa. 446, 454, 157 A. 908, 911 (1931) (noting that absent actual fraud in obtaining a widow's election or in delaying that election until after the statutory period for filing has expired, a petition to revoke an election previously made, presented after expiration of the statutory period, would ordinarily be deemed too late).

Fraud in the Inducement

"The burden of proving actual fraud which would relieve the surviving spouse from the mandatory time requirement of the statute rest[s] upon the widow and, in support of that burden, it

[is] her duty to prove actual fraud by evidence clear, precise and convincing in nature." **DiMarco Estate, supra** at 434, 257 A.2d at 852. Here, Wife claims fraud both in the inducement and as the cause of her late filing.

Wife concedes that there is no absolute duty on the part of the executor of an estate or his counsel to inform a surviving spouse of her right to claim an elective share of the estate. **Id.** at 436, 257 A.2d at 853. Wife contends, however, that the rule is otherwise where the executor or his counsel actively seeks to obtain the waiver of a surviving spouse's elective rights: that in such situation there exists a fiduciary duty on the executor and counsel to provide full disclosure to the surviving spouse of all facts necessary to make an informed decision, including the duty to disclose the value of the assets of the estate in sufficient detail such that the surviving spouse can intelligently evaluate her options. **Daub's Estate, supra** at 452, 157 A. at 910. This is especially true, Wife argues, where a waiver is sought soon after a decedent's death and before any appraisals have been obtained or an accounting prepared for the estate. **In re Woodburn's Estates,** 138 Pa. 606, 21 A. 16, 17 (1891).

In this case, Wife's waiver of her elective rights was sought and obtained shortly after Decedent's death, before probate of his will, and before any appraisals of Decedent's real estate and business interests were made. At the September 2007 meeting in Attorney Cohn's office, Wife was first presented with the waiver to sign. In advance of the meeting, the parties' son had advised her only that the purpose of the paperwork was to save death taxes. The parties' son had also told Attorney Cohn prior to this meeting that there would be no difficulty in obtaining his mother's signature.

At the meeting, Attorney Cohn reviewed the waiver with Wife. For the first time, as far as the evidence shows, Wife was being told that the estate had a gross value of approximately 2.6 million dollars and that she had a right to take against the will and receive one-third of that amount. Wife was also told that it was Decedent's plan for the parties' son to succeed him as owner of his business interests, to run these businesses and that Decedent's will was written with these objectives in mind.

Wife was uncertain what to do when confronted with the waiver. She needed more time to make a decision. As a result, Wife did not sign the waiver at this first meeting. However, a copy was provided to her and this was retained by her when she left the meeting.

Before meeting with Attorney Cohn on October 22, 2007, Wife contacted and met with Attorney Morton Gordon. Attorney Gordon was a longtime friend whom she trusted and whose advice she valued.[3] The parties' son attended this meeting at Wife's request. The proposed waiver was shown to Attorney Gordon. The details of exactly what was discussed and by whom were not made part of the evidence, however, Attorney Gordon's bottom line advice to Wife as to whether she should sign the waiver was whether she trusted her son.

At the second meeting with Attorney Cohn, Attorney Cohn again reviewed the waiver and its terms with Wife. The waiver is relatively short. Excluding the acknowledgement page, it consists of two pages and eight numbered paragraphs. The waiver recites some brief background history of Decedent and Wife; identifies Decedent's will and the trust agreement, with copies said to be attached; advises by providing the cite and quoting from 20 Pa. C.S.A. §2203(a) that "when a married person domiciled in this Commonwealth dies, his surviving spouse has a right to an elective share of one-third of: (1) property passing from the decedent by will or intestacy"; estimates the gross value of Decedent's estate to be approximately $2.6 million; and has Wife acknowledge that pursuant to Decedent's will, if she does not waive her rights, the parties' son "would be the recipient of a minimum of $2 million, and more if it is determined that the business interests which have been bequeathed to him exceed that amount."[4]

[3] It appears likely from the evidence that Attorney Gordon, who has since died, was disbarred at the time of this meeting. Wife's counsel seems to make an issue over this point. We see it as irrelevant to the issues we have to decide. Wife was aware of Attorney Gordon's legal status as an attorney. She did not employ him as her counsel, nor did she pay for his services. She sought his guidance because he was a trusted friend who had experience with legal matters.

[4] This provision of the waiver is inartfully drawn—containing a double negative—and is inaccurate. As worded, the language of the waiver states the exact opposite of what was intended; by waiving her rights, and letting the provisions of the will stand, the parties' son would be the recipient of the monies referred to.

The second meeting in Attorney Cohn's office took approximately one hour. On the same date as this meeting, either before or after, but likely before, Attorney Gordon telephoned Attorney Cohn and advised that he saw no objection to Wife signing the waiver. (N.T., p. 49.)[5] It is also unclear whether the written waiver which was presented to Wife at this second meeting was identical to the one presented to her in September, there being no evidence either way. It must be noted, however, that the document presented to Wife at this second meeting expressly has her acknowledge she had been informed to seek separate counsel to advise her on "this matter," and that she had done so. After reviewing and having the waiver explained to her, Wife signed the document, saying as she did so that she trusted her son.

Wife denies that she was provided any explanation as to the financial consequences of signing the waiver. She denies she was given any information about the debts of the estate or the estimated expenses of administration, and what amount she would receive under the will versus what amount she would receive by exercising her elective share. Wife further denies that she was told how the estimated gross value of the estate was computed or that appraisals had been ordered, but were not yet available, and argues that the estimated value stated in the waiver, 2.6 million dollars, was a gross underestimation.

In actuality, the gross value of the estate as provided in the federal estate tax return was $3,958,298.15. This includes a valuation for Decedent's real estate interests alone at $3,300,500.00. Appraisals for the business real estate at Lake Harmony dated November 27, 2007, and totaling $1,751,000.00, and an installment sale agreement for the Blue Comet dated November 20, 2007, with a purchase price of $1,250,000.00, are attached to the federal estate tax return. The tentative taxable estate, before taking any deductions for transfers to be made to the marital deduction trust, is shown in the return to be $3,567,073.17. This return also

[5] Attorney Cohn's time records reflect that both events occurred on the same date and that the combined time for both was an hour and thirty minutes. Attorney Cohn believed he spoke with Attorney Gordon for approximately fifteen minutes. He could not recall whether this conversation occurred before or after he met with Wife.

includes a copy of a disclaimer of partial interest executed by the parties' son on May 2, 2008, in which the parties' son disclaims all of his interest in the estate as set forth in the will in excess of the net value of $2,000,000.00.[6] None of this information was provided or made available to Wife before the waiver was signed.

We believe and we find that the estimate of the value of Decedent's estate as stated in the waiver signed by Wife was misleading, especially given the information then known, or which should have been known to both the parties' son and Attorney Cohn. In a letter dated September 6, 2007, after PNC had elected not to serve as co-executor, Attorney Cohn stated that he guesstimated the value of the real estate and businesses to be between 1.5 and 2 million dollars. This did not include real estate in Hazleton and two additional adjacent parcels—one with a home, the other with a cabin—located at Lake Harmony. A copy of this letter, which was addressed to another financial institution being considered as a possible substitute co-executor in place of PNC, was sent to the parties' son.

The estimate for Shenanigan's and Nick's Lake House, between 1.5 and 2 million dollars, was fairly accurate.[7] Attorney Cohn also correctly estimated the value of the residential real estate at Lake Harmony at $300,000.00.[8] The value of the real estate in Hazleton (**i.e.,** the Blue Comet), however, appears to have been grossly ignored even though Decedent was in the midst of selling this property at the time of his death and had apparently reached agreement with the buyer on a purchase price of $1,250,000.00, the amount for which the property actually sold. (N.T., pp. 20-21, 233-34.) The agreement which Decedent was negotiating was later memorialized in a written installment sale agreement dated November 20, 2007. (N.T., pp. 50, 233-34.) There is no evidence that Wife was ever told about the pending sale of this property or

[6] At the time, the federal estate tax credit allowed taxable estates with a value of $2,000,000.00 or less to pass tax free.

[7] The appraisals attached to the federal estate tax return for these businesses and real estate show a combined value of $1,780,959.00. (Wife's Exhibit J, United States Estate Tax Return, Schedules A and F.)

[8] The appraisals for these properties attached to the federal estate tax returns show a total value of $288,000.00. (Wife's Exhibit J, United States Estate Tax Return, Schedule A; N.T., p. 31.) These properties refer to Decedent's home and an adjacent lot on which a cabin was located. (N.T., pp. 231-32.)

its value before the waiver was executed. This notwithstanding the parties' son's acknowledgment that one of the reasons Wife's waiver was required was for him to be able to sell this property. (N.T., p. 249.)

The values in the preceding paragraph total between $3,050,000.00 and $3,550,000.00. This does not include an additional $356,039.72 in stocks and bonds; $16,634.25 in mortgages, notes and cash; $105,019.78 in life insurance on Decedent's life for which the parties' son was the beneficiary; $18,565.62 in stock jointly owned between Decedent and the parties' son; $85,114.00 in miscellaneous properties, which include values for the business interests held by Decedent in Shenanigan's and Nick's Lake House, as well as the value of two 2005 Mercedes motor vehicles; $76,424.78 in annuities; and $160,000.00 in a small revocable trust at PNC.[9] All told, these assets total between $3,867,798.15 and $4,367,798.15. It is evident from these figures that the 2.6 million dollar figure used in the waiver was unrealistically low.

The difficulty with Wife's reliance on fraud as the basis both for invalidating the waiver and extending the time within which to file her election against the will, is that for these purposes, active fraud, not constructive fraud, is required: "proof of an intent to deceive on the part of the person or persons who misrepresented or misstated either a fact or the law," **DiMarco Estate, supra** at 436, 257 A.2d at 853, and there must be reliance. We are not convinced either exists.

