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

COURTS OF COMMON PLEAS

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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, JR. ---------- *Judge*
HONORABLE MICHAEL E. DUNLAVEY ---------- *Judge*
HONORABLE ELIZABETH K. KELLY ---------- *Judge*
HONORABLE JOHN J. TRUCILLA ---------- *Judge*

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v.

DAVID BEATON, D.O. and METRO HEALTH CENTER

CIVIL PROCEDURE/DISCOVERY/INTERROGATORIES

The Peer Review Act, 63 Pa.C.S.A. §425 *et. seq.*, restricts disclosure of hospital records only where the information requested is from either proceedings or records of a peer review committee and where the disclosure is in a civil action arising out of the matters which are the subject of evaluation and review by such committee. Where the hospital has not demonstrated that requested information was received or generated as a result of a review organization's activity, or contained in the records of such an organization, it has not met its burden in demonstrating that the material in question falls within this privilege.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 14179 - 2000

Appearances: William P. Weichler, Esquire for the Plaintiffs
Lisa Smith Beck, Esquire for Metro Health Center
Thomas M. Lent, Esquire for David Beaton, D.O.

OPINION

Bozza, John A., J.

The issue before the Court is whether certain information sought by the plaintiffs through discovery is protected from disclosure by the Peer Review Protection Act. 63 Pa.C.S.A. § 425.1 *et. seq.* In this cause of action, the plaintiffs have asserted that Metro Health Center (the hospital) was negligent for failing to select and retain competent physicians, including Dr. Beaton, to perform complicated deliveries. They also alleged that Metro Health Center failed to properly supervise the practice of medicine by Dr. Beaton. In pursuit of their claim, plaintiffs have requested that the hospital respond to the following interrogatory:

> 5. Please identify the name and address of every former patient of the defendant, Dr. David Beaton, that has filed a lawsuit for malpractice, registered a complaint of malpractice and/or complained of the quality of Dr. Beaton's treatment or competency as a physician of which administrative personnel of the defendant, Metro Health Center, is aware.

The defendant responded as follows:

> Objection. The information requested is neither relevant nor reasonably calculated to lead to the discovery of admissible

evidence. Moreover, any such information would not be subject to discovery under the Peer Review Protection Act.

In response to the hospital's answer, the plaintiffs filed a "Motion to Compel Responses to Discovery Requests." Following argument and consideration of the briefs of the parties, the Court for the reasons set forth below, will grant the plaintiffs' Motion.

The assertions against Metro Health Center have typically been regarded as an action for "corporate negligence." Such a cause of action was recognized by the Pennsylvania Supreme Court in 1991. *Thompson v. Nason Hospital*, 591 A.2d 703 (Pa. 1991). In *Thompson*, the Court determined that a hospital had a duty to select only competent physicians and to properly oversee those who practice medicine within its facility. *Id.* at 707. The Peer Review Act (the Act), which restricts the kind of information which may be disclosed in the context of a civil action, was adopted by the Pennsylvania legislature in 1974. 63 Pa.C.S.A. § 425 *et seq.* The Act specifically states, as follows:

> **§ 425.4 Confidentiality of review organization's records**
> The proceedings and records of a review committee shall be held in confidence and shall not be subject to discovery or introduction into evidence in any civil action against a professional health care provider arising out of the matters which are the subject of evaluation and review by such committee. . . . Provided, however, That information, documents or records otherwise available from original sources are not to be construed as immune from discovery or use in any such civil action merely because they were presented during proceedings of such committee, nor should any person who testifies before such committee or who is a member of such committee be prevented from testifying as to matters within his knowledge, but the said witness cannot be asked about his testimony before such a committee or opinions formed by him as a result of said committee hearings.

64 Pa.C.S.A. § 425.4

The Act includes a very broad definition of a "review organization" that includes . . . any hospital board, committee, or individual reviewing the professional qualifications or activities of its medical staff, or applicants for admission thereto. 63 Pa.C.S.A. § 425.2. The hospital has argued that the information requested by the plaintiffs is prohibited from disclosure because of the provisions of the Act. In response, the plaintiffs assert that accepting the hospital's position would significantly and unfairly limit their ability to determine whether the hospital was aware of Dr. Beaton's professional shortcomings when it granted him privileges and retained him on staff.

A close reading of Section 425.4 indicates that the restrictions on disclosure only apply in the following circumstances:

1. Where the information requested is from either "proceedings" or "records" of a peer review committee; and

2. where the disclosure is in a civil action "arising out of the matters which are the subject of evaluation and review by such committee."

See, Hayes v. Mercer Health Corp., 559 Pa. 21, 739 A.2d 114 (1999) (The Court noting that the privilege is not absolute.) While the hospital in this case has asserted that the disclosure of information about malpractice lawsuits and complaints about Dr. Beaton's performance is prohibited by the Act; it has not provided any factual support for its position. The Act does not protect particular types or forms of information but rather "proceedings" and "records" of a peer organization. Specifically, the hospital has not demonstrated that the requested information was received or generated as a result of a review organization's activity or contained in the records of such an organization. When asserting a statutory privilege based on the existence of certain facts, it is the holder's burden to demonstrate that the material in question falls within the privilege. Pa.R.E. 104(a)(6)[1] If the requested information is known to the "administrative personnel" of the hospital apart from their activity as a review committee, it is not protected. The hospital has not met its burden in this regard.

It is also critical for the hospital to demonstrate that the civil action in question arises out of the matters which are the subject of evaluation and review by the administrative personnel in question. The action against Dr. Beaton alleges medical malpractice with regard to the care afforded Jacob Edward Brown and Mary Ellen Brown. Plaintiffs have not sought any information from a review organization of the hospital concerning Dr. Beaton's performance in that regard. Concerning the hospital, the plaintiffs have alleged that it didn't properly hire, retain or supervise Dr. Beaton, and that as a result, he shouldn't have been allowed to provide the care required by the plaintiffs. The action against the hospital does appear to arise, at least to some extent, out of matters which had been the subject of peer review. *See, Sanderson v. Frank S. Bryan*, 361 Pa. Super. 491, 522 A.2d 1138 (1987).

In addition to the limited nature of the privilege, the Act also contains an exception for "information, documents or records otherwise available from original sources. . .". Such items are not precluded from discovery or introduction at trial "merely because they were presented during proceedings of such committee . . .". 63 P.S. § 425.4. Once there has been a prima facie showing that the peer review privilege applies, a requesting

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[1] Generally, a party has the burden of proof with regard to the factual averments set forth in a pleading. See, generally, *McCormick on Evidence*, § 336, 337 (1999).

party has the burden of proving that the information sought meets this exception. While there is little appellate guidance as to the applicability of this provision, it is reasonable to conclude that it is intended to limit the protection afforded by the Act to information and records generated within the review process. Keeping in mind the cornerstone of statutory construction that "each provision of the statute must be given its full effect," it must be concluded that the protected records are those of the review organization and do not include those originating elsewhere that simply may have been used in the review process. *Fuller v. Jackson,* 50 Pa. D&C 3rd 628 (1987). If information or documents originated outside of the review process and are discoverable from the original source under applicable procedural rules, then they are not immune from disclosure pursuant to the Act. Here, it is obvious that the names of persons who filed lawsuits are otherwise available from sources originating outside the peer review process and, therefore, are subject to disclosure by the hospital. Disclosing this information would have no adverse effect on the integrity of a peer review undertaking and would not be inconsistent with the purpose of the Act to protect persons who provide information to a review committee. See, *Sanderson v. Bryan,* 522 A.2d at 1139, 1140. On the other hand, the names of individuals who complained about Dr. Beaton's care are not necessarily a matter of public record and it is not clear whether they would be discoverable from an original source. Therefore, they are not subject to disclosure without additional factual support from which to conclude the exception applies.

Turning to plaintiff's request for production, " . . . of all applications and renewal applications for staff privileges . . ." by Dr. Beaton, it is evident that these would be documents forwarded to and therefore records of a review committee. However, they are also documents otherwise available from Dr. Beaton, the original source, and theoretically discoverable from him in this lawsuit. Therefore, they fall within the statutory exception and must be provided to the plaintiffs.

In support of its position, the hospital has cited to *Fulton v. St. Vincent Health Center,* 77 Erie County L.J. 169 (1994), a case in which the Honorable Shad Connelly denied a request to compel St. Vincent's to disclose certain requested information. In that case, it was apparent that the plaintiffs were seeking specific documents and information directly relating to the activities of a review organization that had granted medical privileges to physicians in question. The request was broadly based and on its face included documents and/or information that would have originated with the review organization. The request in this case is far more limited and the applicability of the Act is not readily apparent.

The plaintiffs have relied in part on the decision of the Court of Common Pleas of Lehigh County in *Geiger v. Zlenkofske, D.O., (No.* 1999-C-2582V, Lehigh County, August 16, 2001). In a well-reasoned opinion, the

Honorable Thomas Wallitsch concluded that the application of the Act required accommodation of the nature and practicalities of a claim for corporate negligence. In allowing for discovery of applications for staff privileges and credential files, the Court noted that the Act had been passed prior to the time that the Supreme Court had recognized a cause of action for corporate negligence in *Thompson*, 591 A.2d 703. In this case, the plaintiff's request is quite different from that presented in *Geiger.* In view of this Court's preceding analysis, it is not necessary to conclude that the Act does not apply to cases involving assertions of corporate negligence. However, reconciling the practical realities of discovery in a corporate negligence case with the purposes of the Act is an inevitable challenge which must be addressed on a case by case basis, perhaps with greater flexibility.

For all the reasons noted above, the plaintiffs Motion to Compel shall be granted and an appropriate Order will follow.

Signed this 4th day of December, 2001.

ORDER

AND NOW, to-wit, this 4th day of December, 2001, upon consideration of the Motion to Compel Responses to Discovery Requests, and for the reasons set forth in the accompanying Opinion, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** as follows:

1. The request in Interrogatory No. 5 for information concerning persons who have filed lawsuits for malpractice is **GRANTED** and Metro Health Center shall provide that information within twenty (20) days of the date of this Order.

2. The request for information concerning individuals who filed complaints of malpractice for the quality of Dr. Beaton's care is **DENIED** without prejudice to reassertion; and

3. **IT IS FURTHER ORDERED**, with regard to Plaintiff's Motion to Compel Discovery that the defendants must comply with No. 9 of the "Request for Production of Documents." Such information shall be provided within twenty (20) days of the date of this Order.

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

KRISTY L. GRIFFIN and ANDRE L. McCLOUD, individually and as Administrators of the Estate of Killian Lamar McCloud, deceased, Plaintiffs

v.

HAMOT MEDICAL CENTER, PREMIAN B. KISSOONDIAL, M.D., E. MICHAEL DAIL, M.D., RICHARD W. NAGLE, M.D., and RADIOLOGY ASSOCIATES OF ERIE, INC., Defendants

CIVIL PROCEDURE/PLEADINGS/PRELIMINARY OBJECTIONS
DAMAGES/PUNITIVE
NEGLIGENCE/ACTIONS AND PLEADINGS/NECESSARY ALLEGATIONS OF PLEADINGS

Plaintiff's Complaint pled a sufficient factual basis for their claim of punitive damages against both doctor and health care provider.

CIVIL PROCEDURE/PLEADINGS/PRELIMINARY OBJECTIONS
DAMAGES/MENTAL SUFFERING
NEGLIGENCE/ACTIONS AND PLEADINGS/NECESSARY ALLEGATIONS OF PLEADINGS

Plaintiff's Complaint pled a sufficient prima facie basis for recovery of emotional distress damages due to negligent infliction under either the "bystander" or physical impact" rules.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW No. 11864 of 2001

Appearances: Thomas V. Myers, Esq., Attorney for Plaintiffs; Garrett A. Taylor, Esq., Attorney for Defendant E. Michael Dail, M.D.; Marcia H. Haller, Esq., Attorney for Defendant Hamot Medical Center; Francis J. Klemensic, Esq., Attorney for Defendants Richard W. Nagle, M.D. and Radiology Associates of Erie, Inc.; and Premian B. Kissoondial, M.D., *pro se.*

OPINION

Connelly, J., December 19, 2001

Procedural History

Plaintiffs filed a Writ of Summons on May 31, 2001. A Motion to Consolidate Actions for Extension of Time to File Complaint was filed by Plaintiffs on July 24, 2001, and subsequently granted by this court on the same date. Plaintiffs filed their Complaint on August 13, 2001, alleging medical negligence and wrongful death. Defendant E. Michael Dail, M.D. filed Preliminary Objections to said Complaint on September 4, 2001. Defendant Hamot Medical Center [hereinafter Hamot] filed Preliminary

Objections to said Complaint on September 12, 2001. Lastly, Defendants Richard W. Nagle, M.D. and Radiology Associates of Erie, Inc. [hereinafter Radiology] filed Preliminary Objections to Plaintiffs' Complaint on September 19, 2001.

Plaintiffs filed Briefs in Opposition to said Preliminary Objections on September 24, 2001, October 2, 2001 and October 17, 2001[1]. All three sets of Preliminary Objections are now before this court.

The Plaintiffs do not oppose Defendant Dail's Preliminary Objection to Paragraph 61(k) of Plaintiffs' Complaint and therefore it is ordered that said Paragraph be stricken. Plaintiffs will have twenty (20) days from the date of this Opinion to amend their Complaint accordingly, if they so choose. The only issue left before this court regarding Defendant Dail's Preliminary Objections is whether Plaintiffs have pled a sufficient factual basis for their claim for punitive damages at Count IV of the Complaint.

The Plaintiffs also do not oppose Defendant Hamot's Preliminary Objection to subparagraph 82(o) of the Complaint and therefore it is ordered that said subparagraph be stricken. As stated above, Plaintiffs will have twenty (20) days to amend their Complaint accordingly. The only issue left for this court to decide, with regard to Defendant Hamot, is their Preliminary Objection in the form of a demurrer as to the Plaintiffs' punitive damage claim against them.

Issue #1

In Count IV, Paragraphs 62 through 68 of Plaintiffs' Complaint, the Plaintiffs allege that Defendant Dail engaged in conduct that was "outrageous and in willful or reckless disregard of the Plaintiffs' and their decedent's interests, thus providing an award for punitive damages." *Id.*

Defendant Dail argues that the Plaintiffs' Complaint "fails to allege any facts that would give rise to an award of punitive damages. As such, the pleading violates the specificity requirement of the Pennsylvania Rules of Civil Procedure." *Defendant Dail's Preliminary Objections, ¶ 12.*

Pennsylvania Rule of Civil Procedure 1019 reads: "[T]he material facts

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[1] Defendant Nagle and Radiology Associates of Erie, Inc. filed their Preliminary Objections on September 19, 2001. Erie County Local Rule 302(g) provides that the non-moving party's response and brief are due twenty (20) days upon receipt of the moving party's brief. At bar, the Plaintiffs' response and supporting brief as to the above Defendant's Preliminary Objections was filed on October 17, 2001, in violation of Rule 302(g). Accordingly, pursuant to Erie L.R. 302(h)(1), this court had the option of dismissing Plaintiffs' Brief in Opposition. However, the rest of the briefs being filed in a timely fashion, this court chose to consider the aforementioned brief.

on which a cause of action or defense is based shall be stated in a concise and summary form." Pa.R.C.P. § 1019(a). A complaint therefore must do more than "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Smith v. Wagner,* __ Pa. Super. __, 588 A.2d 1308 (1991). It should formulate the issues by fully summarizing the material facts. "Material facts" are "ultimate facts," i.e., those facts essential to support the claim." *Id.; Sevin v. Kelshaw,* 417 Pa. Super. 1, 611 A.2d 1232, 1235 (1992). Allegations will withstand challenge under § 1019(a) if (1) they contain averments of all of the facts the plaintiff will eventually have to prove in order to recover, and (2) they are "sufficiently specific so as to enable defendant to prepare his defense." *Wagner, supra.* (citations omitted).

In *Bata v. Central-Penn National Bank of Philadelphia,* 423 Pa. 373,380, 224 A.2d 174, 179 (1966) *cert. denied,* 386 U.S. 1007, 87 S.Ct. 1348, 18 L.Ed.2d 433 (1967), the Pennsylvania Supreme Court opined:

> While it is impossible to establish precise standards as to the degree of particularity required in a given situation, two conditions must always be met. The pleadings must adequately explain the nature of the claim to the opposing party so as to permit him to prepare a defense and they must be sufficient to convince the court that the averments are not merely subterfuge.

Sevin, 611 A.2d at 1235, *quoting Bata, supra.* Further, the pleadings must also form the issues in an action so that proof at trial may be restricted to those issues. See *Cassel v. Shellenberger,* 356 Pa.Super. 101, 514 A.2d 163 (1986), *allocatur denied,* 515 Pa. 603, 529 A.2d 1078 (1987).

Punitive damages will not be awarded for misconduct that constitutes ordinary negligence. *Feld v. Merriam,* 506 Pa. 383,485 A.2d 742 (1984). A jury may only award punitive damages where the conduct of a party was malicious, wanton, willful, oppressive, or exhibits a reckless indifference to the rights of others. *Johnson v. Hyundai Motor America,* 698 A.2d 631, 639 (Pa. Super. 1997).

Further, "reckless indifference to the interest of others" and "wanton misconduct" have been defined as follows:

> "Reckless indifference to the interests of others", or as it is sometimes referred to, "Wanton misconduct", means that "the actor has intentionally done an act of an unreasonable character, in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow.

McClellan v. Health Maintenance Organization of Pennsylvania, 413 Pa.Super 128, 145, 604 A.2d 1053, 1061 (1992) *citing Evans v. Philadelphia Transportation Company,* 418 Pa. 567, 574, 212 A.2d 440, 443 (1965).

It is the opinion of this court that the Plaintiffs' Complaint clearly alleges the sequence of events leading to the fetus' death and stillbirth. Secondly, Plaintiffs have adequately alleged specific factual averments, in Paragraphs 62 through 68 of their Complaint, that provide a specific and legally adequate factual basis for an award of punitive damage. Indeed, the alleged failure of Defendant Dail could possibly be construed as intentional, or done with a reckless indifference to the safety of the fetus. These allegations constitute the type of conduct for which punitive damages may be recovered. For all of these reasons, Defendant Dail's Motion to Strike the Punitive Damage Claim must be denied.

Issue #2

Plaintiffs have set forth a punitive damages claim directed at Defendant Hamot in Paragraphs 87 through 93 of their Complaint. Defendant Hamot argues, "In sum, even when viewing the facts pled as true, [Plaintiffs] have failed to plead the requisite conduct on the part of any health care provider which would permit the recovery of punitive damages in this case." *Defendant Hamot's Preliminary Objections, ¶ 14.* Defendant Hamot therefore asks this court to grant their Preliminary Objection in the form of a demurrer as to the Plaintiffs' Punitive Damage Claim.

It is well settled that the following standard should be applied by the Court when ruling upon preliminary objections in the nature of a demurrer:

> A demurrer can only be sustained where the complaint is clearly insufficient to establish the pleader's right to relief. *Firing v. Kephart*, 466 Pa. 560, 353 A.2d 833 (1976). For the purpose of testing the legal sufficiency of the challenged pleading, a preliminary objection in the nature of a demurrer admits as true all pleaded material, relevant facts, and every inference fairly deducible from those facts .... Since the sustaining of a demurrer results in a denial of the pleader's claim or a dismissal of his suit, a preliminary objection in the nature of a demurrer should be sustained only in cases that clearly and without doubt fail to state a claim for which relief may be granted .... If the facts as pleaded state a claim for which relief may be granted under any theory of law then there is sufficient doubt to require the preliminary objection in the nature of a demurrer to be rejected.

County of Allegheny v. Commonwealth, 507 Pa. 360, 372, 490 A.2d 402, 408 (1985). See also *Wiernik v. PHH U.S. Mortgage Corporation,* 736 A.2d 616 (Pa. Super. 1999) and *Shick v. Shirey,* 552 Pa. 590, 594, 716 A.2d 1231, 1233 (1998).

Also, the Court in *McGill v. Pennsylvania Department of Health, et al,* 758 A.2d 268 (Pa. Cmwlth. 2000) stated:

> In ruling on the preliminary objections in the nature of a demurrer, this Court must accept as true all well-pleaded facts and all inferences reasonably deducible therefrom; conclusions of law, unwarranted inferences, argumentative allegations or expressions of opinion need not be accepted, however.

Id. at 270 *citing Dial v. Pennsylvania Board of Probation & Parole,* 706 A.2d 901 (Pa.Cmwlth. 1998); *Wurth v. City of Philadelphia,* 584 A.2d 403 (Pa.Cmwlth. 1990). "If a demurrer is sustained, the right to amend should not be withheld where there is some reasonable possibility that amendment can be accomplished successfully." *Pennfield v. Meadow Valley Elect,* 413 Pa. Super. 187, 200, 604 A.2d 1082, 1088 (1991).

Preliminary objections, which result in the dismissal of a suit should be sustained only in cases that are clear and free from doubt. *Lahav v. Main Line OB/GYN Associates, P.C.,* 556 Pa. 245, 727 A.2d 1104, 1105 (1999) *citing American Housing Trust v. Jones,* 548 Pa. 311, 696 A.2d 1181, 1183-84 (1997).

As stated above, punitive damages may be imposed for torts that are committed willfully, maliciously, or so carelessly as to indicate wanton disregard of the rights of the parties injured. *G.J.D. v. Johnson,* 552 Pa. 169,713 A.2d 1127, 1129 (1998). In *Althaus v. Cohen, M.D.,* 710 A.2d 1147 (Pa.Super. 1998), the Court noted:

> The purpose of punitive damages is to punish outrageous and egregious conduct done in reckless disregard of another's rights; it serves a deterrence as well as a punishment function. Therefore, under the law of this Commonwealth, a court may award punitive damages only if an actor's conduct was malicious, wanton, willful, oppressive, or exhibited a reckless indifference to the rights of others.

Id. at 1159.

Furthermore, one must look to "the act itself together with all the circumstances including the motive of the wrongdoers and the relations between the parties." *Feld, supra.* The state of mind of the actor is vital. The act, or the failure to act, must be intentional, reckless or malicious. *Id.*

Further, Section 1301.812-A of Act 135 of 1996, which amends the Health Care Services Malpractice Act, sets forth the controlling standard for the recovery of punitive damages in a medical malpractice case:

> Punitive damages may be awarded for conduct that is the result of the health care provider's willful and wanton conduct or reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the health care provider's act, the nature and extent of the harm to the patient that the health care provider caused or intended to cause and the wealth of the health care provider.

40 Pa.C.S.A. § 1301.812-A(a).

Act 135 of 1996, 40 Pa.C.S.A. §1301.812-A also precludes an award of punitive damages against a health care provider who is only vicariously liable for the actions of its agent:

> Punitive damages shall not be awarded against a health care provider who is only vicariously liable for the actions of its agent that caused the injury unless it can be shown by a preponderance of the evidence that the party knew of and allowed the conduct by its agent that resulted in the award of punitive damages.

40 Pa.C.S.A. §1301.812-A(c).

In *Kleck v. Hamot Medical Center,* No. 10089 -1998 (Erie County filed 9/15/00), the Honorable Fred P. Anthony addressed whether Act 135 of 1996 precluded a claim for punitive damages in a malpractice action. The Court ruled that punitive damages were not recoverable because the basis of the plaintiff's claim was vicarious liability:

> Furthermore, punitive damages are not allowed for gross negligence or when the health care provider is only vicariously liable for the actions of its agents, unless the health care provider knew of and allowed the conduct by its agent.

Kleck, slip op. at 6.

It is the conclusion of this court that the Plaintiffs have clearly alleged that Hamot Medical Center, acting through its agents, engaged in conduct that was "outrageous and in willful or reckless disregard of the Plaintiffs' and their decedent's interests..." *Plaintiffs' Complaint, ¶ 93.*

Paragraph 87 of the Plaintiffs' Complaint states:

> The Defendant [Hamot] acted with reckless indifference to the interests of the Plaintiffs and their decedent in departing from the applicable standard of care through its own conduct and/or that of its agents of which it knew, or should reasonably have known of, and which it allowed..."

Plaintiffs' Complaint, ¶ 87.

The Complaint, in subparagraphs 87(a) through (f), states further allegations in great detail about how Defendant Hamot conducted itself with regard to the punitive damage claim. Further, the allegations in Paragraphs 88, 89 and 90 are based alternatively on the Defendant's own actions or omissions or those of its agents that it knew of and allowed "in failing to require necessary cesarean section delivery of the fetus despite awareness of its extreme jeopardy and the likelihood of its death without it." *Plaintiffs' Brief in Opposition to Defendant Hamot's Preliminary Objections, p. 5.*

Further, Paragraph 90 of Plaintiffs' Complaint states:

> The Defendant's actions and/or omissions in this regard, either

> individually and/or knowingly through its agents, constitutes outrageous conduct with a reckless disregard of an obvious danger and reckless indifference to the fetus' safety, well-being and survival as well as to the rights and interests of the Plaintiffs.

Plaintiffs' Complaint, ¶ 90.

Lastly, Paragraph 91 is entirely addressed to the Defendant's own actions or omissions:

> Although the Defendant knew or reasonably should have known of the fetus' extreme jeopardy and the likelihood of its injury and death, it did not act properly as set forth herein and, thereby, failed to prevent the fetus' suffering, injury and death.

Plaintiffs' Complaint, ¶ 91.

It is the opinion of this court that the aforementioned allegations of the Complaint, namely those specified in subparagraphs 87(a) through (f), far exceed that which may be equated with ordinary, or even gross negligence. Therefore, applying the aforementioned principles of law, and when all reasonable inferences are taken as true as they must when considering the propriety of a demurrer, this court concludes the allegations of the instant Complaint are sufficient to withstand a demurrer as to the claim for punitive damages.

Lastly, corporate negligence is a doctrine under which the hospital is liable if it fails to uphold the proper standard of care owed the patient, which is to ensure the patient's safety and well being while at the hospital. *Thompson v. Nason Hospital,* 527 Pa. 330, 591 A.2d 703, 707 (1991). The "corporate negligence claim" at Count VI of the Plaintiffs' Complaint does not *specifically* set forth allegations regarding punitive damages. However, Count VIII of Plaintiffs' Complaint fully addresses the issue of punitive damages with regard to Defendant Hamot Medical Center. Secondly, it is the opinion of this court that the allegations supporting the Plaintiffs' corporate negligence claim against Defendant Hamot in Count VI could support an award of punitive damages. The averments are substantially similar to those alleged in Count VIII of the Complaint. For all of the reasons set forth above, Defendant Hamot's Preliminary Objection in the nature of a Demurrer as to Count VIII is denied.

Issue #3

Lastly, Defendants Nagle and Radiology make a Motion to Strike and/or Demurrer as to Count IX of Plaintiffs' Complaint. Count IX involves a claim against all of the Defendants for negligent inflection of emotional distress. *Plaintiffs' Complaint* ¶¶ *94-97.* Defendant Nagle avers that he is a radiologist who interpreted an obstetrical ultrasound on June 1, 1999. *Brief in Support of Preliminary Objections of Defendants Nagle and Radiology* [hereinafter Nagle Brief], p. 1. He avers that he had "no contact

with the [P]laintiffs and did not render any direct care to the [P]laintiffs, other than the interpretation of the obstetrical ultrasound which was ordered by [Defendant] Kissondial." *Nagle Brief, p. 1.* Defendants Nagle and Radiology argue that said allegations are "inconsistent with current Pennsylvania law and are legally insufficient to state a claim against these [D]efendants." *Defendant Nagle and Radiology's Preliminary Objections, p. 1.*

Defendants Nagle and Radiology base their argument on case that states, in order to find a defendant guilty of negligent infliction of emotional distress, a plaintiff must have observed the defendant "traumatically inflicting the harm on the plaintiff's relative with no buffer of time or space to soften the blow." *Bloom v. DuBois Regional Medical Center,* 409 Pa. Super. 83, 597 A.2d 671, 682 (1991).

The Defendants also cite the case of *Halliday v. Beltz*, 356 Pa. Super. 375, 514 A.2d 906 (1986), in which the Court held that the decedent's husband and daughter could not assert a claim for negligent infliction of emotional distress for an alleged negligent surgery because they did not actually view the actual surgery. *Id.* The Court noted:

> Appellants freely admit that they did not view the actual surgery in this case...While Appellants were in the hospital during the operation itself and the post-operative emergency remedial measures, they never viewed any of the actual surgery. We do not believe the appellants' complaint meets the 'sensory and contemporaneous observance of the accident' or the personal observance requirements of Pennsylvania case law.

Id. at 908.

The Plaintiffs argue that the Complaint alleges sufficient facts to support their Negligent Infliction of Emotional Distress Claim under the "Bystander" and/or "Physical Impact" rules of Pennsylvania Law. Concerning "bystander theory", in *Sinn v. Byrd*, 486 Pa. 146, 404 A.2d 672 (1979), the Pennsylvania Supreme Court established the following factors as criteria for a negligent infliction of emotional distress cause of action for individuals who are neither physically impacted nor within the zone of danger:

> (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it;
>
> (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence;
>
> (2)[sic] Whether plaintiff and the victim were closely related as contrasted with an absence of any relationship or the presence of only a distant relationship.

Bloom, 597 A.2d at 681 *quoting Sinn v. Burd*, 404 A.2d at 685.

According to the language of *Sinn*, the plaintiff must observe the "accident," which, in various cases, has been characterized as "the accident," "the negligent act," "the infliction of the negligent harm," "the negligent event," and the "traumatic event." *Bloom*, 597 A.2d at 682 *citing Neff v. Lasso*, 382 Pa. Super. 487, 555 A.2d 1304, *appeal denied*, 523 Pa. 636, 637, 565 A.2d 445 (1989); *Hackett v. United Airlines*, 364 Pa.Super. 612, 528 A.2d 971 (1987); *Halliday v. Beltz, supra.* The array of terminology used in describing what the plaintiff must have observed has resulted from the myriad of fact situations which give rise to the cause of action. *Bloom*, 597 A.2d at 692. Further, the *Halliday* court noted, "We recognize that the requirement of averring bodily or physical harm, or a severe physical manifestation of mental distress in a complaint for negligent infliction of emotion distress, is not totally clear in this Commonwealth." *Id.*, 514 A.2d at 908-09.

The Superior Court in *Bloom, supra*, noted that the parameters of the tort of negligent infliction of emotional distress have been difficult to define and the tort has undergone an evolutionary development. The courts have held that a basis of recovery for a claim of negligent infliction of emotional distress is the traumatic impact of viewing the negligent injury of a close relative. *Love v. Cramer,* 414 Pa.Super. 231, 606 A.2d 1175, 1177 (1992) *citing Hoffner v. Hodge*, 47 Pa. Cmwlth. 277, 407 A.2d 940 (1979). Also, a person who does not experience a sensory and contemporaneous observance of the injury does not state a cause of action for negligent infliction of emotional distress. *Love*, 606 A.2d at 1177 *citing Mazzagatti v. Everingham by Everingham*, 512 Pa. 266, 516 A.2d 672 (1986).

In *Bloom v. Dubois Regional Medical Ctr, supra*, the Pennsylvania Superior Court addressed a claim of negligent infliction of emotional distress of a plaintiff who observed his wife hanging by the neck from shoestrings behind a bathroom door adjacent to her hospital room in a suicide attempt. *Id.* at 673. The complaint alleged *inter alia* that the plaintiff's wife had informed the defendant medical staff of her mental disorder, and had requested treatment, and that the defendants were negligent in failing to adequately test, diagnose, and supervise her. *Id*. at 674. The court, applying the above-mentioned principles of law, dismissed the plaintiff's claim for negligent infliction of emotional distress, opining:

> Mr. Bloom observed his wife in the aftermath of her own suicide attempt. He did not, however, observe any traumatic infliction of injury on his wife at the hands of the defendants because none occurred. The alleged negligence of defendants here is an omission and involved no direct and traumatic infliction of injury on Mrs. Bloom by defendants.

Bloom, 597 A.2d at 683.

The Defendants rely on *Bloom* for the proposition that witnessing a negligent omission does not give rise to an identifiable traumatic event which may trigger liability for purposes of a claim of negligent infliction of emotional distress. *Nagle Brief, p. 5.* However, the Bloom Court also noted:

> We hasten to add, however, that we do not intend to fashion a rule that excludes recovery to all plaintiffs who allege negligent infliction based on their observance of a negligent *omission* by defendants. There are certainly circumstances where an omission might be construed as a traumatic infliction of injury on the plaintiff's relative and, if the plaintiff observed that occurrence, recovery could be had. Take, for example, the situation where a husband plaintiff seeks to admit his wife to an emergency room for medical care. Because of inaction by the emergency room personnel, the wife is left to languish in the outer office and expires there. Husband has viewed the entire event. The omission by the emergency room personnel in this scenario might create a sufficiently traumatic situation to be the basis for recovery for negligent infliction.

Id. at 683 (emphasis in original).

Further, in *Love, supra,* the Court held that the plaintiff/daughter's observance of the negligent lack of medical care along with her observance of her mother's heart attack was enough to sustain her claim for negligent infliction of emotional distress. *Id.* at 1178. The Court further held, "[I]t is enough if the negligence constituted the proximate cause of the injury, and of the resulting emotional trauma." *Id.* at 1177.

The facts of this case are substantially similar to those in *Love, supra.* The death of Ms. Griffin's fetus could be found to be a discrete and identifiable traumatic event. Further, she witnessed the loss of fetus' heart tones on the monitor and ultimately its death. This event could very well satisfy the requirement of experiencing a sensory and contemporaneous observance of the traumatic injury. It is alleged that Ms. Griffin was physically present at all times during the negligent care that resulted in the death of her fetus. Also, dismissal of the claim against the Defendant is not required even if the alleged negligence of Defendant Nagle did not occur at the time of the actual injury to the fetus' death. As noted above, the *Love* Court found the Defendant negligent, even though the actions which constituted negligence did not occur at the time of the actual injury.

In *Yandrich v. Radic,* 495 Pa. 243, 433 A.2d 459 (1981), the Pennsylvania Supreme Court denied recovery to a plaintiff-father who did not witness the accident and who did not arrive at the accident scene until after his son had been taken to the hospital. *Id.* In the case at bar, however, Ms. Griffin was obviously present during the alleged injury and death to her fetus and a fifty-five hour process of laboring and giving birth to her dead

fetus.

Also, in *Sinn, supra,* recovery was denied because the plaintiff had been informed of the event by a third person and thus had not suffered an emotional injury resulting from a direct and contemporaneous sensory experience of the event itself. In this case, based on the facts alleged, Ms. Griffin was present in the hospital room during the alleged acts of the Defendant.

The facts of *Mazzagatti, supra,* are also different than the case at bar. The mother in *Mazzagatti* had prior knowledge of her child's injuries to act as a buffer against the full impact of observing the accident scene. She was at work, approximately one mile away when she received a telephone call informing her that her daughter had been involved in an accident. *Id.* Conversely, in the case at bar, it is alleged that Ms. Griffin observed the fetus' injury and death and was aware of Defendant Nagle's involvement in interpreting the subject ultrasound.

The Court in *Neff v. Lasso, supra,* examined prior Pennsylvania Supreme Court cases and stated the following:

> Our reading of *Sinn, Yandrich, Mazzagatti,* and *Brooks* leads us to conclude that our Supreme Court, in considering the parameters of the "sensory and contemporaneous observance" requirement, focused upon whether the emotional shock was immediate and direct rather than distant and indirect, and not upon the sense employed in perceiving the accident.

Neff, 382 Pa. Super. at 499-500.

As in the case at bar, it is alleged that Ms. Griffin suffered emotional distress as a result of observing the traumatic injury and death of her fetus and enduring a fifty-five hour process of laboring and giving birth to her dead fetus. Further, the alleged misinterpretations of the Defendant were allegedly made immediately after her ultrasound examination. *Plaintiffs' Complaint, ¶¶ 20-22.*

Further, the court in *Neff* noted:

> Our research discloses no Pennsylvania appellate court cases addressing the narrow question of whether visual perception of the impact is necessary to satisfy the *Sinn* requirement that the "shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident."

Neff, 382 Pa.Super. at 500.

The Court then went on to cite *Kratzer v. Unger,* 17 Pa. D&C 3d 771 (1981) and *Anfuso v. Smith,* 15 Pa. D&C 3d 389 (1980), in which the trial courts allowed the plaintiffs to recover for emotional injury where the plaintiffs heard the impact and immediately thereafter visually observed the injured relative. The *Neff* court then noted, "[W]e cannot believe that

the [Supreme Court in *Sinn]* intended thereby to limit recovery to those situations where the shocking event might manifest itself through the eyesight of the witness, to the exclusion of other types of sensory observation." *Neff,* 382 Pa.Super. at 500.

Lastly, the District Court for the Eastern District of Pennsylvania addressed this question in *Bliss v. Allentown Public Library,* 497 F.Supp. 487 (E.D.Pa. 1980). The Court allowed a plaintiff/mother to recover for emotional distress damages even though she heard, but did not witness, a metal sculpture fall on her son. The Court held that requiring a direct visual perception would defeat the policy underlying *Sinn.*

The Plaintiffs also argue that their Negligent Infliction of Emotional Distress claim against Defendants Nagle and Radiology may be sustained under the "physical impact rule" which provides: [W]here...a plaintiff sustains bodily injuries, even though trivial or minor in character, which are accompanied by fright or mental suffering directly traceable to the peril in which the defendant's negligence placed the plaintiff, then mental suffering is a legitimate element of damages. *Brown v. Philadelphia,* 449 Pa.Super. 667, 679, 674 A.2d 1130, 1135-36 (1996) *quoting Potere v. City of Philadelphia,* 380 Pa. 581, 589, 112 A.2d 100, 104 (1955).

The facts in *Brown, supra,* are substantially similar to the allegations involved in this case. The Court allowed a plaintiff/mother to recover damages for emotional distress under the physical impact rule. The plaintiff had been left unattended in an emergency department examination room while the miscarriage occurred, suffering vaginal bleeding and was left with a fetus lying in a pool of blood between her legs for approximately fifteen minutes. *Id.*

Therefore, this court finds that the Plaintiffs have set forth a prima facie basis for recovery of intentional infliction of emotional distress damages under the "physical impact" rule. Further, there is no requirement under the impact rule that the Plaintiff must have specifically seen the Defendant engaging in his alleged negligent conduct. See *Stoddard v. Davidson,* 355 Pa. 262, 513 A.2d 419, 422 (1986).

Also,

> Where it is definitely established that injury and suffering were proximately caused by an act of negligence, and any degree of physical impact, however slight, can be shown, recovery for such injuries and suffering is a matter for the jury's determination.

Tomikel v. Com., Department of Transportation, 658 A.2d 861 (Pa.Cmwlth. 1995) *citing Zelinsky v. Chimics,* 196 Pa.Super. 312, 175 A.2d 351 (1961).

Defendants cite *Connelly v. Lopatofski,* 19 Lycoming 281 (1994) in support of their argument. However, the facts of *Connelly* are different from the case at bar. It is reasonable to conclude that the alleged omission by Defendant Nagle in this case might create a sufficiently traumatic

situation that could be the basis for recovery for negligent infliction. See *Bloom, supra.* It is clear that Plaintiff Kristy L. Griffin does not have to witness the alleged omissions on behalf of Defendant Nagle or Radiology in order to recover for damages from negligent infliction of emotional distress. Further, as stated above, a discrete or identifiable traumatic event on behalf of these Defendants could very well exist and the granting of a demurrer would be, at the very least, premature.

It is the conclusion of this court that the Plaintiffs have set forth a sufficient prima facie basis for the Plaintiff Kristy L. Griffin's recovery of emotional distress damages due to negligent infliction under either the "bystander" or "physical impact" rules. For all of the reasons set forth above, Defendant Nagle and Radiology's Preliminary Objection in the nature of a Demurrer must be denied.

ORDER

AND NOW, TO-WIT, this 19th day of December, 2001, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** as follows:

(1) Defendant Dail's Preliminary Objection to Paragraph 61(k) of Plaintiffs' Complaint and Defendant Hamot's Preliminary Objection to subparagraph 82(o) of the Complaint are hereby **GRANTED**, and said subparagraphs are ordered stricken. Plaintiffs will have 20 days to amend their Complaint.

(2) Defendant Dail's Preliminary Objection in the nature of a Motion to Strike Count IV of Plaintiffs' Complaint is **DENIED**;

(3) Defendant Hamot's Preliminary Objection in the form of a demurrer as to Count VIII is **DENIED**;

(4) Defendant Nagle and Radiology's Preliminary Objection in the form of a Motion to Strike and/or a Demurrer as to Count IX of Plaintiffs' Complaint is **DENIED**.

BY THE COURT:
/s/ **Shad Connelly, Judge**

ANTHANASIOS "SONNY" MIHADAS and MIHADAS DEVELOPMENT CORPORATION, Plaintiff

v.

CELLULAR ONE-ERIE, SYGNET COMMUNICATIONS, INC., CONNECTIONS, and LARRY FELDMAN, Defendant

CIVIL PROCEDURE/PRELIMINARY OBJECTIONS/AMENDMENT

A demurrer admits all well pleaded facts and inferences reasonably deductible from those facts and should be sustained only where the complaint clearly fails to state a claim for relief under any theory of law. When a demurrer is granted, the right to amend should not be withheld where there is a reasonable possibility of successfully amending the complaint.

TORTS/FRAUD AND MISREPRESENTATION/INVASION OF PRIVACY

To recover on a claim of fraud and misrepresentation the plaintiff must establish: (1) a representation, (2) which is material to the matter at hand, (3) made falsely, with knowledge of its falsity or recklessness as to its truth or falsity, (4) with the intent of misleading another into relying upon it, (5) justifiable reliance, and (6) resulting injury proximately caused by the reliance.

Where the plaintiff alleges that he relied upon a statement in a cellular service contract as to the purposes for which he was signing the contract but that the defendants planned to falsely use the plaintiff's name to obtain service for other individuals with poor credit ratings, a cause of action for fraud and misrepresentation has been sufficiently pleaded.

A demurrer will be sustained to a claim of invasion of privacy where there is no allegation of mental suffering, shame or humiliation to a person of ordinary sensibilities. The plaintiff will be allowed 20 days to amend the complaint.

DAMAGES/PUNITIVE

The scheme alleged by plaintiff that the defendants planned to falsely use his name for purposes other than those set forth in the contract involves a bad motive which could be considered outrageous and willful to a reasonable person and therefore the demurrer to the claim for punitive damages will be denied.

UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW

A complaint which adequately sets forth the elements of a common-law claim for fraud and misrepresentation also sufficiently avers a cause of action under the catch-all provision Unfair Trade Practices and Consumer Protection Law.

AGENCY/VICARIOUS LIABILITY

The principal can be held accountable for the agent's actions. Agency need not be proven but only averred to survive a demurrer; Pa.R.C.P. 1019.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW No. 10408-2001

Appearances: Grant C. Travis, Esq., Attorney for Defendant Cellular One
William J. Kelly, Sr., Esq. and Brian M. DiMasi, Esq., Attorneys for Plaintiff

OPINION

Connelly, J., October 15, 2001

PROCEDURAL HISTORY

Plaintiff's Complaint was filed on February 2, 2001.

Preliminary objections were filed by Defendant, Cellular One-Erie, on March 21, 2001

Plaintiff responded to Defendant's preliminary objections on July 3, 2001.

Oral argument was held on September 6, 2001 to clarify the issues averred by the Defendant and the Plaintiff's response.

Specifically, the Defendant claims that Plaintiff's Complaint is legally insufficient on four counts:

Count I: The Plaintiff failed to state a cause of action for fraud and misrepresentation against Cellular One due to the lack of an agency relationship between Cellular One and the co-Defendants, Connections and Larry Feldman [hereinafter co-Defendants].

Count II: The pleaded facts do not state a cause of action for invasion of privacy and is legally insufficient.

Count III: No cause of action was pleaded in the facts of the Complaint according to the Unfair Trade Practices of the Consumer Protection Law (UTPCPL).

Count IV: A claim for punitive damages cannot be established due to insufficient pleaded facts in the Plaintiff's Complaint.

Count V: There is insufficient specificity pleaded to establish with particularity the elements of fraud against Cellular One claiming, as in count one, that the Plaintiff did not aver an agency relationship between the Defendants.

LAW

It is well settled that the following standard should be applied by the Court when ruling upon preliminary objections in the nature of a demurrer:

> A demurrer can only be sustained where the complaint is clearly insufficient to establish the pleader's right to relief. *Firing v. Kephart*, 466 Pa. 560, 353 A.2d 833 (1976). For the purpose of testing the legal sufficiency of the challenged pleading, a preliminary objection in the nature of a demurrer admits as true all

> pleaded material, relevant facts, and every inference fairly deductible from those facts... Since the sustaining of a demurrer results in a denial of the pleader's claim or a dismissal of his suit, a preliminary objection in the nature of a demurrer should be sustained only in cases that clearly and without doubt fail to state a claim for which relief may be granted... If the facts as pleaded state a claim for which relief may be granted under any theory of law then there is sufficient doubt to require the preliminary objection in the nature of a demurrer to be rejected.

County of Allegheny v. Commonwealth, 507 Pa. 360, 372, 490 A.2d 402, 408 (1985). See also *Wiernik v. PHH U.S. Mortgage Corporation,* 736 A.2d 616 (Pa. Super. 1999) and *Shick v. Shirey,* 552 Pa. 590, 594, 716 A.2d 1231, 1233 (1998).

Also, the Court in *McGill v. Pennsylvania Department of Health, et al,* 758 A.2d 268 (Pa. Cmwlth. 2000) stated:

> In ruling on the preliminary objections in the nature of a demurrer, this Court must accept as true all well-pleaded facts and all inferences reasonably deductible there from; conclusions of law, unwarranted inferences, argumentative allegations or expressions of opinion need not be accepted, however.

Id. at 270 citing *Dial v. Pennsylvania Board of Probation & Parole,* 706 A.2d 901 (Pa. Cmwlth. 1998); *Wurth v. City of Philadelphia,* 584 A.2d 403 (Pa. Cmwlth. 1990).

A cause of action for fraud and misrepresentation contains the following elements:

(1) a representation;

(2) which is material to the matter at hand;

(3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false;

(4) with the intent of misleading another into relying on it;

(5) justifiable reliance on the misrepresentation; and

(6) the resulting injury was proximately caused by the reliance.

Huddleson v. Infertility Center of America, 700 A.2d 453 (Pa. Super. 1997). In the present case the Plaintiff states in his Complaint that the Plaintiff signed up for cellular service with the co-Defendants in which the Plaintiff did not authorize the use of his name or signature for any other purposes. The Complaint also avers that the co-Defendants planned to falsely use the Plaintiff's name to obtain cellular service for other individuals with poor credit ratings. The Complaint reasonably infers that the Plaintiff justifiably relied on the fact that his signature on the cellular contract would be used for only those purposes indicated in the contract and that such reliance resulted in the injury and damages averred. This Court is satisfied that the Plaintiff has sufficiently averred the elements of fraud

and misrepresentation in the Complaint.

As to Count I of the Plaintiff's Complaint, the Defendant, Cellular One, avers that the elements of fraud and misrepresentation cannot be sustained against them because Cellular One is not the principle of the co-defendants Connections, Inc. and Larry Feldman. Therefore, the element of scienter cannot be proven against Cellular One. Both the Plaintiff and the Defendant, Cellular One, agree that if an agency relationship is proven, Cellular One can be held accountable for its agent's actions, in that all the elements for a cause of action in fraud and misrepresentation will apply to Cellular One as well.

Agency does not need to be proven in the Complaint; it only needs to be averred in a well-pleaded complaint. PRCP §1019. The Plaintiff in this case has averred in his Complaint that Cellular One is a principle for the co-defendants. *See Plaintiff's Complaint ¶ 4-11.*

Because the Plaintiff averred agency, these elements can be held against Cellular One in an agency relationship. Therefore, Defendant's preliminary objections in the nature of a demurrer as to Count I must be denied.

As to Count II of the Plaintiff's Complaint, the Defendant, Cellular One, alleges that the Plaintiff failed to state the elements for a claim of invasion of privacy. This Court agrees. To maintain a cause of action for the tort of invasion of privacy there must be an allegation of mental suffering, shame, or humiliation to a person of ordinary sensibilities. *DeAngelo v. Fortney,* 515 A.2d 594, 595 (Pa. Super. 1986). The Complaint only avers monetary damages. Although a reasonable inference may arguably be made that the elements listed above existed, it would not be a well-pleaded Complaint if the Court were to allow inferences that do not clearly define what the cause of action was. However, the Court will afford the Plaintiff an opportunity to amend his Complaint accordingly. The right to amend should not be withheld where there is some reasonable possibility that amendment can be accomplished successfully. PRCP 1033; *Otto v. American Mutual Insurance Company,* 482 Pa. 202, 393 A.2d 450 (1978). Therefore, Defendant's, Cellular One, preliminary objection in the nature of a demurrer as to Count II of the Plaintiff's Complaint must be sustained thereby dismissing Count II of the Plaintiff's Complaint as to the Defendant, Cellular One, without prejudice. The Plaintiff shall have twenty (20) days to file an Amended Complaint.

On Count III the Defendant claims that the Plaintiff's Complaint is legally insufficient as to stating a claim under the Unfair Trade Practices Act [hereinafter UTPA]. The Defendants are relying on the belief that an agency relationship with the co-Defendants does not apply to Cellular One. The aforementioned reasons on principle and agency also apply in this regard. The Plaintiff has averred an agency relationship. *See Complaint ¶ 4-11.* According to the UTPA, the catchall provision will allow recovery if all of the common law elements of fraud are proven. *Hammer v. Nikol,* 659 A.2d

617, 619-620 (Pa. Commw. 1995); see also *Sewak v. Lockhart*, 699 A.2d 755, 761 (Pa. Super. 1997). Again, the Complaint must only aver the elements of fraud not prove them. PRCP 1019(b) states that fraud must be averred with particularity. Further, PRCP 1019(g) allows elements to be incorporated in another part of the complaint by reference. This Court has already noted that the Plaintiff has averted the elements of fraud with sufficient particularity, and further has incorporated those elements in his claim for a cause of action under the UTPA. Therefore, the Defendant's preliminary objection in the form of a demurrer on Count III must be denied.

As to Count IV of the Plaintiff's Complaint, the Defendant claims that the pleaded facts are insufficient as a matter of law to establish a claim for punitive damages. They argue there is an absence of outrageous and willful conduct. The *Restatement of Torts (Second)* §908 (2) sets forth:

> Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and the extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

In the present case, the co-Defendants conduct has been averred and is a question of fact. Whether the conduct was outrageous and willful to a reasonable person is a fact for the jury to decide not a matter of law. Under the standard for reviewing preliminary objections in the nature of a demurrer, this Court must accept as true all well-pleaded facts. See *McGill, supra,* at p. 2. The Plaintiff should be entitled to offer evidence to support a claim for punitive damages because the Complaint limits the issues to be tried. Further, the facts averred in the Plaintiff's Complaint are consistent with the allegation of outrageous and willful conduct. The Plaintiff avers that the co-Defendants developed a scheme involving a bad motive that could be considered outrageous and willful by a reasonable person.

As previously stated, agency has been averred as conduct by Cellular One to enable the Plaintiff to seek punitive damages. *See Complaint ¶ 4-11*. Therefore, the Defendant's preliminary objections in the nature of a demurrer as to Count IV must be denied.

On Count V the Defendant states that fraud was not averred with particularity in the Complaint. Because Pennsylvania is a fact-pleading jurisdiction, a complaint must therefore not only give the defendant notice of what the plaintiff's claim is and the grounds upon which it rests, but must also formulate the issues by summarizing those facts essential to support the claim. *Sevin v. Kelshaw,* 417 Pa. Super. 1, 611 A.2d 1232, 1235 (1992). In *Bata v. Central-Penn National Bank of Philadelphia,* 423 Pa. 373, 380, 224 A.2d 174, 179 (1966) *cert. denied,* 386 U.S. 1007 87 S.Ct. 1348, 18 L.Ed.2d 433 (1967), the Pennsylvania Supreme Court opined:

> While it is impossible to establish precise standards as to the degree of particularity required in a given situation, two conditions must always be met. The pleadings must adequately explain the nature of the claim to the opposing party so as to permit him to prepare a defense and they must be sufficient to convince the court that the averments are not merely subterfuge.

Sevin, 611 A.2d at 1235, quoting *Bata, Supra*. Further, the pleadings must also form the issues in an action so that proof at trial may be restricted to those issues. See *Cassel v. Shellencerger,* 356 Pa. Super. 101, 514 A.2d 163 (1986), *allocatur denied,* 515 Pa. 603, 529 A.2d 1078 (1987). It is the conclusion of this Court that the Plaintiff has averred with sufficient particularity the elements of fraud and misrepresentation in the Complaint. Further, the Plaintiff has correctly incorporated it in other parts of the Complaint. These averments can be held against Cellular One if an agency relationship exists. For the above stated reasons, the Defendant's, Cellular One, preliminary objections in the nature of a demurrer as to Count V must be denied.

The plaintiff has averred with particularity the elements of fraud and misrepresentation in the Complaint and has correctly incorporated it in other parts of the Complaint. These averments can be held against Cellular One if an agency relationship exists. For the above stated reasons, a demurrer cannot be granted on Count IV.

ORDER

AND NOW, TO-WIT, this 15th day of October 2001, for the reasons set forth in the foregoing Opinion, it is hereby **ORDERED**, **ADJUDGED and DECREED** as follows:

1. Defendant's, Cellular One-Erie, Preliminary Objections in the nature of a demurrer as to Counts I, III, IV, and V are **DENIED**.

2. Defendant's, Cellular One-Erie, Preliminary Objection in the nature of a demurrer is **GRANTED**, and Plaintiff shall have twenty (20) days to amend his Complaint.

