# ERIE COUNTY LEGAL JOURNAL

*(Published by the Committee on Publications of the Erie County Legal Journal and the Erie County Bar Association)*

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Reports of Cases Decided in the Several Courts of

Erie County for the Year

2001

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**ERIE, PA**

JUDGES
of the
Courts of Erie County
during the period covered
by this volume of reports

**COURTS OF COMMON PLEAS**

HONORABLE WILLIAM R. CUNNINGHAM -------- *President Judge*
HONORABLE GEORGE LEVIN ---------------------------- *Senior Judge*
HONORABLE ROGER M. FISCHER ----------------------- *Senior Judge*
HONORABLE FRED P. ANTHONY --------------------------------- *Judge*
HONORABLE SHAD A. CONNELLY ------------------------------ *Judge*
HONORABLE JOHN A. BOZZA ----------------------------------- *Judge*
HONORABLE STEPHANIE DOMITROVICH -------------------- *Judge*
HONORABLE ERNEST J. DISANTIS ----------------------------- *Judge*
HONORABLE MICHAEL E. DUNLAVEY -------------------------- *Judge*
HONORABLE ELIZABETH K. KELLY ---------------------------- *Judge*

**Volume 84**

## TABLE OF CASES

**-A-**

Aldi, Inc.; Sadler v. ........ 27

**-B-**

Barczynski; Commonwealth v. ........ 81
Bentley & O'Brien; St. James Anglican Catholic Church, et al. v. ........ 86
Boboshko; Commonwealth of Pennsylvania,
Dept. of Transportation v. ........ 96
Brewer; Commonwealth v. ........ 125

**-C-**

Carson; Commonwealth v. ........ 132
Commonwealth v. Barczynski ........ 81
Commonwealth v. Brewer ........ 125
Commonwealth v. Carson ........ 132
Commonwealth v. Paolello ........ 68
Commonwealth v. Williams ........ 108
Commonwealth of Pennsylvania, Dept. of Transportation v.
Boboshko; Przepierski; Gibson ........ 96
Commonwealth of Pennsylvania Dept. of Transportation v. Littlefield ........ 31

**-E-**

Ellsworth v. McDougall ........ 158

**-G-**

Gibson; Commonwealth of Pennsylvania,
Dept. of Transportation v. ........ 96
Girard School District; Weiss v. ........ 1
Goetzinger; Greig v. ........ 102
Gregor; Proper v. ........ 152
Greig v. Goetzinger ........ 102

**-H-**

Holland, et al. v. Marcy v. Holland ........ 9

**-I-**

In Re: Consolidated Tax Assessment Appeal of Units of The
Millcreek Township Municipal Building ........ 42
In the Matter of A.C., R.C. and A.C. ........ 34
In the Matter of the Adoption of A.J.B. ........ 48
In the Matter of J.S. ........ 62
In the Matter of the Adoption of J. L. ........ 120

**-K-**

Keystone Diesel Engine Company v. Renkis and Duckett, et al. .................. 5
Krimmel; Syndicated Office Systems, Inc. v. ................................................ 22

**-L-**

Littlefield; Commonwealth of Pennsylvania Dept. of Transportation v. ...... 31
Lopez v. Penn Traffic Company d/b/a Quality Markets, Inc. ....................... 58

**-M-**

McDougall; Ellsworth v. ..................................................................... 158

**-P-**

Paolello; Commonwealth v. .................................................................. 68
Penn Traffic Company d/b/a Quality Markets, Inc.; Lopez v. ...................... 58
Proper v. Gregor ................................................................................ 152
Przepierski; Commonwealth of Pennsylvania,
Dept. of Transportation v. ........................................................ 96

**-R-**

Reider v. Reider ................................................................................ 145
Renkis and Duckett, et al.; Keystone Diesel Engine Company .................... 5

**-S-**

Sadler v. Aldi, Inc. ............................................................................ 27
St. James Anglican Catholic Church, et al. v. Bentley & O'Brien .................. 86
Syndicated Office Systems, Inc. v. Krimmel .................................................. 22

**-W-**

Weiss v. Girard School District ........................................................... 1
Williams; Commonwealth v. ................................................................ 108

**Volume 84**

## SUBJECT MATTER INDEX

**-C-**


CIVIL PROCEDURE
  Motion for Summary Judgment ........ 9
  22
  27
  58
  158
  Trial ........ 152
CONTRACTS ........
  Assignment ........ 22
  Legality ........ 22
CRIMINAL LAW & PROCEDURE
  Appeals of Sentences ........ 81
  Arrest
    Probable Cause ........ 125
  Confessions
    Voluntariness Requirement ........ 68
  Constitutionality
    Megan's Law II ........ 108
  Driving Under the Influence ........ 96
  Search Warrants ........ 132
  Sentencing Appeals ........ 81
  Sentencing Guidelines ........ 68
  Technical Defenses
    Due Process Defense ........ 81
  Trial ........ 152
  Warrantless Searches ........ 132


**-E-**


EQUITY
  Specific Performance ........ 102
    Adequate Remedy at Law ........ 102


**-F-**


FAMILY LAW
  Adoption ........ 48
    Juvenile
      Termination of Parental Rights ........ 48
  Child Support
    Res Judicata/Estoppel ........ 145


**-I-**


INSURANCE
  Automobile Insurance
    Financial Responsibility Law ........ 9
    Serious Injury ........ 9

-J-

JUDGMENTS
Motion to Open Judgment ........ 5
JUVENILE
Dependency
Permanency Hearing
Appealability of Order ........ 62
Change of Goal ........ 34
Voluntary Relinquishment of Parental Rights
Absence of OCY Consent ........ 120

-L-

LICENSING OF INSPECTION STATIONS ........ 31

-M-

MOTOR VEHICLE
Limited Tort
Pedestrian ........ 158
Serious injury ........ 152 & 158

-N-

NEGLIGENCE
Condition and Use of Land, Building and Structures ........ 58
NON-PROFIT CORPORATIONS
Religious Organizations
Temporal Affairs ........ 86

-R-

REAL ESTATE
Taxation
Exemption ........ 42

-P-

PLEADINGS
Preliminary Objections ........ 102

-S-

SCHOOL DISTRICTS
Public School Code
Substitute -Temporary Employee ........ 1
STATUTES
Construction ........ 9

-T-

TORTS
Negligence
Causation ........ 27

**T. JEFFREY WEISS, Plaintiff**

**v.**

**GIRARD SCHOOL DISTRICT, Defendant**

*SCHOOL DISTRICTS/PUBLIC SCHOOL CODE/SUBSTITUTE/ "TEMPORARY PROFESSIONAL EMPLOYEE"*

A public school district governed by the Public School Code of 1949 need not immediately replace a regular professional employee with a temporary professional employee. A substitute may be employed for the period of time needed to conduct a thorough search to fill the position vacated by a regular professional employee.

In the current case, a teacher hired under a substitute contract while the School District conducted the search necessary to find a temporary professional employee was not entitled to procedural rights under Pennsylvania law and the School District could properly dismiss him without a hearing.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW 13199-2000

Appearance: Charles Agresti, Esquire for T. Jeffrey Weiss
Richard Perhacs, Esquire for Girard School District

**OPINION**

Anthony, J., December 21, 2000.

This matter comes before the Court on Jeffrey Weiss' (hereinafter "Weiss") Complaint in Mandamus. After holding a hearing on the matter and considering the arguments of counsel, the Court will dismiss the Complaint. The factual and procedural history is as follows.

In 1998-1999, 8th Grade Social Studies at Rice Avenue Middle School (hereinafter "RAMS") was taught by Richard Snyder (hereinafter "Snyder"). Snyder had taught Social Studies at RAMS for many years and was a tenured professional employee. However, in April of 1999, Snyder notified the Girard School District (hereinafter "Girard") of his intent to retire, which he did at the end of the school year in June of 1999. Snyder did not have the intention of returning and Girard was aware of that.

At that time, Mina George (hereinafter "George") was teaching at the Girard High School. George is a tenured professional employee of Girard whose position at the time appears to be as a "permanent substitute." According to the testimony, George had a full-time position but was not necessarily hired to teach any particular class. During the 1997-1998 and 1998-1999 school years, George was teaching Social Studies at the high school in a position that was vacant, due to the temporary reassignment

of Mr. Daugherty, the normal teacher.[1] At the conclusion of the 1998-1999 school year, Mr. Daugherty asserted his rights and was transferred back to the position George was currently teaching.

In the summer of 1999, Girard then reassigned George to teach the position vacated by Snyder. However, after the assignment of George to RAMS, another position opened up at Girard high school, and George was reassigned back to the high school in August of 1999.

The reassignment of George back to the high school reopened the position at RAMS. On August 26, 1999, Girard posted an open position for a full-time substitute social studies teacher for the 1999-2000 school year. The posting specifically mentioned that the vacancy was due to the reassignment of George to the high school.

Weiss was interviewed for the substitute position and was hired on September 7, 1999. When he was hired, Weiss signed a contract that listed him as a substitute teacher. Weiss was originally paid at a per diem rate but the Board of Directors of Girard directed he be paid at Step B-1 on September 27, 1999. This resolution of the Board of Directors was made retroactive. In addition, Weiss was also evaluated by Girard and received a satisfactory rating. He also was involved in determining the purchase of a new textbook for the Social Studies classes.

On May 16, 2000, Girard posted an opening for the Social Studies position at RAMS that Weiss was teaching. After an interview process in which Weiss, a third individual and Matthew Michovich were interviewed, Girard appointed Matthew Michovich to the position. Thereafter, Weiss requested Girard provide him with a hearing in regards to his termination at RAMS. That request was denied.

Weiss then filed the above Complaint on September 18, 2000. Girard filed an Answer and New Matter on October 3, 2000. Weiss filed an Answer to New Matter on October 18, 2000 and the pleadings were closed.

A hearing was held on October 27, 2000 in which both parties were represented and testimony was taken. The parties asked for time to file memorandum in support of their respective positions, which was granted. Both briefs were filed on or about November 6, 2000.

The issue before the Court is whether Weiss should be considered a substitute, as Girard contends, or as a temporary professional employee, as Weiss contends. If Weiss is to be considered a substitute, then he is entitled to no procedural rights under Pennsylvania law and Girard could properly dismiss him without a hearing. If, however, Weiss is a temporary professional employee, then he was entitled to a hearing and Girard could not have dismissed him without providing him that right.

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[1] Mr. Daugherty, whose first name does not appear in the record, had been assigned to an IST program by Girard. As part of the reassignment, Daugherty was allowed to return to his classroom duties at any time.

The terms "substitute" and "temporary professional employee" are codified in the Public School Code at 24 P.S. § 11-1101. A substitute is defined as "any individual who has been employed to perform the duties of a regular professional employee during such period of time as the regular professional employee 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 employee who is absent." A temporary professional employee 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 employee whose services have been terminated by death, **resignation**, suspension or removal."

Weiss contends that, since he was hired to replace Snyder, a regular professional employee who had resigned, he should be considered a temporary professional employee. Girard, on the other hand, argues that Weiss was hired to replace George, who was a tenured professional employee reassigned to the high school. Therefore, he may properly be considered a substitute. In addition, Girard relies on the cases *Kielbowick v. Ambridge Area School Board,* 668 A.2d 1228 (Pa. Cmwlth. 1995) and *Pottsville Area School District v. Marteslo,* 423 A.2d 1336 (Pa. Cmwlth. 1980) for the proposition that a school district may hire a substitute until a thorough search is conducted to fill a position vacated by a regular professional employee.

*In Kielbowick, supra.,* the plaintiff had been hired to replace the vacancy created when a permanent earth science teacher resigned in October, during the school year. 668 A.2d 1229. After he was not hired as a permanent teacher, the plaintiff filed a complaint in mandamus arguing that he should have been considered a temporary professional employee. *Id.* The Commonwealth Court determined that simply because the plaintiff was filling the vacancy of a permanent teacher did not automatically require that he be considered a temporary professional employee. *Id.* at 1230. Instead, since he was hired to fill a vacancy that had recently become available, the school district was allowed to hire a substitute until a temporary employee could be hired. *Id.*

*Pottsville, supra.,* likewise determined that a regular professional employee did not have to be replaced with a temporary professional employee immediately. 423 A.2d at 1340. The Commonwealth Court stated that even though a regular professional employee needed to be replaced by a temporary professional employee, "where to do so would lead to an absurd result and seriously impair the efficient and intelligent administration of our schools" the school district was not bound by the general rule. *Id.* at 1338. The Commonwealth Court further stated that it did not "perceive the rules as requiring school districts to *immediately* fill a permanent vacancy with a temporary professional employee." *Id.* Instead, a substitute teacher may be employed until a more permanent replacement could be

found. *Id*

This Court finds both *Kielbowick and Pottsville* instructive in the present case. Like those two cases, the vacancy created here was an unanticipated one and needed to be filled quickly. Girard was not able to perform the thorough search it needed to find a candidate. Therefore, instead of immediately filling the position with a temporary professional employee, it was filled with a substitute, Weiss, until a more permanent replacement could be found.

Weiss argues that *Kielbowick and Pottsville* are distinguishable because this case was foreseeable. Weiss points to the resignation of Snyder as the important event and notes that Girard knew he was retiring in April. Since they had sufficient time, Weiss argues, he should be considered a temporary professional employee.

Weiss' argument fails to understand the crucial fact in the present case. Weiss was not hired to replace Snyder. Instead, he was hired to replace George. While it is true that George never taught a day at RAMS, he was the replacement slated to take over for Snyder until that changed in August. It was only after he was reassigned back to the Girard high school that Girard needed to hire someone to teach at RAMS.

The Court will further note that Weiss was never misled as to his status. The contract he signed indicated that he was a full-time substitute teacher.[2] The posting for the position listed it the same way in addition to mentioning that it was to replace George not Snyder. Furthermore, Girard informed Weiss that it was seeking a more permanent replacement in the spring of 2000 and allowed him to apply for the job. Finally, Weiss admitted at the hearing that he was aware that he was hired as a substitute.

In conclusion, considering all of the facts presented in this case, the Court holds that Weiss was a substitute teacher and not a temporary professional employee. Therefore, Weiss' Complaint in Mandamus to compel Girard to grant him a hearing on his termination will be dismissed.

## ORDER

AND NOW, to-wit, this 21 day of December, 2000, it is hereby ORDERED and DECREED that Plaintiff T. Jeffrey Weiss' Complaint in Mandamus is DISMISSED.

**BY THE COURT:**
/s/ **Fred P. Anthony, Judge**

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[2] While the Court agrees with Weiss that a contract is not necessarily determinative of his employee status, it does indicate that Weiss was informed that Girard only considered him a substitute teacher. This, along with the other evidence presented to the Court, shows that Weiss was never misled as to his status.

# KEYSTONE DIESEL ENGINE COMPANY
# v.
# ALAN I. RENKIS and MATTHEW J. DUCKETT, Individually and as Partners d/b/a GAS PRODUCTION SERVICE & CONSULTANTS

*JUDGMENTS/MOTION TO OPEN JUDGMENT*

If a Petition to open a judgment is to be successful, it must meet the following test: (1) The Petition to open must be promptly filed; (2) The failure to appear or file a timely answer must be excused; and (3) The parties seeking to open the judgment must show a meritorious defense.

*JUDGMENTS/MOTION TO OPEN JUDGMENT*

Although the defendant does not have to prove every element of its defense in the Answer, it must set forth the defense in precise, specific and clear terms, sufficient to refute the Plaintiff's allegations. Sufficient facts must be alleged to enable the Plaintiff to determine if the Defendant's position has any legal significance or legal merit.

*JUDGMENTS/MOTION TO OPEN JUDGMENT*

The absence of any reliable statement of fact is a significant impediment to determining whether a petitioner has met the legal requirement of setting forth a meritorious defense.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 12024 - 2000

Appearances: John P. Eppinger, Esquire for the Plaintiff
Kevin W. Barron, Esquire for the Defendants

## OPINION

Bozza, John A., J.

On June 8, 2000, plaintiff, Keystone Diesel Engine Company, (hereinafter "Keystone") filed a Complaint against defendants, Alan I. Renkis and Matthew J. Duckett, individually and as partners d/b/a Gas Production Service & Consultants, (hereinafter "Gas Production Service"). On June 13 and June 21, 2000, Mr. Renkis and Mr. Duckett, respectively, were properly served with a copy of the Complaint, and a default judgment was entered on July 24, 2000. On July 25, 2000, Notice of Entry of Judgment was sent to Gas Production Service, and it filed a Motion to Strike Off and/or Open Judgment on August 1, 2000. After hearing argument, the Court denied the Motion on November 2, 2000. Gas Production Service filed a timely Notice of Appeal and a Statement of Matters Complained of on Appeal.

In its Statement of Matters Complained of on Appeal, Gas Production Service claims the Court denied its Motion to Open Judgment because a verified pleading was not attached to its petition, and therefore, the Court

abused its discretion by failing to open the default judgment for that reason. Gas Production Service also asserts that Paragraphs 6 and 7 of its Motion to Open Judgment provided meritorious defenses to Keystone's claims, and the Court's failure to act upon its Motion necessitated this appeal.

The Pennsylvania Supreme Court set forth the test for determining whether to open a default judgment in *Cintas Corporation v. Lee's Cleaning Services, Inc.,* 549 Pa. 84, 700 A.2d 915 (Pa. 1997). The Court stated that:

> A petition to open a judgment is an appeal to the equitable powers of the Court. ... It is committed to the sound discretion of the hearing court and will not be disturbed absent a manifest abuse of that discretion. Ordinarily, if a petition to open a judgment is to be successful, it must meet the following test:
>
> (1) The petition to open must be promptly filed;
>
> (2) The failure to appear or file a timely answer must be excused;
>
> and
>
> (3) The parties seeking to open the judgment must show a meritorious defense.

(Citation omitted). *Cintas Corporation* at 93-94, 700 A.2d at 919.

In the present case, however, Gas Production Service filed its Motion to Open Judgment pursuant to Pa. Rule of Civil Procedure 237.3 - *Relief From Judgment of Non Pros or by Default,* which provides as follows:

> (a) A Petition for Relief from a Judgment of Non Pros or of Default entered pursuant to rule 237.3 shall have attached thereto a verified copy of the Complaint, or answer, which the petitioner seeks leave to file.
>
> (b) If the petition is filed within ten (10) days after the entry of the judgment on the docket, the court shall open the judgment if the proposed complaint or answer states a meritorious cause of action or defense.

The Note to Rule 237.3 states that it:

> does not change the law of opening judgments. Rather, the rule supplies two of the three requisites for opening such judgments by presupposing that a petition filed as provided by the rule is timely and with reasonable explanation or legitimate excuse for the inactivity or delay resulting in the entry of judgment. ...

Applying these criteria to the instant Motion to Open Judgment, the Court found that Gas Production Service met the first and second prongs of the test by following Pa.R.C.P. 237.3. Gas Production Service, however, did not meet the third prong of the test. It failed to present a meritorious

defense by either attaching a verified copy of its Answer to its motion pursuant to Pa.R.C.P. 237.3(a), or by adequately stating a meritorious defense in its motion.

The Pennsylvania Superior Court stated that, "the requirements of a meritorious defense is only that a defense must be pleaded that, if proved, at trial would justify relief. ... The defendant does not have to prove every element of its defense. However, it must set forth the defense in **precise, specific and clear terms.**" (Citations omitted) (Emphasis added). *Penn-Delco School District v. Bell Atlantic-PA, Inc.,* 745 A.2d 14, 19 (Pa. Super. 1999); *Castings Condominium Association v. Klein,* 444 Pa. Super. 68, 663 A.2d 220 (Pa. Super. 1995). Gas Production Service claims that Paragraphs 6 and 7 of their Motion set forth meritorious defenses. These paragraphs provide, in part:

> 6. ... specifically, defendants would have alleged that plaintiff failed to perform the repair in a workmanlike manner and/or in a manner in which the defendants requested plaintiff to do it. Furthermore, plaintiff went forward with the repair without advising the defendants of the cost thereof.
>
> 7. Furthermore, the plaintiff and defendants had ongoing negotiations prior to the judgment being entered, in an attempt to amicably resolve this matter.
>
> ...

Applying the meritorious defense standard to the present case, the Court found that Gas Production Service did not state its defenses in precise, specific and clear terms sufficient to refute Keystone's allegations.

The only assertions of fact of any significance set forth in Gas Production Service's unverified motion is that Keystone didn't perform the repairs in a workmanlike manner and failed to advise the defendants of the costs associated with the repairs. While the failure to perform a service in a workmanlike manner may have legal significance in a contract dispute, there is absolutely no way to determine whether in the instant case such a general allegation constitutes a defense and, more importantly, it is not possible to determine whether such an assertion is meritorious. A similar conclusion must be reached with regard to the allegation the repairs were made without prior notice of cost. The defendant has not set forth any specific facts in either a verified answer or in its motion which relate to the general assertions set forth in its motion. For example, there is no indication of the nature of the faulty repairs or the contractual relevance of the failure to advise the plaintiff of the anticipated costs of repairs. These matters would typically be pled in some manner in an answer and/or new matter. Without additional factual averments, there is no way to determine if Gas Production Service's position has any legal significance, let alone legal merit.

Finally, there remains no response of any kind to Keystone's complaint. No responsive pleading addressing the assertions in the complaint by either admitting or denying the allegations pursuant to Rule 1029 has been tendered by Gas Production Service. While this Court does not believe that the form utilized to convey the existence of a meritorious defense is determinative, the absence of any reliable statement of fact is a significant impediment to determining whether a petitioner has met the legal requirement of setting forth a meritorious defense. Therefore, Gas Production Service's Petition to Open Judgment was denied because it failed to set forth a meritorious defense.

Gas Production Service did not raise any claims regarding its Motion to Strike Off in the Statement of Matters Complained of on Appeal and any such claims should be deemed waived.

For the reasons set forth above, the Court believes its Order of November 2, 2000, should be affirmed.

Signed this 25th day of January, 2001.

**By the Court,**
/s/ **John A. Bozza, Judge**

**JOEL M. HOLLAND, HEATHER L. HOLLAND, minors, by THERESA L. HOLLAND, parent and Natural guardian, and THERESA L. HOLLAND, in her own right, Plaintiffs**

**v.**

**EDWARD E. MARCY, Defendant**

**v.**

**JOEL R. HOLLAND, Additional Defendant**

*CIVIL PROCEDURE/SUMMARY JUDGMENT*

Summary judgment may be granted only where the right is clear and free from doubt, and the moving party has the burden of proving the nonexistence of any genuine issue of material fact.

*INSURANCE/AUTOMOBILE INSURANCE/FINANCIAL RESPONSIBILITY LAW*

Minor children residing in their parents' household are subject to the same tort option as their parents and thus, in this case, are bound by their mother's deemed selection of the limited tort option and are also precluded from recovering first party benefits. 75 P.S. §§ 1705(b)(2), 1714.

*INSURANCE/AUTOMOBILE INSURANCE/SERIOUS INJURY*

The plaintiffs are precluded from challenging the cancellation of their automobile policy because they failed to request review of such cancellation in writing to the Insurance Commissioner. 40 P.S. § 991.2008.

*INSURANCE/AUTOMOBILE INSURANCE/SERIOUS INJURY*

The legislature's intent behind the limited tort option was to require that the threshold determination of whether a serious injury had been sustained not be made routinely by the trial court judge unless reasonable minds could not differ on the question.

*INSURANCE/AUTOMOBILE INSURANCE/SERIOUS INJURY*

The "serious impairment of body function" threshold employed in Pennsylvania contains two inquiries: (a) what bodily function, if any, was impaired because of injuries sustained in the accident and (b) was the impairment of the body function serious? Consideration should be given to the extent of the impairment, length of time the impairment lasted, the treatment required to correct the impairment, and any other relevant factors. An impairment need not be permanent to be serious.

*INSURANCE/AUTOMOBILE INSURANCE/SERIOUS INJURY*

In the present case reasonable minds could not differ with the conclusion that no "serious injuries" were incurred by the plaintiffs so that summary judgment in the defendant's favor was appropriate.

*STATUTES/CONSTRUCTION*

Courts must apply a liberal interpretation to a statute and avoid a result that is contrary to the purpose of the statute and must construe the statute to avoid absurd results.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW NO. 11319-1999

Appearances: Anthony J. Sciarrino, Esq. Attorney for Plaintiffs
Joanna K. Budde, Esq. Attorney for
Defendant, Edward E. Marcy

**OPINION**

Connelly, J., January 5, 2001

**FACTS**

This matter is before the court pursuant to Defendant Edward E. Marcy's Motion for Summary Judgment filed on August 8, 2000. The instant case arises out of a motor vehicle accident, which occurred on State Route 20, approximately 4 miles west of North Springfield, Pennsylvania, Erie County, Pennsylvania, on August 3, 1997. According to the Complaint, at the time of the accident, Plaintiffs, Joel M. Holland, a minor, Heather L. Holland, a minor, Casey M. Holland, a minor[1], and Theresa L. Holland, their parent and natural guardian, were passengers in a 1985 Chevrolet Celebrity operated by Joel R. Holland, and owned by Theresa L. Holland. *Complaint,* ¶ 6.

The Complaint alleges that at approximately 12:30 A.M., on August 3, 1997, the Plaintiffs, as well as the Defendant, were operating their vehicles in a easterly direction on State Route 20, with the Defendant in the right hand lane, and the Plaintiffs in the left hand passing lane. At this time, according to the allegations in the Complaint, "the Defendant was traveling in the right hand lane with his right turn signal operating, when suddenly and without warning, the Defendant made a left turn across the left hand (passing) lane and into the westbound lanes of State Route 20 bringing his vehicle and the vehicle in which the plaintiff's were passengers into violent contact." *Id.* at ¶ 9.

As a result, the Plaintiffs allege several violations of the Motor Vehicle Code, and maintain Defendant's actions represented careless, reckless, negligent, willful and wanton conduct, made in conscious disregard or indifference to the interest of the Plaintiffs. Consequently the Plaintiffs seek economic damages for the medical expenses incurred by Plaintiff Theresa L. Holland, and her two minor children, as well as non-economic damages for the alleged injuries resulting from the accident.

The Defendant, in his Motion for Summary Judgment and supporting brief, argues that Plaintiff Theresa Holland's failure to maintain the requisite financial responsibility on her vehicle precludes the Plaintiffs from

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[1] The Plaintiffs' Complaint does not allege Casey M. Holland, a minor, sustained any injuries as a result of the accident.

recovering their medical expenses, and further, since the registered vehicle involved in the accident was uninsured at the time of the accident, all of the Plaintiffs, as passengers, are deemed bound by the limited tort option and are precluded from recovering non-economic damages since they have not sustained "serious injuries."

Specifically, Defendant avers that presently discovery reveals the following regarding the Plaintiff Theresa Holland's failure to properly maintain financial responsibility:

(a) Plaintiff's policy with Dairy Insurance, which provided limited tort coverage, was cancelled effective February 13, 1997 due to nonpayment of premium;
(b) Plaintiff's policy with State Farm Insurance Company, which provided limited tort coverage, was cancelled effective July 19, 1997 for underwriting reasons; and
(c) Plaintiff's policies with American Independent Insurance Company had effective dates after the August 3, 1997 loss; *i.e.,* October 24, 1997 and February 23, 1998.

*Defendant Edward E. Marcy's Motion for Summary Judgment, ¶4(a)-(c).* Defendant further notes that while cancelled prior to the August 3, 1997 accident date, Theresa Holland's policies of insurance with Dairyland and State Farm both carried the limited tort option. *Id.* at 7 n.2.

At oral argument held before this court on September 27, 2000, the Plaintiffs did not dispute Defendant's allegations regarding Ms. Holland's financial responsibility. Rather, the Plaintiffs, maintaining that the State Farm policy was the only policy at issue, argued that the cancellation of such policy was insufficient, and therefore, Ms. Holland's insurance policy with State Farm was still in effect at the time of the accident. *N.T., Motion for Summary Judgment, 09/27/00, p. 11-12.*

## LAW

It is well-established that in order to withstand a motion for summary judgment, a non-moving party must adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor. *Zachardy v. Geneva College,* ___ Pa. Super. ___ , 733 A.2d 648, 650 (1999). "An entry of summary judgment may be granted only in cases where the right is clear and free from doubt. The moving party has the burden of proving the nonexistence of any genuine issue of material fact." *Id. quoting Kilgore v. City of Philadelphia,* 533 Pa. 22, 25, 717 A.2d 514, 515-516 (1998).

As to the existence of an effective insurance policy, it is the Defendant's position that Plaintiff Theresa Holland applied for automobile insurance through State Farm Insurance on June 2, 1997, and on July 3, 1997, thirty-one (31) days later, State Farm provided Ms. Holland with notice that her policy of automobile insurance would be cancelled effective July 19, 1997.

However, Ms. Holland denies knowledge of the cancellation or receipt of any notice of cancellation, and believed at the time of the accident in August of 1997, the vehicle was insured through State Farm Insurance. *N. T., Motion for Summary Judgment, 09/27/00, p. 10.*

Additionally, the Plaintiffs allege they are entitled to full tort coverage as the cancellation from State Farm fails to comply with Pennsylvania Code 31 Sec. 61.5(3), which requires that the insured have thirty (30) days from the date of mailing to the cancellation date, in that the instant cancellation date was only sixteen (16) days after the mailing date. *Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment,* p. 2. Furthermore, Plaintiff contends the limited tort election application is ineffective because the application does not provide for the appropriate election of tort option form as mandated by §1705 of the Pennsylvania Motor Vehicle Financial Responsibility Law. *Id.* at 3.[2]

In response the Defendant maintains the Plaintiffs are precluded from challenging the cancellation of their policy of insurance as they have

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[2] In his reply brief, the Defendant alleges that the cancellation notice provisions of Act 78, 40 P.S. §991.2001, *et. seq.,* are inapplicable to policies of insurance which have been in effect for a period of less than sixty (60) days. Specifically, Defendant cites Section 991.2002(c) which reads:

(c) Nothing in this act shall apply:

. . .

(3) To any policy of automobile insurance which has been in effect less than sixty (60) days, unless it is a renewal policy, except that no insurer shall decline to continue in force such a policy of automobile insurance on the basis of the grounds set forth in section 2003(a) and except that if an insurer cancels a policy of automobile insurance in the first sixty (60) days, the insurer shall supply the insured with a written statement of the reason for the cancellation.

40 P.S. §991.2002(c). As the exhibits reflect, the Plaintiff applied for automobile insurance on June 2, 1997, and the notice of cancellation was dated July 3, 1997, to be effective July 19, 1997. Therefore, this court agrees with Defendant that the notice provisions relied upon by the Plaintiffs are inapplicable, and thus Plaintiffs' argument is dismissed.

Furthermore, as to the appropriateness of the tort election form, this court dismisses Plaintiffs' argument in accordance with the conclusion of the Pennsylvania Supreme Court in *Donnelly v. Bauer,* 553 Pa. 596, 720 A.2d 447 (1998), which held that the mere failure of the automobile insurer to notify the insured of premium differential between limited and full tort options did not entitle insureds to the full tort option.

failed to exhaust their administrative remedies, and correctly cite Section 991.2008 of Act 78, which reads:

§ 991.2008. Request for Review

(a) Any insured may, within thirty (30) days of the receipt by the insured of notice of cancellation or notice of intention not to renew and of the receipt of the reason or reasons for the cancellation or refusal to renew as stated in the notice, request in writing to the Insurance Commissioner that the Insurance Commissioner review the action of the insurer in canceling or refusing to renew the policy of such insured.

(b) Any applicant for a policy who is refused a policy by an insurer shall be given a written notice of refusal to write by the insurer. The notice shall state the specific reason or reasons of the insurer for refusal to write a policy for the applicant. Within thirty (30) days of the receipt of such reasons, the applicant may request in writing to the Insurance Commissioner that the Insurance Commissioner review the action of the insurer in refusing to write a policy for the applicant.

40 P.S. §991.2008.

It is well established that "where an insured believes that an insurer has improperly terminated insurance coverage, the insured has an *exclusive* remedy to challenge the cancellation under the Insurance Act. If the insured does not challenge the termination of insurance, the insured has waived that issue." *O'Hara v. Com., Dept. of Transp.,* __ Pa. Cmwlth. __, 691 A.2d 1001, 104 (1997) (emphasis added). Further, as the Defendant notes, "[w]hen an administrative remedy is prescribed by statute, a trial court lacks jurisdiction to entertain a case until the aggrieved employee has pursued his or her administrative remedies." *Shumake v. Philadelphia Bd. of Educ.,* ___ Pa. Super. __, 686 A.2d 22, 24 (1996) *citing Cohen v. Temple Univ.,* 299 Pa. Super. 124, 445 A.2d 179 (1982).

Accordingly, as the Plaintiffs' instant argument constitutes a collateral attack on the propriety of the cancellation, the Plaintiffs' failure to challenge State Farm's cancellation of their insurance pursuant to the statutory remedies provided by the Insurance Act precludes them presently from raising the issue before this court, and thus Plaintiffs argument is dismissed.

Moreover, the Defendant argues that regardless of the issue of cancellation, the insurance application in question was for a 1985 Ford LTD, and did not even cover the 1985 Chevy Celebrity, which was the vehicle involved in the accident. *N.T., Motion for Summary Judgment, 09/27/00, p. 10.* Relative to this issue, during oral argument, the Defendant referenced the Pennsylvania Superior Court opinion, *Berger v. Rinaldi,*

__ Pa. Super. ___, 651 A.2d 553 (1994) wherein the court held that in a situation where the driver was using his parent's insured vehicle at the time of the accident, the full tort option that was elected by the driver's parent, allowing her to seek financial compensation for pain and suffering and other nonmonetary damages, was imputed to the driver, even though he was the owner of uninsured vehicle. *Id.* at 557. The court reasoned:

> At the time of the accident, Berger was financially responsible as a resident/relative insured under his mother's policy. As such, it is not appropriate to apply the mandates of section 1705(a)(5)[3] to situations where, as here, the vehicle involved in the accident is an "insured" vehicle and the driver is an insured and financially responsible individual. *On the other hand, if Berger had been driving his currently registered, but uninsured automobile at the time of the accident, section 1705(b)(2)[4] would not apply, and section 1705(a)(5) would clearly prohibit him from recovering for any non-economic loss.*

*Id.* (emphasis added).

Similarly in *Henrich v. Harleysville Insurance Companies,* __Pa. __, 620 A.2d 1122 (1993), the daughter was a passenger in her friend's uninsured motor vehicle, and was injured when the vehicle veered off the road and struck a tree. *Id.* at 1123. At the time of the accident, the minor daughter

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[3] §1705. Election of tort options

(a) Financial responsibility requirements.-

. . .

(5)An owner of a currently registered private passenger motor vehicle who does not have financial responsibility shall be deemed to have chosen the limited tort alternative.

75 Pa.C.S. §1705(a)(5).

[4] (b) Application of tort options.-

. . .

(2)The tort option elected by a named insured shall apply to all insureds under the private passenger motor vehicle policy who are not named insureds under another private passenger motor vehicle policy. In the case where more than one private passenger motor vehicle policy is applicable to an insured and the policies have conflicting tort options, the insured is bound by the tort option of the policy associated with the private passenger motor vehicle in which the insured is an occupant at the time of the accident if he is an insured on that policy and bound by the full tort option otherwise.

75 Pa.C.S. §1705(b)(2).

herself owned a motor vehicle which was registered with the Commonwealth of Pennsylvania, but was uninsured. *Id.* Thereafter the daughter made a claim for uninsured motorist benefits against her father's policy of insurance, but was denied coverage by the insurance company. The issue before the Pennsylvania Supreme Court was whether the Motor Vehicle Financial Responsibility Law (MVFRL), 75 Pa.C.S. §1701 *et. seq.,* precludes the daughter, as the owner of an uninsured vehicle which is registered in this Commonwealth, from recovering uninsured motorist benefits pursuant to her father's policy of insurance. *Id.*

As the Defendant in the instant case, the Defendant in *Henrich,* argued that the daughter could not recover any insurance benefits because she owned a registered but uninsured motor vehicle, in accordance with Section 1714 of the MVFRL which reads:

> **§1714. Ineligible claimants**
> An owner of a currently registered motor vehicle who does not have financial responsibility or an operator or occupant of a recreational vehicle not intended for highway use, motorcycle, motor-driven cycle, motorized pedalcycle or like type vehicle required to be registered under this title cannot recover first party benefits.

75 Pa.C.S. §1714. However the Supreme Court found that Section 1714 did not apply to the daughter because she was not operating *her own* uninsured motor vehicle at the time of the accident. *Id.* at 1124 (emphasis in original). The Court further opined:

> The MVRFL was designed to deter people from failing to insure their vehicles more forcefully than the prior statute. If Ms. Henrich had been injured while operating her own uninsured but registered motor vehicle, we can see how it could at least be argued that the deterrent purpose of Section 1714 might be applied to her so as to prevent her from recovering under her father's insurance policy. . . . Here, Ms. Henrich was hurt while a passenger in her friend's uninsured motor vehicle. It is hard to see how punishing a person like Ms. Henrich, or the threat of punishing her, would deter someone like her driver, an unrelated third party, from neglecting to procure auto insurance.

*Id.*

Therefore, and conversely in the case at bar, since the Plaintiffs were passengers in the uninsured 1985 Chevy Celebrity at the time of the accident, and said vehicle was owned and operated by their parents Theresa L. and Joel R. Holland respectively, as the aforementioned discussion demonstrates, they are precluded from recovering any non-economic loss pursuant to Section 1705(a)(5) of the MVFRL, and from recovering medical benefits pursuant to Section 1714 of the MVFRL.

In the alternative, the Plaintiffs contend the minor children involved in the accident are entitled to recover under a full tort election, "and are still entitled to recover first-party benefits," *(N. T., Motion for Summary Judgment, 09/27/00, p. 19),* and rely in support on the case *Ickes v. Burkes,* __ Pa. Super. __, 713 A.2d 653 (1998) which involved a situation where a wife was injured while a passenger in her husband's vehicle, which was registered, but not insured. The Pennsylvania Superior Court agreed with Appellant that the husband was "deemed to have chosen" the limited tort option by failing to insure his vehicle in accordance with 75 Pa.C.S. §1705(a)(5). Appellant then cited to 75 Pa.C.S. §1705(f), which in pertinent part, defines "insured" as "[a]ny individual residing in the household of the named insured who is: (1) a spouse or other relative of the named insured[,]" and "named insured" as "[a]ny individual identified by name as an insured in a policy of private passenger motor vehicle insurance." *Ickes,* 713 A.2d at 654.

Accordingly the Appellant then suggested that the husband was a "named insured", and therefore the wife was an "insured" under the "policy", and as such, the limited tort "policy" of the husband, which he was deemed to have chosen as an operation of law, would apply to all insureds under his "private passenger motor vehicle policy." *Id.*

Reviewing the language of 75 Pa.C.S. §1705(a)(5) which as mentioned above, provides: "An owner of a currently registered private passenger motor vehicle who does not have financial responsibility shall be deemed to have chosen the limited tort alternative," the lower court concluded that the wife was not an "owner" of her husband's vehicle, and therefore was entitled to recover both noneconomic and economic damages by operation of Section 1705(b)(3) of the MVFRL, which provides:

> An individual who is not an owner of a currently registered private passenger motor vehicle and who is not a named insured or insured under any private passenger motor vehicle policy shall not be precluded from maintaining an action for noneconomic loss or economic loss sustained in a motor vehicle accident as the consequence of the fault of another person pursuant to applicable tort law.

75 Pa.C.S. §1705(b)(3).

The Pennsylvania Superior Court agreed with the lower court's decision that the wife was entitled to collect full tort benefits by operation of 75 Pa.C.S. §1705(b)(3), and further defended this conclusion with the following explanation:

> The fact that her husband, as the owner of an uninsured currently registered vehicle, was "deemed to have chosen the limited tort alternative," by operation of law, does not mean that appellee is an "insured" as defined by the MVFRL. While appellee's husband was treated the same as if he would have been if he was a "named

> insured" who elected the limited tort option when purchasing a policy of private passenger motor vehicle insurance by operation of 75 Pa.C.S §1705(a)(5), it is clear that he was not a "named insured" as defined by 75 Pa.C.S. §1705(f) .... Since we are convinced that appellee was not an "insured" under any "policy of private passenger motor vehicle insurance," she was not bound by the tort option elected by a "named insured".

*Ickes,* 713 A.2d at 655.

Further, the court allowed Appellee to recover the first party benefits under Section 1714 since it was determined that she was not the "owner" of the uninsured, currently registered motor vehicle which was involved in the accident. *Id.* at 657. In conclusion, the court voiced similar public policy concerns as opined in *Henrich:* "[W]e see no purpose in punishing appellee by denying her full tort coverage when she was neither an owner nor operator of the uninsured vehicle involved in the accident." *Id.* at 655.

Conversely, the Defendant offers the case *Hames v. Philadelphia Housing Authority,* __ Pa. Cmwlth. __, 696 A.2d 880 (1997) wherein the Commonwealth Court of Pennsylvania arrived at a different conclusion based on the following facts:

> In May 1992, Appellants, Venice Hames, Venicia Hames, a minor, and Kiara Hames, a minor, were involved in an accident in which their vehicle collided with a vehicle driven by an employee of Appellee. Venice Hames was driving an uninsured Plymouth Voyager minivan registered to his wife, Angela Hames. Venicia and Kiara, ages six and three at the time of the accident, were passengers in the vehicle. . . . On September 1, 1995, Appellee filed a motion for summary judgment on the ground that Venicia and Kiara were bound by the limited tort option in Section 1705(d) of the MVFRL, 75 Pa.C.S. §1705(d), because Angela Hames' vehicle was uninsured, and the children were not entitled to recover noneconomic damages unless they suffered a serious injury.

*Id.* at 881.

As the court in *Ickes,* the Commonwealth Court reviewed the provisions of the MVFRL, specifically Section 1705(b)(2), and reasoned:

> Because her vehicle was uninsured, Angela Hames is deemed by operation of law to have selected the limited tort option. Moreover, Section 1705(b)(2) provides that the tort option selected by a named insured shall apply to all insured under that policy. Logically, then, it must follow that Venicia and Kiara are bound by their mother's deemed selection of the limited tort option, regardless of whether she had an insurance policy on her vehicle.

*Hames,* 696 A.2d at 883.

Despite such contradictory conclusions, this court is persuaded to adopt the reasoning of the Commonwealth Court in light of the following concluding remarks of the court concerning its decision to preclude the minor children from recovering under the full tort option:

> To decide otherwise and to accept Appellants' argument would afford greater rights to minor children whose parents have no insurance than to minor children whose parents have purchased insurance and chosen the limited tort option. It is a well-settled principle of statutory construction that the legislature does not intend a result that is absurd or unreasonable. . . .  As indicated by Section 1705(b)(2) of the MVFRL, the legislature intended that minor children residing in their parents' household be subject to the same tort option as their parents.

*Id.* at 883 (citations omitted).

The MVFRL provides that "every motor vehicle of the type required to be registered...which is operated or currently registered shall be covered by financial responsibility." *Berger,* 651 A.2d at 555; 75 Pa.C.S. §1786(a)[5]. In passing the Act, "the Legislature was primarily concerned with the rising consumer cost of automobile insurance, created in part by the substantial number of uninsured motorists who contributed nothing to the pool of insurance funds from which claims were paid." *Allen v. Erie Ins. Co.,* __ Pa. Super. __, 534 A.2d 839, 840 (1987). "The Act has the effect of requiring all owners of registered vehicles to share in the burden of insurance before they can obtain the benefits." *Id.*

Finally, in *Mowery v. Prudential Property and Casualty Insurance* Co., 369 Pa. Super. 494, 535 A.2d 658 (1988), the Pennsylvania Superior Court held:

> The purpose of Motor Vehicle Financial Responsibility Law is to require owners of registered vehicles to be financially responsible, and the exclusions of persons from benefits under the act, if they are not financially responsible by having automobile insurance,

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[5] **§1702. Definitions**

**"Financial responsibility."** The ability to respond in damages for liability on account of accidents arising out of the maintenance or use of a motor vehicle in the amount of $15,000 because of injury to one person in any one accident, in the amount of $30,000 because of injury to two or more persons in any one accident and in the amount of $5,000 because of damage to property of others in any one accident. The financial responsibility shall be in a form acceptable to the Department of Transportation.