The marriage between Decedent and Wife was not a good one. They married in 1961, separated in 1973, and remained separated for the next thirty-four years. Wife filed for divorce in the early 1980s but, for whatever reason, never followed through. At the time of his death, Decedent was residing at Lake Harmony and Wife in Hazleton.

The parties' son was approximately nine years old when his parents separated. Although he was raised by his mother, he began working for his father in the restaurant business from the bottom up, beginning when he was 12 to 14 years of age. The

[9] The figures in this sentence total $817,798.15. The parties' son acknowledged he knew of most, if not all, of these properties prior to his father's death and would often discuss them with his father. (N.T., pp. 236-41.)

parties' son's employment in Decedent's businesses continued after his graduation in 1988 from Penn State with a degree in economics. From 1988 until his father's death in 2007, the parties' son continued working for and with his father.

Decedent was seventy-two years old at the time of his death and had been in poor health since 2001. For almost six years prior to his father's death, the parties' son managed Shenanigan's and Nick's Lake House. (N.T., pp. 229-30.) It was Decedent's plan for his son to own and operate these businesses after his death.

During the first two meetings in Attorney Cohn's office after Decedent's death, Attorney Cohn explained to Wife the basic terms of Decedent's will and trust, and that they reflected Decedent's intent for their son to own and operate Decedent's business properties. Although at neither of these meetings was Wife given information about what other assets existed in Decedent's estate beyond those specifically devised in the will (as to the specifically devised properties, Wife knew of their existence, location and Decedent's ownership prior to Decedent's death), or even an approximation of what the value of such other assets might be, with an estimated gross value of the estate at 2.6 million dollars and the parties' son to receive all of the business properties, it was or should have been apparent to Wife that the parties' son would be the primary beneficiary of Wife agreeing to accept the terms of Decedent's will: son would receive free and clear of any claim of his mother his father's business interests which clearly constituted the bulk of the estate. Moreover, the parties' son's self-interest in obtaining his mother's waiver could not have gone unnoticed by Wife. It explains, without any further explanation necessary, why Attorney Gordon advised Wife that the decision of whether to sign the waiver rested on whether she trusted her son. (N.T., pp. 133-34.)

Nor does it necessarily follow that the parties' son's desire for his mother to execute the waiver means he intended to deceive his mother or to cause her harm. (N.T., p. 263.) In the son's mind, execution of the waiver would effectuate Decedent's intentions, assure him of certainty in his inheritance, permit him to retain his employment and the means to support himself and his family, and provide him with the financial wherewithal to care for his mother which he assured her he would do. (N.T., pp. 63-66, 247-49.)

As counsel to the executor and the estate, Attorney Cohn had a duty of loyalty to his clients. At the same time, Attorney Cohn owed an ethical obligation to Wife and advised her on more than one occasion that she should seek separate and independent counsel. When considered together—Attorney Cohn's knowledge of Decedent's intentions, the parties' son's expectations and involvement in his father's businesses, and the relationship which existed between the parties' son and his mother—we are not convinced that Attorney Cohn actively sought to deceive or harm Wife. (N.T., pp. 51, 193, 206.)

That Wife's decision to execute the waiver based upon what she was told by her son and Attorney Cohn was not determined by what was financially best for her is clear: with the gross value of Decedent's estate estimated at 2.6 million dollars, the vast majority of the estate's assets passing under the will to the parties' son, and at a time when Wife was not told that her son would be disclaiming any interest in the estate in excess of the net value of 2 million dollars, it was simple math that Wife would receive more by electing against the will than by waiving that right. These circumstances clearly evidence that the information which was provided to Wife by Attorney Cohn and her son about the estate, its value and the assets in it, was not provided with the intent of misleading Wife so she would waive her right to elect against the will. Equally clearly, Wife agreed to the waiver because she loved her son, wanted him to succeed, and as she said at the time of signing, she trusted her son. Simply put, Wife decided to place her son's interests and future above her own.

Full Disclosure

At the same time, having found that there was no intentional deception practiced, no fraud in inducing Wife to execute the waiver, and that the burden of proving fraud in the inducement which rests with Wife has not been met, as Wife also argues, the burden of proving the fairness of the transaction, that the waiver was signed by Wife after full disclosure and with all information necessary for her to make an informed decision as to her elective rights, was upon the estate. **Koonce's Appeal,** 4 Walk. 235, 239 (Pa. 1882).

Both the parties' son, as executor of the estate, and his counsel, owed a fiduciary duty to Wife as the surviving spouse, particularly under circumstances such as these where the waiver was sought shortly after the Decedent's death and there then existed no accounting of the assets, liabilities, income or expenses of the estate, upon which a reliable and detailed estimate of the worth of the estate could be fairly determined. **Id.** at 242; **see also, In re Rowe Estate,** 17 Fid. Rep. 107, 110 (1967).

> [The surviving spouse] should know, and, if she does not, she should be informed, of the relative values of the properties between which she was empowered to choose. In other words, her election must be made with a full knowledge of the facts. The rule applies with especial force where the widow is called upon, as in this case, to make her election shortly after her husband's death.

In re Woodburn's Estate, supra. Moreover, this duty is not affected by the motive of the surviving spouse in signing the waiver: "The only question being was she informed of the choices available to her and the consequences of such a choice." **Rowe Estate, supra** at 111.

As discussed in **Rowe Estate,** in **Appeal of Cunningham,** 122 Pa. 464, 15 A. 868 (1888), within three days of the decendent's death, the executor and his attorney met with decedent's widow and had her execute an agreement in which she would receive less than fifty percent of what she would have received if she had elected against the will. At the time of this agreement, no inventory or valuation of the assets of the estate had been prepared, nor did there exist a schedule of debts and deductions. As such, it was impossible for the widow to make a knowing and intelligent election because she was not provided with sufficient information to do so. In reversing the trial court and permitting the widow to take against the will, the Supreme Court stated:

> ... the burden was on appellees [**i.e.,** executor] to prove the fairness of the transaction; that the release was not procured by fraud, concealment, or other improper means; and that it was executed by appellant [**i.e.,** widow] with full knowledge of the character, extent, and value of the estate, real and personal, and her interest therein.

> The rule above stated as to the burden of proof results from the relation of trust and confidence which the executor occupies to the widow and devisees, especially in connection with the following ... facts: The release was procured by the executor with unreasonable haste, within 48 hours after the funeral, and before either he or the widow, or any one interested in the estate, had or could have had such knowledge of its character, extent, or value as to enable them to act understandingly. The consideration for the release is less than 50 per centum of appellant's statutory interest in the personal estate, as shown by the executor's account.

Id.

Similarly here, although not done with the intent to deceive and take advantage of Wife, Wife was not provided with the information necessary for her to intelligently and accurately determine the value of what she would receive if she elected to take against the will versus if she accepted the terms of the will. (N.T., pp. 46, 88.) Wife was given no information as to the separate values of either Shenanigan's or Nick's Lake House, or even told that appraisals had been ordered and would be forthcoming. She was not told of the pending sale for the Blue Comet or the sale price. Nor was she advised that the estate's liquid assets themselves were worth over $800,000.00. She was provided no information as to the debts and expenses of the estate, or as to the fees and taxes to be paid. Other than knowing of the existence of Shenanigan's, Nick's Lake House and the Blue Comet, and of their location, there is no evidence to suggest that Wife, who was separated from Decedent for approximately thirty-four years, possessed any knowledge of Decedent's assets and debts, income and expenses, or the amount and value of any such items. **Cf. In re Johnson's Estate,** 244 Pa. 600, 604, 90 A. 923, 925 (1914) (election made fifteen days after decedent's death upheld "where no undue advantage was taken of the widow, and she was fairly informed of her legal rights and the facts necessary to an intelligent choice").

The estimated gross value of the estate stated in the waiver was more than 1.3 million dollars less than its actual value. The share which Wife is to receive in trust under the combined will and Agreement of Trust, without consideration of the disclaimer signed

by the parties' son on May 2, 2008 and of which Wife had no prior knowledge, is less than 30 percent of what she will receive if permitted to elect against the will. (Wife's Exhibits M and N.) Further, this share is for a life interest only, to be held in trust, rather than outright ownership of property subject to Wife's exclusive use and disposition. As stated in the **Appeal of Cunningham,** "[i]t was far from being any part of [son's] duty as executor to lend himself to the work of procuring from [his mother], with such undue haste, and for the benefit of [himself], a release of that interest for very much less than he knew, or ought to have known, it was worth." **Id.** at 869. The fiduciary duty owed by the estate and its executor to wife was not met. As such, the evidence is insufficient to sustain the validity of the waiver.

Timeliness of Election

This being said, we must still determine on what basis Wife claims to be excused from the mandatory six-month period for filing an election against the will under 20 Pa. C.S.A. §2210(b). The will was probated on October 31, 2007; the six-month statutory period expired on April 30, 2008; Wife's election was filed on August 11, 2008. The burden of establishing an excusable basis for delay is upon Wife. If that basis is fraud, as Wife appears to claim, it must be actual fraud, proven by clear, precise and convincing evidence. **DiMarco Estate, supra** at 434, 257 A.2d at 852.

As previously discussed, we have determined that actual fraud did not induce Wife to execute the waiver. We now find that after the waiver was signed on October 22, 2007, there was no fraud which delayed the filing of her election. In fact, there was very little, if any, contact involving Wife and the estate between October 22, 2007 and April 2008, even though Wife testified that she had begun questioning her decision to execute the waiver as early as late February 2008. In April 2008, Wife received a copy of the trust agreement from Attorney Cohn following her request at some unspecified date between late February and April. The next contact occurred in June 2008—after the April 30, 2008 filing deadline —when Wife requested and received copies of the federal estate and state inheritance tax returns from Attorney Cohn.