BY THE COURT:
Shad Connelly, Judge

MARY M. PERSEO, Plaintiff

v.

SEAN E. PERSEO, Defendant

CIVIL PROCEDURE/FAMILY LAW

Defendant's application for restoration of firearms is denied despite consent signed by spouse based on extensive factual record of threats to spouse and to himself and pursuant to the provisions of 18 Pa. C.S.A. §6105(a).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 16032-2001

Appearances: Bradley K. Enterline, Attorney for Mary M. Perseo
Charbel G. Latouf, Attorney for Sean E. Perseo

OPINION

October 23, 2001: Before this Court is Sean E. Perseo's Application for Restoration of Firearms Possession Pursuant to 18 Pa.C.S.A. Section 6105(f). Sean E. Perseo has filed this Application under the Protection From Abuse action filed by Mary M. Perseo on January 16, 2001 at the above term and number. A Final Protection from Abuse Order was entered on February 15, 2001 by this Court.[1]

The Application for Restoration of Firearms filed by Sean E. Perseo is also accompanied by a Consent signed by Mary M. Perseo.

The Petitioner participated in a number of Court actions throughout the last year. In January, 2001, the Commonwealth of Pennsylvania charged Sean E. Perseo with rape, involuntary deviate sexual intercourse, sexual assault, aggravated indecent assault, indecent assault, terroristic threats, simple assault and tampering with or fabricating physical evidence. The primary witness against Sean E. Perseo was his wife, Mary M. Perseo.

On July 11, 2001, a trial was commenced and subsequent thereto, Sean E. Perseo was found not guilty of all eight (8) counts.

Also, on January 16, 2001, Mary M. Perseo filed the above-captioned Petition for Protection From Abuse against Sean E. Perseo. In her Petition, Mary M. Perseo alleged the following:

> On or about Saturday, January 13, 2001, approximately 3:30 a.m. "I was choked, punched in the chest, thigh, and left buttocks, I was

[1] Although this Application has been brought under the Protection From Abuse docket, it is not a Request for Modification under the Protection From Abuse Act. 23 Pa. C.S.A. Section 6117 allows either party to seek modification of a Protective Order at any time during the pendency of the Order. In such a case, the modification can be ordered only upon appropriate notice and hearing.

> smacked in the side of the head three-four times, my left breast was bitten and twisted. I was sexually abused anally and vaginally with his hands and penis. He said he was going to kill me... There are several incidents going back at least 12 years. Sexual, verbal and physical. I have been choked several times, pushed into walls, thrown to the ground, slapped in the face, smacked in the head. He has threatened to kill me and take my children away from me. Many incidents have occurred in front of the children."

On February 15, 2001 a Final Protection From Abuse Order was entered. Pursuant to the Order, Sean E. Perseo was prohibited from having any contact with Mary M. Perseo and, further, he was directed to immediately turn over to the Sheriff's Department or to a local law enforcement agency for delivery to the Sheriff's Department, any and all weapons. He was also prohibited from possessing, transferring or acquiring any other weapons for the duration of the Order which will expire on August 15, 2002.

On February 27, 2001 Sean E. Perseo was charged with Indirect Criminal Contempt after violating the Final Protection From Abuse Order. On March 9, 2001, the Court found Sean E. Perseo guilty of Indirect Criminal Contempt pursuant to 23 Pa.C.S.A. Section 6114. He was sentenced to a period of incarceration for one (1) to six (6) months. The effective date of the incarceration was March 3, 2001.

In addition to the above, Mary M. Perseo and Sean E. Perseo have numerous family issues before the Court.

The Court has before it the Application for Restoration of Firearms containing the Consents of both Sean E. Perseo and Mary M. Perseo. However, the Court will deny the request.

18 Pa.C.S.A. §6105(a) states:

> Offense defined - (1) A person who has been convicted of an offense enumerated in subsection (b), within or without this Commonwealth, regardless of the length of sentence or whose conduct meets the criteria in subsection (c) shall not possess, use, control, sell, transfer or manufacture or obtain a license to possess, use, control, sell, transfer or manufacture a firearm in this Commonwealth.

Pursuant to 18 Pa.C.S.A. §6105(c)(6) the prohibition against possessing a firearm in the Commonwealth terminates upon the expiration or vacation of an active protection from abuse order or portion thereof relating to the confiscation of firearms.

Pursuant to the Protection From Abuse Order in effect, this prohibition shall terminate on August 15, 2002. Therefore, the prohibition against possessing a firearm will expire on August 15, 2002. The Court has no reason to change this date, nor will the Court do so.

The Court's review of the record in the Court of Common Pleas of Erie County, Pennsylvania, reveals that restoration of a firearm to Sean E. Perseo is not appropriate.

The allegations of abuse contained in the original Petition for Protection From Abuse filed by Mary M. Perseo on January 16, 2001 are significant and serious.

Furthermore, on March 7, 2001, in the matter of Commonwealth of Pennsylvania v. Sean E. Perseo, Case Nos. 756, 757-2001, a Motion to Revoke Bond was held before the Honorable Shad Connelly in the Court of Common Pleas of Erie County, Pennsylvania.

At the hearing, Robert Day, a drug and alcohol therapist who evaluated Sean E. Perseo through the Erie Police Department Employee Assistance Program testified. He helped arrange transportation for Sean E. Perseo to attend Marworth, a drug and alcohol rehabilitation center in Wavefly, Pennsylvania.

Evidence presented at the hearing indicated that Sean E. Perseo was talking about or contemplating suicide in February of 2001. He was medicated with Paxil. It was Day's opinion that based upon medication, suicidal ideation and depressive disorder, Sean E. Perseo should refrain from alcohol consumption. Specifically, Day told Sean E. Perseo that it would not be in his best interest to drink. Sean E. Perseo continued to drink and subsequently spent five (5) days in the Warren State Hospital.

Subsequent to the Motion to Revoke Bond, Judge Connelly revoked Sean E. Perseo's bond. Judge Connelly declined to reset a bond, and ordered that Sean E. Perseo be held at the Erie County Prison pending trial.

On April 3, 2001, Sean E. Perseo filed a Motion for Reconsideration of the Revocation of Bond. In response, the Court appointed Steven J. Riley, M.A., a clinical psychologist to examine and evaluate Sean E. Perseo's mental stability. On April 12, 2001 Mr. Riley's forensic psychological report was filed of record. Also, on April 12, 2001 Mr. Riley testified concerning the details of his examination.

On April 29, 2001, the Court denied Sean E. Perseo's Motion for Reconsideration of Bond Revocation citing, among other things, Sean E. Perseo's serious alcohol problem and his continued threat to the alleged victim. In denying Sean E. Perseo's Motion, the Court also expressly relied upon and cited Steven Riley's report concerning Sean E. Perseo's mental status. Specifically, the report stated:

> "Information generated from the subject's clinical interview and psychological testing indicates an enduring and pervasive personality trait that underlies this man's emotional, cognitive and interpersonal difficulties. There is reason to believe that he currently suffers from a long-standing history of depression, alcohol abuse and a physically abusive lifestyle which has detrimentally affected his life. Defective physic structure suggests

> failure to develop adequate internal cohesion and a less than satisfactory hierarchy of coping skills. This man's foundation for effective intrapsychiatric regulation and socially acceptable personal conduct appears deficient or incompetent. Firstly, the subject reports a long-standing history of marital discord which has involved physical and verbal abuse, intimidation, as well as a destruction of personal property and personal heirlooms. Coupled with a long-standing history of alcohol abuse, he has experienced a checkered history of marital disappointment and his family relationships remain poor. Social attainments such as graduating from high school, enrollment in the military, and maintaining respectable gainful employment has been compromised due to the subject's self-defeating vicious cycle... personal findings indicate a pattern of spousal abuse and/or battering tendencies which the subject openly admits and for which he candidly appears to be requesting assistance. He often feels cheated, misunderstood and unappreciated and has a limited scope and/or idea of his abusive tendencies. He projects blame quite easily and has not, thus far, taken personal responsibility for his significant loss and misfortune... personal relationships appear quite superficial and the subject appears to be preoccupied with coping skills that produce minimal results at best and certainly no long term change. Furthermore, the subject often struggles between feelings of resentment and guilt and a conflict between dependency and self-assertion may permeate most aspects of his life. He may display an unpredictable and rapid succession of moods. He may be restless, capricious, and erratic and he may tend to be easily nettled, contrary and offended by trifles... although somewhat self-centered, he did admit to an abusive lifestyle and a long-standing history of alcoholism."

Also, the Court heard from Sean E. Perseo during his hearing on the Motion to Reconsider Bond Revocation. He testified that he had authored a letter in which he stated he was going to kill himself. He also testified that although while at Marworth he received alcohol counseling, he ignored the counseling and continued to consume alcohol. He indicated that he had a drinking problem and drank excessively.

Sean E. Perseo also testified at his criminal trial. Among other things, he testified about his alcoholism and his ability to drink excessively. At one point, referring to the number of drinks he had, Sean E. Perseo stated, "it had no effect on me. I went to rehab for alcoholism and eight (8) drinks of Crown Royal is just getting started for me." He also testified about his suicidal ideations and his desire to kill himself, stating he had no desire to live, and was contemplating suicide from as early as January 14, 2001. In discussing the same, he stated, "as soon as I have the guts to pull the

trigger, I was going to be dead." He also put that information in written letters. In addition to contemplation of suicide, he wrote letters saying good-bye to various people. In part he stated, "...That it wasn't worth it, so I just wanted to die and I'm sorry that I'm still here today."

According to the Protection From Abuse presently in effect, Sean E. Perseo has, on several occasions over a substantial period of time, threatened to kill Mary M. Perseo. Further, by his own admission and in documents authored by him, Sean E. Perseo has recently and frequently threatened to kill himself. The above threats, coupled with Sean E. Perseo's long-standing abuse of alcohol, obviously exacerbates the Court's concerns about Sean E. Perseo's behavior, and increases the likelihood of potential future harm to either or both of the parties. Therefore, under all of the circumstances, facts, and law this Court cannot, in all good conscience, order returned to Sean E. Perseo a deadly weapon, which may be used to facilitate the carrying out of the threats Sean E. Perseo has made as to his own life and that of the life of Mary M. Perseo. Therefore, the Application before this Court is **DENIED**.

An appropriate Order will follow.

ORDER

AND NOW, to-wit, this 23rd of October, 2001, upon consideration of Sean E. Perseo's Application for Restoration of Firearms Possession Pursuant to 18 Pa.C.S.A. Section 6105(f), it is hereby **ORDERED**, **ADJUDGED** and **DECREED**, the relief requested is **DENIED**.

BY THE COURT
ELIZABETH K. KELLY, JUDGE

COMMONWEALTH OF PENNSYLVANIA

v.

JEREMY JOSEPH DILLON

STATUTES/CONSTRUCTION

Section 5917 of Judicial Code, 42 Pa. C.S. §5917, relating to notes of former testimony, is only applicable in criminal proceedings where the witness dies, is out of the court's jurisdiction, cannot be found, or becomes incompetent to testify.

Section 5934 of Judicial Code, 42 Pa. C.S. §5934, relating to notes of evidence at former trial, is only applicable in civil proceedings.

CRIMINAL PROCEDURE/ADMISSIBILITY OF EVIDENCE

Counsel's handwritten notes of testimony given during preliminary hearing do not constitute official record of proceedings and, therefore, could not be used to impeach witness.

Previously suppressed statements of defendant were properly admitted at trial where defense counsel called witness and elicited testimony that included the suppressed statements.

CRIMINAL PROCEDURE/INEFFECTIVE ASSISTANCE OF COUNSEL

Counsel was not ineffective for failing to obtain preliminary hearing transcript where counsel did not attempt to impeach witness at trial.

Counsel was not ineffective for eliciting previously suppressed statement where defendant was not prejudiced by its admission.

Counsel was not ineffective for failing to present defense of diminished capacity where defendant testified that he had not been consuming alcohol the day of the murder and where defendant testified in detail regarding specific events leading up to the murder.

CRIMINAL PROCEDURE/APPEALS

Verdict of first degree murder was not against the weight of the evidence where the Commonwealth presented evidence establishing that defendant (1) told witnesses that he was going to murder victim, (2) laid in wait for victim, (3) obtained six weapons and used them to inflict seventy-three wounds on the victim's body, (4) fractured the victim's skull three times, (5) continued to strangle victim after beating and stabbing her, (6) left his fingerprints on one of the weapons and (6), had the victim's blood on his clothing.

Defendant was not denied fair trial where the trial court properly instructed jury on definition of "serious provocation" as that term is defined in Section 2301 of the Crimes Code, 19 Pa.C.S. §2301.

Failure to raise objection during trial resulted in waiver of issue.

Failure to file post-trial motions resulted in waiver of issue.

CRIMINAL PROCEDURE/POST-TRIAL PROCEDURE

When defendant fails to adequately identify in a concise manner the issues sought to be pursued on appeal, trial court is impeded in its preparation of legal analysis and, therefore, the issues are deemed waived.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION NO. 291 OF 2001

Appearances: District Attorney's Office
Joseph P. Burt, Assistant Public Defender

OPINION

This is an appeal from a conviction for First Degree Murder. Sadly, this case involves the ruin of two young, promising lives.

FACTUAL/PROCEDURAL HISTORY

On December 27, 2000 Amanda Orr informed her live-in boyfriend, Jeremy Joseph Dillon (Appellant), their relationship was over and left the apartment they shared. Appellant was distraught about Miss Orr leaving him. Over the next several days Appellant spent most of his time at their apartment playing video games and ruminating.

On January 2, 2001 Appellant and his friend Joseph Siar went to the Millcreek Mall to meet Joshua Samick. During this meeting Appellant told Mr. Samick he was going to get a gun and kill Miss Orr.

On January 4, 2001 shortly after noon, Miss Orr telephoned Appellant before leaving for work and informed him she would be stopping by the apartment to pick up more of her belongings. At approximately 1:15 p.m. Miss Orr arrived at their apartment.

Shortly thereafter Appellant used a metal crowbar, hammer, wooden back massager, glass beer stein, two knives and the cord from his Sega Dreamcast to kill his former girlfriend. The wounds on Miss Orr's body showed Appellant delivered devastating blows to her face, head, neck, sides and legs with the blunt weapons.

Appellant sliced Miss Orr's neck several times and stabbed her once in the chest. At some point Appellant wrapped the cord of the controller from his Sega Dreamcast around Miss Orr's neck and strangled her.

At approximately 3:15 p.m. Appellant went to the office of the building manager, Diane Hogan, to request an ambulance. While there he told the maintenance man, Donald Stanbro, that he had "flipped out" and "lost it" on Amanda.

Soon an ambulance and the police arrived. Appellant was arrested and charged with Criminal Homicide, Aggravated Assault and Abuse of a Corpse. On January 30, 2001 a preliminary hearing was held resulting in all charges being bound over to Court.

On May 23, 2001 Appellant filed a Motion in Limine to Suppress Statements. After a hearing Appellant's Motion to Suppress was granted as to five verbal statements of Appellant to Pennsylvania State Police Trooper Mark Russo.

A jury trial commenced on October 1, 2001. The Aggravated Assault and Abuse of a Corpse charges were withdrawn by the Commonwealth

just prior to jury deliberations. On October 4, 2001 a jury found Appellant guilty of Murder of the First Degree. On October 10, 2001 Appellant filed a Motion for Post-Verdict Relief which was denied by Order dated October 12, 2001. On October 31, 2001 Appellant was sentenced to lifetime incarceration. Appellant did not file a Post-Sentence Motion.

On November 15, 2001 Appellant filed a Notice of Appeal. On November 30, 2001 a Preliminary Statement of Matters Complained of on Appeal was filed along with a Request for Extension of Time to File a Final Statement of Matters. On January 23, 2001 [sic] Appellant notified this Court he wished to proceed with his appeal based on his Preliminary Statement of Matters.

In his Statement, Appellant raises numerous allegations of error. These issues will be addressed seriatim.

DISCUSSION

First, Appellant alleges error because he could not impeach the testimony of two Commonwealth witnesses using prior statements made at Appellant's preliminary hearing of January 30, 2001. Appellant ignores the reality of the circumstances Appellant's counsel created. Appellant's counsel was present at the preliminary hearing, but did not have a stenographer there. Nonetheless Appellant's counsel wanted to use his handwritten notes as a basis to purportedly impeach the trial testimony of Diane Hogan. The Commonwealth's objection was sustained because counsel's notes do not constitute an official record of the preliminary hearing.

Appellant claims the prior inconsistent statement was admissible pursuant to 42 Pa.C.S.A. §5917 and §5934. Appellant misunderstands these two sections, which are only applicable when a witness is unavailable to testify at trial. Diane Hogan was available and testified at trial. Further, Section 5917 applies to proceedings "before a court of record." A preliminary hearing before a district justice is not "a court of record." *See Commonwealth v. Rodgers*, 372 A.2d 771 (Pa. 1977). Appellant also overlooks the fact Section 5934 only applies in civil cases.

In the alternative, Appellant alleges it was ineffective assistance of trial counsel to not have the preliminary hearing transcript available at trial for impeachment purposes. The standard for review of an ineffective assistance claim requires a three-pronged test:

"The standard to be applied in reviewing claims of ineffective assistance of counsel is well settled. The threshold inquiry in ineffectiveness claims is whether the issue/argument/tactic which counsel has foregone and which forms the basis for the assertion of ineffectiveness is of arguable merit; for counsel cannot be considered ineffective for failing to assert a meritless claim. Once this threshold is met we apply the 'reasonable basis' test to determine whether counsel's chosen course was designed to effectuate his

> Client's interests. If we conclude that the particular course chosen by counsel had some reasonable basis, our inquiry ceases and counsel's assistance is deemed effective. If we determine there was no reasonable basis for counsel's chosen course then the accused must demonstrate that counsel's ineffectiveness worked to his prejudice. The burden of establishing counsel's ineffectiveness is on the appellant because counsel's stewardship of the trial is presumptively effective."

Commonwealth v. Pierce, 646 A.2d 189 (Pa. 1994) p. 194, 195.

A review of the record reveals Appellant only wanted to question the testimony of Diane Hogan by utilizing Appellant's trial counsel's notes from the preliminary hearing. At no time did Appellant's trial counsel ever seek to impeach the testimony of Donald Stanbro by Stanbro's prior testimony at the preliminary hearing.[1] Accordingly, there is no issue regarding Appellant's ability to impeach the testimony of Donald Stanbro.

In considering this issue regarding the testimony of Diane Hogan, it is important to establish what Diane Hogan actually testified to and what Appellant was hoping to elicit by way of cross-examination. Appellant was not seeking to impeach the testimony of Ms. Hogan. Instead Appellant's counsel wanted to bolster her testimony.

On direct examination, Diane Hogan testified regarding Appellant's demeanor:

> "Q. Can you describe how he was acting?
>
> A. Kind of distraught. He knew what he was telling me but he didn't seem like he -- I guess distraught is the best way to say it."

Trial Transcript, October 2, 2001 p. 163 (hereinafter Trial Transcript is abbreviated as TT).

On cross-examination, Appellant's trial counsel wanted the witness to elaborate on these observations:

> "Q. Okay. And you mentioned that he looked distraught. That was your explanation?
>
> A. Uh-huh.
>
> Q. Now you also said that he knew what he was saying but you were ready to say something and then you changed it and said "distraught," maybe like he wasn't all there or something to that effect?

[1] Notably, on cross-examination, Donald Stanbro was asked whether he had given a prior written statement to which Stanbro responded affirmatively. Appellant's trial counsel then reviewed the written statement of Mr. Stanbro. *T.T.*, October 2, 2001 p. 180.

A. No. I just -- "distraught" I wasn't sure was the right word I wanted to use. But no, I wasn't going to say like --

Q. Is there any other word that you can use to describe his physical appearance?

A. No, he just didn't -- he just seemed like he was distraught. He didn't seem -- he knew where he was and that he was talking to me. He didn't seem like he didn't know that."

T.T., October 2, 2001 p. 169.

Importantly, a similar observation of Appellant's demeanor was expressed by Donald Stanbro on direct examination:

"Q. Can you describe his demeanor? How he was acting when he talked to you?

A. He was like slurring his words, like he didn't know what he wanted to say and I had thought he was kind of in disorder like."

T.T., October 2, 2001 p. 176.

On cross-examination of Mr. Stanbro, Appellant's trial counsel asked:

"Q. Okay. And would you characterize Mr. Dillon as being nervous at that point or upset?

A. Maybe upset....

Q. Okay. Do you ever recall saying before that you felt that Mr. Dillon didn't know what was going on or where he was?

A. He seemed like he was upset about something, but I believe he knew where he was."

T.T., October 2, 2001 p. 179, 180.

Thus through the trial testimony of Diane Hogan and Donald Stanbro Appellant established that immediately after the murder Appellant appeared distraught and upset. This is exactly the type of evidence Appellant's trial counsel was seeking for his heat of passion defense. In fact Appellant's trial counsel referenced this testimony when he argued in closing "...some say he was upset and crying". *T.T.*, October 4, 2001 p. 115.

The only area of inquiry left was whether Appellant appeared to be crying. According to Diane Hogan, Appellant was not crying at the time she saw him. *T.T.*, October 2, 2001, p. 163. Appellant's trial counsel wanted to use his notes to question Hogan whether she testified at the preliminary hearing Appellant appeared to be crying. It was this limited question that was not allowed for lack of a transcript. *T.T.*, October 2, 2001, p. 170.

However, when viewed in the context of the entire testimony of Diane Hogan, it is clear Appellant's trial counsel was not attempting to impeach the witness since he wanted the jury to believe Diane Hogan thought Appellant was distraught.

According to Diane Hogan, Appellant was distraught regardless of whether he appeared to be crying. Appellant's attempt to have Hogan testify Appellant was crying was only to make it seem Appellant was more distraught. As such, Appellant was not impeaching Hogan, but only bolstering her observation of Appellant's demeanor.[2] Appellant still had the benefit of the evidence he needed regarding Appellant's demeanor for purposes of the heat of passion defense. Therefore Appellant was not prejudiced and his trial counsel was not ineffective.

Next, Appellant alleges it was error to allow into evidence statements made by Appellant to Pennsylvania State Police Trooper Mark Russo which had been previously suppressed. However, the only suppressed statement admitted came in during Appellant's case.

Suppression was granted of the following statements of Appellant: "I guess at this point is where I need an attorney"; "I can't believe it happened"; "I don't know what the f--- happened"; "can you tell me how I could have done what I did"; and "never in a million years did I think something like this would happen". *See* Order dated October 2, 2001.

At trial, Appellant called Trooper Russo as a witness for the defense. On direct examination Appellant's counsel questioned Trooper Russo about a conversation that occurred between Trooper Russo and Appellant during a transport from the District Justice's office to Saint Vincent Medical Center. The purpose of trial counsel's questioning was to inquire as to Appellant's demeanor. As part of his response, Trooper Russo testified Appellant asked him: "can you tell me how I could have done what I did?". *T.T.*, October 3, 4, 2001 p. 59.

The Commonwealth did not thereafter enter the "open door" as none of the other suppressed statements were elicited in the Commonwealth's cross-examination[3]. Hence the only suppressed statement that was admitted was during Appellant's direct examination. This statement actually helps Appellant because it demonstrates Appellant's confusion consistent with his heat of passion defense. While the statement does implicate

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[2] Donald Stanbro, who observed Appellant during the same time period, also testified Appellant was not crying. Hence it is unlikely Appellant could have used the preliminary hearing transcript to get Diane Hogan to change her trial testimony regarding Appellant's crying.

[3] On cross-examination Trooper Russo did mention a different statement from Appellant: "here's where I better stop or I may incriminate myself". *T.T.*, October 3, 2001 p.62. This statement was not requested to be suppressed in Appellant's Motion to Suppress and was not suppressed by the Order dated October 2, 2001.

Appellant as the perpetrator, this fact was never in dispute as Appellant conceded he killed his girlfriend. In any event, Appellant cannot now complain about a response Appellant solicited as part of the defense case.

Appellant also alleges ineffective assistance of trial counsel for opening the door to the suppressed statements. As found above, the Commonwealth did not bring in any of the suppressed statements, therefore Appellant was not prejudiced. Hence trial counsel was not ineffective.

Next, Appellant alleges he was denied a fair trial because trial counsel was not allowed to elicit testimony on redirect examination of Appellant's expert that was omitted from the expert's direct testimony. Specifically, Appellant wanted to re-direct his expert about the victim's use of Prozac and Paxil. Appellant's allegation is so vague this Court cannot properly respond to it. Nor has Appellant ever established the relevancy of these questions. Therefore the issue is waived. *Commonwealth v. Dowling*, 778 A.2d 683 (2001).

Further, there was no factual predicate for this line of questioning to the expert. Appellant's expert had no knowledge of whether the victim used Prozac or Paxil on January 4, 2001. There was nothing in the record anywhere establishing the victim had used these medications. In fact, the victim's mother testified to the contrary as these prescriptions were several years old. To the mother's knowledge her daughter had discontinued using these medications long before her death. *T.T.*, October 1,2001 p. 113.

More importantly, the toxicology test done on the victim showed she did not have either of these medications in her system at the time of her death. *T.T.*, October 3, 2001 p. 410. Hence, Appellant was attempting to elicit an opinion from his expert about a fact that was not only never a part of the record, but was not true. It was a blatant attempt to besmirch the victim without any relevancy. Therefore, the denial of this questioning was proper.

In the alternative, Appellant alleges ineffective assistance of counsel for failing to elicit the information about Prozac and Paxil on direct examination. Because Appellant's underlying claim about Prozac and Paxil is without merit, trial counsel cannot be deemed ineffective.

Next, Appellant alleges he was denied a fair trial because in the course of jury instructions on the heat of passion defense it was stated: "how a reasonable person would act, not Jeremy Dillon, but a reasonable person". *T.T.*, October 3, 4, 2001 p. 144. Appellant argues this instruction was tantamount to saying Appellant could never be a reasonable person. However, Appellant has waived this issue since Appellant failed to object at trial. Pa.R.A.P. § 302 (b).

On the merits, Appellant's allegation must fail. It has long been the law the standard for a heat of passion defense is an objective one based on how a reasonable person would respond. As defined by statute, serious

provocation is:

> "...conduct sufficient to excite an intense passion in *a reasonable person."* 18 Pa.C.S.A. §2301. *(Emphasis added).*

In the instant case, the jury was instructed to determine whether the facts as found by the jury would cause a reasonable person to become so impassioned as to negate the specific intent to kill. The jury was not instructed Appellant was not nor never could be a reasonable person. Instead, it was proper to distinguish for the jury that the determination of provocation was not a subjective one based on Appellant's perceptions. As instructed, the jury needed to determine the response of a reasonable person under the same circumstances. Thus there was no error in these instructions.

Next, Appellant alleges it was error to instruct the jury that if they did not find serious provocation they need not reach the question of whether Appellant acted in the heat of passion. Again this allegation has been waived because Appellant failed to object at the time of trial. Pa.R.A.P §302 (b).

Further, there is no merit to this claim. The threshold question to be answered in a heat of passion defense is whether there was serious provocation. Without serious provocation the law recognizes there can be no passion to mitigate intent to commit murder. Further, without serious provocation, a reasonable person is expected to control his or her passion without resorting to killing.

In explaining the heat of passion instruction, this Court suggested to the jury the question of serious provocation could be considered first. If no serious provocation were found, the jury need not go any further on this issue. This suggested method of analysis is consistent with the law. Importantly, the jury was specifically instructed they were not bound to accept the Court's proffered method of analysis:

> "...you're free to do your own analysis of it. I'm trying to explain it to you in a way that I hope would be helpful for you but you're not bound to accept that".

T.T., October 3, 4, 2001 p. 145.

Accordingly, the jury was properly instructed and Appellant's allegation is without merit.

Next, Appellant alleges error in the denial of his Motion to Quash blood samples taken from him on January 4, 2001. Appellant does not indicate the date said Motion was filed nor does the record show Appellant ever filed a Motion to Quash. Thus, this Court is unable to respond to Appellant's allegation.

Next, Appellant alleges the verdict was against the weight of the evidence to prove Appellant had the capacity to form the intent necessary to commit Murder in the First Degree. Initially it must be noted Appellant failed to file

a Post-Sentence Motion and the issue is waived. Pa.R.A.P. 302 (a). This issue is also waived because Appellant's Statement of Matters simply makes a bald statement the evidence was shockingly short of the quantum to warrant the verdict of Murder in the First Degree given the evidence of provocation. This is nothing more than a conclusory statement. Hence this issue is waived. *See Commonwealth v. Dowling*, 778 A.2d 683 (Pa. Super. 2001).

Assuming arguendo this issue is not waived, Appellant's allegation is without merit. When the weight of the evidence has been challenged:

> "The role of the appellate court in reviewing the weight of the evidence is very limited. The purpose of that review is to determine whether the trial court abused its discretion and not to substitute the reviewing court's judgment for that of the trial court. A new trial should be awarded when the jury's verdict is so contrary to the evidence as to shock one's sense of justice..." *Commonwealth v. Goodwine*, 692 A.2d 233, 236-237 (Pa. Super. 1997).

The weight of the evidence was sufficient to prove Appellant committed Murder of the First Degree. Appellant knew Miss Orr was on her way to the apartment. He made a conscious decision to stay for her arrival. Appellant procured the necessary weapons, including the crowbar, hammer, glass beer stein, back massager, two knives and a ligature.

Appellant used these weapons to inflict seventy-three wounds on the victim's body. The victim's blood was on the Appellant's clothes. Appellant used his folding knife to stab the victim in the chest so deep the lung was struck.

Appellant smashed his ex-girlfriend so violently with a hammer that the hammer handle snapped in two. The victim suffered at least three separate skull fractures. *T.T.*, October 2, 2001 p. 378. Appellant's fingerprints were on the crowbar. The victim had already been beaten and stabbed, yet Appellant strangled her with a ligature for at least fifteen to thirty seconds.

Appellant told Joshua Samick on January 2, 2001 he (Appellant) was going to kill Miss Orr. *T.T.*, October 3, 2001 p. 439. Appellant told Donald Stanbro he "flipped out" and "lost it" on Amanda. *T.T.*, October 2, 2001 p. 175. Appellant admits he brooded for days prior to the murder about the victim breaking off their relationship. By his own admission Appellant was angry that his source of financial support (the victim) had left him. Appellant had ample time and opportunity to form the specific intent to kill. Appellant's use of many blunt objects to vital areas of the victim's body, coupled with the stab wounds and strangulation by ligature around the neck, established a sufficient basis for the conviction. This verdict does not shock one's sense of justice.

Lastly, Appellant alleges it was ineffective assistance of trial counsel for failing to immediately request a blood test of the unused portion of Appellant's blood sample for intoxicants and for failing to put on a

diminished capacity defense. The record shows an attempt to present a diminished capacity defense, but it was ultimately unsupportable largely as a result of Appellant's testimony and conduct.

Appellant testified he did not consume alcohol on the day of the killing. *T.T.*, October 3, 4, 2001 p. 28, 38. Both Diane Hogan and Donald Stanbro testified Appellant did not appear to be under the influence of alcohol or drugs immediately after the murder. *T.T.*, October 2, 2001 p. 169, 177. Thus any testing for alcohol would be useless.

Appellant admitted to smoking one joint or pipe of marijuana over one hour before Miss Orr arrived. *T.T.*, October 3, 4, 2001 p. 38. However this usage did not prevent Appellant from testifying in great detail at trial recalling all of the specific events leading up to and after the murder. At no time did Appellant ever testify that his cognitive capacity was diminished to any degree by the marijuana or any other substance. If Appellant were suffering from the effects of marijuana significant enough to be a defense he would not have been able to remember the details as he did. Further, Appellant had the presence of mind to change his bloody clothes before anyone could see him. Appellant found his way to the building manager's office and had an ambulance called. He was able to coherently interact with the building manager, maintenance man and police. Appellant also had the presence of mind to call his mother. *T.T.*, October 3, 4, 2001 p. 13-28.

It was Appellant's own testimony and conduct that precluded a diminished capacity defense. Accordingly, Appellant's allegation trial counsel should have pursued a diminished capacity defense does not meet the threshold requirement of reasonable merit, thus trial counsel cannot be ineffective for not pursuing a frivolous defense. Appellant's allegation fails.

CONCLUSION

For the reasons contained within, this appeal is without merit and must be dismissed.

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

CARL R. FEICK and JULIA A. FEICK, his wife, Plaintiffs

v.

BRADLEY P. FOX, M.D.; LIBERTY FAMILY PRACTICE; ROBERT J. MIKELONIS, M.D.; ST. VINCENT HEALTH CENTER; and KEYSTONE HEALTH PLAN WEST, INC.; Defendants

CIVIL PROCEDURE/MOTION FOR SUMMARY JUDGMENT

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. The record must be looked at in the light most favorable to the non-moving party. 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.

AGENCY/INDEPENDENT CONTRACTOR/OSTENSIBLE AGENT

The general rule is that employers are not liable for the actions of independent contractors. An exception is the doctrine of ostensible agency. Ostensible agency allows liability if a plaintiff can show that the agent represents that another, i.e. the independent contractor, is the agent's servant and thereby causes a third person to justifiably rely upon the care or skill of such apparent agent. Restatement (second) of torts (1965).

AGENCY/INDEPENDENT CONTRACTOR/OSTENSIBLE AGENT

The doctrine of ostensible agency has been applied to hospitals, as well as HMOs. Plaintiffs still have the burden of identifying facts of record tending to show that participating physicians were ostensible agents of the HMO. The doctrine of ostensible agency applies to HMOs where it is shown that the patient looked to the HMO, rather than to his physician, for his health care needs, and that the HMO, "holds out" its participating physicians as its employees.

AGENCY/INDEPENDENT CONTRACTOR/OSTENSIBLE AGENT

The plaintiffs were required to follow directives by the HMO which created an inference that they needed to look to the HMO, and not only to their primary care physicians for their health care needs. The court held that the plaintiff presented evidence that he reasonably believed his primary care physicians were employees of the HMO. Thus, a genuine issue of material fact is presented as to whether the primary care physicians were ostensible agents of the HMO. The motion for summary judgment is denied.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW No. 13658-1997

Appearances: Thomas Talarico, Esquire for the Plaintiffs
John Quinn, Jr., Esquire for Dr. Fox & Liberty Family Practice

Francis Klemensic, Esquire for Dr. Mikelonis & St. Vincent Health Center
David Johnson, Esquire for Keystone Health Plan West

OPINION

Anthony, J., December 5, 2001.

This matter comes before the Court on Defendant Keystone Health Plan West's (hereinafter "Keystone") Motion for Summary Judgment. After a review of the record and considering the arguments of counsel, the Court will deny the Motion. The factual and procedural history is as follows.

In 1993, Carl Feick (hereinafter "Feick") began experiencing mental, emotional, and physical problems. Among Mr. Feick's complaints were memory loss, difficulty finding words, and forgetting the names of people and objects. Because Mr. Feick's employer had recently contracted with Keystone, a health maintenance organization (hereinafter "HMO"), to provide medical services to its employees, Mr. Feick went to Defendant Saint Vincent Family Medicine Center (hereinafter "St. Vincent") for treatment of his maladies. Mr. Feick's treatment was handled by Dr. Robert J. Mikelonis (hereinafter "Mikelonis"); however, Mr. Feick was dissatisfied with the care he received from Dr. Mikelonis. Mr. Feick began to look for a new physician who was participating in Keystone's plan.

After attending an open house at the office of Bradley P. Fox, M.D. (hereinafter "Fox"), Mr. Feick designated Dr. Fox as his primary care physician. At his initial visit with Dr. Fox, Mr. Feick complained of headache, weight loss, sleep disturbance, changes in eating habits, and changes in sexual prowess. Dr. Fox diagnosed depression and recommended that Mr. Feick see a psychologist. Apparently, Dr. Fox did not refer Mr. Feick to a particular psychologist. Eventually, Feick learned that to access a psychologist, he needed to call a certain organization and then see someone who was in Keystone's network. On November 21, 1995, Feick was diagnosed with swelling of the optic disc. After a CT scan revealed a brain tumor, Feick underwent surgery to remove it.

Plaintiffs initiated this suit by filing a Complaint on February 2, 1998. The Complaint was amended on April 30, 1998. All Defendants answered by July 10, 1998. Defendants Mikelonis, St. Vincent, and Keystone also filed New Matter. Plaintiffs responded to all new matter by July 20, 1998. Defendant Keystone filed a Motion for Summary Judgment and Brief in Support on October 18, 2000. Plaintiffs filed a Brief in Opposition on November 28, 2000. This Court deferred the Motion for Summary Judgment until the close of discovery. Defendant Keystone filed the instant Amended Motion for Summary Judgment and Brief in Support on May 24, 2001. Plaintiffs did not file a Brief in Opposition to the Amended Motion for Summary Judgment, but instead relied upon their previous Brief in Opposition. Arguments were held in chambers at which all parties were represented.

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.

The only issue before the Court is whether there is an issue of material fact as to whether Keystone is vicariously liable for the actions of the physicians participating in its plan. Plaintiffs contend that Keystone is liable for the actions of its independent contractors under the theory of ostensible agency. Keystone argues the facts in this case do not indicate that Drs. Fox and Mikelonis were ostensible agents of Defendant Keystone.

The doctrine of ostensible agency is an exception to the general rule that employers are not liable for the actions of their independent contractors. The courts have found instructive sections 429 and 267 of the Restatement (Second) of Torts which provide:

> One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.
>
> One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care and skill of the one appearing to be a servant or agent as if he were such.

Restatement (Second) of Torts (1965). Courts have long recognized that the doctrine of ostensible agency applies to hospitals. *See Boyd v. Albert Einstein Med. Center,* 377 Pa.Super. 364, 547 A.2d 1229 (Pa. Super. 1988)(citing *Capan v. Divine Providence Hospital,* 287 Pa. Super. 364, 430 A.2d 647 (1980)). The rationale behind the theory was that, given the role hospitals play in society, many patients looked to the hospital, rather than to the individual physicians, for their health care; and hospitals often hold out the physicians as their employees.

In Boyd, the superior court explored the applicability of the doctrine of ostensible agency to HMOs. In that case, the trial court had granted summary judgment in favor of an HMO on the basis that participating physicians were not ostensible agents of the HMO. The HMO argued that

the doctrine of ostensible agency, as it had been applied to hospitals since *Capan,* did not apply to HMOs because they were not hospitals. The superior court rejected this argument stating "[b]ecause the role of health care providers has changed in recent years the *Capan* rationale for applying the theory of ostensible agency to hospitals is certainly applicable in the instant [HMO] situation." *Boyd,* 377 Pa. Super. at 620, 547 A.2d at 1234.

Here, Keystone argues Plaintiffs have not presented any evidence to suggest that they looked to Keystone for Mr. Feick's care or that Keystone held out its participating physicians as employees. Plaintiffs responded that the *Boyd* case did not refer to the facts of the situation, but held that because an HMO promised to care for its members, required the patients to pay fees to the HMO instead of the physicians, and screened its primary care physicians, there was an issue of material fact as to whether the primary care physicians were ostensible agents of the HMO. Thus, Plaintiffs argued, participating physicians are automatically considered to be ostensible agents of the HMO, and the HMO is vicariously liable for their actions.

This is a mischaracterization of the *Boyd* holding. While *Boyd* clearly held that the doctrine of ostensible agency is applicable to HMOs, it does not relieve plaintiffs of the burden of identifying facts of record tending to show that participating physicians were ostensible agents of the HMO. The *Boyd* court undertook an extensive review of the record to demonstrate that sufficient evidence of ostensible agency was present. Nevertheless, this Court undertook a review of the subsequent history of *Boyd* to determine whether, in the interim, courts had decided that HMOs were automatically to be held vicariously liable for the acts of their participating physicians. This Court has not turned up a case indicating such. Thus, the inquiry remains whether Plaintiffs have presented evidence to demonstrate that Drs. Fox and Mikelonis were ostensible agents of Keystone.

The doctrine of ostensible agency applies to HMOs where it is shown that the patient looked to the HMO, rather than to his physician, for his health care needs, and that the HMO "holds out" its participating physicians as its employees. *See Boyd, supra.* A holding out occurs "when the hospital acts or omits to act in some reasonable way which leads the patient to a *reasonable* belief he is being treated by the hospital or one of its employees." *Capan,* 287 Pa. Super. at 370, 430 A.2d at 649 (emphasis in the original). In finding that participating physicians were ostensible agents of their HMO, the *Boyd* court considered the following factors: the HMO covenanted to "[provide] health care services and benefits to Members in order to protect and promote their health ...", the patients paid fees to the HMO rather than to the chosen physician, the HMO provided a limited list of participating physicians from whom patients could choose a primary

care physician, the HMO screened its participating physicians, and HMO members were not permitted to see a specialist without a referral from their primary care physician. *See* 377 Pa. Super. at 621, 547 A.2d at 1235.

Plaintiffs contend that similar factors are present in the instant case. Keystone's stated objective is to provide "the development and expansion of cost-effective means of delivering quality health services to Members,[1] as defined herein, particularly through prepaid, capitated health care plans, and Primary Care Physician concurs in, actively supports, and will contribute to the achievement of this objective." Agreement Between Keystone and Primary Care Physician (hereinafter "Keystone/PCP Agreement"), Pl.'s Brief in Opposition, App. D. Furthermore, the Primary Care Physician was to "provide Primary Care Services and arrange for and coordinate the provision of other health services to Members of KHPW." *Id.* Mr. Feick's wife testified in a deposition that her husband did not see another physician because "[y]ou can't do that. That's against the rules." Depo. of Julie A. Feick at 78, Pl's Brief in Opposition, App. A. At the time of her husband's illness, the list of doctors in the Erie area participating in the Keystone plan was very limited. *See id.* at 84. Additionally, Mr. Feick could not see a specialist or go to the hospital without a referral from his primary care physician. *See id.* at 26; Keystone/PCP Agreement. Finally, Keystone conducted an initial credentialing screening of physicians before they were permitted to join the plan. *See* Objections and Answers to Interrogatories Directed to Keystone Health Plan West, Inc. at No. 5, Def.'s Brief in Support, App. A.

As was the case in *Boyd*, this Court finds the directives Mr. Feick was required to follow creates an inference that he looked to Keystone, and not only to Drs. Mikelonis and Fox, for his healthcare needs; and that Mr. Feick reasonably believed his primary care physicians were employees of Keystone. Thus, there is a genuine issue of material fact as to whether Drs. Mickelonis and Fox were ostensible agents of Keystone. Accordingly, the motion for summary judgment is denied.

ORDER

AND NOW, to-wit, this 5th day of December 2001, it is hereby ORDERED and DECREED that the Amended Motion for Summary Judgment of Keystone Health Plan West, Inc. is DENIED.

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

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[1] Member is defined as an individual who has entered into a contract with [Keystone] ... for the provision of medical and hospital services.

IN RE: CONDEMNATION BY THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, OF THE RIGHT-OF-WAY FOR STATE ROUTE 4034, SECTION A51, IN THE CITY OF ERIE

EMINENT DOMAIN/PRELIMINARY OBJECTIONS/FAILURE TO OBJECT TO DECLARATION OF TAKING/WAIVER OF RIGHT TO CHALLENGE POWER TO CONDEMN

Failure to file preliminary objections as required under Section 406 of the Eminent Domain Code constitutes a waiver of the right to challenge the issue of the type of liability that the Department of Transportation is subject to by the Declaration of Taking.

EMINENT DOMAIN/MEASUREMENT OF CONSEQUENTIAL DAMAGES/NO ACTUAL TAKING/DATE ACCESS IS AFFECTED

Where PennDOT does not actually take any property, damages are assessed from the date that the access is affected. Here, that occurs when the actual construction takes place and not from the mere filing of the Declaration of Taking.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA EMINENT DOMAIN PROCEEDING IN REM
No. 13157 of 2000

Appearances: Chester J. Karas, Jr., Esq., Attorney for Condemnor
Kathryn J. Stevenson, Esq., Attorney for Condemnee

OPINION

Connelly, J., October 16, 2001

Procedural History

The Department of Transportation [hereinafter DOT] filed a Declaration of Taking on September 14, 2000. Globe Amerada Glass Company, Inc. [hereinafter Globe], the condemnee, filed a Petition for the Appointment of a Board of Viewers on December 11, 2000. The Commonwealth filed Preliminary Objections to the Condemnee's Petition for Appointment of a Board of Viewers on December 22, 2000. The Commonwealth filed a Motion for Evidentiary Hearing on April 3, 2001, and a subsequent Motion for Continuance of Evidentiary Hearing on May 18, 2001. A hearing was held on July 24, 2001 regarding the issues now before this court. Condemnee filed a Brief in Support of De Facto Taking on August 3, 2001, and Comdemnor filed a Brief in Opposition to Condemnee's Petition for the Appointment of a Board of Viewers on August 8, 2001.

The Declaration of Taking relates to the anticipated impact on the Condemnee's property by the DOT's highway improvement to the East Side Access Highway. The condemned area is the access area located on

the eastern side of the building.

Condemnee claims that:

> As a direct result of the filing of the above-referenced Declaration of Taking on September 14, 2000, the Condemnee's property is landlocked by virtue of the fact that the Condemnor has failed to provide the Condemnee with the legal right of ingress and egress to the Condemnee's property...the Condemnee has suffered a substantial, in fact a complete, deprivation of the beneficial use and enjoyment of its property such as to effectuate *a de facto* taking...

Petition for the Appointment of a Board of Viewers, p. 2.

Factual Background

Globe owns and operates a business at 806 East Twelfth Street. DOT did not require any property from Globe for right-of-way for the highway project. *Department of Transportation's Brief in Opposition to Condemnee's Petition for the Appointment of a Board of Viewers* [hereinafter DOT Brief], p. 2. However, the grade of East Twelfth Street will be changed. This area immediately adjoins Globe's property. *Id.* The change of grade requires the DOT to construct a retaining wall in front of the Globe property. It is undisputed by both parties that the retaining wall, when constructed, will impact the existing eastern access to the Globe property. *Id.*

The testimony from Mr. Podskalny at the July 24th hearing indicated that his firm initially considered three different driveway designs in an effort to provide access to the eastern portion of the Globe property, See DOT's *Exhibit B and C.* Subsequent to planning the different designs, the DOT discovered that the property owners adjoining the Globe property to the west "expressed a desire to have their property acquired because of the impact of a proposed driveway on their property." *DOT Brief, p.3;* DOT's *Exhibit B, Parcel 50.* Mr. Podskalny testified that he developed a design that would provide access to the Globe property from the Dorich property. See DOT's *Exhibit D.* The DOT subsequently acquired the Dorich property for the replacement access by a deed dated May 18, 2000. See DOT's *Exhibit F.*

Jeffery Hahne, the DOT's Chief of Acquisition and Relocation for Engineering District 1-0, testified that the DOT received an appraisal and paid Globe an estimate of just compensation for the consequential damages its appraiser believed the property would sustain by the change of grade to Twelfth Street. He further testified that included in that payment was an amount to reimburse Globe for inserting two new garage doors into its building and reconfiguring the business layout to accommodate the changed access.

Globe avers that the following facts are undisputed:

(1) At the time of the construction of the instant highway project, the only access formally owned by [Globe] will be cut off completely.

(2) At the time of the Declaration of Taking, the properties which surround [Globe]'s property were owned by individuals or entities other than [Globe].

(3) [DOT] is attempting to compel [Globe] to accept, post condemnation of the subject property, "replacement" access by virtue of a Quit Claim Deed purporting to give [Globe] ingress and egress via the adjoining Dorich property.

Condemnee's Brief in Support of De Facto Taking [hereinafter Globe Brief], *p. 2*. Lastly, Globe asserts that the only relevant issue in this case is whether "the measure of damage which the [DOT] is seeking to avoid, is properly cured by the [DOT]'s post-condemnation conduct." Globe asserts it is not. *Globe Brief, p. 3.*

The DOT preliminarily objects to Globe's Petition for an Appointment of Viewers based on the following factors:

(1) [Globe] failed to file Preliminary Objections to the [DOT]'s Declaration of Taking, therefore [Globe] is precluded from filing for a petition for viewers alleging a de facto taking;

(2) The [DOT] has not landlocked [Globe]'s property by the mere filing of a the Declaration of Taking. [Globe]'s access will not be affected until the inception of the [DOT]'s highway improvements;

(3) The [DOT] has acquired an adjoining property which will provide replacement access for [Globe] prior to the inception of the highway improvements;

(4) [Globe] does not aver specific conduct by the [DOT] which would constitute a de facto taking of [Globe]'s entire property interest; and

(5) Any damages to which [Globe] would be entitled is for consequential damages pursuant to Section 612 of the Eminent Domain Code, 26 P.S. §1-612, and not under a theory of de facto taking.

Commonwealth's Preliminary Objections to Condemnee's Petition for Appointment of Board of Viewers, p. 2-3.

LAW

Section 502(e) of the Eminent Domain Code provides:

> If there has been a compensable injury suffered and no declaration of taking therefore has been filed, a condemnee may file a petition for the appointment of viewers...

26 P.S. §1-502(e).

The Pennsylvania Supreme Court in *Conroy-Prugh Glass Co. v. Corn., Department of Transportation,* 456 Pa. 384, 321 A.2d 598 (1974), defined a "de facto taking" as follows:

> A 'taking' occurs when the entity clothed with the power of eminent domain substantially deprives an owner of the use and enjoyment of his property.

Id. at 599. A "de facto taking" was further defined in *Visco v. Com., Department of Transportation,* 92 Pa.Cmwlth. 102, 498 A2d 984 (1985):

> . . . a situation where a governmental agency..., although clothed with the power of eminent domain, but prior to its formal exercise, engaged in conduct which the property owner contends impinged upon the beneficial use of his property and resulted in a diminution in value, for which he seeks compensation. A de facto taking is not the physical seizure of property; rather, it is an interference with one of the rights of ownership that substantially deprives the owner of the beneficial use of his property.

Id. 104, 985.

There is no "litmus formula" when determining whether or not a governmental action will be deemed to have the effect of a "de facto" taking. *McCraken v. City of Philadelphia,* 69 Pa. Cmwlth. 492, 451 A.2d 1046, 1050 (1982). "Thus, it has remained for the courts to provide, with case-by-case development, the needed doctrinal elaboration." *Id.*

The Court in *Lehigh-Northampton Airport Authority v. WBF Association, L.P.,* __ Pa. Cmwlth. __,728 A.2d 981 (1999) stated:

> . . .Where a de facto taking is alleged, property owners bear a heavy burden of proof and must show that exceptional circumstances exist which substantially deprive them of the use of their property and, further, that such deprivation is the direct and necessary consequence of the actions of the entity having the power of eminent domain. *In re City* of *Allentown,* 125 Pa.Cmwlth. 290, 557 A.2d 1147 (1989).

Id. at 985. The Court set forth specific criteria, based on an analysis and examination of "de facto" taking condemnation case law, and enunciated a three-pronged "working principle" to be applied to these types of cases. *Id.* at 988. The three prongs are whether the property owner successfully established:

(1) that formal condemnation of its property was inevitable, and

(2) that it faced substantial deprivation of the use and enjoyment of its property or exposure to the loss of its property,

(3) as a consequence of the prospect of formal condemnation.

Id.

First, this court finds that the property was formally condemned when the Declaration of Taking was filed on September 14, 2000. The second prong of this test is now the issue before the court. For the ease of discussion, this court will analyze and interpret the issues as presented by the parties.

First Issue

The DOT's first argument is that Globe failed to file Preliminary Objections to the DOT's Declaration of Taking and therefore waived any right to claim a taking of their property. The DOT avers that Globe needed to file preliminary objections as provided for Section 406 of the Code, 26 P.S. §1-406. It is undisputed in this case that Globe did not file Preliminary Objections to the Declaration of Taking.

Globe denies waiving any rights and cites *In Re Condemnation By Commonwealth of Pennsylvania, Department of Transportation, v. Sluciak,* 727 A.2d 618 (Pa. Cmwlth. 1999), *alloc. gn.* 741 A.2d 725 (Pa. 1999) in support of their argument. There, the court noted that the condemnee was not required to file preliminary objections under the Code. *Id.* at 624.

The scope of preliminary objections to a declaration of taking is defined under Section 406 of the Eminent Domain Code. Pursuant to Section 406, a landowner may challenge a declaration of taking on four grounds: (1) the power or right of the condemnor to appropriate the condemned property unless the same has been previously adjudicated; (2) the sufficiency of the security; (3) any other procedure followed by the condemnor; or (4) the declaration of taking. 26 P.S. §1-406, *Appeal of Hanover Foods, Inc.*, 702 A.2d 614, 616 (Pa.Cmwlth. 1997).

The DOT is correct in stating that it has long been recognized that the exclusive method for challenging the declaration of taking is by Section 406 preliminary objections. See *Faranda Appeal,* 216 A.2d 769 (Pa. 1966). Also, the Comment to Section 406 by the Joint State Government Commission - 1964 Report states "it is intended by this section to provide, where a declaration is filed, that the exclusive method of challenging the power to condemn...the declaration of taking and procedure be by preliminary objections." 26 P.S. §1-406. Further, in *Nelis v. Redevelopment Authority of Allegheny County,* 315 A.2d 893 (Pa. Cmwlth. 1972), the court

held that where a declaration of taking has been filed and a landowner has not filed preliminary objections, it may not file a petition for a board of viewers alleging a de facto taking of that property. *Id.* at 895.