75 Pa.C.S. §1702.

> is clearly reasonable as it fosters the goal of promoting financial responsibility among motorists. *The Appellant may not be heard to complain about her exclusion from benefits under a system of insurance to which she willfully refused to participate by failing to obtain the insurance required by the act.*

*Pellot v. D & K Financial Corp.,* 9 D & C.4th 507, 510 (1991) *quoting Mowery,* 535 A.2d at 663 (emphasis in original).

It is well-established that when construing an insurance statute, courts must apply a liberal interpretation to the statute and avoid a result which is contrary to the purpose of the statute. Moreover, this court must construe the statute to avoid absurd results, to give effect to the entire statute and to favor the public interest as against any private interest." *McClung v. Breneman,* __ Pa. Super. __, 700 A.2d 495, 497 (1997) (citations omitted). Therefore, in light of these principles, and the foregoing discussion regarding the public policy concerns of the Commonwealth addressed by the MVFRL, this court concludes that in enacting Section 1705(b)(2) of the MVFRL, the legislation intended that minor children residing in their parents' household be subject to the same tort option as their parents, *Hames,* 696 A.2d at 883, and thus, the minor children are bound by their mother's deemed selection of the limited tort option, and are precluded from recovering first party benefits under Section 1714 of the MVFRL.

Having determined the Plaintiffs are bound by the limited tort option, the final issue before this court is whether the Plaintiffs sustained a serious impairment of body function, within the meaning of Sections 1702 and 1705(d) of the MVFRL. Section 1702 defines serious injury as "[a] personal injury resulting in death, serious impairment of body function or permanent serious disfigurement." Section 1705(d) provides in part:

> Each person who elects the limited tort alternative remains eligible to seek compensation for economic loss sustained in a motor vehicle accident as the consequence of the fault of another person pursuant to applicable tort law. Unless the injury sustained is a serious injury, each person who is bound by the limited tort election shall be precluded from maintaining an action for any noneconomic loss...

*Hames v. Philadelphia Housing Authority,* __ Pa. Cmwlth. __, 737 A.2d 825, 828 (1999).

In *Washington v. Baxter,* __ Pa. __, 719 A.2d 733 (1998), the Pennsylvania Supreme Court "concluded that the legislature's intent behind enactment of the limited tort option was to require that the threshold determination of whether a serious injury has been sustained not be made routinely by a trial court judge." *Id.* at 828. Rather, the Court determined that the issue is to be decided by the jury *unless reasonable minds could not differ on the question. Id.* (emphasis added). Furthermore, the Court adopted the definition of "serious impairment of body function" announced in *DiFranco*

*v. Pickard,* 427 Mich. 32, 398 N.W.2d 896 (1986) which provides:

> The "serious impairment of body function" threshold contains two inquires:
>
> a) What body function, if any, was impaired because of injuries sustained in a motor vehicle accident?
>
> b) Was the impairment of the body function serious?
>
> The focus of these inquires is not on the injuries themselves, but on how the injuries affected a particular body function. . . . In determining whether the impairment was serious, several factors should be considered: the extent of the impairment, the length of time the impairment lasted, the treatment required to correct the impairment, and any other relevant factors. An impairment need not be permanent to be serious.

*Washington,* 719 A.2d at 740 *quoting DiFranco,* 398 N.W.2d at 901.

Upon applying the above mentioned principles to the instant case, even when the evidence is taken in the light most favorable to the Plaintiffs the non-moving party, this court finds that reasonable minds could not differ on the conclusion that Plaintiffs' injuries were not serious.

Plaintiff Theresa Holland alleges she suffered bilateral contusions and abrasions as reflected in her medical records, and further indicated scarring on her leg "which would be visible if an individual was wearing a skirt, shorts or any clothing which would expose the knee area or higher." *Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment, p. 4, ¶C.* According to her deposition testimony, Theresa Holland only missed one day of work, the day after the accident. *N.T. Deposition of Theresa L. Holland, 10/30/00, pp. 87-88, Motion for Summary Judgment-Exhibit E.* Ms. Holland's follow-up treatment consisted of two visits to Dr. Bashline, within two weeks of the accident. During these visits Dr. Bashline merely rebandaged her legs, and indicated to her that her injuries were healing and recommended that she keep the bandages on her legs. *Id.* Additionally, Ms. Holland testified that she had not seen anyone for her injuries since Dr. Bashline, and she has not experienced any further problems with her legs. *ld.* at 90-91. This evidence demonstrates that Ms. Holland's injuries are clearly minor, and fail to rise to the level of a "serious injury," and therefore, this court dismisses Plaintiffs' argument relative to Theresa Holland's injuries.

According to the Plaintiffs, as a result of the accident, Joel Holland suffered a four inch laceration of his forehead. Plaintiffs further aver, "it is understanding [sic] of the plaintiffs, and is indicated in the office notes of Dr. Baker that no further surgical intervention is [sic] would improve the appearance of Mr. Holland's scar. Therefore, it is clear that more than three years after the date of the accident Mr. Holland continues to have a visible

scar on his forehead." *Brief in Opposition, p. 4, ¶A.*

Joel Holland, a minor, testified that he did not see any doctors in between receiving his stitches at the hospital directly after the accident, and having the stitches removed by Dr. Baker. *N. T., Deposition of Joel Holland, 10/30/00, pp. 10-11, Motion for Summary Judgment- Exhibit G.* Further, Joel Holland testified that upon removing the stitches, Dr. Baker commented that the scar "looked pretty good" and that it was "healing". *Id.* Accordingly, this court conclude Joel Holland has not sustained a "serious injury" so as to entitle him to full tort benefits in that the assertion that a "visible scar on his forehead" is wholly inadequate to raise an issue of fact as to the requirement for a permanent serious disfigurement, and Plaintiffs have failed to cite any supporting authority to the contrary. Therefore, Plaintiffs' argument concerning Joel Holland's injuries is denied.

Finally, regarding Heather Holland, a minor, Plaintiffs contend she suffered from "trauma to the face and nose thereafter she suffered nose bleeds for a period of approximately six months. Thereafter, she was treated by Dr. Sydney Lipman for the purpose of cauterizing the left side of her nose." *Brief in Opposition, p. 5, ¶C.*

Heather Holland testified that before the accident she would experience nose bleeds "probably like once or twice a week. Then after the accident I started having them like three times a day." *N. T., Deposition of Heather Holland, 10/30/00, pp. 15-16, Motion for Summary Judgment- Exhibit I.* Following the cauterization, Heather Holland testified she still gets nosebleeds, however they occur "every now and then." *Id.* Heather Holland did not testify that the nosebleeds prevented her from participating in various sports at school, nor did she indicate she suffered from any scars or any other problems from the accident. *Id.* Similarly, as the cases above, this court finds that the evidence regarding Heather Holland is insufficient to raise a material issue of fact as to the serious nature of her injuries, and therefore dismisses Plaintiffs' argument as being without merit.

## ORDER

AND NOW, TO-WIT, this 5th day of January, 2001, it is hereby ORDERED, ADJUDGED and DECREED that the Defendant's Motion for Summary Judgment is GRANTED for the reasons set forth in the foregoing Opinion.

**BY THE COURT:**

/s/ **Shad Connelly, Judge**

**SYNDICATED OFFICE SYSTEMS, INC., Assignee of the claim from TENET HEALTHCARE CORPORATION, f/d/b/a ALLEGHENY HEALTH CORPORATION, a Pennsylvania Corporation, operating under the d/b/a GREATER PITTSBURGH REHABILITATION HOSPITAL, Assignor**

**v.**

**DEBRA KRIMMEL and WILLIAM KRIMMEL**

*CIVIL PROCEDURE/MOTION FOR SUMMARY JUDGMENT*

A Motion for Summary Judgment may only be granted if there are no material facts in dispute, and the moving party is entitled to judgment as a matter of law; and the Trial Court must resolve all doubts against the moving party and examine the record in the light most favorable to the non-moving party.

*CONTRACTS/LEGALITY*

In Pennsylvania, the law prohibits a collection agency from enforcing an assigned claim against a debtor, unless all of the criteria set forth in 18 Pa. C.S.A §7311 et seq. are met.

*CONTRACTS/ASSIGNMENT*

It is unlawful for a collection agency to take an assignment of a claim from a creditor if the original agreement between the creditor and the debtor prohibits assignments.

*CONTRACT/ASSIGNMENT*

The electronic transmission of claims for collection purposes does not in and of itself constitute a written assignment.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 11161 - 1997

Appearances: R. Bruce Manchester, Esquire for the Plaintiff
Ted J. Padden, Esquire and Andrew J. Conner, Esquire for the Defendants.

## OPINION

Bozza, John A., J.

This matter is currently before the Court to decide the defendants' Motion for Summary Judgment and Motion for Partial Summary Judgment. Defendants, Debra and William Krimmel, assert *inter alia* that the assignment of their debt to the plaintiff, Syndicated Office Systems, Inc. (hereinafter "Syndicated") violates Pennsylvania law. The Court agrees for the reasons set forth below.

On March 15, 1999, Syndicated filed a Complaint against Debra and William Krimmel. The Krimmels filed an Answer and New Matter on May 13, 1999. Syndicated filed its Reply to New Matter and Answer to

Counterclaim on June 15, 1999. On March 16, 2000, the defendants served Requests for Admissions upon Syndicated. On May 1, 2000, the Krimmels filed a Motion to Deem Requests for Admissions Directed to Syndicated Admitted. By Order dated August 14, 2000, the Court granted the defendants' motion with regard to all requests for admissions. On September 5, 2000, the Court granted the Krimmels' Motion to Amend New Matter and they filed an Amended Answer on September 11, 2000. On September 12, 2000, the defendants filed a Motion for Summary Judgment and Motion for Partial Summary Judgment.

A motion for summary judgment may only be granted if there are no material facts in dispute, and the moving party is entitled to judgment as a matter of law. *Snyder v. Specialty Glass Products,* 441 Pa. Super. 613, 658 A.2d 366 (Pa. Super. 1995). "In determining whether to grant summary judgment, a trial court must resolve all doubts against the moving party and examine the record in the light most favorable to the non-moving party." *Jones v. Snyder,* 714 A.2d 453, 455 (Pa. Super. 1998). In order to resolve the Krimmels' Motion for Summary Judgment and Motion for Partial Summary Judgment, we must apply these criteria to the following facts.

Syndicated instituted this lawsuit against the Krimmels, as the assignee of Tenet Healthsystem Hospitals, Inc. (hereinafter "Tenet"), in order to collect money owed to Tenet's subsidiary - Great Lakes Rehabilitation Hospital (hereinafter "Great Lakes"). The debt resulted from Debra Krimmel's stay at Great Lakes from October 19, 1992, through April 14, 1993.[1] Since she was entitled to receive medical assistance benefits, Great Lakes billed the Pennsylvania Department of Welfare $168,481.26. In response, the Department of Public Welfare sent Great Lakes two checks covering only a portion of Debra Krimmel's bill. Syndicated claims the Department of Public Welfare later retracted these payments. Syndicated also asserts it has written off any amounts owed by the Krimmels for services rendered from October 19, 1992, through and including November 24, 1992, and has instituted this suit for the balance of the bill in the amount of $118,426.00.

Syndicated and Great Lakes are separate corporations but both are, or were, owned by Tenet. Syndicated is a California corporation and is a wholly owned subsidiary of Tenet, which also indirectly operated Great Lakes, a Pennsylvania corporation. Tenet sold Great Lakes to Health South Corporation effective January 1, 1994, and retained the rights to Great

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[1] Debra Krimmel was admitted to Great Lakes Rehabilitation Hospital as a medical assistance patient due to injuries received in a near fatal fire which left her with burns over sixty percent of her body. In addition, Debra Krimmel has an extensive history of mental health problems, including schizophrenia and depression.

Lakes' accounts receivable including the Krimmels'.[2] Tenet ostensibly assigned the Krimmels' debt to Syndicated for collection.

As noted above, the Court granted the defendants' Motion to Deem Requests for Admissions Directed to Syndicated Admitted, and therefore, the following assertions were admitted by Syndicated:

> 1. Syndicated Office Systems, Inc., is a "collection agency" as that term is defined in 18 Pa.C.S.A. § 7311(h);
>
> 2. Syndicated Office Systems, Inc. is subject to the terms and conditions of 18 Pa.C.S.A. § 7311 *et seq.*; and
>
> 3. The original contract between Great Lakes Rehabilitation Hospital and the Defendant, Debra Krimmel, prohibits assignment.

*See,* Defendant's Request for Admissions Directed to the Plaintiff, Nos. 1, 2, & 3. These facts are therefore established, and must be accepted by the Court within the context of a summary judgment determination.

In Pennsylvania, the law prohibits a collection agency from enforcing an assigned claim against a debtor, unless the criteria set forth in 18 Pa.C.S.A.§ 7311 *et seq.* are met. The statute defines a "collection agency" as:

> A person, other than an attorney at law duly admitted to practice in any court of record in this Commonwealth, who, as a business, enforces, collects, settles, adjusts, or compromises claims, or holds himself out, or offers, as a business, to enforce, collect, settle, adjust, or compromise claims. [18 Pa.C.S.A.§ 731 l(h)].

Furthermore, the statute provides the following:

> It is lawful for a collection agency, for the purpose of collecting or enforcing the payment thereof, to take an assignment of any such claim from a creditor, if all of the following apply:
>
> (1) The assignment between the creditor and the collection agency is in writing.
>
> (2) The original agreement between the creditor and debtor does not prohibit assignments.
>
> (3) The collection agency complies with the act of December 17, 1968 (P.L. 1224, No. 387), known as the Unfair Trade Practices

[2] There is no written assignment between Great Lakes and Syndicated included in the summary judgment record.

> and Consumer Protection Law, and with the regulations promulgated under that act. (Emphasis added).

18 Pa.C.S.A.§ 731 l(a).

Since Syndicated and Tenet are separate legal entities and Syndicated is a collection agency, a legal assignment between Tenet and Syndicated must exist in order for Syndicated to have standing to assert a claim against the Krimmels.

Applying the criteria set forth in 18 Pa.C.S.A. § 7311(a) above to this case, the Court finds that the assignment between Tenet (Creditor) and Syndicated (Collection Agency) is illegal for two reasons. First, the assignment between Tenet and Syndicated is not in writing. Paragraphs 26 and 27 of Syndicated's Reply to New Matter and Answer to Counterclaim state:

> **Tenet Healthsystem Hospitals, Inc., and Syndicated Office Systems, Inc. have no contractual agreement to assign or transfer claims.** Syndicated Office Systems, Inc. is a wholly owned subsidiary of Tenet Healthsystem Hospitals, Inc. between which **all claims are electronically transmitted**.... (Emphasis added).

Syndicated thereby admits that no written assignment exists, and only asserts that "all claims are electronically transmitted". Tenet's sending the claim against the Krimmels by electronic means to Syndicated, for collection purposes, does not in and of itself constitute a written assignment. The summary judgment record provided by Syndicated lacks any indication that Tenet assigned its rights to the disputed claim to Syndicated in written form. Second, Syndicated admitted that the original contract between Great Lakes and Debra Krimmel prohibits the assignment of any claims.

An assignment of rights to collect a debt is a contract and generally speaking, it is a lawful activity enforceable by the Court. The Pennsylvania legislature, however, has expressly made assignments of claims for debt to collection agencies a crime[3], unless certain specified criteria are met. As set forth above, the formation of the assignment between Tenet and Syndicated was criminal pursuant to 18 Pa.C.S.A. § 7311 (a). The Superior Court has stated that, "A contract is illegal if either its formation or its performance is criminal, tortious, or otherwise opposed to public policy." *Contractor Industries v. Zerr,* 241 Pa. Super. 92, 97, 359 A.2d 803, 805 (Pa. Super. 1976).

In the present case, the Court cannot enforce the illegal assignment between Tenet and Syndicated because it would be in effect facilitating the commission of a crime and obviously, against public policy. The

[3] A violation of 18 Pa.C.S.A. § 7311 *et seq.* is a misdemeanor of the third degree.

Superior Court has noted that:

> The principle of public policy is, that no court will lend its aid to a man who grounds his action upon an immoral or illegal act. ...Principles of public convenience demand that the justice of the case shall yield to higher considerations, the operation of the precedent on public morals and the public interest. It is for these reasons courts of justice will not assist an illegal transaction in any respect.

*Contractor Industries* at 97, 359 a.2d at 805.

Having determined that Syndicated has no standing to assert Tenet's claim against the Krimmels', it is unnecessary to reach the other issues raised in the defendants' motions.

An appropriate Order will follow.

**ORDER**

AND NOW, to-wit, this 5th day of February, 2001, upon consideration of the defendants' Motion for Summary Judgment and Motion for Partial Summary Judgment and argument thereon, and for the reasons set forth in the foregoing Memorandum, it is hereby **ORDERED**, **ADJUDGED and DECREED** that the Motion for Summary Judgment is **GRANTED**, and the Motion for Partial Summary Judgment is **DENIED**.

**By the Court,**
**/s/ John A. Bozza, Judge**

## BERNICE SADLER
## v.
## ALDI, INC.

*CIVIL PROCEDURE/MOTION FOR SUMMARY JUDGMENT*

Motion for summary judgment may only be granted if there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. All doubts are to be resolved against the moving party and the record is to be examined in favor of the non-moving party.

*TORTS/NEGLIGENCE/CAUSATION*

Where plaintiff alleges negligence as the cause of a fall in a water-covered area of a parking lot but is unable to adduce any evidence indicating the cause of her fall, the evidence is insufficient to establish causation. Motion for summary judgment therefore properly entered in favor of the defendant.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 13560 - 1999

Appearances: Barry F. Levine, Esq. for Bernice Sadler
Christopher J. Sinnott, Esquire for Aldi, Inc.

## OPINION

Bozza, John A., Judge

This matter is before the Court on plaintiff, Bernice Sadler's, Rule 1925(b) Statement of Matters Complained of on Appeal. On October 13, 1999, Ms. Sadler filed a Complaint against the defendant, Aldi, Inc. (hereinafter "Aldi"). Aldi filed its Answer and New Matter on November 24, 1999. On December 13, 1999, plaintiff filed her Reply to New Matter. Aldi filed a Motion for Summary Judgment on August 30, 2000, and the Court granted it on October 27, 2000. Ms. Sadler filed a timely Notice of Appeal and Statement of Matters Complained of on Appeal.

In her Statement, plaintiff asserts the following:

1. The trial court erred in determining that the plaintiff failed to establish a *prima facie* case of negligence, entitling the defendant to summary judgment;
2. The trial court erred in determining that the plaintiff failed to establish a *prima facie* case for causation, entitling the defendant to summary judgment; and
3. The trial court erred in determining that the defendant met its burden of proof that the plaintiff is guilty of "cooperative negligence"[1], entitling the defendant to summary judgment.

[1] The Court is unsure of the meaning of these terms and assumes that the plaintiff meant "comparative negligence". Since our decision granting summary judgment for the defendant was not based upon comparative negligence, we do not address this issue.

A motion for summary judgment may only be granted if there are no material facts in dispute, and the moving party is entitled to judgment as a matter of law. *Snyder v. Specially Glass Products,* 441 Pa. Super. 613, 658 A.2d *366* (Pa. Super. 1995). "In determining whether to grant summary judgment, a trial court must resolve all doubts against the moving party and examine the record in the light most favorable to the non-moving party". *Jones v. Snyder,* 714 A.2d 453, 455 (Pa. Super. 1998). Applying these criteria to the present case, the Court found that the facts, as set forth below, were insufficient to establish a cause of action in negligence, and accordingly, summary judgment was granted in favor of Aldi.

On the morning of December 18, 1997, Ms. Sadler and her adult daughter, Lisa Fulkrod, drove to defendant's grocery store located at 4728 Buffalo Road, Erie, Pennsylvania, 16510. Plaintiff was a passenger in her daughter's car, and they parked in Aldi's parking lot. It had been raining that day and the parking lot was wet. Ms. Sadler exited the vehicle and walked along the passenger side toward the rear of the automobile, where she observed a large puddle. Plaintiff testified that the puddle was approximately twelve (12') feet long and six (6') feet wide. It was filled with dark, murky water such that neither the plaintiff, nor her daughter could see the bottom of the puddle.

Ms. Sadler was wearing her winter boots and decided to walk through the puddle. After taking a minimum of three steps into the puddle, she lost her balance and fell to the ground. Ms. Sadler's daughter testified that she did not see her mother fall. Plaintiff's last step was upon her right foot when she lost her balance and she fell landing on her right leg, hip, arm and hand. As a result of the fall, Ms. Sadler suffered a distal radius fracture of her right wrist.

A few weeks after the accident, Ms. Sadler and her daughter returned to Aldi's parking lot to take pictures of the accident scene. Ms. Fulkrod testified that the general contour of the parking lot between where she parked her car and the store was that it "goes down a little bit and then it goes up" with the drainpipe located at the lowest point in between. See, Deposition of Lisa Fulkrod, April 10, 2000, pp. 58-61. The drainpipe was six (6) to eight (8) inches in diameter, made of white plastic and had a sewer cap. *See,* Deposition of Bernice Sadler, April 10, 2000, pp. 96-97. Ms. Fulkrod added that the asphalt adjacent to the drainpipe was cracked, broken and uneven, such that it resulted in a two (2) inch drop next to the drainpipe. *See,* Deposition of Lisa Fulkrod, April 10, 2000, pp. 39-42, 50-51.

Despite the assertions in her Complaint that she "stepped into the drain hole. Unprepared for the change in depth, [she] lost her balance and fell, landing on her right hand.", Ms. Sadler repeatedly testified during her deposition that she did not know what caused her to fall. In addition neither Ms. Sadler nor Ms. Fulkrod was able to indicate where the drainpipe was located in relation to where her she fell, or its location anywhere

within the puddle. *See,* Deposition of Lisa Fulkrod, April 10, 2000, pp. 43, 45, 53-54, Fulkrod Deposition Ex. #1 & Sadler Deposition Ex. #2. Plaintiff and her daughter discovered the drainpipe after they returned to Aldi's parking lot a few weeks later. They returned because Ms. Sadler's doctors told her that her hand must have struck something other than the pavement in order to cause the type of injury she sustained.

A cause of action in negligence has four essential elements: (1) a duty or obligation recognized by law on the part of the defendant to conform to a certain standard of conduct with respect to the plaintiff; (2) the defendant's breach of that duty or obligation; (3) a causal connection between the defendant's breach and the resulting injury sustained by the plaintiff; and (4) actual loss or damage suffered by the plaintiff. *Schmoyer by Schmoyer v. Mexico Forge,* 437 Pa. Super. 159, 649 A.2d 705 (Pa. Super. 1996).

Causation is an essential element of negligence, and it involves two concepts, "cause in fact" and "proximate cause". Cause in fact, also known as "but for" causation, provides that if the injury would not have occurred but for the negligent conduct, then a direct causal connection exists between the negligence and the injury. Proximate cause involves the determination that the nexus between a wrongful act (or omission) and the injury is of a type that it is both socially and economically desirable to hold the wrongdoer liable. *First v. Zero Zero Temple,* 454 Pa. Super. 548, 553, 686 A.2d 18, 21 (Pa. Super. 1996).

In the present case, Ms. Sadler cannot provide any sufficient evidence indicating the cause in fact of her injury. As stated above, plaintiff repeatedly testified that she did not know what caused her to fall. For example:

Question: Can you describe for me what you remember about the moments leading up to where you fell?
Answer: All I was doing was walking, and then I fell.
Question: Okay. Do you know how you fell? Do you know what caused you to lose your balance and fall?
Answer: No. That's why I went back there, to find out what made me fall. The doctor wanted to know, too.

Ms. Sadler further testified:

Question: ...When I say personal knowledge, I want to know whether you know from your own observations what you saw, what you heard, not what some doctor might have told you a week or two weeks or two hours afterwards. I want to know what you know, based on your own senses.
Answer: I walked through the water. Down I went. It was dirty water. I heard my bone crack. I hollered to my daughter. And then I told the man to stay away.
Question: Mrs. Sadler, what is your position in this lawsuit? Is your position in this lawsuit that you stepped on or

in that pipe, and that caused you to fall?
Answer: All I know is I fell.
Question: That's all you know?
Answer: That's all I know.
Question: You don't know what caused you to fall?
Answer: I don't know anything.

*See,* Deposition of Bernice Sadler, April 10, 2000, pp. 114, 144 & 149-150. Plaintiff also stated that she did not remember slipping or tripping over anything. *See, Id.* at pp. 114-116. Ms. Sadler further indicated that she did not remember any changes in elevation, or stepping on anything that made her turn her ankle. See, *Id.* p. 139.

Ordinarily questions of negligence and causation are to be determined by the jury and not the judge. However, a question regarding the sufficiency of the evidence is within the trial judge's discretion. "In fact, the trial court has a duty to prevent questions from going to the jury which would require it to reach a verdict **based upon conjecture, surmise, guess or speculation.**" *Farnese v. SEPTA,* 338 Pa. Super. 130, 135, 487 A.2d 887, 890 (Pa. Super. 1985) (Emphasis added); *Reilly v. Tiergarten,* 430 Pa. Super. 10, 633 A.2d 208 (Pa. Super. 1993). Beyond the fact that she fell in a puddle and that somewhere within the puddle existed a protruding drainpipe, plaintiff has not presented any evidence as to what actually caused her fall. There is no evidence that she "stepped into the drain hole". Indeed it is not even possible to determine where the drainpipe was in relation to her fall. In such circumstances a jury could not determine that "but for" the drainpipe Ms. Sadler would not have been injured. Any conclusion in that regard would be the result of speculation and not legally sufficient.

Moreover, it would also be impossible for a jury to determine if Aldi breached a duty to Ms. Sadler without any evidence regarding what caused her to fall. Although the Complaint alleges defendant failed to warn or correct a known dangerous defect and/or maintain its parking lot/drain hole in a safe condition, there was no evidence in the summary record to support these allegations. There is no evidence that Aldi was aware of the puddle's existence, that the drainpipe's condition was defective or dangerous, or the length of time that the puddle had been there prior to Ms. Sadler's fall. *See,* Deposition of Lisa Fulkrod, April 10, 2000, p. 38. No evidence of prior problems, or notice of such problems was included in the summary judgment record. Therefore, plaintiff failed to establish both the elements of causation and breach of duty necessary to support her cause of action in negligence, and Aldi was entitled to summary judgment.

For all the reasons set forth above, the Court entered its Order of October 27, 2000, granting the defendant's motion for summary judgment.

**By the Court,**
/s/ **John A. Bozza, Judge**

# COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF TRANSPORTATION v. LORRAINE E. LITTLEFIELD

*LICENSING OF INSPECTION STATIONS*

By consciously disregarding an employee's poor performance, an operator of an official inspection station will be held to have behaved recklessly by failing to take steps to assure consistent compliance with DOT regulations. Improper record keeping is therefore implicated and a two month suspension of a Certificate of Appointment as an Official Safety Inspection Station was proper pursuant to 67 Pa. Code §175.51. (Licensing of Inspection Stations).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 12504 -2000

Appearances: Chester J. Karas, Esquire for the Department of Trans.
Evan C. Rudert, Esquire for Lorraine Littlefield

## OPINION

Bozza, John A., J.

On June 21, 2000, the Commonwealth of Pennsylvania, Department of Transportation (DOT) mailed to Mr. Lorraine E. Littlefield a Court Order of Suspension of Official Inspection Station. The Order provided that Mr. Littlefield's Certificate of Appointment as an official safety inspection station was being suspended for two months for improper record keeping, noting that thirty-eight (38) inspections had not been recorded on MV-431 forms. In addition, the Order stated that " . . . the Department is including in this offense, the lesser included offense of careless record keeping." The defendant took a timely appeal, and a de novo hearing was conducted by the Court on January 23, 2001.

At the time of the hearing testimony was presented which yielded the following facts:

On March 13, 2000, Frederick Mercer, quality assurance officer employed by Protect Air, in direct contract with DOT, conducted an inspection of Mike's Motor Service, operated by Lorraine Littlefield. At that time Mr. Mercer discovered that there were thirty-eight (38) inspections that were not posted on MV-431 forms. The parties agreed that Department regulations required that inspections be recorded on such forms.

Mr. Littlefield is the holder of the certificate of appointment as an official safety inspector and therefore was obligated to record the inspection information on the appropriate DOT form. This was a responsibility that he had delegated to an employee, his daughter-in-law, who he acknowledges had failed to complete the forms for a sixteen (16) day period between February 24 and March 11, 2000. Mr. Littlefield was not

aware that his employee had failed to complete the forms until he was contacted by Mr. Mercer. During the period in question Mr. Littlefield had not personally looked at the books because he was "just too busy doing other stuff." While he had not looked at the books recently, he had done so periodically in the past. During a previous audit in April of 1999, Mr. Mercer had discovered that there were ten (10) inspections that had not been posted properly. The record is silent as to whether DOT formally responded to that violation.

It is Mr. Littlefield's position that the failure to record the inspections during that sixteen day period should be characterized as "careless" versus "improper" record keeping. The sanctions provided by regulation treat "careless" record keeping as a lesser offense meriting a lesser sanction than "improper" record keeping. 67 Pa. Code § 175.51. For a first offense careless record keeping, a warning is provided, while for a first offense for improper record keeping, a two month suspension is called for. Although the terms are not defined in the Code, the Commonwealth Court has made reference to their definitions as set forth in *Webster's Third International Dictionary. Commonwealth v. Cappo,* 106 Pa. Commw. 481,486, 527 A.2d 190, 193 (1987). Neither fraud or deceit are elements of either type of violation, as the Code provides for a separate category of violation identified as "fraudulent record keeping." *Id.* Careless record keeping applies in circumstances where the record keeping activity was "not taking ordinary or proper care," *i.e.,* neglectful, inattentive. *Id.* Improper record keeping arises in circumstances where actions of an inspection station were "not accordant with fact, truth or right procedure" which include unintentional but negligent conduct. *Id.* On the other hand, where an inspection station behaved recklessly or intentionally, "improper" record keeping would be implicated.

Turning to the facts in this case, the conduct of the employee of Mr. Littlefield was to fail to record inspections at all. It was not a matter of failing to exercise ordinary proper care, it simply was not done. Such conduct is imputed to and is the responsibility of Mr. Littlefield. *Strickland v. Commonwealth, Dept. of Trans.,* 132 Pa. Commw. 605, 574 A.2d 110, (1990). However, the direct conduct of Mr. Littlefield must also be considered in evaluating the degree of violation. In that regard, the record reveals that the defendant had no established approach for determining whether his employee was carrying out her responsibilities properly. He had not checked her work "for awhile" prior to the most recent violations. This was in spite of the fact that in the preceding year DOT had brought to his attention the fact that his employee had failed to record ten inspections from the previous year. Mr. Littlefield consciously disregarded his employee's poor performance and he behaved recklessly by failing to take steps to assure consistent compliance with DOT regulations. In these circumstances, the Department properly characterized his violations as

"improper" record keeping.

The defendant has also argued that the Department should have offered him the option of accepting an "assignment of points" in lieu of a suspension. This is an alternative provided for in the Department regulations. 67 Pa. Code § 175.51(b). However, in order to qualify for an assignment of points, the station owner must prove he provided proper supervision to the employee who committed the violation, such that supervision could not have prevented the violation. This is a burden Mr. Littlefield has not met in this case. Indeed, the record as noted above begs an alternative conclusion.

For the reasons stated above, the appeal of the defendant is DISMISSED.

Signed this 28th day of February, 2001.

**By the Court,**
/s/ **John A. Bozza, Judge**

# IN THE MATTER OF A.C., R.C. and A.C. MINORS ADJUDICATED, DEPENDENTS

*JUVENILE/DEPENDENCY/PERMANENCY HEARING/ CHANGE OF GOAL*

In order for the Office of Children and Youth Services to change its goal for dependent children, there must be a showing by clear and convincing evidence that such a change is warranted.

*JUVENILE/DEPENDENCY/PERMANENCY/ HEARING/CHANGE OF GOAL*

In determining the appropriate goal for a dependent child in a change of goal context, the best interests of the child is the appropriate standard. To argue that adoption is the preferred goal to placement with extended family members, when the latter is in the child's best interests, is to misperceive the ultimate goal of the Juvenile Act.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA JUVENILE DIVISION NO. 200, 201 and 202 OF 1998

Appearances: Catherine A. Allgeier, Esquire for the Office of Children and Youth
Christine Jewell, Esquire for A.C., R.C. and A.C.
Mary Payton Jarvie, Esquire for R.C.

## OPINION AND ORDER

## I. PROCEDURAL HISTORY

This matter comes before this court upon the Erie County Office of Children and Youth's ("OCY") request for a change of goal to that of adoption. For the reasons set forth below, this Court has determined that the Agency has met its burden of proof. OCY may change the children's goal to adoption, and may file a petition to Involuntarily Terminate the parental rights of R.C. and C.C.

## II. FINDINGS OF FACT

The C. children, A.C. (DOB 2/9/87), A.C. (DOB 12/13/90), and R.C. (DOB 6/12/92) were adjudicated dependent on January 28, 1999, after investigation by OCY. At that time, the natural mother, R.C., stipulated to the fact that all the children had recurring head lice problems resulting in truancy. A finding of Aggravated Circumstances as to the father (C.C.) was made based upon his 1997 conviction for Indecent Assault and Corruption of Minors. For that offense he was sentenced to six to twenty-one months incarceration and five years probation.

Permanency hearings were conducted on May 28, 1999, November 3, 1999, May 2, 2000 and November 17, 2000.

The facts of record indicate that the mother is mildly mentally retarded and was experiencing personal difficulties which interfered with her ability to properly parent the children. In spite of serious question as to the mother's viability as a permanency resource, reunification was explored and services were provided to her. The father was not then, nor is he now, a viable resource given his sexual offender status.

By November 1999, given the mother's unstable situation and the declining prospect of her ability to raise these children, OCY began to focus upon other family members as permanency resources. Throughout the period 1999 to May 2000, all parties, as well as the Court, were continuing to proceed on the assumption that a guardianship or some other custodial arrangement would be consummated with relatives.

However, during the period May 2, 2000 to November 17, 2000, those family members indicated that financial considerations precluded adoption. Due to this and other evidence that was admitted at the last permanency hearing, OCY requested that the goal be changed to adoption and that it be allowed to pursue involuntary termination proceedings against the parents. Although the children's counsel agreed that return to the parents was not a viable option, she argued that OCY should continue to attempt to establish a guardianship or other similar arrangement with relatives. OCY disagrees and the party's respective legal positions will be set forth below.

## III. LEGAL DISCUSSION

### A. OCY's position

Primarily, OCY asserts that once a child has been in placement for 15 of the previous 22 months (or when aggravated circumstances are found)[1] and the goal of reunification is abandoned, 42 U.S.C. §671 *et seq.*[2] and the Pennsylvania Juvenile Act[3] require the juvenile court to change the goal to adoption and permit OCY to petition for the termination of parental rights. OCY argues that the court *may not* place the children with a guardian or permanent custodian unless the Agency documents a compelling reason.[4] In other words, OCY has the sole discretion to pursue custodianship over adoption.

OCY also argues that the Juvenile Act creates a hierarchy of permanency goals, resulting in a heavy presumption for adoption over other

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[1] Brief of OCY, page 4. See also, 42 Pa.C.S.A. §6351(f)(9).

[2] Adoption Assistance Act ("AAA") as amended by the Adoption and Safe Families Act of 1997 (hereafter "ASFA").

[3] 42 Pa.C.S.A. §6301 *et seq.*

[4] Brief of OCY, page 4, citing to 42 Pa.C.S.A. §6351 (g)(1)(ii), (iii).

alternatives.[5] Lastly, it questions the validity of "permanent legal custodianship" as used in the Juvenile Act, and argues that it violates the ASFA for lacking sufficient permanency and a self-sustaining nature.[6]

**B. Mother's position**

The natural mother maintains that while OCY *may* pursue a change of goal and termination of parental rights, pursuant to the Juvenile Act 42 Pa.C.S.A. §635l(f)(9)(i),[7] adoption and termination of parental rights are not mandated (unless the court so determines) when the dependent child is "being cared for by relatives best suited for the welfare of the child."[8]

**C. Children's position**

The Children argue that any action under §6351(f)(9) and (g) is permissive, for the same reasons proffered by their Mother.[9] They argue that the Juvenile Act empowers the court to award their physical and legal custody to a permanent custodian (such as a relative) without violating the state law or ASFA.[10] The Children contend that the Pennsylvania General Assembly specifically crafted the Juvenile Act Amendments to allow for this alternative to adoption.[11]

**D. Adoption Assistance Act**

The Adoption Assistance Act ("AAA"), 42 U.S.C. §670 *et seq.,* as amended by the Adoption and Safe Family Act of 1997, provides a list of standards and goals that states must incorporate into their foster care and adoption laws in order to qualify for federal funding.[12] Once a state has complied with the Act's requirements, it must forward proof to the Secretary of the U.S. Department of Health and Human Services for certification.

The AAA is a funding measure, enacted pursuant to Congress' spending power, and is generally not meant to create any substantive federal rights. The Act includes only one explicit grant of a remedy to an aggrieved

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[5] Brief of OCY, pages 4-5.

[6] *Id.*, pages 5-6.

[7] Brief of Natural Mother, page 3, citing 42 U.S.C. §675(5)(E).

[8] *Id.*, pages 3-4, referencing 1 Pa.C.S.A. §1903(a).

[9] Brief of the Children, pages 4 and 6, citing to 42 U.S.C. §675(E)(5). The children also argue that the statute does not create a hierarchy of adoption over alternatives.

[10] *Id.*, pages 4-6, 8, 14, citing to 42 Pa.C.S.A. §6301(b)(1), §6351(a)(2.1), (f)(9), (g), (h), and §6357. See also, 1 Pa.C.S.A §1903(a) and §1932.

[11] Brief of the Children, page 8.

[12] Congress states that this funding shall be used by the states for foster care, transitional independent living programs and adoption assistance for children with special needs. 42 U.S.C. §670.

individual, under the circumstances found in §671 (a)(18).[13] Federal courts have resisted granting relief to any individual based upon a participating state's failure to conform to the AAA.[14] A funded state's non-compliance with the Act may only be redressed by a suspension or denial of funding by the U.S. Dept. of Health and Human Services. Therefore, OCY may not, in the context of this case, treat the federal provisions as substantive law, except to the extent that they have been adopted by the Commonwealth's General Assembly. As such, this Court will decide this case based solely upon the relevant portions of the Pennsylvania Juvenile Act.[15]

**E. Evidentiary standard**

This court finds that the standard to be applied at permanency hearings for a change of goal petition is that of *clear and convincing* evidence. A change of goal is not merely procedural, but is a significant step in the state's deprivation of an individual' s fundamental rights. *In re M.B.,* 565 A.2d 804, 808 (Pa. Super. 1989). The parents' right to guide his or her child has always been recognized. In *In re Rhine,* 456 A.2d 608 (Pa. Super. 1983) the Superior Court stated that in a petition to end visitation, the Agency needed to prove its case by clear and convincing evidence. Relying in part on the U.S. Supreme Court's decision in *Santosky v. Kramer,* 455 U.S. 745, 754 (U.S. S.Ct. 1982), the Court wrote:

> [w]e hold that because the present state action threatens either a prolonged, indefinite or a permanent loss of a substantial private interest, the state must prove that its action was predicated upon clear and convincing evidence.[16]

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[13] Congress amended the 42 U.S.C. 671 in 1996 to create a cause of action for anyone (potential foster parent or would-be adoptive child) who suffers an adverse, discriminatory placement decision based upon their race, color or national origin. This is less a creation of a right within the provisions of the AAA, than an extension of federal civil rights laws in the context of the implementation of federal funding measures.

[14] In *Charlie H. v. Whitman,* 83 F.Supp.2d 476 (D.N.J. 2000), the Court examined the Act, and concluded that under the analysis required by *Blessing v. Freestone,* 520 U.S. 329, 340 (1997) and *Suter v. Artist M.,* 503 U.S. 347 (1992), the AAA and ASFA did not create a right (enforceable under 42 U.S.C. § 1983) to enforcement of the foster child's case plan, a least-restrictive placement or even adoption over foster care. *See also, Daniel H. v. City of New York,* 115 F.Supp.2d 423,427-428 (S.D.N.Y. 2000).

[15] To the extent the provisions of the federal statute may have intended to confer an individual benefit, it is expressed in language too imprecise to be judicially enforceable. *Daniel H.,* supra at 427.

[16] *In re Rhine,* 608, 612.

**F. Analysis under the Pennsylvania Juvenile Act**

After a review of the facts of this case, this court concludes that clear and convincing evidence exists to allow for OCY to change its goal for the C. children to adoption. It is undisputed that OCY pursued the possibility of relatives as adoptive resources. The relatives have since stated that they are financially unable to adopt the children. As such, they cannot be considered as a permanent placement option for the children. Therefore, the only permanent resources available (subject to the disposition of any involuntary termination trials) are those potential adoptive homes identified by OCY.

Although this is case dispositive, given the importance of the issue for future cases in this county, this court will address OCY's position that the Juvenile Act precludes this court from considering a legal custodianship (or kinship placement) that the Agency has not specifically requested.[17]

The Juvenile Act provides that, upon a finding of dependency, the court has the *discretion* to make an order, best suited to the needs of the child, which includes the following:

> 1. Transfer *temporary* custody to a relative or other qualified individual. [18]
> 2. Transfer custody to a public agency or an authorized private agency.
> 3. <u>Allow the dependent(s) to remain in the care of a parent, guardian or other custodian</u>.[19]
> 4. Subject to court limitations, transfer permanent legal custody to a qualified individual who resides out of state. [20]

Furthermore, the court must hold permanency hearings for each dependent child in state custody, and determine:

> 1. The continuing necessity and appropriateness for the placement;
> 2. The current status of and compliance with the permanency plan;
> 3. The status of any attempts to alleviate the causes of the finding of dependency;

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[17] OCY equates documentation of compelling reasons with a request for an adoption alternative (custodianship).

[18] 42 Pa.C.S.A §6351(a)(2), emphasis added.

[19] *Id.*, §6351(a)(1), emphasis added.

[20] *Id.*, §6351(a)(2.1).

4. The status of the child's current placement and safety;
5. The status of the projected goal date for the permanency plan; and
6. If placed outside the Commonwealth, whether such placement continues to be in the child's best interest.[21]

Once these determinations have been made, the court **must** make additional findings for any child who has been in placement for 15 of the past 22 months or when aggravated circumstances exist and reunification efforts have been made or are futile. In those instances, the court shall determine whether the county agency has filed or sought to join a petition to terminate parents and located adoptive resources.[22]

However, the Juvenile Act does not compel a court to proceed to a termination of parental rights trial (and adoption) when the child is "being cared for by a relative best suited to the welfare of the child," the county agency documents a compelling reason not to terminate parental rights, **or** when the family has not been provided with necessary services for reunification within a reasonable time.[23]

After the court considers §6351 (f)(1)-(8), it must fashion an order pursuant to 42 Pa.C.S.A. §635l(g). In its discretion and based upon all relevant evidence,[24] the court must ultimately determine whether the child should be returned to his or her pre-adjudication home, placed for adoption and a petition for termination of parental rights filed, or placed with a "legal custodian" or in another living arrangement meant to be permanent in nature.