During the time between late February 2008 and Wife's filing of the waiver on August 11, 2008, Wife appears to have contacted

and consulted with several attorneys, however, with one exception, the dates of these visits and what legal advice Wife was given does not appear in the record. This exception refers to an appointment Wife scheduled with an attorney from Kingston, Pennsylvania, in early August 2008, which was cancelled when Attorney Gordon, who was to accompany Wife to the appointment, died unexpectedly. By letter dated August 8, 2008, this attorney suggested Wife obtain local counsel and also forwarded to Wife the election which Wife signed and filed on August 11, 2008.

Although we have found that the trust agreement sent by Attorney Cohn to Wife in April 2008 was incomplete and the time to file an election stated in his letter of June 17, 2008 was incorrect, exactly what was missing from the trust agreement was never made clear and a misstatement of law, unless knowingly or intentionally made, is insufficient to support a claim of active fraud. **Daub's Estate, supra** at 454, 157 A. at 911. Not only are we unpersuaded that Attorney Cohn acted in bad faith or with fraudulent intent, in contrast to being mistaken, or at worst negligent, there is no evidence that Wife delayed filing her election because of the deadline stated in Attorney Cohn's letter, which itself was dated a month and a half beyond the April 30, 2008 filing deadline. In addition, as of May 12, 2008, copies of the trust agreement and the tax returns were filed in the register of wills' office and were matters of public record.

The delay between October 22, 2007—when the waiver was signed—and August 11, 2008—when Wife's election to take against the will was filed—a period of almost ten months, is for the most part unexplained and does not demonstrate the requisite due diligence to be effective. For reasons which do not appear on the record, approximately four months after signing the waiver, Wife began having second thoughts about what she had signed. She spoke to at least one attorney during the next two months about her reservations, yet no action was taken to undo the waiver. (N.T., p. 190.) Not until another three months had passed was an appointment with a different attorney scheduled, which by then was three months past the deadline for making an election. **Cf. Salomon's Estate,** 297 Pa. 299, 146 A. 891 (1929) (holding election filed one month after statutory period, where surviving spouse learned six

months earlier of an innocent but material misrepresentation of law made by executor, was untimely).

"[A] person claiming the right to change an election after the expiration of [the statutory period for filing the election] must have acted with due diligence." **Daub's Estate, supra** at 455, 157 A. at 911. "No matter how hard the decision in a particular case may seem to be, if a widow does not make her election within the statutory period, the courts, because of [the statute], must declare that she is deemed to have made an election to take under the will, for this statute fixes the time as definitely as does that relating to taking appeals, and both are mandatory." **Id.** at 453-54, 157 A. at 911(quotation marks and citation omitted). In **Daub's Estate**, as here, absent fraud and notwithstanding that the widow may not have been provided full information about her husband's estate before making her election to take under the will, her delay in seeking to change that election until after expiration of the statutory period was held to be fatal to her claim.

CONCLUSION

Because we find the evidence is unpersuasive to establish actual fraud as either the basis for Wife executing the waiver or the reason for the delay in filing her election, Wife's request to void the waiver of election signed by her on October 22, 2007, and to permit her to make an election **nunc pro tunc,** will be denied.

EUGENE MIZENKO, Plaintiff vs. McDONALD'S RESTAURANTS OF PENNSYLVANIA, INC., Defendant

Civil Law—Award of New Trial—Standard—Vicarious Liability—Applicable Standard of Care—Child/Employee—Expert Opinions—Usurping the Function of the Jury—Direct Examination—Leading Questions—Former Employees—Spoliation—Sanctions—Adverse Inference Instruction

1. A request for new trial involves a two-step analysis, both of which must be answered in favor of the movant before the request will be granted: (1) whether a mistake or mistakes occurred at trial; and (2) whether the moving party was prejudiced by any such error or whether the error was harmless.

2. An employer may be held vicariously liable for the negligent or reckless acts of its employees which cause injury to a third party provided such acts were committed during the course of and within the scope of employment. When the employee is a child, in determining whether the actions of the employee impose liability on the employer by virtue of vicarious liability, the standard of care is that which applies in evaluating the conduct of a child.

3. When the nature of a case involves scientific, technical or other specialized knowledge beyond that possessed by a lay-person, expert opinion testimony is permitted to assist the jury to understand the evidence or to determine a fact in issue. Notwithstanding the foregoing, expert opinions which seek to determine the credibility of witnesses, to judge the case as a whole, or to make findings which the jury is equally capable of making on its own, invade the province of the jury and are, therefore, not permitted.

4. When a party calls a hostile witness, an adverse party or a witness identified with an adverse party, interrogation may be by leading questions. Leading questions are not automatically permitted simply because a witness called to testify was a former employee of an adverse party.

5. In determining whether a party should be sanctioned when potentially relevant evidence within that party's control or possession has been lost or destroyed, the court should consider the following factors: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) the availability of a lesser sanction that will protect the opposing party's right and deter similar conduct. The decision whether to sanction a party, and if so the severity of such sanction, is vested in the sound discretion of the trial court.

NO. 08-0574

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MEMORANDUM OPINION

NANOVIC, P.J.—April 19, 2012

Before us is Plaintiff's Post-Trial Motion following a jury verdict in favor of Defendant. In his motion, Plaintiff claims we erred in what we instructed the jury (**i.e.,** the standard of care applicable to children) and in what we failed to instruct (**i.e.,** spoliation), and further erred in excluding expert testimony which Plaintiff sought to present and in denying Plaintiff's request to call certain former employees of Defendant as of cross-examination. Each of these issues will be discussed in the order advanced by Plaintiff.

FACTUAL AND PROCEDURAL BACKGROUND

On October 30, 2005, the Plaintiff, Eugene Mizenko ("Mizenko") and his friend, Stephen O'Firer, pulled into the parking lot of a McDonald's restaurant located along Blakeslee Boulevard in Lehighton, Carbon County, Pennsylvania, to ask directions to a destination they were going to in neighboring Schuylkill County.

Both were driving motorcycles. After receiving directions from a patron at McDonald's and while driving through the parking lot the same way they had entered, Mizenko hit his brakes and fell to the ground, sustaining injuries. According to Mizenko, the cause of his fall was a wet, greasy substance, like black ice, on the surface of the parking lot, which caused him to skid and lose control.

Shortly before the accident, Charles Shafer ("Shafer"), an employee of McDonald's, had emptied the contents of a shop vac onto the lot near the area where Mizenko fell. In dispute among other issues was whether Shafer knew or should have known the contents of the shop vac, which contained not only dirty water and rocks, but also grease. The shop vac was used to clean the floors at the restaurant, including, at times, cleaning grease around the cooking areas. Also in dispute was whether Mizenko's conduct contributed to his fall. According to McDonald's, based upon a deposition later given by O'Firer, after receiving the patron's directions, Mizenko gunned the engine of his motorcycle, accelerated through the parking lot, and had to suddenly stop to avoid hitting another vehicle exiting a parking space.

As a result of the accident, Mizenko filed a civil action in the Court of Common Pleas of Philadelphia County on June 29, 2006. In his complaint, Mizenko alleged negligence and recklessness against the Defendant, McDonald's Restaurant of Pennsylvania, Inc. ("McDonald's"), and sought compensatory, as well as punitive damages.[1] On January 9, 2007, McDonald's filed an answer with new matter, which denied all material averments of the complaint, and alleged, among other defenses, comparative negligence. Mizenko replied to the new matter on January 29, 2007.

Several months later, on June 13, 2007, McDonald's filed a Petition To Transfer Venue based on **forum non conveniens.** McDonald's request was granted by order dated July 30, 2007, with the transfer to this Court being completed on March 10, 2008.

A jury trial began on February 7, 2011, and ended on February 18, 2011, when a verdict was rendered in favor of McDonald's and

[1] By Stipulation filed on July 20, 2007, the parties agreed to discontinue the action for punitive damages with prejudice.

against Mizenko.[2] On February 25, 2011, Mizenko filed the instant Post-Trial Motion, seeking judgment notwithstanding the verdict and a new trial. For the reasons which follow, we deny Mizenko's motion in full.[3]

DISCUSSION

We begin with our standard of review. In **Harman ex rel. Harman v. Borah,** 562 Pa. 455, 756 A.2d 1116 (2000), our Supreme Court explained that

> [t]here is a two-step process that a trial court must follow when responding to a request for new trial. ... First, the trial court must decide whether one or more mistakes occurred at trial. These mistakes might involve factual, legal or discretionary matters. Second, if the trial court concludes that a mistake (or mistakes) occurred, it must determine whether the mistake was a sufficient basis for granting a new trial. ... The harmless error doctrine underlies every decision to grant or deny a new trial. A new trial is not warranted merely because some irregularity occurred during the trial or another trial judge would have ruled differently; the moving party must demonstrate to the trial court that he or she has suffered prejudice from the mistake.

Id. at 1122 (citations ommitted). With this standard in mind, we address each of Mizenko's claimed errors.

A. **Child Standard of Care**

Mizenko argues first that we erred in charging the jury under Pennsylvania Suggested Standard Instruction 3.12 (now numbered as 13.130), the standard of care applicable to children, in evaluating Shafer's conduct.

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[2] The jury found both parties negligent, attributing 20 percent of causal negligence to McDonald's and 80 percent to Mizenko, thereby precluding Mizenko from recovering damages.

[3] In his motion, Mizenko requests both judgment notwithstanding the verdict and a new trial. Mizenko's request for judgment notwithstanding the verdict is misplaced. "A JNOV can be entered upon two bases: (1) where the movant is entitled to judgment as a matter of law and/or, (2) the evidence was such that no two reasonable minds could disagree that the verdict should have been rendered for the movant." **Oxford Presbyterian Church v. Weil-McLain Company, Inc.,** 815 A.2d 1094, 1099 (Pa. Super. 2003) (citation omitted). Since the issues raised in Mizenko's post-trial motion are based on allegedly erroneous evidentiary rulings and jury instructions, to which the only correct remedy is the grant of a new trial, Mizenko' s request for judgment n.o.v. will be denied.