Globe also cites *Commonwealth of Pennsylvania, Department of Transportation v. Greenfield Township-Property Owners: DeMarco*, 582 A.2d 41 (Pa. Cmwlth. 1990) in support of their argument. The Commonwealth Court there held that the condemnees were not required to file preliminary objections. In that case, at the time of the declaration of taking, the landowners were unaware that a portion of their property would be landlocked by the condemnation because the Department of Transportation had reassured landowners that they would be provided with a right-of-way. The court reasoned that this was the factual difference between *Nellis, supra*, and the facts of *DeMarco.*

Similarly, in *City of Pittsburgh v. Gold,* 390 A.2d 1373 (Pa. Cmwlth. 1978), the Court held that a landowner who had suffered damages to his property as the result of a condemnation proceeding, but who had not filed preliminary objections to the declaration of taking, was not precluded from alleging a de facto taking because the landowner learned of the damage to his property two years after the declaration of taking was filed. *Id.*

It is the conclusion of this court that the facts of this case do not exist in the same context as the facts of *DeMarco, Sluciak,* and *Gold, supra.* Globe was aware of the DOT's intention to acquire the Dorich property to provide it with access on the western side of the subject property. Further, it is undisputed that John Kellman, President of Globe, agreed, in writing, to the proposed condemnation action. See DOT's *Exhibit G.* Also, the stated purpose for the DOT's action was "to establish the liability of the [DOT] for consequential damages due to the change of access to the property from the eastern to the western side of the property." See DOT's *Exhibit B, para. 5 - Declaration of Taking.* Surely, this statement contained in Declaration of Taking was adequate enough to put Globe on notice of the DOT's intention for replacement access.

Therefore, this court must conclude that Globe, having failed to file preliminary objections as required under Section 406, has waived the right to challenge the issue of the type of liability [namely, consequential damages or condemnation damages as the result of a de facto taking] that the DOT is subject to by the Declaration of Taking.

Second Issue

The second issue before this court deals with damages. Globe argues that consequential damages for interference with access are measured from the date of the Declaration of Taking. The DOT argues that because of the type of Declaration of Taking that the DOT filed in this matter, damages are not determined as of the date of the filing of the Declaration of Taking, but are instead measured from the date that access is affected.

DOT Brief, p. 7.

It is the opinion of this court that damages are assessed from the date that the access is affected. Globe ignores the line of cases that establish that where the DOT does not actually take any property, damages to an affected property, assessed under Section 612 of the Code, do not occur until the date that construction begins. See *Pane v. Department of Highways,* 222 A.2d 913 (Pa. 1966); *In Re: Construction of the Commonwealth of Pennsylvania, Department of Transportation, of Legislative Route 115,* [hereinafter *Pettibon]* 471 A.2d 1267 (Pa. Cmwlth. 1984), *Commonwealth of Pennsylvania, Department of Transportation v. Gayeski,* 344 A.2d 730 (Pa. Cmwlth. 1975).

The courts in the above cases held that it was not the filing of the declaration of taking that establishes a compensable injury, but the actual construction that takes place. *See Pane, supra,* at 917, *Pettibon, supra,* at 1270.

The Court in *Pane, supra,* noted:

> Whether it be for the purposes of determining who is entitled to damages or whether the statute of limitation has tolled an action, the time when an 'injury' or 'damage' is deemed to have been incurred is not the time of the 'constructive' or 'paper' appropriation but the time the work is actually undertaken. [Citations omitted] Any other rule would lead to this remarkable result: that the plaintiffs would be entitled to damages without having suffered any injury: that is for anticipated damages, and for which a natural person could not be held liable.

Id. at 917.

In *Pettibon, supra,* the DOT filed a declaration of taking to establish its liability for consequential damages. The Court noted:

> It is clear that the declaration of taking filed by the Commonwealth was limited to such damages as are allowable under Section 612. Furthermore, for the reasons clearly explained in *Pane,* Section 612 provides no cause of action until such time as access is actually interfered with.
>
> Thus, any claim for damages for an injury alleged to have occurred prior to the time that Pettibon's access is actually limited would fall outside of the declaration filed by the Commonwealth, and would be in the nature of a claim of damages for a *de facto* condemnation.

Pettibon, at 1270.

The Court also noted that the trial court rejected the landowner's claim that a de facto taking had occurred under the facts of the case. This court agrees with the DOT's assertion that the facts of *Pettibon,* clearly coincide

with the facts of this case. In this case, Globe's assertion of a de facto taking is based upon the filing of the Declaration of Taking. The DOT has not taken any property yet, and as previously noted above, has not substantially interfered with any of Globe's rights.

Globe cites *In Re Condemnation by the Commonwealth of Pennsylvania, Department of Transportation v. Philadelphia Electric Co.*, 580 A.2d 424 (Pa. Cmwlth 1990), *Sluciak, supra, and DeMarco, supra,* in support of its argument. Their argument is misplaced, however, because those cases dealt with properties that were actually landlocked because of the appropriation of property by a declaration of taking. As previously stated, there is no evidence of Globe's property being landlocked by the DOT's actions.

Further, in the above-cited cases, the courts rejected the DOT's post-condemnation efforts to cure the land locking of the remaining properties. In the case at bar, however, the DOT has taken affirmative steps to assure that there will be adequate replacement access as of the date that access is impacted by the highway project.

Mr. Podskalny testified, at the July 24, 2001 hearing before this court, that he believed that the driveway design for the western access met Globe's needs. Further, it is undisputed that John Kellman, President of Globe, agreed, in writing, to the proposed condemnation action. See DOT's *Exhibit G.* Mr. Podskalny further testified that he shared reasonable concerns with Mr. Kellman previous to his agreement and that Mr. Kellman stated that Globe did not want to relocate.

Mr. Hanhe also testified that Globe did not make any request to have its business relocated as party of the highway project. He further testified that the DOT had possession of the Dorich property before the filing of the Declaration of Taking because it was to give access to Globe once the eastern access is cut off. He went on to testify that DOT made an offer of just compensation, severance, consequential damages, and then paid Globe the monies necessary to reconfigure the business. It is clear from the testimony at the hearing that Globe continues to use the eastern access point and it won't be cut off until the retaining wall is put up. Further, the DOT testified that the access on the west would then be provided by deed.

It is the conclusion of this court, based on the evidence of record and from the July 24, 2001 hearing before this court, that Globe has not faced a substantial deprivation of the use and enjoyment of its property or exposure to the loss of its property. This court must therefore hold that Globe has failed to prove that a de facto taking of its property has occurred. Further, this court holds that consequential damages are to be determined from the date the actual construction takes place and not from the mere filing of the Declaration of Taking.

CONCLUSION

For all of the reasons set forth above, this court must sustain the DOT's Preliminary Objections to the Condemnee's Petition for the Appointment of a Board of Viewers, to the extent that it asserts a de facto taking of its entire property interest as a result of the filming of the DOT's Declaration of Taking. This court, however, directs a Board of Viewers to be appointed in this matter to determine the amount of consequential damages that Globe is entitled to as a result of the East Side Access Highway project.

ORDER

AND NOW, TO-WIT, this 16th day of October, 2001, after reviewing all of the relevant case law, statutes, arguments and briefs of both the Condemnor and Condemnee, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** as follows:

(1) Condemnor's Preliminary Objections to Condemnee's Petition for a Board of Viewers are **GRANTED**;

(2) Condemnee's Petition to Appoint a Board of Viewers is **GRANTED in part**, in that a Board of Viewers is ordered to be appointed to determine the amount of consequential damages that Condemnee is entitled to, and **DENIED in part**, as no de facto taking of Condemnee's property occurred.

BY THE COURT
/s/ **Shad Connelly, Judge**

WILLIAM AGER, JANET M. BAKER, THEODORE G. BENNETT, JOYCE L. BLACK, MICHAEL COUGHLIN, FRANK DYLEWSKI, BEVERLY C. ERICSON, PETER B. ERVIN, EXECUTOR OF THE ESTATE OF SARA M. ERVIN, DECEASED, RICHARD S. FLAUGH, ROGER D. GILES, FREDERICK J. HARRIS, PATRICIA L. HAWLEY, KATHRYN V. HIRSCH, WILLIAM J. HOLTZ, ANTHONY H. LARICCIA, DANIEL J. MULLEN, MARY A. OLON, THOMAS J. PRYLINSKI, FORREST P. SMITH, CHARLES L. SPENCER, HUBERT D. TAYLOR, JOAN C. WHEELER, RICHARD E. WIESEN, FRANCES A. YAZVAC and JOHN M. ZIELINSKI,

v.

STERIS CORPORATION

CRIMINAL PROCEDURE/PRELIMINARY OBJECTIONS

When considering preliminary objections in the nature of a demurrer, the Court must accept as true all well-pleaded material facts set forth in the complaint and give plaintiff the benefit all interferences reasonable deductible therefrom. The Court must overrule a demurrer unless it is certain that there is no set of facts averred, the law would not permit recovery by plaintiff. The issues must be resolved solely on the basis of the pleadings.

LABOR AND EMPLOYMENT/EMPLOYMENT AT WILL

Although an employer's conduct may cause a voluntary termination of employment to result in an award of unemployment compensation because leaving work was with cause of a necessitous and compelling nature under 43 P.S. § 802(b), nothing in that provision indicates that an award of unemployment compensation depends on proof of any wrongdoing on the part of the employer.

LABOR AND EMPLOYMENT/EMPLOYMENT AT WILL

Although an employee may be awarded unemployment benefits despite a voluntary termination of employment because of the employer's conduct, such an award does not imply that the employer violated public policy such as to allow a cause of action for wrongful discharge.

LABOR AND EMPLOYMENT/EMPLOYMENT AT WILL

Although the employee's voluntary resignation was at the risk of an actual reduction in healthcare coverage so as to constitute a necessary and compelling cause of the employee's voluntary resignation and although this entitled the employees to unemployment compensation, those facts do not implicate a violation of public policy to allow an action for wrongful discharge.

LABOR AND EMPLOYMENT/EMPLOYMENT AT WILL

The employer's acting with specific intent to harm an employee is not sufficient to constitute a violation of public policy or to allow a cause of action for wrongful discharge of employment.

CIVIL PROCEDURE/PRELIMINARY OBJECTIONS

Judgment will be entered on demurrer without leave to amend if it appears from the complaint that the plaintiff is not entitled to recover or if there is no indication that the plaintiff could state a good cause of action if permitted to amend.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA No. 11116-2000

Appearances: J. Gregory Moore, Esquire for the Plaintiffs
Roger H. Taft, Esquire for the Defendants

OPINION

Bozza, John A., J.

This matter is before the Court on the Rule 1925(b) Statement of Matters Complained of on Appeal filed by Plaintiffs William Ager, Janet M. Baker, Theodore G. Bennett, Joyce L. Black, Michael Coughlin, Frank Dylewski, Beverly C. Ericson, Peter B. Ervin, Executor Of The Estate Of Sara M. Ervin, Deceased, Richard S. Flaugh, Roger D. Giles, Frederick J. Harris, Patricia L. Hawley, Kathryn V. Hirsch, William J. Holtz, Anthony H. Lariccia, Daniel J. Mullen, Mary A. Olon, Thomas J. Prylinski, Forrest P. Smith, Charles L. Spencer, Hubert D. Taylor, Joan C. Wheeler, Richard E. Wiesen, Frances A. Yazvac, and John M. Zielinski (herein jointly "Plaintiffs").

The Plaintiffs assert that the Court erred in sustaining defendant's preliminary objections resulting in the dismissal of their cause of action with prejudice. Plaintiffs' assertion is based upon the following reasons:

(1) The Court did not find that the defendant's intentional behavior directed toward these Plaintiffs created such a negative work environment that is equated or can be equated to a wrongful termination and a violation of the public policies of the Commonwealth of Pennsylvania;
(2) The Court did not take judicial notice of the underlying unemployment compensation proceedings through the Appellate Court decision in favor of the Plaintiffs;
(3) The court incorrectly relied upon *McLaughlin v. Gastrointestinal Specialists*, 561 Pa. 307, 750 A.2d 283 (2000), which is factually distinguishable from the Plaintiffs' case;
(4) The court did not find that the Plaintiffs had suffered actual damages due to a reduction in health care coverage that was at risk as a result of the intentional behavior of the defendant; and
(5) The court dismissed the Plaintiffs' claims with prejudice.

When considering preliminary objections in the nature of a demurrer,

the Court must accept as true all well-pleaded material facts set forth in the complaint and give the plaintiff the benefit of all inferences reasonably deductible therefrom. *Cardenas v. Schober*, 783 A.2d 317, 321 (Pa. Super. Ct. 2001) (citing *Corestates Bank, Nat'l Assn. v. Cutillo*, 723 A.2d 1053, 1057 (Pa. Super. Ct. 1999)). Further, the Court must overrule a demurrer unless it is certain that there is no set of facts under which the plaintiff could recover. *Id.* It must appear with certainty that, upon the facts averred, the law would not permit recovery by the plaintiff. *Id.* Any doubt must be resolved in favor of overruling the demurrer. *Id.* Finally, the issues presented by the demurrer must be resolved solely on the basis of the pleadings; no testimony or other evidence outside of the complaint may be considered. *Williams v. Nationwide Mutual Ins.*, 750 A.2d 881 (Pa. Super Ct. 2000). Applying these criteria to the present case, the Court has accepted the material facts set forth in the Plaintiffs' Complaint as true, and concluded that the Plaintiffs have not sufficiently stated a cause of action upon which relief may be granted.

The facts may be fairly summarized as follows: The Plaintiffs were employed by AMSCO Corporation, until it was purchased by defendant Steris Corporation in May of 1996. They remained with Steris following the sale, until their retirement on March 31, 1998. The defendant decided to change the health benefit packages of its employees in the Fall of 1996, in order to make the benefits of former AMSCO employees the same as benefits for current employees of the defendant. This change in benefits eliminated, among other things, the continuation of an employee's medical or prescription benefits up to age sixty-five (65), and Medicare supplements for the retiree and spouse past the age of sixty-five (65). Pursuant to these changes, employees with ten years of experience and who were fifty-five (55) years of age could retain their original AMSCO benefits if they retired by March 31, 1998. The Plaintiffs chose to retire, some amidst what they regarded as harassment and generally poor treatment by management. The Plaintiffs were awarded unemployment compensation benefits on June 24, 1998 with a finding that the change in benefits constituted a good reason to accept retirement, an award finalized by a decision of the Commonwealth Court of Pennsylvania on October 8, 1999.

The Plaintiffs initially assert that the Court erred by not finding that the defendant's intentional behavior directed toward these Plaintiffs created a negative work environment so severe that it should be considered a wrongful termination and a violation of public policy. Essentially, the Plaintiffs' position is as follows. The Plaintiffs were awarded unemployment compensation because the Plaintiffs had established a necessary and compelling reason for their voluntary termination of their employment. The Plaintiffs assert that this necessary and compelling reason was the behavior of the defendant's management officials, behavior which was so egregious that it was tantamount to wrongful termination. The Plaintiffs

further assert that this wrongful termination by the defendant was done with a specific intent to harm the Plaintiffs, which would be a public policy violation. However, the Plaintiffs failed to offer any legal support for their position.

The Statute on which the Plaintiffs rely sets a standard for the eligibility of individuals for unemployment compensation in the event of voluntary termination from employment. Section 802(b) states:

> An employee shall be ineligible for compensation for any week -- (b) in which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature...no employee shall be deemed to be ineligible under this subsection where as a condition of continuing in employment such employee would be required to...accept wages, hours or conditions of employment not desired by a majority of the employees in the establishment...(emphasis added).

Where Plaintiffs were awarded unemployment compensation as of October 8, 1999, this award was not based on the defendant's violation of a statutory prohibition or other manifestation of public policy. (Plaintiffs' Ex. III; *Steris Corp. v. Unemployment Comp. Bd. of Review*, No. 3239 C.D. 1998, slip op. at 6 (Pa. Cmwlth. Ct. Oct 8, 1999). Section 402(b) identifies the circumstances under which a worker is eligible to receive unemployment benefits. Nothing in Section 402(b) indicates that an award of unemployment compensation depends on proof of any wrongdoing on the part of an employer nor does it require that such benefits are awardable in the event of a violation of some legal standard. More importantly, the Pennsylvania Supreme Court has specifically noted that the assertion of a violation of a federal statute without a more specific reference to a clear public policy mandate, is insufficient to aver a Pennsylvania public policy violation. *McLaughlin v. Gastrointestinal Specialists, Inc.*, 561 Pa. 307, 320, 750 A. 2d 283, 290 (2000).

Here the Plaintiffs seem to be taking the position that an award of unemployment benefits necessarily implies that an employer violated public policy. Such a conclusion is without legal support. Moreover, the specific facts set forth in Plaintiffs' complaint do not support that conclusion in this case. In setting forth the factual basis for the award of unemployment compensation benefits, the Plaintiffs state that the Commonwealth Court affirmed the determination that the necessary and compelling cause of the Plaintiffs' voluntary resignation was the risk of "an actual reduction in health care coverage and at a significant expense if [the Plaintiffs] had not retired." (Plaintiffs' Third Amended Civil Action Complaint, ¶ 47). The fact that the plaintiffs found it necessary to choose retirement in order to preserve certain health care benefits does not per se implicate a public policy violation.

The Plaintiffs' further assertion that the defendant acted with the "specific intent to harm" is also not sufficient to entitle them to relief. An at-will employee cannot maintain a cause of action for wrongful discharge based on a "specific intent to harm" theory, because the only cause of action for wrongful discharge of an at-will employee recognized in Pennsylvania is for a violation of public policy. *Donahue v. Federal Express Corporation*, 753 A.2d 238, 245 (Pa. Super. Ct. 2000)(citing *Krasja v. Keypunch, Inc.*, 424 Pa. Super, 230, 622 A.2d 355, 360 (Pa. Super. Ct. 1993) where the court concluded that after Supreme Court decisions in *Clay v. Advanced Computer Applications, Inc.*, 522 Pa. 86, 559 A.2d 917 (Pa. 1989) and *Paul v. Lankenau Hospital*, 524 Pa. 90, 569 A.2d 346 (Pa. 1990) no "specific intent to harm" theory of wrongful termination was recognized in Pennsylvania). As such, conduct that does not rise to the level of a public policy violation is insufficient to alter the legal status of an at-will employment relationship. *Donahue*, 753 A.2d at 245.

The Plaintiffs also assert the Court erred by not taking judicial notice of the underlying unemployment compensation proceedings through the Appellate Court decisions in favor of the Plaintiffs. In this regard it is difficult to know the specific nature of the Plaintiffs' concern. The record does not reflect a request to take "judicial notice" of "unemployment compensation proceedings." [1]

The Plaintiffs' have asserted that the Court incorrectly relied upon *McLaughlin v. Gastrointestinal Specialists*, 561 Pa. 307, 750 A.2d 283 (2000), because "the facts of the *McLaughlin* case are vastly different from the facts that were before the Trial Court...." (Plaintiffs' 1925(b) Statement, ¶ 3). In *McLaughlin*, the Pennsylvania Supreme Court addressed both the at-will employment doctrine and the limited exception for a wrongful discharge claim under the common law of Pennsylvania. Reviewing its prior decisions in *Geary v. United States Steel Corporation*, 456 Pa. 171, 319 A.2d 174 (Pa. 1974), *Shick v. Shirey*, 552 Pa. 590, 716 A.2d 1231 (Pa. 1998), *Clay v. Advanced Computer Applications, Inc.*, 522 Pa. 86, 559 A.2d 917 (Pa. 1989), and *Paul v. Lankenau Hospital*, 524 Pa. 90, 569 A.2d 346 (Pa. 1990), the Court confirmed that, as a general proposition, the presumption for all non-contractual employment relations is that they are

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[1] It is possible that the Plaintiffs are raising a collateral estoppel issue, although counsel for the Plaintiffs indicated at the time the preliminary objections were resolved that the Plaintiffs were not raising that issue. In any case, this Court would reject this position on the basis of the Supreme Court's decision in *Rue v. K-Mart Corp.*, 552 Pa. 13, 713 A.2d 82 (1998). Moreover, the issue in this case was not whether this Court was bound by the factual determination of the unemployment compensation claim, but whether **assuming those facts were alleged in the Plaintiffs' complaint and assuming their accuracy**, they were sufficient to entitle the Plaintiffs to relief in a wrongful discharge action.

at-will, and that this presumption is an extremely strong one. *McLaughlin*, 561 Pa. at 313-314. The Court in *McLaughlin* further concluded:

> "[t]his Court has steadfastly resisted any attempt to weaken the presumption of at-will employment in this Commonwealth. If it becomes the law that an employee may bring a wrongful discharge claim pursuant to the 'public policy' exception to the at-will employment doctrine merely by restating a private cause of action for the violation of some federal regulation, the exception would soon swallow the rule. Rather we hold that a bald reference to a violation of a federal regulation, without any more articulation of how the public policy of this Commonwealth is implicated, is insufficient to overcome the strong presumption in favor of the at-will employment relations." *Id.* 561 Pa. at 320.

While not specifically defining "public policy" in the context of a wrongful termination claim, the Supreme Court stated the "public policy is to be ascertained by reference to the laws and legal precedents and not from supposed public interest." *McLaughlin*, 561 Pa. at 315 (citing *Shick*, 716 A.2d at 602, quoting *Hall v. Amica Mutual Insurance Company*, 538 Pa. 337, 648 A.2d 755, 760 (Pa. 1994)).

The Plaintiffs apparently suggest that *McLaughlin* can be distinguished because of the fact that it involved only the claim of one person and that the plaintiff's termination was the result of reporting an Occupational Safety and Health Act[2] violation. These distinctions are without significance in the context of the facts here presented and the standard to be applied in determining the viability of a claim for wrongful termination. The *McLaughlin* Court specifically concluded that no cause of action exists for wrongful termination of an at-will employee if that employee could not articulate how some Commonwealth public policy was violated by the employer's actions. Here the Plaintiffs' were at-will employees, and have only asserted their eligibility for unemployment benefits as the basis for their claim of a public policy violation for their decision to accept early retirement. The Court's reliance on *McLaughlin* as the repository of Pennsylvania law on the issue of wrongful termination of an at-will employee was well placed.

The Plaintiffs' next allegation of error is that the Court erred by not finding that the Plaintiffs had suffered actual damages due to a reduction in health care coverage that was at risk as a result of the intentional behavior of the defendant. As discussed *supra*, the Plaintiffs have failed to state a claim on which relief can be granted. Since the Plaintiffs could not establish a wrongful termination occurred, the Plaintiffs were not entitled to receive

[2] 29 U.S.C.S. 651 et seq.

any award of damages. Indeed, as retirees, the Plaintiffs received health and life insurance benefits paid for by the defendant, and have no claim to any alleged lost wages and benefits that they would have had if they had continued their employment with the defendant.

The Plaintiffs' final allegation of error is that the Court erred by dismissing the Plaintiffs' claims with prejudice. It is well-settled that judgment will be entered on demurrer without leave to amend if it clearly appears from the complaint that the plaintiff is not entitled to recover or if there is no indication that the plaintiff could state a good cause of action if permitted to amend. *Otto v. American Mutual Insurance Co.*, 482 Pa. 202, 205, 393 A.2d 450, 451 (Pa. 1978), *Division 85 of Amalgamated Transit Union v. Port Authority of Allegheny County*, 71 Pa.Cmwlth. 600, 455 A.2d 1265, 1267 (1983). Moreover, the Plaintiffs never requested leave to amend their complaint to modify their factual recitation or to state a new cause of action.

For the reasons set forth above, this Court's Order dated November 16, 2001 should be affirmed.

Signed this 14 day of March, 2001.

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

THOMAS CALICCHIO, Plaintiff

v.

ERIE COUNTY BOARD of ASSESSMENT APPEALS, Defendant

v.

MILLCREEK TOWNSHIP SCHOOL DISTRICT, Intervenor,

TAXATION/REAL ESTATE/SPOT REASSESSMENT

The statutory prohibition of spot reassessment, found in 72 P.S. § 5348.1, applies to board of assessment appeals and not to school districts.

TAXATION/REAL ESTATE/APPEALS

School districts and taxpayers may appeal the assessment of a property to the governing board of assessment appeals without a triggering event. 72 P.S. § 5453.706; 72 P.S. § 5347.1.

TAXATION/REAL ESTATE/SPOT REASSESSMENT/APPEALS

The reassessment of a property by the board of assessment appeals following an appeal taken by a school district does not constitute spot reassessment.

TAXATION/REAL ESTATE/CONSTITUTIONAL REQUIREMENTS

All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws. Pa.Const.Art. VIII § 1.

TAXATION/REAL ESTATE/CONSTITUTIONAL REQUIREMENTS

The test of uniformity is whether or not there is a reasonable distinction between classes of taxpayers sufficient to justify different tax treatment.

TAXATION/REAL ESTATE/APPEAL/
CONSTITUTIONAL REQUIREMENTS

When an appeal from the assessed value of a property is properly taken before a board of assessment appeals, the board of assessment appeals does not violate the uniformity of taxation clause of the constitution in subsequently reassessing the value of the subject property. Pa.Const.Art. VIII § 1.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW No. 14164- 2000

Appearances: I. John Dunn, Esq. for the Plaintiff
Kenneth W. Wargo, Esq. for the Plaintiff
Lee S. Acquista, Esq. for Defendant
Michael J. Visnosky, Esq. for Millcreek Twp. School Dist.

OPINION

Anthony, J., March 21, 2002.

This matter comes for before the Court on Plaintiff Thomas Calicchio's appeal from a decision of the Erie County Board of Assessment

(hereinafter "Board") that has determined that his property at 4026 West Lake Road, Erie, Pennsylvania, has a fair market value of $722,856, as of the year 2000. After an evidentiary hearing on the matter and considering the arguments of counsel, the Court will make the following findings: the fair market value of the subject property for the tax years 2001 and 2002 is $722,856, and Millcreek Township School District's selection of properties for assessment does not violate the constitutional mandate for uniformity of taxation.

The instant action arises from a decision of the Board following an assessment appeal filed by the Millcreek Township School District (hereinafter "District"). In 1999, the subject property was assessed at $40,708 (40%) and $101,770 (100%). This translated to a fair market value of $484,619. Thomas Calicchio (hereinafter "Calicchio") purchased this property in an "arms length" transaction on November 4, 1999, for $800,000. On August 1, 2000, the District filed a Notice of Appeal to the Board. After a hearing on September 12, 2000, the Board determined the forty percent assessment would be increased from $40,708 to $60,900 and the one hundred percent assessment would be increased from $101,770 to $152,250. This translated to a fair market value of $725,000.

In March of 1998 the School Board of the Millcreek Township School District (hereinafter "District") decided to appeal the assessment value of properties determined to be significantly undervalued. The District specifically targeted properties:

> whose current fair market value for either land or improvements, or a combination of both, appears to be under assessed to the extent that it is anticipated that an appeal will most likely generate an additional, annual, net school tax payment to [District] of at least $2,000 from that which is currently being received (or anticipated to be received) as a result of the current assessment. Special counsel is to disregard any other properties which do not meet this threshold test.

Millcreek Township District Special Counsel Fee Agreement, June 26, 2000, Stipulation of Dec. 5, 2001. In identifying properties which were candidates for assessment appeals, District representatives examined current offerings of the Greater Erie Board of Realtors and other listing services, sales data from sales within Millcreek Township, properties similar to other properties which had previously been appealed, building permit records of Millcreek Township, the State Tax Equalization Board Report, and subdivision plans filed with the Recorder of Deeds for properties within Millcreek Township.

In 2000, the District identified forty-two properties for assessment appeals based upon these criteria. The properties included fifteen commercial properties, twenty-two parcels of vacant land, two industrial sites, two residential properties and one recreational property. Calicchio's

property was among those selected.

Calicchio filed the instant action on December 4, 2000. An evidentiary hearing was held December 6, 2001. Additionally, the parties were given the opportunity to brief the issues raised by Calicchio. Calicchio filed a Brief in Support of his appeal on December 13, 2001. The District filed its brief on December 19, 2001. The Board filed a brief in support of the District's position on January 11, 2002.

Initially, the Court notes that Calicchio has argued the District's actions are tantamount to an illegal spot reassessment. In *Millcreek Township School Dist. v. Erie County Bd. Of Assessment Appeals*, 737 A.2d 335 (Cmwlth. Ct. 1999)(hereinafter "Oas"), a school district appealed a property assessment determination. The assessment board and property owner argued that the District's assessment appeal violated the prohibition against spot reassessment. *See* 72 Pa.C.S. § 5348.1. In that case, the commonwealth court held that 72 Pa.C.S. § 5348.1 is inapplicable to a school district as the prohibition clearly applies to a board of assessment appeals and not a school board. *See* 737 A.2d at 337-38. Thus, the District is incapable of impermissible spot reassessment.

Calicchio argues that because the Board reassessed the property in response to the District's appeal, the Board has engaged in spot reassessment and the action should be dismissed. The Court disagrees. In *Oas*, the court noted that a school district is not prohibited from appealing an assessment even though no triggering event has occurred. Calicchio agrees that *Oas* gives the District the right to appeal an assessment absent a triggering event. Calicchio's argument appears to be that if an assessment board agrees with a school district that the property is underassessed, the board cannot reassess the property because to do so would constitute spot reassessment. However, it is clear that a board may reassess property when the assessment is appealed by a municipality. *See Althouse v. County of Monroe,* 159 Pa. Cmwlth. 467, 633 A.2d 1267 (1993); 72 P.S. § 5453.706. Moreover, if Calicchio's argument were accepted, there would be no reason for a school district or a taxpayer to appeal an assessment absent a triggering event. Even if the appeal were sustained, the assessment board would be powerless to reassess the property. The Legislature could not have intended such an absurd result.

The only issue remaining before the Court is whether the District's manner of selecting properties for assessment appeals violated the constitutional mandate of uniformity of taxation. The Uniformity Clause directs that "[a]ll taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." Pa. Const. Art. VIII § 1. "The test of uniformity is whether there exists a reasonable distinction and difference between classes of taxpayers sufficient to justify different tax treatment." *City of Lancaster v. County of Lancaster,* 143 Pa. Cmwlth. 476,

599 A.2d 289 (1991). "It is the burden of the taxpayer alleging a violation of the uniformity clause to show that there is deliberate discrimination in the application of the tax or that it has a discriminatory effect." *Id.*

Calicchio argues that the District's method in pursuing assessment appeals was unconstitutional both in its intent and implementation. The Court disagrees. In *Oas,* it was argued that permitting the school district to selectively appeal assessments would result in non-uniformity of taxation. Although the *Oas* court ultimately decided that because the board of assessment appeal had not changed the assessment at issue the uniformity issue was premature, the court observed:

> the trial court determined that permitting the District to appeal assessments absent a triggering event would result in a lack of uniformity in the taxing properties. However, such reasoning also applies when property owners appeal their assessments. Thus, it matters not whether the District or the property owner appeals the assessment. *Neither action should cause the Board of Assessment, or the courts, to create and maintain a nonuniform assessment of property*. Exercise of appeal rights by both the District and the property owner, will ensure that the uniformity required by our state constitution is maintained.

Oas, 737 A.2d at 339 (emphasis supplied). Thus, this Court finds that the District's selection of properties for assessment appeals did not violate the constitutional mandate to maintain uniformity of taxes.

Calicchio relies primarily upon two cases in support of his position. First, Calicchio directs the Court's attention to *Kraushaar v. Wayne County Bd. of Assessment and Revision and Taxes,* 145 Pa. Cmwlth. 314, 603 A.2d 264 (1992). In *Kraushaar,* a group of developers subdivided a parcel into 27 lots for a proposed subdivision. One of the lots was sold. The board of assessment reassessed all 27 lots at a higher value. The developers appealed arguing that only the lot which had been sold should have been reassessed. The commonwealth court disagreed stating that non-uniformity would result if only the lot which had been sold was reassessed because that landowner's property would be valued differently from the unsold parcels simply because his lot had been sold.

Calicchio argues that a similar situation exists here. He contends that under the District's selection procedure, only properties which have recently been sold and will generate sufficient tax revenue for the District are singled out for reassessment. First, this Court finds *Kraushaar* to be distinguishable from the instant case. *Kraushaar* involved a subdivision of a large lot. The instant case does not involve a subdivision. Additionally, the reassessment in *Kraushaar* was not done in response to an assessment appeal. Moreover, Calicchio's argument ignores the fact

that the District reviewed not only recent sales, but also building permits, recorded mortgages, real estate offerings and subdivision plans.

Calicchio also directs the Court's attention to *City of Harrisburg v. Sch. Dist. of the City of Harrisburg,* 551 Pa. 295, 710 A.2d 49 (1998)(hereinafter "Harrisburg"). In *Harrisburg,* the supreme court struck down a tax on rental consideration paid for the privilege of leasing tax exempt realty finding that the tax distinguished between lessees of public and nonpublic property without a reasonable and just basis. This Court also finds *Harrisburg* to be distinguishable from the instant case. In *Harrisburg,* lessors of tax-exempt property were subjected to a tax that lessors of nonexempt property were not. Here, the District is not imposing an additional or different tax upon owners of certain real estate; it is simply appealing the assessments of those properties.

Having determined that the District's methods in selecting properties for assessment appeals do not constitute spot reassessment or violate the requirement for uniformity of taxation, the Court now turns to the factual situation presented in the instant action. The Court makes the following findings.

Thomas Calicchio purchased this property in an "arms length" transaction on November 4, 1999, for $800,000.

Appraiser Robert Glowacki testified at a hearing held by the Court on behalf of the School District that the fair market value of the property is $722,856. Appraiser Robert B. MacIsaac testified on behalf of Calicchio that the fair market value was $540,000. Both appraisers used the Sales Comparison Approach.

This Court finds the testimony of Robert Glowacki (hereinafter "Glowacki") and his appraisal to be more credible than Robert MacIsaac (hereinafter "MacIsaac"). The reason for such is because of the different comparable properties that were used in their analysis. The properties utilized by Glowacki were more similar to the subject property than those used by MacIsaac.

Additionally, the purchase price of this property in November, 1999, for $800,000 is an arms length transaction supports the findings of the Glowacki appraisal.

Thus, this Court finds that the fair market value of this property was $722,856 for the tax years 2001 and 2002.

ORDER

AND NOW, to-wit, this 21 day of March, 2002, it is hereby ORDERED and DECREED that the fair market value of the subject property for the tax years 2001 and 2002 is $722,856, and the challenge to the constitutionality of the Millcreek Township School District's selection of properties for assessment is DENIED.

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

COMMONWEALTH OF PENNSYLVANIA

v.

ALAN LAURENCE WHITE

CRIMINAL PROCEDURE/MISCELLANEOUS TRAFFIC OFFENSES

Section 3309(1) of Pennsylvania's Motor Vehicle Code, 75 Pa.C.S.A. §3309(1), provides that a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that the movement can be made safely.

CRIMINAL PROCEDURE/TRAFFIC STOP/DUI

A single stop of a vehicle is unreasonable where there is no outward sign the vehicle or the operator are in violation of the Motor Vehicle Code; there must be specific facts justifying the intrusion.

CRIMINAL PROCEDURE/TRAFFIC STOP/REASONABLE SUSPICION

Police officers have the authority to stop vehicles whenever they have "articulable and reasonable grounds to suspect a violation" of the Vehicle Code.

CRIMINAL PROCEDURE/TRAFFIC STOP/REASONABLE SUSPICION

Testimony that the defendant's vehicle momentarily traveled into the turning lane and then abruptly turned to the right across the two eastbound lanes crossing partially over the fog line for a very brief period of time, was insufficient to justify the stop of defendant's vehicle.

CRIMINAL PROCEDURE/MISCELLANEOUS TRAFFIC OFFENSES/ STATUTORY INTERPRETATION

Section 3309(1) only requires that a vehicle be driven as nearly as practicable entirely within a single marked lane, and only after the driver has first ascertained that the movement can be made with safety. If the legislature had wished to demand absolute compliance with the single lane requirement of 75 Pa.C.S.A. §3309, it would not have included the words "as nearly as practicable."

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION NO. 3122 OF 2001

Appearances: John Moore, Esquire for the Commonwealth
Grant Travis, Esquire for the Defendant

OPINION

I. FACTUAL BACKGROUND

On October 9, 2001, Officer Benjamin Bastow of the Millcreek Police Department observed the defendant, Alan Laurence White, traveling in his vehicle eastbound on West Ridge Road, Millcreek Township, Erie County, Pennsylvania at approximately 2:30 a.m.[1] West Ridge Road is a

[1] The officer was in uniform operating a marked police cruiser.

divided highway with two lanes of traffic bearing in each direction. Segmented white lines separate the two lanes. The east and west bound lanes are separated by a one-lane turning lane which is indicated by a solid yellow line then segmented yellow lines. At the far right of the road in both directions is a solid white fog line.

Officer Bastow testified that after following the defendant approximately three blocks at about five to six car lengths, he observed him straddle the segmented center line of the two eastbound lanes. The defendant's vehicle then traveled into the center turning lane without signaling. At this point the officer activated his overhead lights. The defendant then abruptly swerved back across the two eastbound lanes and over the fog line. (The officer did not observe the defendant cross into the westbound lanes or create a hazard. He observed only one other vehicle on the road traveling in the opposite direction.) He followed the defendant as the latter made a right-hand turn onto Colonial Avenue. He completed the stop on Carter Avenue. He further testified that the alleged erratic driving occurred within five to six seconds.

As a result of the incident, the defendant was charged with violating 75 Pa.C.S.A §§3731 (a)(1), (4)(i) and 3309 (1).

II. LEGAL DISCUSSION

Officer Bastow stopped the defendant's vehicle for allegedly violating 75 Pa.C.S.A. §3309(1) of Pennsylvania's Motor Vehicle Code which provides, in relevant part:

> **(1) Driving within single lane.** - A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that the movement can be made safely.

In *Commonwealth v. Gleason*, 785 A.2d 983 (Pa. 2001), the Supreme Court stated that:

> . . .we held that "a stop of a single vehicle is unreasonable where there is no outward sign the vehicle or the operator are in violation of the Vehicle Code.... Before the government may single out one automobile to stop, there must be specific facts justifying this intrusion." *Commonwealth v. Swanger*, [453 Pa. 107,] 307 A.2d at 878. Thus, the presence of similar facts in this case should dictate a similar result. The legislature has vested police officers with the authority to stop vehicles whenever they have "articulable and reasonable grounds to suspect a violation" of the Vehicle Code.

(citations omitted).
Id. at 988-89

In reversing the Pennsylvania Superior Court, the Court found that the police officer had insufficient evidence to stop the defendant who crossed the berm line by six to eight inches on two occasions for a period of a

second or two over a distance of approximately one-quarter of a mile. *Id*. at 983.

In *Commonwealth v. Whitmyer*, 668 A.2d 1113 (Pa. 1995), the Supreme Court found the evidence insufficient to justify a routine traffic stop. There, a state trooper observed the defendant operating his vehicle behind another vehicle as the two vehicles approached a point on the Susquehanna River bridge where two lanes of traffic merged into a single lane. The trooper saw the defendant drive over a solid white line and pass the vehicle in front of him before that vehicle merged into the same lane. There was no evidence that the defendant operated his vehicle in a careless or reckless manner or that he interfered with any other vehicle on the road. *Id*. at 1114.

Turning to the Superior Court cases, in *Commonwealth v. Howard*, 762 A.2d 360 (Pa.Super, 2000), a trooper observed the defendant's vehicle cross over a fog line into the unpaved portion of the right berm of the road. Approximately one-quarter to one-third of the vehicle was over the line and dust kicked up from under the tires. The driver returned to his lane and again went over the fog line. He continued on the roadway turning onto another road and drove in the center of that unlined road up the hill before stopping at an intersection. He then turned onto another road for approximately 100 feet and crossed over the yellow centerline of the road. He then returned to the right side. At that time the trooper decided to stop the vehicle. *Id*. at 361. The trial court suppressed the evidence. In reversing the trial court, the Superior Court noted:

> We conclude that the findings of the suppression court are unsupported by the record.
>
> In *Commonwealth v. Kroekiewicz*, 743 A.2d 958 (Pa.Super. 1999), we held that a police officer may stop a vehicle when he has reasonable, articulable facts to suspect a violation of the Vehicle Code. 75 Pa.S.C.S. (sic) §6308 (b); *Commonwealth v. Whitmyer*, 542 Pa. 545, 668 A.2d 1113 (1995) . . . .

Id. at 361-362.

In reviewing similar cases, the Superior Court noted:

> In *Commonwealth v. Montini*, 712 A.2d 761, 764 (Pa.Super. 1998), we held, based on facts and circumstances similar to those in this case, that the officer had sufficient reasonable suspicion for the traffic stop. In *Montini*, the officer observed the defendant swerve to avoid a car in the midst of parallel parking, weave within his lane of traffic, accelerate and decelerate in an abnormal fashion, and cross the double yellow center line of the road. We concluded that the officer could reasonably believe that Montini violated the Motor Vehicle Code due to his

> observations of erratic driving. *Id.* Similarly, in *Commonwealth v. Lawrentz*, 453 Pa.Super. 118, 683 A.2d 303 (1996), we vacated the lower court's order suppressing evidence derived from a traffic stop where the testimony presented at the hearing indicated that appellee was "weaving" and "swaying" for up to a mile and a half and that he crossed the center line on two occasions. Recently, in *Commonwealth v. Masters*, 737 A.2d 1229, 1232 (Pa.Super. 1999), we reversed a suppression court's finding that there was insufficient reasonable suspicion for the stop because we concluded that the repeated lane changes, even absent other traffic concerns, warranted the stop. We noted that "[a]t the very least, the police officer properly stopped the vehicle out of concern for [the defendant's] own safety based on his erratic driving." *Masters*, 737 A.2d at 1232.

Id.

Although not always in agreement, it appears that both the Supreme and Superior Courts have found the evidence insufficient for a traffic stop where the officer only observes momentary, slight crossing of marked traffic lanes or digressions from the appropriate lane of traffic.[2] This is especially true where no danger to other motorists, pedestrians or property is apparent.

In the instant case, the defendant's actions amounted to approximately five to six seconds of driving outside his proper lane of traffic and crossing over to a turning lane without giving a signal. Although the defendant made an abrupt lane change from the turning lane to the far right lane of traffic partially entering the fog lane, the officer had already activated his lights before the defendant executed that maneuver. Therefore, the facts are closer to those of *Gleason* and *Whitmyer* than they are to the Superior Court cases cited above.

Relative to §3309, this Court agrees with the analysis of Judge Bayley of Cumberland County. In *Commonwealth v. Malone*, 19 D.&C. 4th 41 (C.P. Cumberland Co. 1993) he noted:

> Section 3309(1) does not require perfect adherence to driving entirely within a single marked lane on all occasions. It only requires that a vehicle be driven *as nearly as practicable* entirely within a single marked lane. The requirement to drive entirely within a single marked lane "as nearly as practicable" is further subject to the exception *until the driver has first ascertained that the movement can be made with safety*. There

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[2] Erratic driving for a sustained period of time is an important consideration. *Commonwealth v. Howard*, *supra.* at 362.

were no other vehicles on the highway at the time or for that matter during the entire eight minutes Officer Burger followed defendant on Trindle, State and Church Roads. There were no specific facts to create probable cause for the officer to believe that on the one occasion when the passenger side wheels of defendant's vehicle went onto the berm approximately one foot, and on the other occasion when the driver's side wheels went over the center line for approximately one foot, that such operation of the vehicle constituted a safety hazard.

Furthermore, there was no probable cause for the officer to believe that defendant was not operating her vehicle in a single lane of travel "as nearly as practicable." Section 3309 is a safety provision. If the legislature had wished to demand absolute compliance with the single lane requirement it would not have included the words "as nearly as practicable."

Id. At 44-45.

In this case, the defendant's vehicle traveled for a few seconds straddling the eastbound lanes, momentarily traveled into the turning lane and then abruptly turned to the right across the two eastbound lanes crossing partially over the fog line for a very brief period of time. Moreover, the officer only saw one other vehicle on the road and there was no indication that the defendant's operation of his vehicle constituted a hazardous condition to anyone, including himself. Therefore, under the existing case law (particularly the Supreme Court's) there was insufficient evidence to justify the stop of defendant's vehicle.

ORDER

AND NOW, this 3rd day of April, 2002, for the reasons set forth in the accompanying opinion, it is hereby **ORDERED** that the defendant's motion to suppress is **GRANTED**.

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

MOUNTAIN LAUREL ASSURANCE COMPANY

v.

INFINITY RESOURCES, INC. and JUDITH and RONALD CESEK, Co-Administrators of the Estate of Jesse James Cesek

CIVIL PROCEDURE/PLEADINGS/PRELIMINARY OBJECTIONS

When considering Preliminary Objections which allege lack of personal jurisdiction the burden rests upon the party challenging the exercise of jurisdiction; but once the Movant has supported its jurisdictional objection, the burden shifts to the party asserting jurisdiction to prove that there is a statutory and constitutional support for exercise of in personam jurisdiction.

JURISDICTION/CONSTITUTIONAL ISSUES

In order to meet constitutional muster, the Defendant's contacts with the forum State must be such that the Defendant could reasonably anticipate being called to defend itself in the forum; random, fortuitous and attenuated contacts cannot support the exercise of personal jurisdiction.

JURISDICTION/CONSTITUTIONAL ISSUES

A Court may exercise in personam jurisdiction over a non-resident Defendant if jurisdiction is conferred by the Pennsylvania Long-Arm Statute, 42 P.S. §5322, and the exercise of jurisdiction under the statute meets the constitutional standards of due process clause.

JURISDICTION/MINIMUM CONTACTS

The Contract between the Decedent and the Defendants and the Commonwealth of Pennsylvania are so attenuated and indirect that they are not sufficient to establish the minimum contacts required to comport with fair play and substantial justice.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 11110 OF 2001

Appearances: Francis J. Klemensic, Esquire for Mountain Laurel
James R. Fryling, Esquire for Cesek
James P. Carrabine, Esquire for Cesek

OPINION

Bozza, John A., J.

This matter is before the Court on defendant Judith Cesek's Preliminary Objections to the plaintiff's Declaratory Judgment Action. The factual history of the case is as follows. On July 24, 2000, Jesse James Cesek, (herein "decedent") an Ohio resident, died as the result of an accident which occurred on July 23, 2000 in Madison, Ohio, in which the motorcycle decedent was operating collided with a vehicle driven by Florence M. Courtney. At the time of his death, decedent was employed by Infinity Resources, Inc., a Pennsylvania corporation, which had a local office located in Painesville, Ohio. Defendants Judith and Ronald Cesek,

both Ohio residents, were granted Letters of Administration and appointed co-administrators of the Estate of their son, Jesse James Cesek, pursuant to Ohio law. Acting in their capacity as co-administrators, Judith and Ronald Cesek, attempted to make an underinsured motorist claim against the Pennsylvania Commercial Auto Insurance Policy issued by Mountain Laurel Assurance Company, who had issued the policy to the decedent's employer, Infinity Resources, Inc.

On March 26, 2001, the plaintiff, Mountain Laurel Assurance Company (herein "plaintiff") filed an Action for Declaratory Judgment, pursuant to the Pennsylvania Declaratory Judgment Act. 42 P.S. §7531 *et seq.* Plaintiff sought a judicial declaration declaring that (1) the policy issued to Infinity Resources, Inc., does not provide either underinsured or uninsured motorist coverage and benefits by the terms, conditions, provisions and definitions of the policy and under the facts giving rise to the claim; and (2) that neither the decedent, nor the defendants are insureds within the meaning of the terms, conditions, provisions and definitions of the policy for the accident which occurred July 23, 2000; hence no coverage was owed to the named insured, Infinity Resources, Inc. On November 13, 2001, the defendants filed Preliminary Objections to the plaintiff's Complaint, asserting lack of personal jurisdiction and failure to join an indispensable party. An evidentiary hearing was conducted on April 22, 2002, in order for the Court to have of record all the facts necessary to determine the nature and extent of the defendants' activities in Pennsylvania. *See Rivello v. New Jersey Auto. Full Ins. Underwriting Ass'n.*, 432 Pa.Super. 336, 638 A.2d 253 (1994); *Insulations, Inc. v. Journeymen Welding and Fab.*, 700 A.2d 530 (Pa. Super. 1997); *American Housing Trust, III v. Jones*, 548 Pa. 311, 696 A.2d 1181 (1997).

When considering preliminary objections which allege lack of personal jurisdiction, the Court must make note of several factors. The burden rests upon the challenging party challenging the Court's exercise of jurisdiction, and the Court must consider the evidence in the light most favorable to the non-moving party. *King v. Detroit Tool Co.*, 452 Pa. Super. 334, 682 A.2d 313 (Pa. Super. 1996). Preliminary objections, if sustained, that would result in the dismissal of an action should be sustained in only the clearest of cases. *Id.* 452 Pa.Super. at 337). Once the movant has supported its jurisdictional objection, the burden shifts to the party asserting jurisdiction to prove that there is a statutory and constitutional support for the trial court's exercise of *in personam* jurisdiction. *GMAC v. Keller*, 737 A.2d 279 (Pa. Super. 1999).

Pennsylvania courts may exercise personal jurisdiction over a non-resident defendant based either on the specific acts of the defendant which gave rise to the cause of action or upon the defendant's general activity within Pennsylvania. *Kubik v. Letteri*, 532 Pa. 10, 614 A.2d 1110 (1992). General jurisdiction is based upon the defendant's continuous and systematic contacts with the state of Pennsylvania, while specific jurisdiction is based on particular acts which the defendant committed

that gave rise to the underlying cause of action. *GMAC*, 737 A.2d at 281 (*citing Hall-Woolford Tank Co. v. R.F. Kilns*, 698 A.2d 80 (Pa.Super. 1997)). Further, the question of whether a state may exercise personal jurisdiction over a non-resident defendant must be tested against the Pennsylvania Long Arm Statute, 42 P.S. §5322, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Asahi Metal Indus. Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987); *Kenny v. Alexson Equipment Co.*, 495 Pa. 107, 432 A.2d 974 (1981).

In order to meet constitutional muster, the defendant's contacts with the forum state must be such that the defendant could reasonably anticipate being called to defend itself in the forum. *Kubik v. Letteri*, 532 Pa. 10, 19-20, 614 A.2d 1110, 1115 (1992)(expressly adopting the minimum contacts test advocated by the United States Supreme Court in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985)). Random, fortuitous and attenuated contacts cannot reasonably notify a party that it may be called to defend itself in a foreign forum, and thus, cannot support the exercise of personal jurisdiction. *Id.* Rather, the defendant must have purposefully directed its activities to the forum and conducted itself in a manner indicating that it has availed itself of the forum's privileges and benefits such that it should also be subjected to the forum state's laws and regulations. *Id.*

A court may exercise *in personam* jurisdiction over a non-resident defendant if jurisdiction is conferred by the Pennsylvania long-arm statute and the exercise of jurisdiction under the statute meets the constitutional standards of due process clause. *Fidelity Leasing, Inc. v. Limestone County Board of Education*, 758 A.2d 1207 (Pa.Super. 2000). The Pennsylvania long-arm statute permits Pennsylvania courts to "exercise jurisdiction over nonresident defendants 'to the fullest extent allowed under the Constitution of the United States' and Jurisdiction may be based 'on the most minimum contact with this Commonwealth allowed under the Constitution of the United States.'" *Fidelity*, 758 A.2d at 1211 (*citing* 42 P.S. §5322(b)). Further, Pennsylvania courts may exercise personal jurisdiction over a person who transacts any business in Pennsylvania. *Fidelity*, 758 A.2d at 1211 (*citing* 42 P.S. §5322(a)). However, as noted above, an assertion of personal jurisdiction by a Pennsylvania court must meet two constitutional limitations: (1) the non-resident defendant must have sufficient minimum contacts with the forum state and (2) the assertion of *in personam* jurisdiction must comport with fair play and substantial justice. *Fidelity*, 758 A.2d at 1211 (citations omitted). The totality of the circumstances, including the parties' actual course of dealing, contemplated future consequences of the parties' contract, and the terms of the contract must be considered in this jurisdictional analysis. *Fidelity*, 758 A.2d at 1211 (*citing GMAC*, 737 A.2d at 282). Applying these criteria to the present case, the Court has accepted the material facts set forth in the plaintiff's Action for

Declaratory Judgment as true, and concluded that the Court lacks jurisdiction over this matter.

The plaintiff seeks to establish personal jurisdiction over the instant matter in a Pennsylvania court for two reasons: (1) the decedent was issued payroll from Infinity Resources, Inc., a Pennsylvania Corporation, and (2) the defendants are asserting a claim for pecuniary benefit under a Commercial Auto Insurance Policy issued in Pennsylvania by the plaintiff, a Pennsylvania licensed insurance agency. The policy was delivered to Infinity Resources, Inc., a Pennsylvania corporation, in Pennsylvania, and Infinity Resources, Inc. in turn made premium payments in Pennsylvania. The plaintiff further asserts that Pennsylvania properly has personal jurisdiction over the instant action because the action for declaratory relief is exclusively based in contract law, not tort law, and does not involve the underlying auto accident claim. The plaintiff's assertions are without merit.

It is well-settled that even a single act may support jurisdiction, "so long as it creates a 'substantial connection' with the forum, provided the nature, quality and circumstances of the act's commission create more than a mere attenuated affiliation with the forum." *Engle v. Engle,* 412 Pa. Super. 425, 431-432, 603 A.2d 654 (1992)(*citing C.J. Betters v. Mid South Aviation*, 407 Pa.Super. 511, 518, 595 A.2d 1264, 1267 (1991)). However, a party's contract with an out-of-state individual cannot alone establish sufficient contacts with the forum state. *Engle,* 412 Pa.Super. at 432 (*citing Kenneth H. Oaks, Ltd. v. Josephson*, 390 Pa.Super. 103, 105, 568 A.2d 215, 217 (1989)). As discussed above, to meet constitutional standards of due process, the terms of the contract, as well as the parties' course of dealings and prior negotiations must be considered in order to establish minimum contacts with the forum state that comport with fair play and substantial justice. *Fidelity*, 758 A.2d at 1211.