OCY has argued that §635l(g) creates an *explicit* hierarchy of permanency goals, in which adoption is the presumptive choice over legal custodianship.[25] However, this court concludes that the best interests of the child is the appropriate standard in the change of goal context.[26] *In re M.B*., 674 A.2d 702 (Pa. Super. 1996); *In the Matter of A.H.,* No. 986 and 987

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[21] 42 Pa.C.S.A §6351(f)(1)-(8).

[22] *Id.*, §6351(f)(9). This provision is clearly meant to insure that OCY is diligently pursuing a permanency plan.

[23] *Id.*, §6351(f)(9)(i)-(iii). See also, 1 Pa.C.S.A §1903 ("Words and phrases shall be constured according to rules of grammar and according to their common and approved usage ***.")

[24] *See also, Adoption of CJ-MW,* 19 Fiduc. Rep.2d 427, 431 (Pike Cnty. 1999).

[25] Brief of OCY, pages 4-5.

[26] 42 Pa. C.S.A. §6351(a), (f) and (g). *See also,* 1 Pa.C.S.A. §1921(a). ("The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions.")

WDA 2000, slip. op. at 7 (Pa. Super., Nov. 29, 2000).[27] Moreover, §6301(b) of the Juvenile Act emphasizes the preservation of the family, "whenever possible or to provide another alternative family when the unity of the family cannot be maintained." Although the definition of the word "family" has evolved considerably during the history of our nation, placement with a biological family is, from a societal standpoint, the preferred goal as long as it can be effectuated in a manner:

> To provide for the care, protection, safety and wholesome mental and physical development of children * * *.[28]

Therefore, to argue that adoption is the preferred goal to placement with extended family members, when the latter is in the child's best interests is to misperceive the ultimate goal of the Juvenile Act.

OCY's position constitutes an overemphasis and narrow reading of the provisions of 6351 (g)(1)(iii), rather than an interpretation of the entire statute, including 6351 (f).[29] Contrary to OCY's stance, this court concludes that if a dependent child has been in placement for 15 of 22 months or subjected to aggravated circumstances, but is cared for by relatives best suited to the child's needs, then a change of goal to adoption is not required under §635l (f)(9)(i). Of course, this must be the alternative that serves the best interests of the child on a permanent basis. Harmonizing §6351(f) and (g) (which includes the best interest analysis) clearly supports this interpretation of the Pennsylvania Juvenile Act.[30]

## IV. CONCLUSION

Based upon the above, the Court will issue the appropriate order.

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[27] *See also,* In the Matter of Luis R., 635 A.2d 170, 172 (Pa. Super. 1993).

[28] 42 Pa. C.S.A. 6301(b)(1.1). *See also,* 1 Pa. C.S.A. §1921(a) and §1922(1), (2). ("That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable. That the General Assembly intends the entire statute to be effective and certain.)

[29] 1 Pa. C.S.A. § 1931 ("Statutes or parts of statutes are *in pari material* when they relate to the same persons or things or to the same class of persons or things. Statutes *in pari material* shall be construed together, if possible, as one statute.") emphasis added.

[30] 42 Pa. C.S.A. §6351(a), (f) and (g) as well as 1 Pa. C.S.A. §§1903, 1921, 1922 and 1932. After review of the Pennsylvania Juvenile Act, AAA and state case law, this court concludes that it may, if in the best interests of the child, order long-term placement in any authorized permanency setting, including foster care. While the stated goal of the ASFA amendments is reduction in the use of foster care as a permanent plan, neither it nor the Juvenile Act have eliminated any permanency option, as long as it is in the child's best interests. Ultimately, the appropriate permanency option must be determined on a case-by-case basis.

## ORDER

AND NOW, this 10th day of January 2001, for the reasons stated in the accompanying opinion, it is hereby DECREED that the Erie County Office of Children & Youth may change its goal for A.C., R.C. and A.C. to that of adoption, and may file a petition to involuntarily terminate parental rights. Finally, the children shall remain in the custody of the Agency until further order of court.

**BY THE COURT:**
/s/ **Ernest J. DiSantis, Jr., Judge**

**IN RE: CONSOLIDATED TAX ASSESSMENT APPEAL OF UNITS OF THE MILLCREEK TOWNSHIP MUNICIPAL BUILDING ASSIGNED ERIE COUNTY TAX NOS. (33) 54-226-4.97, 4.98 and 4.99**

**TOWNSHIP OF MILLCREEK, MILLCREEK MILLCREEK TOWNSHIP WATER AND SEWER AUTHORITIES, JUDY ZELINA HAMILTON LACKOVIC and BERKHEIMER ASSOCIATES**

**v.**

**ERIE COUNTY BOARD OF ASSESSMENT APPEALS**

*REAL ESTATE TAXATION/EXEMPTION*

The test of an allowance of an exemption from property assessment under the General County Assessment Law is whether the parties seeking the exemption would be able to demonstrate that the primary and principal use to which the property is put is public. 72 P.S. §5020-204.

*REAL ESTATE TAXATION/EXEMPTION*

The fact that property is leased to another governmental entity or even to a private party who derives profit from it will not defeat its public use character under the General County Assessment Law. It is not the character of the occupant, rather the purpose of its undertaking, which ultimately determine the taxable status of the property. 72 P.S. §5020-204.

*REAL ESTATE TAXATION/EXEMPTION*

If a property is used exclusively for commercial and non-public purposes, it cannot be exempt under the General County Assessment Law. 72 P.S. §5020-204.

*REAL ESTATE TAXATION/EXEMPTION*

The courts have treated public uses differently from uses for public charities. A use for a charitable purpose would not allow an exemption under the General County Assessment Law whereas a use for a public purpose is considered to be exempt. 72 P.S. §5020-204.

*REAL ESTATE TAXATION/EXEMPTION*

The leasing of a township municipal building to the water and sewer authority, the township tax collector, and to a private entity subcontracted to collect taxes are public uses entitling the property to be exempt from property taxes under the General County Assessment Law. 72 P.S. §5020-204.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 11841 - 2000

Appearances: Evan Adair, Esquire
Lee Acquista, Esquire
Kenneth D. Chestek, Esquire

## OPINION

Bozza, John A., J.

The Township of Millcreek (Millcreek), the Millcreek Township Water and Sewer Authorities (Authorities), Judy Zelina Hamilton Lackovic (Tax Collector), and Berkheimer Associates (Berkheimer), appealed from a decision of the Erie County Board of Assessment Appeals finding that three portions of the Millcreek Municipal Building located at 3608 West 26th Street, were no longer exempt from local taxation. The appeal proceeded to trial on the basis of a "joint stipulation" of facts with additional testimony, largely uncontested, introduced by Millcreek. The fundamental issue presented by the parties is whether certain portions of the Millcreek Township Municipal Building, which are subject to leases, should continue to enjoy tax-exempt status. For the reasons set forth below, this Court finds that they should.

The facts indicate that in 1998 Millcreek leased space in its municipal building to each of the other three appellants. It is not disputed that the municipal building is public property, nor is there any disagreement that Millcreek receives revenue from its lessees. The Sewer Authority and the Water Authority are both governmental entities organized pursuant to the Municipal Authorities Act of 1945, as amended. The Sewer Authority owns the township's public sanitary sewer system, which it in turn leases to the township who has the obligation to operate and maintain it. The Water Authority owns and operates a public water system within Millcreek Township.

Ms. Lackovic is the duly elected tax collector of Millcreek Township. As such, she is responsible for the administration and collection of real estate taxes and certain other assessments for Millcreek Township, the Millcreek School District, and Erie County. As Tax Collector, she also maintains certain records of properties within the township. Berkheimer is a business corporation with whom Millcreek contracts for the purpose of collecting the local earned income tax, the occupational privilege tax, and the amusement tax. Berkheimer performs similar services for other Erie County municipalities.

Ms. Lackovic's lease with Millcreek restricts the use of the premises to that of a tax collection office. The leases of Berkheimer and the Authorities limit the use of the premises to that of an "office." None of the leases may be assigned without the consent of Millcreek.

Ms. Lackovic's space in the Millcreek Municipal Building is used exclusively for carrying out the responsibilities of her office. Citizens of the township come there to pay their taxes and to ask questions about tax bills. Employees carry out the administrative and clerical functions necessary for processing tax payments and responding to taxpayer inquiries. Berkheimer is required to maintain an office in the municipal building pursuant to its agreement with the township. Like the Tax Collector,

it uses its space exclusively for the purpose of carrying out its tax collecting responsibilities. Citizens come to the office to pay taxes and make inquiries. Employees perform administrative and clerical functions associated with the collection of the earned income tax, the occupational tax and the amusement tax.

The Authorities utilize their space in the municipal building solely for the purpose of carrying out their legal purposes as set forth in their respective articles of incorporation. Their employees deal with members of the public and process paperwork associated with the obtaining of permits and the enforcement of the respective rules of the Water and Sewer Authorities. The purpose for each entity's presence in the municipal building is to facilitate access to the public.

In this appeal, the Board initially argues that the space in question is not exempt from local taxation because it is not used for public purposes. It argues that the offices are not "freely open to the public" and if each entity leased space on non-public property, that space would remain taxable. The Board also asserts that the property is not exempt because Millcreek derives revenue from it, does not occupy it, and those that do do not possess legal or equitable title to it. The resolution of the Board's position requires interpretation of certain provisions of the General County Assessment Law, specifically, certain provisions found in 72 P.S. § 5020-204, and as set forth as follows:

> (a) The following property shall be exempt from all county, city, borough, town, township, road, poor and school tax, to-wit:
>
> > (7) All other public property used for public purposes, with the ground thereto annexed and necessary for the occupancy and enjoyment of the same . . .
>
> (b) Except as otherwise provided in clauses (11) and (13) of this section, all property real or personal, other than that which is actually and regularly used and occupied for the purposes specified in this section, and all such property from which any income or revenue is derived, other than from recipients of the bounty of the institution or charity, shall be subject to taxation, except where exempted by law for State purposes, and nothing herein contained shall exempt same therefrom.
>
> (c) Except as otherwise provided in clause (10) of this section, all property, real and personal, actually and regularly used and occupied for the purposes specified in this section, shall be subject to taxation, unless the person or persons, associations or corporations, so using and occupying the same, shall be seized of the legal or equitable title in the realty and possessor of the personal property absolutely.

Although the General County Assessment Law (GCAL) has been amended a number of times since its adoption in 1933, the sections set forth above, that is subsections (b) and (c), remain essentially unchanged.

With regard to the issue of the public use of public property, there is a long history of appellate and trial court interpretation of the GCAL, specifically Section 5020-204, and while certain fundamental legal principles with regard to the issue of public use of public property have been developed, this Court can find no rule that requires a public building to be open to the public in a certain manner or to a specified degree in order for its use to be considered a public use. The test is far more general, requiring that the parties seeking the exemption be able to demonstrate that "the primary and principal use to which the property is put is public." *Moon Township Appeal,* 425 Pa. 578, 581, 229 A.2d 890, 891 (1967); *Dauphin County General Authority v. Dauphin County Board of Assessment Appeals,* 2000 Pa. Commw. LEXIS 763 (Pa. Commw. 2000). If property is used exclusively for commercial and non-public purposes, it cannot be exempt. *Appeal of H. K. Porter Co.,* 421 Pa. 438, 219 A.2d 653 (1966); *Reading Municipal Airport Authority v. Schuylkill Valley School District,* 4 Pa. Commw. 300, 286 A.2d 5 (1972). The fact that property is leased to another governmental entity, or even to a private party who derives profit from it, will not defeat its public use character. *Pittsburgh Public Parking Authority v. Bd. of Property Assessment,* 377 Pa. 274, 105 A.2d 165 (1954); *Wesleyville Borough v. Erie County Bd. of Assessment Appeals,* 676 A.2d 298 (Pa. Commw. 1996).

Appellate courts have found a number of circumstances where the use of public property was for private rather than public use. *West View Borough Municipal Authority Appeal,* 381 Pa. 416, 113 A.2d 307 (1995), (lease of portions of public building to a food market, bank and auto store not for public purpose nor was a portion of public building rented out for private parties and meetings.); *Pittsburgh Public Parking Authority v. Bd. of Property Assessment, supra.,* (operation of a restaurant, tailor shop, photo shop, in a portion of a public parking garage, found not to be public uses). Most recently, however, our Commonwealth Court found that utilization of space in a public building by a district justice for offices, waiting area, and courtroom constituted a public use. *Wesleyville Borough v. Erie County Bd. of Assessment Appeals, supra.*

In this case, there is no commercial or private purpose furthered by the leasing of space in the municipal building. The three entities in question all perform responsibilities which require interaction with the general public. Each office is used to further a governmental purpose by providing convenient and cost-effective service. The Tax Collector and the Authorities are in effect units of government charged with a public mission. The Authorities are by statute exempt from tax liability. *Dauphin County*

*General Authority v. Dauphin County Bd. of Assessment Appeals, supra.* Berkheimer, although a for profit corporation, is an agent of Millcreek Township. Its status as a business entity is not *per se* a barrier to a continued tax exemption for the space it occupies. *Pittsburgh Public Parking Authority v. Bd. of Property Assessment, supra.* at 282, 105 A.2d at 169. If Millcreek were to occupy the space that it leases to Berkheimer and used it to facilitate the collection of taxes, its tax-exempt status would not be jeopardized. It is not the character of the occupant, but rather the purpose of its undertaking, which ultimately determines the taxable status of the property. It is apparent that each of the lessees uses its space primarily for a public purpose and that the Board's position is without merit.

The Board has also asserted that the property in question is not exempt because Millcreek derives revenue from it and because the lessees occupying it do not possess legal or equitable title to it. In this regard, the Board points to the provisions of Section 5020-204(b) and (c) and relies in substantial part on the Commonwealth Court's decision in *In re: Appeal of Archdiocese of Philadelphia,* 151 Pa. Commw. 480, 617 A. 821 (1992). In that decision, the Court concluded that the Archdiocese of Philadelphia was not entitled to an exemption for property leased to the Delaware County Pro-Life Coalition. The Court found that the diocese derived rental income from someone other than the recipients of its own bounty and did not occupy the space in question and, as a result, was not eligible for an exemption. Although the language of Subsections (b) and (c) does not distinguish between exemptions for public charities pursuant to Subsection (a)(9) and for "public property used for public purposes" pursuant to (a)(7), appellate decisions in this area point to such a conclusion. It is indeed apparent that appellate courts have treated charities differently. *In re: Tax Assessment of Real Estate of Greater Erie Economic Development Corp.,* 61 Pa. Commw. 144, 433 A.2d 568 (1981), (no exemption because charitable owner did not use or occupy any part of the structure); *Upper Dauphin Nat'l. Bank v. Dauphin County Bd. of Assessment Appeals,* 127 Pa. Commw. 257, 561 A.2d 378 (1989), (no exemption where real property was not used for the purposes of the charitable owner).

On the other hand, for more than fifty years the appellant courts have concluded that the subsections in question do not apply in the same way to exemptions for "public property used for public purposes." *See, Dornan v. Philadelphia Housing Authority, et al,* 331 Pa. 209, 200 A. 834, note 15 (1938), (referring to the applicability of the language of subsections (b) and (c) as previously set forth in the General County Assessment Law of 1933). The Commonwealth Court in 1996 unequivocally stated, "We reiterate that our Supreme Court has held that the leasing of property and the receipt of rent will not defeat an exemption from local real estate taxes

where public property is used for public purposes." *Wesleyville,* 676 A.2d at 303. In *Wesleyville,* the court having found that the use of the space for district justice services constituted a public purpose, further determined that the leasing of the properties to Erie County did not defeat their exemption from local real estate taxes. The Court reached this conclusion even though Wesleyville did not occupy the space, derived income from a source other than the recipient of its bounty, and the occupant, Erie County, did not have title to it.

A close review of appellate decisions reveals that in various circumstances, the courts have found that governmental entities were entitled to exemptions, even though they earned rental income from property or portions of property that they leased to others who did not hold legal or equitable title to it. *Moon Township Appeal, supra.* (leased portions of Greater Pittsburgh Airport for a hotel, restaurant, drug store, and newsstand); *Pittsburgh Public Parking Authority, supra.* (leased a space to operate a parking garage to a business corporation); *Dauphin County General Authority, supra.* (lease of municipal authority property to federal and Commonwealth agencies).

Millcreek Township's Municipal Building was constructed for the purpose of providing accessible and convenient space to carry out governmental functions and responsibilities. That purpose is directly furthered by the presence of the Tax Collector, the Authorities, and Berkheimer. The fact that each pays rent to the township does not change the character or use of the building and continuing it tax exempt status is consistent with the intent of the legislature as reflected in a long history of appellate review.

## VERDICT

AND NOW, this 26 day of March, 2001, the Court finds in favor of the appellants, Township of Millcreek, et al, and against the Erie County Board of Assessment Appeals.

**By the Court,**
/s/ **John A. Bozza, Judge**

# IN THE MATTER OF THE ADOPTION OF A. J. B.

*FAMILY LAW/ADOPTION/JUVENILE/*
*TERMINATION OF PARENTAL RIGHTS*

The Court may allow the natural mother to voluntarily relinquish her parental rights over the objection of the Erie County Office of Children and Youth ("Agency").

*FAMILY LAW/ADOPTION*

The Agency's power to consent pursuant to 23 PA. Cons. Stat. Ann. § 2502(b) is not absolute.

*FAMILY LAW/ADOPTION*

The Trial Court must determine on a case-by-case basis when the Agency's consent is required under the Adoption Statute.

*FAMILY LAW/ADOPTION*

The Agency's exercise of its consent authority must be in furtherance of compelling State interest and narrowly confined; and it may not be unreasonably withheld.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION
NO. 107 IN ADOPTION 2000

Appearances: Catherine Allgeier, Esquire
Jeffrey Misko, Esquire
Amy Jones, Esquire

## OPINION

**ISSUE**

The issue in this case is whether this Court may allow the natural mother to voluntarily relinquish her parental rights over the objection of the Erie County Office of Children and Youth ("Agency").

**I. FACTUAL FINDINGS**

The child who is the subject of this action is A. B. ("A."), (DOB 6-17-98). Her natural mother is K. B. ("mother" or "natural mother"), (DOB 5-4-82). Her father was the late D. M. The child was adjudicated dependent on November 9, 1999. At the time the Agency removed A. from her mother's custody, she had numerous visible injuries. Permanency hearings were conducted and the Court granted the Agency's request to proceed to termination of parental rights. At the time set for the involuntary termination trial, the mother appeared with counsel and indicated that she wanted to voluntarily relinquish her parental rights to the child. The Agency timely objected, indicating that a petition for voluntary relinquishment and its

consent were prerequisites pursuant to 23 Pa. Cons. Stat. Ann. § 2501.[1] The Agency further asserted that it would not consent and, therefore, the case must be resolved at an involuntary termination trial. The mother argued that she should be able to voluntarily relinquish her rights irrespective of the Agency's position. The Court granted her leave to file a voluntary relinquishment petition, which she filed on December 29, 2000. The Agency responded on January 19, 2001. The mother filed an amended petition on February 12, 2001, and argument was conducted on March 1, 2001. On that day, the Agency filed a Motion to Dismiss and asserted that it would not enter its §250l(b) consent.[2] Its reasons were:

> 1. the petition was neither signed nor verified by K.B. as required by Pa. Rules of Civil Procedure 1023, 1024 and Local Orphan's Court Rule;[3]
>
> 2. the petition did not include the child's birth certificate as required by Rule 15.2(b)(2);[4]
>
> 3. the petition did not include the joinder of the Erie County Office of Children & Youth as required by Rule 15.2(b)(4);
>
> 4. the petition did not contain a consent executed by the Erie County Office of Children & Youth to accept custody of the subject child;
>
> 5. the Agency has a right to an involuntary termination trial;

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[1] Prior to the Adoption and Safe Families Act (23 Pa. Cons. Stat. Ann. §2501, *et seq.)* and the amendments to the Pennsylvania Juvenile Act incorporating its provisions (42 Pa. Cons. Stat. Ann. §6301, *et seq.),* the Agency had in many instances consented to the voluntary relinquishment at the time of the termination trial. In those instances, a colloquy was conducted with the parent and, if it could be established that the relinquishment was knowing, voluntary and intelligent, a decree was entered and the case proceeded to the adoption.

[2] A critical consideration is the apparent attempt of the Agency to gain a tactical advantage in future proceedings not yet ripe for judicial determination. For instance, if the Agency is successful in an involuntary termination proceeding, it will have the ability to seek a finding of aggravated circumstances in any future case involving this parent [see, 42 Pa. Cons. Stat. Ann. § 6351(e) (2)].

[3] The verification was provided on February 27, 2001.

[4] The Court will take judicial notice of the child's birth certificate that is a part of the record in this case. Therefore, another copy need not be attached to the adoption petition.

6. the Agency, analogous to a plea bargain or accelerated rehabilitative disposition setting, may refuse to join in the voluntary relinquishment petition;

7. the Agency need not possess a reasonable basis for its refusal to consent to the voluntary relinquishment;

8. if it must state such a reason, it asserts that the reasons are as follows:

(a) the child was physically abused (albeit, not by the mother) and medical treatment for the child had to compelled [sic] through the Agency;

(b) the mother may be pregnant;

(c) A. is the second child removed from the mother's custody,

(d) the mother failed to comply with court-ordered treatment plans during the dependency portion of this case;

(e) a finding of involuntary termination would affect the Agency's obligation to provide services in future dependency cases involving the mother; and

(f) the court should conduct the involuntary termination trial, and at that time decide if the Agency's position is unreasonable.

## II. LEGAL DISCUSSION

### A. Statutory Analysis

Pennsylvania's Adoption Act generally contemplates the termination of a parent's rights to his/her children either through voluntary relinquishment or involuntary termination. The procedure for voluntary relinquishment is found at 23 Pa. Cons. Stat. Ann. §§ 2501 and 2502. Section 2501 provides:

> **(a) Petition.** - When any child under the age of 18 years has been in the care of an agency for a minimum period of three days or, whether or not the agency has the physical care of the child, the agency has received a written notice of the present intent to transfer to it custody of the child, executed by the parent, the parent or parents of the child may petition the court for permission to relinquish forever all parental rights and duties with respect to their child.

> **(b) Consents.** - The written consent of a parent or guardian of a petitioner who has not reached 18 years of age shall not be required. The consent of the agency to accept custody of the child until such time as the child is adopted shall be required.

The comment section to the statute states:

> Subsection (b) is amended to eliminate the requirement of a written consent of a parent or guardian of a petitioner who has not reached the age of eighteen years. Furthermore, the agency having the care of the child is no longer required to join in the petition, but must still consent to accept custody of the child.

(emphasis added).

Adoption was unknown at common law and is a statutorily created mechanism. See, *In re Adoption of E.M.A.*, 409 A.2d 10, 11 (Pa. 1979), cert. denied 449 U.S. 802 (1980). Procedurally, adoptions are governed by the Act, as well as the Pennsylvania Orphans' Court Rules and Pennsylvania Rules of Civil Procedure. Pennsylvania courts have held that the Adoption Act must be strictly construed. See generally, *Gibbs v. Ernst*, 647 A.2d 882, 888 (Pa. 1994).

Furthermore, as the Pennsylvania Supreme Court has stated:

> Our Adoption Act requires, as a prerequisite to adoption, inter alia, either the unqualified consent of natural parents ... or the termination of parental rights ....

*In re: E.M.A*, supra.

This Court first will address the Agency's claim that it may withhold its consent for any reason and its decision is not subject to scrutiny. Although there is little case law available to guide this Court, in at least one instance the Pennsylvania Supreme Court has stated that:

> Accordingly, it seems clear that if the court determines that the agency's consent is being withheld unreasonably, the Court may dispense with the requirement of 2711 (a) (5) that the agency consent to the adoption.

*In re Adoption of Hess*, 608 A.2d 10, 14 (Pa. Super. 1992).

Therefore, Hess indicates that the court has the final burden of determining whose consents are necessary and what statutory requirements must be met. *Id*.[5]

Given the Agency's responsibility to insure the care for dependent children under both the Child Protective Services Law (23 Pa. Cons. Stat. Ann. §6301, *et seq.)* and the Juvenile Act (42 Pa. Cons. Stat. Ann.§ 6301,

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[5] See also Judge Beck's dissenting opinion in *Chester County CYS v. Cunningham*, 636 A.2d 1157, 1161 (Pa. Super. 1994.)

*et seq.),* its position in an adoption should be afforded great deference. However, to find its authority absolute would violate the mother's substantive due process rights.[6]

**B. Due Process Analysis**

Acts of the Pennsylvania General Assembly (in this case the Adoption Act) are presumed to be constitutional. *Commonwealth, Higher Ed. Assistance Agency v. Abington Memorial Hospital*, 356 A.2d 837 (Pa. Cmwlth. 1976). Furthermore, a statute is presumed not to intend a violation of an individual's due process rights. *Rosenblatt v. Pennsylvania Turnpike Commission*, 157 A.2d 182 (Pa. 1960). When interpreting a statute, a court must assume that the legislature intended to comply with federal and state constitutional requirements. *Pagni v. Commonwealth*, 116 A.2d 294 (Pa. Super. 1955).

The Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees that individuals shall not be deprived of "life, liberty, or property, without due process of law." U.S.C.A. Const. Amend. 14. The U.S. Supreme Court has interpreted this provision to mean that the states must afford individuals both procedural and substantive due process protections. *M.L.B. v. S.L.J.*, 519 U.S. 102, 116, 117 S.Ct. *555,* 136 L.Ed.2d 473 (1996). While procedural due process requires proper notice and hearings be afforded, *substantive* due process:

> [P]rovides that, irrespective of the constitutional sufficiency of the processes afforded, government may not deprive individuals of fundamental rights unless the action is necessary and animated by a compelling purpose.

*Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). Beyond the requirement of a compelling interest, a state's action must be *narrowly tailored* to achieve that end. *Id.*

Courts have long held that individuals have a fundamental right to raise their children and maintain a family. In *Gruenke v. Seip,* 225 F.3d 290 (3rd Cir. 2000), the U.S. Court of Appeals for the Third Circuit wrote:

> The right of parents to raise their children without undue state interference is well established. As the Supreme Court remarked in *M.L.B. v. S.L.J.,* 519 U.S. 102, 117 S.Ct. 555, 136 L.Ed.2d 473

[6] The Agency's analogy to A.R.D. and plea bargains in criminal cases does not support its position in this case. First, a district attorney's discretion in the A.R.D. context is not without limitation. See, *Commonwealth v. Lutz*, 495 A.2d 928, 934-935 (Pa. 1995). Second, the factual setting *sub judice* is more analogous to a waiver of the right to a trial. If it is analogous at all to a guilty plea, then the Agency's position is untenable because once a person elects to plead guilty to all charges sans a plea agreement, the Commonwealth's prosecutorial interests have been satisfied and it may not force a trial.

> (1996), "[c]hoices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as of basic importance to our society, rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *Id.*
>
> In *Santosky v. Kramer,* 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982), the Court pointed out that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents..." *Id.* at 753, 102 S.Ct. 1388. Indeed, it is "plain beyond the need for multiple citation' that a parent's desire for and right to the natural companionship, care custody, and management of his or her children is an interest far more precious than any property right." *Id.* at 758-59, 102 S.Ct. 1388 *(quoting Lassiter v. Department of Soc. Servs.,* 452 U.S. 18, 27, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981)).

*Gruenke*, 225 F.3d 290 at 303-304. The Court also noted that in *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), the U.S. Supreme Court reaffirmed the rationale of other notable due process cases, i.e., *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, and *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944). *Gruenke*, at 304.

Once it is clear that state action has burdened an individual's fundamental right, the law must meet the requirements of substantive due process. This issue was examined in the context of termination of parental rights in *Alsager v. District Court of Polk County, Iowa (Juvenile Division)*, 406 F.Supp. 10 (S.D. Iowa 1975), *aff'd per curiam,* 545 F.2d 1137 (8th Cir. 1976). There, two parents challenged the constitutionality of state court proceedings that terminated their parental rights to five of their six children. The U.S. District Court found the Iowa state law at issue to be vague and violative of the Fourteenth Amendment guarantee to substantive due process. *Id.,* at 23-24.

The *Alsager* Court began its analysis by examining whether the parents had standing to challenge the state court's decision and the Iowa state law. The Court found that the parents had suffered an injury, because the state had burdened their fundamental right to raise their children. *Id.* at 16. The parents argued that the Iowa Juvenile Court order terminating their parental rights was based upon a statute that did not require a compelling state interest or a narrowly tailored state action. *Id.* at 21. The Court wrote:

> The United States Supreme Court has provided the following constitutional framework for analyzing statutes which encroach upon protected rights: "Where certain 'fundamental rights' are

> involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interest at stake." (citations omitted). *Roe v. Wade,* 410 U.S. 113, 115, 98 S.Ct. 705, 728, 35 L.Ed.2d 147 (1973).

*Alsager*, at 21-22.

The Court then noted that the state has a legitimate state interest in protecting the health and welfare of its "citizens of tender age," citing to *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). The *Alsager* Court held that this interest is not absolute and must be balanced against the parents' interest in raising their children free from governmental interference. *Alsager*, at 22.

The Court then examined whether the state's need to protect the children through a **termination hearing** was compelling in nature. The Court held that this state interest was different from an initial child dependency (what the Court termed an "immediate removal") hearing. The Court wrote:

> [I]n determining the "compelling" nature of the state's child protection interests when a parental termination is undertaken, an understanding of the mechanics of Iowa law is essential. **Even in a case of clear child abuse, Iowa law has vitiated the need for prompt termination action through its child neglect statute * * *** That law sanctions the immediate, albeit temporary, removal of a child from the parents' home in cases of maltreatment. The Court's ruling today as to the adequacy of Iowa's termination standards is in no way intended to restrict the state's ability to take swift action when necessary to prevent imminent harm or suffering to a child. **Once a child has been removed from the risk of harm, however**, as well as in cases where the risks of harm are insufficient to justify temporary separation, **the state's child protection interests are less compelling. Accordingly, the Court deems that termination proceedings should be distinguished from immediate removal proceedings for purposes of substantive due process analysis.** The state's interest in protecting a child from future harm * * * is clearly less compelling * * * [than] where the state has already obtained temporary protective custody * * *.

*Alsager*, at 22. The Court held that the state agency must prove its case with evidence sufficient to meet the substantive due process test. It therefore reversed the termination of the Alsagers' parental rights. *Id.*[7]

[7] The Court also found the Iowa statute to be unconstitutionally vague and implied that the statute allowed the state juvenile agency too much discretion. The Court's due process analysis in this regard emphasized that "A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with attendant dangers of arbitrary and discriminating application." *Id.*, at 17 (citations omitted).

This Court recognizes that the *Alsager* case predates the Adoption and Safe Families Act and the recent amendments to the Juvenile Act that require prompt disposition of dependency cases. See 42 Pa. Cons. Stat. Ann. §6351(f)(9). *Alsager* is persuasive authority, however, for the proposition that the exercise of the state's police power must be narrowly tailored to effectuate the compelling state interest.

In the case *sub judice*, there is no question that the Agency's intervention on behalf of the A.B. is an appropriate exercise of the Commonwealth's police power in furtherance of a compelling interest. Under the Juvenile Act, this child is clearly dependent and the evidence convincingly established the necessity for a change of goal to adoption, from that of reunification. However, the Commonwealth's interest in pursuing termination of parental rights must be both compelling and narrowly tailored. Obviously, involuntary termination burdens the fundamental right to parent one's child. As such, the Commonwealth must demonstrate that it has a compelling interest in choosing involuntary termination over the voluntary relinquishment as the method to effectuate that interest.

With respect to A., the results of both voluntary relinquishment and involuntary termination are the same. Under either procedure the Commonwealth will ensure that the mother's parental rights will end and A. will be adopted. The Agency's reasons for refusing to consent to the voluntary relinquishment do not demonstrate a "narrowly tailored" means to achieve this purpose. In this case, when voluntary relinquishment will satisfy the Commonwealth's interest in protecting the child, the Agency cannot force an involuntary termination trial in order to gain an advantage in future proceedings not ripe for review.

**CONCLUSION**

The case at bar represents a confluence of three statutes: the Pennsylvania Adoption Act, Juvenile Act and Child Protective Services Law. Under Pennsylvania law, a court shall ascertain and seek to effectuate the legislative intent of an act of the General Assembly. When a court must interpret a statute, it shall do so to give effect to *all provisions* of the act. 1 Pa. Cons. Stat. Ann.§ 1921(a). In construing a statutory provision, the court should consider the aim of the act, the circumstances surrounding its enactment, any prior enactments and what consequences a particular construction shall yield. *Commonwealth v. Davis*, 618 A.2d 426 (Pa. Super. 1992). Furthermore, a statute must be read in a manner that will effectuate its purpose. *Commonwealth, Human Relations Commission v. Transit Cas. Ins. Co.*, 387 A.2d 58 (1978). A statute shall not be construed so as to defeat the object of the legislature if it can be reasonably avoided. *Commonwealth v. Jordan*, 7 A.2d 523 (Pa. Super. 1939). When statutes or parts of statutes are *in pari material,* they shall be construed together. 1 Pa. Cons. Stat. Ann. §1932.

Therefore, under the above rules of statutory construction and interpretation, this Court cannot accept the Agency's assertion that it may refuse to consent on any basis to a voluntary relinquishment of parental rights.

This conclusion corresponds to the Court's statements in *Hess, supra,* which even as *dictum,* express a notion that it is the court that should decide on a case-by-case basis whose consent to an adoption is required. It also comports with fundamental due process standards. On the other hand, this Court concludes that the Agency may, in some cases, withhold its consent. However, substantive due process requires that its refusal must be reasonable.

In this case the mother is willing to accept the fact that she is too young and immature to raise her child and will enter a voluntary relinquishment. This will serve the child's best interests just as well as an involuntary termination. Moreover, it will result in an adoption. However, neither this Court, nor the Agency, can presume that the Agency will prevail at an involuntary termination trial. If it does not, and if the mother later decides not to relinquish, the child's permanency goal will not be met. This would be contrary to the intent of the Adoption and Safe Families, Juvenile and Adoption Acts.

The goal of adoption for A., a goal which effectuates the intent of each statute, can be achieved through voluntary relinquishment, thus satisfying the interest of the Commonwealth and the best interests of the child. Except for its procedural objections, the Agency's stated reasons to withhold its consent boil down to an attempt to gain a tactical advantage in some future case. This is neither reasonable nor rational.[8] Therefore, the voluntary relinquishment may proceed with or without the Agency's consent.

Based upon the above, the Court finds that:

1. The Agency's power to consent pursuant to 23 Pa. Cons. Stat. Ann. § 2502 (b) is not absolute.
2. The trial court must determine on a case-by-case basis when the Agency's consent is required under the Adoption Statute.
3. The Agency's exercise of its consent authority must be in furtherance of a compelling state interest and narrowly confined.
4. In this case, there is no compelling state interest in pursuing an involuntary termination of parental rights over a voluntary relinquishment. Furthermore, allowing the Agency to unreasonably withhold its consent to the voluntary

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[8] In a future case the Agency may produce evidence of the mother's past history to support its position. Therefore, it is not prejudiced by a voluntary relinquishment here.

relinquishment is counter to the aim of the Adoption Act. Therefore, its consent shall not be required in this case.

Therefore, the Court will issue the appropriate order.[9]

## ORDER

**AND NOW**, this 16th day of March, 2001, for the reasons set forth in the accompanying opinion, it is hereby ordered that in light of the mother's Petition to Voluntarily Relinquish her parental rights, the Erie County Office of Children and Youth's request for an Involuntary Termination Trial and Motion to Dismiss are **DENIED**. The voluntary relinquishment hearing shall be scheduled on April 2, 2001, at 8:45 a.m., before this Court.

**BY THE COURT:**
/s/ **ERNEST J. DiSANTIS, JR., JUDGE**

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[9] Based upon the above analysis, this Court does not deem it necessary to individually address each of the Agency's reasons for withholding its consent to the voluntary relinquishment.

**NICHOLAS M. LOPEZ Plaintiff,**

**v.**

**PENN TRAFFIC COMPANY d/b/a QUALITY MARKETS, INC., Defendant**

*CIVIL PROCEDURE/MOTION FOR SUMMARY JUDGMENT*

To sustain a motion for summary judgment it must be shown that there are no disputed issues of material fact and that the moving party is entitled to judgment as a matter of law. The record must be looked at in the light most favorable to the non-moving party. If the non-moving party bears the burden of proof, it must produce evidence of facts essential to its cause of action to defeat the motion for summary judgment.

*NEGLIGENCE/CONDITION AND USE OF LAND, BUILDING AND STRUCTURES*

To establish a case of negligence the plaintiff must demonstrate a duty, failure of the defendant to conform to the duty, a causal connection between the breach and the injury, and damages as a result of the breach.

A customer at a supermarket is a business invitee owed a high duty of protection from foreseeable harm.

Where the plaintiff testifies that the puddle in which he fell was approximately four to five feet wide and that the puddle made a splash when he fell, there is sufficient evidence from which a reasonable person could infer that the amount of time for a puddle of such size to develop is sufficiently long that the defendant, in the exercise of reasonable care, should have known of the puddle, placing the defendant on constructive notice of the condition.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW No. 14135 - 1997

Appearances: Thomas P. Wall, II, Esquire for the Plaintiff
Marcia H. Haller, Esquire for the Defendant

**OPINION**

Anthony, J., March 26, 2001.

This matter comes before the Court on Defendant's PENN TRAFFIC COMPANY d/b/a QUALITY MARKETS, INC. (hereinafter "Quality Market") Motion for Summary Judgment. After a review of the record and the briefs of the parties and considering the arguments of counsel, the Court will deny the motion. The factual and procedural history is as follows.

Plaintiff entered Quality Market on January 7, 1996, around four o'clock in the afternoon to purchase a few items. There was snow on the ground that day, and Plaintiff was wearing rubber-soled shoes. Upon entering the store, Plaintiff selected a few items and then went to the deli counter.

Plaintiff ordered potato salad and baked beans from the deli. After receiving the items, Plaintiff began to walk towards the cash registers. A few steps away from the deli counter Plaintiff slipped in a puddle of water and fell in front of a deli case.

Plaintiff testified in his deposition that he had not seen the puddle before he slipped in it. He did not know from where the puddle had come, but he surmised that it was caused by a clogged drain in the deli case. Plaintiff estimated the puddle to be about four or five feet wide. There was enough water in the puddle that it made a splash when he fell.

Plaintiff initiated this suit by filing a Complaint on March 3, 1998. Quality Market filed its Answer on March 18, 1998. Quality Market filed a Motion for Summary Judgment and Brief in Support on November 28, 2000. Plaintiff filed a Brief in Opposition to Summary Judgment on December 20, 2000. The Court heard oral arguments in which all parties were represented on January 30, 2000.

In order for a party to be granted summary judgment it must be shown that there are no disputed issues of material fact and that the moving party is entitled to a judgment as a matter of law. *See Ertel v. Patriot News,* 544 Pa. 93,674 A.2d 1038 (1996). In addition, the record must be looked at in the light most favorable to the non-moving party. *See Id.* However, the non-moving party may not rest upon the pleadings. *See* Pa.R.C.P. 1035.3. The non-moving party, if it bears the burden of proof at trial, must produce evidence of the facts essential to its cause of action in order to defeat a motion for summary judgment. *See* Pa.R.C.P. 1035.2.

Defendant raises one issue in its Motion for Summary Judgment. Defendant contends that Quality Market is entitled to Summary Judgment as a matter of law because Plaintiff has failed to make out a prima facie case for negligence. To establish a case for negligence a plaintiff must demonstrate a duty recognized by the law, the failure of the defendant to conform to that duty, a causal connection between the breach of duty and the injury sustained, and damages as a result of the breach. Here, Defendant asserts that Plaintiff has not demonstrated a breach of Quality Market's duty.

Both parties agree that Plaintiff was a business invitee on the day of the accident. A business invitee is a person who is invited onto land for the purpose of conducting business with the possessor of that land. *See Emge v. Hagosky,* 712 A.2d 315 (Pa. Super. 1998). Plaintiff went to Quality Market to purchase a few food items. Thus, Plaintiff was a business invitee of Quality Market.

As a business invitee, Plaintiff was owed a high duty of protection from foreseeable harm. Pennsylvania courts have expressed the duty of a landowner to business invitees as follows:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition of land if, but only if, he

> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

*Myers v. Penn Traffic Co.,* 414 Pa. Super. 181, 606 A.2d 926 (1992) (quoting Restatement (Second) of Torts § 343(1965)). There is no evidence that Defendant knew of the puddle before the accident. The manager of the defendant store testified in his deposition that he had walked through the deli area approximately thirty minutes before the accident occurred. He had not seen a puddle on the floor at that time. The issue before the Court is whether evidence has been presented to establish that Defendant had constructive knowledge of the puddle.

Constructive knowledge may be imputed to the landowner where evidence tends to show "the condition existed for such a length of time that in the exercise of reasonable care the owner should have known of it." *Moultrey v. Great A & P Tea Co.,* 281 Pa. Super 525, 422 A.2d 593 (1980). Furthermore, a jury is permitted to make reasonable inferences as to the length of time a condition existed. *See Id.* In the present case it is unknown how long the puddle existed. At most the puddle had been there for thirty minutes. The manager stated that he had walked through the area where the accident occurred approximately thirty minutes prior to the accident and had not seen a puddle. While there is no direct evidence to show how long the puddle was present, the Court finds enough evidence was offered so that a reasonable person could infer the puddle had been there a sufficient time for Defendant to discover it. Specifically, the Court notes Plaintiff estimated the size of the puddle to be four to five feet, and there was a splash when Plaintiff fell. Viewing these facts in the light most favorable to the Plaintiff, a reasonable person could infer that it would have taken a significant amount of time for a puddle of such size to develop and that Defendant, in the exercise of reasonable care, should have known of the existence of the puddle.

The Court is cognizant of Defendant's argument that a land owner is not required to constantly mop water as soon as it appears. See *Harclerode v. G.C. Murphy Co.,* 207 Pa. Super. 400, 217 A.2d 778 (1966). However the Court finds *Harclerode* is factually distinguishable from the present situation. In *Harclerode,* it had snowed the night before the accident, and there was testimony that the floor was wet. There was no testimony, however, as to the size of the wet area or how much water was on the floor. In sustaining a grant of judgment n. o. v., the court stated "[w]ithout

evidence to describe the water and the condition it created, it cannot be said that this defendant . . . should have known of [the wet condition]. *Id.* In the present case Plaintiff has presented evidence of the size of the puddle and the amount of water in it. A store owner does not have a duty to mop up water as soon as it appears on the floor, but he does have a duty to take care of a water condition when, in the exercise of reasonable care, he should have known of it. Plaintiff has provided more evidence than the mere fact that the floor was wet. Plaintiff has described the puddle in such a way that the jury could infer Defendant should have known of the condition.

In conclusion, the size of the puddle and the amount of water in it indicate that it could have taken a substantial amount of time for such a puddle to form. A reasonable jury could infer from such evidence that the puddle existed long enough for Defendant to be on constructive notice of the condition. Therefore, Plaintiff has produced sufficient evidence of Defendant's breach of duty to defeat a motion for summary judgment.

## ORDER

AND NOW, to-wit this 27 day of March 2001, it is hereby ORDERED and DECREED that Defendant's PENN TRAFFIC COMPANY d/b/a QUALITY MARKETS, INC. Motion for Summary Judgment is DENIED.

**BY THE COURT:**
**/s/ Fred P. Anthony, J.**

# IN THE MATTER OF J. S.
# A MINOR CHILD ADJUDICATED DEFENDANT

*JUVENILE/DEPENDENCY/APPEALABILITY OF ORDER FOLLOWING PERMANENCY HEARING*

Where the Order issued following a permanency hearing does not involve a change of goal to termination of Appellant's rights and the cessation of services, such Order does not dispose of the entire case by putting all of the litigants out of Court. Therefore, such order is not appealable.