Shafer was 17 years old at the time of the accident. In judging his conduct, McDonald's requested that we instruct the jury on the standard of care applicable to children, which we did over Mizenko's objection. (N.T. 02/17/11, pp.139-40.)

On this issue, the instruction given was as follows:

> In this case, you are concerned with the care taken or not taken by Charles Shafer, who was 17 years old at the time of the accident. The law does not hold children to the same standard of care as adults. A child is required to exercise the ordinary care appropriate for a child. Specifically, he or she is held to that measure of care that other children of the same age, experience, capacity, and development would ordinarily exercise under similar circumstances.
>
> In applying this standard, the law has placed children of different ages in different categories. Once a child has reached the age of 14, the law presumes that he or she has the capacity to appreciate danger and to exercise care. With respect to a child 14 years of age or over, and Mr. Shafer was 17 years old, the law puts upon him or her the burden of showing lack of intelligence, prudence, foresight, or restraint such as is usual in those of his or her age.

(N.T. 02/17/11, pp. 168-69.)[4] This instruction was accompanied by the following instruction on vicarious liability:

> In this case, it is admitted that Charles Shafer was at the time of the occurrence acting as an employee of McDonald's and was engaged in furthering the interest, activities and affairs or business of McDonald's. McDonald's is liable for the negligence or recklessness of its employees occurring while the employee is acting in the course and within the scope of his employment.

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[4] **See Kuhns v. Brugger,** 390 Pa. 331, 340, 1135 A.2d 395, 401 (1957), which outlines the three categories that minors are placed in, according to their age, as follows:

> [M]inors under the age of seven years are conclusively presumed incapable of negligence; minors over the age of fourteen years are presumptively capable of negligence;[] the burden being placed on such minors to prove their incapacity;[] minors between the ages of seven and fourteen years are presumed incapable of negligence, but such presumption is rebuttable and grows weaker with each year until the fourteenth year is reached.[]

Id. (footnotes omitted).

> Therefore, if you find Charles Shafer was either negligent or reckless in emptying the contents of the shop vac onto McDonald's parking lot, then you must also find McDonald's to have been equally negligent or reckless.

(N.T. 02/17/11, pp. 171-72.)

Mizenko argues that, as a corporation, McDonald's should not reap the benefit of a child standard for judging conduct for which it can be held responsible. This echoes Mizenko's argument at the time of trial that the intent of instruction 13.130 is to protect a child from liability under an adult standard, not to provide a shield to a corporate defendant who has hired a child. (N.T. 02/17/11, pp. 142-43, 208-209.) Such argument, however, misses the mark. It fails to distinguish between negligence in the hiring or supervision of a child, for which an adult standard of care may well be applicable, and the negligence or recklessness of a child, for which an employer may be held vicariously liable. Stated otherwise, the issue was whether Shafer himself was negligent or reckless, and whether such negligence or recklessness could be attributed to McDonald's. (N.T. 02/17/11, p. 143.)

The theory of vicarious liability, requiring some relationship between Shafer, who is asserted to be negligent or reckless, and McDonald's, an employer acting through its employees, imputes Shafer's asserted negligence or recklessness onto McDonald's because of their employee-employer relationship. **See D'Errico v. DeFazio,** 763 A.2d 424, 431 (Pa. Super. 2000) ("[A]n employer is held vicariously liable for the negligent acts of his employee which cause injuries to a third party, provided that such acts were committed during the course of and within the scope of employment.") (citation omitted). Pursuant to this theory, we charged the jury with analyzing the conduct of Shafer, not that of McDonald's.

The charge on the standard of care for children fourteen years of age or older was applicable in this case given Shafer's age and Mizenko's theory of liability based on Shafer's alleged tortious conduct.[5] It instructed the jury to examine Shafer's conduct

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[5] Although at one point in Mizenko's brief in support of his post-trial motion, Mizenko argues that the Court should further have instructed that McDonald's may be held responsible not only for the vicarious liability of Shafer, but also for its negligent supervision, this was not the basis of Mizenko's objection at the time of trial. (N.T. 02/17/11, pp. 142-43.) Nor did Mizenko expand on this objection

when addressing the issue of negligence or recklessness, and explained to the jury, in accordance with the law, that notwithstanding Shafer's age, he was presumptively capable of negligence and recklessness and that the burden of showing otherwise was on him. We find nothing in the charge which was confusing, misleading or unclear. **Cf. Stewart v. Motts,** 539 Pa. 596, 606, 654 A.2d 535, 540 (1995) (stating the standard for evaluating the sufficiency and adequacy of a jury instruction). Furthermore, notwithstanding Mizenko's claim that this instruction held Mizenko to a higher standard of care in proving McDonald's liability, no prejudice was suffered since the jury determined both that McDonald's was negligent and that its conduct was a factual cause of the accident.

B. **Exclusion of Expert Witness Testimony**

Mizenko's second argument concerns our decision to exclude opinion testimony of Mizenko's expert, Dr. Stephen Wilcox, an expert in the field of human factors.

Dr. Wilcox was proffered by Mizenko to render an opinion on whether Shafer acted recklessly in dumping the contents of the shop vac onto McDonald's parking lot. Preliminary to this testimony, Dr. Wilcox authored a report, dated March 22, 2010, whereby he opined that:

> 1. What Mr. Shafer did constituted reckless conduct, in that he knowingly and intentionally created a hazard. ...
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> 2. That it should have been obvious to Mr. Shafer that he was creating a hazard.
>
> 3. That it was further reckless for Mr. Shafer to fail to examine the result of throwing the fluid onto the travel surface.

(Wilcox Report, p. 5.) On February 1, 2011, McDonald's filed a motion **in limine** seeking to preclude Dr. Wilcox's testimony

after the Court's closing instructions were given and before the jury retired to deliberate. (N.T. 02/17/11 pp. 208-209.) **See Burke v. Buck Hotel, Inc.,** 742 A.2d 239, 243 (Pa. Commw. 1999) (requiring that the specific reason for objection to the court's instructions upon which a party bases its claim of error be made in order to preserve this issue for review, noting, however, that it is not necessary to take a specific exception in order to preserve for review the trial court's refusal to give a requested instruction); **cf. Commonwealth v. Pressley,** 584 Pa. 624, 887 A.2d 220, 225 (2005) (holding, under the rules of criminal procedure, that a specific objection following the jury charge is necessary to preserve an issue concerning the instructions, even where points for charge were submitted by a defendant and denied by the trial court).

and report arguing that the jury did not require his expertise in understanding the subject matter; Dr. Wilcox was not qualified to render the opinions expressed; and Dr. Wilcox's opinions would invade the province of the jury.

Argument was held on McDonald's motion on February 4, 2011, resulting in an order dated February 7, 2011, which deferred ruling on the motion until after we had an opportunity to review Dr. Wilcox's trial deposition. On February 8, 2011, in chambers, we explained to counsel we believed Dr. Wilcox could not express an opinion on recklessness for the following reasons: first, the facts are not of a type that require expert testimony to be understood by the jury; second, Dr. Wilcox lacked the expert qualifications to form the opinions sought to be elicited; and third, permitting Dr. Wilcox to express an opinion characterizing the mental state of Shafer and his conduct as being reckless would invade the province of the jury. (N.T. 02/08/11, pp. 74-78.) On February 9, 2011, after giving Mizenko's counsel a further opportunity to determine whether any portion of Dr. Wilcox's testimony could be salvaged, we sustained McDonald's objection.[6]

In his present motion, Mizenko contends that the law in this Commonwealth allows an expert to testify to the ultimate issue; hence, Dr. Wilcox should have been permitted to render his opinion that Shafer's actions were reckless. The preclusion of his testimony

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[6] To the extent Mizenko argued Dr. Wilcox's testimony addressed the implementation and enforcement of McDonald's safety procedures, we found such testimony went beyond the four corners of his report. The expert report focused on the issue of recklessness; as a result, if allowed to testify, Dr. Wilcox would have been limited to discussing only those factors relevant to expressing an opinion on Shafer's alleged reckless conduct.

Pursuant to Pennsylvania Rule of Civil Procedure 4003.5(c), "an expert witness may not testify on direct examination concerning matters which are either inconsistent with or go beyond the fair scope of matters testified to in discovery proceedings or included in a separate report." **Woodard v. Chatterjee,** 827 A.2d 433, 441 (Pa. Super. 2003) (citation omitted). The Explanatory Comment to the rule further states that: "Where the full scope of the expert's testimony is presented in the answer to interrogatories or the separate report, as provided in subdivisions (a)(1) and (2), this will fix the permissible limits of his testimony at the trial." Significant, also, is that on this issue, Mizenko's brief in support of his post-trial motion addresses only his intent to use Dr. Wilcox's testimony to show that McDonald's acted recklessly, not for any other purpose. (Mizenko Brief in Support of Post-Trial Motion, p. 6.)

and report, Mizenko argues, resulted in reversible error as it impeded the jury from finding McDonald's reckless. We disagree.

Expert opinions are intended to assist the jury to understand the evidence or to determine a fact in issue when the nature of the case involves scientific, technical or other specialized knowledge beyond that possessed by a layperson. Pa. R.E. 702; **see also, Commonwealth v. Nasuti,** 385 Pa. 436, 443, 123 A.2d 435, 438 (1956) ("Expert testimony is admissible in all cases, civil and criminal alike, when it involves explanations and inferences not within the range of ordinary training, knowledge, intelligence and experience."). They are not intended to usurp the function of the jury: to determine the credibility of witnesses, to judge the case as a whole, or to make findings which the jury is equally capable of making on its own. This applies separate and apart from whether the opinion sought to be elicited from an expert "embraces an ultimate issue to be decided by the trier of fact." Pa. R.E. 704.