In this case, testimony presented at the evidentiary hearing established that the only relationship the decedent had with the Commonwealth of Pennsylvania was due to the fact that his payroll was generated in Erie, Pennsylvania at the main office of Industry Resources, Inc. Such actions are insufficient to establish minimum contacts with the Commonwealth such that the decedent, and the defendants as co-administrators of the decedent's estate, could reasonably anticipate being haled into court in Pennsylvania. Further, no evidence was presented that either the decedent or the defendants had any knowledge of the connection between Infinity Resources, Inc. and the Commonwealth of Pennsylvania. The decedent applied for a position with Infinity Resources, Inc. at their Painesville, Ohio office, and performed all his employment duties within the State of Ohio. The decedent's situation is distinguishable from the situation in *Colt Plumbing Co., Inc. v. Peter C. Boisseau*, 435 Pa.Super. 380, 645 A.2d 1350 (1994), in which an employment contract was deemed to be sufficient to establish minimum contacts with the Commonwealth of Pennsylvania. In *Colt Plumbing Co., Inc. v. Peter C. Boisseau*, 435

Pa.Super. 380, 645 A.2d 1350 (1994), the defendant-employee communicated by telephone on a daily basis from Virginia to his employer in Pennsylvania in order to set up appointments with clients, the employer maintained confidential information and customer lists of the employee's clients in the Pennsylvania office, and other employees in the Pennsylvania office were specifically assigned to the defendant-employee to assist in taking the defendant-employee's sales calls. *Id.* 435 Pa.Super. at 393. In that situation, the defendant-employee should have reasonably foreseen that if he committed any breach of his employment contract, injuries to his employer would be felt in Pennsylvania and the employer would seek to prove those injuries in a Pennsylvania court. *Id.* There is no such foreseeability of injury in Pennsylvania in the instant case on the part of either the decedent or the defendants.

The plaintiff also contends that the defendant's claim for pecuniary benefit under Infinity Resources, Inc.'s auto insurance policy is contained in the Pennsylvania long-arm statute, since it is the commission of a single act in the Commonwealth for the purpose of realizing pecuniary benefit. 42 P.S. §5304(a)(1)(ii). The defendants have adequately supported their jurisdictional objection, and the burden now shifts to the plaintiff as the party asserting jurisdiction to prove that there is a statutory and constitutional support for the trial court's exercise of *in personam* jurisdiction. *GMAC v. Keller*, 737 A.2d 279 (Pa.Super. 1999). Even if the Court accepts the plaintiff's contention that the defendant's actions are contained within the Pennsylvania long-arm statute, the plaintiff fails to find constitutional support for its argument in favor of the Court's having jurisdiction, as discussed above. The contacts between the decedent and the defendants and the Commonwealth of Pennsylvania are so attenuated and indirect that they are not sufficient to establish the minimum contacts required to comport with fair play and substantial justice. The defendants sought to make a claim against Infinity Resources, Inc's insurance policy in Ohio, and all contacts with Infinity Resources, Inc.'s insurance carrier were in Ohio. As such, there were insufficient contacts with the Commonwealth of Pennsylvania to meet the constitutional standards of due process.

The defendants also assert that the plaintiff's action should be dismissed for lack of subject matter jurisdiction because of the plaintiff's failure to join an indispensable party, namely Ronald Cesek. However, as a result of the Court's determination that it lacks subject matter jurisdiction, this aspect of the defendant's Preliminary Objections are moot.

For the reasons set forth above, the defendant's Preliminary Objections are sustained and the plaintiff's Declaratory Judgment Action is dismissed.

Signed this 15th day of May, 2002.

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

CHARLES A. ALESSI, JR., and MELISSA D. ALESSI, his wife, and PATRICK S. HORWATH and ROBERTA E. HORWATH, his wife

v.

MILLCREEK TOWNSHIP ZONING HEARING BOARD,

and

SHEETZ, INC., a Pennsylvania corporation, TIMOTHY and SANDRA BIRKMIRE, husband and wife, and MILLCREEK TOWNSHIP

ZONING/VARIANCE/SCOPE OF REVIEW

Where the court takes no additional evidence, its scope of review is limited to determining whether a zoning hearing board has abused its discretion or committed an error of law. An abuse of discretion occurs when a decision is not based on substantial evidence, *i.e.*, relevant evidence that a reasonable mind might accept as adequate to support the conclusion of the zoning hearing board. An error of law is committed when a zoning hearing board reaches an incorrect legal conclusion. The court conducts plenary review of conclusions of law.

ZONING ORDINANCE/INTERPRETATION

The zoning hearing board is the entity responsible for interpretations and application of the zoning ordinance and its interpretation is entitled to great deference from a reviewing court. Undefined terms in an ordinance must be given their plain and ordinary meaning and doubts about the meaning of a term are to be resolved in a manner favorable to the landowner.

DEFINITIONS/ "CONVENIENCE STORE" AND "GASOLINE SERVICE STATION"

The evidence of record and the language of the zoning ordinance support the zoning hearing board's determinations that a "convenience store" may engage in the sale of gasoline; that the sale of gasoline does not necessitate the conclusion that a proposed use constitutes a "gasoline service station"; and that the sale of gasoline does not require compliance with all requirements of the ordinance for a "gasoline service station."

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 12718-2001

Appearances: Evan E. Adair, Esq. for Millcreek Twp.
James F. McCormick, Esq. for Sheetz, Inc.
John J. Mehler, Esq. for Birkmire
John J. Shimek, Esq. for Alessi & Horwath
Timothy M. Zieziula, Esq. for Millcreek Twp. Zoning Hearing Bd.

OPINION

Bozza, John A., J.

This matter is before the Court on the Rule 1925(b) Statement of Matters

Complained of on Appeal filed by the Appellants, Charles A. Alessi, Jr. and Melissa D. Alessi, his wife, and Patrick D. Horwath and Roberta E. Horwath, his wife (herein jointly "Appellants"). The Appellants reside at 6040 Meridian Drive and 6120 Meridian Drive, respectively, in Erie, Pennsylvania. On May 4, 2001, Sheetz, Inc. (herein "Sheetz") applied to the appellee, the Millcreek Township Zoning Hearing Board (herein "Board") for a variance for property located at the southeast corner of the intersection of State Route 99 (also referred to as Edinboro Road) and Interchange Road. In their application, Sheetz requested that the Board grant a variance to permit the sale of motor fuels on the property, or in the alternative, requested that the Board interpret the Millcreek Township Zoning Ordinance (herein "Ordinance") to include the sale of motor fuels as a permitted use in the "B" Business District under Section 407(22) of the Ordinance. The Board conducted a hearing on Sheetz's application on May 30, 2001, and on July 11, 2001, the Board concluded that Sheetz was entitled to a permit as a matter of right for the proposed use. On July 25, 2001, the Board issued its written adjudication, which included findings of fact, discussion, and conclusions of law. Appellants filed a Notice of Appeal to this Court on August 8, 2001. In August, 2001, Millcreek Township, Sheetz, and Timothy and Sandra Birkmire each filed Notice of Intervention in the above-captioned matter pursuant to the applicable provisions of the Municipalities Planning Code. 53 P.S. §11004-A. The Court affirmed the decision of the Board in its Order entered February 19, 2002, and the Appellants filed a Notice of Appeal to the Superior Court on March 13, 2002.

The Appellants assert that the Court erred in affirming the decision of the Board and denying the Appellants' Land Use Appeal. Appellants' assertion is based upon thirty-seven points of error, all of which are without merit, and many of which do not focus on the central issue of whether the Board abused its discretion or committed an error of law when it interpreted the term "convenience store," as it is used in the zoning ordinance, to encompass the sale of gasoline. Hence the Court will focus on those points of error which relate to the central issue of the case.

When reviewing the decision of a zoning hearing board where the Court takes no additional evidence, the Court must limit its review to whether the zoning hearing board abused its discretion or whether the zoning hearing board committed errors of law. *Valley View Civic Association v. Zoning Board of Adjustment*, 501 Pa. 550, 462, A.2d 637, 640 (1983). The zoning hearing board abuses its discretion when its decision is not based on substantial evidence in the record, defined as relevant evidence that a reasonable mind might accept as adequate to support a conclusion reached by the board. *Id*. The zoning hearing board commits errors of law when it draws the incorrect legal conclusion, whether or not the board relied on substantial evidence in drawing these conclusions. The Court

has plenary review of the board's conclusions of law. Applying these criteria to the present case, this Court concluded that the decision of the board was proper and should be affirmed.

Appellants' first assertion of error is that the Court erred by affirming the Board's conclusion that the sale of gasoline is an inherent aspect of the use of "convenience store" as the term is used in Section 407(22) of the Ordinance. (Appellants' 1925(b) ¶ 5). The first issue the Court considered in its review of the Board's decision was whether the Board relied upon substantial evidence in the Board's record in making its decision. The Board heard evidence from representatives of Sheetz, as well as other interested parties, to determine whether the sale of gasoline should be considered an inherent aspect of the convenience store business. (Record of Proceedings Before the Zoning Hearing Board of Millcreek Township). Sheetz offered the testimony of Stephen B. Augustine, regional real estate director for Sheetz; Charles A. Wooster, a traffic engineer retained by Sheetz; and Michael Sanford, a professional engineer retained by Sheetz for its proposed development. (May 30, 2001 R.T.). Testimony was also offered by Appellant Charles Alessi, Mr. Rudy Navotny, a local competitor, and Millcreek Township's zoning officer, Charles Pierce. *Id.* The parties stipulated to the Court at a hearing conducted on January 22, 2002 that no additional evidence would be accepted by the Court, and so the Court's decision was based on this evidentiary record.

The evidence presented by Sheetz to the Board at the meeting on May 30, 2001 was as follows. Augustine testified that Sheetz is a member of the National Association of Convenience Stores (herein "NACS"), a group representing 2,200 members who operate 104,209 convenience stores in the country. (5/30/01 R.T. pp. 29-30). Augustine did not know how many convenience stores are currently operating nationally. (5/30/01 R.T. p. 30). Other statistics offered by Augustine included: 1) 84.16% of convenience stores in Erie County, Pennsylvania sell gasoline (approximately 101 out of 120); 2) 100% of Sheetz's 257 stores sell gasoline; and 3) no Sheetz convenience stores offer automobile service or are constructed with service bays. (5/30/01 R.T. pp. 31-34).

Appellants criticized the evidence presented by Sheetz by contrasting the statistic that only 76.1% of stores currently represented by NACS sell gasoline with the statistic cited in *Borough of Fleetwood v. Zoning Hearing Board of Borough of Fleetwood*, 538 Pa. 536, 545, 649 A.2d 651, 655 (1994), that 78% of convenience stores in 1990 sold gas. (Brief of Appellant, p. 6). Appellants asserted that this discrepancy undermined Sheetz's claim that gasoline sales are becoming more prevalent in the convenience store business. *Id.* However, Appellants misconstrued this data and misinterpret its significance. While 76.1% of the total number of stores represented by NACS sell gasoline, 93% of stores opened in 1999

sell gasoline. This data clearly demonstrates that almost all convenience stores opening in recent years had gasoline sales as a part of their business, up from 85% in 1990. In addition, regardless of the subtle implications of statistical variation, it is apparent that for a very long time the overwhelming majority of convenience stores have sold gasoline. Also, while the 1990 data is not identical to the current data provided by Augustine and NACS, both statistics indicate the vast majority of convenience stores currently have gasoline sales as a part of their regular business.

The evidence provided by Sheetz regarding Erie County convenience stores, as well as Sheetz' own practices, was adequate enough to support the conclusion that gasoline sales are inherent to the business of convenience stores. The fact that Sheetz does not open any of its convenience stores without gasoline pumps, as well as the fact that one-third of all sales are gasoline only, is an indication of the importance of the sale of gasoline to Sheetz's operations in the convenience store market. However, the importance of gasoline sales to Sheetz's operations does not lead to the conclusion that such gasoline sales are the principal use of the property. The testimony given by Augustine at the hearing before the Board indicated that two-thirds (2/3) of Sheetz's customers purchase convenience items in the store in addition to their purchase of gasoline, and that the stores contain approximately six thousand (6,000) items. (5/30/01 R.T. pp. 35, 37). The evidence offered by Sheetz came from a credible source, namely NACS, and was undisputed. This evidence was adequate to support the Board's conclusion that gasoline sales are an inherent aspect of the land's use for a convenience store. The Court's determination that no abuse of discretion occurred was proper.

Appellants also assert that the Court erred by affirming the Board's determination that an ambiguity existed in the Ordinance that required the terms "convenience store" and "gasoline service station" to be interpreted in a manner most favorable to the free use of property for legitimate purposes. (Appellants' 1925(b) Statement, ¶ 8). This assertion is without merit, as there was a legitimate ambiguity in the Ordinance that the Board was required to interpret, and there was no error in the Board's conclusion. A zoning hearing board is the entity responsible for the interpretation and application of the zoning ordinance. *Smith v. Zoning Hearing Board of Huntingdon Borough*, 734 A.2d 55, 57 (Pa.Cmwlth. 1999). The Board's interpretation of its own ordinance is entitled to great deference from a reviewing court. *Id.* In the present case, the Ordinance did not provide a definition for the terms "convenience store" and "gasoline service station" in the definitions portion of the Ordinance. Zoning Ordinance, Article III, Definitions. Hence, the Board was required to define these terms in order to make their decision.

In determining these definitions, the Board was required to strictly

construe the provisions of the Ordinance, because zoning ordinance provisions are in derogation of the common law property rights of an individual. *Appeal of Lord*, 368 Pa. 121, 81 A.2d 533 (1951). The Board was required to apply this "strict construction" rule, in a manner which would favor the landowner. *Heck v. Zoning Hearing Board for Harveys Lake Borough*, 39 Pa. Cmwlth. 570, 397 A.2d 15 (1979). Undefined terms must be given their plain, ordinary meaning, and "absent a limiting legislative definition, a term permitting a use must be presumed to have been employed in its broadest sense...any doubt must be resolved in favor of the landowner...to permit the widest use of land is the rule and not the exception." *Appeal of Mt. Laurel Racing Association v. Zoning Hearing Board, Municipality of Monroeville*, 73 Pa. Cmwlth. 531, 534-535, 458 A.2d 1043, 1044-1045 (1983). Further, the Pennsylvania Municipalities Planning Code requires that all doubts about a term's intended meaning in a zoning ordinance must be resolved in the favor of the landowner. 53 P.S. § 10603.1. The Pennsylvania Statutory Construction Act requires that terms be given their common and approved usage. 1 Pa.C.S.A. § 1903(a). The Court's determination that the Board had the ability to interpret the terms "convenience store" and "gasoline service station" was proper.

The Appellants then assert that the Court erred by "misdefining, misinterpreting, misstating and misconstruing" the terms "convenience store" and "gasoline service station," as well as the rest of the Ordinance. (Appellants' 1925(b) Statement, ¶ 9-13). Section 407 of the Ordinance lists numerous "B" Business District uses, and includes the term "grocery [including convenience] stores." As discussed above, the Ordinance does not specifically define the terms "convenience store" or "grocery store." Zoning Ordinance, Article III, Definitions. Section 408 of the Ordinance lists numerous "C" Business District uses, and this list includes the term "gasoline service stations" among "engine rebuilding and repair shop" and "car wash." According to the Ordinance, "gasoline service stations" are required to have five parking spaces per bay of the service station garage. The footnote to Section 408 of the Ordinance refers to Section 809 for special conditions regarding "gasoline service stations." In turn, Section 809(B) sets forth several requirements for the establishment of "gasoline service stations," mandating, for example, that the street entrances of such facilities must be two hundred (200) feet from the street entrance or exit of any school, park or playground attended by children. Zoning Ordinance § 809(B). Section 203(B) requires that "in cases of mixed occupancy, the regulations for each use shall apply to the portion of the building or land so used." Zoning Ordinance § 203(B). Lastly, Section 406A provides for combination of uses in the Resort Business District, permitting, among other uses, gasoline service stations with grocery stores and convenience store.

Appellants asserted in their Brief in Support of Land Use Appeal that

there was enough information elsewhere in the Ordinance for the Board to discern a definition of "convenience store," and hence the Board had no authority to interpret the meaning of the term. In support of their argument, Appellants refer to Section 809(B) of the Zoning Ordinance which provides special conditions for "service station (gasoline)." While the sale and storage of gasoline is mentioned initially in this section, such sale and storage is couched in terms of a station providing other automobile services, which is something that Sheetz is not in any way proposing. Appellants disagree with the Court affirmation of the Board's conclusion that the term "gasoline service station" does not accurately describe the sale of gasoline as proposed by Sheetz. (Appellants' 1925(b) Statement ¶ 6). Yet the testimony given by representatives of Sheetz at the hearing indicated that Sheetz has never provided any such automotive services at its convenience stores and does not plan on offering such services in the future. (5/30/01 R.T. pp. 33-34).

While it is true, as Appellants allege, that Section 809(B) does not limit a service station to the sale of only gasoline and other automotive items, it is reasonable to conclude that the facility must actually be a service station for this section to even be of any assistance to the Board. The distinctions made in Section 809(B) for parking and distance from schools and residences appear more out of concern for the involved activities of a service station rather than the sale of gasoline. Also, it does not appear reasonable, as Appellants claimed, to read Section 408(18) to state that *if* a service station has bays, that the parking requirement must be followed. Rather, it is more reasonable to read the ordinance to mean that bays are *assumed* to be an inherent part of a gasoline service station, and that the facility would not be a gasoline service station without these bays. Indeed, the Board relied upon this very distinction in reaching its decision that the sale of gasoline at a convenience store is not similar to the operations of a gasoline service station, stating "...no service bays exist in a typical modern convenience store, and no automotive service is proposed here or authorized by our decision." (Board Adjudication, p.3).

Appellants also assert the Court erred by ignoring the principals of statutory construction and Appellants allege both that the Court did not attempt to discern the intent of the governing body in enacting the applicable provisions of the Ordinance, as well as that the Court misinterpreted the intent of the governing body. (Appellants' 1925(b) ¶ 18-21). These assertions are without merit. Appellants refer to the section of the Ordinance which address Mixed Occupancy use (Section 203(b)) and Resort Business District uses (Section 406A) in an attempt to define the term "convenience store" in the context of the entire Ordinance. However, the Board need not to have looked to these other sections of the Ordinance, as these sections do not offer any definitive assistance regarding the intent of the drafters of the Ordinance. Under Pennsylvania

law, the Ordinance should be construed as part of the whole. *Crary Home v. Defrees*, 16 Pa.Cmwlth. 181, 185, 329 A.2d 874, 876 (1974). While an inference may be drawn about the drafter's intent by examining the various uses provided for in each zoning classification, the uses described in the Ordinance offer little assistance in discerning any such intent on the part of the drafters of the Ordinance. There is no listed use in any of the Ordinance's classifications for gasoline sales without the presence of service bays in a facility. Also, as discussed above, there is no definition of the term "convenience store" provided in the Ordinance, and the Ordinance does not state that a dictionary should be consulted by the Board in order to provide a meaning. *See Sunnyside Up Corp. v. City of Lancaster Zoning Hearing Board*, 739 A.2d 644 (Pa.Cmwlth. 1999). Rather, the Board must have given the term its usual ordinary meaning, which the Court believes the Board has done.

Even if the Court considered the definition of the terms "convenience store" and "gasoline service station" as set forth in the dictionary, such definitions would not accurately describe Sheetz's proposal. The definition of "service station" describes the *servicing* of vehicles, which inherently implies more than the sale of gasoline. Merriam-Webster Collegiate Dictionary (10th ed. 2001). This definition indicates that there must be maintenance services provided to the car, such as oil changes, which is entirely different from the retail sale of gasoline by itself. Also, the definition of "convenience store" also does not offer any indication as to whether gasoline sales may be part of that operation. Merriam-Webster Collegiate Dictionary (10th ed. 2001). The definition of "convenience store" is "a small often franchised market that is open long hours." *Id*. There is nothing in that definition which manifestly excludes or includes the sale of gasoline in the operation of that facility. The Board has not merely concluded that the modern trend toward selling gasoline in conjunction with convenience store operations has changed the definition of "convenience store," as appellants allege. (Appellants' 1925(b) Statement ¶ 18). The definition of the term, even in the dictionary, is not clear. Thus, the Board was within its jurisdiction to resolve this legitimate ambiguity using the broadest sense of the terms involved, to act in favor of the landowner, and with the least restriction on the use of the property. *Smith, supra*; *Mt. Laurel, supra*. The Board's interpretation of the term "gasoline service station" and convenience store" are in accord with the plain meaning of the terms, and there is substantial evidence in the record to support those interpretations.

Appellants next assert the Court erred by affirming the Board's conclusion that the sale of gasoline in conjunction with a convenience store is a permitted principal use in the "B" Business District, as well as failing to conclude that the sale of gasoline and the sale of convenience items are legally dissimilar uses. (Appellants' 1925(b) Statement, ¶ 7,

14-17). Appellants also assert that the Court erred by judicially rewriting the zoning ordinance to permit gasoline sales in the "B" Business District, pursuing the spirit, and not the letter, of the Ordinance. (Appellants' 1925(b) Statement, ¶ 22, 23). The four cases on which Appellants principally rely to support their conclusion that gasoline sales are not a permitted principal use in the "B" Business District are *VSH Realty, Inc. v. Zoning Hearing Board of Sharon Hill*, 27 Pa.Cmwlth. 32, 365 A.2d 670 (1976), *Food Bag, Inc. v. Mahoning Township*, 51 Pa.Cmwlth. 304, 414 A.2d 421 (1980), *Appeal of Atlantic Richfield Co.*, 77 Pa.Cmwlth, 310, 465 A.2d 1077 (1983), and *Gustin v. Board of Sayer Borough*, 55 Pa.Cmwlth. 410, 423 A.2d 1085 (1980). Upon a closer reading of these cases, however, it is clear that Appellants' assertions of error are without merit.

None of the cases Appellants cite involve a local zoning hearing board interpreting the scope of permitted use for a "convenience store," which was the issue before the Board in the present case. In *VSH*, the property owner sought to construct a convenience store and gasoline pumps on a nonconforming parcel which was too small to contain both facilities. *VSH*, 27 Pa.Cmwlth. at 33-35. In *Atlantic*, the property owner sought to "retain a part of the existing nonconforming use—the sale of gasoline—and at the same time, establish an entirely new nonconforming use—convenient market." *Atlantic*, 77 Pa.Cmwlth. at 316. In *Gustin*, the property owner also sought to expand a nonconforming use as a convenience store into a further nonconforming use by adding gasoline sales. *Gustin*, 55 Pa.Cmwlth. at 412. In *Food Bag*, the local zoning board did not even make any findings as to whether the convenient food market is a separate industry or whether gasoline sales are inherent to the business of convenience stores. *Food Bag*, 51 Pa.Cmwlth. at 309-310. Rather, each of these cases involved situations where the zoning ordinance in question did not have a convenience store as a permitted principal use in that particular zoning classification, and the addition of gasoline sales only added another nonconforming use. In each of these cases, the only two zoning classifications from which to choose were retail sales and gasoline service stations. While it is true that the Commonwealth Court of Pennsylvania did not agree with the argument that the sale of gasoline is different from the sale of retail goods, that argument was made in completely difference contexts from the present case. In the present case, the Board was required to determine whether the sale of gasoline was permitted as part of convenience store operations, not whether the sale of gasoline should be permitted at all as part of the retail use of a property in general.

Appellants also assert the Court erred in affirming the Board's consideration of traffic flow as the chief factor to be used in determining similarity of uses, as well as the Board's conclusion that two fast food restaurants could be located on the subject parcel. (Appellant's 1925(b)

Statement ¶ 24-26). Appellants allege that the Board impermissibly considered traffic issues when deciding whether gasoline sales should be permitted at a convenience store. While the Appellants correctly stated that there was no evidence offered into the record on this point, the fact that the Board adopted this statement as a finding of fact is of no consequence to the Board's decision. The Board's decision was not based on traffic concerns, but rather on the interpretation of the terms "convenience store" and "gasoline service station." The Board's discussion of traffic issues, as well as fast food operations, was not relevant to their decision, and as such, has no bearing on this Court's review of their decision.

Appellants also assert that the Court erred by "permitting Attorney Mehler to 'testify' at oral argument that virtually all convenience stores with gasoline pumps are located in the 'B' Business District in Millcreek Township." (Appellants' 1925(b) Statement ¶ 27). This assertion is without merit, due to the fact that the Court did not take judicial notice of this alleged testimony by Attorney Mehler. At the hearing, the Court specifically stated that it "can't take judicial notice of that (fact that all the convenience stores in Millcreek are in the "B" Business District" unless the parties agree by stipulation that that's the case because that is not a fact that is obvious to anyone." (January 22, 2002 R.T. p. 45). The parties never stipulated to this fact, and as such, there was no error in the Court's permitting Attorney Mehler to make this statement. The Court stated that it would not take judicial notice of that statement unless the parties all agreed, the parties did not agree, and the Court did not take judicial notice of the statement.

It must be noted that the second portion of the Appellants' 1925(b) Statement, under the heading "Abuse of Discretion" is merely redundant, in that each of these points of error were addressed in the first portion of the Appellants' 1925(b) Statement. As such, the Court need not address these points of error, as the issues raised in these points have already been addressed above.

For the reasons set forth above, this Court's Order dated February 19, 2002 should be affirmed.

Signed this 15 day of May, 2002.

By the Court,
John A. Bozza, Judge

LOUIS A. COLUSSI, Plaintiff

v.

THE CITY of ERIE WATER AUTHORITY, THE CITY OF ERIE, and MERCHANTS and BUSINESS MEN'S MUTUAL INSURANCE COMPANY, Defendants

CIVIL PROCEDURE/MOTION FOR SUMMARY JUDGMENT

On summary judgment, court must view the record in a light most favorable to the opposing party and resolve all doubts and reasonable inferences as to the existence of a genuine issue of material fact in favor of nonmovent.

Summary judgment is proper where there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035.1-1035.5.

On summary judgment, 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. Pa. R.C.P. 1035.2.

INSURANCE/CONTRACTS AND AGREEMENTS/INTERPRETATION OF POLICIES

Insurance policy must be construed in accordance with its plain, common, and ordinary meaning.

It is the duty of the court to interpret an unambiguous provision of an insurance policy while the interpretation of an ambiguous clause may properly be left to the jury.

Language of insurance policy excluding flood damage was sufficiently broad enough to encompass damages resulting from a water main break.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW No. 10117-2001

OPINION

Anthony, J., April 12, 2002.

This matter comes before the Court on Defendant Merchants and Business Men's Mutual Insurance Company's Motion for Summary Judgment. After a review of the record and considering the arguments of counsel, the Court will grant the motion. The factual and procedural history is as follows.

Plaintiff is owner of real property located at 923-925 French Street, Erie, Pennsylvania (hereinafter "property"). At all times relevant to the instant action, the property was insured by a policy issued by Merchants and Business Men's Mutual Insurance Company (hereinafter "Merchants"). On January 14, 1999, a water main in the street in front of the property ruptured. As a result, a substantial amount of water entered the building on the property. The water damaged the structure and contents of the basement as well as a concrete area behind the building, the front porch,

and concrete steps on the north side of the building. Plaintiff submitted the loss to his insurance company. Merchants denied coverage for the loss.

Plaintiff filed a complaint in this action on March 9, 2001. Merchants filed Answer and New Matter on April 9, 2001. Merchants filed the instant Motion for Summary Judgment and Brief in Support on January 2, 2002. Plaintiff did not file a response to the motion. Oral argument was held in chambers at which all parties were represented.

The standard for summary judgment is well-settled. 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.

The facts in the instant case are not in dispute. The only issue to be resolved is whether Plaintiff's insurance policy covers flood damage resulting from a municipal water main break. Defendants contend the policy specifically excludes coverage for water damage. Plaintiff concedes that the policy states an exclusion for water damage but argues that the exclusion applies only when the pipes that burst are pipes contained in the insured premises.

Insurance policies are to be construed in accordance with their plain, common and ordinary meaning. *See Peerless Dyeing Co., Inc. v. Industrial Risk Insurers*, 392 Pa. Super. 434, 573 A.2d 541 (1990). Additionally, "it is the duty of the *court* to interpret an unambiguous provision while the interpretation of ambiguous clauses may properly be left to a jury." *Id*. With regard to water damage, Plaintiff's insurance policy includes the following provision:

> B. Exclusions
>
> 1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
>
> g. Water
>
> (1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not;
>
> (2) Mudslide or mudflow;
>
> (3) Water that backs up or overflows from a sewer, drain or sump; or

(4) Water under the ground surface pressing on or flowing or seeping through;

(a) Foundations, walls, floors or paved surfaces;

(b) Basements, whether paved or not;

(c) Doors, windows or other openings.

2. We will not pay for loss or damage caused by or resulting from:

b. Rupture or bursting of water pipes (other than Automatic Sprinkler Systems) unless caused by a Covered Cause of Loss.

c. Leakage or discharge of water or steam from any part of a system or appliance containing water or steam (other than an Automatic Sprinkler System), unless the leakage or discharge occurs because the system or appliance was damaged by a Covered Cause of Loss.

d. Explosion of steam boilers, steam pipes, steam engines or steam turbines owned or leased by you, or operated under control.

But if explosion of steam boilers, steam pipes, steam engines or steam turbines results in fire or combustion explosion, we will pay for the loss or damages caused by that fire or combustion explosion.

e. Mechanical breakdown, including rupture or busting caused by centrifugal force.

But if mechanical breakdown results in a Covered Cause of Loss, we will pay for the loss or change caused by that Covered Cause of Loss.

Mot. for Summ. J., Ex. A.

In support of their argument, Defendants direct the Court's attention to *Peerless*, *supra*, which presents a strikingly similar factual situation. In *Peerless*, a municipal water main burst and flooded the insured's property. The defendant insurance company denied coverage on the basis that such damage was specifically excluded under the policy. The policy at issue in *Peerless* explicitly excluded water damage involving a water main that was part of a public water system.

Although the instant case does not make such an explicit exclusion, this Court finds that the language contained in the instant policy is equally clear in excluding damage resulting from a water main break. Plaintiff's property was damaged by what was essentially a flood. The language of the policy clearly excludes damage from floods, back ups or overflows from sewers or drains, and underground water that seeps into foundations or basements. The Court does not agree with Plaintiff that the failure to specifically exclude water damage that results from a municipal water main break necessarily means that such damage is included in the coverage. On the contrary, the Court finds that the

language of the policy is sufficiently broad to include damage from a water main break.

Thus, the Court finds that the policy issued on Plaintiff's property excludes damage from a water main break. Accordingly, Defendants' motion for summary judgment is granted.

ORDER

AND NOW, to-wit, this 12th day of April, 2002, it is hereby ORDERED and DECREED that Defendant Merchants and Business Men's Mutual Insurance Company's Motion for Summary Judgment is GRANTED.

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

COMMONWEALTH OF PENNSYLVANIA

v.

THOMAS J. ALTADONNA, JR.

CONSTITUTIONAL LAW/POLICE POWER

When parole agents have information that a parolee is in violation of the terms of their parole the use of police officers as a backup during an investigation into the veracity of the violation is proper.

CONSTITUTIONAL LAW/DUE PROCESS

So long as the parole agent is following office policy and not acting in concert with law enforcement officials to circumvent the warrant requirement and such a search is reasonably related to the parole agent's duties, a warrantless search does not violate a parolee's due process right against illegal searches and seizures.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION NO. 2663 OF 2001

Appearances: Matthew J. DiGiacomo, Esquire for the Commonwealth
Philip B. Friedman, Esquire for the Defendant

OPINION

FACTS

On May 16, 2001 a parole officer received information concerning the Defendant, Thomas Altadonna, Jr., about a possible drug transaction involving another parolee. The information also included that the Defendant might be carrying a handgun. *N.T.*, 2/28/02, at 20-21, 47, 58. The information came from another parolee, Sean Bryson (hereinafter informant). The information was conveyed to Supervisor Steve Dreistadt. Agent Dreistadt instructed Agent John Amato to contact the Bureau of Narcotics Investigation of the Attorney General's Office (hereinafter BNI) for back up and security on the investigation. *Id.*, at 20-21. The Attorney General's office was chosen due to possible jurisdictional uncertainty that may occur in the investigation. *Id.*, at 22. Sometime between 10:30 and 11:00 AM Agent Tim Albeck of BNI arrived at the Probation and Parole Office (hereinafter PPO). *Id.*, at 72. At this time Agent Albeck was informed of the PPO's plan. Agent Albeck agreed with the plan and made some of his own suggestions such as using their vehicles for fear of the Defendant recognizing the PPO vehicles. *Id.*, at 72-73. The plan included taking the informant to a pay phone to set up a drug buy. This was done by Agents Amato and Mott and BNI Agent Albeck. *Id.*, at 47-48, 63, 73. The informant set up a buy with the Defendant for 2:30 PM at the Country Fair located at West 38th Street and Caughey Road. The informant was not given any money to purchase drugs, nor was he told to buy any

drugs or the quantity of drugs he would have to buy. The informant was not permitted to make actual contact with the Defendant during the alleged "buy" that was set up with the help of the informant. *Id.*, at 43-44.

Agent Albeck suggested using the BNI vehicles so that the Defendant would not recognize the PPO vehicles. *Id.* at 73. Two BNI vehicles and Agent Dreistadt's personal vehicle were used in the investigation. *Id.*, at 11, 24, 40. BNI Agents Connelly and Visnesky were contacted to assist as back up for the PPO Agents. *Id.*, at 73. Upon arrival at the Country Fair, the agents observed the Defendant pull his van into a parking space in the Country Fair lot. *Id.*, at 5, 26, 77. The informant began to approach the Defendant's vehicle and then ran when the agents appeared. The informant was chased, apprehended, cuffed and placed in a vehicle while Agent Albeck's vehicle blocked Defendant's van. *Id.*, at 6-7, 49, 77. The Defendant was removed from his vehicle, placed facedown on the ground and cuffed by PPO Agent Amato. *Id.*, at 15, 27, 41, 49, 59. PPO Agents Campbell and Mott searched the van. *Id.*, 8, 16, 47, 50. Upon returning to the parole office, BNI Agent Connelly field-tested the cocaine and Agent Albeck took possession of the cocaine to transport to the BNI Office. *Id.*, at 18, 28, 68, 82.

The Defendant raises the following issues:

1. Whether the parole agents were acting as a "stalking horse" for the BNI.
2. Whether the Defendant's due process rights guaranteed by the United States Constitution, Amendment IV, Article I and the Pennsylvania Constitution, Section 8 have been violated through an unlawful search and seizure.

LAW

A parole officer must act consistently with office policy and not at the request of law enforcement officials or in concert with them to circumvent the warrant requirement. This type of activity would render the warrantless search invalid. *Commonwealth v. Brown*, 240 Pa. Super. 190, 197-98, 361 A.2d 846, 850 (1976); *Commonwealth v. Miller*, 303 Pa. Super. 504, 516-17, 450 A.2d 40, 45 (1982); *Commonwealth v. Green*, 405 Pa. Super. 24, 34, 591 A.2d 1079, 1084 (1991). A parole officer must have reasonable suspicion that the parolee had committed a parole violation and that the search was reasonably related to the parole officer's duty for a warrantless search and seizure to be valid. *Commonwealth v. Williams*, 547 Pa. 577, 588, 692 A.2d 1031, 1036 (1997). When conducting a warrantless search, the parole officer must be acting reasonably within the scope of his official duties to insure that the parolee was not violating his parole. *Id.*, 692 A.2d at 1037.

In the case at bar, the testimony of all the officers involved in the events that lead up to and including the search of the Defendant's vehicle clearly establishes that the parole officers were in control of the operation

at all times, the purpose of the operation was to establish if the Defendant was violating any parole conditions, and that the BNI officers were merely back up for the parole officers. This Court agrees with the Commonwealth that the informant was not used in a controlled buy. He was merely used to setup an investigation of a parole violation. *See Commonwealth Brief, p.3*. There was never any intention for the informant neither to purchase drugs from the Defendant nor to use the informant to effectuate an arrest for the BNI Agents. Arguably, it can be inferred that the participation of the BNI Agents in the planning process of the investigation that it is possible that the plan was devised to circumvent the need for a warrant. However, the record establishes that the BNI participation was mostly for the protection of the BNI Agents that would be involved as back up. *Id.*, at 20-21, 55, 66, 69, 72, 74.

The Defendant correctly cites *Commonwealth v. Brown*, 240 Pa. Super. 190, 361 A.2d 846 (1976) to support his allegation that the PPO agents were used as "stalking horses" for the BNI to perfect an arrest for possession with the intent to deliver. However, the case at bar is distinguishable from *Brown*. In *Brown* the parole agent sought police assistance in order to effectuate an arrest for burglary. As previously stated, the present case clearly establishes that BNI agents were only called to assist for purposes of back up for the PPO agents while investigating whether a parole violation was being committed by the Defendant. *Id.*, at 20-21, 55, 66, 69, 72, 74. The Court in the *Brown* case recognized that law enforcement officers, in order to circumvent the warrant requirement may use parole agents. Therefore, the Pennsylvania Superior Court found that the purpose of the search, not the physical presence of a parole agent, is a vital element in the determination of a lawful search and seizure. The Court further stated that once it is determined that when the informal treatment of parolees ceases, the parolee's Fourth Amendment rights are to be given full consideration. *Id.*, 361 A.2d at 850.

This Court finds, based on the evidence of record, that the parole agents had reasonable suspicion based on the informant's information. Further, the agents were acting within their duties and consistent with office policies. Therefore, this Court cannot find that the PPO Agents had "switched hats" and were actually working for the BNI Agents to circumvent the requirement of a warrant.

The Defendant avers that if this Court should find that the PPO Agents were acting as police officers rather than administrators of the parole system then the Defendant's Fourth Amendment Rights were violated and the evidence found by the PPO Agents should be suppressed. The Defendant correctly cited cases supporting his due process right to be free from unreasonable search and seizure under the U.S. Constitution and the Pennsylvania Constitution when a police officer or an agent of a police officer conducts the search. *Defendant's Brief, p.3-4.* However,

this Court has determined that the PPO Agents were not conducting their investigation as agents of BNI. To clarify why a PPO Agent has a lesser standard than police officers when investigating parole and probation violations this Court will briefly address the constitutional issues.

The Pennsylvania Supreme Court has addressed the constitutionality of a warrantless search by parole/probation officers in *Commonwealth v. Williams*, 547 Pa. 557, 692 A.2d 1031 (1997). The Supreme Court of Pennsylvania does not believe it contravenes the U.S. Const. amend. IV, for a conditionally released convict to be accorded a more narrowly protected privacy interest than that afforded a free individual. This is recognized and required in order to facilitate the parolee moving more quickly from confinement of a prison to a point where most of his full panoply of civil liberties are restored. *Id.*, 692 A.2d at 1031. The Court further states that the U.S. Const. amend. IV prohibits a warrantless search based merely on reasonable suspicion unless there is consent of the parolee or a statutory or regulatory framework governing this type of search. Pennsylvania provides such framework in *61 P.S. §§331.27*. Pursuant to *61 P.S. §§331.27a, 331.27b*, which authorizes searches of a parolee by state and county police officers, evidence discovered shall not be suppressed if the parole officer had a reasonable suspicion that the parolee violated the conditions of his parole. *Id.*, 692 A.2d at 1035. The *Williams* case also established that the Pa. Const. § 8 does not provide greater protection than the U.S. Const. amend. IV provides for parolees. The Court noted that a parolee must expect to have a diminished right to privacy as a condition of being released from prison early and regaining his freedom from incarceration in order to insure an orderly transition from incarceration to freedom.

Based on the foregoing analysis, this Court finds that the Defendant's due process rights under the U.S. Const. amend. IV and the Pa. Const. §8 were not violated since the PPO Agents were found to be acting of their own accord and within their duty as probation/parole officers and not as agents of BNI. The evidence was not illegally obtained and therefore will not be suppressed.

ORDER

AND NOW, to-wit, this 6th day of May 2002, it is hereby **ORDERED, ADJUDGED and DECREED** that Defendant's Motion to Suppress is **DENIED** for the reasons set forth in the foregoing Opinion.

BY THE COURT:
/s/ **Shad Connelly, Judge**

MIGUEL JOSE GARCIA, Plaintiff

v.

MARTIN HORN, EDWARD BRENNAN, DR. MARK BAKER, DR. HOFFMAN, JUDITH WEYERS, CORRECTION OFFICER LT. BROUGHER, CORRECTION OFFICER SGT. JONES, CORRECTION OFFICER NICHOLS, CORRECTION OFFICER SPURLOCK, and CORRECTION OFFICER MEAD, Defendants

CIVIL PROCEDURE/ MOTION FOR SUMMARY JUDGMENT

Proper grant of summary judgment depends on an evidentiary record that either (1) shows the material facts are undisputed; or (2) contains insufficient evidence of facts to make out a prima facie cause of action or defense, and, therefore, there is no issue to be submitted to jury.

CIVIL PROCEDURE/ MOTION FOR SUMMARY JUDGMENT

When motion for summary judgment is based upon insufficient evidence of facts, non-moving party must come forward with evidence essential to prove the cause of action. If non-moving party fails, the moving party is entitled to judgment as a matter of law.

EVIDENCE/ EXPERT TESTIMONY/ CAUSE AND EFFECT OR TORTS/ NEGLIGENCE/ CAUSATION

Summary judgment is properly entered against plaintiff in a medical malpractice action where plaintiff fails to secure an expert to show that defendants' care deviated from the standard of care accepted in the medical profession and that this deviation was a substantial factor in the alleged harm.

CONSTITUTIONAL LAW/ CIVIL RIGHTS/ MEDICAL TREATMENT OF PRISONERS

Prisoner's complaint that defendants were negligent in treating his injuries/medical conditions does not state a valid claim for medical mistreatment under the Eighth Amendment; medical malpractice does not become a constitutional violation merely because the victim is a prisoner.

POLITICAL SUBDIVISIONS/ STATES/ LIABILITY OF EMPLOYEES FOR NEGLIGENCE OR MISCONDUCT

State prison employees were protected by sovereign immunity from imposition of liability for claims of negligence, willful misconduct, intentional and negligent infliction of emotional distress where it was undisputed that the Commonwealth employees were acting within their scope of employment when the acts were committed.

POLITICAL SUBDIVISIONS/ STATES/ LIABILITY OF EMPLOYEES FOR NEGLIGENCE OR MISCONDUCT

Summary judgment was properly entered against plaintiff where plaintiff failed to demonstrate that a sovereign immunity defense was not applicable pursuant to 42 Pa.C.S.A. §8522 or that this defense was specifically waived pursuant to 1 Pa.C.S.A. §2310.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW STATE TORT ACTION
No. 14033-1999

Appearances Miguel Jose Garcia, pro se
Vincent C. Longo, Esq., for Dr. Baker
William A. Dopierala, Esq. for all Defendants

OPINION

Connelly, J., February 5, 2002

PROCEDURAL HISTORY

The Plaintiff, Miguel Jose Garcia, filed a Complaint on November 22, 1999, which was amended per Court Order on August 28, 2000, alleging that prior to his incarceration he had received a work related back injury. His medical exams prior to incarceration indicate that Plaintiff had a central disc herniation of his lower back. *See Amended Complaint, Count I, 1-6* (hereinafter, Complaint). Through medical examinations conducted by the medical staff at Coal Township State Prison, confirmation of the Plaintiff's back injury was obtained and surgery was scheduled. *See Complaint, Count I, 7-13*. The Plaintiff further alleges that the Department of Corrections Medical Director, due to the costly nature of the surgery, canceled this surgery. *See Complaint, Count I, 14-16*. Upon Plaintiff's transfer to Albion State Prison, some time in April 1998, numerous requests were made by the Plaintiff to be examined by an Orthopedic Physician, a Neurologist, to have physical therapy scheduled and to have his pain medication increased, all of which were denied by Albion State Prison Medical Director, Dr. Mark Baker. *See Complaint, Count I, 18-30*.

The Plaintiff claims he filed grievances, which were denied and appealed through the chain of command to the Department of Corrections Secretary, Martin F. Horn. Allegedly, Mr. Horn failed or neglected to respond to Plaintiff's appeals. *See Complaint, Count I, 31-35*.

The Plaintiff received back surgery on March 2, 2000 from Neurosurgeon, Dr. Paul Diefenbach. Plaintiff alleges that the delay in receiving this surgery has caused him to endure severe physical pain, emotional suffering, cosmetic disfigurement and permanent nerve damage. *See Complaint, Count I, 46-48*.

On March 1, 1999, Plaintiff further claims that he was assaulted by Corrections Officers (C.O.) Nichols, Spurlock, Mead, and Sgt. Jones, while Lt. Boughner stood by instructing the C.O.'s to take Plaintiff to the Restricted Housing Unit (RHU). *See Complaint, Count II, 1-28*. Plaintiff filed grievances for these actions, which were denied. Again, the Plaintiff filed appeals through the proper chain of command to Mr. Horn. Mr. Horn allegedly failed or neglected to respond. *See Complaint, Count II, 29-32*.

Plaintiff claims that he received, as a result of the assault, cuts, scrapes, contusions and abrasions to the back of the head; bruised right shoulder, right arm and right elbow; pain and numbness in the right shoulder, right arm and right elbow; cluster headaches; high blood pressure; and blurred vision. Plaintiff further claims that his requests for medical treatment for these injuries were denied. *See Complaint, Count II, 33-34*. It is important to note that none of these injuries complained of are related to Plaintiff's lower back condition.

On August 26, 1999, a specialist in Physical Medicine and Rehabilitation, Dr. Silvia M. Ferretta saw Plaintiff. The Department of Corrections, working with Albion State Prison's Medical Department, contracted Dr. Ferretta. Dr. Ferretta's examination indicated permanent nerve root damage to Plaintiff's lower back and right leg. *See Complaint, Count II, 35-38*. It is further noted that there is no indication that this condition was caused by the assault or by the degeneration of the previous back condition.

On September 8, 2000, Defendants filed an Answer and New Matter. The Defendants deny all allegations and properly raised their defenses in New Matter. Defendants aver in New Matter that they were acting within the scope of their employment and are thus "Commonwealth parties" as defined by 42 Pa.C.S. §8501[1]. As Commonwealth Defendants, they are specifically entitled to the listed defenses of 42 Pa. C.S. §8524[2]. Defendants also allege as a further defense that the cause of action against them does not fall within any of the nine exceptions listed in 42 Pa.C.S. §8522[3].

Plaintiff filed a Brief in Opposition to the Defendant's Answer and New Matter on October 4, 2000. Plaintiff reiterates the same arguments averred

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[1] **§8501 Definitions**

"Commonwealth Party." A Commonwealth agency and any employee thereof, but only with respect to an act within the scope of his office or employment.

[2] **§8524. Defenses**

The following common law defenses are available:

(1) An official of a Commonwealth agency, or a member of the General assembly or the judiciary may assert on his own behalf, or the Commonwealth may assert on his behalf, defenses which have heretofore been available to such officials.

(2) An employee of a Commonwealth agency, or a member of the General assembly or the judiciary may assert on his own behalf, or the Commonwealth may assert on his behalf, the defense that the employee was acting pursuant to a duty required by a statute or statutorily authorized regulation.

(3) An employee of a Commonwealth agency, or a member of the General assembly or the judiciary may assert on his own behalf, or the Commonwealth may assert on his behalf, the defense that the act was within the discretion granted to the employee by statute or statutorily authorized regulation.

[3] 42 Pa.C.S. §8522 states that the defense of sovereign immunity shall not be raised for damages caused by (1) vehicle liability; (2) medical-professional liability; (3) care, custody or control of personal property; (4) Commonwealth real estate, highways and sidewalks; (5) potholes and other dangerous conditions; (6) care, custody or control of animals; (7) liquor store sales; (8) National Guard activities; (9) toxoids and vaccines.

in his Complaint in his Objections to Motion for Summary Judgment[4].

On November 13, 2000, Defendant, Dr. Mark Baker, in his own behalf, also filed an Answer to Plaintiff's Complaint, which states the same as the Defendants' Answer described above.

The Plaintiff filed a Petition for Production of Documents on January 10, and March 27, 2001, which was granted by this Court on April 3, 2001. The Defendants' filed notice of Service of Expert Interrogatories Directed to Plaintiff on March 26, 2001. After several petitions for documents were filed by the Plaintiff and answered by the Defendants, Plaintiff filed a Motion for Assignment of Expert Witness on June 5, 2001. This Court denied the Motion on June 7, 2001 stating that in a civil case the Plaintiff is not entitled to a court appointed expert witness nor is he entitled to county and/or court funds to secure an expert witness.

On June 11, 2001, Defendant, Dr. Mark Baker, filed a Motion to Compel Expert Interrogatories Directed to Plaintiff. This Court ordered on June 19, 2001 that Plaintiff must serve answers to Defendant's Expert Interrogatories within 20 days or suffer further sanctions including, but not limited to, preclusion of expert testimony at the time of the trial. The Plaintiff responded to the Defendant, Dr. Mark Baker, in a letter dated July 3, 2001 stating the reasons why the interrogatories have not been answered and further stating that there will most likely be no expert witness testifying for the Plaintiff. Defendant, Dr. Mark Baker, filed a Motion to Preclude Expert Testimony on July 12, 2001, which was granted by this Court on August 22, 2001.

Consequently, the Defendants filed a Joint Motion For Summary Judgment on October 17, 2001. Plaintiff filed a timely Objections to Motion for Summary Judgment on November 15, 2001.

The issues at bar are:

1. Whether Plaintiff can sustain a cause of action for medical malpractice without the testimony of an expert witness against Defendants.

2. Whether the medical mistreatment rises to a level of cruel and unusual punishment in violation of the incarcerated Plaintiff's U.S. Constitution VIII Amendment rights.

3. Whether Plaintiff can maintain a cause of action for Plaintiff's remaining allegations against Defendants under the doctrine of sovereign immunity.

LAW

A party can move for summary judgment when there is no genuine issue of material fact that is a necessary element of the cause of action or

[4] The Plaintiff avers other issues in his Objections to Motion for Summary Judgment, which was not originally averred in his Amended Complaint. Therefore, this Court cannot consider these issues in a motion for summary judgment. *See Pa. R.C.P. 1032.1.*

defense that could be established through additional discovery or expert report. *Pa. R.C.P. 1035.2(1).* Further, a motion for summary judgment may be filed if after the close of discovery, including the production of expert reports, an adverse party has failed to produce evidence of fact essential to the cause of action or defense in which a jury would need to decide the issues. *Pa. R.C.P. 1035.2(2)*.

The standard which the court must apply when considering a motion for summary judgment is set forth in *McCarthy v. Dan Lepore & Sons Co., Inc.*, 724 A.2d 938 (Pa. Super. 1998), *alloc. den.*, 743 A.2d 921 (Pa. 1999). *McCarthy* states that a grant for summary judgment is proper when the evidentiary record either shows that the material facts are undisputed or there is insufficient evidence to establish a prima facia cause of action or defense. Furthermore, it is incumbent upon the adverse party to provide essential evidence to preserve the cause of action. If the non-moving party fails to provide sufficient evidence to establish or contest a material issue the moving part is entitled to judgment as a matter of law. It is the non-moving party that bears the burden of providing sufficient evidence on issues that are essential to the case such that a jury could return a verdict favorable to the non-moving party. The court must examine the record in the light most favorable to the non-moving party and resolve all doubts against the moving party as to the existence of a triable issue in all motions for summary judgment. *Id*. At 940 (citations omitted).

To establish a prima facia cause of action for medical malpractice, a plaintiff must establish that: (1) the healthcare provider owed a duty to the patient; (2) the provider breached that duty; (3) the breach of duty was the proximate cause of, or a substantial factor in, bringing about the harm suffered by the patient; and (4) the damages suffered by the patient were a direct result of that harm. *Gregorio v. Zeluck*, 451 Pa. Super. 154, 158, 678 A.2d 810, *alloc. den.*, 546 Pa. 681, 686 A.2d 1311 (1996); *Flanagan v. Labe, M.D.*, 446 Pa. Super. 107, 111, 666 A.2d 333 (1995), *aff'd*, 547 Pa. 254, 690 A.2d 183 (1997); *Hoffman v. Brandywine Hospital*, 443 Pa. Super. 245, 250, 661 A.2d 397 (1995); *Montgomery v. South Philadelphia Medical Group, Inc.*, 441 Pa. Super. 146, 155, 656 A.2d 1385, *alloc. den.*, 542 Pa. 648, 666 A.2d 1057 (1995).

It has been well established that where the events and circumstances of a malpractice action are beyond the knowledge of the average lay person, expert testimony is required to establish the cause of action. *Chandler v. Cook*, 438 Pa. 447, 451, 265 A.2d 794 (1970); *Gregorio*, 451 Pa. Super. at 158, 678 A.2d at 810; *Hoffman v. Mogil, M.D.*, 445 Pa. Super. 252, 258, 665 A.2d 478 (1995), *alloc. den.*, 546 Pa. 666, 685 A.2d 546 (1996). The rules of evidence in Pennsylvania state:

> If scientific, technical or other specialized knowledge beyond that possessed by a lay person will assist the trier of fact to

> understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

Pa.R.E. 702.