In the Court of Common Pleas of Erie County Pennsylvania
Juvenile Division No. 12 of 1998

Appearances: Anthony A. Logue, Esquire for the mother
Christine Jewell, Esquire for the child

## OPINION

This case presents the rather anomalous situation wherein a mother is complaining about the government attempting to return her child to her. For the reasons that follow, the mother's appeal is without merit.

## PROCEDURAL/FACTUAL HISTORY

The Erie County Office of Children and Youth (OCY), acting on a request from A. L., filed a petition seeking to adjudicate J. S., date of birth February 11, 1984, a dependent child under the Juvenile Act. A. L. is the natural mother of J. S. The child's biological father is deceased. The mother is now married to D. L.

The Dependency Petition averred the mother was unable to control J.'s behaviors. A host of mental health services were provided for the child in the mother's home, although the mother "only marginally cooperated with these services". See Dependency Petition. On January 14, 1998, the Millcreek police were summoned to the mother's home to help restrain the child. On January 16, 1998, the mother did not want the child to return home after school and thereafter voluntarily placed J. in foster care. Notably, the Dependency Petition avers "J. remains in placement where he has not had any outbursts".

A combined Detention and Adjudication Hearing was held in front of a Master on February 5, 1998. At the hearing, all parties stipulated to the facts set forth in the Dependency Petition and J. S. was formally adjudicated dependent on February 5, 1998.

From January 16, 1998 until December 11, 1998, J. S. resided in the P. Foster Home. Since December 18, 1998, J. S. has resided in the foster home of R. D. and B. D. J. has received services through the Mental Retardation Base Service Unit. Specifically, the child had a mobile therapist and a resource case manager. J. enjoyed a good working relationship with

his mobile therapist and overall was cooperative with all service providers.

A Permanency Hearing was held on February 26, 2001. The stated goal of placement remained "a legal custodian or in another living arrangement intended to be permanent in nature...". See Court Summary, February 26, 2001, pg. 3. Despite J. having been in placement for over thirty-seven months preceding the Permanency Hearing, there were compelling reasons for not filing for the termination of parental rights essentially based on the relationship/bond between the mother and child.

As a result of the hearing on February 26, 2001, the permanency goal remained the same, to-wit a legal custodian or other living arrangement permanent in nature. At the conclusion of the hearing, the record reflects the direction from the Court to begin a process for the eventual return of the child to the mother. However, no return of the child to the mother was ordered to take effect prior to the next Permanency Review Hearing.

On or about March 20, 2001, A. L. filed a Notice of Appeal from the Order of February 26, 2001. She thereafter filed a Statement of Matters Complained of on Appeal. This Opinion addresses the issues raised in said Statement.

Before reaching the substantive allegations of the Statement of Matters, there must be an initial determination of whether the Order of February 26, 2001 is subject to appellate review at this time.

**THE ORDER OF FEBRUARY 26, 2001 IS NOT AN APPEALABLE ORDER**

A party can appeal only from a Final Order unless provision is made by statute or rule for an appeal from an interlocutory Order. See Pa. RAP 341(a). A Final Order is one which disposes of the entire case thereby putting all of the litigants out of Court. Pa. RAP 341(b).

In the case *sub judice*, the Order of February 26, 2001 did not end the entire case or put any party, including Appellant, out of Court. To the contrary, the Order continued the status quo by keeping the child in placement and continuing the goal of the Family Service Plan as a legal custodian or other living arrangement permanent in nature. Accordingly, the February 26, 2001 Order is interlocutory and not appealable.

The Appellate Courts in Pennsylvania have recognized on occasion the appealability of an Order changing the goal of a Family Service plan from reunification to adoption. See *In Re M.B.*, et al, 388 Pa. Super. 381, 565 A.2d 804 (1989), allocatur denied 527 Pa. 602, 589 A.2d, 692 (1990). The present case is inapposite factually from *In Re M.B.*

Unlike the Order in *In Re M.B.*, which changed the goal from reunification to adoption thereby terminating any services to the parents as well as attempting to terminate parental rights, the case at bar does not involve a change of goal to termination of Appellant's parental rights and the cessation of services. Instead, the Order of February 26, 2001 continued the status quo by stating:

> "The appropriate and feasible placement goal for the child is placement in another living arrangement intended to be permanent in nature..."

Importantly, this was not a change of goal for this child. This is not a case where the goal has been changed wherein the government seeks to discontinue services to a parent and terminate parental right(s).

The Order of February 26, 2001 did not provide for the return of the child to the mother prior to the next Permanency Hearing. As the record reflects, this Court was looking beyond the next review hearing for the return of the child. Specifically, this Court stated:

> "Given all the facts and circumstances, it is hardly justified on a 1ong-term basis his continued adjudication of dependency. So what I am going to do is this. And I think this is in the best interest of this child at this time. I'm going to Order, and I will structure it generally so that it will allow the discretion with the Agency to increase the unsupervised visits with the mother with the ultimate goal that in six months which would be the next hearing that this child would be returned to the mother. So this would allow an opportunity for that transition."

See Transcript from Hearing February 26, 2001, pg. 21 (all references to the hearing transcript shall be hereinafter noted as H. T.)

What the record reflects was an intent to begin the transition of this child home, but the final determination of the appropriateness for any change of goal returning the child home is to be made at the next six month Permanency Hearing. As such, the present appeal is premature since there is no Order returning this child home nor otherwise changing the goal. Accordingly, the Order of February 26, 2001 is an Interlocutory Order from which there is no appeal as of right nor by permission.

**DISCUSSION**

The gravamen of Appellant's position is her claim of fear of this child whom she feels should never return to live with her. Ms. L. avers "she has utilized numerous community services all to no avail." See Statement of Matters Paragraph 4(b). Appellant contends she is unable to control the minor child who represents a threat of violence to her and her daughter. Appellant concludes it is not in the child's best interest as a "special needs" child to be removed from his current environment and returned home.

The record no longer supports Appellant's position. As the Dependency Petition stated, there was one episode on January 14, 1998 when J.'s behavior was such that police were summoned to assist in restraining him. There are no other averments of any other episodes of physical harm attempted or perpetrated by the child against the mother or his sister. There is also nothing of record of any criminal charge(s) ever having been

pursued against the child.

In the three years since J.'s placement, there have been no other episodes of violence by the child toward his mother, sibling or anyone else in his foster home. To the contrary, the record reflects the original reason for adjudication and placement, after three years of services, is now almost remedied.

Appellant began the hearing on February 26, 2001 by walking into the courtroom holding hands with J. Appellant proceeded to testify she has an excellent relationship with the child (H.T., pg. 4). Further, Appellant stated J. is doing wonderful when he comes to her home and she is very proud of how much he has grown and matured (H.T., pg. 11).

The Court Summary reflects:

> "J. has shown a lot of affection towards his mother at visits and does not appear to have any adverse effects after visiting with her. J. also visits with his sister, D., during some of the visits. Ms. L. does bring J. gifts on many occasions. Recently, Ms. L. and J. started having visits in Ms. L.'s home. These are supervised by Ms. C. These visits are going well."

See Court Summary, February 26, 2001, at pg. 4.

According to the caseworker from OCY, J.:

> "has an excellent relationship with his mother. They are constantly visiting or increasing these visits, or hoping to. I don't know if the LIFT has been okayed yesterday or not, but they had an application for the LIFT and he is going to learn to independently visit his mother at some point here."

See H.T. at pg. 4.

According to J.'s foster father, R. D.:

THE COURT: I'd like to hear from you folks. How is J. doing?

MR. D.: He has some anger problems still. We have it down to the point where it comes out as verbal anger rather than aggressive anger.

THE COURT: What triggers his anger?

MR. D.: Well, you know, that's hard to say. He's MR. I think that has a lot to do with it. There's something in him that fires him off easily. You know, for the most part we've gotten him to redirect it so that, like I said, it comes out as verbal, and we're working on reducing that. He's (sic) removes himself from situations when he's getting very angry and comes back once that anger leaves him.

THE COURT: Does he pose a risk to any of the other children in your home?

MR. D.: I don't think so. Not anymore. Maybe when he first came to us he did, but not now."

H.T., February 26, 2001, pg. 8

Mr. D. was also specifically asked regarding the child's understanding of his inappropriate behavior towards his mother:

MS. JEWELL: Has J. ever talked about some of the actions he directed toward his mother?

MR. D.: He's talked about it some, yes.

MS. JEWELL: So he understands or has a recognition of what is right and wrong?

MR. D.: Yes, he does.

MS. JEWELL: Does he understand those actions that he directed towards his mother were wrong?

MR. D.: I think he understands that. I don't know that that would stop him in a real heated situation or not.

H.T., February 26, 2001, pp. 12-13.

Finally, the foster father concurred that a reunification of the child with the mother is possible:

MR. D.: I think it's possible in the future. I think that his mother needs to do more work and I think J. needs to do more work. I think it's a possibility.

MS. JEWELL: Is it time to initiate some counseling?

MR. D.: Well, there is counseling for J. and the same therapist is working with his mother. And they've come a long way. You know, we've come from where more showed fear even being in the same room with him with other adults to the point where now she's willing to try to be out with him alone.

H.T., February 26, 2001, pg. 14

At the hearing on February 26, 2001, there was evidence J. was no longer receiving services through the Mental Health Base Service Unit based on a determination he has stabilized. J. turned 17 years old on February 17, 2001 and he had been receiving services since at least age 13. The fact he was discontinued from services through the Base Service Unit is evidence of his progress.

According to the OCY caseworker, J. "follows directives". See Court Summary, February 26, 2001 at pg. 5. Given the progress the child has made, it is unfair to him and hard to justify his indefinite placement outside of his mother's home.

The Order of February 26, 2001 provided for an increase in unsupervised visits (consistent with Appellant's request) to see if reunification was feasible. This process, after all, is consistent with the clear and overriding purposes of the Juvenile Act:

> "(1)To preserve the unity of the family whenever possible... (3) To achieve the foregoing purposes in a family environment whenever possible, separating the child from parents only when necessary for his welfare, safety or health or in the interest of public safety."

See 42 Pa. C.S.A. §6301(b)(1)(3).

Given J.'s maturity, improved behavior and stabilization, it will be hard to justify prolonging J.'s forced separation from his family. In this Court's view, Appellant is more concerned for her well-being than that of J.'s. Assuming arguendo Appellant's fear of her son is legitimate (of which this Court is not convinced), such fear is not a reason to preclude reunification. In this case, the child may have remedied the conditions which caused his placement. It is inconsistent with the stated purposes of the Juvenile Act to prevent the child's return home simply because of Appellant's fears. Such fears are outside the scope of this proceeding. In fact, Appellant would have available to her a host of criminal and civil remedies to protect her.

In Appellant's Statement of Matters Complained of on Appeal, there are several unsupportable allegations. Appellant avers "she has utilized numerous community services all to no avail". See Statement of Matters, Paragraph 4(b). Appellant fails to identify any services she has employed that will permit the return of this child to her. To the contrary, the Dependency Petition, to which the mother stipulated, stated, "Ms. L. has only marginally cooperated with these services." Hence there is absolutely no factual support for Appellant's averment.

Appellant also stated "the Court erred where it failed to fully benefit from the input from the foster parents...". See Statement of Matters, Paragraph 4(b). To the contrary, this Court heard from and considered the testimony of the foster parents. Indeed the testimony of the foster father is quoted at length in this Opinion. To the extent Appellant relies on a post-hearing letter sent by the foster parents and attached as Exhibit A to the Statement of Matters, said letter is outside the scope of this record and cannot be considered. Instead, what was considered was the sworn testimony of the foster parents at the hearing on February 26, 2001.

**CONCLUSION**

This appeal is premature. There has been no Order entered changing the goal to return of the child to the mother. From this record, the next Permanency Review Hearing may result in an Order returning the child. Even if that Order (if it occurs) is appealable, there are sound reasons for the return of this child to his mother, all consistent with the overriding purpose of family reunification under the Juvenile Act.

**BY THE COURT:**
/s/ **WILLIAM R. CUNNINGHAM**
**President Judge**

**COMMONWEALTH OF PENNSYLVANIA**
**v.**
**FATIMA PAOLELLO**

*CRIMINAL PROCEDURE/SENTENCING GUIDELINES*

A sentence will not be disturbed on appeal absent a manifest abuse of discretion. *Commonwealth v. Hess*, 745 A.2d. 29 (Pa. Super. 2000); 42 Pa.C.S. §9781(c).

A claim of excessiveness of sentence fails to raise a substantial question for review where, as here, the sentence is within the statutory limits. *Commonwealth v. Martin*, 727 A.2d 1136, 1143 (Pa. Super. 1999). An appeal will only be granted by the Superior Court if a legitimate argument is presented by appellant which demonstrates that the sentencing judges' actions were either (1) inconsistent with a specific provision of the sentencing code; or (2) contrary to the fundamental norms which underlie the sentencing process. *Commonwealth v. Nelson*, 664 A.2d 714 (Pa. Super. 1995).

*CRIMINAL PROCEDURE/CONFESSIONS/*
*VOLUNTARINESS REQUIREMENT*

The determination as to whether a knowing, voluntary and intelligent waiver was effected is to be made by viewing the totality of the circumstances. *Commonwealth v. Chacko*, 459 A.2d 311, 317 (Pa. 1983). The Supreme Court has consistently declined to adopt a per se rule of incapacity to waive constitutional rights based on mental or physical deficiencies, or because a defendant possessed a low IQ. *Commonwealth v. Bracy*, 461 A.2d 775 (Pa. 1983).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA TRIAL COURT DIVISION NO. 239 OF 1999

APPEARANCES: Bradley H. Foulk, Esq., District Attorney, for the Commonwealth
Joseph P. Burt, Esq., for the Defendant

Domitrovich, J. July 7, 2000

This matter arises from Defendant's guilty plea on charges of Conspiracy to Commit Robbery and Robbery. Defendant was sentenced on April 27, 2000 as follows: Court costs and restitution; Count 1 - one year to two years of state incarceration and a $200.00 fine; Count 4 - two years to five years to run consecutive to Count 1 and a $200.00 fine. Defendant raises the following issues on appeal: 1) whether Defendant's sentence was excessive and unreasonable; and 2) whether Defendant's statement was given knowingly, voluntarily and intelligently.

The relevant facts are as follows: in the early morning hours of December 23, 1998, Defendant entered the Dairy Mart at 18th and Chestnut

Streets, in the City of Erie, approached the "loan cashier," pointed a gun in the victim's face and demanded money. (N.T., 7/8/99, pp. 4-5). The victim in said case was the daughter of Erie City Police Officer Edward Tucholski, and therefore, he had an interest in the case. (N.T., 7/8/00, pp. 4-5). Defendant, later, at the police station made a voluntary statement regarding the robbery.

Pennsylvania case law states, "[t]he standard of review in sentencing matters is well settled. Sentencing is left to the discretion of the sentencing court and will not be disturbed absent a manifest abuse of discretion." *Commonwealth v. Nixon,* 718 A.2d 311, 315 (Pa.Super. 1998), *citing Commonwealth v. Plank,* 498 Pa. 144, 145, 445 A.2d 491, 492 (1982); *Commonwealth v. Martin,* 727 A.2d 1136, 1144 (Pa.Super. 1999); *Commonwealth v. Roden,* 730 A.2d 995, 997 (Pa.Super. 1999); *Commonwealth v. Hess,* 745 A.2d 29, 30-31 (Pa.Super. 2000) and 42 Pa.C.S. §9781(c). The Pennsylvania Superior Court has further stated:

> ...a sentence will not be disturbed on appeal absent a manifest abuse of discretion. An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will.

*Hess,* at 31, *citing Commonwealth v Burkholder,* 719 A.2d 346, 350 (Pa. Super. 1998); 42 Pa.C.S. §9781(c).

The court in *Nixon,* reasoned:

> We note that ordinarily, allegations that a sentencing court "failed to consider" or "did not adequately consider" various factors is really a request for this court to put its judgment in place of the trial court's and do not raise a substantial question.

*Nixon,* at 315. Further, "[a] claim of excessiveness of sentence fails to raise a substantial question for review where, as here, the sentence is within the statutory limits." *See Martin,* at 1143, *citing Commonwealth v. Nelson,* 446 Pa. Super. 240, 666 A.2d 714,720 (1995).

An appeal will only be granted by the Superior Court, if a legitimate argument is presented by appellant which demonstrates 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." *Id.* Furthermore, the Pennsylvania Superior Court declared:

> ...when reviewing sentencing matters, we accord the court great weight as it is in the best position to view appellant's "character, displays of remorse, defiance or indifference, and the overall effect and nature of the crime."

*Hess,* at 33, *citing Commonwealth v. Brown,* 741 A.2d 726 (Pa.Super. 1999); *Commonwealth v Andrews,* 720 A.2d 764, 768 (Pa.Super. 1998); *Commonwealth v. Ellis,* 700 A.2d 948, 958 (Pa.Super. 1997). The court, in *Roden,* concluded, "[i]n sentencing an appellant, the trial court is permitted to consider the seriousness of the offense and its impact on the community." *See Roden,* at 998.

Additionally, the sentencing court is presumed to have considered all relevant factors regarding Defendant's sentencing, when the sentencing court has possession of the Presentence Investigation Report (hereinafter PSI). *Commonwealth v. Devers,* 519 Pa. 88,101-102, 546 A.2d 12,18 (1988).

In the instant case, the sentencing court had the opportunity to review and consider a thorough PSI, psychological evaluations, drug and alcohol evaluations the Pennsylvania Sentencing Guidelines, Defendant's age, the seriousness of the offenses, facts and circumstances of the offenses, the protection of society and definitely Defendant's rehabilitative needs. The Court stated the ranges of the sentencing guidelines, on the record, for each charge against Defendant, which are as follows: robbery - standard-range sentence is twenty-two months to thirty-six months, aggravated-range sentence is forty-eight months and mitigated-range sentence is ten months; criminal conspiracy - standard-range sentence is twelve months to twenty-four months, aggravated-range sentence is thirty-six months and mitigated-range sentence is restorative sanctions.

The sentencing court announced the following sentence for Defendant: at docket 239 of 1999, count 1 - court costs, $200.00 fine, restitution and serve one year to two years state incarceration; count 4 - court costs, $200.00 fine, serve two years to five years state incarceration followed by five years of probation, state supervised, consecutive to count 1. The sentencing court ordered Defendant to be evaluated for drug and alcohol treatment and receive the necessary treatment, attend weekly meetings of the 12-step program, participate in vocational training and educational courses, undergo drug and alcohol analysis screening. The sentencing court noted, "Hopefully the training will help her when she's paroled to obtain and maintain legitimate full-time employment." *See* (N.T., 4/27/00, p. 23).

The sentencing court also considered the remarks of the District Attorney, the Defendant's counsel and the victim's in-depth impact statement. Defendant completed the program at White Deer Run, which she was released into on February 4, 1999, after committing said offense, as a condition for lowering her bond, pursuant to a court order. Additionally, District Attorney Foulk noted for the record that although the Defendant successfully completed the White Deer Run program, she did not complete a program she entered at Community House on March 10, 1999, nor did she complete the program at Saint Vincent's Mental Health on March 29, 1999, which she left against advice. *See* (N.T., 4/27/00, p. 17). Further,

although Defendant did turn herself into the police once she learned the police were looking for her, Defendant has received a "substantial, substantial break from the Commonwealth in this particular case when she could have been looking at a mandatory five years in jail." (N.T., 4/27/00, p.17). All counts, except count 1 and 4, were nolle prossed and the mandatory five-year sentence for use of a deadly weapon was waived by the Commonwealth in this case, as well as the Commonwealth did not seek a weapons enhancement in this case. Moreover, the Court noted Defendant did voluntarily offer a confession in said matter. The sentencing court considered all of these factors in fashioning Defendant's sentence.

The sentences imposed by said sentencing court were all within the standard ranges, and in fact, were at the low end of each standard range. The sentencing court additionally stated, "Each are separate offenses being run consecutive due to them being separate offenses." *See (N.T.,* 4/27/00, p. 23). The sentencing court afforded Defendant the benefit of a seventy-three day credit, for the days of inpatient treatment, towards her incarceration sentence.

The sentencing court explained its reasoning for the sentenced imposed, and as stated previously, Defendant's sentences were, in fact, within the low end of the standard range of the Sentencing Guidelines. The sentencing court, being "in the best position to view appellant's 'character, displays of remorse, defiance or indifference, and the overall effect and nature of the crime,'" considered all aspects of Defendant and her circumstances, which is evident from the record, in fashioning Defendant's sentence. Therefore, Defendant's issue regarding sentencing is without merit.

Next, Defendant alleges that her confession was not voluntarily, knowingly and intelligently given. However, after evaluating the testimony offered at the hearing to suppress said confession, this Court, in the instant case, determined that the confession was, in fact, voluntarily, knowingly and intelligently offered by the Defendant. The following case law and testimony support the suppression court's decision.

At a suppression hearing, the precise burden of proof is clearly on the Commonwealth to come forward with the evidence and to establish, by a preponderance of the credible evidence, that the confession is voluntary. *Commonwealth v. Ravenell,* 448 Pa. 162, 292 A.2d 365, 367 (1972); *Commonwealth v. Starkes,* 461 Pa. 178, 335 A.2d 698, 701 (1975); *Commonwealth v. Smith,* 487 Pa. 626, 410 A.2d 787, 789 (1980); *Commonwealth v. Edwards,* 521 Pa. 134, 555 A.2d 818 (1989) and Rule 323(h), Pennsylvania Rules of Criminal Procedure. The Commonwealth is not required to prove the "voluntariness" beyond a reasonable doubt. *Ravenell,* at 367. After all of the witnesses have testified, the hearing judge must weigh the interests of those witnesses and then conclude which testimony is more credible. *Id.,* at 368.

The suppression court must determine whether Defendant's confession was the product of a free and uncoerced decision:

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. *Is the confession the product of an essentially free and unconstrained choice by its maker?* If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession. (Emphasis added)

*Starkes,* at 700-701. All attending factors and circumstances must be considered and evaluated to determine the voluntariness of the waiver/ confession. *Id.* "[T]he determination at to whether a knowing, voluntary and intelligent waiver was effected is to be made by viewing the totality of the circumstances." *See Edwards,* at 826 *quoting Commonwealth v. Chacko,* 500 Pa. 571, 583, 459 A.2d 311, 317 (1983); *Commonwealth v. Williams,* 537 Pa. 1, 640 A.2d 1251, 1259 (1994). The *Edwards* court determined that an appellant's statements are not automatically rendered inadmissible due to the fact that the appellant had been drinking prior to his arrest. *Edwards,* at 826. The *Edwards* court further stated:

> The test is whether he had sufficient mental capacity at the time of [his making the statements] to know what he was saying and to have voluntarily intended to say it. Recent imbibing or the existence of a hangover does not make his [statements] inadmissible, but goes only to the weight to be accorded to [them].

*Id., quoting Commonwealth v. Smith,* 447 Pa. 457,460, 291 A.2d 103, 104 (1972).

The *Williams* court stated that in certain circumstances, the use of "artifice or deception to obtain a confession is insufficient to make an otherwise voluntary confession inadmissible where the deception does not produce an untrustworthy confession or offend basic notions of fairness." *Williams,* at 1259. In the case of *Commonwealth v. Wanner,* the appellant challenged whether his waiver was knowing, intelligent, or voluntary since he was on medication and in a hospital setting. *Commonwealth v. Wanner,* 413 Pa. Super. 442, 605 A.2d 805, 810 (1992). The *Wanner* court stated that although it may have been preferable for the interrogating officer to obtain an expert medical appraisal, the absence of such an appraisal did not destroy the voluntary nature of any statements made by Defendant. *Id.* The *Wanner* court further stated that the "credible

testimony" of the interrogating officers "alone" could substantiate the finding of "voluntariness." *Id.*

The Pennsylvania Supreme Court has "consistently declined to adopt a per se rule of incapacity to waive constitutional rights based on mental or physical deficiencies." *See Chacko,* at 317; *Commonwealth v. Cox,* 546 Pa. 515, 686 A.2d 1279, 1287 (1996); *Commonwealth v. Bracey,* 501 Pa. 356, 461 A.2d 775 (1983). Further, the Supreme Court has "clearly established" that a confession is not rendered involuntary simply because a defendant possesses a low I.Q. *Id.* The determination of whether the waiver was "knowing, voluntary and intelligent" is, again, to be based upon the "totality of the circumstances." *Id.* The Pennsylvania Supreme Court continued:

> All attending circumstances surrounding the confession must be considered in this determination. These include: the duration and methods of the interrogation; the length of delay between arrest and arraignment; the conditions of detainment; the attitudes of the police toward defendant; defendant's physical and psychological state; and all other conditions present which may serve to drain one's power of resistence to suggestion or to undermine one's self-determination.

*Id., citing Commonwealth v. Kichline,* 468 Pa. 265, 279, 361 A.2d 282, 290 (1976).

In the *Chacko* case, the appellant argued "because of his mental condition and the situation with which he was confronted, he was incapable of effecting a knowing, voluntary and intelligent waiver...rendering his statements involuntary." *Id.* The appellant's claim was based solely on a psychiatric evaluation, which was introduced as an exhibit at the suppression hearing. The report characterized appellant as a "'mental retardation subject' whose I.Q. placed him in the 'dull-normal' range." *Id.* The *Chacko* court ruled that the "argument is without merit."

The appellant testified, in said case, "that he was 'a little nervous' but that there was nothing physically or mentally wrong with him at the time, that he was awake, alert and aware of what was going on, and that he was not coerced in any way." *Id.,* at 318. Furthermore, the Major of the Guard, at the State Correctional Institute at Pittsburgh, whom established that appellant "answered questions promptly, did not appear to have difficulty understanding and did not ask him to repeat or clarify questions", corroborated appellant's testimony. *Id.* The institution's Director of Treatment's testimony was consistent with both the appellant's and the Major's testimony. *Id.* There was no indication in the record of any "unusual circumstances" surrounding appellant's interview with the State Trooper. *Id.* The appellant then testified that he had "knowingly and willingly" waived his rights and had given his statement "voluntarily and without

coercion." *Id.* The State Trooper stated that appellant was "responsive, had no difficulty in speaking and seemed 'perfectly normal.'" *Id.* The suppression court concluded that the appellant's statements were "voluntary," which was "amply" supported by this "uncontradicted evidence." *Id.*

The Pennsylvania Supreme Court has set forth the guidelines to be used in evaluating the evidence, on appeal, to determine whether a confession is voluntary:

> Where, as here, the trial court ruled the statement of the accused was voluntarily given, our review is limited to a consideration of the testimony of the witnesses offered by the Commonwealth and that portion of the testimony for the appellant which remains uncontradicted.

*See Smith,* 410 A.2d at 789, *quoting Commonwealth v. Davenport,* 449 Pa. 263, 295 A.2d 596, 598 (1972).

A review of the record, in the instant case, reveals that the trial court had ample evidence to conclude the Defendant's confession was voluntarily given. The Commonwealth's first witness was Officer Tucholski. Although Officer Tucholski was not assigned to the robbery case, he was informed of a "break in the case," and decided to go down to the holding cell to "take a look and see if I could recognize the individual, because I - - I worked that area at one time pretty heavily." (N.T., 7/8/99, pp. 5-6). Officer Tucholski's daughter was the victim in said case, and therefore, had an interest in the case. (N.T. 7/8/99, pp. 4-5). Officer Tucholski was not in uniform when he went to the holding cell, nor was he armed at the time. (N.T., 7/8/99, pp. 6-7).

OfficerTucholski asked Defendant, "Do you know who I am?" Defendant replied by shaking her head "like I don't know who you are." (N.T., 7/8/99, pp. 7-8). Officer Tucholski replied by stating that he was the father of the "girl that she put the gun in her face, I was her dad." (N.T., 7/8/99, p. 8). Officer Tucholski did not have any other conversation with Defendant. When asked by the prosecutor, "Did you ever tell her whether or not you were a police officer?" Officer Tucholski replied, "I don't believe that issue came up because it was so brief." (N.T., 7/8/99, p. 8). Officer Tucholski stated that the entire episode lasted "probably about a minute." (N.T., 7/8/99, p. 8). The prosecutor asked Officer Tucholski, "But did you say anything to her about the need or necessity to give a statement about the incident that had happened with your daughter?" Officer Tucholski replied, "No. I didn't make any comments to her other than what I told you and that was it. " (N.T., 7/8/99, p. 9). Officer Tucholski also stated that he did not know if Defendant had given a statement at the time he spoke to her, and that he was not "privy" to any information relating to this case since he had "other responsibilities, other duties, that I had to take care of."

(N.T., 7/8/99, p. 9).

On cross-examination, defense counsel attempted to determine the exact date that Officer Tucholski entered the holding cell and spoke to the Defendant. When asked if the date could have been December 23rd (the day of the incident), Officer Tucholski responded, "I can't be particular as to the date...the incident happened and then the arrest wasn't immediate." (N.T., 7/8/99, p. 10). Defense counsel also asked Officer Tucholski "[w]hen you said what you said, you raised your voice, didn't you?" Officer Tucholski replied, "No, I was pretty calm and collected," and further stated that he was "more curious than upset" when he spoke to Defendant. (N.T., 7/8/99, p. 15). Officer Tucholski explained that he was "elated" that she was in custody, and he "wasn't smiling and laughing. I just had a - - probably an even demeanor." (N.T., 7/8/99, p. 16). Then, defense counsel asked, "Could you have said to her that you just wanted to look at the person who stuck a gun in my girl's face? Could you have said that to her?" Officer Tucholski answered, "I could have said that, yeah." (N.T., 7/8/99, p. 16). Next, defense counsel inquired if Officer Tucholski was trying to "intimidate" Defendant, and the reply was "You may have misunderstood my reason for going back there. When I was in patrol I worked a number of - - of assignments over in car three's area over there, West 18th Street area, and I was familiar with the majority of the people in the area...As a result there's a good possibility that I knew the person who did it, so I wanted...So I wanted to see the individual that did it so I could recognize them." (N.T., 7/8/99, pp. 17-18). Then, defense counsel asked Officer Tucholski if he had seen Defendant's reaction to the Officer's comment, and he replied, "[y]es, I saw her reaction. She had no reaction...Basically she just stood there, looked up at me, and looked down. She continued to look down." (N.T., 7/8/99, p. 19). Officer Tucholski stated that he had no further involvement with the case. (N.T., 7/8/99, p. 20).

Detective Clark Peters of the City of Erie Police Department, was an investigator in the instant case, and offered testimony that Defendant called the police station to "turn herself in." (N.T., 7/8/99, p.22). The trial court was informed that the Defendant "came on her own" to the police station, rather than an officer or someone else from the police station transporting Defendant to the police station. (N.T., 7/8/00, p. 23). Detective Peters obtained a statement from Defendant. However, prior to Defendant offering her statement, Detective Peters informed Defendant of her Miranda warning, and Defendant actually signed a Miranda rights waiver form. (N.T., 7/8/99, p. 23). Detective Peters also stated that Defendant's mother was present at the interview, since Defendant "has some problems with reading and writing, so her mom was invited to stay." (N.T., 7/8/99, pp. 23-24). Detective Peters was asked how old the Defendant was, and defense counsel offered that her date of birth is August 5, 1979. (N.T., 7/8/99, p. 24).

Therefore, Defendant was 19 years old at the time of the hearing.

Defendant's mother remained in the room with her daughter throughout the interview, while Defendant's statement was being videotaped. Defendant's mother witnessed Defendant sign the rights waiver form. (N.T., 7/8/99, p. 24). Detective Peters stated that he believed that Officer Tucholski spoke to Defendant prior to her giving the statement to the detective; however, the he [sic] did not know of the encounter between Officer Tucholski and Defendant at the time of Defendant's statement. Detective Peters estimated that he spoke with Defendant approximately "half an hour later," and her demeanor was "[b]asically the same as it is now. I felt that she was nervous, but under the circumstances I didn't think it was unreasonable or exceptional." (N.T., 7/8/99, pp. 25-26). The detective further stated that because Defendant was there to confess to an armed robbery "that that would be something that would be difficult for anyone to overcome." (N.T., 7/8/99, p. 26). Defendant did not tell the detective about Officer Tucholski's comment to her, and the detective stated, "I would have to say no to the intimidation. She never appeared intimidated to me. She did appear nervous." (N.T., 7/8/99, p. 26). Again, he attributed the nervousness to the fact that she was there to confess to an armed robbery. Defendant's videotaped statement is "about 20 minutes long." (N.T., 7/8/99, p. 28).

On cross examination, defense counsel asked Detective Peters if he was with Defendant prior to her statement, and if so, how long he was in with Defendant before she offered her statement. Detective Peters answered, "Yes, we would have talked with her for about 20 minutes prior to the videotaped statement...Very little contact afterwards. We probably would have taken her downstairs." (N.T., 7/8/99, p. 32). Defense counsel asked if that meant he would have taken Defendant "[t]o the holding cell area again?" Detective Peters answered, "That is correct." (N.T., 7/8/99, p. 32).

On redirect, the prosecutor asked Detective Peters, "During that 20 minute period was her demeanor the same or different than the demeanor that she had at the time of the videotaped statement?" Detective Peters answered, "I would say it was the same." (N.T., 7/8/99, p. 33). The videotape was then shown to the Court during the hearing to demonstrate the Defendant's demeanor throughout the confession. (N.T., 7/8/99, p. 34).

After viewing the videotape, the trial court asked Detective Peters a few questions to clarify the situation. Detective Peters responded, "Carmen originally had the gun, according to the statement that was given to me by Ms. Paolello, and did not pull the gun out in the store...They left the store, she said, 'I can't do it,' gave the gun back to Ms. Paolello, Ms. Paolello then went back in and pulled the gun." (N.T., 7/8/99, p. 37).

Defense counsel, next, called the Defendant to the stand. However, prior to Defendant taking the stand, defense counsel offered the following

information, to which the Commonwealth stipulated, regarding Defendant:

> Basically I'm looking at this is [sic] being taken from a record from the School District of the City of Erie, Your Honor, and it just indicates that when she was in school, which she only attended into the ninth grade, she was enrolled in the learning support program due to serious emotional disturbances...

(N.T., 7/8/99, p. 38). However, as the case law indicates, this fact alone cannot render her confession involuntary, rather "all attending circumstances surrounding the confession must be considered in this determination." *See Chacko,* at 317; *Kichline,* 290.

Defense counsel questioned the Defendant regarding Officer Tucholski approaching her while she was in the holding cell, "What did he say?" Defendant answered:

> He walked up to the cell, and he said, "Hi." And I said, "Who are you?" And he said, "I'm the girl's dad who you waved the gun all up in her face." And he said, "I want to get a real good look at you, because you're going to get yours." And then he looked at me and then he walked out, and then I just had a really bad anxiety attack, and it - -

(N.T., 7/8/99, pp. 40-41). Defense counsel asked Defendant how loud Officer Tucholski's voice was, and her answer was, "His voice was like four times louder than yours." Defendant was asked, "Was he shouting?" Defendant answered, "No, he just like raised his voice." (N.T., 7/8/99, p. 41). Then, Defendant stated that Officer Tucholski did not say anything else to her and he left the cell area. (N.T., 7/8/99, p. 41).

Defendant was asked if she agreed with her demeanor as she appeared on the video and she said, "Yes." (N.T., 7/8/99, p. 45). Then, Defendant alleges that she was "worse," she was "just shaking really bad." (N.T., 7/8/99, p. 45). Defendant stated that she was in this condition because she "was scared. I was going to jail and I didn't know if he - - if that girl's dad could come in there and hurt me, because he came back there and I was scared." (N.T., 7/8/99, p. 46). However, when defense counsel asked "Did you ever see that officer again before today's hearing after the day?" Defendant stated, "No." (N.T., 7/8/99, p. 46).

On cross-examination, Defendant offered the following statements:

Q: Fatima, before you got to the police station you called the police station and told them you were going to come down, correct?

A: My mom did.

Q: You went to the police station with your mom on you own, right? The police didn't come and get you, did they?

A: I turned myself in, but my Uncle Ron, my Uncle Ronnie knows John Vendetti, so the police couldn't say that they came and got me or like I was

running. I turned myself in, so my Uncle Ron told John Vendetti to call the police, and then they came and got me at this office.

Q: Okay. So the police came to District Justice Vendetti's office and got you?

A: Yeah.

. . .

Q: You had called them or someone, your uncle, had called them telling them that you wanted to turn yourself in, right?

A: My mom, yes.

Q: And when you went to the police station you intended on telling them what had happened that night, right, earlier that night for the robbery, right?

A: Yes.

. . .

Q: When you went down to the police station it was your intention to turn yourself in, right?

A: Yes.

Q: Officer Tucholski came in, you testified as to what he said to you about him wanting to see who pointed a gun in his daughter's face. He said that to you right?

A: Who did?

Q: The officer that testified before, Officer Tucholski?

A: He said what?

Q: You testified that he came into the cell, into the holding area, and said that he wanted to see who pointed a gun in his daughter's face?

A: Yes.

Q: And that made you scared, right?

A: Yes.

Q: But you still gave the statement, the videotaped statement, right?

A: Right.

Q: Okay. And him saying that to you isn't what made you give the statement, right?

A: Well, I feel like I wanted to say a lot more stuff.

Q: You wanted to say a lot more stuff?

A: I wanted to - - he just messed me up, because I was having a bad anxiety attack and I wasn't - I - I don't know.

Q: But you went there with the intention of turning yourself in, right?

A: Yes.

Q: Okay. And you gave the statement, and your mother was with you, right, when you gave the videotaped statement?

A: Yes.

. . .

Q: You knew when you were giving the statement that you were telling them information about your involvement or what you did the night of this

robbery at the Dairy Mart. You knew that that's what you were telling them, right?
A: Telling them what I did?
Q: Right, you were telling them what you did.
A: Yeah.
. . .
Q: Whether or not Officer Tucholski said that to you, you were going to tell them about what you did because you went there to turn yourself in, right?
A: Right.
. . .
Q: But if he hadn't come in there and said that to you, you were still going to turn yourself in and give them a statement, right?
A: Yeah.
THE COURT: Yes?
A: Yes.
(N.T., 7/8/99, pp. 47-51).

On redirect examination, it was alleged that Defendant had smoked some "Weed and crack. We were putting it in weed." (N.T., 7/8/99, p. 51). Further, Defendant alleged she was "high" at the police station. (N.T., 7/8/99, p. 52). At that time, the trial court asked Detective Peters, "Did you observe that she was under the influence when you took the statement?" The Detective answered, "No, ma'am." (N.T., 7/8/99, p. 53).

The trial court evaluated all of the testimony, the videotape confession and the argument of counsel. The trial court found the testimony of both Officer Tucholski and Detective Peters credible. Further, Detective Peters did not believe that Defendant was under the influence of drugs. He did state that Defendant was "nervous," however; he felt that under the circumstances it was normal for a person to be nervous while confessing to an armed robbery. Additionally, the Court noted:

> during the videotaped confession the Defendant does appear to be nervous, but it seems to be a catharsis that was occurring for her. She seems to be not pressured to give the confession. She's not being coerced to give the confession. Her mother is there. She seems to be comfortable, but a bit nervous. In fact, the nervousness might be an expression of her genuine remorsefulness as to what she was going through. But today when she's on the witness stand, her demeanor today is one of a person more upset than the one - - and more nervous than the one that's on the videotape...In fact, the Court finds that Mr. Tucholski's statement or statements had no effect on the Defendant's confession statement, and his statement did not force her to give any confession. In fact, as she states herself, he prevented her from giving more in her statement...

(N.T., 7/8/99, pp. 55-56). As the Pennsylvania Supreme Court has stated, "It is for the trial court to determine the weight to be given the evidence, and to weigh the interests of all the witnesses in determining their respective credibility." *See Smith,* 410 A.2d at 789; *Ravenell,* at 368.

In the instant case, the trial court determined that the Defendant had a significant interest in alleging both that the statements of Officer Tucholski scared her or coerced her into making the statements/confession; and in alleging she was under the influence of drugs. However, the testimony of Officer Tucholski and Detective Peters was more credible and they really had no interest to be served in this case particularly. Furthermore, Defendant, herself, stated that she went to the station to confess and Officer Tucholski really had no impact on that, except that she may have offered more information, which may have been to her detriment. Additionally, as the *Edwards* court determined, the test is whether Defendant had "sufficient mental capacity...to know what he/she was saying and to voluntarily intended to say it." [sic] *See Edwards,* at 826. In the instant case, Defendant specifically states that the only reason she went to the police station was to confess, to tell the police what had happened during the robbery that occurred on December 23, 1998. Therefore, there is no doubt as to whether the confession was voluntary.

The Commonwealth established by a preponderance of the credible evidence that Defendant's confession was "knowing, voluntary and intelligently" made. Further, Defendant's confession was the product of an essentially free and unconstrained choice, and therefore, said confession may be used against her. This Court finds no merit to Defendant's issue regarding her confession.

Finally, based upon the aforementioned testimony and case law, both of Defendant's issues on appeal are without merit.

**BY THE COURT:**
/s/ **Stephanie Domitrovich, Judge**

**COMMONWEALTH OF PENNSYLVANIA**
**v.**
**MICHAEL BARCZYNSKI**

*APPEALS OF SENTENCES/CRIMINAL*

In regards to Criminal Contempt, mistake of law is not a defense in the Commonwealth of Pennsylvania

*APPEALS OF SENTENCES/CRIMINAL*

Defendant did in fact understand what was expected from him and/or what actions were proscribed by the PFA Order.

*TECHNICAL DEFENSES/DUE PROCESS DEFENSE*

A Statute will not be invalidated based upon the Constitutional Prohibition against vagueness, simply because the Statute could have been drafted with greater precision as long as it is drafted with sufficient definiteness to elimate arbitrary and discriminatory enforcement.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA TRIAL COURT DIVISION NO. 5221 OF 2000

APPEARANCES: Bradley H. Foulk, Esq., District Attorney, for the Commonwealth
Gustee Brown, Esq., for the Defendant

**OPINION**

Domitrovich, J., April 24, 2001

This matter arises after Defendant's second Indirect Criminal Contempt conviction on December 5, 2000. Defendant received a sentence of three (3) months to six (6) months in the Erie County Prison, costs of prosecution, $200.00 fine, and any necessary restitution. See (N.T., 12/5/00, p. 23). However, on December 19, 2000, this Court granted Defendant work/school release; thereafter, Defendant was paroled on March 2, 2001. Defendant raises the following issues on appeal: 1) whether mistake of law is a proper defense in the Commonwealth of Pennsylvania; and 2) whether the order directing Defendant to not have "contact" with the Victim is void due to vagueness, thereby violating Defendant's due process rights under both the United States and Pennsylvania Constitutions.

The relevant facts are as follows: On or about November 18, 2000, the Victim was at her place of employment, Barbato's on West 38th Street, in Erie, eating dinner with her father, mother and little brother. (N.T., 12/5/00, pp. 3-4). The Victim stated that her fellow employees had seen the Defendant drive by her place of employment "at least five times that day." (N.T., 12/5/00, pp. 8, 17).

At approximately 3:30 p.m., as the Victim and her family were dining, they observed the Defendant walk up to the Victim's vehicle, use his spare set of keys to gain entrance to the vehicle, and attempt to start the vehicle's

engine. (N.T., 12/5/00, pp. 4-5). The Victim's father exited the restaurant to stop the Defendant, and attempted to open the door of the vehicle, but the door was locked. (N.T., 12/5/00, p. 5). The Victim's father broke the side window of the vehicle in an attempt to get inside the vehicle, and "tried to pull" the Defendant out. (N.T., 12/5/00, p. 5). At the same time, the Victim was attempting to call the police; however, another person was able to contact the police before the Victim was able to complete the telephone call. (N.T., 12/5/00, p. 5).