An expert is not permitted to opine on issues credibility, yet this is exactly what Dr. Wilcox would have done. In his trial deposition, as in his report, Dr. Wilcox testified what he thought must have been obvious to Shafer. Dr. Wilcox further put forth as fact that Shafer knew, or should have known, that the shop vac contained grease. (Wilcox Trial Deposition, pp. 22-24, 34, 41-46.) Yet Shafer himself testified to not knowing the contents of the shop vac until they were dumped out, when he noticed dirty water and rocks, not grease.

"[A]n expert cannot weigh contradictory evidence and place his imprimatur upon a particular version." **Kozak v. Struth,** 515 Pa. 554, 559, 531 A.2d 420, 422-23 (1987) ("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.") (emphasis added); **see also, Commonwealth v. Delbridge,** 578 Pa. 641, 855 A.2d 27, 42 (2003) ("Credibility is an issue uniquely entrusted to the common understanding of laypersons. The teaching of [**Commonwealth v. Dunkle,** 529 Pa. 168, 602 A.2d 830 (1992)] is that

expert testimony will not be permitted when it attempts in any way to reach the issue of credibility, and thereby usurp the function of the factfinder." [sic]).

In seeking to characterize Shafer's conduct as reckless—a mixed question of law and fact, not simply a factual one—Dr. Wilcox sought to opine on facts which do not require the opinion of an expert for the jury to understand and evaluate, and in doing so, further sought to invade the province of the jury in the application of law to fact. **Cf. Houdeshell ex rel. Bordas v. Rice,** 939 A.2d 981 (Pa. Super. 2007) (upholding trial court's ruling precluding expert testimony as to what a defendant should have done, as no specialized knowledge was required for jury to determine whether defendant acted negligently). To this end, Mizenko was asking the expert to offer an opinion on "all the evidence," and to judge for the jury and conclude on its behalf that Shafer was reckless. **Cf. Kozak, supra** at 559, 531 A.2d at 422 ("[t]he [expert] witness can not be asked to state his opinion upon the whole case, because that necessarily includes the determination of what are the facts, and this can only be done by the jury."); **see also, Commonwealth v. Daniels,** 480 Pa. 340, 352, 390 A.2d 172, 178 (1978) (endorsing excluding from evidence a statement by a witness which "amounts to no more than an expression of his general belief as to how the case should be decided.").

Finally, the question of whether Shafer acted recklessly is not a complex issue requiring expert testimony. **See Commonwealth v. Brown,** 544 Pa. 406, 420, 676 A.2d 1178, 1184 (1996) ("[t]he purpose of expert testimony is to assist in grasping complex issues not within the ordinary knowledge, intelligence and experience of the jury.") (citation omitted). On the contrary, it is a matter of ordinary knowledge, intelligence, and experience that can be described to the jury, and evaluated by them without the need of an expert. **See Burton v. Horn & Hardart Baking Co.,** 371 Pa. 60, 64, 88 A.2d 873, 875 (1952) ("[e]xpert testimony is inadmissible when the matter can be described to the jury and the condition evaluated by them without the assistance of one claiming to possess special knowledge upon the subject.").

On all these bases, we find that Dr. Wilcox's proffered expert testimony was properly excluded from consideration by the jury.

C. **Refusal To Allow Cross-Examination of Former Employees**

Mizenko next contends that we erred in denying his request to ask leading questions of former employees of McDonald's called by Mizenko on direct examination as part of his case in chief.

At the outset of Mizenko's case, Mizenko called four former employees of McDonald's who were employed by McDonald's at the time of the accident.[7] As to each, Mizenko sought permission to call them as of cross-examination and to ask leading questions. McDonald's objected. In sustaining the objection, we determined that unless there was some reason to believe, beyond their mere status as former employees, that the witnesses were hostile, adverse, or prejudiced either against Mizenko or in favor of McDonald's, there was no basis to permit leading questions on Mizenko's direct examination.

The general rule is that leading questions are not permitted on direct examination. However, the Pennsylvania Rules of Evidence, Rule 611(c), provides in part: When a party calls a hostile witness, an adverse party or a witness identified with an adverse party, interrogation **may** be by leading questions." (Emphasis added). As is apparent from this language, the rule permits, it does not require, the use of leading questions in the circumstances described.

The danger of leading questions is a perversion of the truth: having the examiner's questions become the testimony of the witness. When leading questions are permitted, it is to compensate for some disadvantage or other circumstance which has been balanced against this danger. In the context of cross-examination generally, the witness has moments earlier committed to a version of the facts, often contrary to that of the examiner's client, which the examiner seeks to analyze, test, challenge, undermine, and sometimes, emphasize. Similarly, leading questions of an adverse or hostile witness are intended, to some measure, as a counterweight against a witness who either has a motive or a personal bias which may color his testimony.

[7] These were Dorothy VanStrander, Amanda Pointon, Erica Markley Kugler, and Shafer. Ms. VanStrander was last employed by McDonald's on October 31, 2005. With respect to the other three employees, several years had passed between the time of their last employment by McDonald's and the time of trial.

None of the four witnesses at issue is an adverse party or has been shown to have an interest adverse to Mizenko.[8] While at one time, each was employed by McDonald's, none was so employed at the time of trial. Such employment as existed was low to mid-level. None of the individuals were owners, officers or directors of McDonald's. Moreover, each employee's past employment with McDonald's and the positions held were made apparent to the jury.

Nor were any of these witnesses hostile. None exhibited any personal animosity or disrespect to Mizenko or his counsel. When questioned, each responded to the questions asked without being evasive, argumentative or sarcastic. Neither the tone nor the manner of their responses were anything but civil. **Cf. Commonwealth v. Lambert,** 765 A.2d 306, 356 (Pa. Super. 2000) (" '[H]ostility' require[s] a showing of surprise during the witness's [sic] testimony or an obvious lack of cooperation, reluctance or evasiveness in answering questions.") (quoting trial court).

While we agree with Mizenko that Rule 611(c)'s language permitting leading questions of "a witness identified with an adverse party" expands the use of leading questions beyond that to a hostile witness or an adverse party, this does not automatically open the door to ask leading questions of any person who has or had some relationship with an adverse party, no matter the nature or extent of that relationship. To be sure, in some contexts the identity with the adverse party may be apparent on its face: a spouse, a business associate, or another with an interest in the outcome of the case tied to that of the adverse party. **Cf.** 42 Pa. C.S.A. §5935 (authorizing the calling as of cross-examination of an adverse party or a person having an adverse interest).

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[8] In **Commonwealth v. Lambert,** 765 A.2d 306, 360-61 (Pa. Super. 2000), the Pennsylvania Superior Court stated:

> [A] witness, other than a party[,] is not considered adverse simply because his testimony is adverse to the calling party ... . As the term is understood in this context, a witness is adverse to the calling party if the witness has an interest in the issue being tried, and his interest would be increased or promoted if the calling party's adversary prevails. ... Thus, if the witness is not a party and has no 'legal' interest in the outcome of the proceedings, then the witness is not an adverse witness. ... Whether a witness' interest is adverse to the calling party is a factual determination within the trial court's discretion.

(Citations omitted).

Such identity, however, is not apparent when the relationship between the calling party and the witness is that between an employer and a former employee. This is even more so, as here, when the employment positions held were low to mid-level, the separation from employment occurred years earlier, and the reasons for that separation may well bear on what attitude the witness holds to his or her former employer. In such circumstances, we do not believe it can be presumed without more that the former employee identifies, as a matter of law, with the adverse party. **Cf. Kauffman v. Carlisle Cement Products Co., Inc.,** 227 Pa. Super. 320, 323 A.2d 750 (1974) (holding a defendant's truck driver who was not a party to personal injury litigation arising out of an automobile-truck collision was not subject to being called as of cross-examination by plaintiff's counsel).

The circumstances of this case did not entitle Mizenko to call McDonald's former employees as of cross-examination for purposes of asking leading questions. Moreover, we believe the review of the full testimony given by each of these witnesses reveals no prejudice or injustice has been sustained by Mizenko in restricting the form of questioning.[9]

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[9] In sustaining McDonald's objection, we expressly left open the possibility for Mizenko to ask leading questions if any of the witnesses were shown to be evasive, non-responsive, uncooperative or partial to McDonald's. (N.T. 02/08/11, p. 72.) **Cf. Commonwealth v. Bibbs,** 970 A.2d 440, 453 (Pa. Super. 2009) ("A witness may be treated as hostile by the party calling him where the testimony of the witness is unexpected, contradictory to earlier statements, and harmful to the party calling the witness, and where an injustice would result if the request to treat the witness as hostile is denied.").

To the extent Mizenko argues McDonald's also should have been precluded from asking leading questions of these same witnesses, such objection was neither raised at the time of trial nor included in Mizenko's post-trial motion.

> It is axiomatic that, in order to preserve an issue for review, litigants must make timely and specific objections during trial and raise the issue in post-trial motions. ... Granting or denying an untimely objection lies in the discretion of the trial court. Requiring a litigant to make a timely, specific objection during trial ensures that the trial court has a chance to correct alleged trial errors. ... We have stressed that '[w]aiver is indispensable to the orderly functioning of our judicial process and developed out of a sense of fairness to an opposing party and as a means of promoting jurisprudential efficiency by avoiding appellate court determinations of issues which the appealing party has failed to preserve.'

Harman ex rel. Harman v. Borah, 562 Pa. 455, 756 A.2d 1116, 1124-25 (2000) (citations omitted).

D. **Spoliation—Refusal of Adverse Inference Charge**

Lastly, Mizenko asserts this court erred in refusing to instruct the jury on Pennsylvania Suggested Standard Jury Instruction 5.06 (now numbered as 5.60) with respect to McDonald's alleged spoliation of evidence.