Expert testimony is necessary to establish the prevailing standard of medical care accepted by the medical profession. *Strain v. Ferroni*, 405 Pa. Super. 349, 592 A.2d 698 (1991). Also, it is required to establish that the professional conduct of the defendant deviated from and fell below such a standard. *Gregorio*, 451 Pa. Super. at 158, 678 A.2d at 810; *Mogil*, 445 Pa. Super. at 258, 665 A.2d at 478. Lastly, expert testimony is required to establish that such deviation from the appropriate standard of care was a substantial factor in causing the plaintiff's alleged harm. *Gregorio*, 451 Pa. Super. at 158, 678 A.2d at 810; *Brandywine Hospital*, 443 Pa. Super. at 250, 661 A.2d at 183.

Disagreement among the parties as to proper medical treatment alone is not sufficient to support a claim for a constitutional violation. *Wareham v. Jeffes*, 564 A.2d 1314 (Pa. Cmwlth. 1989). A complaint that a healthcare professional has been negligent in the diagnosis or treatment of a medical condition does not state a valid claim of medical mistreatment rising to the level of cruel and unusual punishment under the U.S. Constitution, Amendment VIII. *Id.*, at 1323, *citing Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 292, 50 L.Ed.2d 251 (1976).

The law in Pennsylvania permits employees or agencies of the Commonwealth the defense of sovereign immunity as long as they were acting within the scope of their authority or employment. *See FN 1 and 2*. There are nine (9) exceptions to this defense. *See FN 3*. An employee that is acting within the scope of his employment is protected from the imposition of liability for intentional tort claims by sovereign immunity. *Holt v. Northwest Pennsylvania Training Partnership Consortium, Inc.*, 694 A.2d 1134, 1140 (Pa. Cmwlth. 1997). It is incumbent upon the plaintiff to show that his actions meet the exceptions to sovereign immunity. *Snyder v. Harmon*, 562 A.2d 307 (Pa. 1989).

In the present case, the Plaintiff alleges medical malpractice against the Defendants. Medical malpractice is an exception listed under 42 Pa.C.S. §8522(2). *See FN 3*. As stated above, the Plaintiff, however, is unable to sustain a claim in medical malpractice because he cannot provide expert testimony to show whether the Defendants' actions and/or inactions deviated from the standard of treatment accepted in the profession. This cannot be established by a layperson since such knowledge is beyond that of the average layperson's. Therefore, this Court must grant the Defendants' Joint Motion for Summary Judgment on this issue.

As to the Plaintiff's complaint that his U.S. Constitutional VIII Amendment rights were violated, this Court takes the position of the U.S.

Supreme Court in *Estelle*, 429 U.S. at 97. In *Estelle*, a prisoner brought suit against a State Correctional Department's medical director and two correctional officials claiming inadequate medical treatment for a lower back injury. The prisoner had received some medical care but disputed the adequacy of the care. The court held that a question of whether x-rays or additional diagnostic techniques or forms of treatment are indicated is a matter of medical judgment. It further held that the failure to provide certain treatment does not represent cruel and unusual punishment but at most is medical malpractice. As in the instant case, even if the Plaintiff could show medical malpractice, there would still be no violation of his Constitutional rights under the VIII Amendment.

As to the final issue in the case at bar, the Plaintiff's remaining allegations of negligence, malice, willful misconduct, negligent infliction of emotional distress, intentional infliction of emotional distress, stress, anxiety, distress, excessive force, assault, bodily harm, and pain and suffering do not fall under any exception listed in 42 Pa.C.S. §8522. *See FN 3*. The defense of sovereign immunity is applicable unless is it specifically waived by statute. *1 Pa.C.S. §2310*. In the present case, the Defendants claim that they were acting within their scope of employment and are, therefore, Commonwealth Defendants protected by sovereign immunity. *Holt*, 694 A.2d at 1140. This Court agrees with the Defendants that the Plaintiff has not alleged that the Defendants were not acting within their scope of employment at the time the alleged acts were committed and that the defense of sovereign immunity has not been specifically waived. Therefore, the Plaintiff's intentional tort claims are barred by sovereign immunity.

For the reasons set forth in this opinion, this Court is constrained to grant the Defendants' Joint Motion for Summary Judgment.

ORDER

AND NOW, to-wit, this 5th day of February, 2001, for the reasons set forth in the foregoing Opinion, it is hereby **ORDERED, ADJUDGED and DECREED** that Defendants' Joint Motion for Summary Judgment is **GRANTED.**

BY THE COURT:
/s/ **Shad Connelly, Judge**

COMMONWEALTH OF PENNSYLVANIA

v.

ROGER TODD VACTOR

CRIMINAL PROCEDURE / SUFFICIENCY OF EVIDENCE

The applicable standard of review with respect to a sufficiency of the evidence is whether, viewing all the evidence in the light most favorable to the Commonwealth as the verdict winner, and drawing all reasonable inferences therefrom, a jury could conclude that all the elements of the offense were established beyond a reasonable doubt. The facts and circumstances established by the Commonwealth need not be absolutely compatible with the defendant's innocence, but the question of any doubt is for the jury unless the evidence is so weak and inconclusive that as a matter of law no probability of fact can be drawn from the combined circumstances.

CRIMINAL PROCEDURE / ALIBI DEFENSE

The Commonwealth is not required to rebut every specific piece of evidence introduced under an alibi defense; the burden of the Commonwealth is to present evidence that the defendant was present at the scene of the crimes charged.

CRIMINAL PROCEDURE / SUFFICIENCY OF EVIDENCE

Evidence, when viewed in its totality, sufficiently established that Appellant committed the rape and murder of victim; Appellant himself was the person who filled in the details of his crimes for the police and corroborated the rape, murder, and tampering with evidence by offering specific details of his crimes.

CRIMINAL PROCEDURE / CREDIBILITY OF WITNESSES

When conflicts and discrepancies arise, it is within the province of the jury to determine the weight to be given to each witness' testimony and to believe all, part or, or none of the evidence as it deems appropriate; a witness's credibility is reserved exclusively for the jury and the appellate court cannot substitute its judgment for that of the finder of fact.

CRIMINAL PROCEDURE / WEIGHT OF EVIDENCE

A new trial is warranted on a challenge to the weight of the evidence only if the verdict is so contrary to the evidence as to shock one's sense of justice.

CRIMINAL PROCEDURE / CORPUS DELECTI RULE

Policy underlying the corpus delecti rule is to prevent the admission of a confession where no crime has been committed; the grounds on which the rule rests are the hasty and unguarded character which is often attached to confessions and admissions and the consequent danger of a confession where no crime has in fact been committed.

CRIMINAL PROCEDURE / CORPUS DELECTI RULE

An exception to the corpus delecti rule, known as the closely related crime exception, comes into play when an accused is charged with more

than one crime, and the accused makes a statement to all crimes charged, but the prosecution is only able to establish the corpus delecti of one of the crimes charged; under those circumstances, where the relationship between the crimes is sufficiently close so that the introduction of the statement will not violate the purpose underlying the corpus delecti rule, the statement of the accused will be admissible as to all the crimes charged.

CRIMINAL PROCEDURE / CORPUS DELECTI RULE

Proof of criminal act may be circumstantial and need only demonstrate that the loss or injury is consistent with the commission of a crime.

CRIMINAL PROCEDURE / DIMINISHED CAPACITY / VOLUNTARY INTOXICATION

In order to support a defense of voluntary intoxication, the evidence must establish that, at the time of the murder, the Appellant was overwhelmed by the effects of alcohol to the point of losing his faculties and sensibilities, resulting in an inability to form the specific intent to kill.

CRIMINAL PROCEDURE / DIMINISHED CAPACITY / VOLUNTARY INTOXICATION

A diminished capacity defense negates the specific intent requirement of first-degree murder only.

CRIMINAL PROCEDURE / SUPPRESSION OF EVIDENCE / INVOLUNTARY CONFESSION

The determination as to whether a knowing, voluntary and intelligent waiver was effected is to be made by viewing the totality of the circumstances; all attending circumstances surrounding the confession must be considered in this determination, including: the duration and methods of 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 resistance to suggestion or to undermine one's self-determination.

CRIMINAL PROCEDURE / SUPPRESSION OF EVIDENCE / INVOLUNTARY CONFESSION

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.

CRIMINAL PROCEDURE / SUPPRESSION OF EVIDENCE / MIRANDA WARNINGS

Miranda warnings are necessary only when the suspect is subject to custodial interrogation; the standard for determining whether an encounter with the police is deemed 'custodial' or police have initiated custodial interrogation is an objective one based on the totality of the circumstances, with due consideration given to the reasonable impression conveyed to the person interrogated rather than the strictly subjective view of the officers of the persons being seized.

CRIMINAL PROCEDURE / JURY INSTRUCTIONS

Jury instruction was more than adequate to cure any potential prejudice toward Appellant; there was absolutely no evidence that Appellant was prejudiced in any way by reference to "voice-stress analyzer" test.

CRIMINAL PROCEDURE / JURY INSTRUCTIONS

A trial court has broad discretion in phrasing its points for charge and is not bound to deliver instructions in a particular requested form; appellate examination of jury charge must be based on examination of it as a whole to determine whether it was fair or prejudicial.

CRIMINAL PROCEDURE / JURY SELECTION

The purpose of *voir dire* is not to provide a better basis upon which a defendant can exercise his peremptory challenges, but to ensure that none of the jurors have formed a fixed opinion as to the accused's guilt or innocence. The randomness made possible by computer selection is designed to protect appellant's constitutionality protected right to be tried by "a jury of his peers" rather than by a jury selected for some impermissible reason. If the random ordering that results interferes with optimal use of appellant's peremptory challenges, that is an unfortunate, but unavoidable consequence.

CRIMINAL PROCEDURE / INEFFECTIVE ASSISTANCE OF COUNSEL

To establish a claim of ineffective assistance of counsel, the appellant must demonstrate the following things and burden of proof for all three is on the appellant: (1) underlying claim of arguable merit; (2) counsel's action or inaction was not grounded in any reasonable basis to effectuate appellant's interest; and (3) there is a reasonable probability that the act or omission prejudiced appellant in such a way that the outcome of the trial would have been different.

CRIMINAL PROCEDURE / INEFFECTIVE ASSISTANCE OF COUNSEL

Counsel cannot be ineffective for failing to pursue a meritless claim.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION No. 1090 A & B of 2001

Appearances: Bradley H. Foulk, Esq. for the Commonwealth
Deanna L. Heasley, Esq. for the Appellant

MEMORANDUM OPINION

Connelly, J.

Procedural History

This matter comes before the court pursuant to Appellant Roger Todd Vactor's Final Statement of Matters Complained of On Appeal and this court's Pa.R.A.P. §1925(b) Order dated December 5, 2001.

Appellant was charged with six counts, including Criminal Homicide/ Murder. After a jury trial lasting from October 15, 2001 and ending

October 19, 2001, the jury convicted the Appellant of 2nd Degree Murder (Docket #1090A), and Counts 2, 4 and 5 (Docket #11090B). He was found not guilty at Count 1, and Count 3 was dismissed by this court. No pre-trial or post-sentence motions were filed. On November 20, 2001, the Appellant was sentenced to the following:

Count	Charge	Sentence
1 (1090A)	Criminal Homicide/Murder[1]	Life Imprisonment; No Parole;
2 (1090B)	Rape[2]	Merged with Count 1 (1090A);
4 (1090B)	Abuse of Corpse[3]	3 to 24 months incarceration;
5 (1090B)	Tampering With or Fabricating Physical Evidence[4]	3 to 24 months incarceration;

All of the sentences were consecutive to one another. No Post Sentence Motion or Motion to Suppress was filed. Appellant filed a timely Notice of Appeal on December 3, 2001. Appellant filed his Preliminary Statement of Matters Complained of On Appeal on December 19, 2001 and his Final Statement [hereinafter Appellant's Brief] on February 1, 2002.

Appellant alleges multiple errors in regard to the sufficiency and weight of the evidence, ineffective assistance of counsel, jury selection, and suppression. This court will first examine whether or not the evidence at this trial was sufficient. The applicable standard of review with respect to a sufficiency of the evidence argument is whether, viewing all the evidence in the light most favorable to the Commonwealth as the verdict winner, and drawing all reasonable inferences therefrom, a jury could conclude that all the elements of the offense were established beyond a reasonable doubt. *Commonwealth v. Fisher,* 769 A.2d 1116, 1122 (Pa. 2001) *citing Commonwealth v. Simmons,* 541 Pa. 211, 223, 662 A.2d 621, 627 (1995) and *Commonwealth v. Hagan,* 539 Pa. 609, 613, 654 A.2d 541, 543 (1995); See also *Commonwealth v. Gwynn,* 555 Pa. 86, 723 A.2d 143, 147 (1998); *Commonwealth v. Bryant,* 524 Pa. 564, 574 A.2d 590, 592 (1990).

"The facts and circumstances established by the Commonwealth 'need not be absolutely incompatible with [the] defendant's innocence, but the question of any doubt is for the jury unless the evidence is 'so weak and inconclusive that as a matter of law no probability of fact can be drawn from the combined circumstances.'" *Commonwealth v. Wright,* 722 A.2d 157, 161 (Pa.Super. 1998) *quoting Commonwealth v. Sullivan,* 472 Pa.

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[1] 18 P.S. §2501
[2] 18 P.S. §3121
[3] 18 P.S. §5510
[4] 18 P.S. §4910

129, 150, 371 A.2d 468, 478 (1977) *quoting Commonwealth v. Libonati*, 346 Pa. 504, 508, 31 A.2d 95, 97 (1943).

The crime of Murder of the Second Degree is defined as, "A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony." *18. P.S. §2502(b).* The crime of Rape is defined as:

> A person commits a felony of the first degree when he or she engages in sexual intercourse. . . (2) By threat of forcible compulsion that would prevent resistance by a person of reasonable resolution, and/or (3) Who is unconscious or where the person knows that the complainant is unaware that the sexual intercourse is occurring.

18 P.S. §3121.

"Abuse of Corpse" is defined as, "Except as authorized by law, a person who treats a corpse a way that he knows would outrage ordinary family sensibilities commits a misdemeanor of the second degree." *18 P.S. §*5510. Lastly, the crime of Tampering with or Fabricating Physical Evidence is defined as:

> A person commits a misdemeanor of the second degree if, believing that an official proceeding or investigation is pending or about to be instituted, he: (1) alters, destroys, conceals or removes any record, document or thing with intent to impair its veracity or availability in such proceeding or investigation.

18 P.S. §4910(1).

The Commonwealth's first witness was CeAnya Smith, sister to the victim, Natasha Smith. She testified that she had been living with the victim, the victim's two 5-year-old children, and her 9-year-old child in December of 2000. *N.T., Jury Trial - Day One of Three, 10/17/01, p. 38.* CeAnya worked at the Gertrude Barber Center from 11:00 p.m. to 9:00 a.m. *Id.* CeAnya had been married to the Appellant. *Id.* at 39, 61. She had moved in with Natasha after her and the Appellant had divorced in July 2000. *Id.* at 39, 62. She stated Natasha had not been dating anyone in December of 2000. *Id.* at 40. Natasha had been dating Daniel Jones up until June or July of 2000. *Id.* at 40, 60, 71. The father of the twins, Anwar McAdory, was in jail at the time of the murder. *Id.* at 59.

On Thursday, December 21, 2000, CeAnya left for work in her father's van around 10:45 p.m. *Id.* at 41, 53. She testified that her other sister, Crystal Smith (Robinson), had come over around 10:00 or 10:15 p.m. and was watching TV with Natasha when she left for work. *Id.* at 41-42. Crystal lives right around the corner from Natasha and CeAnya. *Id.* at 41. She stated that there was no drinking, alcohol, or drug use going on and Natasha did not use any drugs. *Id.* at 42. She stated the three children were sleeping before she left for work that evening, and that they usually

sleep in the bedroom with the door open. *Id.* at 42, 57-58. CeAnya stated she came home around 9:20 a.m., opened the locked door with a key, and went upstairs and her son and the twins stated they could not find Natasha. *Id.* at 43-44. Her sister-in-law, Zundra, called and stated Natasha's workplace, GECAC, had called and wondered why she had not arrived yet. *Id.* at 44. She went and got Crystal and then came back to search for Natasha. *Id.* at 45. CeAnya stated the apartment did not look any different than when she had left for work the night before. *Id.* at 45, 56, 59.

Crystal and Natasha looked in every room and were on their way to the basement. *Id.* at 46. CeAnya then noticed footprints from the back door going all the way over to the abandoned house next door. *Id.* By that time, her brother, Dwight Smith, and Zundra had arrived. *Id.* at 47. As CeAnya was following Zundra down the backstairs to the basement, Dwight came running and shouting, "I found her, I found her!" *Id.* at 47-48. CeAnya then went over to the house next door and bent down and looked through the basement window. *Id.* at 48-50. She saw Natasha's naked body lying with her head lying right near the window area and her legs out. *Id.* at 50. She further testified that Natasha usually wore pajamas to bed, but was still dressed in her work clothes when CeAnya left. *Id.* at 50, 53. After discovering Natasha's body, CeAnya ran upstairs and took the phone from Crystal, who was talking to their mother, Ceola Smith. *Id.* at 51. She stated the Appellant had been over to their apartment "quite a few times" and that the Appellant was familiar with the layout of the basement. *Id.* She stated that the Appellant had gained entry through the basement window near the beginning of 2000. *Id.* at 52. She further stated she did not remember the Appellant ever cutting himself or bleeding on Natasha's pajamas. *Id.*

CeAnya had filed for a PFA petition against the Appellant in March 2000, alleging that the Appellant had threatened to kill her, choke her, and shoot her. *Id.* at 63-64. It was denied for her failure to appear. *Id.* at 64. She filed a second PFA petition against the Appellant on March 27, 2000, alleging that he grabbed her by the neck and raped her. *Id.* at 65-67. This second petition was also vacated. *Id.* CeAnya field a third PFA petition in October 2000 alleging that the Appellant had punched her and covered her face so she couldn't breathe. *Id.* at 68. This third petition was also denied for insufficient grounds. *Id.* at 69. CeAnya stated that she told the police she believed the Appellant killed Natasha because of "all the things he did to [her]." *Id.* She further testified that the Appellant had gotten "physical" with her before and would get "real angry" if she ever struck him. *Id.* at 70.

The Commonwealth's second witness, Crystal Smith (Robinson), corroborated her sister's story. On the night of December 21, 2000, at around 10:20 p.m., she walked over to CeAnya and Natasha's apartment so she could use the phone to call her Aunt Cassandra for a ride. *Id.* at 75-

76. She woke up CeAnya and CeAnya left for work around 10:45 p.m. *Id.* at 76. She testified that the three kids were in bed and Natasha was watching TV. *Id.* at 76-77. She stated no one was drinking or using drugs. *Id.* at 77. She stayed until "about almost 12:30" and then left because she got tired of waiting for her aunt to come pick her up, and Natasha said she was going to bed. *Id.* at 77-78. Crystal stood with Natasha outside for a five minutes, then walked home and was picked up by her aunt. *Id.* at 78.

The next day, at around 9:30 a.m., CeAnya woke her up and stated they could not find Natasha. *Id.* at 78-79. They went to the apartment and they searched every room. *Id.* at 79, 88. CeAnya and her went down to look for Natasha in the basement with her flashlight, then came back upstairs and removed the bar from the backdoor. *Id.* at 80-81. This metal bar goes across the back door that leads to the outside patio. *Id.* at 81. She observed footprints in the snow and stated it looked like someone had "just drug something over there" but could not see the direction in which the footprints went because of the sunshine. *Id.* at 81-82, 87. She went back in the apartment, ran upstairs, and told her brother Dwight. *Id.* at 82. CeAnya, Zundra, Dwight, and Crystal all went out in the backyard. *Id.* at 83. Crystal went to the right of the house, toward East Avenue. *Id.* at 84. She then went back in after searching and met CeAnya, and then heard Dwight screaming, "I found her!" *Id.* at 84-85. She eventually went over to the abandoned house and looked in the basement window and saw Natasha's naked body lying with her head closest to the wall. *Id.* at 86.

Dwight Smith, Natasha's older brother, was the third witness to testify. He stated on the morning of Friday, December 22, 2000, he was at work. *Id.* at 91. He called his wife and she informed him that Natasha could not be found. *Id.* at 91-92. He left work, went home and got Zundra, and went into Natasha's apartment from the front door. *Id.* at 92. He saw her purse still on the table in the front room, but noticed nothing unusual about the apartment. *Id.* at 93, 96. Dwight and Zundra went down the backstairs, removed the bar from the door and saw tracks in the snow, but first looked around the porch. *Id.* at 93-94, 97. He then followed the tracks over to the abandoned building next door and saw a board that was against a basement window, set off to the side. *Id.* at 94, 98. The board caught his attention because it was not covered with snow and the snow had been packed down in front of the window. *Id.* at 98-99. He looked in through the window and at first didn't see anything, but then saw Natasha's naked body. *Id.* at 94-95. He screamed and stated he had found her and told them to call 9-1-1. *Id.* at 95.

The Commonwealth's fourth witness, Victoria Taylor, not only put the Appellant near the scene of the crime, but also at the appropriate time. Victoria testified she met the Appellant in November 2000 through a mutual friend. *Id.* at 99-100. She lived in Millcreek, on Patio Drive, with her

daughter. *Id.* at 100. The Appellant and Victoria had a dating type of relationship and he had stayed at her house prior to the Appellant's crimes. *Id.* She testified that the Appellant called her on the night of December 21, 2000, and stated he would not be able to go out with her because he couldn't get a ride. *Id.* He then called her later on that night around 11:15 p.m., from Marty's Tavern on 10th and Parade Streets. *Id.* at 100-01. Appellant explained to her that he had gotten into an argument with his brother and asked her if she would come get him. *Id.* at 101. She told him she did not want to at first, because her daughter was sleeping, but she ultimately agreed she would because she was concerned with his "rather upset and very concerned" demeanor. *Id.* at 101-02. She told him she would be outside the bar and that she did not want to come in because her daughter was with her. *Id.* at 103. She got her daughter ready and left her house around 11:30 p.m. *Id.* at 103. She waited outside the bar for him for a few minutes, and then pulled around to Denny's ice cream store across the street. *Id.* The Appellant still did not come out, so she was going to leave, but decided to call him from a payphone at the BP station on 12th and Parade Streets. *Id.* A woman answered the phone at the tavern, and the Appellant told Victoria he would be right down. *Id.* at 104. Appellant was wearing a black-hooded sweatshirt, black and brown suede jacket with elbow patches, sweat pants, and sneakers. *Id.* at 115-16. She picked him up and Appellant stated to her that he "needed to go to his uncle's house" because he had called to borrow some money. *Id.* at 104. She was upset, but agreed. When they got to 26th and Parade Street, she asked Appellant where she was going and he told her to go over 26th Street. *Id.* She asked him again, and he directed her to turn onto East Avenue, and then over 25th Street. *Id.* at 104-05. During the drive over 26th Street, they passed the victim's apartment. *Id.* She pulled over onto the north side of the street, four or five houses off of East Avenue, upon which the Appellant directed her to pull over to a house with Christmas icicle lights, stating to her that this was his uncle's house. *Id.* at 106. Appellant got out of the car and stated he would be right back. *Id.* Victoria testified at this time it was around 12:15 or 12:20 a.m. *Id.* at 113. He then went behind her car and went up a driveway on the south side of the street and Victoria lost sight of him. *Id.* at 106-07. She never saw him enter the house. *Id.* at 107. She waited about 15 minutes and then left. *Id.*

On Friday, December 22, 2000, Appellant called her around 4 or 5 o'clock in the afternoon from his mother's house on 23rd and German Street. *Id.* at 108. Appellant apologized and stated that he had fallen asleep at his uncle's house. *Id.* Appellant stated he had been at his sister Rachel's house hanging drywall and had cut his hand on some scrap metal. *Id.* Appellant further stated that he was waiting for his brother, Jeff, to come and bring a burn barrel so he could burn "newspapers and some clutter" that his mother had in the house. *Id.* at 108-09. Appellant then told her

that when he arrived home, Jeff told him that Natasha had died. *Id.* at 110. Appellant told Victoria that this was his ex-wife's sister. *Id.*

Appellant called her again later on that night around 11:30 p.m. *Id.* at 109-10. They were both watching the news, when Appellant stated, "they would never find the person that did it." *Id.* at 110. She stated she felt it wouldn't be hard because it was snowing out and there would be footprints, and the Appellant asked her what she was insinuating. *Id.* She told him she was not insinuating anything and the conversation ended. *Id.* Appellant called her the next morning on Saturday, December 23rd, 2000. *Id.* at 110. She testified the Appellant sounded "okay", but that Appellant had left a message on her answering machine that afternoon while she was out shopping with her mother. *Id.* at 111. He sounded "upset" on the machine, so she called him, but he was not home. *Id.* She had bought some gifts for the Appellant's children, and took them over the Appellant's mother's house and dropped them off. *Id.* The next morning, on the 24th, she called Appellant's mother, upon which she informed Victoria that the Appellant had been arrested for the murder of Natasha Smith. *Id.* Appellant, and his brother Jeff, tried contacting her the day prior to the preliminary hearing, but she did not accept any calls. *Id.* at 111-12.

Officer Jerome Skrypczak of the City of Erie Bureau of Police testified to his training, knowledge, and routine of fingerprint, hair, and fiber identification. *Id.* at 117-19, 129-30, 137-39, 145-58. He is the lieutenant in charge of the identification section whose primary job is to collect "whatever may interpret the scene." *Id.* at 133, 137. On Friday, December 22, 2000, he arrived at the crime scene at approximately 11:00 a.m. and met with the other two officers, Jim Rouse and Chris Lynch. *Id.* at 120, 133. He was directed to the body of Natasha Smith, whereupon he observed she was naked, with her head underneath the open, basement window. *Id.* at 120-21. Skrypczak also observed shoe prints in the snow behind the two houses and began to photograph them. *Id.* at 121. They obtained search warrants and photographed, videotaped, and collected evidence from both of the houses. *Id.* at 121-23, 136. They did fingerprint work primarily around the front door area in the living room of Natasha's apartment. *Id.* at 123. They did not recover any prints off the doorway, doorframe or doorknob. *Id.*

The following day, Saturday the 23rd, the residents noticed that there was a particular window that was ajar in the basement of Natasha's apartment building. *Id.* at 124. "It appeared that the window had been forced open because there was some fresh wood showing around the window frame that hadn't been painted, there was some fresh wood behind, like a piece of wood had been chipped off." *Id.* Officer Metzger attempted to collect some fingerprints off the clothes dryer directly below the window, laundry soap, and a metal Christmas tree stand. *Id.* They recovered some

latent prints on a metal pipe near the dryer and the box of laundry soap. *Id.* at 140. They further processed fingerprints all the way up the hallway including the walls, woodwork and doorframes, and window frames. *Id.* at 124-25, 141-42.

Officer Skrypczak described the victim's room as "messy" and there were "clothes and things all over the floor." *Id.* at 129. He found a pair of the victim's plaid pajamas "just near the foot of the bed." *Id.* at 130. They also collected the victim's bed sheet, which were "gathered up onto the bed like they had been moved in some manner." *Id.* They found hairs, fibers and lint in numerous locations including the basement of the abandoned house. *Id.* at 144-45. In regard to prints on the victim's body, Officer Skrypczak testified that they were not able to get any lifts. *Id.* at 150. However, they did recover eight identifiable fingerprints. *Id.* at 142. They collected approximately 80 items, all of which were collected, tagged, and sent to the Pennsylvania State Police Lab to examine for blood, hair, fibers or other items of identification. *Id.* at 130-31, 142, 153. Lastly, on December 24, 2000, Officer Metzger collected ashes and parts of a burnt sneaker from the rear yard at 2222 German Street, the Appellant's home address. *Id.* at 132.

The Commonwealth's sixth witness was William D. Wagner, a corporal in the Pennsylvania State Police, who was in charge of examining the latent prints recovered at the crime scene. *Id.* at 159. He testified that he received "several latent fingerprint impressions and postmortem fingerprints of the victim Natasha Smith and the fingerprint cards of [the Appellant]", ten in all. *Id.* at 160. He analyzed the latent prints to "determine if there [was] enough information, characteristics present in [the] latent print to positively identify it." *Id.* at 161. He stated that some of the prints that were submitted were palm print impressions and he only had the Appellant's fingerprints so he wasn't able to identify any of the prints. *Id.* He further testified that when it is very cold and you are not perspiring, "you are not going to leave a whole lot of residue behind." *Id.* at 162. Lastly, he stated that the fact that the Appellant's prints were not identified at the victim's residence does not eliminate him from being in that house at any particular time. *Id.*

The testimony of Bruce Tackett, forensic scientist II at the Pennsylvania State Police Crime Laboratory, followed. He received the 80 or so collected items, and examined the clothing and bedding items collected from the crime scene for the presence of bloodstains, semen stains, and hairs or fibers. *Id.* at 168. He stated, "Usually the only thing I can state is that the bloodstain was deposited since the last time an object was laundered or clean." *Id.* He testified that he found bloodstains on the top portion of a pair of pajamas that he received from Lieutenant Skrypczak. *Id.* at 171. They were located on the left front pocket, on the right shoulder area and on the back of the left upper sleeve. *Id.* Secondly, there were bloodstains

found on the comforter from a futon in the victim's apartment. *Id.* at 173. Finally, a bloodstain was identified on a piece of the cover of a mattress collected from the foot of the mattress. *Id.* He then sent the bloodstains to the Greensburg DNA laboratory for the Pennsylvania State Police. *Id.*

The blood sample from the Appellant matched the DNA from bloodstain from the pajama top. *Id.* at 174. Further, Tackett testified:

> Of the samples that I examined, there were approximately five items that had bloodstains that either I could identify as bloodstains or consistent with human bloodstains. Of those, I sent them three of them for DNA testing. Of the three that I sent for DNA testing, two of them came back and matched the DNA from [the Appellant]. The third one came back and indicated that it was a mixture of blood from two different people. Natasha Smith was included in that as well as [the Appellant]. . .The comforter stains, the stain that I sent from the comforter was a mixture of the two people. The bloodstain that I sent from the left sleeve of the pajama top matched [the Appellant], and the bloodstain that I sent from the mattress cover at the foot of the bed from the victim also matched [the Appellant].

Id. at 177-78.

Asked about whether or not he could tell the jury that the Appellant's blood was deposited on December 21st or 22nd of 2000, Tackett responded, "No, I cannot. All I can state is that sometime before I received them in the laboratory and after they were laundered the last time the blood was deposited, but I don't know exactly when." *Id.* at 180. He further testified:

> [I]t's not likely that [the blood] came from another piece of fabric, say, that had liquid blood on it. The shape and distribution of the bloodstains are more indicative of having come from - - coming in contact with a bloody object but not another piece of fabric.

Id. at 181.

Tackett testified that he did not detect any pubic hairs or head hairs of the Appellant on the victim's body, or on the top sheet of the bed. *Id.* at 183-84. Nor did he detect any of the victim's hair on the Appellant's suspected clothing. *Id.* at 185. He also did not detect any seminal material on the vaginal and rectal swabs taken of the victim. *Id.* at 186. He noted that there was a semen stain present on a section of carpet that was cut from the victim's bedroom floor, but it did not match that of the Appellant. *Id.* at 187-88.

Mr. Tackett did state, however, "[A]nytime you have the laundering process it removes most of the hairs that may have been transferred." *Id.* at 184. Further, in response to questioning of whether or not he was concluding that the Appellant did not rape Natasha Smith, he answered:

> No, I am not concluding that at all. It's the lack of any findings leaves me in a situation where I have to refer to it as being inconclusive. I can't determine whether or not anything occurred so I can't state anything either way on that.

Id. at 191.

The Commonwealth's eighth witness was Dr. Eric Vey, a forensic pathologist serving ten counties including the Erie County Coroner's Office. Dr. Vey not only described the injuries caused by the Appellant, but also an approximate time of death and cause of death. Dr. Vey testified that he has performed close to 1,700 autopsies. *N.T., Jury Trial - Day Two of Three, 10/18/01, p. 6.* He performed the autopsy on Natasha Smith on December 22, 2000, commencing at approximately 5:25 p.m. *Id.* at 8. He performed an external vaginal and rectal examination. *Id.* at 9. There were also no drugs or alcohol found in the blood of Natasha Smith. *Id.* at 12. He testified that there were external and internal injuries to Natasha's head. *Id.* at 13. The internal injuries to the head consisted of a half-dozen hemorrhages to the soft tissues of the scalp. *Id.* at 13-14. They were deep soft tissue bruises consistent with blunt force trauma. *Id.* at 14. Dr. Vey also stated, within a reasonable degree of medical certainty, that the cause of death of Natasha Smith was determined to be due to asphyxiation due to strangulation. *Id.* He further stated, "In this case the distribution and configuration of the external injuries to the lower face and neck were consistent with manual strangulation." *Id.* at 15. Dr. Vey described, in detail, the multiple number of internal and external injuries consistent with manual strangulation. *Id.* at 15-17.

Dr. Vey subsequently described, in great detail, the numerous contusions found on the victim's neck and surrounding areas. *Id.* at 20-25. Further, he testified that the injuries sustained by Natasha Smith were consistent with two or more episodes of strangulation, but he could not state how far apart they were. *Id.* at 26-27. He further testified that the injuries were consistent with someone picking someone up by their neck. *Id.* at 26. Regarding the lack of external injuries to the victim's vagina and anus, Dr. Vey opined:

> In this particular instance, however, I think it's worth bearing in mind and needs to be recognized for the jurors that the absence of injuries to the genitalia does not necessarily rule out the absence of a sexual assault. On the other hand, it doesn't rule it in either.

Id. at 34.

Finally, regarding the time of Natasha's death, Dr. Vey explained the various processes used to determine time of death, including a standard deviation of plus or minus 20 hours. *Id.* at 29-32. He gave a time frame of 11 hours, plus or minus 20 hours, from 11:30 p.m. on December 22, 2000. *Id.* at 32-33, 36.

The final witness for the Commonwealth was Lieutenant Joseph Emerick of the Criminal Investigation Division of the City of Erie Bureau of Police. He testified that he was called to the crime scene on Friday, December 22, 2000, at approximately 12:00 noon, whereupon he observed the naked corpse of Natasha Smith lying in the basement of the abandoned house. *Id.* at 37-38. He further corroborated the testimony of CeAnya Smith, Crystal Smith (Robinson), and Dwight Smith regarding the position of the victim's naked body in the basement of the abandoned house and the locking bar on the back door. *Id.* at 38-40. He also corroborated the testimony of Officer Skrypczak regarding the window in the basement of Natasha Smith's apartment complex and the pajamas found in her bedroom. *Id.* at 40, 42. He further stated that the lock on the door at the top of the landing that leads into the kitchen of Natasha Smith's apartment was inoperable. *Id.* at 41.

He stated the initial suspects were the Appellant, Daniel Jones, and Anwar McAdory. *Id.* at 42. McAdory was eliminated as a suspect because he was incarcerated at Western Penitentiary at the time of the incident. *Id.* at 42-43. Mr. Jones was also cooperative, his statements verified, and was therefore eliminated as a suspect. *Id.* at 43. Lt. Emerick called the Appellant's residence and talked to Jeffrey Vactor who told him that the Appellant was sleeping and that he'd go wake him up. *Id.* at 45. He talked to the Appellant and asked him if he could come down and talk to them about the death of Natasha. They agreed to meet at the police station at 6:30 p.m. *Id.* at 45, 81. The Appellant arrived at the police station at 6:30 p.m. and was not put under arrest. *Id.* at 45. Emerick stated, "[W]e were interested in what he knew about Natasha Smith and his whereabouts on the 21st and 22nd, what he had done." *Id.*

They questioned the Appellant in the interview room at the police station and Emerick testified, "It's a fairly large room." *Id.* at 47. There were two other officers in the room and a video camera was also present. *Id.* Approximately 30 to 45 minutes into speaking with the Appellant, they asked him if they could do a videotape of the interview "and he said sure." *Id.* at 48. Emerick testified that they went over the Miranda rights waiver with the Appellant prior to them turning on the camera. *Id.* at 48-49. Further, the Appellant signed and initialed next to the questions, "Do you understand these rights that I explained to you?" and "Having these rights in mind, do you wish to talk to us?" *Id.* at 49. The date was Saturday, December 23, 2000, 7:28 p.m. *Id.* Appellant was still not under arrest at this time and he was free to leave. *Id.* Appellant had also told Emerick that he told his ride down to the station to leave because he would "probably be there for awhile." *Id.* at 50.

Emerick testified that the Appellant's story about what he did on Thursday, December 21, 2000, changed a few times. Appellant first stated he had visited a few friends, a few bars and had walked home around

12:30 a.m. *Id.* It was later independently verified that the Appellant had been at two different bars on December 21, 2000. *Id.* at 83. Appellant stated he had been wearing a green outfit, green sweat pants, green top and jacket. *Id.* at 50-51. Emerick testified further to the differences between the Appellant's first interview and his later interview on the videotape. *Id.* at 52-53. Appellant never mentioned Victoria Taylor giving him a ride home, nor did the officers know who she was at this point in the interview. *Id.* at 51. Appellant had also never mentioned that he had gotten cut helping some friends move some metal or with a knife. *Id.* at 52. The Appellant further told them at some point, he had received a phone call from some female friends asking him to go out. *Id.* at 51. Emerick did not know about the burning of sneakers in the Appellant's backyard at this time, nor did the officers mention anything about "looking for a key in the purse of Natasha Smith inside the apartment" or her "pajamas being thrown to the floor." *Id.* at 53. This is crucial because the Appellant alleged during trial, and now in his appeal, that the officers "excessively pressured" him into making statements they would accept as "the truth." *Appellant's Brief, ¶ 7(a).*

Emerick testified further that they took a break about an hour to an hour and a half into the interview so they could attempt to locate some of the names that the Appellant mentioned he was with on the night of December 21, 2000. *N.T., Jury Trial - Day Two of Three, 10/18/01, p. 53-54.* During this time, the Appellant was still free to leave, not under arrest, and did not mention he was tired or wanted to leave. *Id.* at 54, 73. At some point after the break in the interview, Emerick stated to Appellant that he did not believe that he was telling the truth. *Id.* at 54. He described the Appellant as "nervous" and "there was a lot of tapping on the table." *Id.* He also noticed the change in the Appellant's answering. "Some questions were answered, others got nods or silence." *Id.* at 55. Emerick then testified to the Appellant's "second" version of events, or "second" interview.

Appellant admitted he went to the victim's house and that he had been driven there by Victoria Taylor. *Id.* at 67. He further stated he had gotten into Natasha Smith's residence through the basement window. *Id.* at 68. Emerick then testified to what the Appellant told him happened that night:

> He went into Natasha's bedroom where she was sleeping, startled her. She woke up. Told him to get out of there. A struggle ensued in there where a knife fell out of his coat pocket. He ended up getting cut on one of his fingers with that knife. He placed the knife back into his pocket. The confrontation then went out into the living room or another room, and Natasha started screaming more. She slapped [the Appellant]. He got upset. And at some point he grabbed her and held her up against the wall, was choking her. She was struggling, screaming. [The

> Appellant] was afraid the kids were going to wake up. At some point she fell on to the floor. He removed her clothing, was choking her some more, covering her mouth to keep her from making any noises. He then began having sexual intercourse. And during the intercourse at some point she made a gurgling sound, and he stopped at that point.

Id. at 68-69.

The Appellant mentioned that she was still alive during intercourse. *Id.* at 69. Emerick continued testifying to what the Appellant told him he did after he realized that Natasha had died:

> Her clothing that she was wearing, her underwear and her pajamas he threw in her bedroom. He then transported her from the second floor down the back stairway, which he had entered the apartment through, down to the door with the crossbar or bar that goes across it to keep it locked, goes outside into the snow. He then drug her through the snow by her wrists to the abandoned building next door, 936-938, removed the paneling that covered up the basement window of that building and then deposited her body into the basement. . .After that he went back into Natasha's apartment through the rear door, put the crossbar back in or the bar that holds it there, locked the cellar door, went up into the apartment, looked through her purse for a key, for a key to the apartment. He didn't believe that he ever found the key. He then left through the front door. . .He went home, he ended up going home. . .Washed the clothing that he was wearing and at some point burned the sneakers.

Id. at 69-70.

The Appellant also told Emerick he gave the knife to a girl named Kelly Loomis, "who was one of the girls that he did meet up with later that night. They went up to Wal-Mart together." *Id.* at 70. "[The Appellant] told her to hold on to it for him, and she did in fact do that. When we spoke with her the following day, she said that she was given this knife by [the Appellant.]" *Id.* Leigh Ann Griffin and Kelly Loomis further corroborated that they had gone to the Appellant's home on December 21, 2000, picked him up and went to Wal-Mart and a few other places. *Id.* at 84. Emerick went on to testify that they recovered the knife from Kelly Loomis. *Id.* at 70. The officers also noticed a small cut on the Appellant's right index finger during the interview. *Id.* at 70-71.

Also during the "second" interview, the Appellant stated he had been wearing a "black sweat suit with a hoodie on it, a brown suede, brown/black suede jacket." *Id.* at 71. This admission from the Appellant is further corroborated by Victoria Taylor's testimony as to the Appellant's clothing on December 21, 2000. Emerick recovered the Appellant's black sweat suit from his house at 2222 German because the Appellant told

them where the clothes were at. *Id.* He stated that were in "a grocery-type bag that you would get from a store, Country Fair or whatever type bag." *Id.* Further, the Appellant's brother, Jeffery, telephoned the police the day after Appellant was arrested and stated that the Appellant had worn his jacket to the interview and that the jacket the Appellant wore on December 21, 2000, was "still at the house." *Id.* at 72. All of Detective Emerick's testimony at trial was then corroborated by the Appellant's own words, in his videotaped interview, which was then played for the jury. *Id.* at 73-74. Appellant's admissions gave the police the details they needed to find further witnesses and evidence that helped corroborate the Appellant's own admissions.

Appellant was subsequently arrested after his admission to the officers and taken down to the booking station. *Id.* at 72, 74. They met with the Appellant the following day for the purpose of trying to track down Victoria Taylor. *Id.* at 75. They had the Appellant read over and sign another Miranda rights waiver. *Id.* at 75-76. Appellant then cooperated and told Detective Emerick where Victoria Taylor lived and provided a phone number for her. *Id.* at 76. A warrant was obtained for hair and blood samples of the Appellant and executed nine or ten days after the Appellant's arrest. *Id.* at 47.

The last testimony before the jury at trial was the testimony of the Appellant. Nothing could have been more damaging to the Appellant's plight, than his own testimony. The Appellant testified for a long time on the witness stand, describing in great detail the events of December 21, 2000. He testified very specifically to waking up, working out, catching the bus, calling Victoria Taylor, playing with her daughter, and to drinking numerous drinks at both Antler's and Marty's Tavern that evening. *Id.* at 106-115. He further testified to calling Victoria Taylor and asking her for a ride. *Id.* at 112-115. She came and picked him up and the Appellant testified to the following:

Defense Counsel:	Where were you - - where did it turn out that you were calling her to take you?
Appellant:	Home. Well, I was going to head out that way. But I - - she said, well, I am going to drop you off at home.
Defense Counsel:	And what happened?
Appellant:	That's where - - she - - I don't know.

Id. at 115.

It seems that the Appellant could remember everything about the night before right up to the point where Victoria Taylor dropped him off on East 25th Street behind Natasha Smith's apartment. Appellant went on to describe, once again in great detail, the events of December 22, 2000, including his voluntary choice to come down to the police station and talk to Detective Emerick. *Id.* at 115-129. Finally, when asked the following

question by his attorney at trial, the Appellant chose not to specifically deny the serious charges against him:

Defense Counsel: You obviously know the allegation against you. You have been sitting here the last several days, and you have heard all of the witnesses that have testified. And you know what it's alleged you did on Thursday, December 21st of 2000, at 940 ½ East 26th Street. There are some serious, serious allegations. With regard to those, Mr. Vactor, what can you tell jury (sic) about your involvement in the death of Natasha Smith?

Appellant: I feel like - - I don't know what to feel. These people say I did it, but I doubt it.

Id. at 129.

Appellant then went into a diatribe against Detective Emerick and how the officers played with a pen, confused him, and badgered him into foolishly admitting to a murder and rape he did not commit. *Id.* at 129-136. Lastly, the Appellant's own words were most damaging to him. The following exchange took place on direct examination:

Defense Counsel: Without having to go through all of that again, because the jury's already had a chance to see the videotape of what happened from that point forward, Mr. Vactor, but obviously there are two things here that are incredibly important. One is: Were you in the that house on December 21st of 2000, and did you strangle Natasha Smith?

Appellant: I don't know.

Defense Counsel: Did you on Thursday, December 21st, did you have sex with her or attempt to have sex with her?

Appellant: I don't know.

Id. at 137.

On cross-examination, the Appellant admitted that the pajamas with his bloodstains on them were the type of pajamas that Natasha Smith would typically wear. *N.T., Jury Trial - Day Three of Three, 10/19/01, p. 9.* Appellant even changed his testimony that he had not been in Natasha Smith's apartment since November by stating that he "could have stopped by" in December. *Id.* at 11. Regarding the testimony of Victoria Taylor, Appellant admitted that he did does not have an uncle that lives on 25th Street. *Id.* at 17. It became apparent on cross-examination that the Appellant was lying to the court and trying to avoid the questioning:

Mr. Daneri: You heard [Victoria Taylor]'s testimony that you said I want to go to my uncle's house on East 25th Street because I need to get some money, and I got to go there because he's been waiting for me after I called him. You heard her testimony, didn't you?

Appellant: Yes, that's what she said, but I didn't have to pick up no money because I had over $300 in my pockets.

Mr. Daneri: I understand. Now, after you got home that evening - - I'm sorry - - and you heard her say that you got out of her car on East 25th Street and you headed along the side of the house in the southerly direction across the street. You heard that, didn't you?

Appellant: Yeah, that's what she said.

Mr. Daneri: And if you would have kept walking - - just talking about geography. If you keep walking in the direction she said you were, you'd walk right into the backyard of the houses on East 26th Street, wouldn't you?

Appellant: I don't know. I'm not familiar with that area.

Id. at 17-18.

Appellant continued to lie and avoid the questioning on the witness stand, as evidenced by the record:

Mr. Daneri: So you filled in the police, and told them that's how you went up to the house? In detail you told them that, right?

Appellant: I said I went up through the yard. I didn't say I went up to the house.

Mr. Daneri: You cut through the yards. And you told the police your uncle story was a lie?

Appellant: Obvious it was because I didn't have an uncle that lived up there. When she said your uncle, I'm like - - I really didn't get into the details of it.

Mr. Daneri: On the videotape you said to the police, I lied to Vicki Taylor when I told her that my uncle lived on East 25th, right?

Appellant: I'm just saying that I know I didn't tell her that so obviously if I did, I must have lied to her, but I know I didn't - - she said I mentioned my uncle, and I know I don't have no uncle that lives up on 25th.

Id. at 44-45.

Appellant later admitted that he gave the police specific details of Natasha's strangulation:

Mr. Daneri: [The officers] didn't know where she was strangled, did they?

Appellant: No.

Mr. Daneri: You are not suggesting that the officers made this up, right?

Appellant: No, I'm not saying they made it up.

Id. at 52.

Regarding the rape of Natasha Smith, the Appellant further admitted in his confession that he did not ejaculate while he was raping Natasha Smith. *Id.* at 57. It became clear at trial that Appellant's new strategy was that the officers "coerced" him into accepting responsibility for a murder and rape he did not commit. Another exchange revealed the following:

Mr. Daneri: You heard the tape. And did you hear yourself breaking down, semi crying and sobbing at portions of that confession?

Appellant: Yeah.

Mr. Daneri: And that was - - again, you thought it would be a good thing to just put on some tears for them because you were going along with their story; is that correct?

Appellant: No. It hurt me that I had to accept this and say what I'm saying. And I don't want to say it, but I had no choice. Like he said, you either come clean now or they are going to burn you later.

Mr. Daneri: So you came clean is what you did?

Appellant: No, I didn't come clean. I had - - I'd rather face the music then than when he said when DNA and all that stuff come back, he said, going to burn you. They are going to hang you, Roger. He said, so if you want to work with us now, then tell us something.

Id. at 61-62.

In summary, the Appellant's testimony on cross-examination was so contradictory to his videotaped confession that it is apparent the Appellant lied under oath to the members of the jury and to this court. Regarding the evidence presented by the Appellant on behalf of his alibi defense, namely his own stumbling testimony, this court notes that the Commonwealth is not required to rebut every specific piece of evidence introduced under an alibi defense. The burden of the Commonwealth is to present evidence that the [Appellant] was present at the scene of the crimes charged. *Commonwealth v. Walker,* 243 Pa.Super. 388, 365 A.2d 1279, 1281 (1976). As such, the Commonwealth did so in this case, as

evidenced by the testimony at trial. It is clear from the record that the Appellant did have both the opportunity and the time to commit such offenses.

The Assistant District Attorney said it best in his closing remarks to the jury:

> And I'll touch briefly on this, but it's almost as important or if not maybe the most important is [the Appellant] gave a few answers to the most important question of the day. And you recall that yesterday: Did you strangle, did you murder Natasha Smith? And we all sat in this courtroom. I don't know how long it was. Maybe a minute, maybe a little less, but it was a long time in terms of waiting for that kind of answer. He sat on that witness stand, I submit, he appeared choked up, and he looked at all of us, and he didn't give an answer right away when asked did you do this crime. Now, what kind of person, as he said, who realized back on December 24th after that second Miranda rights waiver and he wanted a lawyer because this was all being made up on him, what kind of person now ten months away when asked that question, sitting in jail, gets to think about it all this time, he's had all this time to tell you people he didn't do it, when he's asked that question, he doesn't even answer? And then he finally says, I don't know.

N.T., Jury Trial - Day Three of Three, p. 129-130.

In light of the voluminous record in this matter, it is clear that the evidence, viewed in its totality, sufficiently establishes that the Appellant committed these acts against the victim in this case. The Appellant himself was the person who filled in the details of his crimes for the police and corroborated the rape, murder, and tampering with evidence by offering specific details of his crimes. It appears the Appellant was willing to accept responsibility for his actions at one point in time, but then retracted that decision. The Court noted in *Wright, supra,* noted, "[w]hen conflicts and discrepancies arise, it is within the province of the jury to determine the weight to be given to each [witness's] testimony and to believe all, part of or none of the evidence as [it] deem[s] appropriate." *Id. quoting Commonwealth v. Verdekal*, 351 Pa.Super. 412, 419-420, 506 A.2d 415, 419 (1986). See also *Simmons, supra*, 541 Pa. at 229, 662 A.2d at 630 (holding that the question of a witness's credibility is reserved exclusively for the jury and that the appellate court cannot substitute its judgment for that of the finder of fact); *Commonwealth v. Davis*, 518 Pa. 77, 82, 541 A.2d 315, 317 (1988). Accordingly, the jury as sole fact finder in this case resolved any conflicts in favor of the Commonwealth, and thus Appellant's argument as to the sufficiency of the evidence should be dismissed.

This opinion will be continued in the next issue of the Erie County Legal Journal, Vol. 85 No. 29

COMMONWEALTH OF PENNSYLVANIA

v.

ROGER TODD VACTOR

Continued from last week's edition of the Erie County Legal Journal, Vol. 85, No. 28

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION No. 1090 A & B of 2001

Appearances: Bradley H. Foulk, Esq. for the Commonwealth
Deanna L. Heasley, Esq. for the Appellant

MEMORANDUM OPINION

continued

Appellant also argues that the verdict is against the weight of the evidence. "A new trial is warranted on a challenge to the weight of the evidence only if the verdict is so contrary to the evidence as to shock one's sense of justice." *Wright, supra*, 722 A.2d at 160. Based on the argument and evidence as set forth above, it is the opinion of this court that the verdict is not so shocking as to shock's one sense of justice. The trial court, having heard the testimony, and observed the witnesses testify, is convinced there was credible evidence of sufficient weight and import to support the verdict in this case. Therefore the court concludes the interests of justice do not require the granting of a new trial. *Commonwealth v. Burns*, 765 A.2d 1144 (Pa.Super. 2000) *citing Commonwealth v. Murray*, 597 A.2d 111 (Pa.Super. 1991).

Appellant also argues in his appeal, "[T]he Rape conviction was based on a confession which was not sufficiently reliable to constitute proof beyond a reasonable doubt." *Appellant's Brief, ¶ 6(b).*

The policy underlying the corpus delecti rule is to prevent the admission of a confession where no crime has been committed: The grounds on which [the corpus delecti] rule rests are the hasty and unguarded character which is often attached to confessions and admissions and the consequent danger of a confession where no crime has in fact been committed. *Commonwealth v. Turza*, 340 Pa. 128, 16 A.2d 401, 404 (1940). An exception to the corpus delecti rule known as the closely related crime exception comes into play when an accused is charged with more than one crime, and the accused makes a statement to all the crimes charged, but the prosecution is only able to establish the corpus delecti of one of the crimes charged. Under those circumstances, where the relationship between the crimes is sufficiently close so that the introduction of the statement will not violate the purpose underlying the corpus delecti rule, the statement of the accused will be admissible as to all the crimes charged. *Commonwealth v. Bardo*, 551 Pa. 140, 146, 709 A.2d 871, 874 (1998) *citing*

Commonwealth v. McMullen, 545 Pa. 361, 372, 681 A.2d 717, 723 (1996); *Commonwealth v. Verticelli*, 550 Pa. 435, 706 A.2d 820 (1998).