The Victim was standing along side her father, and both the Victim and her father attempted to pull the Defendant out of the vehicle. At the same time, the Victim was "trying to unlock the other door so maybe I could pull him out from the other side." (N.T., 12/5/00, p. 11). The Victim further explained that the door of the vehicle was open and she and her father were attempting to pull the Defendant out of the vehicle. (N.T., 12/5/00, p. 11).

"Eventually" Defendant exited the vehicle. (N.T., 12/5/00, p. 5). Defendant immediately went to his father's vehicle. There was blood all over the interior of the vehicle and the window was broken. (N.T., 12/5/00, pp. 5-6). The blood was from the window being broken. (N.T., 12/5/00, p. 6).

At some point after the initial scuffle, the Victim went back into her place of employment and retrieved a pizza paddle. (N.T., 12/5/00, p. 12). The Victim hit the Defendant's father one time with the pizza paddle, in an attempt to get the Defendant's father away from her father. (N.T., 12/5/00, pp. 12-13). Thereafter, the Defendant's father called the Victim "a skinny ugly bitch." (N.T., 12/5/00, p. 13). The Victim had also hit the Defendant in the leg with the pizza paddle, but does not recall how many times. (N.T., 12/5/00, p. 14). The Victim told the Defendant's father "he was ugly and fat." (N.T., 12/5/00, p.14). Then, the Victim's mother took the pizza paddle out of her daughter's hands and took it back into the restaurant. (N.T., 12/5/00, p. 14). The Victim's mother was just standing there during this situation, and did not touch anyone during the entire encounter. (N.T., 12/5/00, pp. 14-15). At no time were any threats made against the Victim during this scuffle. (N.T., 12/5/00, pp. 11, 19-20).

The Victim did not give the Defendant permission "at all" to take the vehicle, and Defendant knew that the Victim was using the vehicle as transportation. (N.T., 12/5/00, pp. 6-7). The vehicle had been purchased in November 1998 or 1999, and the Victim wrote a check from her account for said vehicle. (N.T., 12/5/00, pp. 7-8).

Procedurally, a temporary Protection from Abuse Order (hereinafter PFA) was issued on April 10, 2000, and Defendant was served on the same date. Then, on April 18, 2000, the Honorable Michael E. Dunlavey, entered a final PFA Order. Thereafter, Defendant violated the PFA, and appeared before the Honorable Shad Connelly on September 8, 2000. Defendant

admitted the violation and the Assistant District Attorney stated, "It is not violent in that there was no physical contacts between the parties; however, there is some, certainly, aggressive behavior." (N.T., 9/8/00, p. 3). Defendant's counsel added, "And, for the future, he now knows it's the letter and the spirit of the order to abide by, and he - - he would appreciate the chance to prove himself on probation." (N.T., 9/8/00, pp. 3-4). Thereafter, Judge Connelly sentenced Defendant to six (6) months of probation, pay costs of prosecution, $100.00 minimum fine, and Defendant was ordered to "undergo Batterers' Intervention and any other program the probation office deems appropriate for him." (N.T., 9/8/00, p. 4). However, on November 18, 2000, Defendant once again violated the PFA, which resulted in the aforementioned incident.

Defendant's first issue is regarding whether mistake of law is a valid defense in the Commonwealth of Pennsylvania. However, the Pennsylvania Supreme Court acknowledged that although the General Assembly adopted many provisions of the Model Penal Code when enacting the comprehensive Crimes Code, the General Assembly did not adopt Section 2.04-(3)(b), or effectuate any substantial equivalent. *Commonwealth v. Kratsas*, _ Pa. __, 764 A.2d 20, 29-30 (2001). The Pennsylvania Supreme Court continued, "Indeed, official commentary reflects the legislative intent that '[g]enerally speaking, ignorance or mistake of law is no defense.'" 18 Pa.C.S. § 304 (official comment); *Kratsas*, at 30. Further, the *Kratsas* court added that in *Commonwealth v. Fisher,* 398 Pa. 237, 248, 157 A.2d 207, 213 (1960), it appeared that the court substantially endorsed a reliance defense in overturning a contempt conviction; however "criminal contempt is a unique area of the law and it is thus questionable how broadly the Court's analysis in *Fisher* should be read." *Id.* The *Kratsas* court stated:

> Moreover, *Fisher* preceded the comprehensive enactment of the Crimes Code, and thus, even to the extent that the holding was intended to be read broadly, the continued viability of such construction must be determined in light of the subsequent legislative prescriptions.

*Id.* Therefore, mistake of law is not a defense in the Commonwealth of Pennsylvania, and Defendant's first issue lacks merit.

Defendant, next, contends that the PFA Order should be "void due to vagueness," since the term contact is neither specifically defined in the Order, nor in the Pennsylvania statutory law. Further, Defendant alleges that the term contact "does not connote any logical and/or reasonable meaning." Therefore, Defendant alleges that he was not afforded "adequate notice of what actions are proscribed." *See Defendant's 1925fb) Concise Statement of Matters Complained of on Appeal.*

The court in *Brown* stated, "there is a strong presumption in law that legislative enactments are constitutional." *Commonwealth v. Brown*, 741 A.2d 726, 733 (Pa. Super. 1999), citing *Commonwealth v. Barud,* 545 Pa.

297, 304, 681 A.2d 162, 165 (1 996). *Brown* continued:

> There is a heavy burden of persuasion upon one who challenges the constitutionality of a statute. A statute will only be found unconstitutional if it clearly, palpably and plainly violates the Constitution.

*Id.* Furthermore, the *Brown* court continued,

> As generally stated, the void for vagueness doctrine requires that the penal statute define a criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Due process requirements are satisfied if the statute provides reasonable standards by which a person may gauge his or her future conduct.
>
> A law is void on its face and violative of due process if it is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.

*Id.* A statute will not be invalidated, based upon the constitutional prohibition against vagueness, simply because the statute could have been drafted with greater precision. *Id.* However, the court must consider the essential fairness of the law, as well as the impracticability of drafting the legislation with greater specificity. *Id.* Due process basically requires a statue be drafted with sufficient definiteness to eliminate arbitrary and discriminatory enforcement. *Id.*

In the instant case, prior to the hearing before the Honorable Michael E. Dunlavey, on April 18, 2000, Defendant received a Notice of Hearing and Order, which was served on Defendant on April 10, 2000, at 2:55 p.m., by the Erie County Sheriff's Deputy Paul Greiner, and a copy is attached as Exhibit A. In said Notice, on page 4, paragraphs A & E, the Notice specifically states:

> A. Restrain Defendant from abusing, threatening, harassing, or stalking Plaintiff and/or minor child/ren in any place where Plaintiff may be found.
>
> . . .
>
> E. Prohibit, Defendant from having any contact with Plaintiff and/or minor child/ren, either in person, by telephone, or in writing, personally or through third persons, including but not limited to any contact at Plaintiff's school, business, or place of employment, except as the court may find necessary with respect to partial custody and/or visitation with the minor child/ren.

*See Notice of Hearing and Order, p. 4, A & E* (emphasis added). Additionally, Judge Dunlavey inquired as follows:

> Okay. Now, so you each understand, you've been in court, you understand what the rules are. There is no contact, no threats, no phone calls, et cetera and that is absolute, okay? It's a two way

> street. Because what's been alleged, and we're not asking you to admit or deny anything at this point, but what's been alleged could have resulted in your immediate placement in jail which would do you no good. You're obviously working somewhere.

(N.T., 4/18/00, p. 3). Neither the Defendant nor the Petitioner asked any questions at this time, and thereafter, Judge Dunlavey ordered the final PFA.

Subsequently, on September 8, 2000, Defendant, along with his counsel, appeared before the Honorable Shad Connelly on an Indirect Criminal Contempt charge, a copy of which is attached as Exhibit B. As stated previously, Defendant admitted the violation and thereafter Defendant's counsel stated, "And, for the future, he now knows it's the letter and the spirit of the order to abide by, and he - - he would appreciate the chance to prove himself on probation." (N.T., 9/8/00, pp. 3-4). The two aforementioned situations demonstrate that Defendant did, in fact, understand what was expected from Him and/or what actions are proscribed. Furthermore, if Defendant did not understand what "no contact" meant, he should have asked at a previous hearing and/or stated that he did not understand. The record is clear that he understood "no contact" and the ramifications of not following the Order of Court. Therefore, Defendant's issue is without merit.

For all of the reasons as set forth in the preceding Opinion, Defendant's issues are without merit.

**BY THE COURT:**
/s/ **Stephanie Domitrovich, Judge**

**ST. JAMES ANGLICAN CATHOLIC CHURCH, a non-profit corporation d/b/a ST. DAVID OF WALES ANGLICAN CATHOLIC CHURCH, RHONDA MAXA, ALETHA T. HOOD, JACK W. ZIMMERLY, SR. and GLORIA ZIMMERLY**

**v.**

**FREDERICK J. BENTLEY and TERRY O'BRIEN, C.P.A.**

*NON-PROFIT CORPORATIONS/ RELIGIOUS ORGANIZATIONS/ TEMPORAL AFFAIRS*

A court will defer to the decisions of a church's adjudicatory authority in doctrinal or ecclesiastical matters. A court may apply normal principles of law which do not jeopardize First Amendment values. The actions of a religious organization may be reviewed where those actions are contrary to the constitution and laws of the religious organization.

A decision of the Anglican Catholic Church to remove an individual from his position as a priest, which decision is consistent with the canons of the church, is a final decision binding upon the court. Therefore, the former priest will be enjoined from serving as rector of his former parish.

A parish within the Anglican Catholic Church remains a parish of the Church until such time as either the parish amends its bylaws to withdraw from the church or the Anglican Catholic Church takes action with regard to the parish.

Where a dispute between two factions of a parish prevent the members from acting in a manner consistent with the interests of the corporation, Pennsylvania law allows for the appointment of a custodian to preserve assets and assure compliance with bylaws until the current membership is determined and a proper organizational structure is in place.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 60001 - 1998

Appearances: Timothy McNair, Esquire for Bentley
Gerald J. Villella, Esquire for St. James Anglican Catholic Church

**OPINION**

Bozza, John A., J.

**Findings of Fact:**

Among the facts found in this case are the following:

1. The Anglican Catholic Church (hereinafter "the Church"), is a hierarchal church divided into two provinces.

2. The Metropolitan is the Chief Bishop and Pastor of a province.

3. The diocese is an entity within a province administered by a bishop and comprised of individual parishes.

4. The bishop is the chief administrator of church affairs within a diocese.

5. The decisive authority within the Church resides in its bishops as a college and as set forth in its Constitution and Canons.

6. Each parish forms a civil non-profit corporation to conduct its temporal affairs, including the holding of property.

7. If a parish properly leaves the church, it takes with it property held in its own name.

8. Membership in a parish is determined by the Corporate By-Laws.

9. A rector of a parish is called by the parish and serves at the pleasure of the Bishop of the diocese.

10. St. James Anglican Catholic Church (hereinafter "St. James") is a parish formed pursuant to Pennsylvania's Non-For-Profit Law in 1989 and a part of the Church.

11. As a part of its process of incorporation, St. James adopted By-Laws in which it sets forth that it "accepts and abides by the Canons of the Diocese of the Resurrection." (The only Canons of record in this proceeding are the Canons of the Anglican Catholic Church).

12. Pursuant to Article IV of its By-Laws, St. James delineates the qualifications for membership in the parish.

13. Frederick Bentley was a priest of the Anglican Catholic Church, an incorporator of St. James Parish and its first and only rector.

14. Around July of 1997, a dispute arose within the Church over who would become the Acting Metropolitan in the event that Bishop Lewis became incapacitated or died.

15. In the event the Metropolitan becomes incapacitated or dies, the senior bishop by rite of consecration becomes the Acting Metropolitan.

16. Archbishop Lewis requested the opinion of the Church's registrar, who opined that the Senior Bishop would be John T. Cahoon.

17. Bishop Thomas Klepinger, who was the bishop of the Diocese of the Resurrection, and certain others, believed that he should be identified as the Senior Bishop.

18. The matter was submitted to Provincial Court, but before the Court rendered a decision, the dispute became more pronounced.

19. In August, 1997, after much controversy, the Metropolitan signed "Acts of Inhibition" against Bishop Klepinger and four other bishops, who, as a result, lost their authority to act as bishops.

20. Father Bentley was sympathetic with the position of Bishop Klepinger, and he encouraged his parishioners to support him.

21. In September/October, 1997, at a meeting of the parish "vestry" (the Board of Directors of the corporation), Father Bentley asked and received the support of the majority of the members of the vestry. The exact nature and extent of the support cannot be determined from the record.

22. As the dispute unfolded, some members of the parish, including Rhonda Maxa, a member of the vestry, believed that Father Bentley's position in support of Bishop Klepinger was incorrect.

23. Two separate factions emerged; one led by Father Bentley, and one that included among others Rhonda Maxa, Aletha Hood, Jack Zimmerly and Gloria Zimmerly.

24. On October 29, 1997, seven parish members, including three members of the vestry, signed a statement declaring their "allegiance to the original province of the Anglican Catholic Church."

25. A meeting was called at the home of Rhonda Maxa for October 29, 1997, and notice of the meeting was sent to all members of the parish except Father Bentley.

26. The notice of the meeting did not expressly state the purpose of the meeting.

27. When Father Bentley arrived at the meeting, he was asked to leave.

28. Ms. Maxa stopped attending Father Bentley's services after the last Sunday in October because she was advised by the Reverend John A. Hollister, Chancellor of the Church, that the St. James Parish which Father Bentley was heading "was either non-existent or was a new parish of the new church."

29. As of the end of October, 1997, no action had been taken by St. James to withdraw from the ACC.

30. When Ms. Maxa and others stopped attending services, they no longer received any notices of vestry or parish meetings.

31. At the time of the controversy in October, 1997, there were approximately 21 voting members of the parish.

32. As of the end of October, no formal action had been taken against Father Bentley by the Church, although a request "to inhibit him" had been made by a fellow priest, Stanley F. Lazorczyk, on September 27, 1997. Although a "Writ of Suspension" was issued by The Very Rev. Stanley Lazorczyk on December 19, 1997, there was insufficient evidence in the record to conclude that he had the authority to do so pursuant to Canon [10] 7.02. and Canon [3]8.

33. At no time prior to the annual meeting of St. James Parish did Father Bentley voluntarily leave the Church, although his dispute with the church hierarchy continued.

34. On October 26, 1997, three members of the parish, including Rhonda Maxa, filed a "certificate" asking that Father Bentley be inhibited. No formal action was taken upon this request.

35. Father Bentley scheduled the annual meeting of the parish for November 9, 1997 and notice was given from the pulpit during services and in the parish bulletin. Notice was not provided to members not present at the service.

36. Ms. Maxa and others with whom she was associated in her opposition to Father Bentley did not attend the parish meeting. Although she did not receive notice of the meeting, she would not have attended even if she had.

37. At the meeting, a quorum of eight members was present and they voted to fill certain vacancies in the vestry and unanimously voted to amend the By-Laws to define references to the Anglican Catholic Church/ Diocese of the Resurrection as meaning Anglican Catholic Church (Allentown Synod).

38. A resolution was passed at the meeting of the vestry on October 27, 1997, which, among other things, expressed support for Bishop Klepinger and his supporters and to what they referred to as the "provincial synod of Allentown."

39. In the resolution of October 27, 1997, Rhonda Maxa was advised that she had "removed yourself from this communion" and that she was removed as acting senior warden.

40. Various items of property had been acquired by the parish during its existence and Ms. Maxa and other individual plaintiffs made contributions to the church.

41. In June of 1998, Father Bentley received a gift in the amount of $30,000.00 from the Presbytery of Lake Erie for the purpose of assisting St. James Parish in obtaining a permanent church building. The check was made payable to St. James Anglican Catholic Church.

42. The $30,000.00 donation was made after the dispute described above and after the amended By-Laws were adopted at the annual meeting in November, 1997.

43. Prior to making the donation, the Presbytery was made aware by Father Bentley of the conflicts that had arisen within the parish.

44. The donation was used to assist in the purchase of the church building on April 30, 1998.

45. Father Bentley's group now holds themselves out as St. James of Jerusalem Church parish, and as a "Anglican rite Catholic Church."

46. In October, 1998, the Diocese of the Resurrection issued a "Pronouncement of Deposition" deposing Father Bentley as a priest in the Church. This was issued by Bishop John Cahoon.

47. To be a voting member of the parish, one must be at least eighteen (18), confirmed, and an active member who has contributed of record for at least three months preceding the vote. (By-Laws, Article V). The voting members of St. James Church as of November 9, 1997 included Rhonda Maxa, Patrick McCleery, Aletha Hood, Mark Bullard, Jenny Bullard, Albert Smith, Jill Jerret, Ronald Weir, Benjamin Bentley, Alex Bentley, Frederick Bentley, Barbara Bentley, Rebecca Bentley, Elizabeth Michalik, Chester Fachetti, Dr. Jack Zimmerly, Gloria Zimmerly, Lela McCleery, Charles McCleery and Elizabeth Fachetti.

48. In order to withdraw from the Church or disaffiliate from the Diocese of the Resurrection, a vote of two-thirds of the eligible voting members of the parish is required. (By-Laws, Article XVII).

49. An annual meeting of the parish shall be held on one of the four

Sundays preceding Advent. (By-Laws, Article VI).

50. A special meeting can be called by a majority of the vestry, and notice must be provided which includes a statement of the business to be transacted, five days prior to the date of the meeting and sent to all members eligible to vote. (By-Laws, Article VII).

51. The rector of the parish is called by the vestry of the parish and must be a member and recognized by the Diocese of the Resurrection. (By-Laws, Article XI).

52. The "Provincial Canons" take precedence over the By-Laws in case of conflict. (By-Laws, Article XI).

53. The discipline of a member of the clergy of the Anglican Catholic Church is to be carried out in accordance with the constitution and of the Church. (Canon Title X).

54. The Canons vest the jurisdiction and responsibility for the resolution of disputes over church matters in the ecclesiastical courts with a right to appeal to a higher authority. (Constitution, Art. X; Canon Title IX).

55. No disciplinary action has been taken against any member of St. James Anglican Catholic Church, other than Father Bentley.

56. No disciplinary or other action has been taken by the Anglican Catholic Church with regard to the status of St. James Parish within the Diocese of the Resurrection of the Anglican Catholic Church.

57. No disciplinary action has been taken against Father Bentley as a member of the St. James Anglican Catholic Church parish apart from his status as priest.

58. As of November 9, 1997, no disciplinary or other action had been taken against Father Bentley by any adjudicatory authority of the Anglican Catholic Church.

59. The members of the parish associated with the respective factions involved in this dispute have been unable to agree as to the affiliation of the parish with the Anglican Catholic Church or with a separate group under the leadership of Bishop Klepinger and referred to as to the Anglican Catholic Church (Allentown Synod). This dispute has significantly impaired the ability of the corporation to function consistent with its By-Laws from October, 1997 until the present.

60. The disagreement among the members of the parish has led to significant difficulty in the conducting of the affairs of the corporation, making it very impracticable to accomplish the purpose of the corporation as set forth in the Articles of Incorporation.

**Discussion:**

This is an action in equity concerning a conflict between two factions of a parish within the Anglican Catholic Church over property rights and related temporal matters. The Parish of St. James Anglican Catholic Church is a non-for-profit corporation incorporated pursuant to the laws of the Commonwealth of Pennsylvania. On November 9, 1997, an Annual Meeting

of the corporation was conducted and the By-Laws were amended by two-thirds of the eligible members present to add Article XIX as set forth in the defendant's Exhibit 1. Article XIX now reads as follows:

> "The Anglican Catholic Church/Diocese of the Resurrection throughout this document shall mean the Anglican Catholic Church (Allentown Synod) Under the spiritual direction of Metropolitan Leslie Hamlett, the Rt. Rev'd. Thomas Klepinger, Bishop of the Diocese of Resurrection (Allentown Synod) and Rector, Father Frederick Bentley, and their successors.

At the time of the annual meeting, two-thirds of the total eligible voting members of St. James Parish did not vote to withdraw from the Anglican Catholic Church as required by Article XVII of the By-Laws. The amendment to the By-Laws did not change St. James' affiliation with the Church and therefore St. James remains within the hierarchal structure of the Church and subject to its constitution and Canons.

The effect of the adoption of the amendment from the point of view of the Church is not known because no action has been taken with regard to the Parish or any member thereof by the church's highest adjudicatory authority. This Court would be bound by a decision of the Anglican Catholic Church made in that regard. *Poesnecker v. Ricchio,* 158 Pa. Commw. 459, 631 A.2d 1097 (1993).

The matter of Father Frederick Bentley's status within the Anglican Catholic Church has been resolved. He was deposed by the Diocese of the Resurrection on October 28, 1998, and Father Bentley sought no further review of that action within the Church. Therefore, the Church's highest adjudicatory authority has resolved the issue of Father Frederick Bentley's status as a priest within the Anglican Catholic Church. The By-Laws provide that the rector of the parish must be a member and recognized by the Diocese of the Resurrection and the Canons provide that a rector serves with the approval of the Bishop. It is therefore apparent that Father Bentley is not eligible to be the rector of St. James Anglican Catholic Church.

The gift of $30,000.00 made by the Presbytery of Lake Erie is the lawful property of the non-for-profit corporation identified as St. James Anglican Catholic Church. It was provided to the parish for the purpose of assisting it in the acquisition of a church building and only after it was aware of the current controversy.

It is apparent to the Court that the two factions involved in this dispute have a fundamental difference over a matter of ecclesiastical significance. The only formal action taken by the Church has been the deposition of Father Frederick Bentley. The status of the parish and therefore the non-for-profit corporation has not been addressed by the Anglican Catholic Church. Since the parish has not acted consistent with the requirements of Article XVII of the By-Laws, the parish remains, from the corporation's

point of view, affiliated with the Anglican Catholic Church. It is obvious that the disagreement among the members has made it extraordinarily difficult and very impracticable to conduct affairs of the corporation in a manner calculated to accomplish the corporate purpose set forth in the articles of incorporation. A custodian will need to be appointed pursuant to Pennsylvania Not-For Profits Corporation Law, Section 5764, and appropriate steps taken to preserve corporate assets and assure compliance with St. James' corporate purpose and By-Laws.

An appropriate Order shall follow.

## DECREE NISI

AND NOW, to-wit, this 29 day of November, 2000, following a non-jury trial, and upon consideration of the claims of the plaintiff and the counterclaim of the defendants, it is hereby **ORDERED, ADJUDGED and DECREED** as follows:

1. Father Frederick Bentley shall not serve as rector of St. James Anglican Catholic Church Parish.

2. (Hon.) John R. Falcone is appointed custodian pursuant to 15 Pa.C.S.A. § 5764, and shall conduct the temporal affairs of the corporation consistent with the authority set forth therein and as the Court shall otherwise provide.

3. No person shall dispose, transfer or encumber any property of the corporation until further Order of Court.

4. No further action may be taken to amend the By-Laws or articles of incorporation without the consent of the Court.

5. The custodian shall direct that an accounting be conducted within thirty (30) days of the date of this Order.

6. In all other respects, the relief requested by the parties is **DENIED**.

**By the Court,**
**John A. Bozza, Judge**

## SUPPLEMENTAL OPINION

Bozza, John A., J.

This matter is before the Court pursuant to Rule 1925(b), Statements of Matters Complained of on Appeal filed by the parties, Frederick J. Bentley and St. James Anglican Catholic Church. On March 13, 2001, this Court issued an Order denying plaintiffs' Motion for Post Trial Relief and defendants' Exception to Decree Nisi and/or in the alternative Post Trial Motion. In support of its initial decision, this Court filed an Opinion including Findings of Fact. This Opinion is provided in order to more specifically address issues arising out of the lawsuit and to further set forth the Court's reasoning.

This action arose as a result of a dispute between the parties concerning

the governance of their parish and diocese. The courts of this country have taken a long-standing position against interference in doctrinal or ecclesiastical matters of religious organizations, deferring in that regard to the decisions of a church's adjudicatory authority. *Watson v. Jones,* 80 U.S. 679, 20 L.Ed. 666, 13 Wall. 679 (1871). There are occasions, however, when the resolution of a dispute among members of a religious organization are properly before the court. In *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed. 2d 658 (1969), the United States Supreme Court adopted what has come to be known as the "neutral principles of law" approach to the resolution of such matters. The Court noted that where a dispute involves property issues, such principles can be applied without jeopardizing First Amendment values. The "neutral principles" approach has been applied many times in Pennsylvania, including in *Presbytery of Beaver-Butler of the United Presbyterian Church v. Middlesex Presbyterian Church,* 507 Pa. 255, 489 A.2d 1317 (1985), where the Pennsylvania Supreme Court determined that a local parish could retain ownership of certain property following the termination of their membership with the national church. In *Trinity Lutheran Evangelical Church v. May,* 112 Pa. Commw. 557, 537 A.2d 38 (1988), the Commonwealth Court utilized the "neutral principles" approach in concluding that the Court was bound by a determination of an appropriate church authority where the church acted in accordance with its rules and procedures. *See, also, Poesnecker v. Ricchio,* 158 Pa. Commw. 459, 631 A.2d 1097 (1993), (affirming the trial court's decision to appoint a custodian to resolve a dispute within a religious organization incorporated under Pennsylvania's non-profit corporation law); *Conference of African Union First Colored Methodist Protestant Church v. Shell,* 659 A.2d 77 (Pa. Commw. 1995), (finding that church property was held in trust for the Conference); *All Saints Anglican Church v. Andrews,* Court of Common Pleas of Lancaster County, CI-98-00656 (2000), (the Court applied the "neutral principles" analysis in resolving a property dispute between the All Saints Anglican Church and certain members of the parish).

Of further guidance is the Pennsylvania Supreme Court's decision in *Kaminski v. Hoynak,* 373 Pa. 194, 95 A.2d 548 (1953). In *Kaminski,* members of the Holy Ghost Carpatho-Russian Greek Catholic Orthodox Church of the Eastern Rite of Phoenixville sought to have their pastor enjoined from conducting services in the church and give up his living quarters on church property. Although it was decided before the court had adopted the "neutral principles" approach, the court nonetheless noted that "a court of equity does have jurisdiction to protect property rights and where such rights are involved, the fact that the dispute arose within a church organization will not prevent a court of equity from acting to protect those property rights." The court further noted that, "if the action of a church

body is contrary to the law it professes to administrator, such action may be reviewed." *Id.* at 199, 95 A.2d at 551. The court then went on to find that the church failed to follow the constitution and laws adopted by the diocese and, as a result, had not proceeded to properly remove the pastor.

In resolving the present dispute, this Court was bound by the Anglican Catholic Church's ecclesiastical decisions properly rendered pursuant to church law. St. James Anglican Catholic Parish, as a member of the Anglican Catholic Church, was obligated to follow its laws, but as a non-profit corporation, it also was required to act consistently with its articles of incorporation and by-laws, and it remains subject to Pennsylvania's non-profit corporation law.

As noted in this Court's Findings of Fact, and otherwise supported in the record, Father Frederick Bentley was "deposed" (removed as a priest of the Anglican Catholic Church) by action of Bishop John Cahoon in October, 1998. The church's canons provide that a "sentence of deposition" may be appealed directly to the Metropolitan, who in turn is authorized to take alternative courses of action. *Defendant's Exhibit 2;* Canon § 10(3.03). Ostensibly because he refused to accept his authority, Father Bentley took no steps to appeal Bishop Cahoon's issuance of deposition within the framework provided by the church.[1] Therefore, Bishop Cahoon's action constituted a decision by the final adjudicatory authority within the Anglican Catholic Church and this Court is bound by it. *See, Presbytery of Beaver-Butler United Presbyterian Church v. Middlesex, supra.* at 259, 489 A.2d at 1319, (the court recognizing the effect of the "deference rule"). Therefore, following October, 1998, Father Bentley was not authorized to serve as a priest within the Anglican Catholic Church.

The by-laws of St. James parish require that in order to serve as the "rector" of the parish, one must be a member and recognized by the Diocese of the Resurrection. Since Father Bentley was no longer a priest of the Anglican Catholic Church and therefore not recognized by the Diocese of the Resurrection, he was no longer eligible to serve as rector of the parish.

A core issue presented to the Court was whether St. James parish had disaffiliated with the Anglican Catholic Church. The parish's by-laws provide the vehicle by which it may disaffiliate from the Church. Article XVII states that in order for the church to withdraw from the Anglican Catholic Church it must obtain a two-thirds vote of the total eligible members

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[1] The underlying dispute within St. James Parish concerned Father Bentley's belief that Bishop Thomas Kleppinger should have been selected as Bishop of the Diocese of the Resurrection rather than Bishop Cahoon. The record was clear that Bishop Cahoon had been properly appointed by the Anglican Catholic Church. *See also: All Saints Anglican Church v. Andrews, supra.*

of the parish. The church is required to follow its own rule in that regard and the evidence introduced during the trial indicated that it failed to do so. At the time that a vote was taken, there were no fewer than twenty members of the parish eligible to vote. The evidence introduced at trial was sufficient to find that the requirement of a two-thirds vote was not met. The action of the members present at the annual meeting of November 9, 1997, amending the by-laws was insufficient to constitute a vote to withdraw from the Anglican Catholic Church. Therefore, the non-profit corporation identified as St. James Anglican Catholic Church remains a part of the Anglican Catholic Church.

Finally, the record reveals a long-standing and significant dispute between two factions of the parish who disagree about fundamental matters of ecclesiastical and practical significance. It was obvious to the Court that they were not able to reconcile their differences and to act in a manner consistent with the interests of the corporation and in a manner which would allow the corporation to pursue its purpose as set forth in the articles of incorporation. In such circumstances, Pennsylvania law provides for the appointment of a custodian to take the necessary steps to preserve corporate assets and assure compliance with the by-laws. *Poesnecker v. Ricchio*, 158 Pa. Commw. 459, 631 A.2d 1097 (1993); *Beverly Hall Corporation v. Ricchio*, 659 A.2d 600 (Pa. Commw. (1995). The dispute between the two groups continues and there remains a compelling need to oversee the temporal affairs of St. James until such time as the Parish's current membership is ascertained and a proper organizational structure in place.

For the reasons set forth above, this Court's Order of March 13, 2001 should be affirmed.

Signed this 4 day of June, 2001.

**By the Court,**
**John A. Bozza, Judge**

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION
v.
VICTOR P. BOBOSHKO**

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION
v.
PAUL A. PRZEPIERSKI**

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION
v.
MICHAEL GIBSON**

*CRIMINAL PROCEDURE/DRIVING UNDER THE INFLUENCE*

The Department of Transportation (DOT) may suspend the operating privileges of a Pennsylvania driver when they receive a report from New York State (or other party states) indicating that a Pennsylvania resident has been convicted of a substantially similar offense to Pennsylvania's driving under the influence statute. This includes new York State's driving while ability impaired as a result of the consumption of alcohol, New York Vehicle and Traffic Law §1192(1). *Squire v. Comm. of Pennsylvania, Department of Transportation, Bureau of Driver Licensing*, 769 A.2d 1224 (Pa. Commw. Ct. 2001); 75 Pa.C.S.A. §1581 (IV) & (II).

*Editor's Note: The Court opinion upheld but disagreed with the DOT policy of suspending the driver's license of the appellants. Judge Bozza indicated that this policy is contrary to the intent and plain language of the driver's license compact, 75 Pa. C.S. §1581. The court stated that it was not apparent whether conduct punishable under New York State's DWAI statute would be subject to suspension if it occurred in Pennsylvania. The degree of impairment required for a conviction under New York law is far less than that required in Pennsylvania. However, the Court was bound by precedent from the Commonwealth Court.*

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NOS. 11020-2001, 10126-2001, 10125-2001

Appearances: Chester J. Karas, Esquire for PA Dept. of Trans.
Robert Brabender, Esquire for Defendant Boboshko
Donald L. Wagner, Esquire for Defendant Przepierski
John B. Carlson, Esquire for Defendant Gibson

## OPINION

Bozza, John A., J.

In each of the cases before the Court, a Pennsylvania driver was convicted of violating New York Vehicle and Traffic Law Section 1192(1), that prohibits driving while ability impaired as the result of the consumption of alcohol. The New York State authorities notified Pennsylvania of the convictions because both states are parties to the Driver License Compact, 75 Pa.C.S. § 1581. Pennsylvania in turn notified the appellants that their driving privileges in Pennsylvania would be suspended for a period of one year as a result of their New York State convictions. Each driver appealed the decision of the Pennsylvania Department of Transportation (DOT), and those appeals are now pending before this Court.

A cursory search indicates that since 1995 there have been more than seventy-five (75) reported appellate court cases concerning the application of the Compact, and in particular, Article IV(a)(2), which relates to convictions for driving under the influence of alcohol.[1] Most certainly, the impact of the Compact on Pennsylvania drivers has been significant.

As a party to the Compact, Pennsylvania has agreed to give the same effect to the driving conduct of a Pennsylvania resident in a Compact state as it would if such conduct had occurred in Pennsylvania with regard to a conviction for:

> (2) driving a motor vehicle while under the influence of intoxicating liquor . . . . . which renders the driver incapable of safely driving a motor vehicle.

75 Pa.C.S.A. § 1581(IV) & (II).

In effect, Pennsylvania agreed to suspend for one year the operating privileges of any Pennsylvania resident who was convicted of driving under the influence of alcohol "to a degree that renders the driver incapable of safely driving a motor vehicle" or an offense of a substantially similar nature. *Id* at IV(c). The Pennsylvania legislature more recently adopted an amendment to the Compact which provides that if a party state has a statute that describes the offense as driving while impaired, such offense shall be considered "substantially similar" to Pennsylvania's DUI provisions, even if it requires a different degree of impairment. *Id.* at Section 1586.[2] It would appear on the basis of Section 1586 and recent Pennsylvania

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[1] It also appears that fewer than thirty cases have reached the appellate courts of all the other party states to the Compact combined.

[2] This amendment may well have been in response to the Commonwealth Court's decision in *Olmstead v. Commonwealth of Pennsylvania,* 677 A.2d 1285 (1995), in which the Court concluded that New York State's DWAI offense was not substantially similar to Pennsylvania's DUI offense. *See also, Petrovich v. Department of Transportation, Bureau of Driver Licensing,* 559 Pa. 614, 741 A.2d 1264 (1999), (holding that New York's DWAI statute was not substantially similar to Article 4(a)(2) of the Compact.)

appellate court decisions that the current state of the law in Pennsylvania requires the DOT to take appropriate action, which may include the suspension of operating privileges against Pennsylvania drivers when they receive a report from New York State or some other party state indicating that a Pennsylvania resident has been convicted of a driving under the influence offense, including New York's DWAI, regardless of the degree of impairment. *See, Horvath v. DOT, Bureau of Driver Licensing,* 2001 Pa. Commw. LEXIS 196 (2001); *Squire v. Comm. of Pennsylvania, Department of Transportation, Bureau of Driver Licensing,* 769 A.2d 1224 (Pa. Commw. Ct. 2001). Therefore, this Court is constrained to deny the appeals presently before the Court.

Because I most respectfully disagree that the DOT properly suspended the drivers' licenses of the appellants, I write to reiterate the position expressed by this Court in *Commonwealth v. Wroblewski,* (Erie County Court of Common Pleas No. 13854-1999), (reversed by the Commonwealth Court in an unreported Opinion). It is my view that allowing DOT to suspend the operating privileges of a Pennsylvania driver for conviction of New York State's driving while ability impaired (DWAI) is contrary to the intent and plain language of the Compact. The Compact most certainly does not require a state to sanction its own drivers for conduct that does not violate its own statutes. The drafters and adopters of the Compact did intend to promote "overall compliance with motor vehicle laws . . . as a condition precedent for the continuance . . . of any license to operate a motor vehicle in any of the party states." 75 Pa.C.S. § 1581, Article I(b)(2). This is a most laudable objective which is not advanced when a party state like Pennsylvania takes away operating privileges from its citizens for behavior which would not merit such action had it been exhibited within its own jurisdiction. The language of the Compact dictates this conclusion. Article IV only requires that Pennsylvania suspend the driving privileges of its citizens if the conduct for which they were convicted in New York, or any other party state, would have required suspension had it occurred in Pennsylvania. The relevant language is as follows:

> "The licensing authority in a home state for purpose of suspension shall give the same effect **to the conduct reported** . . . as it would **if such conduct had occurred** in the home state .... (emphasis added).

Article IV(a).

This language was not modified in any way by the addition of Section 1586 which simply requires Pennsylvania to treat any offense in another Compact state relating to driving under the influence of alcohol to be substantially similar to its own DUI statute, regardless of impairment requirements. It does not require that the license of a Pennsylvania driver should be suspended even if the driver's conduct did not violate Pennsylvania law. The a nalysis for determining that matter remains as

follows:

> 1. Are the Pennsylvania and New York offenses both the same or substantially similar to the driving a motor vehicle while under the influence of intoxicating liquor provision set forth in Article IV(a)(2)? *See, Petrovich v. Department of Transportation, Bureau of Driver Licensing,* 559 Pa. 614, 741 A.2d 1264 (1999). If the answer is "yes" then,
>
> 2. Would the **conduct** for which the person was convicted in New York lead to a suspension of operating privileges if it had occurred in Pennsylvania? (Emphasis added).

It is obvious that Pennsylvania's DUI statute is almost identical to the language contained in the Compact. It is equally apparent the language of the DWAI statute in New York is not in anyway similar to the Compact language. *Petrovich, Id.* However, because the legislature added Section 1586, it appears that the DOT regards the DWAI statute and Pennsylvania's DUI statute as substantially similar <u>and</u>, therefore, substantially similar to the language of the Compact.

With regard to the second part of the analysis, Pennsylvania would have to be aware of at least the threshold conduct necessary for conviction in order to determine if it is sanctionable in Pennsylvania. Fortunately, it is often possible to ascertain with substantial precision the type of conduct which meets the threshold for conviction by merely reading another state's statute or by reviewing relevant case law. However, here, with regard to New York State's DWAI statute, it is not possible to know if the violator's conduct would be subject to suspension if it occurred in Pennsylvania simply by reading it (or, for that matter, interpretive case law). The degree of impairment required for conviction of DWAI in New York is far less than that required in Pennsylvania. *Olmstead v. Commonwealth of Pennsylvania, Department of Transportation,* 677 A.2d 1285 (1996); *Pappacera v. DOT, Bureau of Driver Licensing,* 716 A.2d 714 (Pa. Commw. 1998). Consequently, knowing only of the conviction, Pennsylvania cannot conclude that the effects of such conduct had it occurred in Pennsylvania would be a suspension of driving privileges.[3]

This Court's analysis also does not depend on a determination of whether New York's DWAI law is substantially similar to the law of Pennsylvania, nor does this Court suggest that the amendment to Section

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[3] This is not because of a reporting defect. There is nothing wrong of any legal consequence with the form used by New York to tell Pennsylvania about the New York convictions. *See, Harrington v. Commonwealth*, 563 Pa. 565, 763 A.2d 386 (2000). Pennsylvania simply does not have enough information to make a decision in this circumstance.

1586 is without effect or otherwise illegal or unconstitutional. This Court does conclude, however, the effect of the amendment to Section 1586 is limited. It does not alter the very fundamental notion of equitable treatment explicit in the Compact in Article IV. The Compact continues to provide that Pennsylvania should sanction its citizens for driving convictions in other states only where the conduct underlying the conviction would merit sanctions in Pennsylvania.

Finally, the other arguments advanced by the appellants concerning constitutional violations are without merit, as those issues have been definitively resolved in the Pennsylvania courts. *Horvath v. DOT, Bureau of Driver Licensing,* 2001 Pa. Commw. LEXIS 196 (2001), *Commonwealth v. McCafferty,* 563 Pa. 146, 758 A.2d 1155 (2000); *Crooks v. DOT, Bureau of Driver Licensing,* 760 A.2d 1106 (2001).

Signed this 24 day of June, 2001.

**COMMONWEALTH OF PENNSYLVANIA**
**DEPARTMENT OF TRANSPORTATION**
**v.**
**VICTOR P. BOBOSHKO**

**ORDER**

AND NOW, to-wit, this 26 day of June, 2001, in accordance with the attached Opinion, it is hereby **ORDERED, ADJUDGED and DECREED** that the appeal in this case is **DENIED**.

**By the Court,**
/s/ **John A. Bozza, Judge**

**COMMONWEALTH OF PENNSYLVANIA**
**DEPARTMENT OF TRANSPORTATION**
**v.**
**PAUL A. PRZEPIERSKI**

**ORDER**

AND NOW, to-wit, this 26 day of June, 2001, in accordance with the attached Opinion, it is hereby **ORDERED, ADJUDGED and DECREED** that the appeal in this case is **DENIED**.

**By the Court,**
/s/ **John A. Bozza, Judge**

**COMMONWEALTH OF PENNSYLVANIA**
**DEPARTMENT OF TRANSPORTATION**
**v.**
**MICHAEL GIBSON**

**ORDER**

AND NOW, to-wit, this 26 day of June 2001, in accordance with the attached Opinion, it is hereby **ORDERED, ADJUDGED and DECREED** that the appeal in this case is **DENIED**.

**By the Court,**
/s/ **John A. Bozza, Judge**

**RICHARD S. GREIG**

**v.**

**JOHN R. GOETZINGER**

*PLEADINGS/PRELIMINARY OBJECTIONS*

Preliminary objections in the nature of a demurrer will be granted where it appears with certainty that based upon the facts averred, the law will not permit recovery by the plaintiff.

*EQUITY/SPECIFIC PERFORMANCE*

In a lease agreement between the parties, the plaintiff was given an exclusive irrevocable option and right to purchase a certain piece of real estate. However, the agreement went on to require that the defendant must be able to convey good and marketable title. Here, the property in question was subjected to a mortgage in favor of the defendant's ex-wife. The Court held that the existence of this mortgage rendered the title unmarketable to any potential purchaser because it would expose them to the hazard of a lawsuit. Therefore, the Court ruled that no breach of the lease agreement existed because the defendant was unable to convey good and marketable title to the plaintiff. Therefore, the Court denied the plaintiff's request for a decree of specific performance.

*EQUITY/SPECIFIC PERFORMANCE/ADEQUATE REMEDY AT LAW*

Where the lease agreement provides the plaintiff with a remedy in the event of the defendant's inability to convey good and marketable title, specific performance is inappropriate.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 60043-2000

Appearances: Sumner E. Nichols, II, Esquire for Mr. Greig
Joseph E. Altomare, Esquire for Mr. Goetzinger

**OPINION**

Bozza, John A., J.

This matter is before the Court on plaintiff, Richard S. Greig's, Rule 1925(b) Statement of Matters Complained of on Appeal. On August 31, 2000, Mr. Greig filed a Complaint for Specific Performance against the defendant, John R. Goetzinger. A praecipe to reinstate Plaintiff's Complaint was filed on October 4, 2000, and defendant filed Preliminary Objections on October 24, 2000. The Court heard argument on the matter on April 3, 2001, and issued an Order dated May 8, 2001, sustaining Mr. Goetzinger's Preliminary Objections in the nature of a demurrer and dismissing Mr. Greig's cause of action. Plaintiff filed a timely Notice of Appeal and Statement of Matters Complained of on Appeal.