The factual basis for this request is McDonald's Customer Incident Report, a one-page form designed for information to be completed on both sides. During discovery, the defense provided Mizenko with a copy of the report completed on the face side only. Defense counsel informed Mizenko that they could not locate the original document and were unable to determine whether the reverse side of the form was ever completed. It was thought that the original document may have been misplaced or destroyed when the restaurant building was extensively renovated several years earlier. (N.T. 02/16/11, pp. 122-23.) In any event, a copy of the reverse side of the reporting form in blank was supplied so Mizenko would know what information might be missing.

In requesting the charge, Mizenko argued that the fact that McDonald's was unable to produce the second side of the original report was in and of itself sufficient to support a spoliation instruction. Having found that this failure resulted in minimal prejudice, if any, we denied Mizenko's request for an adverse inference instruction.

In **Schroeder v. Commonwealth Department of Transportation,** 551 Pa. 243, 710 A.2d 23 (1998), our Supreme Court listed certain factors to be considered in determining whether a party should be sanctioned when potentially relevant evidence within that party's control or possession has been lost or destroyed:

> (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party, and (3) the availability of a lesser sanction that will protect the opposing party's right and deter similar conduct.

Id. at 27; **see also, Croydon Plastics Co., Inc. v. Lower Bucks Cooling & Heating,** 698 A.2d 625, 629 (Pa. Super. 1997) ("The decision whether to sanction a party, and if so the severity of such sanction, is vested in the sound discretion of the trial court."), **appeal denied,** 717 A.2d 1028 (Pa. 1998); **Creazzo v. Medtronic, Inc.,** 903 A.2d 24, 28-30 (Pa. Super. 2006) (discussing the above-referenced spoliation-of-evidence standards).

With respect to fault, we agree with Mizenko that McDonald's is responsible for the loss of the original document and not knowing whether the second side of the report was ever completed. Erika Markley recalled filling out the report shortly after the accident and then handing it to someone at McDonald's. She believed, but could not recall for certain whether or not she in fact completed the reverse side of the form. Unfortunately, it was not known who the report was given to, what became of the original, or why a copy was only kept of one side.[10] Having found that McDonald's was responsible for this lack of relevant information, we also found, based upon the evidence of record, that there was no evidence of bad faith or a deliberate decision to conceal or destroy relevant information.

As to the second prong of the test, we found a relatively low level, if any, prejudice resulting from the absence of the second side of the report. The second side contained three sections to be completed, if relevant, entitled: 5. Alleged Playplace/Playland Incident; 6. Alleged Premium/Promotional Product Incident; and 7. Alleged Customer Accident/Property Damage. Clearly, the only relevant section is Section 7: Alleged Customer Accident/Property.

The first line of section 7 asks for the "type of incident," with one of the following to be circled: "customer accident," "property damage," or "other." The next two lines ask the shift manager to "describe customer accident/property damage" and "describe any hazards or conditions which may have contributed" to the incident, with space for information to be inserted. In finding little, if any, prejudice resulted to Mizenko from the absence of this information in the report, we note first that not only was it uncertain whether the reverse side of the incident report was ever completed, but also that the information responsive to these inquiries was equally, if not better, known to Mizenko. In addition: the local police in Mahoning Township were contacted, arrived within approximately fifteen minutes of the accident, and spent over an hour at the

[10] Ms. Markley testified this was the first time she completed an incident report. She left McDonald's and began a new job approximately two weeks after the accident. After filling out the report and handing it to someone at McDonald's, she assumed it was sent in, but did not know. Whether only the face side of the report was copied and sent, another possibility, is unknown.

scene observing conditions and conducting an investigation; and pictures of the surface of the parking lot and what Mizenko contended was the cause of his fall, were taken by either Mizenko or O'Firer[11] within an hour of the accident and were used extensively at trial. None of the witnesses disputed what was depicted in these pictures. Finally, the last inquiry under Section 7 of the form asks for "Recommended corrective action" which Shafer and other witnesses testified consisted of cleaning the affected area with a degreaser solvent.

In light of these findings, we found that a charge on spoliation was unjustified under the circumstances. **Cf. Mount Olivet Tabernacle Church v. Edwin L. Wiegand Division,** 781 A.2d 1263, 1273 (Pa. Super. 2001) (holding that the trial court did not abuse its discretion in not giving a spoliation instruction since the loss of evidence from the fire scene was not attributable to any negligence or bad faith on the part of the offending party and relatively little prejudice was proven to have occurred).[12]

CONCLUSION

Having determined that no error of law or abuse of discretion was committed, and further determined, after a review of the whole record, that even absent the foregoing, the likelihood of prejudice is minimal, we deny Mizenko's motion in full.

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[11] At trial, Mizenko testified that the pictures were taken by O'Firer. However, in O'Firer's trial deposition, O'Firer testified the pictures were taken by Mizenko.

[12] Also worth noting is that Mizenko was not prohibited from presenting evidence or arguing this issue to the jury. As discussed in **Mount Olivet Tabernacle Church v. Edwin L. Wiegand Division,** 781 A.2d 1263, 1269 (Pa. Super. 2001), "the evidentiary rationale [for the spoliation inference] is nothing more than the common sense observation that a party who has notice that [evidence] is relevant to litigation and who proceeds to destroy [evidence] is more likely to have been threatened by [that evidence] than is a party in the same position who does not destroy the document." (Citation omitted.) The jury instructions received by the jury expressed and included the jury's right to make inferences from the evidence presented. (N.T. 02/17/11, pp. 149-50.)

PAUL and LINDA STOSS, Individually and As H/W, Plaintiffs vs. SINGER FINANCIAL CORPORATION and PAUL SINGER, Individually, Defendants

Civil Law—Law of the Case Doctrine

1. The law of the case doctrine provides generally that a court involved in the later stages of a litigated matter should not reopen questions decided by another judge of that same court or by a higher court in the earlier phases of the matter. The doctrine does not prohibit a decision on an issue not previously decided, even if related to an earlier decision. Nor does the doctrine prohibit a trial judge from revisiting his own pretrial rulings in a case.

2. A trial court order granting preliminary objections to a complaint based upon what was filed, not when it was filed, and granting an opportunity to file an amended complaint to address such issue, does not bar, under the law of the case doctrine, a later filing challenging the timeliness of the transfer of pendent state claims previously dismissed by a federal court pursuant to the transfer statute (42 Pa. C.S.A. §5103).

NO. 10-0559

MATTHEW B. WEISBERG, Esquire—Counsel for Plaintiffs.

SCOT M. WISLER, Esquire—Counsel for Defendants.

MEMORANDUM OPINION

NANOVIC, P.J.—April 26, 2012

Paul and Linda Stoss (the "Stosses") have appealed our order dated February 29, 2012, granting Defendants' preliminary objections to the Stosses' third amended complaint and dismissing that complaint with prejudice. This opinion is provided pursuant to Pennsylvania Rule of Appellate Procedure 1925(a)(1).

Upon receipt of the Stosses' notice of appeal taken on March 19, 2012, we immediately requested, by order dated March 20, 2012, a Concise Statement of the Matters Complained of on Appeal. This Statement was received by the court on Tuesday, April 10, 2012, and consists of seven separately numbered, interrelated and overlapping issues.

The order appealed from was accompanied by a Memorandum Opinion dated the same date, February 29, 2012. That opinion, we believe, addresses all of the questions raised in the Stosses' Concise Statement. For this reason, we have attached a copy of the February 29, 2012 Memorandum Opinion to this opinion for the convenience of the Superior Court.[1]

[1] A copy of the February 29, 2012 opinion can be found at 18 Carbon L.J. 602 (2012).

Nevertheless, we address briefly issues four and six raised in the Concise Statement. These issues suggest that the Stosses' late filing was ratified by our order of October 13, 2010 and protected under the "law of the case" doctrine. A recitation of the history of this case shows otherwise.

The October 13, 2010 order ruled on Defendants' preliminary objections to the Stosses' second amended complaint. Those objections challenged the propriety of the Stosses' transfer of their pending claims from the federal district court to this court based upon what was filed, not when it was filed. Specifically, the Stosses had yet to file a certified copy of the district court's February 24, 2010 order dismissing the Stosses' claims, or a copy of the first amended federal complaint which was the subject of that order. This filing deficiency and the difficulties it created in this court's understanding of what claims the Stosses were seeking to transfer was made clear in footnote 1 of the October 13, 2010 order.

The October 13, 2010 order struck the Stosses' second amended complaint and permitted the Stosses thirty days from the date of its entry to file with this court those documents necessary to effect a transfer of the Stosses' claims dismissed by the United States district court, as required by the transfer statute, 42 Pa. C.S.A. §5103. The order was never intended to address, because it was never raised, whether such filing would be timely. In response to the order, on November 12, 2010, the Stosses filed certified copies of both the district court's final order dismissing their claims and the related first amended federal complaint. This was the first time copies of either of these critical documents were filed with this court.

On November 19, 2010, Defendants filed objections to the first amended federal complaint. In these objections, Defendants, for the first time, raised as an issue the promptness of the transfer. (Defendants' Preliminary Objections to Plaintiffs' First Amended Complaint, paragraphs 30-32.) The reason for not raising this issue earlier was explained in footnote 2 of Defendants' brief filed in support of their objections wherein Defendants stated: "Defendants could not have raised the issue of promptness in either of its previous Preliminary Objections because the issue of promptness was not yet ripe." Prior to ruling on these objections, the Stosses filed their third amended complaint, to which the Defendants filed preliminary objections on December 23, 2010, again raising

the issue of promptness. (Defendants' Preliminary Objections to Plaintiffs' Third Amended Complaint, paragraphs 27-29, 49-50.) By opinion and order dated February 29, 2012, the order appealed from, we addressed this issue for the first time.