In the case at bar, the Appellant's confession related to more than two crimes: Murder, Rape, and Tampering with physical evidence. Pursuant to the rule in *Verticelli, supra*, the Appellant's confession is admissible as to both crimes, for the relationship between the two crimes, 2nd Degree Murder and Rape, being the underlying felony, is close and the policy of the corpus delecti rule has not been violated. Further, the proof may be circumstantial and need only demonstrate that the loss or injury is consistent with the commission of a crime. *Commonwealth v. Steward*, 263 Pa.Super. 191, 196, 397 A.2d 812, 814 (1979). As such, there is sufficient circumstantial evidence in this case to establish that a rape did in fact occur. The fact that the victim's body was found naked in the basement of the house next door, and the fact that the victim's pajamas were found left behind in her apartment are both pieces of evidence that are corroborated by the Appellant's own admissions in his videotaped statement to the Detective Emerick. Lastly, as already shown above, there was sufficient evidence introduced at trial that the Appellant was in the victim's apartment on the night of December 21, 2000. Therefore, Appellant's assertion that the rape cannot be proven beyond a reasonable doubt is meritless. The jury, as the sole trier of fact, appropriately weighed the evidence, and their verdict should not be overturned on appeal.

Appellant further argues that the verdict was against the weight of the evidence because "the diminished capacity defense of alcohol intoxication was presented and proven." *Appellant's Brief*, ¶ *6(b)*. In order to support a defense of voluntary intoxication, the evidence must establish that, at the time of the murder, the Appellant was overwhelmed by the effects of alcohol to the point of losing his faculties and sensibilities, resulting in his inability to form the specific intent to kill. *Commonwealth v. Miller*, 541 Pa. 531, 559, 664 A.2d 1310, 1324 (1995) *citing Commonwealth v. Breakiron*, 524 Pa. 282, 295, 571 A.2d 1035, 1041, *cert. denied*, 498 U.S. 881, 111 S.Ct. 224, 112 L.Ed.2d 179 (1990).

As previously shown, the verdict was not against the weight of the evidence, so Appellant's claim is meritless. Further, even if a "diminished capacity" defense was proven, it only negates the specific intent requirement of 1st degree murder, not 2nd degree murder. In other words, it only reduces a 1st degree murder charge to a 3rd degree murder. *Commonwealth v. Bracey*, 787 A.2d 344, 356 (Pa. 2001) *citing Commonwealth v. McCullum*, 558 Pa. 590, 738 A.2d 1007, 1009 (1999). Therefore, Appellant's claim is wholly lacking in merit because a diminished capacity defense is not even relevant.

Further still, a diminished capacity defense was not necessarily proven at trial. Appellant told Detective Emerick that he had "five or six" Rum and Cokes at Antler's tavern and another half a dozen at Marty's. *Id.* at 92.

However, during the entire interview with Detective Emerick, the Appellant never told him that he was drunk on the night of December 21, 2000. *Id.* at 96. In fact, the Appellant never even mentioned he might have been drunk until he testified at trial. Also, as previously shown above, the Appellant's testimony conflicts with itself and flies in the face of common sense. Had he been so drunk that his faculties were seriously diminished, it is highly unlikely he would have been able to recall, in incredible detail, all the events of the night in question. Further still, Victoria Taylor, the witness who picked the Appellant up from the bar that night and dropped him off near the victim's residence, never stated that the Appellant was incoherent, or exhibited any signs of drunkenness. For all of these reasons, Appellant's argument should be dismissed.

Next, Appellant argues that his statement to the police:

> [S]hould have been suppressed because it was not not [sic] knowingly, intelligently, and voluntarily made, and the Miranda rights waiver was invalid. Further, under the totality of the circumstances, it becomes clear that the statement was induced by the interrogators (sic) comments that the Appellant "could go home" after he confessed, and that he "would not get the death penalty, or life in prison, if that was what he was worried about."

Appellant's Brief, ¶ 6(a).

First off, Appellant failed to file any pre-trial Motion to Suppress as stated in Pa.R.Crim.P. 578(3). Therefore, said issue is deemed waived under Pa.R.A.P. 302(a). Even if it were not waived, Appellant's argument fails.

Appellant first argues that his confession was not voluntarily, knowingly and intelligently given. "[T]he 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. Edwards*, 521 Pa. 134, 555 A.2d 818, 826 (1989) *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 Pennsylvania Supreme Court in *Commonwealth v. Bracey*, 501 Pa. 356, 461 A.2d 775 (1983) stated:

> 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 resistance to suggestion or to undermine one's self-determination.

Id., 461 A.2d at 779 *citing Commonwealth v. Kichline*, 468 Pa. 265, 279, 361 A.2d 282, 290 (1976).

The *Williams* Court further stated 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." *Id.*, 640 A.2d at 1259.

The record reveals that there was ample evidence produced at trial to conclude that the Appellant's confession was voluntarily given. First off, Appellant admitted, on cross-examination, that his statements were voluntary:

Mr. Daneri:	Okay. And you had nothing to hide. That's what you told them. You had nothing to hide, right?
Appellant:	I didn't mind talking to them.
Mr. Daneri:	So you were volunteering your time, and you were volunteering your statements to them, weren't you?
Appellant:	I was cooperating, exactly.
Mr. Daneri:	They weren't forcing you to be down there, and they weren't forcing you to speak; is that a fair statement?
Appellant:	Yeah, that's fair.
Mr. Daneri:	And these guys, the cops, they were fair guys to you, Mr. Kress, Mr. Emerick, Mr. McShane? They didn't raise their voice, correct?
Appellant:	No.

Id. at 31.

The record further reveals the following:

Mr. Daneri:	No one threatened you, correct?
Appellant:	No.
Mr. Daneri:	In fact - - and you heard the tape - - what they were doing constantly was saying, come on, just open up to us, just let it out. We know it's killing you. Just let it out, just tell us. We know, Roger. Just tell us. That's essentially what they kept on saying, don't make it bad on your family, the community. The Smiths want some closure. Come on, Roger, just tell us. All right? That's the tone of how it was going, wasn't it?
Appellant:	Yeah.

Id. at 32-33.

Based on all of the above, it is clear that the Appellant's confession was knowing, voluntarily and intelligent and at no time were his rights violated.

Secondly, Miranda warnings are necessary only when the suspect is subject to custodial interrogation. *Commonwealth v. Fisher*, 769 A.2d 1116 (Pa. 2001) *citing Commonwealth v. Gwynn, supra*, 723 A.2d at 149, *cert. denied*, 528 U.S. 969, 120 S.Ct. 410, 145 L.Ed.2d 320 (1999). There is no question in this case that the questioning by Detective Emerick and other police officers during the videotaped interview constituted "interrogation." The only remaining issue is whether or not the Appellant was "in custody."

In *Gwynn*, the Court noted:

> The standard for determining whether an encounter with the police is deemed 'custodial' or police have initiated custodial interrogation is an objective one based on the totality of the circumstances, with due consideration given to the reasonable impression conveyed to the person interrogated rather than the strictly subjective view of the officers of the persons beings seized.

Id. quoting Commonwealth v. Edmiston, 535 Pa. 210, 634 A.2d 1078, 1085 (1993).

As pointed out above in this opinion, the record clearly shows that the Appellant was not in custody when he gave his "confession" to the officers. First, the Appellant corroborated the testimony of Detective Emerick about voluntarily getting a ride down to the police station to talk with him. *Id.* at 122-124; *N.T., Jury Trial - Day Three of Three, 10/19/01, p.* 24. As the above-cited record clearly indicates, Appellant thereafter agreed to talk with the officers and subsequently agreed to have his statement videotaped. Secondly, and even more persuasive, is the fact that the Appellant had already read, signed and initialed the Miranda rights waiver form prior to his video-taped statement to the officers. *N.T., Jury Trial - Day Three of Three, 10/19/01, pp. 24*-29. The Appellant claimed his "bad eyes" accounting for him not fully reading and/or understanding his Miranda rights. *Id.* at 28. However, he not only signed the form, but also initialed next to each question and put an exclamation point next to each of them indicating his comprehension of his rights. *Id.* at 28-29. The Appellant's contention that he couldn't leave is meritless. The Appellant stated at trial, "I started to get up, leave, but I said, they probably think something of me so I just sat there." *N.T., Jury Trial - Day Two of Three, 10/18/01, p. 130.*

In summary, it is clear that the Appellant was not under arrest, or in custody, when he voluntarily chose to come down to the police station and talk to Detective Emerick. The officers did not threaten, scream, or yell at him. They got him a drink, took a break, and the Appellant was free to go if he so chose. At no time was the Appellant handcuffed or placed in a holding cell. He signed the Miranda waivers, further acknowledging

his right to leave, right to counsel, and right to remain silent. He further agreed to the voice-stress analyzer test (CVSA) and the videotaping of his statement. For all these reasons, Appellant's argument as to suppression of his confession should be dismissed as having no basis in law or fact.

Appellant next argues:

> It was error for the Court to refuse to excise the. . . reference to a "voice-stress-analyzer" test. . .and to require, as a condition of keeping it from the jury, that the defense not present the portion of the tape where the police were excessively pressuring [Appellant] to make statements the interrogators would accept as "the truth."

Appellant's Brief, ¶ 7(a).

Appellant further alleges, "The cautionary instruction given by the Court, following the video-taped statement reference to a "voice-stress analyzer" test that the Appellant had "failed", was insufficient to cure the prejudice caused by the reference." *Appellant's Brief, ¶ 7(c)*.

Appellant's assertion that another part of the videotape should have been played is completely meritless. The Appellant had the opportunity at trial to play any portion of the videotape he wanted. Defense counsel further stated the following to the court before the video was played:

> Forty-four minutes in length. Once that portion is played the portion of the tape that I would propose to play during defense portion of the case immediately precedes the [Appellant]'s confession where the police officers for 27 minutes basically do all of the talking and all of the questioning.

N.T., Jury Trial - Day Two of Three, 10/18/01, p. 63.

Appellant chose to show a portion of the videotape in which the officers are allegedly badgering him about the results of the voice-stress analyzer test. It was relevant to the argument the Appellant was trying to make in regard to the officers alleged badgering of the Appellant. The Commonwealth was entitled to have the jury hear the full context of what led up to the Appellant's statement and whether or not it was voluntary. The Appellant cannot now come back and say there was evidence tending to show his innocence in the tape that was never played.

Secondly, Appellant's argument that he was prejudiced by the reference to a "voice-stress-analyzer" is meritless. The court gave the following cautionary instruction:

> Ladies and gentlemen of the jury, before we go any further, let me give you a cautionary instruction. The voice stress analyzer test that you have heard about is an investigative tool that is used by some police

> departments. The results of a voice stress analyzer test have not been proven to be sufficiently reliable to be admitted in court as evidence. Therefore, I instruct you that you are not to consider the results of this test as evidence of the [Appellant]'s guilt in this case. The only reason that the test results were admitted into evidence was because they have some bearing in determining the voluntariness of the [Appellant]'s statement that he gave to the police after he underwent the test. And you may consider it for that purpose and that purpose alone.

Id. at 98.

This instruction was more than adequate to cure any potential prejudice toward the Appellant. Further, there is absolutely no evidence that the Appellant was prejudiced in any way by said reference. As previously set out, the evidence of the Appellant's guilt was overwhelming in this case. For all these reasons, Appellant's arguments should be dismissed.

Appellant next argues, "It was error for the Court not to instruct the jury on voluntary or involuntary manslaughter since the evidence supported those instructions." *Appellant's Brief, ¶ 7(b).*

It is well-known that a trial court has broad discretion in phrasing its points for charge and is not bound to deliver instructions in a particular requested form. See *Commonwealth v. Magwood,* 371 Pa.Super. 620, 538 A.2d 908 (1988); *Commonwealth v. Ohle,* 503 Pa. 566, 470 A.2d 61 (1983) (appellate examination of jury charge must be based on examination of it as a whole to determine whether it was fair or prejudicial). Secondly, as set forth above in the court's analysis, the evidence was more than sufficient to convict the Appellant of 2nd Degree Murder, in which an instruction of 18 P.S. §2503 or §2504 is irrelevant. Also, it is clear from the record that Appellant's trial counsel covered this issue. Defense counsel for the Appellant stated the following:

> As the Court just mentioned, with regard to involuntary manslaughter, it certainly does not appear as though it could reasonably be argued to the jury based upon any fair inferences from the evidence that [the Appellant] engaged in reckless or negligent conduct or otherwise committed this offense that would justify involuntary manslaughter. With regard to voluntary, while there is some evidence - - and this is the only reason I want to put it on the record - - that the victim acted in a provocative manner by slapping him and/or hitting him in the chest, my own belief is that, number one, that is not really consistent with the theory of the defense. And, number two, I don't believe that that

> is even enough evidence to justify a request for voluntary manslaughter. And those are the reasons why I am not asking for voluntary or involuntary manslaughter.

Id. at 78.

This court agreed with defense counsel's statement:

> I agree with you, considering the fact that [the Appellant] initiated the confrontation as well as the fact that those reactions I don't believe under the circumstances would have been sufficient to constitute the kind of provocation required.

Id.

Based on the evidence presented at trial, and all of the above, Appellant's assertion that this court erred in not charging the jury with voluntary and/or involuntary manslaughter must be dismissed.

Appellant next argues he was "deprived of his constitutional right to be tried by a jury of his peers, in that he was denied the opportunity to have one or more black jurors on his jury (no black jurors having been on his panel)." *Appellant's Brief, ¶ 8.*

Appellant's assertion is meritless and has no basis in fact or law. A jury pool consists of a random sampling of people from Erie County, Pennsylvania. Appellant now chooses to argue on appeal that he was somehow denied his right to a jury trial because there were no African-Americans on the jury. The Court in *Commonwealth v. McNamara,* 443 Pa.Super. 448, 461, 662 A.2d 9, 15 (1995) held:

> [T]he purpose of voir dire is not to provide a better basis upon which a defendant can exercise his peremptory challenges, but to ensure that none of the jurors has "formed a fixed opinion as to the accused's guilt or innocence." The randomness made possible by computer selection is designed to protect appellant's constitutionally protected right to be tried by "a jury of his peers" rather than by a jury selected for some impermissible reason. If the random ordering that results interferes with optimal use of appellant's peremptory challenges, that is an unfortunate, but unavoidable, consequence.

Id. (citations omitted).

Lastly, Appellant failed to preserve said issue and it is therefore waived, per Pa.R.A.P. 302(a). For these reasons, Appellant's assertion should be dismissed.

Appellant avers he was:

> deprived of a fair trial by juror misconduct in that - Appellant offers to prove - a juror read a newspaper

> in front of other jurors and the newspaper contained two pages on which there appeared prejudicial material about the [Appellant].

Appellant's Brief, ¶ 9.

There is absolutely no evidence that the jury pool was contaminated by any juror misconduct. This court finds it hard to believe that Appellant could have seen a potential juror reading a newspaper, when the Appellant was seated in the jury room for the entire questioning of the jury pool. The only other time the Appellant was present in the courtroom was when this court gave its short, three-minute introduction, in which it seems highly unlikely a juror was reading a newspaper. Lastly, it is the policy of this court that newspapers be removed from all potential jurors, especially in cases that might receive more attention from the media.

Further, even if the Appellant's assertion were true, the voir dire examination of the prospective jurors would have revealed any juror's prior knowledge regarding the Appellant's acts. Also, Appellant never raised this issue at any previous time, prior to, during, and after trial. Therefore, the issue is also deemed waived, per Pa.R.A.P. 302(a).

Still, the court stated to the jury pool at the beginning of voir dire:

> The Court: I would instruct you that those of you who are in the courtroom are not to discuss the case at any time, nor anything about the case. Secondly, after you come back out of the jury room from your questioning, please do not discuss with other jurors what was asked of you or what you may have answered or anything that may bear on the questions.

N.T., Jury Trial - Day 1 - Voir Dire, 10/16/01, p. 3.

The court further addressed the jury immediately following their selection:

> The Court: First and foremost, it is imperative that you not discuss this case with anyone, and that includes your family members, nor should you allow anyone to discuss the case with you. Secondly, please avoid anything that may appear in the news media pertaining to this case. If you should inadvertently see or hear something that pertains to the case, please immediately and totally disregard it. It's necessary that you decide this case based on the evidence and law presented in this courtroom during this trial.

N.T., Jury Trial - Day 1 - Voir Dire, pp. 129-30.

Appellant argues his trial counsel was ineffective for "failing to move for a Change of Venue and/or Venire, inasmuch as the Appellant was deprived of a fair trial by the jury having been tainted by pre-trial publicity." *Appellant's Brief, ¶ 6(c).*

To establish a claim of ineffective assistance of counsel the [Appellant] must demonstrate the following things and the burden of proof for all three is on the [Appellant]: (1) underlying claim of arguable merit; (2) counsel's action or inaction was not grounded in any reasonable basis to effectuate [Appellant]'s interest; and (3) there is a reasonable probability that the act or omission prejudiced [Appellant] in such a way that the outcome of the trial would have been different. *Commonwealth v. Lawson*, 762 A.2d 753 (Pa.Super. 2000).

First off, Appellant's claim is meritless. As previously stated, the Attorney for the Commonwealth and the Appellant with his counsel, went through a four hour voir dire examination of forty-seven prospective jurors. Both the Commonwealth and the Appellant were given their seven preemptory strikes and another eleven jurors were dismissed for cause. See *N.T., Jury Trial - Day 1 - Voir Dire, 10/16/01, pp. 124-25*. Further, a competent and fully prepared attorney represented Appellant throughout the jury selection process. Appellant never objected during this whole process to the inclusion of an alleged biased juror. It is clear, as the record shows below, that the jury members who convicted the Appellant did not have prior knowledge of the Appellant's acts prior to trial.

Next, even if Appellant's claim arguably was of reasonable merit, the Appellant has not shown that a change of venue would have resulted in a different trial outcome. Further, hindsight criticism of former counsel's actions alone are insufficient to establish ineffective acts or omissions of counsel. Appellant's former defense counsel showed no signs of ineffectiveness. Lastly, it is now well-settled law that counsel cannot be ineffective for failing to pursue a meritless claim. *Commonwealth v. Blassingale*, 581 A.2d 183 (Pa.Super. 1990); *Commonwealth v. Donnell*, 740 A.2d 198 (Pa. 1999).

There is not even a scintilla of evidence that the jury was tainted by pre-trial publicity. Nor is there any evidence that any biased juror made it onto the jury. As previously stated, the voir dire process weeds out jurors with bias, or potential bias. Further, both parties had access to the questionnaires of every potential juror. Appellant fails to point out any part of the record that revealed any juror bias. The record clearly indicates the specific questions asked of each juror that convicted the Appellant. The relevant parts, in regard to pre-trial publicity and/or knowledge, are detailed below. Regarding Ms. Verdecchia:

Mr. Lucas:	How are you. My name is Tim Lucas and I represent Mr. Vactor. The only question really that we have is that you indicated that you saw the headline in the paper?
Juror:	Yeah.
Mr. Lucas:	When would that have been?
Juror:	I don't even remember, I probably scanned the paper.

Mr. Lucas: Okay.
Juror: And I don't usually read much of it, but - -
Mr. Lucas: You pretty much already did indicate that you don't recall anything about the case. Do you recollect anything at all about the headline?
Juror: After reading it, it took me a couple minutes after reading the paper to even have it come back to me that I probably read a headline just saying something about, you know, the case - - nothing. I don't have any information.

N.T., Jury Trial, Day 1 - Voir Dire, 10/16/01, pp. 8-9.

Regarding Mr. Terrizzi, Jr.:

Mr. Daneri: Also, I note, Question 6, you indicated that you had heard or read something about this case?
Juror: I saw an advertisement on the TV on the news, it said there was a crime, but I didn't recollect anybody's name. I just knew that I saw it on TV.
Mr. Daneri: When was that?
Juror: Four, five, six months ago, I guess, eight months ago, wintertime.
Mr. Daneri: You don't remember any specifics about it or anything?
Juror: Just I saw a picture, I remember seeing a house, they were arresting somebody for an assault case, and that's about it.

N.T., Jury Trial - Day 1 - Voir Dire, 10/16/01, p. 13.

Further, defense counsel questioned him:

Mr. Lucas: I guess just two things, Mr. Terrizzi. We have learned over time that sometimes jurors, when they are - - if they are chosen and they listen to the evidence, that sometimes that that creates a recollection of things that they may have read or heard about the case. Are you fairly confident that regardless of whether you read or heard anything about it, that you could put that aside and judge Mr. - -
Juror: I don't read a lot of newspapers. I have not read anything about the case. The only thing I have seen is when I saw quick blurbs on the TV in the afternoon and evening news.

N.T., Jury Trial - Day 1 - Voir Dire, 10/16/01, pp. 14-15.

Regarding Mr. Sweeney:

Mr. Lucas: Mr. Sweeney, a few question that was asked about knowledge of the case or having heard about it from some source, media, TV, newspapers. Could you just elaborate for us a little bit how it was that you heard about it and what you heard?

Juror: Just on the newspapers this weekend, but not much about it.
Mr. Lucas: Okay. Can you tell us when you would have gotten information, do you think?
Juror: I couldn't tell you.
Mr. Lucas: Back when it happened?
Juror: Yeah, probably.
Mr. Lucas: Anything that you have read about the case since you have received notification that you were going to be serving as a juror during this?
Juror: No.
Mr. Lucas: Anything about what you may have heard that you think might cause you to not be able to be fair and impartial in this case?
Juror: No.

N.T., Jury Trial - Day 1 - Voir Dire, 10/16/01, pp. 22-23.

Regarding Ms. Steen:

Mr. Lucas: Okay. And then for whatever reason, I don't have the last page of the questionnaire, the other question was do you recollect having heard or read or seen something about this case?
Juror: I think it was either the news clip or it was the newspaper report, but it was just that one time.
Mr. Lucas: And is there - - can you remember anything about what it is that you heard?
Juror: I don't, I remember seeing a woman being interviewed.
Mr. Lucas: All right. Regardless of what it was that you may have heard and sometimes when people are picked as jurors, when they hear people testify, they remember, "okay, that's what I heard," do you think you can put that aside and judge the case if you were chosen as a juror based on the evidence that you hear in here?
Juror: Yes.

N.T., Jury Trial - Day 1 - Voir Dire, 10/16/01, pp. 44-45.

Regarding Ms. Rohm:

Mr. Lucas: First, you indicated that there was something that you could recall and heard about the case. Can you tell us what that was?
Juror: Just when it was on the TV and the newspapers, I read that. That was basically it.
Mr. Lucas: Okay. Do you remember when that would have been?
Juror: Right when it first happened.
Mr. Lucas: How about since that time, have you heard?
Juror: I haven't heard anything.

Mr. Lucas: And thinking back on what it was that you would have heard heard [sic] about the case, can you tell us what that was?

Juror: The reason why I paid attention to it because I was going over 26th Street that morning, and I saw all the yellow tape and the police cars and everything, so I listened to see what happened. I just heard about the rape and the murder.

Mr. Lucas: Okay. Anything else?

Juror: No. That would be it.

Mr. Lucas: Do you remember ever hearing anything about the persons who were charged or person who was charged?

Juror: No.

Mr. Lucas: Is there anything about that, about your recollection from that day and what it is that you heard that you believe might not allow you to be fair and impartial?

Juror: No.

Mr. Lucas: And you think you could sit and listen to the evidence and make a decision based on the evidence?

Juror: Hm-hmm.

N.T., Jury Trial - Day 1 - Voir Dire, 10/16/01, pp. 54-55.

Regarding Mr. Runser:

Mr. Daneri: Okay. On the individual question - - voir dire questionnaire, you indicated that prior as to today you had heard, read, or seen something about the case?

Juror: Just only on TV and in the newspapers and all, nothing from anybody connected to it that I would know of.

Mr. Daneri: Between the TV and newspapers or other media sources, was that recently or long ago?

Juror: Just about the time that it happened. I have no follow ups on it or anything that I recall.

N.T., Jury Trial - Day 1 - Voir Dire, 10/16/01, pp. 59-60.

Further examination by defense counsel revealed the following:

Mr. Lucas: Mr. Runser, can you give me a little bit better idea of what it exactly is that you do remember about the case though?

Juror: Just what had transpired. Just the fact that the woman was found in the basement of the house next-door and that's pretty much the basics that I remember.

Mr. Lucas: Nothing else besides the fact that the woman was found in the basement?

Juror: No.

Mr. Lucas: Anything about who may have done it?

Juror: Well, not the name or anything. I mean, you know, like I can retain that, but just some of the facts.

Mr. Lucas: What were some of the other facts that you can recollect about the - -

Juror: Supposedly that things happened in the house next door, and she was put into the basement in the house next-door through the basement window, that's pretty much what happened, everything I remember what was supposed to have happened.

N.T., Jury Trial - Day 1 - Voir Dire, 10/16/01, p. 61.

Regarding Ms. Pushinsky:

Mr. Daneri: Okay. Now, you indicated that you were or someone close to you had been the victim of a crime, but there's no explanation for that?

Juror: My brother-in-law's sister was murdered.

Mr. Daneri: How long ago was that?

Juror: Seventeen years ago.

Mr. Daneri: Okay. Was anyone ever arrested or charged with that?

Juror: Yes.

Mr. Daneri: Okay. Anything about the fact that someone - - it's somewhat of a relative was the victim in the case, that would affect your ability to be fair and impartial in this case?

Juror: No.

Mr. Daneri: Okay. You wouldn't be looking to or you wouldn't feel automatic sympathy for the victim in this particular case?

Juror: No.

Mr. Daneri: Okay. Now, also, as you probably know from reading the questionnaire, this case involves not only a rape charge, but also a homicide charge?

Juror: (Witness nods head).

Mr. Daneri: The nature of those particular charges, does that affect you in any way given your history and knowledge of having those things in your past?

Juror: No.

Mr. Daneri: Okay. And you have not heard, read, or seen anything about this case before today, is that correct?

Juror: No. I haven't.

N.T., Jury Trial - Day 1 - Voir Dire, 10/16/01, pp. 63-64.

Regarding Mr. Spyker:

Mr. Daneri: Okay. You also noted on the individual questionnaire that you had heard, read, or seen something about the case prior to trial today?

Juror: Yeah, when it first happened?
Mr. Daneri: Okay. What do you recall?
Juror: They found her body in the basement.
Mr. Daneri: Okay.
Juror: Naked, I think I remember, covered in plastic or something.
Mr. Daneri: Okay. Anything else?
Juror: No not really.

N.T., Jury Trial - Day 1 - Voir Dire, 10/16/01, p. 69.

Further examination revealed:

Mr. Lucas: Just one, Mr. Spyker. Whatever it was that you may have heard about the case, is it something that you think you can put aside and judge the case based on the evidence that you're going to hear?
Juror: Yeah, I mean, there wasn't many as far as facts go. They were talking about it on talk radio and I read about it in the paper, that's about all.
Mr. Lucas: Was there anything else that you remember about it in terms of who was charged with the case or - -
Juror: No.

N.T. Jury Trial - Day 1 - Voir Dire, 10/16/01, pp. 69-70.

Regarding Mr. Schaaf, Jr.:

Mr. Lucas: It does, you'd also indicated that you had either heard or read something about the case as well.
Juror: Just what was in the paper.
Mr. Lucas: When would that have been, if you can remember about?
Juror: I would say when it first came out in the paper. I don't know, it was a year ago. I don't exactly remember, but I remember reading about it.
Mr. Lucas: It's actually more critical than what it is you may remember now that you read or heard about the case. Can you remember anything at all about the case from what you read?
Juror: Just about where it happened.
Mr. Lucas: Which was?
Juror: On 26th Street.
Mr. Lucas: Okay. Anything else that you can recollect?
Juror: No.

N.T., Jury Trial - Day 1 - Voir Dire, 10/16/01, pp. 79-80.

Lastly, it is clear from the record that the Appellant was represented by a more than adequate defense counsel throughout all of the voir dire examinations of the prospective jurors. Defense counsel noted the following to the court after the voir dire examinations:

> [T]here were 28 people [that] indicated, as the Court

> noted before, positive responses to whether they heard about the case. Really we worked through all of those. In most instances, they had heard about it, but they couldn't even recollect what they heard.

N.T. Jury Trial - Day 1 - Voir Dire, 10/16/01, pp. 127-28.

Based on the record, and all of the above, Appellant's assertions regarding the voir dire process should be dismissed.

The Appellant also alleges that he was deprived of the effective assistance of counsel by counsel's failure "to file a Post-Sentencing Motion which attacked the sufficiency and weight of the evidence for the conviction against the Appellant." *Appellant's Brief, ¶ 6(b).*

As previously discussed, there was sufficient evidence to convict the Appellant of the crimes charged, including 2nd Degree Murder. Therefore, Appellant's claim lacks any merit. Further, he fails to point out a filing a post-verdict motion would have changed any outcome. For all of these reasons, Appellant's claim should be dismissed.

In conclusion, the Appellant received a full and fair trial and had previously been represented by a fully competent and prepared defense counsel. The Appellant voluntarily, knowingly, and intelligently gave a videotaped confession that the jury was entitled to view and weigh. The jury's verdict was overwhelmingly substantiated by the evidence and the Appellant's conviction for his heinous crimes should not be overturned on appeal.

BY THE COURT:
/s/ **Shad Connelly, Judge**

NANCY J. HUDACKY and
ANTHONY HUDACKY, her husband
v.
SONNY P. HARRIS

CIVIL PROCEDURES/SERVICE OF PROCESS/GOOD FAITH

Pennsylvania courts have held in numerous cases that a plaintiff failed to act in good faith when service was not properly effected within the required time limits due only to neglect or mistake

CIVIL PROCEDURES/SERVICE OF PROCESS/TIMELINESS

The Pennsylvania Supreme Court has now limited the application of the "equivalent period" doctrine, and held that "the process must be immediately and continually reissued until service is made."

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 13167-2001

Appearances: Lee S. Acquista, Esquire for the Plaintiff
Joanna K. Budde, Esquire for the Defendant

OPINION

Bozza, John A., J.

This matter is before the Court on the defendant Sonny Paris's Preliminary Objections to the plaintiffs' complaint.[1] The history of the case is as follows. The plaintiffs' cause of action arises out of a motor vehicle accident which occurred on October 2, 1999, in which plaintiff Nancy Hudacky allegedly suffered various injuries as a result of the defendant's vehicle striking the rear of her vehicle. The plaintiffs commenced this action on September 14, 2001 by filing a Praecipe for Writ of Summons, which was issued on the same date by the Prothonotary's office. However, the plaintiffs did not attempt to effectuate service on the defendant at that time. The two year statute of limitations expired on October 2, 2001, and the writ of summons expired on October 14, 2001. On December 5, 2001, plaintiffs filed a Praecipe to Re-Issue Writ of Summons, and delivered the writ to the Erie County Sheriff's Office, with instructions to serve the writ upon defendant at his last known address. The re-issued writ was served upon the defendant on December 13, 2001. The defendant filed Preliminary Objections on February 25, 2002, alleging that the plaintiffs failed to timely serve the writ upon the defendant and that the filing of the writ of summons was ineffective to toll the two year statute of limitations. The issue in this matter is whether the plaintiffs' filing of the writ of summons without any attempt at service of the writ constitutes a good faith effort to toll the statute of limitations. Based on

[1] The defendant is incorrectly identified in the suit as "Sonny P. Harris."

the record before the Court, it is apparent that the plaintiffs' actions were not in good faith and as such, the defendant's Preliminary Objections are sustained.

A plaintiff is required to make a good faith effort to notify a defendant of a commenced action. *Witherspoon v. City of Philadelphia*, 564 Pa. 388, 768 A.2d 1079 (2001)(citing *Lamp v. Heyman*, 469 Pa. 465, 366 A.2d 882 (1976)). The rule set forth in *Lamp* states that "a writ of summons shall remain effective to commence an action only if the plaintiff then refrains from a course of conduct which serves to stall in its tracks the legal machinery he has just set in motion." *Lamp*, 469 Pa. at 478. A plaintiff's good faith effort is assessed on a case-by-case basis, and while "there is no mechanical approach to apply to determine what constitutes a good faith effort," the plaintiffs bear the burden of showing that their efforts were reasonable. *Rosenberg v. Nicholson*, 408 Pa.Super. 502, 597 A.2d 145 (1991).

In the present case, the plaintiffs failed to effect service of the writ of summons on the defendant before the thirty (30) day time limit expired on the original writ of summons, and also failed to effect service before the two year statute of limitations expired on October 2, 2001. The plaintiffs also failed to re-issue the writ in a timely manner, waiting until December 5, 2001, almost two (2) months after the expiration of the original writ of summons. The plaintiffs have offered no explanation for the complete absence of service activity. In such circumstances, this Court cannot conclude that the plaintiffs acted in good faith.

The plaintiffs need not have committed an "overt attempt to delay" or have acted in bad faith in order for the rule set forth in *Lamp* to apply. *Rosenberg*, 408 Pa.Super. at 509-510. Pennsylvania courts have held in numerous cases that a plaintiff failed to act in good faith when service was not properly effected within the required time limits due only to neglect or mistake. *See, e.g. Green v. Vinglas*, 431 Pa.Super. 58, 635 A.2d 1070 (1993)(counsel failed to advance necessary costs for deputized service as required by local practice); *Ferrara v. Hoover*, 431 Pa.Super 407, 636 A.2d 1151 (1994)(counsel failed to take affirmative action to see that the writ of summons was served properly); *Schriver v. Mazziotti*, 432 Pa.Super. 276, 638 A.2d 224 (1994)(counsel failed to include instruction form for sheriff's office as required by local practice); *Witherspoon v. City of Philadelphia*, 564 Pa. 388, 768 A.2d 1079 (plaintiff failed to serve writ within time limit due to failure of process server to file proof of non-service). Further, the Pennsylvania Supreme Court has now limited the application of the "equivalent period" doctrine,[2] and held that "the process

[2] The "equivalent period" doctrine refers to a rule, developed through case law, which permits a plaintiff to "... 'continue process to keep his cause of action alive' by reissuing the writ within a period of time equivalent to the statute of limitations applicable to the cause of action." *Witherspoon*, 564 Pa. at 393-394.

must be immediately and continually reissued until service is made." *Witherspoon*, 546 Pa. at 398.

Even if the plaintiffs had alleged that their failure to effect service was due to neglect or mistake, it is unlikely that the plaintiffs' failure to serve the writ of summons would be excused, particularly in light of the Pennsylvania Supreme Court's holding in *Witherspoon*. Based on the record before the Court and upon review of controlling authority, the Hudacky's writ of summons did not effectively toll the two (2) year statute of limitations. The defendant's Preliminary Objections must be sustained and the plaintiffs' complaint dismissed with prejudice. An appropriate Order will follow.

Signed this 7th day of June, 2002.

ORDER

AND NOW, to-wit, this 7th day of June, 2002, upon consideration of the defendant's Preliminary Objections, and argument thereon, it is hereby **ORDERED, ADJUDGED and DECREED** that the defendant's Preliminary Objections are **SUSTAINED**. The plaintiffs' complaint is hereby dismissed with prejudice.

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

COMMONWEALTH OF PENNSYLVANIA

v.

CRAIG WARD

CRIMINAL PROCEDURE/SENTENCING

It is the practice of the judges of this court to impose consecutive rather than concurrent sentences for multiple offenses where one of the offenses is involuntary deviant sexual intercourse involving a minor victim. The affirmative duty rests with defense counsel to establish circumstances justifying concurrent sentencing. Where defense counsel does not demonstrate substantial legal or factual reasons to mitigate the sentence, a consecutive sentence is appropriate.

A challenge to the imposition of consecutive rather than concurrent sentences does not present a substantial question regarding the discretionary aspects of sentence.

CRIMINAL PROCEDURE/PCRA/EFFECTIVE ASSISTANCE OF COUNSEL

To prevail on a claim of ineffectiveness of counsel, a defendant must demonstrate (1) that the underlying claim is of arguable merit; (2) that counsel's course of conduct was without any reasonable basis designed to effectuate his client's interest; and (3) that he was prejudiced by counsel's ineffectiveness. The court finds that defense counsel was ineffective because of his failure to review records of hospitalization in a mental health unit approximately two years prior to sentencing and to use those records as grounds for mitigation of sentence or as the basis for a defense psychiatric examination. Defense counsel proffered no evidence to correlate the medical findings to defendant's conduct or to locate, interview and call character witnesses to support a defense expert.

CRIMINAL PROCEDURE/WITHDRAWAL OF PLEA

To withdraw a guilty plea after sentencing, the evidence must demonstrate manifest injustice which exists where the plea was involuntary or entered without knowledge of the charges. In light of the psychiatric evidence, the court finds the defendant did not fully understand the nature of his constitutional right to a jury trial and was unable to weigh the alternatives of trial versus entering a guilty plea. The court finds that the entry of the guilty plea rises to the level of manifest injustice under these circumstances. The court accordingly sets aside the guilty plea and vacates the sentence, reinstating in full all original charges and orders the defendant be committed for involuntary psychiatric treatment and examination.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA TRIAL COURT DIVISION NO. 1841 & 1842 OF 2001

APPEARANCES: Damon Hopkins, Esq., for the Commonwealth
Dennis V. Williams, Esq. for the Defendant

OPINION

Domitrovich, J., February 5, 2002

PROCEDURAL HISTORY

This case comes before the Court at the above numbers as the result of the District Attorney charging Defendant, Craig Tyrone Ward, with thirty-one sexually related offenses which arise from his course of conduct in engaging in involuntary deviate sexual intercourse with a fourteen year old juvenile while he acted as both a counselor and a night guard at the Harborcreek Youth Home. These offenses were graded as follows: seven Felony I, two Felony II, seven Felony III, thirteen Misdemeanor I, and two Misdemeanor II. These offenses of force and violence are more specifically defined on each of the charge sheets as: one Rage, Felony I; six Involuntary Deviate Sexual Intercourses, Felony I; one Aggravated Indecent Assault, Felony II; seven Institutional Sexual Assaults, Felony III; one Sexual Assault, Felony II; seven Corruption of Minors, Misdemeanor I; six Indecent Exposures, Misdemeanor I; and two Indecent Assaults, Misdemeanor II.

On October 31, 2001, the Defendant entered a plea to six of the thirty-one offenses charged. This plea agreement was made by defense counsel, Dennis V. Williams and Asst. D.A. Hopkins earlier at the time of his preliminary hearing. However, there was extensive discussion on the record at the time of his plea about the Defendant's withdrawal of said plea agreement. Ultimately, Defendant stated that he wanted to have the Court formally accept it. The negotiated plea required the Defendant to plead guilty to four counts of Involuntary Deviate Sexual Intercourse with a Person less than Sixteen Years of Age, 18 Pa. C.S. §3123, all graded as felony one charges and each requiring a mandatory minimum five year sentence. The agreement also required entry of guilty pleas to two misdemeanor one charges, which were the Corruption of Minors, 18 Pa. C.S. §6301, and Institutional Sexual Assault, 18 Pa. C.S. §3142.2. The District Attorney withdrew the remaining twenty-five (25) charges.

The Defendant was sentenced on December 10, 2001. Consistent with the evidence and the request of Asst. D.A. Damon Hopkins, this Court sentenced Mr. Ward consecutively of the four felony one charges and two misdemeanor one charges and incarcerated him for 21 ½ to 50 years.

On December 14, 2001, the Defendant had apparently discharged his counsel and retained new counsel, Anthony A. Logue, another criminal defense attorney. On December 14, 2001, Mr. Logue filed a Motion to Modify/Reconsider Sentence/Motion to Withdraw Guilty Plea and alleged various reasons at paragraphs 5(a) through (g) to permit the withdrawal of the guilty plea and then alleged at paragraphs 12(a) through (d) various reasons for the modification of the sentence.

On December 19, 2001, Attorney Williams filed a Motion to Amend Motion to Modify/Reconsider Sentence/Motion to Withdraw Guilty Plea.

This Motion contained many allegations at paragraphs 20(a) through (n) which will be dealt within this Opinion. Moreover, at Count II, Mr. Williams attempted to compare the Defendant's case to two unrelated prior sexual offense cases which are not comparable with the facts presented to this Court in this case. Moreover, the charges which were filed in each case by the District Attorney are far from comparable. Accordingly, no weight is given to this argument made by Mr. Williams. These three cases are all legally and factually distinguishable from one another.

On January 14, 2002, this Court heard legal arguments. At the conclusion of those arguments, Mr. Ward clearly indicated upon the questioning of Mr. Williams that he wished to withdraw his guilty plea.

Thereafter, on January 15, 2002, this Court entered an Order requiring a psychiatric examination to be performed by Booker T. Evans, M.D., regarding the Defendant's competency on October 31, 2001, his present competency and the presence of organic brain damage.

On January 16, 2002, this Court entered an Opinion indicating that it considered Mr. Ward's oral request on January 14, 2002, to be his Motion for the withdrawal of his guilty plea. The Court has done this even though it places the Court in a very difficult position of being required to set aside not only a guilty plea, but a previously imposed sentence which is supported by substantial precedent in this County as well as statutory law and case law.

On January 30, 2002, after the receipt and review of the psychiatric evaluation of Booker T. Evans, M.D., the final hearing was conducted which leads to the entry of the following Opinion and Order.

MEDICAL EVIDENCE

This Court recognizes that on December 10, 2001, the medical records of the Defendant concerning his hospitalization at St. Vincent Health Center in the Mental Health Unit from June 25, 1999, through July 16, 1999, were not physically available to the Court. The records have been ordered by the Probation Department on December 3, 2001. The records were apparently received by the Probation Department on December 27, 2001. Prior to the January 14, 2002, argument, Mr. Williams had not reviewed these records but wished to continue to speculate as to their content and their ultimate usefulness in reducing his client's sentence.

This Court had thoroughly reviewed the medical records of St. Vincent Health Center from June 25, 1999, through July 16, 1999. At the outset, it should be noted that while at St. Vincent, Mr. Ward underwent a radiology evaluation for structural abnormality of his brain which was done through an MRI procedure. That test was negative. Further, Mr. Ward underwent an electroencephalogram. Michael P. Duncombe, M.D., a board certified neurologist, indicated that the test was normal. On his discharge on July 16, 1999, Mr. Ward was without suicidal ideation, he was eating and sleeping well and had a good attitude. The record notes the following:

> He was smiling and in good spirits and there was nothing to gain in keeping him in the hospital any longer.

His final diagnosis was major depression, psychotic features. There is no indication that there has been any psychiatric follow-up by Mr. Ward since July 16, 1999. However, Booker T. Evans, M.D., in his evaluation indicates that Mr. Ward had some unspecified post-discharge treatment at Stairways as an outpatient during 1999.

In the entire medical record, there is only one reference to Mr. Ward's alleged diagnosis of organic brain syndrome. In a consultation with Michael P. Duncombe, M.D., on June 30, 1999, Dr. Duncombe notes the following:

> He (Mr. Ward) had a neuropsychological evaluation done, which showed discrepancies raising the question of organic brain syndrome.

Other than this passing notation, there is nothing in the St. Vincent medical records which would prove that Mr. Ward is, in fact, afflicted with organic brain syndrome.

Additionally, at the time of sentencing, Attorney Williams, Bishop Brock, and Mr. Ward stated that Mr. Ward was raped, manipulated sexually, manipulated spiritually, all of the same occurring within his home. Unfortunately, Mr. Williams offered no psychiatric/psychological evidence which advised this Court of the impact of the physical, sexual and spiritual attacks on Mr. Ward as a young boy which relates them to his current situation. In fact, other than the unsupported statements of Mr. Williams, Bishop Brock and Mr. Ward, there was no evidence of record at the time of sentencing which would permit this Court to consider Mr. Ward's alleged prior sexual abuse to mitigate his sentence. In *Com. v. Jones*, 418 Pa. Super. 93, 613 A.2d 587 (1992), the defendant retained a psychiatrist who testified that he was suffering from pedophilia as a result of various events which had occurred during his childhood and adolescence. The expert discussed the effect of the pedophilia on the defendant, as well as his prospects for rehabilitation. Such evidence is notably absent from the December 10, 2001, sentencing record. It is important to note that Mr. Williams did not petition the Court, at the time of the entry of the plea on October 31, 2001, to have a psychiatric evaluation performed on Mr. Ward. Such evaluations are routinely requested when issues of this nature are concerned. The Court does not believe that the taxpayers of Erie County should be paying for Mr. Ward's psychiatric evaluation where he is not proceeding through the criminal justice system with the status of informa pauperis. He is proceeding through the criminal justice system represented by privately retained legal counsel.

In summary, the medical records of St. Vincent Health Center for the hospitalization of June 25 through July 16, 1999, provide no mitigating

evidence to support Mr. Ward's contention that he should have a reduced sentence because of organic brain syndrome.

SENTENCING ON DECEMBER 10, 2001

At the time of sentencing, the negotiated plea bargain was thoroughly reviewed by Asst. D.A. Hopkins and Mr. Williams on the record. It was clear that the only victim was a 14 year old boy identified by the initials of JF. It was also clear that all charges at No. 1843 of 2001 had been nolle prossed by the District Attorney's Office on its own Motion. It was also clear that the involuntary deviate sexual intercourse charges each carried a five year mandatory minimum sentence.

Attorney Williams' remarks on the record in support of concurrent sentencing told this Court nothing new about Mr. Ward. Rather, Mr. Williams simply restated the content of the Pre-Sentence Investigation report in his own words, offering the Court no justification to sentence Mr. Ward concurrently when he knew, or should have known because of his more than twenty years of practice in the criminal law area in Erie County, Pennsylvania, that consecutive sentencing was the predominant practice for the judges of this Court regarding the offense of involuntary deviate sexual intercourse with a minor. However, he ignored his affirmative duty as defense counsel to advise the Court of some special or mitigating circumstances which would justify concurrent sentencing particularly where he knew that Asst. D.A. Hopkins would be requesting consecutive sentencing. In similar cases, this Court has received and considered legal memorandum in aid of sentencing from defense counsel. Considering the serious nature of the charges and the potential sentence facing Mr. Ward, Attorney Williams should have filed such a memorandum. He did not. The Court has also received, in other cases, letters from citizens who know the defendants and can attest to their character and offer possible reasons for a deviation from their otherwise good behavior. Again, Attorney Williams did not offer any supporting letters and only presented the testimony of only one character witness.

Asst. D.A. Hopkins' remarks regarding reasons set forth by Mr. Williams, Bishop Brock, and Mr. Ward for concurrent sentencing are particularly relevant. At page 24 of the Sentencing Record, Mr. Ward, in an attempt to justify his conduct, stated the following:

> And this young boy, which is not his fault and neither do I blame him, but he had a background and some how he picked up on the fact that I was having problems, and on so many occasions, he presented himself and this had happened.

Attorney Hopkins replied as follows:

> All you've heard so far from Mr. Ward and his attorney are excuses as to why that happened. And, in fact, you've even heard Mr. Ward that essentially this young man sought him out,

> and that it wasn't so much Mr. Ward's fault, but it was the young man's fault. That's absolutely, completely, and totally ridiculous.

With regard to the argument advanced by Mr. Williams, Bishop Brock and Mr. Ward regarding the allegations of rape, physical abuse and sexual abuse of Mr. Ward as a young child, Asst. D.A. Hopkins stated the following on pages 25 and 26 of the Sentencing Record:

> The fact that he was sexually assaulted as a juvenile doesn't surprise me and shouldn't surprise this Court, but the fact of the matter is he took himself as a victim as a juvenile and he turned around and victimized another young individual. And I don't see any reason to reward him because he comes forward now and says, "I was sexually assaulted. That's why I am sexually assaulting somebody else." Of all the people in the world who should have known better and should have sought help, should have done anything they could but to assault and ruin another child's life, it should have been this man because he had his life ruined that way. But he didn't. Instead, he got pleasure from having oral sex with a fourteen year old boy.

The Court agrees with Asst. D.A. Hopkins' analysis of the argument presented by Attorney Williams at the time of sentencing which is totally unsupported by any independent evidence.

Mr. Hopkins also addressed the plea bargain at sentencing and stated the following at page 26 of the sentencing record:

> There are four counts; each count carries a mandatory minimum five years incarceration. If this Court gives him concurrent time as is asked by his attorney, you will be discounting what he did. He should get some consideration for his willingness to accept what he did and not force this fourteen year old through a trial. The Commonwealth dropped numerous charges at the preliminary hearing for that very reason. Numerous charges. I believe if I went back and counted all of them, we had enough IDSIs with Mr. Ward that we could have locked him up for fifty to a hundred years with mandatory minimums alone. We did not because he was willing to take responsibility for what he did. We dropped those, we kept it at the four that is before the Court.
>
> **I would ask the Court to impose them consecutively. Please do not discount what he did and give him a one for four deal.** (Emphasis added)

Mr. Ward received the benefit of a good plea bargain. A total of sixteen felonies and fifteen misdemeanors were reduced to four felonies and two misdemeanors. No agreement was reached regarding a proposed sentence

in this case. At allegation #40 of the December 19, 2001, Motion, Mr. Williams notes the following:

> That, the Commonwealth of Pennsylvania was not willing to negotiate a plea arrangement with the defendant which avoided mandatory minimums.

Then, at allegation #42, Mr. Williams expresses the expectations of Mr. Ward which Mr. Williams admits was based upon his advice to his client:

> That the defendant expected to receive, although he was advised that the court was not bound by his beliefs that he would receive a five to ten year sentence.

Apparently, Mr. Williams was looking for a volume discount which was not consistent with Asst. D.A. Hopkins request and does not present a substantial question for appeal. *Com v. Rickabaugh*, 706 A.2d 826, 847 (Pa. Super. 1997). *Com. v. Hoag*, 445 Pa. Super. 455, 665 A.2d 1212, 1214 (1995) states the following:

> in imposing sentence the court has discretion to determine whether to make it concurrent with or consecutive to other sentences then being imposed or other sentences previously imposed." *Com v. Graham*, ___ Pa. ___, ___, 661 A.2d 1367, 1373 (1995) (citation omitted). A challenge to the court's imposing consecutive rather than concurrent sentences, however, does not present a substantial question regarding the discretionary aspects of sentence. *Gaddis*, 432 Pa. Super. At 536, 639 A.2d at 469-470. We see no reason why Hoag should be afforded a "volume discount" for his crimes by having all sentences run concurrently.

In *Com. v. Hoag*, *supra*, at 1213-1214, the Superior Court in affirming a consecutive sentence imposed upon a defendant commented as follows regarding the plea bargain and sentence received by the defendant:

> "An allegation that a sentencing court 'failed to consider' or 'did not adequately consider' certain factors does not raise a substantial question that the sentence was inappropriate. Such a challenge goes to the weight accorded the evidence and will not be considered absent extraordinary circumstances. *Com. v. Urrutia*, 439 Pa. Super. 227, 653 A.2d 706, 710 (1995). Claiming that a sentence is too severe because the others imposed were so slight is a novel argument, but it hardly qualifies as an extraordinary circumstance meriting our review. Just because fortune smiled once upon appellant does not mean that he now had a vested interest in forevermore being the recipient of the Commonwealth's munificence…

Accordingly, this Court finds that that it was within its sound discretion to sentence Mr. Ward consecutively and not give him a volume discount. The sentence was appropriate under the Sentencing Code as a whole. It was well within the statutory limits permitted. The Court considered all factors presented and supported by competent evidence by the District Attorney and Mr. Williams at the time of sentencing.

The most hollow argument made by Mr. Williams throughout these proceedings came at page 19 of the Sentencing Record where he argued that Mr. Ward was not a danger to this community. At this particular juncture of the case, Mr. Ward voluntarily admitted under the guidance of Attorney Williams that he was a serious sexual offender. He had been charged with sixteen different felonies, and fifteen different misdemeanors, all relating to the activity of a serious sexual offender. Nonetheless, at this juncture of the case, Mr. Williams chose to argue that Mr. Ward was not a danger to the community. This Court disagrees with that unsupported allegation, and finds that Mr. Ward is a clear and present danger to the community. He admitted that he had had oral sex on numerous occasions with a fourteen year old boy whom he was required to supervise and counsel. He was discovered by the eyewitnesses with his penis in the minor's mouth. On December 10, 2001, this Court was not about to give Mr. Ward another opportunity to victimize another minor in this community.

To put the Ward sentence in context, the Court had conducted some research as to the past sentencing practices of other members of this Court in cases which involved an adult being charged with the crime of involuntary deviate sexual intercourse and other sexually related offenses with the victim being a minor. The cases reviewed and the sentences imposed involved other judges who currently sit on this Court or who have recently sat on this Court. It appears that attorneys who practice in the criminal law area in this Court should know that adults charged with involuntary deviate sexual intercourse and other sexually related offenses with minors are, for the most part, sentenced consecutively and not concurrently. Case captions and sentences by sentencing judge are set forth on Appendix A to this opinion.

For this Court to have avoided consecutive sentencing, Mr. Williams had an affirmative duty to demonstrate to the Court that there were substantial legal reasons and factual reasons to mitigate Mr. Ward's sentence as requested by Asst. D.A. Hopkins. He did not. Accordingly, on December 10, 2001, a consecutive sentence was entirely appropriate for Mr. Ward.