In his Statement, Mr. Greig asserts that the trial court erred in sustaining defendant's preliminary objections resulting in the dismissal of his cause

of action. Plaintiff's assertion is based upon the following reasons:

(a) The May 8, 2001, Order lacks a supporting opinion limiting its effect, so it appears to be *res judicata* as to any subsequent claims under the subject lease agreement, which goes beyond the relief requested by the defendant;

(b) At oral argument, plaintiff's counsel recalls that both parties and the Court agreed that the issue to be determined was "Is title to real estate marketable if it is subject to encumbrances which total less than the agreed consideration?" Plaintiff's counsel believes the Court would have had to answer this question in the negative to sustain defendant's preliminary objections, which plaintiff's counsel believes is an error of law;

(c) Plaintiff's Complaint pleads sufficient facts to make out a *prima facie* case for specific performance;

(d) The Court has not held the defendant to his duty to deal in good faith; and

(e) The Court has not attempted a construction of the lease agreement giving it validity and effect.

When considering preliminary objections in the nature of a demurrer, the Court must accept as true all well-pled material facts set forth in the complaint and give the plaintiff the benefit of all reasonable inferences deducible therefrom. *Aetna Electroplating Company, Inc. v. Jenkins,* 335 Pa. Super. 283,484 A.2d 134 (1984). Further, the Court must overrule a demurrer unless it is certain that there is no set of facts under which the plaintiff could recover. *Bower v. Bower,* 531 Pa. 54, 611 A.2d 181 (1992). It must appear with certainty that, upon the facts averred, the law will not permit recovery by the plaintiff. Any doubt must be resolved in favor of overruling the demurrer. *Moser v. Heistand,* 545 Pa. 554, 681 A.2d 1322 (1996). Applying these criteria to the present case, the Court has accepted the material facts pled in Mr. Greig's Complaint as true, and concluded that the plaintiff is not entitled to the relief requested.

On June 26, 1992, Mr. Goetzinger, ("as Landlord"), and Mr. Greig, ("as Tenant"), entered into a Lease and Purchase Option Agreement (hereinafter "Lease Agreement") regarding a commercial property located at 2956 West 17th Street, Erie, Pennsylvania, which adjoins plaintiff's business. Under the Lease Agreement, plaintiff agreed to lease the property to defendant for a ten year term beginning July 1, 1992, with a monthly net rental fee of $1,421.88.

Paragraph 19 of the Lease Agreement, captioned "Purchase Option,"

provides as follows:

> If Tenant is not in default under this Lease, Landlord hereby grants to Tenant the exclusive and irrevocable option and right to purchase the real estate . . . for a total purchase price of One Hundred Seventy-five Thousand ($175,000.00) Dollars. This option shall commence on June 1, 1992 and shall expire at Twelve midnight on May 31, 2002. To exercise this option, Tenant shall send to Landlord . . . written notice of his intention to so exercise. The closing for such purchase and sale shall take place upon the latter of thirty (30) days after Landlord's receipt of Tenant's written notice of his intention to exercise this option or thirty (30) days after notice by Landlord to Tenant that he is in the position to convey **good and marketable title to Tenant, free and clear of all claims, liens and encumbrances**, . . . (Emphasis added).

Defendant's ex-wife filed a divorce action in 1986, culminating in the entry of a final decree in divorce on November 28, 1994. Margaret Goetzinger's statutory interest in the property was then converted to a mortgage in her favor as security for on-going alimony payments from the defendant through October, 2002. Plaintiff was aware of the divorce action when he entered into the Lease Agreement in 1992. *See,* Transcript of Preliminary Objections, April 3, 2001, p. 5.

On June 1, 1999, Mr. Greig's counsel sent a letter to Mr. Goetzinger providing him notice that plaintiff was exercising his right to purchase the property for the option price of $175,000.00 pursuant to the Lease Agreement. Mr. Goetzinger's counsel responded to plaintiff's counsel by letter dated June 11, 1999, stating:

> Mr. Goetzinger regrets that he is not in a position to convey good and marketable title at this time. In checking the record, you will find that in accordance with a divorce decree entered in November of 1994, the property in question became subject to a mortgage in favor of Mr. Goetzinger's ex-wife as security for on-going alimony payments and other financial obligations owing her pursuant to that decree. . . . Paragraph 19 provides that closing of any exercise of the option is contingent upon Mr. Goetzinger's ability to convey good and marketable title.

Following receipt of this letter, Mr. Greig's counsel telephoned Attorney Joseph B. Spero, counsel for Margaret Goetzinger. On June 29, 1999, Attorney Spero sent Mr. Greig's counsel a letter confirming Margaret Goetzinger's willingness to take full payment of her existing mortgage, which was approximately $45,000.00 to $55,000.00. At that time, this was the only existing lien on the property and theoretically, the sale price of $175,000.00 would more than adequately cover the lien amount owed. Mr.

Greig's counsel provided a copy of Attorney Spero's letter to Mr. Goetzinger's counsel by letter dated June 30, 1999, however, no response was forthcoming. Plaintiff is seeking a Court order requiring the defendant to execute a deed in favor of the plaintiff for the property located at 2956 West 17th Street, Erie, Pennsylvania, in return for receipt of $175,000.00, pursuant to Paragraph 19 of the Lease Agreement.

In this case, plaintiff is seeking specific performance of the Purchase Option under the Lease Agreement.

> "A decree of specific performance is not a matter of right, but of grace. Such a decree will only be granted if the plaintiff is clearly entitled to such relief, there is no adequate remedy at law, and the chancellor believes that justice requires such a decree. . . . In addition, specific performance should not be ordered where it appears that doing so may result in hardship or injustice to either party."

*Barnes v. McKellar,* 434 Pa. Super. 597, 609-610, 644 A.2d 770, 776 (1994) (Citations omitted). As noted above, Paragraph 19 of the Lease Agreement provides that the closing would take place thirty days after notice by landlord to tenant that, "he is in the position to convey good and marketable title to tenant, free and clear of all claims, liens and encumbrances."

> A marketable title is one that is free from liens and encumbrances and which a reasonable purchaser, well-informed as to the facts and their legal bearings, willing and ready to perform his contract, would, in the exercise of that prudence which businessmen ordinarily bring to bear upon such transactions, be willing to accept and ought to accept. A title is not marketable if it is such that the grantee may be exposed to the hazard of a lawsuit. . . .

*Barter v. Palmerton Area School District,* 399 Pa. Super. 16, 20, 581 A.2d 652, 654 (1990) (Citations omitted); *Boyle v. O'Dell,* 413 Pa. Super. 562, 605 A.2d 1260 (1992).

In the present case, the parties agree defendant's ex-wife has a mortgage lien on the subject property, and therefore, it is not "free and clear of all claims, liens and encumbrances." See, Transcript of Preliminary Objections, April 3, 2001, p. 6. This mortgage renders the title unmarketable to any potential purchaser because it would expose them to the hazard of a lawsuit. Therefore, no breach of the Lease Agreement exists because defendant is unable to convey good and marketable title to plaintiff at this time.

Although Plaintiff's Complaint does not contain any allegations of a breach by the defendant of his duty of good faith and fair dealing under the Lease Agreement, Mr. Greig does raise the issue in Plaintiff's Brief In

Opposition to Preliminary Objections. Plaintiff relies upon the Superior Court's decision in *Baker v. Lafayette College,* 350 Pa. Super. 68, 504 A.2d 247 (1986), for the principle that "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." *Id.* at 84, 504 A.2d at 255, citing Restatement (Second) Contracts § 205. The *Baker* case involved an employment contract and the Court specifically stated its holding was a narrow one. The Court further noted the Comments to the Restatement indicated the meaning of good faith "varies somewhat with the context". *Id.* In the context of *Baker,* the Court held that good faith required the employer "to render a sincere and substantial performance of these contractual undertakings, complying with the spirit as well as the letter of the contract." *Id.* at 85, 504 A.2d at 255.

It is unclear in Pennsylvania whether a duty of good faith applies to the parties under a lease agreement involving real estate. In *Liazis v. Kosta, Inc.,* 421 Pa. Super. 502, 618 A.2d 450 (1992), the Superior Court held a duty of good faith applied to a lessor and lessee under a lease and purchase agreement and cited the Restatement (Second) Contracts § 205. However, in *Commonwealth (DOT) v. E-Z Parks, Inc.,* 153 Pa. Commw. 258, 620 A.2d 712 (1993), the Commonwealth Court held no duty of good faith was owed by a landlord or tenant under a lease agreement because no special or fiduciary relationship existed between the parties.

Assuming a duty of good faith exists in the present case, plaintiff's Complaint does not aver any facts regarding how the defendant failed to act in good faith under the Lease Agreement. Mr. Greig maintains that the title is good and marketable because once the sale is consummated, Mr. Goetzinger can pay off his former wife's mortgage with the proceeds. The lease does not require that Mr. Goetzinger take steps to clear the title. Moreover, the terms of the mortgage or other financial circumstances may well dictate that a mortgage pay-off is financially or personally unwise. About these matters the complaint is silent and no judgment concerning the defendant's breach of an alleged duty of "good faith" can be made.

Assuming *arguendo,* the Lease Agreement was breached by defendant, Paragraphs 20, 21 and 22 provide an adequate remedy at law. The relevant portions of these provisions are as follows:

> 20. NO ENCUMBRANCES. Landlord covenants and agrees that on or before December 31, 1992 all existing liens of record against the leasehold premises including, **but not limited to**, the existing PIDA $175,000 mortgage, shall be removed from the leasehold premises so that Tenant's lease shall be the sole encumbrance on the leased premises. (Emphasis added).
>
> 21. TENANT'S CANCELLATION RIGHTS. In the event that Landlord fails to remove all encumbrances against the leased premises by December 31, 1992 as required under Paragraph 21

> [sic] above of this Lease, Tenant may cancel this Lease effective June 30, 1993 . . .
>
> In the event that Tenant has exercised the option set forth in Paragraph 20 [sic] above and Landlord has been unable to convey good and marketable title to this leasehold premises by June 30, 1996, Tenant may cancel this Lease effective June 30, 1997 . . .
>
> 22. RENEWAL OPTION. In the event that Tenant has exercised his purchase option described in Paragraph 19 above, and Landlord has been unable to convey good and marketable title to the leasehold premises during the initial term of this Lease, this Lease shall automatically renew for successive one-year terms commencing July 1, 2002, upon the same terms and conditions as set forth herein, with the sole exception being that the monthly rent shall be reduced to $1,166.67, with these options to continue until June 30, 2022 or within thirty days of Landlord's notifying Tenant that he is in the position to convey good and marketable title to the leasehold premises, whichever occurs first.

In this case, Mr. Goetzinger failed to remove the existing encumbrances in the form of his wife's statutory interest from the property by December 31, 1992, as required by Paragraph 20 of the Lease Agreement. In addition, Margaret Goetzinger's mortgage lien was placed upon the property in 1994. Mr. Greig simply decided to wait and not terminate the Lease Agreement pursuant to Paragraph 21. *See,* Transcript of Preliminary Objections, April 3, 2001, pp. 6 & 9-10. Since Mr. Greig exercised his Purchase Option after June 30, 1996, pursuant to Paragraph 22, the Lease Agreement should automatically renew for successive one year terms beginning July 1, 2002, upon the same terms and conditions, except that Tenant's rent should be reduced, and will continue until June 30, 2022, or within thirty days of defendant's notifying plaintiff that he is in a position to convey good and marketable title to the Tenant, whichever occurs first. These provisions provide Mr. Greig with a remedy in the event Mr. Goetzinger is unable to convey good and marketable title to him, and therefore, specific performance is inappropriate.

For the reasons set affirmed.

Signed this 10 day of July, 2001.

**By the Court,**
/s/ **John A. Bozza, Judge**

**COMMONWEALTH OF PENNSYLVANIA**

**v.**

**GOMER ROBERT WILLIAMS, JR.**

*CRIMINAL LAW/CONSTITUTIONALITY/MEGAN'S LAW II*

Where a legislative enactment constitutes the imposition of punishment, a defendant must be given the full complement of due process rights (including the right to a jury trial, the right against self-incrimination, proof beyond a reasonable doubt, and the right to have criminal proceedings initiated by indictment or information) prior to the imposition of such punishment.

The three-pronged test to determine whether a legislative enactment constitutes punishment is 1) whether the legislature's purpose or intent is punitive (i.e., the "subjective" component); 2) whether the objective purpose is punitive; and 3) whether the actual effect of the statute is punitive. If any of these prongs lead to the conclusion that the statute is punitive, the defendant must be afforded the full panoply of constitutional protections.

The legislature's purpose in enacting the registration and notification provisions of Megan's Law II was remedial in nature and not punitive, being intended to protect the safety and general welfare of the public.

When examined under the objective standard, however, the registration and notification requirements of Megan's Law II are punitive. The notification requirements result in the dissemination of information far beyond that portion of the population which has any reasonable need to know about the defendant. It also imposes a social stigma and may lead to incidents of threats and violence. Likewise, the requirements that the defendant report on a quarterly basis and participate in mandatory counseling at the risk of losing his or her liberty are tantamount to probation, a commonly recognized form of punishment. The division into two separate sentencing schemes, one of which subjects the offender to a ten-year registration requirement and one of which imposes a lifetime registration requirement, reinforces the conclusion that the requirements of the statute are punitive.

The court also concludes that the actual effect of the statute is punitive for the same reasons that the court concluded that the objective purpose of the statute is punitive.

The provisions of Megan's Law II requiring notification, registration and counseling are unconstitutional because they constitute punishment without provision for the full panoply of constitutional protections to which a defendant is entitled under the due process clause.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION No. 2416 of 2000

Appearances: James K. Vogel, Esquire for the Commonwealth
John B. Carlson, Esquire for the Defendant
Karl Baker, Esquire for Amici Curiae

## OPINION

Before the Court is a constitutional challenge to the latest version of Megan's Law.

## FACTUAL HISTORY

On July 27, 2000, Petitioner sexually assaulted a seventeen year old girl in the women's restroom of the Tinseltown movie theater. On March 21, 2001 Petitioner pled guilty to several charges[1] including Rape. Because Rape is a predicate offense under 42 Pa.C.S.A. § 9795.1, *et seq.* (hereinafter Megan's Law II), this Court ordered the State Sexual Offenders Assessment Board (hereinafter Board) to evaluate Petitioner prior to his sentencing. The results of the evaluation are to assist the Court in determining whether Petitioner is a "sexually violent predator" (hereinafter SVP).

If Petitioner is found to be an SVP then he must comply with the requirements of Megan's Law II. Petitioner will be required to register with the state police, provide them with fingerprints, a photograph of himself, his current address, any subsequent change of address and his employment information, all of which the SVP must update quarterly. The state police are then required to transmit this information to the local police where the SVP resides and works. The local police are then required to disseminate the gathered information to neighbors, schools, daycare facilities and the victim. In addition, the SVP must attend monthly counseling sessions in a program approved by the Board for the rest of their life and must shoulder the financial burden. Failure of the SVP to comply with any of these requirements subjects the SVP to a mandatory minimum sentence of probation for life up to a maximum sentence of life in prison.

On March 26, 2001 Petitioner, through counsel, filed a Motion for Extraordinary Relief challenging Megan's Law II as unconstitutional under the United States and Pennsylvania Constitutions. A Brief in support of his Motion was attached thereto. The American Civil Liberties Union together with the Pennsylvania Association of Criminal Defense Lawyers, Defender Association of Philadelphia and the Public Defender Association

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[1] § 3121 Rape
§ 3123 Involuntary Deviate Sexual Intercourse
§ 2702 Aggravated Assault
§ 2706 Terroristic Threats
§ 907 Possessing Instruments of Crime

of Pennsylvania filed an Amicus Curiae Memorandum of Law in support of Petitioner's challenge.

Petitioner argues the effects of Megan's Law II rise to the level of punishment requiring the full panoply of constitutional protections as required in any other criminal proceeding. After extensive review, this Court finds Megan's Law II in fact does inflict additional punishment and therefore is violative of the Fourteenth Amendment of the United States Constitution[2].

## LEGISLATIVE HISTORY

The original Megan's Law (hereinafter Megan's Law I) was adopted by the Pennsylvania Legislature in 1995 and signed into law on October 24th of that same year. In 1999, the Pennsylvania Supreme Court, in *Commonwealth v. Williams,* 733 A.2d 593 (Pa. 1999), struck down Megan's Law I as violative of the due process clause of the Fourteenth Amendment. In *Williams,* the Supreme Court found unconstitutional section 9794(b), which placed the burden of proof upon the person convicted of a predicate offense, to rebut the presumption that they are a sexually violent offender.

In response, on May 3, 2000, the Pennsylvania General Assembly passed Megan's Law II which was signed into law May 10th of that same year. Megan's Law II does not contain the presumption that was found to be unconstitutional in *Williams.*

## APPLICABLE LAW

1. A statute "will only be found unconstitutional if it clearly, palpably and plainly violates the constitution." *Commonwealth v. Mikulan,* 470 A.2d 1339, 1340 (Pa. 1983).

2. The Fifth Amendment to the United States Constitution provides that "No person shall...be deprived of life, liberty, or property without due process of law..." ***U.S. Const. Amend. V.***

3. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution directs that "No State shall...deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." ***U.S. Const. Amend. XIV, sec. 1.***

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[2] This Court is not unaware that the Constitution of Pennsylvania may in fact grant greater protections to those accused of a crime, however since this Court finds Megan's Law II violates the protections afforded in the Constitution of the United States, this Court need not address the protections provided by the State Constitution.

## DISCUSSION

Petitioner's constitutional challenges are based on the assumption that the registration requirements in Megan's Law II are punitive in nature and therefore entitle Petitioner to the full panoply of constitutional protections available to defendants in criminal proceedings.[3]

Megan's Law II has yet to be reviewed in the Appellate Courts at the time of the Court's writing of this Opinion and therefore is a matter of first impression in the case at bar.[4]

The *Williams* Court found Megan's Law I to be punitive in nature and as a result held that shifting the burden of proof to the offender to prove s/he is not an SVP violated the constitutional protections of due process. The *Williams* Court stated:

> Given our view, however, that the proceeding set forth in the Act to determine whether or not one is a sexually violent predator is a separate factual determination, the end result of which is the imposition of criminal punishment, we hold anything less than the full panoply of the relevant protections which due process guarantees is violative of the Fourteenth Amendment. *Williams,* at 304.

The same day *Williams* was decided the Supreme Court of Pennsylvania also decided *Commonwealth v. Gaffney,* 733 A.2d 616 (Pa.1999). The issue before the *Gaffney* Court was whether the registration requirements of Megan's Law I violated Gaffney's constitutional right against ex post facto laws. Gaffney argued the registration requirements of Megan's Law I imposed additional punishment on him and as such violated his constitutional rights.

In order to determine whether the requirements of Megan's Law I were ex post facto, it was necessary for the *Gaffney* Court to determine if the requirements of Megan's Law I constituted additional punishment. The *Gaffney* Court found the requirements Megan's Law I did not inflict additional punishment on a defendant and accordingly found no violation of Gaffney's constitutional rights.

At first blush there appears to be a dichotomy in the holdings between *Williams* and *Gaffney* on the issue of what constitutes punishment. However, when both cases are examined in light of the heightened burdens and consequences of Megan's Law II, which are significantly greater than those of Megan's Law I, there is a consistency of law which is appropriate

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[3] Those requirements include, the right to a jury trial, the right against self-incrimination, proof of guilt beyond a reasonable doubt and the right to have criminal proceedings initiated by indictment or information.

[4] Megan's Law II has been held to be unconstitutional by several judges in at least two counties in Pennsylvania however.

to application herein. Even more significant, the increased burden, effect and consequences of Megan's Law II strengthen the holding in *Williams*.

To determine whether a statute is punitive in nature both the *Williams* and *Gaffney* Courts adopted the test from the Third Circuit's decisions in *Artway v. Attorney General,* 81 F.3d 1235 (3d Cir. 1996)[5] and *E.B.v. Verniero,* 119 F.3d 1077 (3d Cir. 1997).[6] *Gaffney* at 619. The test has three prongs, the first subjective, the second objective (both of which focus on the legislature's purpose and intent of enacting legislation) and the third, requiring an evaluation of the effects of the statute. If a statute fails any one prong it is punitive in nature and the defendant prosecuted under that law must be afforded the full panoply of the constitutional protection. This Court will now examine Megan's Law II under the *Artway/Verniero* test.

The General Assembly significantly increased the SVP requirements under Megan's Law II. Further, it broadened the dissemination of information by requiring the information to be circulated by electronic means. Second, it increased the punishment for failure to comply with the requirements of the act to a possible sentence of life in prison. Third, it removed the ability to have the SVP status reviewed by the Board and the Court and removed if the SVP has been rehabilitated.

Initially the *Artway/Verniero* test requires an analysis of whether the legislature's actual, subjective purpose or intent in enacting a particular measure is punishment. A review of the statute's legislative history reveals that Megan's Law I and II were both passed by the Pennsylvania General Assembly for the purpose of creating a system to identify and track SVP's by requiring such offenders to register with the state police as they transition from incarceration into society and any subsequent relocations. The information gathered from the registration is then disseminated to various agencies that have a heightened interest in protecting citizens from SVP's. The information is designed to put those who might be at risk of becoming a victim of such predators on notice so they can take the necessary steps to guard against such risks.

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[5] In *Artway,* the Third Circuit found that New Jersey's Megan's Law notification provisions were unripe for adjudication but found the registration provisions constitutional because at the registration phase only Tier 1 notification was required, therefore the only notification was to public agencies and not to the outside public.

[6] In *Verniero,* the Third Circuit again found New Jersey's Megan's Law notification provisions constitutional on Tier levels 2 and 3 because the Act restricts the dissemination of information on Tier 2 and 3 offenders to those who are "reasonably certain" to encounter a Tier 2 or 3 offender.

Initially, Megan's Law II appears to be specifically crafted to protect the community and not to punish those who are subject to registration under the Act. The legislature made it clear under 42 Pa.C.S.A. §9791(b) "Declaration of Policy":

> It is hereby declared to be the intention of the General Assembly to protect the safety and general welfare of the people of this Commonwealth by providing for registration and community notification regarding sexually violent predators who are about to be released from custody and will live in or near their neighborhood. It is further declared to be the policy of this Commonwealth to require the exchange of relevant information about sexually violent predators among public agencies and officials and to authorize the release of necessary and relevant information about sexually violent predators to members of the general public as a means of assuring public protection and shall not be construed as punitive.

The Declaration of Policy in Megan's Law II, is identical to that of Megan's Law I which the *Gaffney* Court found was not intended as punitive. Accordingly, the subjective purpose or intent of Megan's Law II is designed to be remedial in nature and not punitive. See *Gaffney* at 619.

The second prong of the test requires a Court to determine if analogous measures have traditionally been regarded by society as punitive. It has three subparts; (A) proportionality, whether the remedial measure or purpose can explain all of the adverse effects on those involved, (B) whether the measure has been historically considered punishment, and (C) whether the measure serves both a remedial and deterrent purpose. See *Gaffney* at 619.

If subpart (C) is answered in the affirmative then a measure will only be considered punitive if; (a) the deterrent purpose is an unnecessary compliment to the measure's salutary operation, (b) the measure is operating in an unusual manner inconsistent with its historically mixed purpose, and (c) the deterrent purpose overwhelms the salutary purpose. *See Gaffney* at 619, 620. The *Gaffney* Court found Megan's Law I satisfied the second prong of the *Artway/Verniero* test. However Megan's Law II is significantly more enhanced.

Petitioner here argues[7] the objective effects of the enhanced requirements of Megan's Law II are so burdensome that they constitute punishment. Petitioner further argues that because the new Act requires the wide

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[7] Although Petitioner raises a host of other challenges because this Court finds Megan's Law II violative of the United States Constitution on the above issues, this Court's inquiry need not go any further.

dissemination of his status as an SVP, a social stigma or indelible mark is attached to him equivalent to that of a Scarlet Letter. Moreover, he asserts that the threat of incarceration for the rest of his life and an inability to ever have the future opportunity to remove the burdens of the statute rise to the level of punishment. These requirements are equivalent to a lifetime of probation which is clearly a well-established form of punishment in this country.[8]

The *Gaffney* Court (albeit only ruling on the issue of registration) was guided by *Artyway* [sic] and in dicta addressed the issue of notification:

> The notification issue is not before us. We evaluate only registration, and that provision bears little resemblance to the Scarlet Letter. Registration simply requires Artway to provide a package of information to local law enforcement; registration does not involve public notification. Without this public element, Artway's analogy fails. The Scarlet Letter and other punishments of "shame" and "ignominy" rely on the disgrace of an individual before his community. The act of registering with a discrete government entity, which is not authorized to release that information to the community at large (except in emergencies), cannot be compared to public humiliation. The officers who constitute local law enforcement, even if they are from Artway's area, would constitute only a de minimis portion of that community. *Gaffney* at 620.

**NOTIFICATION**

This is one of the areas where Megan's Law II falls short of constitutional muster. The information gathered does not stop at the doors of law enforcement. In fact local law enforcement agencies are under an affirmative duty to disseminate the information to the public at large. 42 Pa. § 9798(b)(1)(2)(3)(3.1)(4)(5).[9] Now authorized to use electronic means,

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[8] Neither probation nor parole is a sentence. Sentencing is an original imposition of punishment for a crime while parole is a conditional release from prison before the end of a sentence. *Geraghty v. U.S Parole Com.*, 429 F.Supp. 737 (1977). Probation is a supervisory period ordered in lieu of incarceration. *Commonwealth v. Ferguson,* 193 A.2d 657 (1963). However for all intents and purposes probation is considered a sentence in Pennsylvania. For example, probation is a sentence for purposes of appeal, due process, or double jeopardy. *Commonwealth v. Vivian,* 231 A.2d 301 (1967).

[9] Under the statute the written notice shall contain the name of the SVP, his address, the offense he was convicted for, a statement he has been determined to be an SVP, and a photograph and shall be given to neighbors,

such as the internet to proliferate information about an SVP, this information is available for viewing by those who live in other states and around the world, clearly outside the zone of any risk. 42 Pa. § 9798(d).[10]

Such a non-selective, blanket notification scheme exceeds the non-punitive aspects of the Act's own "Declaration of policy" statement that "it be the policy of this Commonwealth to require the exchange of relevant information about sexually violent predators among public agencies and officials and to authorize the release of necessary and relevant information about sexually violent predators. . . ." Declaration of Policy, 42 Pa.C.S.A. §9791(b)

This Court must strain to envision a legitimate state interest and need for the wide, uncontrollable dissemination of the stigmatizing fact Petitioner is an SVP, that the Act now requires. For instance, there is no need for someone in California to know the personal information of an SVP living in the state of Pennsylvania. The likelihood of someone from another state having any contact with an SVP from Pennsylvania, is remote at best. Yet notification by electronic means is sweeping, overly broad and adversely affects those involved.

Because the notification scheme in Megan's Law II is so broad, it will reduce the Petitioner to be viewed as a pariah by others who may not be remotely at risk. Citizens who feel the SVP should not be entitled to live in their neighborhoods or work in their job field may be likely to retaliate against the SVP. Incidents in other jurisdictions with acts containing less notifications confirm this fact.[11] Therefore, the more wide-spread this information becomes, the more likely the SVP and the innocent public at large will be exposed to violence and other inappropriate recriminations.

## REGISTRATION and COUNSELING

Labels aside, the Act inflicts even greater punishment of a more traditional style. If determined to be an SVP, Petitioner is faced with the unsettling fact that if he fails to comply with the enumerated requirements of Megan's

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[9] continued the director of the county children and youth agency, the superintendent of each school district and private and parochial school officials, and the operators of all certified and licensed day care and preschool programs within the municipality, as well as the president of any college within 1000 feet of the defendant's residence.

[10] This section of the statute provides that all of the information provided in subsection (a) about the SVP be available to the general public and may be provided by electronic means.

[11] *See Amicus Curiae Appendix* for anecdotal evidence of such including threats made not only to defendant's but family members, lawyers and judges, loss of employment, harassment and physical assault.

Law II at any time during his lifetime, he is exposed to a possibility of spending the rest of his life in prison. Once classified as an SVP the door is permanently open for Petitioner to lose forever his right to liberty even though he may not commit any further substantive offenses.

Moreover, the requirement that the SVP report quarterly to the state police is tantamount to probation where one must report to his probation officer on a regular basis; the provision of mandatory, monthly counseling is also a condition often associated with probation/parole supervision. This procedure has traditionally been used as punishment in our criminal justice system. Even more troubling to this Court is the fact that the SVP will be subject to these burdens after serving their time in prison and on supervision (parole). In short, having completely paid their lawful debt to society, they are unable to ever lift the heavy burden placed on them by the Act. Specifically the statute requires that the Pennsylvania State Police verify the defendant's residence (and compliance with counseling) of an SVP every 90 days by sending a verification form to his residence. The SVP must then personally appear within 10 days and complete the form and be photographed. **§ 9796(a), Verification of Residence.** This requirement is in effect for the lifetime of the SVP. Should the SVP fail to verify his/her residence or be photographed (as to any 90-day period) s/he "commits a felony of the first degree and shall be sentenced to a mandatory minimum sentence of probation for the remainder of the individual's lifetime and may be sentenced to a period of incarceration up to the individual's lifetime." **§ 9796(e). Penalty.**

Further and also for the SVP's lifetime s/he is "required to attend monthly counseling sessions in a program approved by the board and be financially responsible for all fees assessed by the counseling sessions." **§ 9799.4. Counseling of Sexually Violent Predators.**

Regular reporting and mandatory counseling have long been conditions of supervision traditionally attached to sentences of probation (or requirements of parole). *See Commonwealth v. Johnson,* 422 A.2d 655 (Pa. Super. 1980) (leaving drug counseling program prematurely sufficient grounds for revocation of probation); *Commonwealth v. McBride,* 433 A.2d 509 (Pa. Super. 1981); *Commonwealth v. Newman,,* 310 A.2d 380 (1973) (revocation for failure to report to probation or parole officer).

The Act also inflicts punishment because it contains two separate sentencing schemes depending on the level of culpability or aggravating circumstances of an offender. The offender may be subject to a ten-year or lifetime registration depending on the underlying predicate offense.[12] 42

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[12] **32 § 9795.1. Registration**

**(a) Ten-year registration**.--The following individuals shall be required to register with the Pennsylvania State Police for a period of ten years:

(1) Individuals convicted of any of the following offenses:

Pa. § 9795.1(a)(b). These variations are traditionally used when measuring the extent of wrongdoing rather than facilitating a remedial purpose. Such a large disparity as to time of tracking an offender does not serve as an aid or indicate the likelihood of recidivism among different offenders. These diverse limits simply appear to act as differing forms of retribution. If the underlying predicate offense is of one category the offender is required to register for only ten years. However, if the underlying offense is perceived to be of a more egregious legal delineation, the offender is subject to the enhancement of having to register for life rather than simply ten years. And no matter in which category the predicate offense falls, if the offender is determined to be an SVP then he is subject to registration and the mandatory conditions attached thereto for the rest of his life. These provisions clearly inflict punishment of different length and magnitude

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18 Pa.C.S. § 2901 (relating to kidnapping) where the victim is a minor.

18 Pa.C.S. § 3126 (relating to indecent assault) where the offense is a misdemeanor of the first degree.

18 Pa.C.S. § 4302 (relating to incest) where the victim is 12 years of age or older but under the age of 18 years of age.

18 Pa.C.S. § 5902(b) (relating to prostitution and related offenses) where the actor promotes the prostitution of a minor.

18 Pa.C.S. § 5903(a)(3), (4), (5) or (6) (relating to obscene and other sexual materials and performances where the victim is a minor).

18 Pa.C.S. § 6312 (relating to sexual abuse of children).

18 Pa.C.S. § 6318 (relating to unlawful contact or communication with minor).

18 Pa.C.S. § 6320 (relating to sexual exploitation of children).

(2) Individuals convicted of an attempt to commit any of the offenses under paragraph (1) subsection (b)(2).

**(b) Lifetime registration.** --The following individuals shall be subject to lifetime registration:

(1) An individual with two or more convictions of any of the offenses set forth in subsection (a).

(2) Individuals convicted of any of the following offenses:

18 Pa.C.S. § 3121 (relating to rape)

18 Pa.C.S. § 3123 (relating to involuntary deviate sexual intercourse).

18 Pa.C.S. § 3124.1 (relating to sexual assault.)

18 Pa.C.S. § 3125 (relating to aggravated indecent assault.)

18 Pa.C.S. § 4302 (relating to incest) when the victim is under 12 years of age.

(3) Sexually violent predators.

based on a somewhat arbitrary and discretionary classification, somewhat akin to the sentencing schemes for various classes of crimes (felonies and misdemeanors).

The third prong of the test requires the court to measure the effect of the statute on one of the citizenry. The analysis and the effects of the third prong are similar to those of the objective portion of the test, which failed constitutional scrutiny (i.e. if the effects of the Act are so harsh as a matter of degree that it constitutes punishment). Here, the same analysis that leads this Court to conclude that objective purpose of the test is punitive, likewise leads this Court to conclude that the effect of the Act is also punitive. The SVP must provide extensive information to law enforcement officials on a quarterly basis, notify authorities of any subsequent moves and must attend monthly counseling sessions at their own expense. Moreover, this information is not just available to those who need to know, it is spread wide and far by electronic means (i.e. the internet). Retaliations against SVP's have regularly surfaced, often leaving the SVP unable to return to a normal lifestyle once their debt to society has been paid. As a result many SVP's must live in constant fear for their and their families physical and financial well-being.

## CONCLUSION

The foregoing analysis indicates to this Court that the notification, registration, and counseling scheme found in Megan's Law II does rise to the level of punishment. Accordingly, the full panoply of constitutional protections must be available to Petitioner to minimize the possibility of an unjustified, unfair or unreliable prosecution that inflicts additional punishment. Thus, the Act is unconstitutional because it does not provide these procedural safeguards.

Although the Commonwealth has a compelling interest in protecting citizens through registration and notification procedures, the state has no interest in notifying the public of those persons who have been erroneously identified as an SVP. Thus the state has a compelling interest in insuring its citizens that the system of determining whether a person is an SVP is both fair and accurate. *See Williams* at 311. Because the lynchpin to whether Petitioner is exposed to the requirements of Megan's Law II is the initial (and final) determination of SVP status, this is the point at which due process rights must attach, not later when or if a violation of the Act occurs.

The Court therefore reasonably and legally deducts that the provisions of Megan's Law II as to §§ 9796(a) (quarterly verification of residence), 9798(b) (to whom written notice provided) and (d) (public notice), as well as 9799.4 (mandatory monthly counseling) constitute the imposition of additional punishment above and beyond the statutory maximum allowable by law for the predicate offenses for which an SVP has been convicted.

Before a defendant may be declared a sexually violent predator (SVP) and such additional punishment may be imposed upon a defendant he must be given the full complement of due process rights (*see* footnote 3). Since the Megan's Law Statute does not incorporate such safeguards and sections 9795.4(a), (b) and (e) give the defendant less than the rights he is entitled to (assessment and hearing as opposed to criminal information and trial; and as to burden of proof, clear and convincing evidence versus proof beyond a reasonable doubt), those sections too must be declared unconstitutional as violative of the defendant's due process rights.[13]

**ORDER**

AND NOW, TO-WIT, this 20th day of June, 2001, the Court is constrained to conclude that portions of Megan's Law II are unconstitutional for the reasons set forth in the foregoing OPINION, and the defendant's Motion for Extraordinary Relief is GRANTED consistent therewith.

**By The Court:**
**Shad Connelly, Judge**

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[13] This Court is ever mindful and acutely aware of the heinous acts of child molesters, their impact upon the community and the damage they impose upon their victims. Indeed in its 15¼ years on the bench this Court has presided over more than its share of such cases and has handed down some of the stiffest penalties in the history of the Commonwealth (including a 100 to 200-year sentence) for such gross and deviate behavior. But that has only been done after a defendant has had a full and fair trial, been proven guilty beyond a reasonable doubt and had all of his due process rights safeguarded. As well intentioned as this legislation may have been, it, as all statutes and laws, must not and cannot usurp the constitutional rights of any citizen no matter how heinous the crime or infamous the criminal.

# IN THE MATTER OF
# THE ADOPTION OF J. L.

*JUVENILE/VOLUNTARY RELINQUISHMENT OF PARENTAL RIGHTS/ ABSENCE OF OCY CONSENT*

A parent's Petition to Voluntarily Relinquish Parental Rights is properly denied where the agency having the care of the child - OCY - does not join in the relief requested. In such a case, the Petition fails to comply with the terms and provisions of both the Adoption Act and the Orphan's Court Rules.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 34-2001

Appearances: Office of Children & Youth
Michael Nies, Esq. for the mother
Amy Jones, Esq. for the father
Jeff Misko, Esq. for the child

## OPINION

At issue is whether a mother's petition to voluntarily relinquish parental rights was properly denied. Since a Court is without authority to dispense with statutory or procedural requirements, the denial of the mother's petition is appropriate.

## FACTUAL HISTORY

On October 30, 1998, J. W. L. was born the son of V. L. H. L. and R. M. K. Unfortunately J.'s parents were unable to care for the child such that he was adjudicated dependent on January 12, 2000. Thereafter a reunification plan was established, with neither parent compliant. Ultimately, on December 8, 2000, the filing of a petition for involuntary termination of parental rights was authorized.

On February 27, 2001, the Erie County Office of Children and Youth (hereinafter OCY or the Agency) filed an involuntary termination petition regarding each parent. On April 10, 2001, a Petition for Voluntary Relinquishment of Parental Rights for a Single Parent was filed by the mother, V. L. A hearing was held on said Petition on July 20, 2001.

On the same day, July 20, 2001, R. K., with counsel present, stipulated to the entry of an order involuntarily terminating his parental rights. A Decree involuntarily terminating the father's rights was entered on July 20, 2001. No appeal was taken therefrom.

The Petition for Voluntary Relinquishment of Parental Rights as filed by the mother was denied by Order dated July 26, 2001. A Notice of Appeal was timely filed by the mother on August 2, 2001. A Statement of Matters Complained of on Appeal was filed on August 14, 2001. This Opinion addresses the two issues raised therein.

Meanwhile, the involuntary termination petition filed by the Agency against Appellant has been held in abeyance while this appeal is pending.

**"READY, WILLING AND ABLE TO GIVE UP"**

Initially Appellant alleges error in denying the Petition "when the Appellant was ready, willing and able to voluntarily give up her rights to her son." Appellant's averment is vacuous.

There is no statutory or even common law authority for the proposition a parent can relinquish parental rights whenever "ready, willing and able to voluntarily give up ..." Indeed, if such were the standard, the courthouses across Pennsylvania would be busier because a parent could simply walk in and say I am ready, willing and able to give up my parental rights.[1]

Instead, Pennsylvania has established a statutory and procedural framework for a parent to follow to relinquish parental rights. Pursuant to the Adoption Act, there are two avenues for a parent: relinquishment to an agency or relinquishment to an adult intending to adopt. Obviously these measures are intended to ensure a child is not abandoned or in legal limbo because there has to be someone in place to accept the care of the child.

In the case sub judice Appellant filed her Petition for Relinquishment to an agency pursuant to 23 Pa. C.S.A. §2501. Importantly, the statute provides in part:

> (b) Consents - the written consent of a parent or guardian of a petitioner who has not reached 18 years of age shall not be required. The consent of the agency **to accept custody of the child until such time as the child is adopted shall be required.**

See 23 Pa. C.S.A. §2501(b)(emphasis added)

The Official Comment thereto states "...the agency having the care of the child is no longer required to join in the petition, but must still consent to accept custody of the child." In the instant case, OCY declines to consent to accept custody of the child until adoption. Hence the petition Appellant filed was not in compliance with the statute.

In addition, Appellant's Petition was not in compliance with Pennsylvania Orphan's Court Rule 15.2, which provides in relevant part:

> "(b) **EXHIBITS** - the Petition shall have attached to it the following Exhibits:
>
> (4) the joinder of the agency having care of the child and its consent to accept custody of the child until such time as the child is adopted."

See Pennsylvania Orphan's Court Rule 15.2(b)(4). (Emphasis added).

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[1] This Court shudders to think of how readily his parents, with good reason, would have availed themselves of this procedure!

Orphan's Court Rule 15.2 goes farther than the Adoption Act in that it requires the joinder of the agency. By joinder, it means the agency is concurring in the relief requested, to-wit, the voluntary relinquishment of parental rights. In this case, the agency does not join in the relief requested. To the contrary, the agency opposes the relief requested.

Therefore it is uncontroverted Appellant's Petition to Relinquish Parental Rights was not in compliance with the Adoption Act or Orphan Court Rule 15.2. Nonetheless, Appellant asserts the Court has the discretion to dispense with the necessity of OCY's consent. In essence, Appellant asks for the judicial creation of an exception to Adoption Act and to re-write the Orphan's Court Rule. However, the plain language of the statute and Orphan Court Rule make it mandatory the petition include the required consent. Neither the statute nor the Orphan's Court Rule empower a Court to grant a voluntary relinquishment petition without the consent of the agency.

Further, "the provisions of the Adoption Act must be strictly construed...our Courts cannot and should not create judicial exceptions where the legislature has not seen fit to create such exceptions." *In re Adoption of K. M. W.,* 718 A.2d 332, 333 (Pa. Super. 1998). More specifically, our Pennsylvania Supreme Court has stated:

> "To effect an adoption, the legislative provisions of the Adoption Act must be strictly complied with. Our courts have no authority to decree an adoption in the absence of a statutorily required consent. Nor may exceptions to the Adoption Act be judicially created where the legislature did not see to create them.." *In Re Adoption of E.M.A.,* 487 Pa. 152, 153 409 A.2d 10, 11 (1979).

In a case in which the biological mother filed a petition to confirm consent for the voluntary termination of the parental rights of the biological father without the written consent of the father, the petition was denied for failure to comply with the Adoption Act. See *In Re Stickley,* 432 Pa. Super. 354, 638 A.2d 976 (1994) ("we will not terminate parental rights upon a petition to confirm consent to adoption where the statutory requirements have not been satisfied."). Likewise *In Re Adoption of C.C.G. and Z.C.G.,* 762 A.2d 724 (2000), the Superior Court affirmed the denial of an adoption petition because of the lack of consent of the biological father to the termination of his parental rights. While each of these cases involve a different section of the Adoption Act, the analysis is the same: a Court does not have discretion to grant a petition which does not have the required consent(s). Stated differently, the Court cannot disregard the mandated consents nor create a judicial exception to these mandates, particularly when the result would jeopardize the child because there is no entity in place to accept custody of the child.

## SUBSTANTIVE DUE PROCESS

Appellant claims substantive due process requires an analysis of whether OCY is unreasonably withholding its consent and if so, the requirement of OCY's consent can be ignored and the petition granted. This argument widely misses the mark.

In the procedural context of this case, substantive due process is not implicated. For there to be a substantive due process analysis, there has to be action on behalf of the government which is depriving a citizen of a fundamental right.

There is no fundamental right of a parent to voluntarily relinquish parental rights. Further, this appeal involves a citizen initiating an action. It is not the government seeking to force a citizen to voluntarily relinquish her parental rights. Instead, the government in this case is simply not agreeing to the relief requested by Appellant. As such, there is no affirmative conduct on the part of the government to deprive Appellant of any fundamental personal or property right. Therefore a substantive due process analysis is unnecessary.[2]

## "COMPELLED CONSENT"

Appellant cites no authority for the proposition that OCY has to consent to the petition or that a Court can order OCY to consent. Inherent in the concept of consent is the right to refuse to consent. If there is no choice whether to consent, the meaning of consent is eviscerated. After all, a compelled consent cannot be a consent.

There are several scenarios in which OCY is justified in withholding consent to a relinquishment petition. This Court has witnessed actual cases of able-bodied, capable parents who, for their own narcissistic reasons, want someone else to raise their children. The government is not obligated to consent to such selfish behavior. Nor does the Adoption Act or the Orphan's Court Rules empower a Court to substitute its judgment for that of the Agency in determining whether to consent. OCY is no different than any other party to litigation in that it retains the unfettered discretion whether to agree to the relief sought by another party.