Given this time sequence, it is inaccurate to state that the October 13, 2010 order excused any delay in the filing with this court of copies of either the district court's dismissal order or the related first amended federal complaint, or that this order is now the law of the case with respect to the timeliness of the Stosses' transfer. Fundamentally, we could not, and did not, address in the October 13, 2010 order issues or arguments that had not been raised by the parties. **Commonwealth v. Bibbs,** 970 A.2d 440, 452 n.3 (Pa. Super. 2009), **appeal denied,** 603 pA. 683, 982 A.2d 1227 (2009). Therefore, it is disingenuous and legally inaccurate to state that the October 13, 2010 order ruled on the timeliness of the Stosses' transfer and consequently became the law of the case on this issue.[2]

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[2] As stated in **In re Estate of Elkins,** "[t]he law of the case doctrine sets forth various rules that embody the concept that a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of that same court or by a higher court in the earlier phases of the matter." 32 A.3d 768, 776 (Pa. Super. 2011) (citation and quotation marks omitted). Expounding further, and **quoting** the Pennsylvania Supreme Court, the **Elkins** court stated:

> Among the related but distinct rules which make up the law of the case doctrine are that: (1) upon remand for further proceedings, a trial court may not alter the resolution of a legal question previously decided by the appellate court in the matter; (2) upon a second appeal, an appellate court may not alter the resolution of a legal question previously decided by the same appellate court; and (3) upon transfer of a matter between trial judges of coordinate jurisdiction, the transferee trial court may not alter the resolution of a legal question previously decided by the transferor trial court.

Id. (**quoting Commonwealth v. Starr,** 541 Pa. 564, 574, 664 A.2d 1326, 1331 (1995)).

Since this case has not been previously appealed nor did another judge of this court issue the October 13, 2010 order, the law of the case doctrine is inapplicable. Moreover, "[a] trial judge may always revisit his own prior pre-trial rulings in a case without running afoul of the law of the case doctrine; by its terms, the doctrine only prevents a second judge from revisiting the decision of a previous judge of coordinate jurisdiction or of an appellate court in the same case." **Id.** at 777 (**quoting Clearwater Concrete & Masonry, Inc. v. West Philadelphia Financial Services Institution,** 18 A.3d 1213, 1216 (Pa. Super. 2011)). Finally, when applicable, the doctrine applies only if the specific question in issue has been previously decided, not when, as here, the issue previously decided was a related but not identical issue. **Id.** at 776.

It is also factually inaccurate to argue that the untimeliness of the Stosses' transfer is attributable to the October 13, 2010 order. The federal district court dismissed the Stosses' claims on February 24, 2010. Not until November 12, 2010, did the Stosses file with this court the pertinent pleading to which the federal court's dismissal order applied—the first amended federal complaint. This was thirty days after our October 13, 2010 order. Therefore, if any delay in the filing of the first amended federal complaint can be attributed to the October 13, 2010 order, which premise, we believe, is untenable, it is at most thirty days. This in no way excuses the 231-day delay—between February 24, 2010 and October 13, 2010—which preceded the entry of our order and which, by itself, is excessive and inexcusable.

Finally, to the extent the Stosses may question the ability of the Defendants to raise the issue of timeliness in their third set of preliminary objections—an issue which may at best be hidden in several of the matters set forth in the Stosses' concise statement (**see e.g.,** issue 1)—the issue has been waived. At no time have the Stosses argued that the Defendants were barred from raising this issue in the objections filed on November 19, 2010 by virtue of their earlier preliminary objections. Rule 1032(a) of the Pennsylvania Rules of Civil Procedure expressly provides, with exceptions not applicable here, that "[a] party waives all defenses and objections which are not presented either by preliminary objection, answer or reply." Consequently, Defendants having contended that the issue could not be raised earlier because not ripe and the Stosses having failed to object to the raising of this issue at the time presented, we believe the issue was properly considered by us and decided.

COMMONWEALTH OF PENNSYLVANIA vs.
ADAM JOHN DOYLE, Defendant

Criminal Law—Traffic Stop—Asserted Vehicle Code Violation—Requisite Quantum of Proof—Reasonable Suspicion v. Probable Cause—Breathalyzer Test Testing Standards—Observation Requirements—Simulator Solution

1. A traffic stop premised upon a perceived violation of the Motor Vehicle Code, to withstand a constitutional challenge, must be supported by either probable cause or a reasonable suspicion that a violation of the Vehicle Code has or is occurring.

2. For reasonable suspicion to support a traffic stop, the claimed violation must be one amenable to further investigation to either confirm or negate the violation. A stop based on reasonable suspicion presupposes that there is something further to investigate—that there exists a legitimate expectation of investigatory results; if this not the case, reasonable suspicion alone will not support the stop.

3. A vehicle stop based solely on offenses not "investigable" cannot be justified by a mere reasonable suspicion. Because such violations by definition are such that no additional evidence is obtainable following a stop to either prove or disprove the violation, a stop based upon a "noninvestigable" offense must be supported by probable cause to be valid. For this reason, the traffic stop of Defendant for claimed violations of Section 3111(a) (obedience to traffic control devices) and 3714(a) (careless driving) of the vehicle code, to be valid, must be supported by probable cause, not reasonable suspicion.

4. Section 77.24(a) of Title 67 of the Pennsylvania Code requires that prior to the administration of a breathalyzer test, the person to be tested be kept under continuous observation for a period of at least twenty consecutive minutes immediately preceding administration of the test.

5. Absent evidence of a product defect, there exists a presumption of accuracy that ampoules or solutions placed on the market by a manufacturer for use with an approved breathalyzer machine will produce the intended results per statutory requirement. Under these circumstances, independent testing and certification of the simulator solution and/or ampoules by the police is not a precondition of admissibility of the breath test results.

NO. 550 CR 2011

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

GEORGE TWARDY, JR., Esquire—Counsel for Defendant.

MEMORANDUM OPINION

NANOVIC, P.J.—May 14, 2012

We address here Defendant's Omnibus Pretrial Motion in the nature of a motion to suppress. In this Motion, Defendant seeks to suppress all evidence obtained as the result of a traffic stop of his motor vehicle by the police. Specifically, Defendant contends that he was stopped for alleged summary violations under the Motor Vehicle Code—Obedience to Traffic Control Devices (75 Pa. C.S.A. §3111(a)) and Careless Driving (75 Pa. C.S.A. §3714(a))—and that for neither did probable cause exist to support the stop. In consequence, Defendant argues that all subsequently obtained evidence must be suppressed. Defendant also argues that the test results from a breathalyzer machine should be excluded for failure to follow required testing and certification procedures.

FACTUAL AND PROCEDURAL HISTORY

On March 13, 2011 at approximately 6:40 P.M., Defendant was operating a pickup truck driving north on State Route 209 at or near its intersection with Broadway in Jim Thorpe, Carbon County, Pennsylvania. Defendant was stopped at a red light waiting to make a left-hand turn. At the location where Defendant was stopped, two restricted lanes existed: one for traffic headed straight onto Broadway and one for traffic intending to turn left to continue on Route 209 north. Defendant's truck was straddling both lanes, with approximately half of his vehicle in the right lane and half in the left lane.

Trooper Michael Walsh of the Pennsylvania State Police was driving south on Route 209. Upon observing the position of Defendant's stopped vehicle, he immediately made a U-turn and pulled behind Defendant's vehicle. When the light turned green, Defendant turned left. As he did so, Trooper Walsh observed the right-hand portion of Defendant's vehicle come within inches of striking the sidewalk curb. At this location, Route 209 has one lane proceeding north and there is no adjacent shoulder. At the time of the incident, a St. Patrick's day parade was concluding and people were in the area. However, there was no evidence that any pedestrian was startled or in danger of being harmed.

At this point, Trooper Walsh initiated a traffic stop. Defendant responded appropriately and pulled over at a safe location. As Trooper Walsh spoke with Defendant, he smelled an odor of alcohol, administered a PBT test and conducted an HGN assessment, all of which indicated intoxication.

Defendant was arrested and transported to the Pennsylvania State Police barracks in Lehighton. At 7:17 P.M., Defendant was given and acknowledged his implied consent warnings. At 7:32 P.M., he performed the requested breathalyzer test. The results revealed a blood alcohol content of 0.105 percent.

Defendant was charged with Driving Under the Influence (75 Pa. C.S.A. §3802(a)(1), (b)), Obedience to Traffic Control Devices, Careless Driving and Failure to use a Seat Belt (75 Pa. C.S.A. §4581(a)(2)). Defendant's Omnibus Pretrial Motion was filed on September 8, 2011. Therein, Defendant alleges that Trooper Walsh "had no prior notice or reasonable suspicion as to the exis-

tence of [motor vehicle] violations prior to stopping Defendant" and that "all fruits of the illegal stop ... , including his arrest by Trooper Walsh must be suppressed, as no reasonable suspicion or probable cause existed warranting the traffic stop at issue and as such, the stop was unconstitutional." (Omnibus Pretrial Motion, paragraphs 8 and 9.) At the hearing held on this Motion, Defendant also argued that Trooper Walsh failed to observe him for twenty consecutive minutes immediately preceding the administration of the breath test as required by 67 Pa. Code §77.24, and that the Commonwealth failed to present independent evidence that the simulator solution or ampoules used in testing the breathalyzer machine met testing standards, both of which require suppression of the breathalyzer test.

DISCUSSION

a) **Legality of Stop**

As to Defendant's primary argument, the legality of the stop, the initial question presented is whether probable cause must support Defendant's traffic stop for the suspected motor vehicle code violations observed by Trooper Walsh, or whether reasonable suspicion is sufficient. This question concerns the quantum of proof required to support Defendant's stop for alleged violations of the Vehicle Code.