JANUARY 14, 2002, ARGUMENT

The Court scheduled this legal argument in response to Mr. Williams' December 19, 2001, Motion for Reconsideration, to clarify the record and to determine the positions of the District Attorney's Office and defense

counsel after their receipt and review of the St. Vincent Health Center medical records. There was extensive discussion on the record between Asst. D.A. Hopkins, Mr. Williams and the Court regarding Mr. Ward's participation in the negotiation of the plea, his knowledge of the crimes charged, his knowledge of the penalties for those crimes and the probable sentence of the Court. It is clear to the Court that while Mr. Ward may have been told of all of the foregoing, he did not have the mental capacity to evaluate them and relate them to the sentence which the Court may and did impose. It appears to this Court that Mr. Ward was advised by Mr. Williams that he "…could not conceive that the Court would impose four consecutive sentences in this case, but he was aware of it, yes." (1/14/02 TR p.12) It is also apparent that Mr. Williams also told Mr. Ward that, "…a legitimate sentence would be five years plus significant supervision. Did I tell him the Court would give him that? No. I thought that (concurrent sentencing) would be a fair sentence and he was aware of that when he pled." (1/14/02 TR p.13). Further Mr. Williams states that Mr. Ward was aware that he could have been sentenced consecutively but "Under no circumstances did he expect it nor did I." (1/14/02 TR p.14)

Mr. Williams' December 19, 2001, Motion for Reconsideration and argument for reconsideration of sentence to a lesser sentence is misplaced. Neither Mr. Ward, nor the community, benefit from a reduction in sentence. Mr. Ward may be incarcerated for a shorter period of time, but in all probability, it is incarceration without treatment for the various mental illnesses which have been identified, consolidated and discussed in Dr. Evans' report. The Court ordered Dr. Evans to examine Mr. Ward following the January 14, 2002, hearing because all counsel agreed and requested a psychiatric examination. Mr. Hopkins stated the following at pages 44-45 of the January 14, 2002, transcript:

> "Your Honor, at this time neither myself nor any representative of the Commonwealth can take a position on Mr. Ward's sentence or the reconsideration. We have not been able to – as much as we would have like to read through all of the medical records, the court is correct, those records were at the probation department. However, I did not – it did not occur to me to go up and read them in preparation for today. And I would agree with Mr. Williams that a current psychological of Mr. Ward would be beneficial if the court is going to entertain his motion to reconsider any further. … I cannot intelligently nor can anyone else from my office intelligently represent to this court what the Commonwealth's position is today."

Mr. Foulk, the District Attorney then added at pages 47-49 of the transcript the following:

> "And as Mr. Hopkins has indicated, what appears on its face without further evaluation differs substantially from what was

represented at the original time of sentencing by defense counsel and the defendant. **It is possible, and I'm not discounting it entirely that there may be more serious underlying mental health issues going on here that in the interests of justice I know the court would want to delve – I hate to speak for the court, but I know the court would want to delve into and for sure the Commonwealth would want to evaluate its position**. … I'm asking that the court order that Mr. Ward be provided a complete psychological by professionals for the purpose of determining his mental limitation. … **he has serious mental health issues that are significant factors in mitigation that have never been determined and the court has never had the benefit of them**. So I'm asking that he be given a complete psychological to determine the extent of the damage, in any, that exists or the mental health issues that exist or the organic brain damage that exists because the court must consider that in determining whether or not incarceration is even appropriate, let alone how long. … **We are as interested, as I'm sure the court is interested, in finding out what was going on with Mr. Ward at the time these offenses occurred so that we can properly take a position with regard to something**." (Emphasis added)

Following the completion of Mr. Foulk's remarks, Mr. Williams clearly stated to the Court the following:

> "I'm asking for a complete evaluation of Mr. Ward, however extensive the court wants it to be. … I'm saying that if they want to have him psychologically examined for the purpose of determining whether or not he's a sexual predator or not, that's fine, but I want a complete psychological as well as a medical examination done to determine the extent, if any, of any brain damage or brain injuries or organic limitations."

To which Mr. Foulk replied at pages 50 and 51 of the January 14, 2001, transcript as follows:

> "With all due respect to Mr. Williams and Mr. Ward, **we're interested in doing the right thing here, judge. And I don't think the burden should be on the Commonwealth to do the defense's job for them**. We are willing to do whatever it takes to make sure that a psychological evaluation, an appropriate and competent psychological evaluation be performed so that everyone involved in this case can determine Mr. Ward's needs for rehabilitation, the community's protection and to punish him for his crimes. … We want to get to the bottom of this as much as anyone else **and if that takes us back to our original position or it may entirely take us back to a position where we would consent**

> **to a modification. I don't know. We just simply don't have enough information before us**." (Emphasis added)

This led the Court to order a psychiatric evaluation to be performed by a psychiatrist, Booker T. Evans, M.D. pursuant to a court order dated January 15, 2002. Unfortunately, the Court had to limit Dr. Evans' time to perform this examination/evaluation to fourteen (14) days from the date of the Order, however, the doctor was able to perform a complete psychiatric evaluation within the Order's timeframe although he was on a planned vacation for several days.

On January 14, 2002, it also became abundantly clear to this Court that Mr. Williams was not communicating with his client. Mr. Williams was unaware that Mr. Ward was speaking with other prisoners at the Erie County Prison in an attempt to represent himself and find an alternative sentence. To that end, Mr. Ward wrote this Court a letter which was received and read shortly before the scheduled 3:30 p.m. legal argument. Had Mr. Williams been speaking with his client on a regular basis, he would have known about this letter. He did not. Mr. Ward's request for alternative sentencing requires the Court to consider fashioning an extreme remedy for Mr. Ward, setting aside not only his guilty plea, but also the sentence imposed on December 10, 2001. For Mr. Ward to explore alternative remedies, both of these actions must be taken. It was clear to the Court on January 14, 2002, that Mr. Ward wishes to have his sentence set aside and to begin again from square one. Under questioning from Mr. Williams, Mr. Ward stated the following:

MR. WILLIAMS:	And ask the court to sentence you more fairly; am I correct?
THE DEFENDANT:	I guess, yes.
MR. WILLIAMS:	Not I guess. Do you want – right now I'm going to ask you, do you want to withdraw your plea of guilty or do you want the court to sentence you consistent with arguments? Which do you want to do?
THE DEFENDANT:	I want my plea withdrawn.

The Rules of Professional Conduct, which define a lawyer's responsibility to his client, provide the following at Rule 1.2 in its pertinent part:

> (a) A lawyer shall abide by a client's decision concerning the objectives of representation… and shall consult with the client as to the means by which they are to be pursued… In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to the plea to be entered, whether to waive a jury trial and whether the client will testify.

Because Mr. Williams was not communicating with Mr. Ward regarding the strategy to be employed at the January 14, 2002, argument, Mr. Williams did not know about Mr. Ward's decisions regarding his sentence.

As the District Attorney had stated he received the prison visitation record of Dr. Booker T. Evans with Mr. Ward, this Court has reviewed the visitation record of Mr. Williams from the Erie County Prison. From December 19, 2001, to January 14, 2002, Mr. Williams chose to visit his fee-paying client one time on December 19, 2001, from 1:35 p.m to 2:10 p.m. It appears to this Court, that Mr. Williams did not make himself available so that he could become aware of any decision made by his client regarding the reconsideration of his sentence and/or to the withdrawal of his guilty plea.

JANUARY 30, 2002 HEARING

On January 29, 2002, this Court received and reviewed the psychiatric exam and evaluation of Booker T. Evans, M.D. of Stairways Behavioral Health Outpatient Clinic. Dr. Evans' evaluation and opinion confirmed this Court's earlier findings regarding Mr. Ward. Mr. Ward advised Dr. Evans of the following:

> …he had a poor relationship with his attorney and he did not trust him. He stated he could not communicate with his attorney neither on October 31, 2001, nor at the present time.

Mr. Ward also advised Dr. Evans that:

> …he did not have the trust of his attorney, and did not understand the role of his attorney in this situation. He stated he had difficulty relating to authoritarian persons, such as the attorney who was designated to represent him.
>
> He stated that his confidence in the attorney had deteriorated.

These statements by Mr. Ward confirm the Court's suspicions that Mr. Williams was not consulting with Mr. Ward on a regular basis about this case.

In further response to the required examination to complete the McGarry Instrument, Mr. Ward told Dr. Evans that:

- He did not have any knowledge at the time of his plea, nor at the current time, of what legal defenses were available to him.
- He was unable to plan the legal strategy.
- He did not understand courtroom procedures and that they were a big mystery to him.

Dr. Evans provided the Court with the following diagnoses for Mr. Ward on each Axis:

Axis I: Bi Polar disorder II, most recent episode depressed 296.89.
Cognitive disorder not otherwise specified 294.9
Posttraumatic stress disorder chronic 309.81.
Pedophilia 302.2

Axis II: Schizoid personality disorder by history.

Axis III: History of gastroesophageal reflux disease.

Axis IV: Severity of psychological stressors is moderate. Mr. Ward has problems related to interaction with the legal system; he is incarcerated. He has problems with the primary support group; he has had a traumatic relationship with his family. He has problems related to the social environment; he has inadequate social support.

Axis V: The current global assessment of functioning is 45, and the highest in the last year has been 45.

In his Assessment, Dr. Evans discusses diagnoses which had been made by other treating psychiatrists but not previously revealed or known to this Court or the District Attorney's office or Mr. Williams, their interrelation, and the result of that interrelation on Mr. Ward's behavior patterns. His assessment has provided significant guidance to the Court which should have been provided by Mr. Williams as defense counsel well before December 10, 2001, both to the Court and the District Attorney's office. Dr. Evans' analysis of Mr. Ward's mental, emotional and behavioral status is as follows:

> Mr. Ward is a 40-year-old male with multiple diagnoses and a complex history. He has several comorbid illnesses, both by history and mental status examination. These are collectively contributing to his dysfunction. His first disorder is a cognitive disorder. … there is clear evidence of soft neurological signs which indicate what was formerly called organic brain syndrome, but no clear definitive etiologies have been discovered. This patient may also have dementia. … The patient also has bipolar disorder… This illness is categorized by severe depression, periods of mood swings, irritability and suicidal thought and actions. His third diagnosis is posttraumatic stress disorder. This occurred as a result of extreme sexual abuse that he incurred at approximately age 6. This was in his latency period, his period of middle childhood. The residuals of posttraumatic stress disorder are that Mr. Ward is unable to trust people, especially his close family members.
>
> He was also diagnosed with the fourth problem and the most significant one of all, which is schizoid personality disorder. The schizoid personality causes him to be withdrawn and not to seek interaction with other human beings. This is interacting collectively with the preceding three diagnoses and it is causing

> him social delay that gives him inappropriate behavior in society and an inability to react with society. … Mr. Ward does not have the ability to evaluate rules of interpersonal engagement and then to use these to interact with other human beings. He does not have an ability to define his own role in society. He does not know how to relate to others. … The insults which occurred to his personality and intellectual development would tend to diminish his insight and judgment. He uses immature defense mechanisms, which were the result of trauma to the personality and intellect.

Dr. Evans expresses his opinion regarding Mr. Ward's competency, which again should have been made known to this Court long ago by Mr. Williams. His opinion is relevant because it defines Mr. Ward's state of mind from the striking of the plea bargain after the preliminary hearing through the present time:

> It is the opinion of the examiner that Mr. Ward is incompetent to stand trial, because he does not understand the nature of the legal contest or the roles played by other participants. He was incompetent to stand trial on October 31, 2001, and he is currently incompetent to stand trial, because he cannot conceive of the nature of the proceedings and his role in the proceedings. He does not know how to interact with his counsel, nor with the defense, nor with the judge. It is the impression of the examiner that Mr. Ward has been severely impaired for most of his life.

However, the Court is aware of Dr. Evans' apparently contradictory statements that Mr. Ward appeared on the record to say he knew the charges and the severity which were brought against him, that he said he could understand the penalties and the possible likely outcome. However, on examination by both Mr. Foulk and Mr. Williams, Dr. Evans believed that Mr. Ward was not competent to fully appreciate the plea and is incompetent to stand trial. The bottom line is, in taking into consideration the totality of the circumstances, Dr. Evans has identified that Mr. Ward is a person with serious mental illnesses which are cumulative in their nature and overlap and interact with one another (1/30/02 TR. 9, 10, 33, 38 and 39). Dr. Evans has further advised the Court in his testimony that Mr. Ward must be evaluated in a more structured inpatient setting on a daily basis for a longer period of time. Dr. Evans' evaluation has organized, consolidated and identified the serious mental illnesses afflicting Mr. Ward which render him incompetent to defend himself and to stand trial. This analysis will enable this Court to fashion an appropriate remedy for Mr. Ward. Dr. Evans' use and reliance on previously developed medical records concerning Mr. Ward's various diagnoses is an appropriate application of Pa. R.E. 703. Even though Dr. Evans operated under severe

time constraints imposed by the January 15, 2002, Court Order, he has provided valuable and relevant evidence to the Court regarding Mr. Ward's mental health status which as Mr. Foulk has stated was the responsibility of defense counsel. (1/14/02 TR, p.51)

This opinion will be continued in the next issue of the Erie County Legal Journal, Vol. 85, No. 33.

COMMONWEALTH OF PENNSYLVANIA

v.

CRAIG WARD

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA TRIAL COURT DIVISION NO. 1841 & 1842 OF 2001

APPEARANCES: Damon Hopkins, Esq., for the Commonwealth
Dennis V. Williams, Esq. for the Defendant

OPINION

Domitrovich, J., February 5, 2002

Opinion continued from last week's issue of the Erie County Legal Journal, Vol. 85, No. 32.

INEFFECTIVE ASSISTANCE OF COUNSEL

This Court is of the opinion that after negotiation of the plea bargain, from the time of the entry of the plea to the conclusion of these proceedings, that Mr. Ward did not have the benefit of effective assistance of counsel. It is well established that trial counsel has an "obligation to conduct a thorough investigation of the defendant's background". *Williams v. Taylor,* 529 U.S. 362, 396 (2000). Counsel's ineffectiveness occurred on Mr. Ward's entry into a critical phase of the proceedings which began with the negotiation of the plea bargain and continued through January 30, 2002. In *Com. v. Abdul-Salaam*, 2001 Pa.LEXIS 2764 (Pa. 2001), our Supreme Court held the following:

> To prevail on a claim alleging counsel's ineffectiveness under the PCRA, Appellant must demonstrate (1) that the underlying claim is of arguable merit; (2) that counsel's course of conduct was without any reasonable basis designed to effectuate his client's interest; and (3) that he was prejudiced by counsel's ineffectiveness, i.e., there is a reasonable probability that but for the act or omission in question the outcome of the proceeding would have been different. *Commonwealth v. Kimball*, 555 Pa. 299, 724 A.2d 326, 333 (Pa. 1999); *Commonwealth v. Douglas*, 537 Pa. 588, 645 A.2d 226, 230 (Pa. 1994). If a reasonable basis exists for the particular course chosen by counsel, the inquiry ends and counsel's performance is deemed constitutionally effective. *Commonwealth v. Derk*, 553 Pa. 325, 719 A.2d 262, 266 (Pa. 1998) (opinion in support of affirmance).

This Court specifically finds that the claim of Mr. Ward's mental illness did have arguable merit which was never developed or confirmed by competent admissible evidence. It was Mr. Williams' duty to develop and present such evidence to the Court. Mr. Williams course of conduct had no reasonable basis in that, he did not read and review the June 25 through July 16, 1999, medical records of Mr. Ward and use them to develop a

basis for mitigation of Mr. Ward's requested concurrent sentencing or, more importantly, as a basis for a defense psychiatric examiner to render an opinion as to Mr. Ward's mental condition and the effects of the physical, sexual and spiritual abuse which had been previously referred to. Instead, he speculated as to the content of the St. Vincent medical record and ignored the development of a more complete psychiatric record based upon a current evaluation of Mr. Ward. Until Dr. Evans testified on January 30, 2002, this Court was unaware of the existence of a Stairways Behavioral Health Outpatient Treatment Record. Mr. Williams was also unaware of the existence of this record, and it was clearly within the scope of his representation of Mr. Ward to know about and produce this record for the Court's consideration. Lastly, it is a certainty, not a reasonable probability, that the outcome of these proceedings will be different as a result of the introduction and consideration of the evaluation and testimony of Dr. Evans. The production of this evidence was clearly the responsibility of defense counsel.

The St. Vincent mental health records developed from June 25 through July 16, 1999 were not available to the Court until 17 days after sentencing. The Stairways Outpatient Treatment Records were not made available to this Court until Dr. Evans testified regarding their content, including many diagnoses which had been made regarding Mr. Ward's mental illness. There was no evidence proffered by Mr. Williams which would correlate these records and their medical findings as a causative or mitigating factor for Mr. Ward's criminal conduct. There is no defense expert testimony which correlates these records and Mr. Ward's allegations of physical, sexual, and spiritual abuse during his childhood to his criminal conduct. Additionally, while other character witnesses may have been available to offer explanations for Mr. Ward's conduct, which would have been in support of a defense expert opinion, those witnesses, likewise, were never located, interviewed, and called.

In *Com. v. Gorby*, 2001 Pa. LEXIS 2763 (Pa., 2001), this Court finds a strikingly similar case to that attempted to be presented by Mr. Ward. Gorby asserted that his trial counsel was ineffective for "not investigating and presenting to the jury evidence that Gorby was intoxicated at the time of the crime, evidence of diminished capacity, and evidence that Gorby experienced an abusive childhood, had a history of drug and alcohol problems, and had organic brain damage." At the time of the Post-Conviction Remedy Act Hearing, Gorby's counsel did present various affidavits concerning his mental state and history, but did not present for cross examination any of the witnesses who made the affidavits. The Commonwealth argued that the unsupported affidavits were not and could not be part of the record in the case in that in the absence of a record, it was unable to respond to Gorby's claim that his counsel was ineffective for failing to investigate his mental history and incapacity. The Supreme

Court agreed with that argument and remanded Gorby's case to the PCRA Court for hearing at which time Gorby was entitled to present witnesses who would be subject to cross examination on issues of his mental history and capacity and trial counsel's failure to investigate.

The issue of defense counsel's ineffectiveness in failing to investigate Defendant's psychiatric history is raised in *Commonwealth v. Porter,* 556 Pa. 301, 728 A.2d 890, 897 (1999). Unlike the counsel in *Porter*, Attorney Williams knew Mr. Ward's psychiatric records existed; the existence of these records were never hidden from him. Attorney Williams failed to pursue them on his own. Mr. Williams also failed to discover the outpatient counseling records from Stairways Outpatient Clinic referred to in Dr. Evans' report. Mr. Williams has failed to investigate and pursue diminished capacity and guilty but mental ill defenses for his client which may be supported by Dr. Evan's Opinion and the mental health records.

Attorney Williams is well aware that a claim of excessiveness of sentence does not raise a substantial question so as to permit appellate review where the sentence is within the statutory limits and where in Mr. Ward's case the Involuntary Deviate Sexual Intercourse sentences are within the Standard ranges of the Guidelines and only the legislatively mandatory minimum of five (5) years on each Involuntary Deviate Sexual Intercourse offense was imposed by the Sentencing Court. *Commonwealth v. Mobley*, 399 Pa.Super. 108, 581 A.2d 949 (1990). Consecutive sentences within the statutory limits also fail to raise a substantial question for appellate review. *Commonwealth v. Nelson*, 446 Pa.Super. 240, 666 A.2d 714 (1995) and *Commonwealth v. Bowersox*, 456 Pa.Super. 260, 690 A.2d 279 (1997).

As to withdrawing a guilty plea after sentencing, Defendant's issues are limited to the validity of his plea, legality of his sentence imposed or the trial court's jurisdiction. *Commonwealth v. Harvey,* 407 Pa.Super. 545, 595 A.2d 1280 (1991). In the instant case, it is undisputed that Mr. Ward's sentence is legally imposed and the trial court has jurisdiction. Therefore, the validity of his plea and his competency to enter the plea are the focus of this Court. The Court's inquiry must also focus on whether the accused was misled or misinformed and acted under that misguided influence when entering his guilty plea. *Commonwealth v. Broadwater*, 330 Pa.Super. 234, 479 A.2d 526 (1984). *Commonwealth v. Flood*, 426 Pa.Super. 555, 627 A.2d 1193 (1993).

As indicated earlier, Mr. Ward is incompetent to stand trial as proven by a preponderance of the evidence. *Commonwealth v. duPont*, 545 Pa. 564, 681 A.2d 1328, 1330 (1996). The psychiatric evidence shows he suffers from mental illnesses or defects to the extent he did not have the ability to consult with counsel with a reasonable degree of rational understanding, and did not have a rational as well as factual understanding of the nature of the proceedings and his role. *Commonwealth v. Appel*, 547 Pa. 171, 689 A.2d 891, 899 (1997).

Moreover, in order for Defendant to withdraw his guilty plea after sentencing, the evidence must demonstrate a prejudice of "manifest injustice." *Commonwealth v. Starr*, 450 Pa. 485, 301 A.2d 592 (1973). Manifest injustice exists where "the plea was involuntary, or was entered without knowledge of the charges", thereby rendering the plea invalid. *Commonwealth v. Shaffer*, 494 Pa. 342, 446 A.2d 591 (1982). The Court must analyze the totality of the circumstances. *Id.*

In *Commonwealth v. Muller*, 334 Pa.Super. 228, 482 A.2d 1307 (1984), the Court discusses the role of defense counsel to pursue alternatives to total confinement for his client. In the instant case, Defendant himself raises three issues in a letter to the Court with the advice of his fellow prisoners, not his defense counsel. Defense counsel's ineffectiveness is well documented in the case record.

To enter a knowing and voluntary plea, the Defendant must have the ability to weigh the alternatives of going to trial versus entering a guilty plea. *Commonwealth v. Leonhart*, 358 Pa.Super. 494, 517 A.2d 1342, 1344 (1986). As a measuring stick, the Court must review the "totality of the circumstances" to determine whether a Defendant has made a showing of manifest injustice to allow post-sentence withdrawal. *Leonhart* at p. 1344. "This test looks beyond the technical note recitations made to a Defendant at the plea colloquy to a critical evaluation of the evidence presented against him which substantiates the elements of the crime(s) charged, as well as his own testimony concerning the criminal episode." *Leonhart* at p. 1344. *Commonwealth v. Shaffer*, 498 Pa. 342, 446 A.2d 591 (1982).

Defendant must be able to weigh the alternatives of going to trial versus entering a guilty plea… "because of the real possibility, apparent from the instant record, that he was misled or acted pursuant to inaccurate or incorrect information." *Leonhart* at 1346. Defendant must be afforded Due Process. Although he has no substantive right to a particular sentence, "he has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process" *Commonwealth v. Wright*, 508 Pa. 25, 494 A.2d 354 (1985). Based upon the totality of the circumstances, this Court holds that Mr. Ward's guilty plea must be withdrawn in light of Dr. Evan's psychiatric report and testimony, because Mr. Ward's claim rises to the level of manifest justice. To do otherwise, that is, to refuse his claim would be error and manifest justice.

Moreover, in light of his psychiatric evidence as well as the totality of the circumstances, as previously discussed, this Court finds that the Defendant did not fully understand the nature of his constitutional right to be tried by a jury. See also *Commonwealth v. Campbell*, 309 Pa.Super. 214, 455 A.2d 126 (1983), wherein Defendant had an excessive criminal record and was not permitted to withdraw his guilty plea. There is no

prejudice to the Commonwealth in permitting Defendant to withdraw his plea in view of his incompetency.

Moreover, this Court does not believe Mr. Ward is requesting a withdrawal of his guilty plea in order to secure a reduction in sentencing or to use withdrawal of his plea as a sentence-testing device. *Commonwealth v. Shaffer*, 498 Pa. 342, 446 A.2d 591 (1982) and *Commonwealth v. Starr*, 450 Pa. 485, 301 A.2d 592 (1973).

In fact his negotiated plea is so beneficial to Defendant that his own defense counsel is opposed to withdrawing this negotiated plea because it reactivates the original thirty-one (31) charges and exposes his client to a far higher maximum. However, it also opens alternative remedies to Mr. Ward. It would be manifestly unjust not to withdraw his guilty plea in view of the totality of the circumstances, especially the psychiatric evidence indicating his incompetence to stand trial. Mr. Ward, as a mentally incompetent person, is constitutionally entitled to treatment. Once he is competent, he may make a knowing, voluntary intelligent plea or choose to exercise his constitutional right to stand trial before a jury. To do as Mr. Williams desires, would be manifestly unjust. Even the District Attorney agreed at the time of the Reconsideration Hearing that if the psychiatric evidence indicated a serious mental illness, he would consider modifying Mr. Ward's sentence. The District Attorney did not continue his request for consecutive mandatory sentences and wanted to wait for the outcome of the expert's report. Dr. Evans' expert report from the treating physician at Warren State Hospital will aid the Defendant, his defense counsel and the Commonwealth in arriving at their respective positions in the future. Meanwhile, Defendant will be in a secured inpatient treatment facility, and the community's interest will be protected.

The above record clearly demonstrates prejudice that was caused by Attorney Williams' ineffectiveness and as demonstrated in Dr. Evan's psychiatric report that Defendant was and is incompetent to enter the plea and/or stand trial. The guilty plea is a very significant procedure that the Court must scrutinize. *Commonwealth v. Turiano*, 411 Pa.Super. 391, 601 A.2d 846 (1992). To not withdraw the plea would result in manifest injustice to Defendant. The Court, therefore, is compelled in view of the totality of the circumstances to withdraw Defendant's guilty plea since his plea was/and is invalid i.e. involuntary and unknowing.

Because defense counsel failed in the foregoing respects, the Court sentenced Mr. Ward consistent with Asst. D.A. Hopkins' request for consecutive sentencing, which was appropriate on December 10, 2001, but that sentence can no longer stand in consideration of the foregoing.

SUMMARY

This Court reviewed the entire record of the proceedings of this case and finds that the following facts are inescapable and uncontradicted as a matter of record:

1. Mr. Ward has had limited communication with his counsel, Attorney Williams, regarding the legal effect of the entry of the plea to the four counts of Involuntary Deviate Sexual Intercourse, the one count of Corruption of Minors and one count of Institutional Sexual Assault.

2. Even though Attorney Williams was aware that he intended to use certain medical records from St. Vincent Health Center Mental Health Unit concerning Mr. Ward's hospitalization of June 25 through July 16, 1999, to establish organic brain syndrome, which allegedly diminished Mr. Ward's capacity to appreciate the seriousness and criminality of his actions at the Harborcreek Youth Center, Mr. Williams failed to request a copy of those records so that they would be present for the Court's review either at or before the December 10, 2001, sentencing and relied solely upon the Probation Department's request for those records made on or about December 3, 2001.

3. Even after the medical records were received by the Probation Department on or about December 27, 2001, Attorney Williams failed to read and review the same in preparation for legal argument to be held January 14, 2002.

4. Attorney Williams failed to obtain a defense psychiatric/psychological report for Mr. Ward. At no time during these proceedings did Mr. Williams file a petition with the Court requesting that the Court appoint a psychiatrist to perform an evaluation to be used in the sentencing of Mr. Ward.

5. Attorney Williams failed to provide the Court with any type of presentence legal memorandum citing legal authority and factual argument which would have supported the concurrent sentencing of Mr. Ward on the negotiated guilty plea rather than the consecutive sentencing of Mr. Ward as requested by the District Attorney's Office. Mr. Williams ignored the fact that Asst. D.A. Hopkins had advised him at least on three occasions prior to December 10, 2001, that he intended to request consecutive sentencing from the Court for the six offenses which comprised the plea bargain.

6. Attorney Williams failed to provide any testimonial letters from character witnesses which may have explained or assisted the Court in understanding the reasons for Mr. Ward's actions toward the fourteen (14) year old minor, JF, but instead solely relied on his own argument, the testimony of Bishop Dwane Brock and Mr. Ward's recitation of certain childhood events. No testimony from family members was offered at sentencing. Testimony from his pastor at the Morning Star Baptist Church, which he had been associated with for twenty-five (25) years was not offered at the time of sentencing. Additionally, no character witnesses were produced from Cross Roads where Mr. Ward worked as a volunteer for six (6) months or the Volunteers in Probation Program for Juveniles where Mr. Ward worked as a volunteer for seven (7) years.

7. Attorney Williams, in his December 19, 2001, Motion misstated the ages of the victim of the case, which was fourteen (14) not fifteen (15) at the time the offenses were committed, misstated the ages of victims in two other cases which he attempted to compare to this case as seventeen (17) and fifteen (15), when in fact they were eighteen (18) and sixteen (16).

8. Attorney Williams chose to base his argument on two cases which are not legally or factually comparable to the Ward case. In the case of Daniel W. Susi, the District Attorney had originally charged Mr. Susi with five (5) criminal counts, two of which were felonies and three of which were misdemeanors, and then entered a plea bargain with Mr. Susi for three misdemeanor charges only, which were graded as two misdemeanor II offenses and one misdemeanor III offense. In the case of Kyle Naples, Mr. Naples was charged with three offenses, one of which was a felony and two of which were misdemeanors which the District Attorney entered a plea bargain to for the felony III charge only. This contrasts to Mr. Ward's being charged with sixteen felonies and fifteen misdemeanors and pleading guilty to four felonies and two misdemeanor charges.

9. The District Attorney's Office did not request consecutive sentencing in the Susi case, even though a Motion for Reconsideration of Sentence was filed. It filed no further appeal to the Pennsylvania Superior Court after the denial of that Motion. Consecutive sentencing was not an alternative in the Naples case, in that, only one charge was before the Court for sentencing. In Mr. Ward's case, the Commonwealth through Asst. D.A. Hopkins made it clear from the time of the striking of the plea bargain that consecutive sentencing would be requested. In the cases of Mr. Susi and Mr. Naples, 5 year mandatory minimum sentences were not required for the offenses to which they pled.

10. Attorney Williams failed to meet and discuss the evidence available in this case and a strategy for using said evidence with his client at the Erie County Prison for any substantial period of time. From December 19, 2001, through January 14, 2002, a period of twenty-six (26) days, there was only one thirty-five (35) minute meeting on December 19, 2001. Attorney Williams failed to effectively communicate with his client at a critical state of these proceedings.

11. District Attorney Foulk, Asst. D.A. Hopkins, and Mr. Williams all agreed on January 14, 2002, that a complete psychiatric evaluation is necessary before an appropriate sentence may be imposed upon Mr. Ward.

12. Dr. Evans' evaluation of January 24, 2002, has provided the Court with a preliminary report which consolidates and identifies Mr. Ward's prior mental health treatment, the diagnoses which were made by other treating psychiatrists, their interaction and their overall effect on his functioning in society.

13. Dr. Evans' testimony also provides a valuable recommendation to the Court that Mr. Ward would benefit from further inpatient evaluation

over a longer period of time because of his schizoid personality disorder which causes him to avoid maintaining an outpatient treatment schedule. This recommendation is consistent with the request of District Attorney Foulk, Asst. D.A. Hopkins and Mr. Ward as stated on pages 45 through 51 of the January 14, 2002, transcript.

CONCLUSIONS

1. The Defendant, Craig Tyrone Ward, could not make a knowing, voluntary and intelligent decision in accepting the plea agreement negotiated by his attorney, Dennis V. Williams, and Asst. D.A. Damon Hopkins on October 31, 2001.

2. At the time of sentencing, and thereafter, Mr. Ward was unaware of the difference between consecutive sentencing and concurrent sentencing which was a vital component to his acceptance of the negotiated plea at the October 31, 2001, entry of that plea.

3. Craig Tyrone Ward did not have effective assistance of counsel from his attorney, Dennis V. Williams, during the critical phases of the case. No reasonable basis exists for the course of conduct chosen by Mr. Williams throughout Mr. Ward's case. He ignored and did not develop a claim of arguable merit, namely, Mr. Ward's mental illness. He had no reasonable basis for not pursuing and developing evidence which would provide a diagnosis of Mr. Ward's mental condition. And, lastly, his failure to act caused the sentence of consecutive time, as requested by the District Attorney, to be imposed on Mr. Ward on December 10, 2001.

4. Mr. Ward suffers from various mental illnesses whose diagnoses have been identified and consolidated by Dr. Evans and are stated at pages 18-19 of this Opinion. The interaction of these mental illnesses render Mr. Ward incompetent to stand trial and incompetent to appreciate the significance of his role in the legal process.

5. Mr. Ward requires a more extensive and comprehensive psychiatric and medical evaluation which only can be performed over a longer period of time in an inpatient secured setting where he can receive the necessary mental health treatment to return him to competency, if possible, so that he may stand trial.

Accordingly, this Court is compelled to enter the following:

ORDER

AND NOW, to-wit, this 5th day of February, 2002, after a thorough review of the October 31, 2001 plea transcript, pre-sentence investigation report prepared by the Erie County Probation Office, the December 10, 2001 sentencing transcript, the Saint Vincent Health Center Mental Health Unit records concerning Mr. Ward's hospitalization from June 25 to July 16, 1999, the January 14, 2002 transcript, the psychiatric report of Booker T. Evans, M.D., the court-appointed psychiatrist, and his testimony on January 30, 2002, and the argument of counsel. It is hereby

ORDERED, ADJUDGED and DECREED that the plea of October 31, 2001, based upon the negotiated plea bargain between Dennis V. Williams, attorney for the Defendant and Asst. D.A. Damon Hopkins is hereby set aside and declared null and void.

It is hereby further ORDERED, ADJUDGED and DECREED that the sentence of this Court imposed on December 10, 2001, is hereby vacated.

It is hereby further ORDERED, ADJUDGED and DECREED that all of the original thirty-one (31) charges filed against Craig Tyrone Ward at No. 1841 of 2001 and 1842 of 2001 are hereby reinstated in full at each of the above terms and numbers.

Defense counsel Williams' Motion to Reconsider Sentence is deemed moot in light of the above findings.

After considering the psychiatric evaluation of Booker T. Evans, M.D. dated January 24, 2002, and his testimony of January 30, 2002, relative to the examination of the Defendant, this Court finds the Defendant incompetent to stand trial pursuant to 50 P.S. §7402(a). Pursuant to the above finding, it is hereby ORDERED, ADJUDGED and DECREED that the Defendant be committed to Warren State Hospital for a period of ninety (90) days for involuntary psychiatric inpatient treatment pursuant to §402.

It is further ORDERED that during his commitment to Warren State Hospital, the Defendant shall be examined by a psychiatrist to determine his competency and a report concerning the Defendant's competency shall be submitted to his assigned Judge from the Trial Division on or before May 1, 2002.

Upon completion of treatment or no later than May 1, 2002, the Sheriff of Erie County is hereby directed to return Defendant to the Erie County Prison from Warren State Hospital.

It is further ORDERED that a hearing to determine the Defendant's competency to stand trial will be scheduled for hearing by the Court Administrator for a Judge assigned to the Trial Division to hear testimony from the treating psychiatrist with counsel of record and Defendant present. In the event that the psychiatric report submitted to the Court reveals that Craig T. Ward is incompetent to stand trial, the presence of the treating psychiatrist will not be necessary.

The County of Erie is hereby directed to pay the court appointed psychiatrist, Booker T. Evans, M.D. the sum of One Thousand Five Hundred ($1,500.00) dollars as his fee for ten (10) hours of consultation as well as in-court testimony regarding Mr. Craig Ward. See attached Exhibit "B".

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

APPENDIX A

FRED P. ANTHONY		**COMM. vs. JAMES COOLEY No. 2460 - 1991**
Count 1:	Rape	10-20 years
Count 3:	Ulaw. Restr.	Merges w/Cnt. 1;
Count 4:	Indec. Asslt.	1-2 years consecutive to Cnt. 1;
Count 5:	Simple Asslt.	3-6 months consecutive to Cnt. 2;
Count 6:	Burglary	3-6 years consecutive to Cnt. 5.
TOTAL:		14¼-28½ years

FRED P. ANTHONY		**COMM. vs. FRANK A. MITULSKI, JR. No. 341 - 1996**
Count 6:	Rape	7-14 years
Count 7:	IDSI	5-10 years consecutive to Cnt. 6;
Count 8:	Indec. Asslt.	Merges w/Cnt. 6.
TOTAL:		12-24 years

FRED P. ANTHONY		**COMM. vs. FRANK A. MITULSKI, JR. No. 342 - 1996**
Count 1:	Rape	7-14 years consecutive to Case No.: 341 - 1996;
Count 2:	IDSI	5-10 years consecutive to Cnt. 1;
Count 3:	Indec. Asslt.	Merges w/Cnt. 1.
TOTAL:		12-24 years

FRED P. ANTHONY		**COMM. vs. WARREN DURHAM, JR. No. 435 - 1996**
Count 4:	Rape	8½-20 years;
Count 5:	IDSI	5-10 years consecutive to Cnt. 4.
TOTAL:		13½-30 years

FRED P. ANTHONY		**COMM. vs. NEIL EDWARD LARSON No. 2095 - 1996**
Count 1:	IDSI	5-20 years
Count 3:	Indec. Asslt.	Merges w/ Cnt. 1;
Count 4:	Corrup. of Minors	6-12 months consecutive to Cnt. 1.
TOTAL:		5½-21 years

FRED P. ANTHONY		**COMM. vs. RICHARD R. GRANDE No. 1420 - 1997**
Count 15:	Rape	5-10 years;
Count 16:	IDSI	5-10 years consecutive to Cnt. 15;
Count 17:	IDSI	5-10 years consecutive to Cnt. 16;
Count 18:	IDSI	5-10 years consecutive to Cnt. 17;
Count 1:	Endngr. Welf. Children	6-12 months concurrent to Cnt. 17;
Count 4:	Statutory Rape	6-12 months concurrent to Cnt. 17;
Count 8:	Aggr. Indec. Asslt.	6-12 months concurrent to Cnt. 17;
Count 10:	Corrup. of Minors	6-12 months concurrent to Cnt. 17.
TOTAL:		15-30 years

FRED P. ANTHONY		**COMM. vs. WILLIE E. WILLIAMS No. 308 - 2001**
Count 1:	IDSI	7-14 years
Count 2:	IDSI	7-14 years consecutive to Cnt. 1;
Count 3:	Indec. Asslt.	9-18 months;
Count 4:	Indec. Asslt.	9-18 months;
Count 5:	Indec. Asslt.	9-18 months;
	[Counts 3, 4 & 5 are concurrent with each other and concurrent with Cnt. 2]	
Count 6:	Corrup. of Minors	1-2 years consecutive to Cnt. 2;
Count 7:	Corrup. of Minors	1-2 years consecutive to Cnt. 6;
Count 8:	Corrup. of Minors	1-2 years;
Count 9:	Corrup. of Minors	1-2 years;

Count 10:	Corrup. of Minors	1-2 years.
	[Counts 8, 9 & 10 are concurrent with each other and concurrent with Cnt. 7]	
TOTAL:		16-32 years

FRED P. ANTHONY — **COMM. vs. ERIC JETSON LYONS**
No. 852 - 2001

Count 1:	Crim. Attmpt./Crim/ Hmcd-Murder	20-40 years;
Count 2:	Rape	10-20 years consecutive to Cnt. 1;
Count 3:	IDSI	10-20 years consecutive to Cnt. 2;
Count 4:	Aggr. Indec. Asslt.	10-20 years consecutive to Cnt. 3;
Count 5:	Indec. Asslt.	2½-5 years consecutive to Cnt. 4;
Count 6:	Aggr. Asslt.	Merges w/ Cnt. 2;
Count 7:	Kidnapping	10-20 years consecutive to Cnt. 5;
Count 8:	Interference w/ Cust. Children	1-2 years consecutive to Cnt. 7;
Count 9:	Poss. Instr. of Crime	1 -2 years consecutive to Cnt. 8;
Count 10:	Terr. Threats	1 5/6- 3 4/6 years consecutive to Cnt. 9;
Count 11:	Burglary	10-20 years consecutive to Cnt. 10;
Count 12:	Statutory Sex. Asslt.	Merges w/ Cnt. 2;
Count 13:	Corrup. of Minors	2½-5 years consecutive to Cnt. 11;
Count 14:	Unlaw. Restr.	Merges w/ Cnt. 7;
Count 15:	Reckls. Endngr. Another	Merges w/ Cnt. 6.
TOTAL:		78 years, 2 months-158 years

JOHN A. BOZZA — **COMM. vs. JAMES ROBERT CONNER**
No. 2534 - 1989

Count 1:	Rape	6-15 years consecutive to Case No.: 2533 - 1989;
Count 2:	Crim. Consp./Rape	1-2 years concurrent to Cnt. 1;
Count 3:	Indec. Asslt.	1-5 years concurrent to Cnt. 2;
Count 4:	Terr. Threats	2-5 years consecutive to Cnt. 1;
Count 5:	Simple Asslt.	1-2 years consecutive to Cnt. 1.
TOTAL:		9-22 years

JOHN A. BOZZA — **COMM. vs. RICHARD DENNIS BRUNO**
No. 377 - 1991

Count 1:	Corrup. of Minors	1-4 years;
Count 2:	Indec. Asslt.	6-12 months consecutive to Cnt. 1;
Count 3:	Indec. Exp.	6-12 months consecutive to Cnt. 2;
Count 5:	Statutory Rape	5-10 years consecutive to Cnt. 3.
TOTAL:		7-16 years

JOHN A. BOZZA — **COMM. vs. DAVID LAWRENCE RICKS**
No. 748 - 1991

Count 1:	Aggr. Indec. Asslt.	Merges;
Count 3:	IDSI	7-15 years;
Count 2:	Indec. Asslt.	2½-5 years consecutive to Cnt. 3;
Count 4:	Corrup. of Minors	2½-5 years consecutive to Cnt. 2.
TOTAL:		12-25 years

JOHN A. BOZZA — **COMM. vs. WILLIAM DELBERT BALDWIN**
No. 2397 - 1995

Count 1:	Rape	10-20 years consecutive to Cnt. 5 of Case No.: 2396 - 1995;
Count 2:	Rape	7-20 years consecutive to Cnt. 1;
Count 3:	Statutory Rape	* Merge w/ Cnt. 1;
Count 4:	Statutory Rape	* Merge w/ Cnt. 2;
Count 5:	IDSI	10-20 years consecutive to Cnt. 4;
Count 6:	Indec. Asslt.	2½-5 years consecutive to Cnt. 5;
Count 7:	Corrup. of Minors	2½-5 years consecutive to Cnt. 6.
TOTAL:		32-70 years(originally 4-10 years consecutive to each other then modified)

JOHN A. BOZZA — **COMM. vs. MARTIN DAVID SMILEY**
No. 777 - 1996

Count 1:	IDSI	8-20 years;
Count 2:	Crim. Solicit.	4-10 years consecutive to Cnt. 1;
Count 3:	Prostitution	3-7 years consecutive to Cnt. 2;
Count 4:	Corrup. of Minors	2-5 years consecutive to Cnt. 3.
TOTAL:		17-42 years

JOHN A. BOZZA — **COMM. vs. JEFFREY STEVEN HARRICK**
No. 2149 - 1999

Count 1:	IDSI	5-10 years;
Count 2:	IDSI	5-10 years consecutive to Cnt. 1;
Count 5:	Photo/Film Sex Acts-Child	1-3 years consecutive to Cnt. 2.
TOTAL:		11-23 years

JOHN A. BOZZA — **COMM. vs. JAMES KENT STANSELL**
No. 2566 - 1999

Counts 1-10:	Photo/Film Sex Acts-Child	Cnts. 1-10 consecutive to each other [10x(1-3 years) = 10-30 years];
Counts 11-20:	Poss. of Child Pron.	Merge;
Counts 21-30:		9-24 months consecutive to each other [10x(9-24 mnths) =7½-20 years];
Count 31:	IDSI	10-20 years consecutive to Cnts. 21-30
Count 32	Aggr. Indec. Asslt.	30-10 years consecutive to Cnt. 31.
TOTAL:		30½-80 years

JOHN A. BOZZA — **COMM. vs. CHARLES SANFORD**
No. 687 - 2000

Count 1:	Rape Threat/ Frcble. Comp.	6½-20 years;
Count 4:	IDSI	6½-20 years consecutive to Cnt. 1;
Count 6:	Indec. Asslt.	1-5 years consecutive to Cnt. 4;
Count 8:	Endngr. Welf. Children	1½-7 years consecutive to Cnt. 6.
TOTAL:		15½-52 years

JOHN A. BOZZA — **COMM. vs. WALTER BEERS**
No. 1466 - 2000

Count 1:	IDSI	5-10 years;
Count 2:	IDSI	5-10 years consecutive to Cnt. 1;
Count 3:	IDSI	5-10 years consecutive to Cnt. 2;
Count 4:	IDSI	5-10 years consecutive to Cnt. 3;
Count 5:	IDSI	5-10 years concurrent to Cnt. 1.
TOTAL:		20-40 years

JOHN A. BOZZA — **COMM. vs. HARRISON JOSEPH BREAULT**
No. 301 - 2001

Count 3:	Attempt Rape	4-10 years;
Count 4:	Attempt Rape	4-10 years consecutive to Cnt. 1;
Count 9:	Indec. Asslt.	Mergers w/ Cnt. 3;
Count 10:	Indec. Asslt.	Merges w/ Cnt. 4;
Count 11:	Corrup. of Minors	1-4 years concurrent to Cnts. 3 & 4;
Count 12:	Corrup. of Minors	1-4 years concurrent to Cnts. 3 & 4.
TOTAL:		8-20 years

SHAD CONNELLY — **COMM. vs. JOHN DAVID MALY**
No. 1400 - 1986

Count 1:	IDSI	7½-20 years;
Count 2:	Indec. Asslt.	1-2 years consecutive to Cnt. 1;
Count 3:	Endngr. Welf. Children	1-2 years consecutive to Cnt. 1, but concurrent to Cnt. 2;
Count 4:	Corrup of Minors	1½-3 years consecutive to Cnts. 2 & 3.
TOTAL:		10-25 years

SHAD CONNELLY — **COMM. vs. DARRYLE SWOPE**
No. 2047 - 1986

Count 1:	IDSI	9-20 years;
Count 2:	Corrup. of Minors	2-5 years consecutive to Cnt. 1;
Count 3:	Indec. Asslt.	1-2 years consecutive to Cnt. 2;
Count 4:	Statutory Rape	4-10 years consecutive to Cnt. 3.
TOTAL:		16-37 years

SHAD CONNELLY — **COMM. vs. RODNEY EARL SEIERSEN**
No. 1375 - 1989

Count 2:	IDSI	5-10 years;
Count 5:	Incest	1½-5 years consecutive to Cnt. 2;
Count 3:	Indec. Asslt.	1-2 years consecutive to Cnt. 5;
Count 1:	Corrup. of Minors	1-5 years consecutive to Cnt. 3.
TOTAL:		8½-22 years

SHAD CONNELLY — **COMM. vs. CHARLES SCOTT PARKER**
No. 2068 - 1989

Count 1:	Statutory Rape	1-2 years concurrent to Cnt. 2;
Count 2:	IDSI	5-10 years;
Count 3:	IDSI	5-10 years consecutive to Cnt. 2;
Count 4:	IDSI	5-10 years consecutive to Cnt. 3;
Count 5:	IDSI	5-10 years consecutive to Cnt. 4;
Count 6:	IDSI	5-10 years consecutive to Cnt. 5;
Count 7:	IDSI	5-10 years consecutive to Cnt. 6;
Count 8:	IDSI	5-10 years consecutive to Cnt. 7;
Count 9:	Indec. Asslt.	6-12 months consecutive to Cnt. 1;
Count 10:	Indec. Asslt.	6-12 months consecutive to Cnt. 9;
Count 11:	Indec. Asslt.	6-12 months consecutive to Cnt. 10;
Count 12:	Indec. Asslt.	6-12 months consecutive to Cnt. 11;
Count 13:	Indec. Asslt.	6-12 months consecutive to Cnt. 12;
Count 14:	Indec. Asslt.	6-12 months consecutive to Cnt. 13;
Count 15:	Indec. Asslt.	6-12 months consecutive to Cnt. 14;
Count 16:	Indec. Exp.	6-12 months consecutive to Cnt. 15;
Count 17:	Indec. Exp.	6-12 months consecutive to Cnt. 16;
Count 18:	Indec. Exp.	6-12 months consecutive to Cnt. 17;
Count 19:	Indec. Exp.	6-12 months consecutive to Cnt. 18;
Count 20:	Indec. Exp.	6-12 months consecutive to Cnt. 19;
Count 21:	Indec. Exp.	6-12 months consecutive to Cnt. 20;
Count 22:	Indec. Exp.	6-12 months consecutive to Cnt. 21;
Count 23:	Corrup. of Minors	6-12 months consecutive to Cnt. 22;
Count 24:	Corrup. of Minors	6-12 months consecutive to Cnt. 23;
Count 25:	Corrup. of Minors	6-12 months consecutive to Cnt. 24;
Count 26:	Corrup. of Minors	6-12 months consecutive to Cnt. 25;
Count 27:	Corrup. of Minors	6-12 months consecutive to Cnt. 26;
Count 28:	Corrup. of Minors	6-12 months consecutive to Cnt. 27;
Count 29:	Corrup. of Minors	6-12 months consecutive to Cnt. 28.
TOTAL:		45½-91 years

SHAD CONNELLY — **COMM. vs. HOMER RAY GUY**
No. 1254 - 1990

Count 1:	Corrup. of Minors	1½-5 years concurrent to Cnt. 6;
Count 2:	Indec. Asslt.	Merges;
Count 3:	IDSI	10-20 years consecutive to Cnt. 3 of Case No.: 607 - 1981;
Count 4:	Rape	10-20 years consecutive to Cnt. 3;
Count 5:	IDSI	10-20 years consecutive to Cnt. 4;
Count 6:	Statutory Rape	1½-5 years concurrent to Cnt. 8;
Count 7:	Rape	10-20 years consecutive to Cnt. 5;
Count 8:	Statutory Rape	1½-5 years concurrent to Cnt. 3.
TOTAL:		40-80 years

SHAD CONNELLY — **COMM. vs. DENNIS JOSEPH AUSTIN**
No. 1479 - 1990

Count 1:	IDSI	7½-15 years consecutive to Cnt. 4 of Case No.: 1396 - 1990;
Count 2:	Poss. Instr. of Crime	1½-3 years consecutive to Cnt. 1;
Count 3:	Rape	7½-15 years consecutive to Cnt. 2;
Count 4:	Unlaw. Restr.	Merges;
Count 5:	Kidnapping	7½-15 years consecutive to Cnt. 3;
Count 6:	Simple Asslt.	Merges.
TOTAL:		24-48 years

SHAD CONNELLY — **COMM. vs. REBECCA ANN GETZENDINER**
No. 897 - 1991

Count 1:	Sexual Abuse/Child	1½-3 years;
Count 2:	Sexual Abuse/Child	1½-3 years consecutive to Cnt. 1;
Count 3:	Sexual Abuse/Child	1½-3 years consecutive to Cnt. 2;
Count 4:	Sexual Abuse/Child	1½-3 years consecutive to Cnt. 3;
Count 5:	Sexual Abuse/Child	1½-3 years consecutive to Cnt. 4;
Count 6:	Endngr. Welf. Children	2½-5 years concurrent to Cnt. 1;
Count 7:	Corrup. of Minors	2½-5 years consecutive to Cnt. 6;
Count 8:	IDSI	5-10 years consecutive to Cnt. 5;
Count 9:	Rape	5-10 years consecutive to Cnt. 8.
TOTAL:		20-40 years

SHAD CONNELLY — **COMM. vs. PAUL JEFFERSON HAYNES**
No. 2011- 1991

Count 1:	IDSI	5-20 years;
Count 2:	IDSI	5-20 years consecutive to Cnt. 1;
Count 3:	IDSI	5-20 years consecutive to Cnt. 2;
Count 7:	Indec. Asslt.	1-5 years consecutive to Cnt. 3;
Count 8:	Indec. Asslt.	1-5 years consecutive to Cnt. 7;
Count 9:	Indec. Asslt.	1-5 years consecutive to Cnt. 8;
Count 10:	Indec. Asslt.	1-5 years consecutive to Cnt. 9;
Count 13:	Corrup. of Minors	1-5 years consecutive to Cnt. 10;
Count 14:	Corrup. of Minors	1-5 years consecutive to Cnt. 13.
TOTAL:		21-90 years

SHAD CONNELLY — **COMM. vs. DARREN MUSHAT**
No. 2028 - 1991

Count 1:	Burglary	9-18 years;
Count 2:	Rape	9-18 years consecutive to Cnt. 1;
Count 3:	Terr. Threats	2-4 years consecutive to Cnt. 2;
Count 4:	Unlaw. Restr.	2-4 years consecutive to Cnt. 3;
Count 5:	Aggr. Asslt.	9-18 years consecutive to Cnt. 4;
Count 6:	Robbery	9-18 years consecutive to Cnt. 5;
Count 7:	Poss. Instr. Crime	1-2 years consecutive to Cnt. 6;
Count 8:	IDSI	9-18 years consecutive to Cnt. 7.
TOTAL:		50-100 years

SHAD CONNELLY — **COMM. vs. JAMES CHAPION**
No. 2317 - 1991

Count 1:	Corrup. of Minors	2½-5 years;
Count 2:	Rape	10-20 years consecutive to Cnt. 1;
Count 3:	Statutory Rape	5-10 years consecutive to Cnt. 2;
Count 4:	Indec. Asslt.	Merges.
TOTAL:		17½-35 years

SHAD CONNELLY — **COMM. vs. DANIEL FICKENWORTH**
No. 630 - 1992

Count 1:	Rape	8½-20 years;
Count 2:	Statutory Rape	Merges;
Count 3:	IDSI	4-10 years consecutive to Cnt. 1;

Count 4:	Incest	1-5 years consecutive to Cnt. 3;
Count 5:	Endngr. Welf. Children	1-5 years consecutive to Cnt. 4;
Count 6:	Corrup. of Minors	1-5 years consecutive to Cnt. 5;
Count 7:	Rape	8½-20 years consecutive to Cnt. 6;
Count 8:	Statutory Rape	Merges;
Count 9:	IDSI	5-10 years consecutive to Cnt. 8:
Count 10:	Statutory Rape	Merges;
Count 11:	Corrup. of Minors	1-5 years consecutive to Cnt. 9.
TOTAL:		30-80 years

SHAD CONNELLY **COMM. vs. THOMAS McGHEE**
No. 826 - 1992

Count 1:	Rape	9-20 years consecutive to Case No. 153 - 1992;
Count 2:	Reckls. Endngr. Another	6 months-2 years consecutive to Cnt. 1;
Count 3:	Poss. Instru. Crime	6 months-2 years consecutive to Cnt. 2;
Count 4:	Felonious Restr.	6 months-2 years consecutive to Cnt. 3;
Count 5:	IDSI	5-10 years consecutive to Cnt. 4;
Count 6:	Indec. Asslt.	6 months-2 years concurrent to Cnt. 5;
Count 7:	Simple Asslt.	6 months-2 years concurrent to Cnt. 6.
TOTAL:		15½-36 years