## THE BEST INTEREST STANDARD

Appellant avers the denial of her Petition for Voluntary Relinquishment "does not serve the best interest and welfare of the child". However, the best interests of the child is not the governing standard.

Before there can be any consideration of the best interest of the child, there must be a determination of whether the statutory requirements for the termination of parental rights have been met. See *In Interest of Post,*

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[2] In a related matter, substantive due process is implicated by the petition of OCY to involuntarily terminate Appellant's parental rights. However, the IVT proceeding is not an issue in this appeal.

385 Pa. Super. 450, 561 A.2d 762 (1989)(the best interests analysis is inapplicable in the determination whether the statutory requirements for termination of parental rights have been met).

To accept Appellant's logic would be to ignore the requirements of the Adoption Act and the Orphan's Court Rules. In other words, Appellant would simply focus on whether voluntary termination of parental rights was in the best interest of the child without regard to whether the statutory and procedural rules have been met. Such an approach invites chaos.

The better-reasoned approach, and one adopted by the Appellate Courts, is a two-step analysis in which the statutory and procedural requirements have to be satisfied before consideration can be given to the best interests of the child. In the case sub judice, since the statutory and procedural requirements have not been met, the issue of the best interest of the child is not reached.

**OTHER OBJECTIONS**

Appellee has cited several other deficiencies in Appellant's Petition for Relinquishment of Parental Rights. However, these deficiencies are technical in nature and have been or are easily curable (for example, the attachment of a birth certificate). The crux of this dispute is whether the consent of the agency is needed for the petition to be granted. For the reasons stated, OCY's consent is necessary for Appellant's petition to be granted. Hence the other objections need not be addressed.

**CONCLUSION**

The easiest course for this Court to take is to allow the voluntary relinquishment of parental rights to occur so that an adoption can be finalized. However, for sound reasons, Pennsylvania has erected a framework which must be followed for the proper relinquishment of parental rights. There has to be a party in place to assume the responsibilities the parent is abdicating. Without the consent of OCY, there is no entity in place for this child.

There is no fundamental right of a parent to voluntarily relinquish parental rights. Further, a Court cannot compel a party, in this case OCY, to join in a parent's request for relinquishment or to consent to accept custody. Nor is the Court empowered to supplant the legislative branch by creating judicial exceptions to the Adoption Act. Based on a plain reading of the statute and procedural rules, Appellant's petition was not in compliance and was properly denied.

In arriving at these conclusions, this Court is mindful of the resulting delay to this child's future. Hopefully, OCY will be very circumspect in its opposition to parental relinquishment petitions.

**BY THE COURT**
**WILLIAM R. CUNNINGHAM**
**President Judge**

# COMMONWEALTH OF PENNSYLVANIA
v.
# CARMEN L. BREWER

*CRIMINAL PROCEDURE/ARREST/PROBABLE CAUSE*

In general, police are allowed to approach individuals and ask questions so long as a reasonable person would believe that they are free to refuse to cooperate. When an encounter rises to the level of an investigatory detention, the encounter becomes a seizure for state and federal constitutional purposes and must be supported by a reasonable suspicion that criminal activity has, or is about to occur. An investigatory detention has occurred if the circumstances of an encounter would have communicated to a reasonable person that the person was not free to decline the officer's request or otherwise terminate the encounter. *Commonwealth v. Boxwell*, 554 Pa. 275, 721 A.2d 336 (1998).

*CRIMINAL PROCEDURE/ARREST/PROBABLE CAUSE*

The use of a person's race in formulating reasonable suspicion regarding whether criminal activity is imminent may only constitute a starting point in the development of reasonable suspicion. *Commonwealth v. Lewis*, 535 Pa. 501, 636 A.2d 619 (1994). Profile information is considered probabilistic evidence, which must be evaluated in totality of the circumstances of each case. *Id.* See also, *United States v. Sokolow*, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989). Absent any overt manifestations of criminal conduct such as an exchange of money or items, reports of suspected crimes, any furtive actions, deceptive behaviors or "other manifestations of criminal intentions," the police had no information indicating that the defendant had been involved in any criminal activity.

*CRIMINAL PROCEDURE/ARREST/PROBABLE CAUSE*

An investigatory detention occurs when reasonable persons do not feel that they are free to decline the police officer's requests or feel that they have the right to terminate the encounter. *Commonwealth v. DeHart*, 745 A.2d 633 (Pa. Super. 2000). Police did not have a reasonable suspicion to justify an investigatory detention of the defendant. The activities of loitering, entering a car, driving a short distance, exiting a car, entering a house, exiting a house, and re-entering and re-exiting a car could not reasonably lead to a belief that a crime had been or was about to be committed, even in a neighborhood where drug use and/or prostitution was common. This behavior is so innocuous and common that to bring it into the reach of government intrusion would be to cast the net of criminal suspicion too wide. *Commonwealth v. Beasley*, 761 A.2d 621 (Pa. Super. 2000); *Commonwealth v. Tither*, 448 Pa. Super. 436, 671 A.2d 1156 (1996).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 1095 of 2001

Appearances: Robert A. Sambroak, Esquire,
Office of the District Attorney
Keith Clelland, Esquire

## OPINION

Bozza, John A., J.

This matter is before the Court on the defendant's Motion to Suppress cocaine seized by the Erie Police Department from a parked vehicle on February 17, 2001. A hearing was conducted on July 2, 2001 and, as a result, the Court notes the following factual summary.

On the date in question, Erie City police officers Tucholski and Ferrick were routinely patrolling in the area of East 22nd Street in Erie, Pennsylvania. At approximately 7:20 p.m., the officers observed a dark-colored Land Rover driven by a white male with a black female passenger. The area being patrolled by the officers was known to them as a high drug area where prostitution was also commonplace. Officer Ferrick had frequently patrolled the area and had not seen the Land Rover before. Officer Tucholski testified that "its in an area where a white male driver is not necessarily stopping to chit chat with individuals and drive away from the area asking for sports scores or information." Transcript, p. 16.

Earlier in the evening, Officer Tucholski had observed Carmen Brewer, the defendant, "loitering in the area about a block and one-half away." He observed her enter the Land Rover which drove off and was out of sight momentarily until they observed it again parked in the 100 block of East 22nd Street. He watched Carmen Brewer exit the vehicle and go into a house. The officers circled the block and parked on Holland Street, where they were able to visually observe the vehicle. When they observed the defendant walk back towards the vehicle, they proceeded to pull a few car lengths behind the Land Rover, saw the defendant re-enter the car and then exit the vehicle. At that time, both officers exited their cruiser "just to investigate, see what was going on." Although no criminal activity had been observed by the police officers, they were obviously suspicious.

Officer Ferrick went to talk to the driver, who remained in the vehicle, and Officer Tucholski went to speak to Ms. Brewer. In the meantime, another police unit containing Officers Sornberger and Popovic arrived to back them up. Officer Sornberger went to the passenger side of the Land Rover to "keep an eye on the passenger side" while Officer Ferrick was talking to the driver. Transcript, p. 8. Officer Sornberger advised Ferrick that he saw cocaine inside the passenger side of the vehicle and on the ground outside the passenger door. At that point the driver was questioned about this discovery.

Meanwhile, outside the vehicle, Officer Tucholski had approached the defendant and asked if he could speak to her. She stopped, but refused to

give him any information, challenging his justification for the inquiry. Officer Tucholski's intended to ask her why she went into the house, if she knew the driver, and to request her identification. While obtaining the identification, he was informed that cocaine was discovered and, at that point, advised the defendant that she was not free to leave.

Ms. Brewer argues that the discovery of the cocaine resulted from violations of both the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution. More specifically, defendant's position is that both the encounter with the driver and Ms. Brewer were "investigative detentions" requiring a showing that the police had a reasonable suspicion of criminal activity. In general, the police are allowed to approach individuals and ask questions so long as a reasonable person would believe that they are free to refuse to cooperate. *Commonwealth v. Boswell,* 554 Pa. 275, 721 A.2d 336 (1998). However, where such a "mere encounter" rises to the level of an investigatory detention, the encounter becomes a seizure for state and federal constitutional purposes and must be supported by a reasonable suspicion that criminal activity has, or is about to occur. *Id.* An investigatory detention has occurred if the circumstances of an encounter "would have communicated to a reasonable person that the person was not free to decline the officer's request or otherwise terminate the encounter." *Id.* at 284.

In support of her position, defendant has pointed to *Commonwealth v. McClease,* 750 A.2d 320, (Pa. Super. 2000). In *McClease,* the police had approached a vehicle and a police detective told the defendant, "police officer. Stay in your vehicle." The Court concluded such a statement would cause a reasonable person to believe that he or she was not free to leave and therefore, the encounter constituted an investigative detention.

The Commonwealth argues the police activity constituted a "mere encounter with the police" and consequently no level of suspicion was required in order to justify the Erie Police officers actions, citing *Commonwealth v. DeHart,* 745 A.2d 633 (Pa. Super. 2000) and *Commonwealth v. Vasquez,* 703 A.2d 25 (Pa. Super. 1997). In *DeHart,* following a report of a suspicious vehicle, the police came upon the defendants' vehicle pulled up to the berm of a road in front of a house with the engine running. The troopers parked their vehicle next to the defendants and asked them, "What's going on here?" The trooper noted what he believed to be suspicious conduct on the part of the driver because he responded to his question in a soft-spoken manner and avoided eye contact. The troopers exited their vehicle, one approached the driver's side while the other approached the passenger side and, thereafter, noted alcohol on the breath of both individuals, drivers' licenses were requested, and a pat-down search of the defendant yielded a marijuana pipe and a bag of marijuana discovered in his pocket. Citing *Commonwealth v. Sierra,*

555 Pa. 170, 723 A.2d 644 (1999), the Supreme Court affirmed the trial court's decision to suppress the evidence, noting the officers lacked reasonable suspicion of criminal activity at the time that they exited their cruiser and began a more intensive questioning of the occupants. The Court held that when the troopers left their vehicle and approached defendant's vehicle, reasonable persons in the defendant's position would not have felt free to drive away or to refuse to answer questions, and that it was apparent that the troopers intended to "escalate the encounter to afford greater investigation." *Id.*

In the *Vasquez* case, the Court was confronted with an approach to a drug interdiction which involved drug agents detaining a public bus and questioning its occupants about a variety of subjects, including whether they possessed drugs. Following a lengthy analysis, the Court concluded that, on the facts before it, the practice constituted an investigative detention for which reasonable suspicion was required. *Id.* Recently, the Supreme Court reached a similar conclusion in circumstances where agents of the Attorney General's office detained a bus for the purpose of investigating drug activity. *Comm. v. Polo,* 563 Pa. 218, 759 A.2d 372 (2000).

It is apparent that neither case cited by the Commonwealth supports its position in this case. Here, the facts indicate that prior to approaching the parked vehicle, Officers Ferrick and Tucholski observed and considered the following facts:

1. The area in question is known as a high-drug area and an area where prostitution is common.
2. Ms. Brewer, an African-American, had within a short time been seen "loitering" on the street.
3. At approximately 7:20 p.m., she approached and entered a Land Rover driven by a white male.
4. It would be unusual for a "white male driver" to stop to "chit chat" and then drive away after asking for "sports scores or information."
5. The vehicle had not been seen in that neighborhood before.
6. After a short time, the vehicle parked in front of a house whereupon Ms. Brewer exited the vehicle, went into a house, returned to the vehicle, and exited the vehicle.
7. It was the police officers' intention to "just figure out what was going on, who was there, why they were there."

Based on these facts, the police radioed they were investigating the Land Rover and another cruiser arrived to assist. Both officers approached the vehicle, one engaging the driver in conversation ostensibly having to do with his identification and presence in the neighborhood, and the other approached Ms. Brewer, outside of the vehicle.

Obviously, the police suspected that some kind of criminal activity was

afoot and intending to investigate the matter further they approached the vehicle to discuss it with the driver and Ms. Brewer. With a police car parked behind him, a uniformed officer at his window questioning him, a second officer engaging his passenger, and a third officer approaching his passenger window, it would be most reasonable for him to conclude that he was not free to terminate the encounter or deny the officers' request for information. These circumstances are almost identical to that found in *DeHart* where the Court stated:

> " . . . would reasonable persons, faced with the situation where state troopers pulled up next to their car, engaged them in questioning and observed the troopers exit the vehicle and approach both windows, feel they are free to decline the officers' request and right/terminate the encounter? We believe the answer is no." *Id.* at 637.

It is thus apparent that, once the vehicle was approached, an investigative detention had occurred. A similar analysis would yield the same result with regard to Officer Tucholski's interaction with the defendant, Carmen Brewer, who initially resisted answering the officer's questions and who most certainly believed she couldn't simply walk away.[1]

The issue then before the Court is whether the police had reasonable suspicion to justify an investigatory detention of either the driver or Ms. Brewer. After close examination of the factual record, it must be concluded that they did not. The available facts presented to Officers Ferrick and Tucholski prior to detaining of the defendant and the driver of the car were much more likely to give rise to an inference of innocent, and indeed ordinary conduct, rather than criminal involvement. Having seen Ms. Brewer "loitering," they watched her enter a car, drive a short distance, exit the car, enter a house, exit a house, and re-enter the car and exit the car. This conduct could not reasonably lead to the belief that a crime had been or was about to be committed, even in a neighborhood where drug use and/or prostitution are common. On its face, the behavior in question is so innocuous and common that to bring it into the reach of government intrusion would be to cast the net of criminal suspicion too wide. *Commonwealth v. Beasley,* 761 A.2d 621 (Pa. Super. 2000); *Commonwealth v. Tither,* 448 Pa. Super. 436, 671 A.2d 1156 (1996).

Apparently from the police officer's perspective, it was quite significant

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[1] While the record is not clear as to the relationship of Ms. Brewer's separate detention and the discovery of the cocaine, the Commonwealth has not raised the issue of "standing" and therefore, it has not been addressed by this Court. *See, United States v. Padilla,* 508 U.S. 77, 113 S.Ct. 1936 (1993).

that the defendant and driver of the vehicle were of different races, and in particular, that the driver was caucasian and in a vehicle that had not been previously seen by the police in that neighborhood. This certainly begs the question whether circumstances exist that would allow consideration of a person's race in formulating "reasonable suspicion" regarding whether criminal activity is imminent. Here, the officers supposition was that a white person ordinarily would not be in this neighborhood unless he is seeking to engage in an illegal transaction with an African-American.

While this Court has not found any controlling authority dealing directly with this issue, guidance may be found in the line of cases concerning the use of "drug courier profiles." The Pennsylvania Courts have addressed this issue, and while reluctantly recognizing the utility of such predictive devices, they have noted that profiles only constitute a "starting point" in the development of reasonable suspicion. *Commonwealth v. Lewis,* 535 Pa. 501, 511, 636 A.2d 619, 624 (1994). Moreover, it has been noted by the Superior Court that profiles are subject to "racial abuse and gender stereotyping." *Commonwealth v. Daniels,* 599 A.2d 988, 991 (Pa. Super. 1991).

Profile information is considered "probabilistic" evidence, which must be evaluated in the totality of the circumstances of each case. *Id.,* 991-992; *See also, United States v. Sokolow,* 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989). Here, the police engaged in what might be reasonably thought of as de facto profiling by concluding that a white and perhaps affluent person in a black neighborhood must be, or is more likely to be, there for criminal purposes. There is no evidence indicating this conclusion is borne out of anything other than stereotypical notions, perhaps accurate in the fictional world of television police dramas, but of no value in the real community absent compelling evidence and strict judicial scrutiny. Without a firmly established set of criteria demonstrating the validity of assumptions concerning the propensity for criminal conduct, probabilistic evidence of any kind is of no value. It is difficult to imagine any set of circumstances which would allow the government to predict the propensity of criminal behavior on the basis of race.

To put this matter in perspective, it is helpful to note what is missing from the framework of reasonable suspicion constructed by Erie police. Completely absent is any overt manifestations of criminal conduct. They did not observe any exchange of money or items, they had no information indicating that either person was known to the police as having previously been involved in the type of criminal activity suspected. There were no recent reports of suspected crimes to which the police were responding, and they did not observe any furtive actions, deceptive behavior or other manifestations of criminal intentions. The time of day was not significant and nothing was questionable about the house Ms. Brewer entered. Any detention by the police requires reasonable suspicion of criminal activity

based on specific and articuable facts. *Boswell* at 283, 721 A.2d at 340. Here, the individuals in question did nothing other than engage in the kind of harmless behavior that could be observed countless times each day. On the record before the Court it must be concluded that absent the racial characteristics of the actors, police suspicions would not have been seriously aroused and no investigative detention would have occurred.

In a matter involving the suppression of the evidence based on constitutional infirmities, the Commonwealth has the burden of proving that the police properly seized the evidence. *Commonwealth v. Crompton,* 545 Pa. 586, 682 A.2d 286 (1996). In the matter before the Court, the Commonwealth has failed to prove that the encounter involving Ms. Brewer was anything other than an investigative detention, nor was the evidence sufficient to prove that the police officers' suspicions, based in considerable part on the race of the parties, were reasonable. As a consequence, defendant's Motion to Suppress must be granted, and an appropriate Order shall follow.

## ORDER

AND NOW, to-wit, this 28 day of August, 2001, upon consideration of defendant's Motion to Suppress and argument thereon, and in accordance with the foregoing Opinion, it is hereby **ORDERED, ADJUDGED and DECREED** that the Motion is **GRANTED**.

**By the Court,**
/s/ **John A. Bozza, Judge**

# COMMONWEALTH OF PENNSYLVANIA
# v.
# KENNETH ALLEN CARSON

*CRIMINAL PROCEDURE/WARRANTLESS SEARCHES*

A parolee and a probationer have limited Fourth Amendment rights because of a diminished expectation of privacy.

*CRIMINAL PROCEDURE/WARRANTLESS SEARCHES*

The constitutional rights of a parolee are indistinguishable from a probationer.

*CRIMINAL PROCEDURE/WARRANTLESS SEARCHES*

A probation system presents special needs beyond normal law enforcement that may justify departures of the usual warrant and probable-cause requirements.

*CRIMINAL PROCEDURES/WARRANTLESS SEARCHES*

A warrantless search of a probationer's residence is permissible if there is reasonable suspicion that the residence contains contraband or evidence of parole violations.

*CRIMINAL PROCEDURES/WARRANTLESS SEARCHES*

A warrantless search of a probationer's residence may satisfy the demands of the Fourth Amendment if it is carried out pursuant to a regulation that itself satisfied the Fourth Amendment's reasonableness requirement.

*CRIMINAL PROCEDURES/WARRANTLESS SEARCHES*

Pennsylvania does not have the regulatory framework that would by itself satisfy the Fourth Amendment's reasonableness requirement for a warrantless search of probationer's residence.

*CRIMINAL PROCEDURES/WARRANTLESS SEARCHES*

Parole and probation officers cannot act like stalking horses for the police to be able to conduct searches of a parolee's or probationer's residence without warrant.

*CRIMINAL PROCEDURES/SEARCH WARRANTS*

The task of a magistrate issuing a warrant 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; probable cause determinations are based on a common-sense, non-technical analysis.

*CRIMINAL PROCEDURES/WARRANTLESS SEARCHES*

The "totality" standard of determining whether a search warrant should be issued represents a loosening of the two-prong test for probable cause, but the dual basis of knowledge and veracity is still very much part of the inquiry.

*CRIMINAL PROCEDURES/SEARCH WARRANTS*

An informant's tip constitutes probable cause where police have been

able to provide independent corroboration of the tip or where the informant previously provided police with accurate information of criminal activity or where the informant himself participated in the criminal activity.

*CRIMINAL PROCEDURES/SEARCH WARRANTS*

A mere description of an individual with nothing more does not establish probable cause.

*CRIMINAL PROCEDURES/SEARCH WARRANTS*

If a search warrant is based on an affidavit containing deliberate or knowing misstatements of material fact, the search warrant is invalid; a material fact is one without which probable cause to search would not exist.

*CRIMINAL PROCEDURES/SEARCH WARRANTS*

An affidavit underlying a search warrant must set forth a concrete time frame in which the confidential informant observed the alleged criminal activity forming the basis for his tip.

*CRIMINAL PROCEDURES/WARRANTLESS SEARCHES*

Where parole agents received inaccurate information that an absconded parolee lived in an apartment and, upon searching the apartment, found evidence of drugs, in a coat pocket not in plain view, the drugs and the discovery thereof by the state parole agents would not be admissible at trial.

*CRIMINAL PROCEDURES/SEARCH WARRANTS*

An affidavit stating that the parolee was arrested inaccurately conveyed the impression that the search was conducted incident to the parolee's arrest, and this constituted a material misstatement invalidating the search warrant.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA TRIAL COURT DIVISION NO. 3011 OF 2000

APPEARANCES: John H. Daneri, Esq., Assistant District Attorney, for the Commonwealth
Kevin M. Kallenbach, Esq., for the Defendant

**OPINION AND ORDER OF COURT**

Domitrovich, J., April 4, 2001

This matter arises from Defendant's Motion to Suppress Physical Evidence. Defendant raises the following issue in said Motion: whether the search violated Defendant's Fourth Amendment Rights, or in the alternative whether the Affidavit of Probable Cause contained defects warranting the Court to void said search warrant.

The relevant facts are as follows: Two Pennsylvania Parole Agents were attempting to locate an absconded parolee, Greg Moyer. (N.T.,

10/25/00, pp. 4-5). Neither agent knew Greg Moyer at this time. (N.T., 10/25/00, p. 14). After receiving information from an undisclosed confidential informant (hereinafter C.I.) that Greg Moyer was staying at a boarding house located at 501 East 10th Street, in apartment #5, the two agents began surveillance of the residence. (N.T., 10/25/00, pp. 5-6). The C.I. also informed the agents that Greg Moyer was possibly using the name of Kenny Carson. (N.T., 10/25/00, p. 5). The surveillance continued for several days to a week. (N.T., 10/25/00, p. 6).

The agents did not observe Greg Moyer within this time period (several days to a week), and thereafter, approached the landlord of the boarding house and showed the landlord a photograph of Greg Moyer to which the landlord responded, "yeah, this is Greg Moyer." (N.T., 10/25/00, pp. 5, 7). The agents had shown the photograph of Greg Moyer to the landlord on "at least, I'd say, three different occasions." The first time was when the agents initially contacted the landlord; the second time was subsequent to the landlord letting the agents into the apartment, which the agents again presented the photograph of Greg Moyer and asked the landlord, "are you sure;" and the third time was after entering the apartment, the agents and the landlord noticed a photograph on a dresser, as well as a poster, and "all three of us said, yeah, this is the guy." (N.T., 10/25/00, p. 7).

After obtaining positive identification from the landlord that Greg Moyer resided in apartment #5, the agents requested access to Unit #5, and the landlord complied, on March 7, 2000. (N.T., 10/25/00, pp. 7-8). Agent Verga was asked, "And is it your practice to enter into the dwelling place of one of your supervisees when you believe they're there and had violated--" (N.T., 10/25/00, p. 8). Agent Verga replied, "Absolutely, yes." (N.T., 10/25/00, p. 9). Then, Agent Verga was asked, "So, you reasonably believe Mr. Moyer is *in* Apartment 5. You go in with Agent Wurley [sic][1] and Mr. Manning (the landlord)?" (N.T., 10/25/00, p. 9). Agent Verga responded, "The landlord, that's correct." (N.T., 10/25/00, p. 9).

Once the agents and the landlord were inside Defendant's room (unit #5), they compared the photograph they had with a photograph that was on a stand inside Defendant's room, which according to Agent Verga was "remarkably alike." (N.T., 10/25/00, p. 9). Once they compared the photographs and agreed they were the same person, they noticed some paperwork lying around and "started to look through the paperwork... to gain and to ascertain some verification that, you know, this was, you know, Moyer's place." (N.T., 10/25/00, pp. 9-10). Several pieces of mail addressed to "Kenny Carson" and other paperwork with Kenny Carson's

[1] The preliminary hearing transcript incorrectly spells the name of State Parole Agent Wurley, the correct spelling is Wehrle, and hereafter it will be presented in the correct manner, i.e., Wehrle.

name on it were discovered in the room (N.T., 10/25/00, pp. 21-22, 31). Alternatively, nothing was found in the room displaying the name "Greg Moyer." (N.T., 10/25/00, p. 22).

As the agents looked around the room, they observed that "there were a ton of clothes in this place for, you know, being a small area... As I said, the bed was just littered with clothes." (N.T., 10/25/00, p. 10). Agent Verga commented that the room was very small "probably not bigger than a cell. I mean, maybe square feet, 80 square feet, 8 by 10, something like that." (N.T., 10/25/00, p. 8). At that time, Agent Wehrle looked on the bed and "picked up a ski jacket and noticed that there was something hard in there." (N.T., 10/25/00, p. 10). Then Agent Wehrle pulled the contents of the pocket out of the jacket and discovered "what was in our estimation at the time to believe, you know, cocaine, drugs." (N.T., 10/25/00, p. 10). Thereafter, they stopped their search and contacted the Erie City Police Department. (N.T., 10/25/00, p. 11). Agent Verga stayed in the room to secure the area, while Agent Wehrle called the Erie City Police Department. (N.T., 10/25/00, p. 11). The drugs were never left alone, either Agent Verga or Agent Wehrle was present at all times, until Detective Nolan of the Erie Police Department arrived. (N.T., 10/25/00, p. 11).

The search was discontinued until Detective Nolan arrived. (N.T., 10/25/00, pp. 12-13). Detective Nolan was escorted to Unit #5, and Agent Wehrle explained what had transpired to Detective Nolan. (N.T., 10/25/00, p. 13). Agent Wehrle "immediately" showed Detective Nolan "a white Shur-Fine shopping bag that contained two sandwich baggies. And each of these baggies contained large slabs of crack cocaine." (N.T., 10/25/00, p. 27). Agent Wehrle was explaining to Detective Nolan how the drugs were discovered, at the same time he was showing Detective Nolan the drugs. (N.T., 10/25/00, p. 27).

After showing Detective Nolan the drugs, the agents showed Detective Nolan a poster and some other photographs of who they believed to be Greg Moyer. (N.T., 10/25/00, p. 27). Detective Nolan immediately knew that the pictures were not Greg Moyer, but rather, were of Kenny Carson, and Detective Nolan informed the agents of this information. (N.T., 10/25/00, pp. 27-28). Detective Nolan stated, "But I was confident that they were two different people, because I was familiar with the both of them, individually." (N.T., 10/25/00, p. 28). Detective Nolan stated that it did not take him long to realize the room was Kenny Carson's and not Greg Moyer's room. (N.T., 10/25/00, p. 28). Thereafter, Detective Nolan obtained a search warrant. (N.T., 10/25/00, pp. 13, 28-29). As a result, Defendant was charged with knowingly or intentionally possessing a controlled substance by a person not registered under this act, 35 Pa.C.S. §780-113(a)(16), and the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, 35 Pa.C.S. §780-113(a)(30).

Subsequent to the search, the real Greg Moyer was arrested without incident, in the area of 14th and Division Streets, on the East side of Erie, for absconding from parole supervision in Pittsburgh. (N.T., 10/25/00, p. 15).

The Pennsylvania Supreme Court stated, "A parolee and a probationer have limited Fourth Amendment rights because of a diminished expectation of privacy." *Commonwealth v. Williams,* 547 Pa. 577, 692 A.2d 1031 (1997), citing *Griffin v. Wisconsin,* 483 U.S. 868, 873-74, 97 L.Ed.2d 709, 107 S.Ct. 3164 (1987). The United States Supreme Court, in *Griffin,* stated:

> "A probationer's home like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'" However, the requirement that a parole officer obtain a warrant based upon probable cause before conducting a search does not apply to a parolee because parole is a form of criminal punishment imposed after a guilty verdict and the states must have the necessary power over parolees in order to successfully administer a parole system as a controlled passageway between prison and freedom.

*See Williams,* at 1035; citing *Griffin,* at 873-875. In *Griffin,* the United States Supreme Court refused to decide the issue of whether a probationer[2] had limited fourth amendment rights; instead the Supreme Court held:

> A State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, likewise presents "special needs" beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.

*Griffin,* at 873-874. Therefore, a warrantless search of a probationer's residence is permissible if reasonable suspicion that the residence contains contraband or evidence of parole violations, according to *Griffin.* The *Griffin* Court, in making this conclusion, stated that the search "satisfied the demands of the Fourth Amendment because it was carried out pursuant to a regulation that itself satisfies the Fourth Amendment's reasonableness requirement under well-established principles." *Id.,* at 873.

However, the Pennsylvania Supreme Court addressed the *Griffin* "special needs" exception in *Commonwealth v. Pickron,* 535 Pa. 241, 634 A.2d 1093 (1993)[3]. In *Pickron,* the court agreed with the argument presented that "because Pennsylvania does not have such a regulatory framework, the

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[2] The constitutional rights of a parolee are indistinguishable from that of a probationer. *See Williams,* at 1035, n. 7.

[3] The *Pickron* court "refused to decide the issue of whether the probationers had limited fourth amendment rights..." *Pickron,* at 1097.

*Griffin* exception does not apply." *Pickron,* at 1097. The *Pickron* court continued:

> [i]t is a matter of federal law and state law that parole and probation officers cannot act like 'stalking horses' for the police... We do not have a statute or regulation which allows or governs the performance of warrantless searches based upon reasonable suspicion or probable cause.

*Id.* Furthermore, the *Pickron* court was "confronted with the issue left unaddressed by *Griffin;"* and therefore, made the following conclusion:

> We hold therefore that the fourth amendment prohibits the warrantless search of probationers or parolee's residences based upon reasonable suspicion without the consent of the owner or without a statutory or regulatory framework governing the search. We do so because we recognize that there are no safeguards to protect the limited fourth amendments rights of probationers and parolees if their supervision is left entirely to the discretion of individual parole officers. In the traditional fourth amendment case, the warrant requirement based upon probable cause and issued by a neutral and detached magistrate guarantees the protection of a citizen's constitutional rights. Similarly, in the context of a probationer or parolee's limited fourth amendment rights, some systemic procedural safeguards must be in place to guarantee those limited fourth amendment rights.

*Id.,* at 1098.

In *Pickron,* two state parole officers (Guglielmi and Newton) went to the defendant's apartment armed with a warrant to arrest defendant for failure to report to the State Board of Parole. *See Pickron,* at 1094. Upon arrival, the two agents informed defendant's mother that they intended to search the residence for her daughter, which the mother admitted the agents "for that limited purpose." *Id.*

After entering the apartment, the agents, in *Pickron,* "immediately noted" defendant was "living beyond her means." *Id.* Thereafter a general search for defendant was conducted in areas large enough to conceal a person. *Id.* Agent Newton opened a closet door, and after discovering no one was in the closet, he observed a bottle of quinine, a cutting agent for heroin, in plain view. *Id.* Then, believing that narcotics would be found within the apartment, Agent Newton instituted a more thorough search, which resulted in the seizure of the following items: "a coffee grinder containing a white powdery residue" located in a box on the windowsill; "a teacup containing a small package of white powder" recovered from a desk; "a welfare card depicting" a co-defendant, as well as an insurance card and business card both belonging to the co-defendant; additionally, "a roll of

plastic tape, a silver spoon, glassine packets, bags containing vials and plastic bags" located in and under the desk. *Id.*

Agent Newton informed Agent Guglielmi of his "discoveries" and then Agent Guglielmi expanded the scope of his search, in *Pickron. Id.* Agent Guglielmi searched all of the cabinets and drawers in defendant's bedroom, and thereafter, seized "two packets containing a white substance, nine packets containing a green weed, a plastic bottle of inositol, and a face filter mask" from the dresser drawer. *Id.,* at 1095. Also seized from inside the dresser, by Agent Guglielmi, was "Pennsylvania State Parole Agent James Commons' business card, and a ziplock bag containing empty packets." *Id.* After returning to the kitchen, Agent Guglielmi "recovered a plastic bag containing white powder from the medicine cabinet." *Id.*

Agents Guglielmi and Newton remained in the apartment and upon defendant's arrival at the residence, she was arrested, and the agents confiscated a beeper from her person. *Id.* Although the agents, in *Pickron,* waited approximately another two hours, the co-defendant did not return to the apartment, and thereafter the agents left. *Id.* The defendant was transported to the local police station, as well as the evidence seized from defendant's apartment. *Id.* The agents never instituted technical parole violations based upon the contraband seized. *Id.*

Defendants, in *Pickron,* filed a Motion to Suppress the drugs, the drug paraphernalia and the identification evidence. *Id.* The trial court granted the defendants' suppression motion. *Id.* In granting said Motion, the trial court held:

> the parole officers had "switched hats" by ceasing to act as administrators of the parole system, and began acting as police officers gathering evidence to support new criminal charges.

*Id.* Furthermore, the trial court rejected the Commonwealth's argument that the parole officers were permitted to conduct the search pursuant to *Griffin v. Wisconsin, supra. Id.*

The Commonwealth appealed to the Superior Court, which reversed the trial court's Order, suppressing the evidence. *Id.* Thereafter, the Pennsylvania Supreme Court "granted allocatur to examine the fourth amendment rights of a parolee." *Id.* The Commonwealth argued, "the purpose of the agents is unimportant because the parole officers have the right to conduct a search for evidence of parole violations, including criminal activities which violate parole." *Id.,* at 1096. Alternatively, appellants argued that the Superior Court "improperly disregarded the Suppression Court's factual findings that the parole officers acted like police officers." *Id.*

The clearly defined standard of review, as stated in *Pickron,* follows:

> Where the Commonwealth appeals the findings of a Suppression Court we consider only the evidence of the defendant's witnesses

> and the evidence of the prosecution that, when read in the context of the entire record, remains uncontradicted. We are bound by the lower court's findings of fact if they are supported in the record, but we must examine any legal conclusions drawn from those facts.

*See Pickron,* at 1096. In the Pickron case, the Suppression Court determined that "the parole officers had subjectively changed the purpose of their search from searching for evidence of parole violations to searching for evidence of criminal violations. *Id.* As stated previously, the fourth amendment protects parolees with some limitations. *Id.*

The Commonwealth of Pennsylvania adopted the *Gates* standard under the Pennsylvania Constitution in *Commonwealth v. Gray,* 509 Pa. 476, 503 A.2d 921, 926 (1985). Under *Gates,* the standard used is a "totality of the circumstances" approach to determine if probable cause exists to support a search warrant. *Id.* The new test to be used in analyzing warrants follows:

> 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." *Jones v. United States,* [362 U.S. 257, 271, 80 S.Ct. 725, 736, 4 L.Ed.2d 697 (1960)].

*Gray,* at 925. The *Gray* Court continued by stating, "we have always held that probable cause determinations must be based on common sense non-technical analysis." *Id.*

When probable cause to obtain a search warrant is based upon an informant's tip, the court must be satisfied that the tip is reliable; therefore, the veracity of the information must be assessed as well as the basis for the knowledge to establish whether the officers had probable cause. *In Interest of J.H.,* 424 Pa.Super. 224, 622 A.2d 351 (1993); *citing Commonwealth v. Davis,* 407 Pa. Super. 415, 595 A.2d 1216, 1219 (1991), *appeal denied,* 530 Pa. 630, 606 A.2d 900 (1992). The Pennsylvania Superior Court, in *In Interest of J. H.,* further clarified the standard utilized by stating, "While the 'totality' standard represents a loosening of the previously rigid, two-prong test for probable cause, the dual basis of knowledge and veracity prongs are still very much a part of our inquiry." *Id.*

The following are ways of determining the reliability of an informant's tip:

> We have been satisfied that an informant's tip constitutes probable cause where police have been able to provide

> independent corroboration of the tip or where the informant previously provided police with accurate information of criminal activity, or where the informant himself participated in the criminal activity.

*Id.* In the case of *In interest of J.H.,* it was determined that the evidence did not support a finding of probable cause since the suppression hearing lacked any testimony regarding the basis of the informant's knowledge; no claim was made that the informant was an eyewitness or that the informant gained knowledge from an individual involved in the crime; nor was any testimony proffered of the informant's previous cooperation with the police. *Id.*

Furthermore, the Court in *In Interest of J.H.,* stated:

> A mere description of an individual, with nothing more, does not establish probable cause. This information, appellant's clothing and location, does not support the reliability of the informant's tip; it is information available to anyone and is not indicative of criminal conduct.

*Id.,* at 354, *See Commonwealth v. Edmunds,* 526 Pa. 374, 382 n. 3, 586 A.2d 887, 891 n. 3 (1991) (citing *United States v. Leon,* 468 U.S. 897, 903 n. 2, 104 S.Ct. 3405, 3410 n. 2, 82 L.Ed.2d 677 (1984)). The Pennsylvania Superior Court, in *In Interest of J.H.,* concluded, "In sum, the suppression court was presented with no evidence tending to prove that the information given to police was reasonably trustworthy." *Id.*

In *Clark,* it stated, "if a search warrant is based on an affidavit containing deliberate or knowing misstatements of material fact, the search warrant is invalid." *Commonwealth v. Clark,* 412 Pa. Super. 92, 602 A.2d 1323, 1325 (1992), referring to *Commonwealth v. Bonasorte,* 337 Pa. Super. 332, 347 486 A.2d 1361, 1369 (1984). The *Clark* court continued by stating, "A material fact is one without which probable cause to search would not exist." *Clark,* at 1326. Further, "An affidavit underlying a search warrant must set forth a concrete time frame in which the confidential informant observed the alleged criminal activity forming the basis for his tip." *Id.*

After applying the aforementioned case law regarding a parolee's fourth amendment rights, this trial court makes the following findings. Agent Wehrle and Agent Verga believed the residence, at 501 East 10th Street, Unit #5, to be that of the absconded parolee, Greg Moyer, based upon information received from their C.I. They had a photograph of Greg Moyer that they showed to the landlord, and the landlord agreed that the photograph appeared to be that of Greg Moyer, the parolee. Furthermore, the agents obtained information that Greg Moyer was possibly going by the name of Kenny Carson.

After gaining access to the room, the photographs inside the room also appeared to be that of Greg Moyer. The agents were seeking verification

that the room did, in fact, belong to Greg Moyer (or his supposed alias Kenny Carson). Agent Verga and Detective Nolan stated that paperwork and mail addressed to Kenny Carson was seen lying around the room, which was in plain view. (N.T., 10/25/00, pp. 9, 31). Therefore, the agents did not need to go any further for verification, the paperwork and/or mail bearing the name of Kenny Carson found in the room substantiated the room belonged to Kenny Carson.

Additionally, the state parole agents are not required to verify the information they had received from their C.I.[4] regarding Greg Moyer, alias Kenny Carson. However, when they received the information that the absconded parolee, Greg Moyer, was possibly using the name Kenny Carson, the agents could have attempted to contact the Erie Police Department and inquire whether the police department knew an individual named Kenny Carson and/or Greg Moyer, and any possible aliases. The state parole agents may have discovered that Greg Moyer and Kenny Carson are two separate individuals. This scenario appears even more relevant when taking into consideration the situation that occurred once Detective Nolan arrived on scene at 501 East 10th Street, Unit #5. Detective Nolan knew within minutes of entering the unit that Kenny Carson and Greg Moyer were two separate individuals. This could have solved the entire problem before it occurred.

Furthermore, the agents entered the room believing that Greg Moyer was inside the room. *See* (N.T., 10/25/00, pp. 8-9)[5]. Upon entering the room it was obvious that no one was present in the room. However, instead of leaving at that point, they began to "search the place for, not only drugs, but for weapons and whatnot," according to Agent Verga. (N.T., 10/25/00, p. 10). The information the agents had received from the C.I. only revealed information that Greg Moyer (alleged alias Kenny Carson) was living at 501 East 10th Street, Unit #5; not that Mr. Moyer (alias Carson) was involved in any illegal activity. Therefore, the agents had no reason to believe the parolee was involved in any illegal activity, only that he had absconded from parole supervision in Pittsburgh; making any search to substantiate criminal conduct unreasonable.

In the instant case, Agents Wehrle and Verga, just as the agents in the

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[4] This is true as long as the State Parole Agents had reason to believe that their C.I. was reliable.

[5] When asked, "And is it your practice to enter into the dwelling...when you believe they're *there...*" Agent Wehrle responded, "Absolutely, yes." (N.T., 10/25/00, p.8). Further, Agent Wehrle was asked, "So, you reasonably believe Mr. Moyer is *in* Apartment 5..." and he replied, "...that's correct." (N.T., 10/25/00, p.9).

*Pickron* case, ceased acting as administrators of the parole system, and began acting as police officers, in effect "switched hats," when they entered the room looking for Greg Moyer, the person, and when they did not find him, they began searching the room collecting evidence "to support new criminal charges." *See Pickron,* at 1095. The parole agents, in the instant case, subjectively changed the purpose of their search from searching for evidence of parole violations to searching for evidence of criminal violations.

The agents stated to the landlord that they believed the parolee they were looking for had rented the room and believed he was present in the room. The agents gained access to the room under that assumption. However, upon entering the room, they discovered the parolee was not in the room, and thereafter, the agents initiated a search of the room, with no reasonable suspicion that any criminal activity was being conducted out of said room.

Although a parolee has limited fourth amendment rights, safeguards must be utilized to guarantee those limited fourth amendment rights. Parole agents may not act like "stalking horses" for the police. The drugs that were seized were located inside a plastic bag, in a coat pocket, which was lying on the bed, along with a "ton" of other clothes; not in plain view. Further, in *Pickron,* even though the agents were looking for the defendant in a closet and the evidence seized was in plain view, the *Pickron* court suppressed the evidence, stating that the agents were acting as "stalking horses" for the police. Pursuant to the aforementioned case law, although the parole officers were permitted to enter the room, in an attempt to locate an absconded parolee, the parole agents were not permitted to conduct a further search to discover evidence to warrant new criminal charges; and therefore, the evidence must be suppressed.

However, even if, assuming arguendo, the search that resulted in the discovery of the drugs was legal, this trial court finds that defects still exist making the search and subsequent discovery of the drugs illegal. Once the drugs were discovered, the state parole agents notified Detective Nolan, Erie Police Department. After entering the alleged room of parolee Greg Moyer, alias Kenny Carson, Detective Nolan was apprised of what had occurred and how the drugs were discovered. Thereafter, Detective Nolan noticed the photographs in the room and was able to distinguish Greg Moyer from Kenny Carson. Detective Nolan explained, with candor, that he was acquainted with both Greg Moyer and Kenny Carson, and that they were two distinct people. Detective Nolan stated, "I'm also familiar with Greg Moyer because we have a photograph of him from a previous arrest in our office." (N.T., 10/25/00, p. 28). In regards to Kenny Carson, Detective Nolan stated, "I've had encounters with him throughout my years in the police department, in the Franklin Terrace, and in the hood area of 22nd, 23rd of Holland area." (N.T., 10/25/00, p. 28). Thereafter, Detective

Nolan explained to the two state parole agents that this in fact was Kenny Carson's apartment, not Greg Moyer, and that Greg Moyer is a separate person. (N.T., 10/25/00, p. 28).

Then, Detective Nolan stated that he believed it would be appropriate to obtain a search warrant at that time. (N.T., 10/25/00, p. 29). Detective Nolan took custody of the drugs and then left to obtain a search warrant, to enable the police to return to the room and conduct a more thorough search. (N.T., 10/25/00, p. 29).