In 1995, this question was answered by the Pennsylvania Supreme Court based upon its interpretation of the language contained in Section 6308(b) of the Vehicle Code, 75 Pa. C.S.A. §6308(b), as it then existed. At the time, Section 6308(b) provided that an officer must have "articulable and reasonable grounds to suspect a violation of [the Vehicle Code]" before effecting a vehicle stop. Finding the term "articulable and reasonable grounds" to be the equivalent of "probable cause," the Supreme Court held probable cause was a statutory prerequisite for a traffic stop of a motor vehicle premised upon a perceived belief by an officer that the vehicle or its driver was in violation of some provision of the Vehicle Code. **Commonwealth v. Whitmyer,** 542 Pa. 545, 550, 668 A.2d 1113, 1116 (1995).

The holding in **Whitmyer** was dictated by the court's construction of the standard set by statute, not that set by either the federal or state constitutions. From a constitutional perspective, a traffic

stop for Vehicle Code offenses is reasonable and constitutionally sound under both the Fourth Amendment to the United States Constitution and Article I, §8 of the Pennsylvania Constitution, when an objective review of the facts underlying the stop shows that the officer possessed specific, articulable facts that the driver was violating a traffic law at the time of the stop. Under this standard, either probable cause or reasonable suspicion with the intent of conducting an investigation, will support the stop. The rationale for an investigatory stop upon reasonable suspicion is just that, the totality of the circumstances forming the basis of reasonable suspicion must be such that a stop under such circumstances supports an investigatory purpose. "Put another way, if the officer has a legitimate expectation of investigatory results, the existence of reasonable suspicion will allow the stop—if the officer has no such expectations of learning additional relevant information concerning the suspected criminal activity, the stop cannot be constitutionally permitted on the basis of mere suspicion." **Commonwealth v. Chase,** 599 Pa. 80, 92, 960 A.2d 108, 115 (2008).

A stop based on reasonable suspicion requires that there be something to investigate. Therefore, if the only basis for the stop is reasonable suspicion that the detained motorist is presently involved in criminal activity, the violation being investigated must be such that evidence from the investigation will either confirm or negate the violation. "[A] vehicle stop based solely on offenses not 'investigatable' cannot be justified by a mere reasonable suspicion, because the purposes of a **Terry** stop do not exist—maintaining the **status quo** while investigating is inapplicable where there is nothing further to investigate. An officer must have probable cause to make a constitutional vehicle stop for such offenses." **Id.,** at 94, 960 A.2d at 116.

The Act of September 30, 2003, P.L. 120, No. 24, §17, effective February 1, 2004, amended Section 6308(b) of the Vehicle Code to set the standard for a vehicle stop at the constitutional level, thus replacing the higher statutory threshold presented in **Whitmyer. Chase, supra** at 87, 960 A.2d at 112; **Commonwealth v. Fulton,** 921 A.2d 1239, 1240 n.2 (Pa. Super. 2007), **appeal denied,** 594 Pa. 686, 934 A.2d 72 (2007). Specifically, Section 6308(b) was amended to permit an officer with reasonable suspicion to believe

that a violation of the Vehicle Code is occurring or has occurred to make an investigatory stop. **Chase, supra** at 87-88, 94, 960 A.2d at 112, 115-16. Under this statute, "in order to establish reasonable suspicion, an officer must be able to point to **specific and articulable facts** which led him to reasonably suspect a violation of the Motor Vehicle Code." **Commonwealth v. Holmes,** 609 Pa. 1, 12, 14 A.3d 89, 95-96 (2011). This standard is conceptually the same as for a **Terry** stop. **Chase, supra** at 94, 960 A.2d at 116.

In the instant case, Trooper Walsh acknowledged that Defendant was not stopped because he suspected Defendant was driving under the influence. **Cf. Commonwealth v. Sands,** 887 A.2d 261 (Pa. Super. 2005) (holding that "reasonable suspicion" to believe that a driver is operating a motor vehicle while under the influence of alcohol will normally support a stop of that vehicle for further investigation). Rather, Defendant was stopped because of Trooper Walsh's belief that Defendant had violated Sections 3111(a) and 3714(a) of the Vehicle Code. Therefore, the question of whether probable cause or reasonable suspicion must support the stop hinges on whether at the time of the stop Trooper Walsh had a legitimate expectation of investigatory results. **Cf. Commonwealth v. Whitmyer, supra** (holding that where the offense forming the basis of the stop was such that no additional evidence to establish a violation of the Vehicle Code could be obtained from a subsequent stop and investigation, the stop must be supported by probable cause). In **Whitmyer** the court found that determination of the violation at issue, driving at an unsafe speed (75 Pa. C.S.A. §3361), would not be furthered by a post-stop investigation.

With respect to the offenses of both careless driving and obedience to traffic control devices, each, under the circumstances here present, is of that type that is not "investigatable" after a stop. For each of these offenses, there was nothing to be gained by Trooper Walsh subsequent to the stop to either confirm or negate the alleged violations. Consequently, for Defendant's stop to be valid, what Trooper Walsh observed must support a finding of probable cause to believe that Defendant was in violation of the Vehicle Code.

Applying the requisite standard of probable cause to Defendant's stop, this standard was not met as it pertains to Defendant's stop premised on careless driving. The offense of careless driving is defined as follows: "Any person who drives a vehicle in careless

disregard for the safety of persons or property is guilty of careless driving, a summary offense." 75 Pa. C.S.A. §3714. "The **mens rea** requirement applicable to §3714, careless disregard, implies less than willful or wanton conduct[,] but more than ordinary negligence or the mere absence of care under the circumstances." **Commonwealth v. Gezovich,** 7 A.3d 300, 301 (Pa. Super. 2010) (**quoting Matter of Huff,** 399 Pa. Super. 574, 582 A.2d 1093, 1097 (1990) **(en banc), aff'd per curiam,** 529 Pa. 442, 604 A.2d 1026 (1992)) (quotation marks omitted). That Defendant's vehicle, a pickup truck, may have momentarily come within several inches of striking a curb while Defendant made a left-hand turn from a stopped position into a single lane of traffic with no shoulders, after traveling the width of an intersection, without more does not establish probable cause to believe Defendant was guilty of careless driving.

However, as to the claimed violation of Section 3111(a), we believe probable cause supports the stop. The relevant provision of this section provides that "the driver of any vehicle shall obey the instructions of any applicable official traffic-control device placed or held in accordance with the provisions of this title." 75 Pa. C.S.A. §3111(a). The traffic-control devices existent here are the markings on the pavement which designated a left-turn lane for traffic turning left and a separate right lane for traffic continuing straight ahead. These devices are presumed to be legal and correctly placed, absent evidence to the contrary, of which there was none. 75 Pa. C.S.A. §3111(c), (d). Defendant's truck, as observed by Trooper Walsh, was half in one lane and half in the other. Having found a legitimate stop (based on probable cause), all evidence which was subsequently obtained by Trooper Walsh is admissible, unless required to be suppressed on some other basis. In this respect, Defendant contends that 67 Pa. Code §77.24 was violated.

b). **Administration of Breathalyzer Test**

Section 77.24(a) of Title 67 of the Pennsylvania Code requires that a person who is administered a breathalyzer test be kept under continuous observation by a police officer or certified breath test operator for at least twenty consecutive minutes immediately preceding the administration of the test. On this issue, Trooper Walsh testified that Defendant was arrested on location, transported to the Pennsylvania State Police Lehighton barracks, and held in custody during administration of the breathalyzer test. Although Trooper

Walsh left the room where Defendant was being detained during a portion of the twenty-minute period immediately preceding administration of the BAC test in order to obtain materials to input into the machine, while Trooper Walsh was absent, Defendant remained under the custody of another trooper present in the same room with Defendant. There is no evidence that during the time Trooper Walsh was absent, the Defendant ingested alcoholic beverages or other fluids, regurgitated, vomited or ate or smoked anything which would affect the test results. Under these circumstances, we find the observation requirements of 67 Pa. Code §77.24(a) have been met.

As to Defendant's final argument raised at the time of hearing, that the simulator solution and/or ampoules used in the breath testing process were not independently tested and certified by the police, absent a suggestion that these products were in some manner tainted or defective, the Commonwealth does not bear the burden of proving independent testing. **Commonwealth v. Little,** 354 Pa. Super. 546, 554, 512 A.2d 674, 678 (1986); **see also, Commonwealth v. Starr,** 739 A.2d 191, 196 (Pa. Super. 1999). Certification of these products by the manufacturer is required by 67 Pa. Code §77.24(d) and (e), and their placement in the market is deemed certification to the user that the product will produce the intended results per statutory requirement. **Little, supra** at 553, 512 A.2d at 678.

> **Little** establishes a rebuttable presumption that placing the solution or ampoules on the market, after independent testing, constitutes certification that the products will operate as intended. Defendants are permitted to rebut that presumption with some evidence of a product defect. Instantly, appellant failed to offer evidence of a defect and the Commonwealth was therefore entitled to rely on the presumption of accuracy.

Starr, supra at 197. Here, Defendant has presented no evidence to suggest that the manufacturer's product was defective.[1]

[1] At the suppression hearing, the Commonwealth offered into evidence certificates of accuracy and calibration for the breathalyzer machine used in testing Defendant. With reference to these certificates, the Vehicle Code provides that "[a] certificate ... showing that a device was calibrated and tested for accuracy and that the device was accurate shall be presumptive evidence of those facts ... ." 75 Pa. C.S.A. §1547(c)(1); **see also, Commonwealth v. Mongiovi,** 360 Pa. Super. 590, 596, 521 A.2d 429, 432 (1987).

CONCLUSION

Having concluded that Defendant's traffic stop was valid and that no reason has been shown to suppress the results of Defendant's breathalyzer test, Defendant's Omnibus Pretrial Motion will be denied.

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