This suppression court finds the following defects as to the affidavit of probable cause: Detective Nolan, affiant on the search warrant, states, "fugitive parolee, Greg Moyer" was arrested by State Parole Agents Wehrle and Verga. The affidavit continues, "While searching what these officers believed to be the residence of Moyer," they discovered the drugs at issue. However, in fact, Moyer was arrested after the search had taken place, in fact, it was the day after the search was conducted. *See* (N.T., 10/25/00, pp. 16-17). Therefore, the affidavit does not state the events as they occurred and the time sequence in which they had taken place; the affidavit gives the impression that Greg Moyer was arrested and then the officers went to what they believed to be his residence and searched it. In fact, the affidavit states Moyer was arrested and the agents approached the landlord and showed him a picture of Moyer, which he identified as Moyer (or Carson), and then the landlord described a vehicle that "matched the one that Moyer was arrested in on this date." Then the affidavit states, "These Agents went to this apartment to search it as a matter of procedure and once the crack was found..." This seems to imply that the search was conducted incident to Moyer's arrest "as a matter of procedure." Pursuant to *Clark,* this Court finds this to be a material misstatement, and thereby, invalidates the search warrant. *See Clark, supra.,* at 1325.

Also, the C.I. that offered the information leading to the boarding house being staked out by the State Parole agents was not known to Detective Nolan, which Detective Nolan candidly admitted[6]; and therefore, Detective Nolan cannot speak to the reliability of the C.I., or the accuracy of his previously providing information to the police, nor can Detective Nolan offer independent corroboration of the tip, and the C.I. did not participate

[6] When asked about the C.I., Detective Nolan stated, "I don't even know if I-- I may know their confidential informant, but I didn't ask who it was." When asked if Detective Nolan knew the C.I.'s name, he answered, "No." Then, when asked if Detective Nolan used this as a reliable informant in his affidavit or probable cause, Detective Nolan replied, "I can tell you this, I got my information from the search warrant from these agents. Where they got their information from, I don't exactly know, but I consider them reliable, and I saw the crack myself.

in the criminal activity. *See In Interest of J.H.* The C.I. was known only to the State Parole Agents. Further; the Pennsylvania Superior Court determined that "a mere description of an individual... and location" does not establish probable cause, nor does it support the reliability of the informant's tip. *See In Interest of J.H.* In the instant case, the only information that the State Parole Agents had received was that Greg Moyer, alleged alias Kenny Carson, "was staying in and around the 10th and Wallace area" at first. Then the information was that he "was living in an apartment building on 10th and Wallace," the C.I. was able to ascertain the unit number. *See* (N.T., 10/25/00, p. 5). The agents also had a photograph of Greg Moyer. Therefore, the agents probable cause to believe they had located their absconded parolee, and thereafter, enter the room they believed to be Greg Moyer's, was based upon a description and a location.

Detective Nolan discusses a C.I. known to him that had relayed information regarding alleged illegal activity of Ken Carson; however this information concerned information obtained in November 1999, and concerned activity occurring from a house in the 2500 block of German Street. Therefore, according to Pennsylvania case law, the affidavit underlying a search warrant "must set forth a concrete time frame in which the confidential informant observed the alleged criminal activity forming the basis for his tip." *See Clark, supra.,* at 1326. In the instant case, Detective Nolan states in the affidavit that he is relying on the aforementioned information, in applying for this search warrant. However, this information was not relevant to the search initiated at 501 East 10th Street, Unit #5. The search at 501 East 10th Street was initiated due to the information that the State Parole Agents has received from *their* C.I. During the preliminary hearing, Detective Nolan stated that he was relying on the information obtained by State Parole Agents Wehrle and Verga. See (N.T., 10/25/00, p. 38).

This suppression court enters the following Order:

**ORDER OF COURT**

AND NOW, to-wit, this Fourth day of April, 2001, after hearing argument and reviewing the memoranda submitted by both counsel and the relevant Pennsylvania case law regarding Defendant's Motion to Suppress Physical Evidence, it is hereby ORDERED, ADJUDGED AND DECREED that said Motion is GRANTED based upon the preceding Opinion.

**BY THE COURT:**
/s/ **Stephanie Domitrovich, Judge**

**LORI REIDER, Plaintiff,**

**v.**

**JEFFERY M. REIDER, Defendant,**

***FAMILY LAW/CHILD SUPPORT***

***Res Judicata/Estoppel***

Where the custodial mother has agreed to the entry of an order denying support on the grounds that her husband was not the biological father of the child for whom support was sought, the mother is barred by the doctrine of res judicata from later seeking to modify the support order. An intervening determination that the mother is also estopped from asserting a claim of support against the biological father does not alter the applicability of the doctrine of res judicata to the claim against the husband.

A presumption of paternity does not arise where the parties have separated and a divorce action is pending prior to the support hearing. Further, the husband is not estopped from denying paternity where he ceased to hold himself out to the child and third parties as the child's father once he learned that he was not the natural father of the child.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA DOMESTIC RELATIONS SECTION
PACSES NO. 335102443
DOCKET NO. NS-2000-01699

Appearances: Kelly Mroz, Esquire for the Plaintiff
Michael Cauley, Esquire for the Defendant

**OPINION**

Ernest J. DiSantis, Jr., Judge

**I. <u>FACTUAL FINDINGS</u>**

This case is before the Court on the defendant's request to enter an order dismissing the plaintiff's petition for modification of a support order entered on September 14, 2000.

The plaintiff, Lori L. Reider, and the defendant, Jeffery M. Reider, were married on September 7, 1985. The parties produced two children during the marriage, Courtney (d/o/b 10-30-86) and Morgan (d/o/b 5-01-90). Subsequent to Morgan's birth, the father underwent a vasectomy.

In August, 1996, the mother became pregnant with a third child, Madison. As it happens, Madison was conceived while the mother had an extra-marital affair with Dennis Baumann, an affair she kept secret from Mr. Reider. During her pregnancy and the subsequent birth, however, the defendant believed he was the natural father and assumed that the vasectomy had reversed itself. Therefore, he did not initially question paternity. Madison was born on March 25, 1997. The Reiders continued to live together until the summer of 2000.

On July 5, 2000, the mother filed a complaint for divorce. On July 6, 2000, she filed a petition against Mr. Reider for spousal support and for support of the three minor children. By this time, Mr. Reider had developed serious doubts as to his paternity of Madison after he had been informed that the failure of a vasectomy is extremely rare. On August 15, 2000, he had a DNA test performed to determine if he was the father of the child. On August 28, 2000, before he had received the results, he signed a property settlement agreement prepared by the mother's divorce counsel (not counsel in this action). The second "Whereas" clause states that the parties have three children, including Madison.

Shortly after the settlement was signed, the father received the results of the DNA test, which confirmed that he was not Madison's biological father. On September 13, 2000, a copy was submitted to the mother. On September 14, 2000, a support conference was scheduled on the support petition filed by the mother on July 6, 2000. At the conference, Mr. Reider objected to paying child support for Madison on the grounds that he was not the biological father. The mother stipulated to his objection and sought support only for Courtney and Morgan.

On September 14, 2000, an order was issued reflecting those facts. On September 21, 2000, Ms. Reider filed a petition for child support for Madison against Mr. Baumann. Mr. Baumann filed a petition to dismiss the support complaint on January 18, 2001. On March 13, 2001, the Honorable Elizabeth K. Kelly granted Mr. Baumann's petition to dismiss. In her opinion, she found that Ms. Reider was estopped from asserting that Mr. Baumann is the father of the child. Relying, inter alia, on *Fish v. Behers*, 741 A.2d 721 (Pa. 1999), Judge Kelly found:

> [t]his case, like *Fish*, affirms the application of the estoppel principle despite the existence of scientific evidence which establishes a third party as the biological father. The genetic tests herein clearly exclude Father as the biological father of the child. The genetic test also established Baumann as the biological father of the Child. However, because the facts of the present case are almost identical to the *Fish* facts, this Court is compelled to apply the Estoppel Doctrine, as outlined by the Supreme Court of Pennsylvania in 1999.

J.K.Op. 4-5[1]

It should be noted that Mr. Reider was not a party to that action and, therefore, was not in a position to assert his rights or defenses. Furthermore, Judge Kelly found that the Reiders never discussed Madison's parentage because Mr. Reider believed the vasectomy had reversed. Ms. Reider never dispelled him of that notion. J.K. Op.2.

Following Judge Kelly's decision, on March 16, 2001, the mother filed a

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[1] Judge Kelly's opinion of March 13, 2001.

petition to modify the September 14, 2000 support order requesting that Mr. Reider be held responsible for Madison's child support. On June 25, 2001, (after a support conference) an interim order was entered ordering Mr. Reider to pay child support for all three children. Mr. Reider objected then, as he does now, and on July 3, 2001 he requested a *de novo* hearing on this issue. On October 10, 2001, he filed his motion to dismiss and the matter came before this Court on September 26, 2001. At that time, after hearing the Reiders' positions, this Court ordered that briefs be submitted to assist the Court in resolving the issue.

## II. LEGAL DISCUSSION

This case is somewhat complicated. Although the parties make a number of arguments, at its essence, Mr. Reider's position is that the doctrine of res judicata bars an award of child support against him for Madison.[2] Inter alia, Ms. Reider argues that the doctrine of estoppel should apply and that he should not be allowed to avoid paying child support for this child. In discussing the issue, the Court will attempt to break the legal analysis into its component parts.

### A. The doctrine of res judicata

Res judicata is an affirmative defense. Pennsylvania Appellate courts have defined it in this way:

> [t]he doctrine of res judicata holds that "[a] final valid judgment upon the merits by a court of competent jurisdiction bars any future suit between the same parties or their privies on the same cause of action." *Mintz v. Carlton House Partners, Ltd.*, 407 Pa.Super. 464, 474, 595 A.2d 1240, 1245 (1991), quoting *Stevenson v. Silverman*, 417 Pa. 187, 190, 208 A.2d 786, 788 (1965), cert denied, 382 U.S. 833, 86 S.Ct. 76, 15 L.Ed.2d 76 (1965). The purpose of the doctrine is "to minimize the judicial energy devoted to individual cases, establish certainty and respect for court judgments, and protect the party relying on the prior adjudication from vexatious litigation." *Mintz v. Carlton House Partners, Ltd., supra* at 474, 595, A.2d at 1245, quoting *Lebeau v. Lebeau*, 258 Pa. Super. 519, 524, 393 A.2d 480, 492 (1978).
>
> Where parties have been afforded an opportunity to litigate a claim before a court of competent jurisdiction, and where the court has finally decided the controversy, the interests of the state and of the parties require that the validity of the claim and any issue actually litigated on the action not be litigated again. (citation omitted).

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[2] Mr. Reider asserts that he will continue to pay child support on a voluntary basis, although he believes he is not legally obligated to do so.

*Scott v. Mershon*, 657 A.2d 1304, 1306 (Pa. Super. 1995).

Principles of res judicata are applicable to determinations of paternity. *Id.* (citations omitted). See also, *Coleman v. Coleman*, 522 A.2d 1115, 1119-1120 (Pa.Super. 1987).

There are four elements which must be satisfied before the defense is effective. They are: (1) identity of the things sued upon; (2) identity of the cause of action; (3) identity of the parties; and (4) identity of the capacity of the parties. See, *Scott*, *supra* at 1306 (citations omitted).

Turning to the analysis of this case, the Court finds the following. First, the identity of the things sued for, i.e. child support, is the same in the current action as it was when Ms. Reider filed her original support complaint against Mr. Reider. Second, there is an identity of the cause of action. Third, there is an identity of the parties' quality; and fourth, there is identity of or capacity in the persons for or against whom the claim is made. At the time of her initial support action that resulted in the order of September 14, 2000, the mother sought support from Mr. Reider for Madison. She withdrew that claim based upon his assertion and her assent of lack of paternity. Neither party filed exceptions nor took an appeal. Therefore, that order was final. The courts of this Commonwealth have noted that:

> [a]n absence of appeal from an original support order for a purported son, fact of husband's paternity establishes as a matter of law, and under the doctrine of res judicata, such paternity could not be challenged or put at issue in a subsequent proceeding.

See generally, *Nedzwecky v. Nedzwecky*, 199 A.2d 490, 491 (Pa. Super. 1964).

As the Superior Court noted in Scott:

> "The binding effect of a former adjudication does not depend upon the evidence or arguments presented. Inadvertent omission of available evidence is never an acceptable ground for a new action or a new trial." (citations omitted) . . . . Res judicata encompasses not only those issues, claims or defenses that were actually raised in the prior proceeding, but also those which could or should have been raised that were not. (citations omitted).

*Scott v. Mershon*, *supra* at 1307.

Therefore, in the instant case all of the elements of the affirmative defense of res judicata have been satisfied.

**B. The doctrine of estoppel**

Ms. Reider argues that the doctrine of estoppel trumps the defense of res judicata. In order to resolve this issue, the Court will engage in a brief discussion of the law of paternity.

In Pennsylvania, it is presumed that a child born to a married woman is the child of the woman's husband. In *Strauser v. Stahr*, 726 A.2d 1052 (Pa. 1999), discussing the presumption of paternity, the Supreme Court stated:

> [t]raditionally, the presumption can be rebutted only by proof either that the husband was physically incapable of fathering a child or that he did not have access to his wife during the period of conception. Thus, it has been held that, where the presumption applies, blood test results (existing or potential) are irrelevant unless and until the presumption has been overcome. It has also been held that, in one particular situation, no amount of evidence can overcome the presumption: where the family (mother, child, and husband/presumptive father) remains intact at the time that the husband's paternity is challenged, the presumption is irrebuttable.

*Id.* At 1054.

In *Barnard v. Anderson*, 767 A.2d 592 (Pa. Super. 2001), the Pennsylvania Superior Court stated that:

> [t]he court, in *Fish v. Behers*, 559 Pa. 523, 741 A.2d 721 (1999), stated "[t]he policy underlying the presumption of paternity is **the preservation of marriages**. The presumption only applies in cases where that policy would be advanced by the application; otherwise it does not apply." (citations omitted).

*Id.* At 594. (emphasis added).

In *Brinkley v. King*, 701 A.2d 176 (Pa. 1997), the Supreme Court set forth the analytical framework as follows:

> [t]hus, the essential legal analysis in these cases is twofold: first, one considers whether the presumption of paternity applies to a particular case. If it does, one then considers whether the presumption has been rebutted. Second, if the presumption has been rebutted or is inapplicable, one then questions whether estoppel applies. Estoppel may bar either a plaintiff from making the claim or a defendant from denying paternity. If the presumption has been rebutted or does not apply, and if the facts of the case include estoppel evidence, such evidence must be considered. If the trier of fact finds that one or both of the parties are estopped, no blood tests will be ordered.

*Id.* At. 180.

In *Sekol v. Delsantro*, 763 A.2d 405 (Pa. Super. 2000), a case factually similar to the case at bar, the Supreme Court did not apply the presumption of paternity because the parties had separated and a divorce action was pending prior to the support hearing. *Id.* at 409. Because that is, in effect, what occurred in the case sub judice, the presumption does not apply. Ms. Reider argues that, by his conduct, Mr. Reider held him self out to Madison and third parties as the child's father and should, therefore, be estopped from asserting that he has no support obligation. However, once he knew he wasn't Madison's natural father, he asserted his instant claim and has continued to do so. Therefore, he has continued paying support purely

on a voluntary basis.

Ms. Reider also asserts that the father is barred from discharge of a child support obligation to Madison because of the marital settlement agreement. However, this Court's review of that agreement discloses that the issue of Madison's child support was not addressed, even though there is a "Whereas" recitation that the three children were those of Mr. Reider.

She further argues that she could not bargain away Madison's right to support. Although it is true that parties are not free to bargain away a right of child support, [see *Kessler v. Weniger*, 744 A.2d 794, 796 (Pa. Super. 2000)], the right to child support was not bargained away in this case. A bar based upon res judicata is not the same as the bargaining away of the child's rights. Here, the mother waived the claim by not pursuing it.

This court recognizes that the right of support is the right of the child not the parent. See, *Kessler*, *supra* at 796. However, after its review, it finds that the doctrine of waiver as it applies in the res judicata context is binding. Continuing, Ms. Reider's argument that the September 14, 2000 support order did not determine paternity is not tenable. The issue of paternity was raised during the course of those proceedings, and was, implicitly resolved by the September 14, 2000 order.[3] Mrs. Reider cites *Manze v. Manze*, 523 A.2d 821 (Pa. Super. 1987) in support of her position. However, *Manze* actually supports Mr. Reider's position. There the Superior Court, in a support case, noted:

> [f]irst, as found by the trial court, appellant is precluded from denying paternity under the doctrine of res judicata. As this court has repeatedly held, a support order necessarily determines the issue of paternity. (citations omitted). To challenge paternity, an appeal must be taken directly from the support order itself. Absent any appeal, the issue of paternity is established as a matter of law.

*Id.* at 824 (emphasis added)

Therefore, the issue of paternity as it relates to this support case was necessarily established in Mr. Reider's favor by the order of September 14, 2000, an order to which Ms. Reider filed no exception or an appeal[4].

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[3] The mother also alleges a material and substantial change in circumstances because she is seeking more money than is currently paid. However, that argument cannot be used to avoid the application doctrine of res judicata in this case.

[4] It appears that in many of the relevant cases the obligor is the one who is barred from relitigating the paternity issue that was resolved by virtue of the support order and the failure to appeal. See also, *McCormell v. Berkheimer*, 781 A. 2d 206, 211 (Pa. Super. 2001). However, it would be illogical to hold that the obligee is not similarly bound by the paternity disposition.

## III. THE EFFECT OF JUDGE KELLY'S ORDER OF MARCH 13, 2001

Ms. Reider implies that Judge Kelly's order of March 13, 2001 determined that Mr. Reider is estopped from paying his support obligation. This is a collateral estoppel argument. However, he was not a party to that action and had no opportunity to assert his claims or defenses. Under Pennsylvania law, a person must have the opportunity to actually litigate an issue for collateral estoppel to apply. As the Commonwealth Court noted:

> [w]ith respect to res judicata or collateral estoppel, for issues to be binding in subsequent proceedings, parties must have had the opportunity to actually litigate issues in earlier proceedings.

*Nether Providence TP. V. R.L. Fatscher Associates, Inc.*, 674 A.2d 749 (Pa. Cmwlth. 1996). See also, *City of Pittsburgh v. Zoning of Adjustment of City of Pittsburgh, Zullo and Date*, 559 A.2d 896, 901 (Pa. Super. 1989). It appears that Mr. Reider was an indispensable party to that action. *See* Pa. R. Civ. P 2227. However, neither Ms. Reider nor Mr. Baumann sought to join him. Therefore, Judge Kelly's order is not dispositive of Mr. Reider's claims.

## IV. CONCLUSION

The determination of this case leads to an illogical and inequitable result, partly because of the procedural history of this case, and partly because of the state of Pennsylvania's paternity law.[5] Madison is now left in a position where she can only seek child support against Ms. Reider. Although that may seem unfair, to hold otherwise would require the court to ignore the res judicata doctrine and Ms. Reider's failure to properly prosecute this case. This Court is not free to ignore the law to avoid this result. Therefore, the Court will grant Mr. Reider's petition to dismiss.

## ORDER

AND NOW, this 14th day of November, 2001, for the reasons set forth in the accompanying opinion, it is hereby ORDERED that the defendant's petition to dismiss is GRANTED.

**BY THE COURT:**
/s/ **ERNEST J. DISANTIS, JR., JUDGE**

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[5] The Court respectfully notes its assent with Mr. Justice Nigro's dissent (joined by Ms. Justice Newman) in *Fish v. Behers*, supra at 724-725.

## GREGORY L. PROPER and KIM PROPER, his wife
## v.
## GEORGE GREGOR

*CRIMINAL PROCEDURE/TRIAL*

So long as no liberties are taken with the evidence, a lawyer in opening and closing arguments is free to draw such inferences as he wishes from the testimony and to present his case in the light most suited to advance his cause; but this does not include discussion of facts not in evidence which are prejudicial to the opposing party.

*CRIMINAL PROCEDURE/TRIAL*

To preserve an issue for review, trial counsel is required to make a timely, specific objection during trial.

*CRIMINAL PROCEDURE/TRIAL*

If the court's response to an objection to an opening statement is inadequate, counsel must request a mistrial or a cautionary instruction at that time; and where a cautionary instruction or mistrial was not requested, the issue was waived.

*MOTOR VEHICLE/LIMITED TORT/SERIOUS INJURY*

To determine whether a plaintiff has suffered a serious impairment of a bodily function so as to be entitled to damages despite the election of the limited tort option in his auto policy, the trier of fact must resolve two questions: (a) what bodily function, if any, was impaired because of the injury sustained in the motor vehicle accident and (b) whether the impairment of the bodily function was serious.

*MOTOR VEHICLE/LIMITED TORT/SERIOUS INJURY*

Several factors may be considered in determining whether the impairment of bodily function, for the limited tort option, was serious, these including the extent of the impairment, the length of time the impairment lasted, the treatment required to correct the impairment, and any other relevant factors. An impairment need not be permanent to be serious.

*CIVIL PROCEDURE/TRIAL*

A jury is the finder of fact and determines the credibility of witnesses; and the jury's determination that the plaintiff was not suffering from a serious impairment of a bodily function after considerable testimony, including medical experts, was supported by the evidence in the record.

*CIVIL PROCEDURE/TRIAL*

A trial court may grant a new trial when a jury's verdict is so contrary to the evidence that it shocks one's sense of justice.

*CIVIL PROCEDURE/TRIAL*

The admission of testimony by an expert witness is a matter within the sound discretion of the trial court, and the admission of rebuttal evidence is also within the discretion of the trial judge.

*CIVIL PROCEDURES/TRIAL*

A physician's testimony on increased risk of seizure was properly

excluded where this factor was not mentioned in any way in this expert's report or in any pre-trial discovery and defendant's expert was not realistically in a position, within one week of trial, to address the issue.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 13853 1999

Appearances: Kevin W. Barron, Esquire for the Plaintiffs
Eric J. Purchase, Esquire for the Defendant

**OPINION**

Bozza, John A., J.

This matter is before the Court on plaintiffs' Gregory L. Proper and Kim Proper's Statement of Matters Complained of on Appeal. This case involves personal injuries arising from an automobile accident that was tried before a jury on April 9 and 10, 2001. The jury found that although the defendant, Mr. Gregor, was negligent, Mr. Proper did not suffer a serious impairment of a bodily function and therefore was precluded from recovering non-economic damages. On April 18, 2001, plaintiffs filed a Motion for Post Trial Relief that was denied by Court Order dated June 7, 2001. Judgment on the verdict was entered on June 15, 2001, and plaintiffs filed a timely Notice of Appeal and Statement of Matters Complained of on Appeal.

The automobile accident which is the subject of this suit occurred on December 1, 1998, near the intersection of Arbuckle Road and Wattsburg Road in Erie County. Mr. Proper was traveling northbound on Arbuckle Road in a 1979 Chevrolet Cheyenne pick-up truck and Mr. Gregor was proceeding in a westerly direction on Wattsburg Road in a 1985 Ford Ranger pickup truck. Mr. David M. See, who is not a party to this action, was traveling southbound on Arbuckle Road in a 1993 Ford van. A collision occurred between Mr. Gregor's pick-up truck and Mr. See's van, forcing Mr. See to lose control of his vehicle, which rolled onto its driver's side on top of Mr. Proper's vehicle. As a result of the accident, Mr. Proper alleged that he suffers from post-concussive syndrome and from December 1, 1998, through April 5, 1999, suffered from headaches, irritability and memory problems. In addition, plaintiff sustained a triple facial fracture during the accident, requiring the placement of two permanent sets of screws and plates to repair his facial injury. During that same time period, Mr. Proper alleged lost wages in the amount of $7,820.00.

The Proper's have asserted that they were prejudiced by defense counsel's opening statement concerning their selection of limited tort option insurance coverage. Concerning statements made by counsel during opening and closing arguments, the Pennsylvania Supreme Court has held that "so long as no liberties are taken with the evidence, a lawyer is

free to draw such inferences as he wishes from the testimony and to present his case in the light most suited to advance his cause. . . . However, this latitude does not include discussion of facts not in evidence which are prejudicial to the opposing party." *Wagner v. Anzon, Inc.,* 453 Pa. Super 619, 635, 684 A.2d 570, 578 (1996). In order to preserve an issue for review, trial counsel is required to make "a timely, specific objection during trial." *Takes v. Metropolitan Edison Co.,* 548 Pa. 92, 98, 695 A.2d 397, 400 (1997); *Dilliplaine v. Lehigh Valley Trust Co.,* 457 Pa. 255, 260, 322 A.2d 114, 117 (1974). Even if counsel's objection is sustained if the Court's response is inadequate, counsel must request a mistrial or a cautionary instruction at that time. *McMillen v. 84 Lumber, Inc.,* 538 Pa. 567, 649 A.2d 932 (1994); *Tagnani v. Lew,* 493 Pa. 371,426 A.2d 595 (1991).

In the present case, Mr. Proper's attorney objected to defense counsel's statement regarding the limited tort option selected by the plaintiffs as being a misstatement of the law. During sidebar, counsel explained:

> Your Honor, that is, right now as it stands, a misstatement of the law in Pennsylvania and misleads the jury. As we all know, limited tort allows you to sue for pain and suffering for injuries that are serious and permanent in nature, and to leave that out here when he's talking about the law and he should be talking about the facts of the case leaves a wrong impression to the jury.

See, Transcript Jury Trial Day 1, April 9, 2001, pp. 3-4.
The Court responded by stating that discussion of the details of the limited tort option was not relevant and therefore not necessary in an opening statement. *Id.* at pp. 4 & 5. Upon conclusion of the conference the Proper's attorney said nothing concerning a cautionary instruction or mistrial. *Id.* at p. 6. As a consequence, the Court did not address the issue with the jury and further consideration of the issue on post-verdict motions or on appeal was waived.

Mr. Proper's claim that he has suffered a serious impairment of a bodily function as a matter of law also lacks merit. The determination that a serious impairment of a bodily function has occurred requires the trier of fact to resolve two questions:

> a) What body function, if any, was impaired because of the injuries sustained in the motor vehicle accident?; and
> b) Was the impairment of the body function serious?

Several factors may be considered in determining whether the impairment was serious including the extent of the impairment, the length of time the impairment lasted, the treatment required to correct the impairment, and any other relevant factors. An impairment need not be permanent to be serious. *Robinson v. Upole,* 750 A.2d 339, 342 (Pa. Super. 2000); citing *Washington v. Baxter,* 553 Pa. 434, 447-448, 719 A.2d 733, 740 (1998).

A jury is the finder of fact and determines the credibility of witnesses. *Davis v. Mullen,* 773 A.2d 764 (Pa. 2001); *Martin v. Evans,* 551 Pa. 496, 711 A.2d 458 (1998). In the instant case, the jury listened to considerable testimony presented by both parties on the issue of serious injury, including medical experts and specifically concluded that Mr. Proper was not suffering from a serious impairment of a bodily function. In video-taped deposition testimony, plaintiff's medical expert, Dr. Esper, stated that Mr. Proper's neurological examination results were normal and there was nothing wrong with him other than his complaints of headaches. *See,* Videotape Deposition Transcript - Jeffrey Esper, D.O., April 2, 2001, pp. 9, 21-22 & 26. Similarly, Dr. Burstein, defendant's medical expert, testified that plaintiff had no problems with his memory or concentration. *See,* Videotape Deposition Transcript - Stuart S. Burstein, M.D., April 3, 2001, pp. 31-34 & 38-41. Also, Mr. Proper's brain injury had healed well and his abilities would not be limited in the future. *Id.* at pp. 21-22, 46 & 62. Moreover, Dr. Burstein testified plaintiff's complaints were inconsistent and exaggerated and Mr. Proper had admitted to him that "he wanted a little bit of money out of his claim." *Id.* at 43-44. The jury could have reasonably relied on this testimony in reaching their verdict and generally accepted Dr. Burstein's opinion concerning the nature and extent of Mr. Proper's injury. The evidence in the record, including but not limited to Dr. Burstein's testimony, was sufficient to support the jury's conclusion.

The Proper's assertion that they are entitled to a new trial on damages because the jury's failure to award damages shocks the conscience of a reasonable person is also meritless. A trial court may only grant a new trial when a jury's verdict is so contrary to the evidence that it "shocks one's sense of justice." *Livelsberger v. Kreider,* 743 A.2d 494, 495 (Pa. Super. 1999). The jury's decision required an assessment of the character and significance of all evidence and a determination of the credibility of the witnesses. As noted above, if the jury accepted the testimony of defense witnesses and/or rejected some or all of the plaintiff testimony, the evidence was sufficient to support a finding that Mr. Proper did not suffer a serious injury. Therefore, the verdict is not against the weight of the evidence such that it shocks one's sense of justice.

Finally, the assertion that the trial court erred by not allowing the testimony of plaintiff's medical expert regarding Mr. Proper's increased risk of seizure due to his head injury is also without merit. "The allowance of testimony by an expert witness is a matter within the sound discretion of the trial court." *Houston v. Canon Bowl, Inc.,* 443 Pa. 383, 386, 278 A.2d 908, 910 (1971). Also, the admission of rebuttal evidence is within the discretion of the trial judge. *Mitchell v. Gravely International, Inc.,* 698 A.2d 618 (Pa. Super. 1997). Here, plaintiff offered the testimony of Dr. Esper concerning the likelihood of future seizures. The issue arose for the first time during the doctor's videotaped deposition approximately one

week before trial. In his testimony Dr. Esper, in response to a question on direct examination regarding longterm or chronic therapy for headaches, stated:

> Q. Now, is he at increased risk of having to have long term or chronic therapy for this problem?
>
> A. Again, if we try tapering the medicines after a year or so and he has the headaches recur, we may again, he may have to remain on the medication. The other possibility that can happen is that, again, we did do some neuro imaging, it shows that he did have a, basically a bruise on his brain. And there is a possibility long term you can develop seizures from a bruise to your brain. So, he hasn't had any seizures currently, but again, that is a possibility in the future.

*See,* Videotape Deposition Transcript - Jeffrey Esper, D.O., April 2, 2001, p. 16. Defense counsel objected to the testimony concerning possible future seizures as speculative. Dr. Esper could not quantify plaintiff's risk of future seizures in more specific terms other than it was higher than the general population. *Id.* at pp. 17-19. The defendant also objected because the subject of future seizures had never been raised in Dr. Esper's expert report. The Court granted the defendant's request to exclude the testimony.

When an expert witness' testimony exceeds the scope of his or her written report, the Court must determine:

> whether there has been surprise or prejudice to the party which is opposing the proffered testimony of the expert, based upon any alleged deviation between the matters disclosed during discovery, and the testimony of such expert at trial. . . . The question to be answered is whether, under the particular facts and circumstances of the case, the discrepancy between the expert's pretrial report and his trial testimony is of a nature which would prevent the adversary from preparing a meaningful response, or which would mislead the adversary as to the nature of the appropriate response.

*Hickman v. Fruehauf Corporation,* 386 Pa. Super. 455, 459, 563 A.2d 155, 157 (1989).

This Court concluded that the defendant would have been prejudiced by admitting Dr. Esper's testimony regarding Mr. Proper's increased risk of seizure. The doctor's opinion regarding this matter was not mentioned in any way in his expert report nor was there any indication of his view in any pre-trial discovery. The plaintiff had not made any claim in any pleading

for future injury related to an increased risk of seizures. The defendant's expert, a psychiatrist, was not realistically in a position, within one week of trial, to address this issue. The "seizure" testimony was directly related to a neurological issue, and defendant's position that an additional consultation with a neurologist would have had to be secured was reasonable.

It is also important to note that the character of Dr. Esper's testimony was such that his opinion about the onset of seizures was not limited to Mr. Proper's personal circumstances and as such was of very limited probative value. Consider his observations about the likelihood of seizures being a problem:

> Anybody that suffers a structural problem to the brain, such as a bruise or a stroke, is at higher risk. And I can't give you an exact number or percentage, is at higher risk that the general public in developing seizures in the future. I can research it for you, but I can't give you a specific number at this time.

*See,* Videotape Deposition Transcript -Jeffrey Esper, D.O., April 2, 2001, p. 18.

There was no reason that the issue could not have been brought to the defendant's attention in a timely fashion. Had it been a matter of substantial medical consequence, it surely would have been discussed with the plaintiff and properly addressed by counsel. This is unlike those cases where the defendant had at least some notice of the expert's position through other pre-trial information. *See, Feden v. Conrail,* 746 A.2d 1158 (Pa. Super. 2000) (Distinction between trial testimony and earlier expression of opinion was minor); *Coffee v Minwax,* 764 A.2d 616 (Pa. Super. 2000) (Expert's opinion concerning cause of the fire had been made known through answers to interrogatories). Here, the issue of future seizures was simply put, never an issue.

For all the reasons set forth above, the jury verdict dated April 10, 2001, and the judgment entered thereon on June 15, 2001 should be affirmed.

Signed this 4 day of October, 2001.

**By the Court,**
/s/ **John A. Bozza, Judge**

**WENDY S. ELLSWORTH**
**v.**
**WILLIAM J. McDOUGALL**

*MOTION FOR SUMMARY JUDGMENT*

A motion for summary judgment may only be granted if there are no material facts in dispute and the moving party is entitled to judgment as a matter of law.

*LIMITED TORT OPTION /PEDESTRIAN INVOLVED IN MOTOR VEHICLE ACCIDENT*

The limited tort option does not except pedestrians involved in motor vehicle accidents.

*LIMITED TORT OPTION/SERIOUS INJURY*

The focus in determining whether the Plaintiff suffered a serious injury is on how the injuries affected a particular body function and not on the injuries themselves. Every injury has some consequence and carries with it some inconvenience or limitation, but when one selects the limited tort option, only in the narrowest circumstances can one recover for "pain and suffering."

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 11493 - 2000

Appearances: Ethan M. Lyle, Esquire for the Plaintiff
Dale E. Huntley, Esquire for the Defendant

**OPINION**

Bozza, John A., J.

Plaintiff, Wendy S. Ellsworth, was injured as a result of an automobile accident that occurred on October 29, 1999, in the parking lot of the Kaufmann’s Store located at the Millcreek Mall in Erie, Pennsylvania. Ms. Ellsworth was a pedestrian, walking across Kaufmann’s parking lot when she was struck by a motor vehicle operated by the defendant, William J. McDougall. At the time of the accident, plaintiff was insured under an automobile insurance policy purchased by her mother, Paula Ellsworth. Mrs. Ellsworth had selected the “limited tort option” provided for in the Pennsylvania Motor Vehicle Financial Responsibility Law (hereinafter “MVFRL”) for her automobile insurance policy. A limited tort policy prevents recovery of non-economic damages, unless the plaintiff has sustained a “serious injury”. 75 Pa.C.S.A. § 1705(d). On May 14, 2001, Mr. McDougall filed a Motion for Summary Judgment arguing that as a matter of law, as a pedestrian, Ms. Ellsworth was bound by the limited tort option, and furthermore, she was precluded from recovering any non-economic damages because she had not suffered a serious injury. By Court Order

dated August 15, 2001, the trial court granted defendant's Motion for Summary Judgment finding that the plaintiff was bound by the selection of the limited tort option and that she had not suffered a serious injury. Plaintiff filed a timely Notice of Appeal and Statement of Matters Complained of on Appeal.

A motion for summary judgment may only be granted if there are no material facts in dispute, and the moving party is entitled to judgment as a matter of law. *Snyder v. Specialty Glass Products,* 441 Pa. Super. 613, 658 A.2d 366 (1995). "In determining whether to grant summary judgment, a trial court must resolve all doubts against the moving party and examine the record in the light most favorable to the non-moving party." *Jones v. Snyder,* 714 A.2d 453, 455 (Pa. Super. 1998). With that standard in mind, the record on summary judgment indicates that Ms. Ellsworth is a twenty year-old Edinboro University student majoring in business administration who, as a result of the accident, suffered a broken right collarbone, a fractured right wrist, lacerations and bruises on her right leg, a bruise to her forehead, and some pain in her lower back. On October 30, 1999, Ms. Ellsworth's right wrist was placed in a cast, and her right arm in a sling to allow her collarbone to heal on its own. As of December 6, 1999, plaintiff's wrist and collarbone fractures had completely healed, all lifting restrictions were removed and she was released to return to her regular activities. Although plaintiff has some small scars on her right leg, her injuries did not result in any permanent disability and her prognosis was evaluated as "good".

Plaintiff's assertion that she is not bound by the selection of the limited tort option because she was a pedestrian when injured and was not involved in the use and/or maintenance of her insured motor vehicle at the time of the injury is without merit. Although 75 Pa.C.S.A. § 1705(d) of the MVFRL provides exceptions to the limited tort election, it does not except pedestrians involved in motor vehicle accidents from the effect of a limited tort election. Instead, the legislature has chosen to make the election in Section 1705 applicable to "all injuries caused by other drivers." 75 Pa.C.S.A. § 1705(a)(1)(A) & (B). It does not require that the injured person be a driver or a passenger in a motor vehicle. The statute only requires that the injury be caused by a driver of a motor vehicle. *Eckler v. Watson,* Vol. 29, No. 143, Mercer Co. L. J., 393 (5/1/01). The location of the injured party within a motor vehicle is not a factor.

This conclusion becomes more compelling when one recognizes that the legislature made only one exception to the selection of the limited tort option. Specifically, Section 1705(d)(3) provides that a limited tort election does not apply to a person who is injured while an occupant of a non-private passenger motor vehicle. The applicable provisions of MVFRL do not except pedestrians involved in motor vehicle accidents from the effects of a limited tort election. *See,* 75 Pa.C.S.A. § 1705(d)(1)-(3). Enlarging the

scope of the exceptions under Section 1705 to include pedestrians contravenes the plain language and meaning of the statute and ignores the legislative intent underlying the MVFRL. It is not within a court's province to second-guess the legislature and add words to a statute where the legislature not supplied them. *Guinn v. Alburtis Fire Co.,* 531 Pa. 500, 614 A.2d 218 (1992); *Kusza v. Maximonis,* 363 Pa. 479, 70 A.2d 329 (1950); *See, also O'Donoghue v. Laurel Savings Association,* 556 Pa. 349, 728 A.2d 914, (1999). *See also, Murray v. McCann,* 442 Pa. Super. 30, 32, 658 A.2d 404, 405 (1995).[1]

Plaintiff's claim that the issue of whether she has suffered a "serious injury" should not have been decided by summary judgment and instead should have been submitted to a jury for determination is also without merit. In *Washington v. Baxter,* 553 Pa. 434, 719 A.2d 733 (1999), the Pennsylvania Supreme Court held that, "The traditional summary judgment standard was to be followed and that the threshold determination was not to be made routinely by a trial court judge . . . but rather was to be left to a jury unless reasonable minds could not differ on the issue of whether a serious injury had been sustained. . . . The ultimate determination should be made by the jury in all but the clearest of cases." *Id.* at 446-447, 719 A.2d at 740. In the present case, reasonable minds could not differ as to whether Ms. Ellsworth sustained a serious injury.

In order to determine whether the record on summary judgment supports a finding of "serious injury", it is necessary to determine whether the plaintiff has suffered a "serious impairment of body function." In that regard, the legal standard is well-defined and was set forth by the Pennsylvania Supreme Court in *Washington v. Baxter, supra.* Specifically, it is necessary to determine the nature of the particular body function that was impaired, and whether that impairment was serious. This Court has addressed the issue of "serious impairment of body function" in a number of cases and has set forth its view in some detail in *Schack v. Virges, 83* Erie Co. L.J. 65 (3/3/00), 45 Pa. D&C 4th 504 (Erie Co. 2000). In adopting the definition of "serious impairment of body function" as set forth in the Michigan decision of *DiFranco v. Pickard,* 398 N.W.2d 896 (Mich. 1986), the Supreme Court reiterated the following:

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[1] Although not raised on appeal, the fact that the plaintiff did not specifically agree to the selection of the limited tort option has no bearing on whether it applies to her because she is a third party beneficiary under the automobile insurance policy. Plaintiff cannot alter the contract terms to suit her needs after the accident because the insurer issued the policy to insure against a specific risk and charged a premium commensurate with that risk. If the plaintiff is allowed to increase the risk by ignoring the limited tort election after the accident, the fundamental principles of contract law are violated.

> The focus of these inquiries is not on the injuries themselves, but on how the injuries affected a particular body function. In determining whether the impairment was serious, several factors should be considered: the extent of the impairment, the length of the time the impairment lasted, the treatment required to correct the impairment, and other relevant factors. An impairment need not be permanent to be serious.

*Id.* at 447-448, 719 A.2d at 740.

Applying these criteria to the present case, the Court concludes that Ms. Ellsworth did not sustain a serious injury. The plaintiff's ability to use her right arm and hand were impaired. The extent of the impairment included restrictions on lifting objects and engaging in recreational activities.[2] The primary period of impairment lasted approximately six weeks (October 30, 1999 - December 6, 1999). Treatment included a cast on plaintiff's right wrist and her right arm being placed in a sling. As of the date of her deposition on October 27, 2000, she was no longer treating with any health care provider for the injuries that she had received in the accident, and her doctor had indicated that her wrist had healed normally without any complications. She had no restrictions of any kind regarding work or recreational activities. *See,* Deposition of Wendy S. Ellsworth, dated October 27, 2000, pp. 26-27. Indeed, she had been released by her physician to carry on regular activity approximately five weeks after the accident. *Id.;* Defendant's Motion for Summary Judgment, Ex. No. 4.

Ms. Ellsworth testified she did have some pain in her right wrist and that she could only lay on her right side for so long due to discomfort from her collarbone injury. *See,* Deposition of Wendy S. Ellsworth, dated October 27, 2000, pp. 29-30. Despite this, she indicated that she was still able to get a full night's sleep. *Id.* at p. 32. Although she has continued to have some pain in the wrist, its affect on her daily activity was minimal. Specifically, she has been able to carry on all normal activity including personal care, cooking, driving, working, and a full range of recreational activity. *Id.* at pp. 31-32 & 37-41. Her use of medication is limited to over-the-counter drugs to relieve intermittent pain. *Id.* at p. 33. Although she had initially asserted she suffered from loss of memory and cognitive difficulties, there is no medical support for these conditions in the record. *Id.* at p. 36. Other complaints, such as fatigue are also without any evidentiary support. Her physician has indicated that her injuries resulted in no permanent disability. *Id.* at pp. 49-50, 52. *See,* Defendant's Motion for Summary Judgment, Ex. 4.

Furthermore, Ms. Ellsworth testified that she liked to downhill ski, roller

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[2] Wendy Ellsworth is left-handed and could eat, write, and "do most everything" with her left hand during this period. *See,* Deposition of Wendy S. Ellsworth, October 27, 2000, p. 22.

blade, walk and occasionally lift weights at the gym. *Id.* at pp. 41-42. Plaintiff denied having any physical therapy as a result of the accident. *Id.* at p. 42. Ms. Ellsworth testified she was still capable of roller blading, walking and downhill skiing and testified she had no physical restrictions or pain regarding downhill skiing, however, she was just afraid of falling. *Id.* at p. 45. Plaintiff testified that she was able to bowl without any pain. *Id.* at pp. 46-47. Ms. Ellsworth said she did not have any restrictions on her driver's license, was capable of going up and down stairs, and had not missed more than ten days of work as a result of the accident. *Id.* at p. 48.

In order to collect non-economic damages under the limited tort election, any impairment is not sufficient, it must be serious in nature. Every injury by its nature has some consequence and carries with it some inconvenience or limitation, but when one selects the limited tort option, only in the most narrow circumstances can one recover for "pain and suffering" type damages. After viewing all the uncontested facts in this case in a light most favorable to the plaintiff, and applying the summary judgment standard and criteria set forth in *Washington v. Baxter,* this Court must conclude that reasonable minds could not differ that Ms. Ellsworth did not suffer a serious injury. *See, Johnson v. Gutfreund,* 82 Erie Co. L.J. 138 (10/15/89), *affirmed,* 761 A.2d 1243 (Pa. Super. 2001).

For the reasons set forth above, this Court's Order dated August 15, 2001, should be affirmed.

Signed this 28 day of November, 2001.

**By the Court,**
/s/ **John A. Bozza, Judge**