SHAD CONNELLY **COMM. vs. BRETT THOMAS CULVER**
No. 907 - 1993

Count 1:	Rape	8-20 years; consecutive to existing sentence;
Count 2:	Statutory Rape	1-2 years concurrent to Cnt. 1;
Count 3:	IDSI	5-10 years concurrent to Cnt. 1;
Count 4:	Aggr. Indec. Asslt.	2½-5 years consecutive to Cnt. 3;
Count 5:	Indec. Asslt.	6 months-2 years concurrent to Cnt. 4;
Count 6:	Endngr. Welf. Children	6 months-2 years consecutive to Cnt. 4;
Count 7:	Corrup. of Minors	6 months-2 years consecutive to Cnt. 6;
Count 8:	Sexual Abuse/children	1-2 years consecutive to Cnt. 7.
TOTAL:		17½-41 years

SHAD CONNELLY **COMM. vs. WILLIE GRIFFIN**
No. 320 - 1994

Count 7:	Statutory Rape	5-10 years;
Count 1:	Reckls. Endngr. Another	1-2 years consecutive to Cnt. 7;
Count 2:	Corrup. of Minors	2½-5 years consecutive to Cnt. 1;
Count 4:	Induce. of Minors/Liquor	6 months-1 year consecutive to Cnt. 2;
Count 5:	Reckls. Endngr. Another	1-2 years consecutive to Cnt. 4;
Count 6:	Corrup. of Minors	2½-5 years consecutive to Cnt. 5;
Count 8:	Induce. of Minors/Liquor	6 months-1 year consecutive to Cnt. 6.
TOTAL:		13-26 years

SHAD CONNELLY **COMM. vs. GARY E. FELTENBERGER**
No. 1094 - 1995

Count 3:	IDSI	8-20 years;
Count 2:	Statutory Rape	1½-3 years consecutive to Cnt. 3;
Count 7:	Indec. Asslt.	1½-3 years consecutive to Cnt. 2;
Count 8:	Corrup. of Minors	1-5 years consecutive to Cnt. 7.
TOTAL:		12-31 years

SHAD CONNELLY **COMM. vs. GARY LEE HATHAWAY**
No. 214 - 1996

Count 2:	IDSI	2½-5 years;
Count 4:	Crim. Attempt.	2½-5 years consecutive to Cnt. 2;
Count 1:	Endngr. Welf. Children	6 months-1 year concurrent to Cnt. 2.
TOTAL:		5-10 years

SHAD CONNELLY — **COMM. vs. BRIAN THOMAS SPROAT**
No. 1065 - 1996

Count 1:	Rape	3½-10 years;
Count 2:	IDSI	3½-10 years consecutive to Cnt. 1;
Count 4:	Incest	6 months-3 years consecutive to Cnt. 2
Count 5:	Statutory Rape	1-5 years concurrent to Cnt. 1.
TOTAL:		7½-23 years

SHAD CONNELLY — **COMM. vs. ANTONIA ANDERSON**
No. 1220 - 1996

Count 1:	IDSI	7½-15 years;
Count 2:	Burglary	2-5 years consecutive to Cnt. 1;
Count 3:	Felonious Restr.	3 months-2½ years consecutive to Cnt. 2;
Count 4:	Terr. Threats	Merges w/ Cnt. 1;
Count 6:	Reckls. Endngr. Another	3 months-2½ years consecutive to Cnt. 3;
Count 7:	Poss. Instru. Crime	6 months-2½ years consecutive to Cnt. 2;
Count 8:	Simple Asslt.	Merges w/ Cnt. 1.
TOTAL:		10½-27½ years

SHAD CONNELLY — **COMM. vs. THEO JONES**
No. 1235 - 1996

Count 1:	IDSI	6½-15 years;
Count 2:	Burglary	1¾-5 years consecutive to Cnt. 1.
TOTAL:		8¼-20 years

SHAD CONNELLY — **COMM. vs. MARTIN DAVID SMILLIE**
No. 2409 - 1996

Count 1:	IDSI	5-10 years consecutive to Case No.: 777 - 1996;
Count 3:	Indec. Asslt.	Merges w/ Cnt. 1;
Count 4:	Corrup. of Minors	1-5 years concurrent to Cnt. 7;
Count 5:	IDSI	5-10 years consecutive to Cnt. 1;
Count 6:	IDSI	5-10 years consecutive to Cnt. 5;
Count 7:	Indec. Exp.	1-5 years concurrent to Cnts. 4 & 1.
TOTAL:		15-30 years

SHAD CONNELLY — **COMM. vs. CLIFFORD LEE FOX**
No. 139 - 2000

Count 1:	IDSI	5-10 years;
Count 2:	Simple Asslt.	5-10 years consecutive to Cnt. 1.
TOTAL:		10-20 years

SHAD CONNELLY — **COMM. vs. GOMAR WILLIAMS, JR.**
No. 2416 - 2000

Count 1:	Rape	7-20 years;
Count 2:	IDSI	7-20 years consecutive to Cnt. 1;
Count 5:	Aggr. Asslt.	14 months-5 years consecutive to Cnt. 2;
Count 6:	Terr. Threats	7 months-2½ years consecutive to Cnt. 5;
Count 9:	PIC	3 months-2½ years consecutive to Cnt. 6.
TOTAL:		16-50 years

SHAD CONNELLY — **COMM. vs. CORY LAMONT ROGERS**
No. 1584 - 2001

Count 2:	Aggr. Indec. Asslt.	5-10 years;
Count 3:	IDSI	7½-15 years consecutive to Cnt. 2.;
Count 4:	IDSI	7½-15 years consecutive to Cnt. 2.
TOTAL:		20-40 years

WILLIAM R. CUNNINGHAM — **COMM. vs. DUANE KEITH CAMPBELL**
No. 2695 - 1996

Count 2:	IDSI	5-10 years;
Count 1:	Crim. Attmpt. Rape	5-10 years consecutive to Cnt. 2;
Count 3:	Aggr. Indec. Asslt.	$2\ ^{1}/_{12}$ - $4\ ^{1}/_{6}$ consecutive to Cnt. 1;

Count 4:	Indec. Asslt.	6 months-1 year consecutive to Cnt. 3;
Count 5:	Indec. Asslt.	6 months-1 year consecutive to Cnt. 4;
Count 8:	Corrup. of Minors	1-2 years consecutive to Cnt. 5;
Count 9:	Simple Asslt.	2 years probation consecutive.
TOTAL:		14½-28 1/6 years (followed by 2 years probation)

WILLIAM R. CUNNINGHAM — **COMM. vs. JOSEPH MALLORY STEELE**
No. 973 - 1998

Count 1:	IDSI	5-10 years;
Count 2:	Indec. Asslt.	6 months-1 year consecutive to Cnt. 1;
Count 3:	Corrup. of Minors	6 months-1 year consecutive to Cnt. 2;
Count 4:	IDSI	2½-5 years consecutive to Cnt. 3.
TOTAL:		8½-17 years

WILLIAM R. CUNNINGHAM — **COMM. vs. JAMES LEE FARMER**
No. 1359 - 1998

Count 1:	Rape	5-10 years;
Count 2:	IDSI	4-8 years consecutive to Cnt. 1;
Count 3:	Indec. Asslt.	Merges;
Count 4:	Unlaw. Restr./ Involv. Servitude	5 years probation consecutive to Cnt. 2.
TOTAL:		9-18 years (followed by 5 years probation)

WILLIAM R. CUNNINGHAM — **COMM. vs. RICHARD J. GRIFFTHS**
No. 2122 - 1998

Count 1:	IDSI	10-20 years;
Count 3:	IDSI	10-20 years consecutive to Cnt. 1;
Count 4:	IDSI*	10-20 years concurrent to Cnt. 3;
Count 6:	IDSI*	10-20 years concurrent to Cnt. 3;
Count 7:	Aggr Indec. Asslt.	2½-5 years consecutive to Cnt. 6;
Count 9:	Aggr. Indec. Asslt.	2½-5 years consecutive to Cnt. 7;
Count 10:	Aggr. Indec. Asslt.	2½-5 years consecutive to Cnt. 9;
Count 12:	Aggr. Indec. Asslt.	2½-5 years consecutive to Cnt. 10;
Count 13:	Indec. Asslt.	9 months-1½ years consecutive to Cnt. 12;
Count 15:	Indec. Asslt.	9 months-1½ years consecutive to Cnt. 13;
Count 16:	Indec. Asslt.	9 months-1½ years consecutive to Cnt. 15;
Count 18:	Indec. Asslt.	9 months-1½ years consecutive to Cnt. 16;
Count 19:	Corrup. of Minors	5 years probation consecutive to Cnt. 18;
Count 20:	Corrup. of Minors	5 year probation consecutive to Cnt. 19.
TOTAL:		33-66 years (10 years probation consecutive)
		*(originally consecutive, then modified)

WILLIAM R. CUNNINGHAM — **COMM. vs. JONATHAN CHARLES KENT**
No. 3418 - 1998

Count 2:	Rape	5-10 years;
Count 1:	IDSI	4-8 years consecutive to Cnt. 2;
Count 4:	Aggr. Asslt.	2-4 years consecutive to Cnt. 1;
Count 5:	Terr. Threats	5 years probation consecutive to Cnt. 6;
Count 6:	PIC	1 month-1 year consecutive to Cnt. 4.
TOTAL:		11½-23 years (5 years probation consecutive to Cnt. 6)

ERNEST J. DISANTIS — **COMM. vs. JAMES ANTHONY ELLIS**
No. 766 - 1996

Count 1:	IDSI	8-20 years;
Count 2:	Crim. Solicitation	7-20 years consecutive to Cnt. 1.
TOTAL:		15-40 years

ERNEST J. DISANTIS — **COMM. vs. DONALD FRANCIS WILLIAMS**
No. 922 - 1997

Count 1:	IDSI	5-20 years;
Count 2:	IDSI	5-20 years consecutive to Cnt. 1
Count 5:	Corrup. of Minors	9 months-5 years consecutive to Cnts. 1 & 2;
Count 3:	Indec. Asslt.	Merges w/ Cnt. 1;

Count 4:	Indec. Asslt.	Merges w/ Cnt. 2.
TOTAL:		10¾-45 years

ROGER M. FISCHER — **COMM. vs. ANTHONY PAUL DIRIENZO**
No. 1747 - 1986

Count 2:	Kidnapping	5-10 years;
Count 1:	Rape	5-10 years consecutive to Cnt. 2.
TOTAL:		10-20 years

ROGER M. FISCHER — **COMM. vs. THOMAS BYERS**
No. 807 - 1992

Count 2:	Aggr. Indec. Asslt.	5-10 years consecutive to Case No.: 953 - 1983;
Count 3:	Indec. Asslt.	2½-5 years consecutive to Cnt. 2;
Count 4:	Corrup. of Minors	2½-5 years concurrent to Cnt. 3.
TOTAL:		7½-15 years

ROGER M. FISCHER — **COMM. vs. ERIC JOHN WOLFGANG, JR.**
No. 1440 - 1992

Count 1:	Rape	10-20 years consecutive to Case No.: 1439 - 1992;
Count 2:	Statutory Rape	Merges;
Count 3:	IDSI	10-20 years consecutive to Cnt. 1;
Count 4:	Indec. Asslt.	Merges;
Count 6:	Felonious Restr.	1-2 years consecutive to Cnt. 3;
Count 7:	Terr. Threats	2-4 years consecutive to Cnt. 6
Count 8:	Aggr. Indec. Asslt.	2-4 years consecutive to Cnt. 7.
TOTAL:		25-50 years

ROGER M. FISCHER — **COMM. vs. DAVID LENTZ**
No. 1512 - 1992

Count 5:	IDSI	5-20 years;
Count 3:	Aggr. Indec. Asslt.*	5-10 years concurrent to Cnt. 5;
Count 10:	Aggr. Indec. Asslt.*	5-10 years consecutive to Cnt. 5;
Count 9:	Statutory Rape	2-10 years consecutive to Cnt. 10;
Count 4:	Indec. Asslt.	Merges w/ Cnt. 3;
Count 6:	Corrup. of Minors	Merges w/ Cnt. 5;
Count 13:	Corrup. of Minors	Merges w/ Cnts. 9 & 10.
TOTAL:		12-40 years

*(originally 5-20 years concurrent to Cnt. 5, then modified)

ROGER M. FISCHER — **COMM. vs. HAROLD TALBURT**
No. 1444 - 1994

Count 3:	IDSI	5-10 years;
Count 9:	Aggr. Indec. Asslt.	3-6 years consecutive to Cnt. 3;
Count 1:	Corrup. of Minors	6 months-1 year consecutive to Cnt. 9;
Count 2:	Corrup. of Minors	6 months-1 year consecutive to Cnt. 1;
Count 4:	Indec. Asslt.	9 months-1½ years consecutive to Cnt. 2;
Count 6:	Endngr. Welf. Children	6 months-1 year consecutive to Cnt. 7;
Count 7:	Indec. Asslt.	9 months-1½ years consecutive to Cnt. 6;
Count 8:	Endngr. Welf. Children	6 months-1 year consecutive to Cnt. 7.
TOTAL:		11½-23 years

JESS S. JIULIANTE — **COMM. vs. GEORGE AARON FULLER**
No. 541 - 1990

Count 1:	IDSI	Withdrawn
Count 2:	Indec. Asslt.	1-2 years consecutive to Case No.: 2113 - 1987;
Count 3:	Corrup. of Minors	1-4 years consecutive to Cnt. 2.
TOTAL:		2-6 years

JESS S. JIULIANTE — **COMM. vs. JAMES MARTELL**
No. 2843 - 1994

Count 2:	Aggr. Indec. Asslt.	3-6 years consecutive to Case No.: 278 - 1992;
Count 1:	Indec. Asslt.	Merges w/ Cnt. 2;

Count 3:	Corrup. of Minors	3-6 months concurrent to Cnts. 4 & 2;
Count 4:	Endngr. Welf. Children	3-6 months concurrent to Cnts. 3 & 2;
Count 5:	IDSI	5-10 years consecutive to Cnt. 2;
Count 6:	IDSI	5-10 years consecutive to Cnt. 5;
Count 7:	Rape	5-10 years consecutive to Cnt. 6;
Count 8:	Statutory Rape	Merges w/ Cnt. 7;
Count 9:	Aggr. Indec. Asslt.	2-4 years consecutive to Cnt. 7;
Count 10:	Indec. Asslt.	Merges w/ Cnt. 9;
Count 11:	Corrup. of Minors	3-6 months concurrent to Cnt. 9;
Count 12:	Endngr. Welf. Children	3-6 months concurrent to Cnt. 11.
TOTAL:		20-40 years

MICHAEL JOYCE **COMM. vs. AUGUSTAS COLE**
No. 617 - 1985

Count 1:	Corrup. of Minors	2½-5 years;
Count 2:	Indec. Asslt.	1-2 years consecutive to Cnt. 1;
Count 3:	Corrup. of Minors	2½-5 years consecutive to Cnt. 2;
Count 4:	Indec. Asslt.	1-2 years consecutive to Cnt. 3.
TOTAL:		7-14 years

MICHAEL JOYCE **COMM. vs. JAMES MICHAEL WEBB**
No. 189 - 1987

Count 1:	Rape	5-10 years;
Count 2:	IDSI	5-10 years consecutive to Cnt. 1;
Count 3:	Indec. Asslt.	1-2 years concurrent to Cnt. 2;
Count 4:	Unlawful Restr.	2-4 years consecutive to Cnt. 2;
Count 5:	Simple Asslt.	1-2 years concurrent to Cnt. 4.
TOTAL:		12-24 years

MICHAEL JOYCE **COMM. vs. CECIL L. ABLES, SR.**
No. 365 - 1989

Count 1:	IDSI	5-10 years;
Count 2:	Indec. Asslt.	Merges;
Count 5:	Rape	5-10 years consecutive to Cnt. 10:
Count 6:	Statutory Rape	1-2 years consecutive to Cnt. 3;
Count 8:	IDSI	5-10 years consecutive to Cnt. 1;
Count 9:	IDSI	5-10 years consecutive to Cnt. 8:
Count 10:	IDSI	5-10 years consecutive to Cnt. 9.
TOTAL:		26-52 years

MICHAEL JOYCE **COMM. vs. DANIEL LEE HAYES**
No. 1273 - 1989

Count 1:	IDSI	6 months-1½ years:
Count 2:	Crim. Attmpt/ Statutory Rape	6 months-1½ years consecutive to Cnt. 1;
Count 5:	Corrup. of Minors	Merges w/ Cnt. 1 & 2.
TOTAL:		1-3 years

MICHAEL JOYCE **COMM. vs. RICHARD EUGENE HUNT**
No. 860 - 1996

Count 1:	IDSI	5-20 years;
Count 2:	Indec. Asslt.	6 months-5 years consecutive to Cnt. 1;
Count 3:	Corrup. of Minors	6 months-5 years consecutive to Cnt. 2.
TOTAL:		6-30 years

ARTHUR C. SCHENCK

v.

CNA INSURANCE COMPANY

INSURANCE / COMMON LAW ARBITRATION / APPEAL AND ERROR

Decision of arbitrator in common-law arbitration is binding and cannot be attacked unless it can be shown by clear, precise and indubitable evidence that a party was denied hearing, or that there was fraud, misconduct, corruption or other irregularity that caused rendition of unjust, inequitable, or unconscionable award. 42 P.S. § 7341.

INSURANCE / COMMON LAW ARBITRATION / APPEAL AND ERROR

Judicial review of an award in a common-law arbitration appeal is directed at whether there was irregularity in the process of the arbitration and not the result of the arbitration.

INSURANCE / COMMON LAW ARBITRATION / APPEAL AND ERROR

Alleged failure of a party to disclose tax records was not an irregularity in the process of the arbitration, but rather it was a challenge on the merits and therefore not subject to review.

CIVIL PROCEDURE / DISCOVERY / SUBPOENAS

During discovery, a party seeking production may serve on the person named in the subpoena a copy of the subpoena only if it is identical to the subpoena attached to the notice of intent to serve the subpoena and if the party seeking production has filed with the court a certificate that the notice of intent to serve was mailed or delivered to each party at least twenty days prior to the date on which the subpoena is sought to be served. The twenty day notice however, may be waived. Pa.R.Civ.P. 4009.22.

CIVIL PROCEDURE / PETITIONS / RULE TO SHOW CAUSE / DISCOVERY

If an answer to a rule to show cause is filed that raises disputed issues of material fact, the petitioner may take depositions on those issues, or such other discovery as the court allows, within the time set forth in the order of the court. If the petitioner does not conduct discovery, the petition shall be decided on petition and answer and all averments of fact responsive to the petition and properly pleaded in the answer shall be deemed admitted. Pa.R.Civ.P. 206.7.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 90030 – 2001 MISCELLANEOUS

Appearances: Joseph J. May, Esquire for the Plaintiff
Walter F. Kawalec, III, Esquire for the Defendant

OPINION

Bozza, John A., J.

This matter is before the Court on the Rule 1925(b) Statement of Matters Complained of on Appeal filed by defendant, Continental Insurance Company[1] (herein "CNA"). The procedural history of the case is as follows. Plaintiff Arthur C. Schenck, D.O. (herein "Dr. Schenck") was involved in an auto accident on June 18, 1996 with Margaret M. Buhite, sustaining several injuries which prevented plaintiff from continuing to work as an osteopathic physician. The underlying tortfeasor claim was settled for the limit of Margaret M. Buhite's policy, and Dr. Schenck filed a claim for underinsured motorist benefits, medical and work loss benefits with his insurance carrier, CNA Insurance Company on April 14, 1997. On February 10, 1998, Dr. Schenck requested this matter be assigned to an attorney so that underinsured arbitration could occur, pursuant to the terms of Dr. Schenck's insurance policy.

Initially, counsel for CNA requested Dr. Schenck's financial records. Counsel for Dr. Schenck responded by providing various documents including some tax returns, indicating that "These are the only financial statements which I have been able to obtain regarding the income of Dr. Schenck." (Brief in Opposition to Defendant's Petition to Vacate or Modify or Correct Underinsured Arbitration Award, Exhibit C). Tax returns had not been filed for any years after 1997. It appears that depositions were also conducted at various times during the pendency of the action. Arbitrators were selected on October 13, 2000.[2] In July, 2001 following the resolution of a dispute concerning an independent medical examination, the Court entered an Order mandating that the arbitration hearing be scheduled before October 3, 2001. The hearing was finally commenced on October 31, 2001 and a second hearing was set for November 14, 2001.

Between hearings on November 8, 2001, CNA served Dr. Schenck with subpoenas for the records of Metro Health Prompt Care, California Medical Board, Highmark Blue Cross/Blue Shield, and Prison Health Services. Dr. Schenck refused to waive the twenty (20) day notice requirement asserting that the arbitration proceedings had already commenced. At the second arbitration hearing on November 14, 2001, the arbitrators sustained Dr. Schenck's objection to the subpoenas.

On November 29, 2001, a third hearing was conducted and CNA requested a continuance due to the fact that a witness was unable to

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[1] Defendant is mistakenly captioned as CNA Insurance Company.

[2] A change to the composition of the panel was later required upon request of CNA.

attend. On December 7, 2001, CNA filed a Certificate Prerequisite to Service of Subpoena, Pursuant to Rule 4009.22 of the Pennsylvania Rules of Civil Procedure, indicating that the subpoenas had been served as of November 13, 2001. On December 12, 2001, the final arbitration hearing was conducted and on January 3, 2002, the arbitrators issued a unanimous award of $400,000 for Dr. Schenck. On February 1, 2002, CNA filed a Petition to Vacate or Modify or Correct Underinsured Arbitration Award Pursuant to 42 Pa. C.S.A. §§7314 and 7315. Following argument, the Court issued an Order on May 1, 2002 denying the petition. On May 13, 2002, CNA filed a "Motion for Reconsideration of Petition to Vacate or Modify or Correct Underinsured Arbitration Award Pursuant to 42 Pa. C.S.A. §§7314 and 7315 and Request for Leave of Court to Perform Discovery on the Damage Issue." On May 15, 2002, the Court issued an Order denying CNA's Motion for Reconsideration and Request for Discovery. On May 31, 2002, CNA filed a Notice of Appeal to the Superior Court of Pennsylvania, and filed a timely 1925(b) Statement of Matters Complained of on Appeal.

In its 1925 (b) Statement of Matters Complained of on Appeal, CNA asserts the Court committed an error of law and an abuse of discretion because the Court did not find that fraud, misconduct, corruption or similar irregularity occurred in the arbitration proceedings which led to an unjust, inequitable or unconscionable award. Specifically, CNA asserts the Court erred by not finding fraud occurred due to:

> (1) Dr. Schenck's "withholding and/or failure to permit the discovery of actual data and information necessary to determine the presence of the plaintiff's wages during the applicable time;"
> (2) the "arbitrators failing to permit the discovery of the actual data and information necessary to determine the plaintiff's wages during the applicable time;"
> (3) Dr. Schenck's "failure, in light of his failure to file tax returns during the time in question, to allow the enforcement of subpoenas designed to acquire the information necessary to determine the facts at issue in this case;"
> (4) the arbitrators' "refusal, in light of the claimant's failure to file tax returns during the time in question or disclose financial data sufficient to determine his income during the requisite period, to enforce the subpoenas designed to acquire the information necessary to determine the facts at issue in this case
> (5) the arbitrators' "refusal, in light of the claimant's obfuscation and failure to provide adequate financial data sufficient to determine his income during the requisite time period, to grant an adverse inference against the claimant with regards to the facts at issue in this case;"

(6) the parties should be permitted to conduct any discovery on disputed issues of fact under Rule 206.7.

Issues of fact and of law are not reviewable on appeal from a common-law arbitration, and an arbitrator's award will be considered binding unless it can be shown by "clear, precise, and indubitable evidence that a party was denied a hearing, or that there was fraud, misconduct, corruption, or other irregularity which caused the rendition of an unjust, inequitable or unconscionable award." *Smith v. Employers' Liability Assurance Corporation, Ltd.*, 217 Pa. Super. 31, 268 A.2d 200 (1970); 42 P.S. §7341. It should also be noted that this standard of review requires irregularity in the *process* of the arbitration, not the *result* of the arbitration. *Press v. Maryland Casualty Co.*, 227 Pa. Super. 537, 324 A.2d 403 (1974).

In this case, CNA alleges that Dr. Schenck withheld or failed to permit the discovery of information, including tax returns, concerning Dr. Schenck's earning history. Essentially, CNA believes that Dr. Schenck lied when he said that he did not have certain past tax returns or other documents evidencing his income during the relevant periods. Alternately, it appears that CNA is alleging that Dr. Schenck didn't file the tax returns or keep records in order to conceal his actual income for the years 1997 through 1999. However, in support of its position CNA offered nothing more than conjecture regarding both Dr. Schenck's conduct and motives.

The present case is somewhat analogous to *Snyder v. Cress*, 791 A.2d 1198 (Pa.Super. 2002), a case in which plaintiffs alleged that the arbitration award in favor of defendant should be vacated because defendant committed fraud when he performed the original construction work that became the subject of the arbitration proceedings. The Pennsylvania Superior Court noted that the plaintiffs' appeal was "based not on any defect in the arbitration proceedings, but upon a litigant's evidentiary posture and disclosures at the time of the arbitration." *Id.* at 1201. An appeal which seeks to review the merits of a particular case is excluded from appellate consideration. *Id.* Dr. Schenck's failure to file tax returns for several years and to keep or have available wage records for the years in question certainly presented a proof problem at the time of the arbitration. However, those failures on the part of Dr. Schenck had nothing to do with any defect in the arbitration proceedings per se.

CNA maintains that disposition of this case is controlled by the holding in *Paugh v. Nationwide Insurance Co.*, 278 Pa.Super. 108, 420 A.2d 452 (Pa.Super. 1980). In *Paugh*, the plaintiff's intentionally misled the arbitrators by falsely claiming not to know the identity of the driver who caused the accident. The plaintiffs had named the driver in a complaint filed several years earlier and not only failed to reveal this but through witnesses maintained that they did not know who the driver was. *Id.* 278 Pa.Super. at 121. In the present case, CNA presented no evidence that Dr. Schenck lied about the existence of the requested tax returns or withheld other

records in his possession. CNA's position is predicated entirely on its belief that in a previous case Dr. Schenck filed tax returns following the conclusion of the litigation in order to avoid income disclosure. (Argument Transcript, 4/23/02, p. 5-6). Moreover, as the Superior Court stated in *Snyder*,

> we are unwilling to read *Paugh* which involved an extraordinary factual setting as authority for modifying an arbitration award based on a bare claim of fraud with respect to a single element of a complex construction performance award. Since there is no transcript of the arbitration proceedings, appellants' claim of fraud cannot be documented and on appeal from this award, the court could be required to speculate as to the parties' evidentiary posture during the proceedings. The lack of a record and appellants' reliance upon a conclusory claim of fraud by a disappointed litigant in support of his effort to relitigate the issues in the arbitration proceedings, give credence to our high court's allegiance to the finality of common law arbitration awards absent evidence of a defect in the process. *Id*. at 1202.

There is no evidence in the record to suggest that Dr. Schenck deliberately withheld information from CNA during the time for discovery, which occurred between February 10, 1998 up until the time of the arbitration hearings.

CNA's assertion concerning the subpoenas served by CNA are also without merit. Rule 4009.22 of the Pennsylvania Rules of Civil Procedure requires that the party seeking service of a subpoena provide all other parties a twenty (20) days notice of intent to serve a subpoena. Pa.R.Civ.P. 4009.22(a)(1). The notice requirement is for the benefit of the parties, and may be waived by the parties' agreement in order to expedite the production of the materials desired. Pa.R.Civ.P. 4009.22(a) *Note*. In the present case, defendant filed the necessary certificate on December 7, 2001, indicating that it had provided Dr. Schenck with notice on November 11, 2001 of the intent to serve a subpoena. (CNA alleges notice was provided on November 8, 2001). The record is clear that Dr. Schenck refused to waive the twenty (20) day notice requirement. Although CNA alleges that Dr. Schenck's refusal to waive the notice requirement constitutes fraudulent conduct, there is no legal basis for such a finding. The Rules of Civil Procedure do not mandate that a party must agree to waive the notice period.

At the second arbitration hearing on November 14, 2001 the arbitrators refused to compel plaintiff to waive the notice requirement.[3] Since there

[3] There is a serious question as to the authority of arbitrators to order a party to "waive" a right to notice.

is no transcript of the arbitration proceedings, the Court is unable to determine the precise reasons for the arbitrator's decision. However, as Dr. Schenck's counsel noted at the time of oral argument, CNA was not prohibited from serving the subpoenas and obtaining records after the twenty (20) day notice period had elapsed. (Hearing Transcript, 4/23/01 p. 22). Although the arbitration proceedings may have been concluded before CNA received the material requested, it would have had occasion to discover information concerning its position Dr. Schenck had fraudulently withheld documents. There is nothing in the record to support CNA's allegation that the arbitrators actions in choosing not to order waiver of the twenty day period constituted corruption, fraud or other similar irregularity. CNA's assertion is without merit.

CNA also asserts that the Court erred by not permitting the parties to conduct discovery on disputed issues of fact, pursuant to Rule 206.7 of the Pennsylvania Rules of Civil Procedure. This assertion is without merit. Rule 206.7 of the Pennsylvania Rules of Civil Procedure permits discovery to be conducted on issues of material fact raised in an answer to a petition before the Court, and discovery shall be conducted as the Court allows. Pa.R.Civ.P. 206.7(c). However, if the petitioner does not seek to conduct discovery, "the petition shall be decided on petition and answer and all averments of fact responsive to the petition and properly pleaded in the answer shall be deemed admitted for the purpose of this subdivision." Pa.R.Civ.P. 206.7(c). In this case, CNA did not seek to have discovery conducted after the rule to show cause was issued. Rather, CNA sought discovery only after its petition was denied on May 1, 2002. As the Court stated at the time of argument on CNA's petition,

> …The only thing that you're missing is proof. And of course without that, I can't help you. Now if you had some proof that, in fact, that information existed, then you've got a different matter … while your point is an important one and disturbing one, of course, there isn't any proof that they withheld information, and that's the bottom line.

(Hearing Transcript, 4/23/02 p. 26).

Dr. Schenck filed an Answer to CNA's petition on February 8, 2002, and oral argument on CNA's petition was not conducted until April 23, 2002. CNA had ample time to seek discovery. Moreover, CNA has offered no explanation for not seeking discovery after the rule to show cause was issued, a fact which is not easily reconcilable with CNA's claim that it would have subpoenaed relevant documents from Highmark Blue Cross/ Blue Shield among others, if it had had more time in which to do so. As discussed above, CNA could very well have served the subpoenas after the twenty-one (21) days expired and may have obtained material that would have supported the claims CNA made in its petition.

For the reasons set forth above, this Court's Order dated May 1, 2002 should be affirmed. Signed this 22nd day of July, 2002.

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

ANNETTE WASHAM, Plaintiff

v.

KATHLEEN AZZARELLO, Defendant

CIVIL PROCEDURE/SERVICE

The plaintiff's attempt to serve a complaint, (which amounted to sending the complaint by certified mail to the defendant, receiving an unsigned return receipt) was defective. The defendant's motion to dismiss the case was granted, because the statute of limitations had lapsed and the plaintiff did not make further efforts to secure service.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 13804-2001

Appearances: J. David Ungerman, Esquire for the Plaintiff
John B. Fessler, Esquire for the Defendant

OPINION

Before the Court are the Defendant's preliminary objections seeking to dismiss this case for lack of personal jurisdiction. Reluctantly, this Court is constrained to concur.

On October 30, 1999, the parties were involved in a two vehicle accident in a Wal-Mart parking lot. Five days before the statute of limitations expired, the Plaintiff filed a Writ of Summons. Because the Defendant was not a resident of Pennsylvania, service of process was attempted by certified mail. The postal service provided Plaintiff's counsel with a return receipt card postmarked Brooklyn, New York dated November 6, 2001. However, the return receipt was not signed by the Defendant nor anyone authorized to do so on behalf of the Defendant. In fact, the return receipt was unsigned.

On December 10, 2001, Attorney John Fessler informed Plaintiff's counsel he would be representing the Defendant. The lawyers discussed the problems with the certified mail card being unsigned. On that date Plaintiff's counsel asked Attorney Fessler to accept service of process for the Defendant.

On December 12, 2001 Attorney John Fessler formally entered an appearance on behalf of the Defendant. By letter dated December 12, 2001, Attorney Fessler indicated to Plaintiff's counsel he would not accept service of process on behalf of the Defendant.

On December 27, 2001, Plaintiff's counsel filed a return of service acknowledging the certified return receipt was not signed by the Defendant nor any agent of the Defendant. Unfortunately, the Plaintiff took no further measures to secure service of process upon the Defendant.

The procedural rules governing service of process for out-of-state defendants are straightforward. The Pennsylvania Supreme Court has required strict compliance with these rules in order to secure personal jurisdiction and perfect the timely tolling of the statute of limitations.

Pa.R.C.P. No. 404 provides various options for the service of original process outside the Commonwealth of Pennsylvania. Plaintiff attempted service pursuant to Pa.R.C.P. No. 404(2) which provides for service by mail in accordance with Rule 403. In relevant part, Rule 403 provides:

> "If a Rule of Civil Procedure authorizes original process to be served by mail, a copy of the process shall be mailed to the Defendant by any form of mail requiring a receipt signed by the Defendant or his authorized agent. Service is complete upon delivery of the mail." (emphasis added.) See Pa.R.C.P. No. 403.

In the case sub judice, it is uncontroverted the certified mail sent by Plaintiff was returned unsigned by the Defendant or any authorized agent. Plaintiff was aware of this deficiency in service which led to the Plaintiff's request for Attorney Fessler to accept service on behalf of the Defendant. When Attorney Fessler did not agree to accept service, Plaintiff still had plenty of time to pursue several avenues.

Pa.R.C.P. No. 404 provides that original process shall be served within ninety days of the issuance of the writ. Therefore, Plaintiff had until January 24 or 25, 2002 to effectuate service. Upon the refusal of defense counsel to accept service, Plaintiff could have attempted service by certified mail again and/or proceeded pursuant to Pa.R.C.P. No. 405(c)(2) allowing for service by ordinary mail upon the refusal of Defendant to accept mail service. Also, Plaintiff could have pursued the other forms of service permitted under Pa.R.C.P. No. 404 (1) or (3).

Because Plaintiff did none of these possibilities, the Writ of Summons as filed on October 25, 2001 was not served in compliance with the procedural Rules. Hence this Court does not have personal jurisdiction over the Defendant.

The present situation has long been scrutinized by our Appellate Courts. In *Cintis Corp. v. Lee's Cleaning Services, Inc.*, 549 Pa. 84, 700 A.2d 911 (1997), the Pennsylvania Supreme Court stated:

> "Service of process is a mechanism by which a Court obtains jurisdiction of a defendant, and therefore, the rules concerning service of process must be strictly followed… Without valid service, a Court lacks personal jurisdiction of a defendant and is powerless to enter judgment against him or her… Thus, improper service is not merely a procedural defect that can be ignored when a defendant subsequently learns of an action against him or her."

Cintis Corp., 700 A.2d at 917-918.

The Pennsylvania Supreme Court has also examined whether a plaintiff has made a good faith effort to achieve service of process. See *Farinacci v. Beaver County Industrial Development Authority*, 510 Pa. 589, 511 A.2d 757 (1986). However, the record in this case is devoid of a good faith effort. As noted, Plaintiff had ample time to attempt a second certified mail and/or to seek service by ordinary mail. Another option would have been to have the Writ reissued to allow additional time for service. See Pa.R.C.P. No. 401 (b)(1). Further, Plaintiff could have sought service pursuant to Pa.R.C.P. No. 404 (1) or (3). Plaintiff took none of these actions and therefore cannot be deemed to have proceeded in good faith.

While the result in this case is harsh, Plaintiff's failure to comply with the Rules of Civil Procedure leaves this Court without personal jurisdiction over the Defendant. Since the statute of limitations has now expired, the Defendant's Preliminary Objections must be granted and this case dismissed.

In reaching this result, this Court is mindful of the strong likelihood the Defendant received the Writ on November 6, 2001 as evidenced by the entry of Attorney Fessler's appearance on December 12, 2001. However, Plaintiff's awareness of the deficiency in service was manifested by Plaintiff's request for Attorney Fessler to accept service. Plaintiff's failure to subsequently effectuate service of process cannot simply be winked at, particularly in view of the rulings from the Pennsylvania Supreme Court.

ORDER

The Defendant's Preliminary Objections are hereby **GRANTED** for the reasons set forth in the accompanying Opinion. Because the statute of limitations has expired, this case is **DISMISSED**.

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

JEFFREY D. CROCKETT

v.

EDINBORO UNIVERSITY OF PA.

CIVIL PROCEDURE/PLEADINGS/PRELIMINARY OBJECTIONS

The question presented by the demurrer is whether, on the facts averred, the law states with certainty that no recovery is possible.

Where doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling it.

When ruling on preliminary objections in the nature of a demurrer, the court must accept as true all well-pleaded material facts set forth in the complaint and give the plaintiff the benefit of all reasonable inferences.

Preliminary objections in the nature of a demurrer require that the court resolve the issues solely on the basis of the pleadings; no testimony or other evidence outside of the complaint may be considered to dispose of the legal issues presented by the demurrer.

STATUTES

Statutory personal property exception to sovereign immunity was inapplicable in action alleging that Commonwealth university improperly withheld college transcript and diploma for student's failure to satisfy student loans obtained through Pennsylvania Higher Education Assistance Agency. 1 Pa. C.S. §2310; 42 Pa. C.S. §8522.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 11549 – 2001

Appearances: Gary H. Nash, Esquire for the Plaintiff
Thomas G. Eddy, Esquire for the Defendant

OPINION

Bozza, John A., J.

This matter is before the Court on the 1925(b) Statement of Matters Complained of on Appeal filed by the plaintiff, Jeffrey D. Crockett. The procedural history of the case is as follows. On May 2, 2001, Mr. Crockett filed a Complaint alleging defendant, Edinboro University of Pennsylvania (herein "Edinboro University"), had violated the Unfair Trade Practices and Consumer Protection Law,[1] Pennsylvania Debt Collection Trade Practices Regulation,[2] and the Federal Fair Debt Collection Practices Act[3] by wrongfully withholding Mr. Crockett's college degree and transcript

[1] 73 P.S. §201-1 et seq. (herein "UTPCPL").
[2] 37 Pa.Code Chapter 303.1 et seq.
[3] 15 U.S.C. §1692 et seq.

until Mr. Crockett satisfied his educational assistance loans through the Pennsylvania Higher Education Assistance Agency (herein "PHEAA"). On June 8, 2001, Edinboro University filed a Notice of Removal to the United States District Court for the Western District of Pennsylvania. On March 8, 2002, the Honorable Sean J. McLaughlin granted Edinboro University's Motion for Summary Judgment with respect to Mr. Crockett's federal cause of action and granted Mr. Crockett's Motion for Remand. On March 18, 2002, Edinboro University filed Preliminary Objections in the Nature of a Demurrer to Mr. Crockett's Complaint, which the Court granted on June 5, 2002. On July 3, 2002, Mr. Crockett filed a Notice of Appeal to the Commonwealth Court of Pennsylvania, and filed a timely 1925(b) Statement of Matters Complained of on Appeal.

Mr. Crockett asserts that the Court erred in its reliance on the case of *Sugalski v. Commonwealth*, 131 Pa.Cmwlth. 173, 569 A.2d 1017 (1990). Mr. Crockett alleges *Sugalski* "extended an exception to an exception on an overly broad basis…the extension of the [doctrine of sovereign immunity] exemption in *Sugalski* was overly broad to bar Plaintiff's claims because he was not injured by the property itself." (1925(b) Statement). Mr. Crockett asserts that the care, custody or control of his personal property by Edinboro University caused him harm, and seeks to have *Sugalski* overruled. Mr. Crockett's assertions are without merit.

When considering preliminary objections in the nature of a demurrer, the Court must accept as true all well-pleaded material facts set forth in the complaint and give the plaintiff the benefit of all inferences reasonably deductible therefrom. *Cardenas v. Schober*, 783 A.2d 317, 321 (Pa. Super. 2001)(citing *Corestates Bank, Nat'l Assn. v. Cutillo*, 723 A.2d 1053, 1057 (Pa. Super. 1999)). Further, the Court must overrule a demurrer unless it is certain that there is no set of facts under which the plaintiff could recover. *Id*. It must appear with certainty that, upon the fact averred, the law would not permit recovery by plaintiff. *Id*. Any doubt must be resolved in favor of overruling the demurrer. *Id*. Finally, the issues presented by the demurrer must be resolved solely on the basis of the pleadings; no testimony or other evidence outside of the complaint may be considered. *Williams v. Nationwide Mutual Ins.*, 750 A.2d 881 (Pa. Super. 2000). Applying these criteria to the present case, the Court accepted the material facts set forth in Mr. Crockett's Complaint as true, and concluded that Mr. Crockett did not sufficiently state a cause of action upon which relief may be granted. Specifically, Mr. Crockett did not state a cause of action which fell within any exception to the Doctrine of Sovereign Immunity.

The Doctrine of Sovereign Immunity[4] protects the Commonwealth, and its officials and employees from suit except when immunity has been

[4] 1 P.S. §2310.

specifically waived by the General Assembly. Edinboro University is both a public corporation and a government instrumentality which is part of the State System of Higher Education (herein "SSHE"), and state sovereign immunity has been extended to each institution in the SSHE. 24 P.S. §20-2002-A; 24 P.S. §20-2016-A; *Bucks County Community College v. Bucks County Bd. of Assessment Appeals*, 147 Pa.Cmwlth. 505, 509, 608 A.2d 622, 624 (1992)(*citing Finkelstein v. Shippensburg State College*, 29 Pa.Cmwlth. 373, 370 A.2d 1259 (1977)). In order for Mr. Crockett to have stated a cause of action against Edinboro University, his claim must have fit within one of the nine exceptions to the Doctrine of Sovereign Immunity.

Mr. Crockett averred in his Complaint that his action fit within the personal property exception, which permits actions for damages caused by "the care, custody or control of personal property in the possession or control of Commonwealth parties, including Commonwealth-owned personal property and property of persons held by a Commonwealth agency." 42 P.S. §8522(b)(3). Specifically, Mr. Crockett averred that Edinboro University wrongfully refused to issue his Bachelor of Science in Education Degree and undergraduate transcript while attempting to collect a debt for a third party, causing Mr. Crockett to suffer "economic loss based on his inability to obtain employment commensurate with his education degree status. (Complaint, ¶ 15). However, following an examination of relevant authority, it was apparent that Mr. Crockett's claims did not fall within any exception of sovereign immunity.

Mr. Crockett's action did not fall within the personal property exception to the Doctrine of Sovereign Immunity because the property held by the Edinboro University did not cause Mr. Crockett's harm. In *Sugalski v. Commonwealth*, 131 Pa.Cmwlth. 173, 569 A.2d 1017 (1990), the plaintiffs sought damages for the mishandling of their money which had been seized during an illegal gambling investigation. The Commonwealth Court upheld the dismissal of the plaintiffs' action for failure to state a claim, clearly stating that "the personal property exception may only be applied to those cases where the property itself is alleged to have caused the injury." *Sugalski*, 131 Pa.Cmwlth. at 177 (citing *Nicholson v. M & S Detective Agency, Inc.*, 94 Pa.Cmwlth. 521, 503 A.2d 1106 (1986); *Deveaux v. Palmer*, 125 Pa.Cmwlth. 631, 558 A.2d 166 (1989)).

In *Nicholson*, the plaintiff sought damages for the failure of the state police to check the criminal records of all applicants to private detective agencies, as required by statute. *Nicholson*, 94 Pa.Cmwlth. at 522. In that case, the plaintiff worked in a bank that was robbed by its own security guard, who had a criminal record. *Id.* Despite the state police's breach of duty, the criminal records of the security guard "were not involved in the chain of causation…the personal property must be in some manner responsible for the injury." *Id.* at 526. In *Deveaux*, the plaintiff sought

damages for breach of a settlement agreement by officials of the Commonwealth's medical liability fund. *Deveaux*, 125 Pa.Cmwlth. at 634-35. While the "Fund monies are personal property, Deveaux's assertions of third-party interference with the performance of a contract between Federal Home Life and the parties to the settlement agreement cannot in any way be construed to raise a cognizable claim that the care, custody or control of the property—that is, the money itself—caused her injuries." *Id*. at 637. Mr. Crockett's case is directly analogous to these cases, in that the harm caused to Mr. Crockett was the result of the *managing* of his academic records, not his records per se. As such, the exception to sovereign immunity was inapplicable to Mr. Crockett's factual situation.

Mr. Crockett avers in his 1925(b) Statement that the *Sugalski* decision was overly broad, and points to "the decision in *Nicholson v. M & S Detective Agency, Inc*., 94 Pa.Cmwlth. 521, 503 A.2d 1106 (1986), decision by Judge Cullins [sic] and based on a reading of the descent [sic] of Judge Cullins [sic] in *Sugalski*" as support for his view that *Sugalski* should be overruled. While Mr. Crockett is correct that Judge Colins[5] did deliver the opinion in *Nicholson* and did dissent in *Sugalski*, little else may be inferred from those facts. Judge Colins did not file a written dissent in *Sugalski*, and there is no way to ascertain exactly with what portion of the *Sugalski* decision Judge Colins did not agree. Mr. Crockett apparently believes that because Judge Colins wrote the opinion in *Nicholson*, and then dissented from a similar opinion in *Sugalski*, that Judge Colins no longer supports the rationale behind either decision. Such an interpretation is without any legal basis and certainly beyond the speculation of the trial court.

Moreover, there have been numerous decisions which have reaffirmed the *Sugalski* concept that the harm must have been caused by the personal property itself in order for the exception to sovereign immunity to apply.[6] For example, the plaintiffs in *Dianese, Inc. v. Pennsylvania*, 2002 U.S. Dist. LEXIS 10917 (E.D. Pa. June 19, 2002), alleged that the Commonwealth

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[5] Mr. Crockett has incorrectly referred to Judge Colins as Judge Cullins.

[6] In addition to the cases discussed herein, see also: *Drexel v. Vaughn*, 1997 U.S. Dist. LEXIS 8939 (E.D. Pa. June 20, 1997)(immunity not waived when improper confiscation and retention of property, not property itself, caused injury); *Serrano v. Pennsylvania State Police*, 130 Pa.Cmwlth. 531, 568 A.2d 1006 (1990)(immunity not waived when failure of crime lab to analyze evidence in timely fashion, not evidence itself, caused the harm); *Warnecki v. SEPTA*, 689 A.2d 1023 (Pa.Cmlwth. 1997)(immunity not waived when personal property was alleged to have facilitated, but not cause, the harm); *SEPTA v. Simpkins*, 167 Pa.Cmwlth. 451, 648 A.2d 591 (1994)(immunity not waived when cup on bus step, not bus itself, caused harm); *Horick v. Banfi*, 15 Pa. D. & C. 4th 22 (Butler Cty. 1992)(demurrer denied where wine bottle transported by Commonwealth is alleged to have caused injury).

and numerous other defendants who were parties to numerous construction projects "participated in a conspiracy to bankrupt plaintiffs by withholding contractually owed funds and by creating financial difficulties to prevent plaintiffs from further pursuing the disputed funds." *Id*. at *7. The *Dianese* Court rejected plaintiffs' argument that the personal property exception should apply stating that

> the personal property must be the cause of the injury. See *Iseley v. Horn*, Civ. No. 95-5389, 1996 U.S. Dist. LEXIS 13471 (E.D. Pa. September 3, 1996) (immunity not waived when improper confiscation, not property itself, caused injury); (*Sugalski v. Commonwealth*, 131 Pa.Cmwlth. 173, 569 A.2d 1017, 1019 (1990)(immunity not waived when improper handling of property caused injury). In contrast, plaintiffs have alleged that injury was caused by the improper retention of plaintiffs' property, rather than by the property itself. Accordingly, Pennsylvania has not waived its immunity in this action. *Id*. at *16.

In *Iseley*, an inmate sued the Pennsylvania Department of Corrections for confiscation of personal property, and his claim was dismissed since his "… 'injuries,' if any, were caused by the Defendant's confiscation and retention of Iseley's property, not the property itself." *Id*. at *21. There is no indication in any of these cases that *Sugalski* is no longer the law in Pennsylvania; indeed, *Sugalski* continues to be cited as the relevant authority on this issue. The Court's reliance on *Sugalski* was well placed.

The case most similar to Mr. Crockett's situation is *Bufford v. Pennsylvania Dept. of Transp.*, 670 A.2d 751 (1996). In *Bufford*, the plaintiff filed suit against the Pennsylvania Department of Transportation (herein "DOT") after his driver's license was negligently suspended, and the plaintiff was arrested and cited for driving with a suspended license. *Id*. at 751-752. The plaintiff argued that "DOT's records did not have to literally 'fall on his head' to bring this case within the personal property exception…the harm he suffered was related to DOT's negligent management of its records." *Id*. at 754. The Court acknowledged that the parties' dispute centered over whether the phrase "care, custody or control of personal property" should be construed to mean tangible or intangible personal property. *Id*. Even if DOT's conduct could be deemed negligent, a Commonwealth agency is immune from suit for "negligent regulation and negligent policies", as well as "negligent, erroneous and inaccurate examinations." *Id*. at 754 (citations omitted). In *Bufford*, the "inaccurate driving record, at most, only facilitated Bufford's injury by communicating DOT's inaccurate suspension record to third parties." *Id*.

Mr. Crockett's suit is clearly analogous to the factual situation presented in *Bufford*, and merits the same disposition. Here, Mr. Crockett's concern was with intangible property, namely his degree and transcript. Edinboro

University informed Mr. Crockett that it would not issue his degree or transcript without Mr. Crockett first satisfying his loans through PHEAA, despite allegedly not having any authority to do so. Even if the Court assumes *arguendo* that Edinboro University negligently held itself out to have the ability to collect such a debt on behalf of a third party, there is no waiver of Edinboro University's immunity. At most, Edinboro University's actions, while not condoned by this Court, rise to the level of a negligent policy for which immunity still applies. Since Mr. Crockett's claim was barred by the Doctrine of Sovereign Immunity, his Complaint was properly dismissed.

Based on the aforementioned reasons, the Court's Order of June 5, 2002 should be affirmed.

Signed this 7th day of August, 2002.

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

TERRY FERRI and DENISE FERRI

v.

HIGHMARK BLUE CROSS/BLUE SHIELD

CIVIL PROCEDURE / SUMMARY JUDGMENT

Summary judgment may be granted only in those cases in which there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law.

PERSONAL INJURY / INSURANCE / SUBROGATION

The purpose of subrogation is to place the burden of the debt upon the person who should bear it. The equitable doctrine of subrogation places the subrogee in the precise position of the one to whose rights and disabilities he is subrogated. An insurer who indemnifies a party for a loss on which that party has also recovered from a third party should be restored for those costs. In this way, the cost of the harm will be placed on the party who should bear it, and the insured will not enjoy a "double recovery" to the detriment of the insurer. The insurer's restoration should be limited to recovering in subrogation the amount received by the subrogor *relative* to the claim paid by the subrogee, for equity will not allow the subrogee's claim to be placed ahead of the subrogor's.

PERSONAL INJURY / MOTOR VEHICLES / SUBROGATION

Section 1720 of the Pennsylvania MVFRA prohibits subrogation in actions arising out of the maintenance or use of a "motor vehicle" with respect to a claimant's recovery of benefits, with respect to worker's compensation benefits, benefits available under section 1711 (relating to required benefits), 1712 (relating to availability of benefits) or 1715 (relating to availability of adequate limits) or benefits paid or payable by a program, group contract or other arrangement whether primary of excess under section 1719 (relating to coordination of benefits).

MOTOR VEHICLE CODE / DEFINITIONS

Although the term "motor vehicle" is not defined in the MVFRA it is defined in the Pennsylvania Motor Vehicle Code, as "a vehicle which is self-propelled except one which is propelled solely by human power or by electric power. . ." "Motorcycle" is defined as "a motor vehicle having a seat or saddle for the use of the rider and designed to travel on no more than three wheels in contact with the ground."

STATUTORY INTERPRETATION

When the language of a statute is free from all ambiguity, the plain language of the statute is not to be disregarded under the pretext of pursuing its spirit. When the language of a statute is ambiguous, statutory interpretation must be performed and may include consideration of the legislative history of the relevant statute, the purpose of the statute, and the consequences of a particular interpretation. Moreover, a Court must construe a statute in a manner to give effect to every word contained in the statute.

MOTOR VEHICLES / SUBROGATION / STATUTORY INTERPRETATION

Section 1720 states that subrogation is not permitted in actions arising out of the maintenance or use of a motor vehicle. The Motor Vehicle Code unambiguously states that a "motorcycle" is a "motor vehicle." In instances where the legislature chose to treat motorcycles differently in the MVFRA, it set forth its intention with specificity. The legislature chose not to make a distinction with regard to the subrogation provision. To conclude that the legislature meant something entirely different would require the court to speculate, substitute its judgment for that of the legislature, and ignore the necessity to give effect to the plain meaning of the relevant statutory provisions. Limitations on the right of subrogation are consistent with the conceptual foundation of the MVFRA.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 13275 – 2000

Appearances: Kevin C. Jennings, Esquire for the Plaintiffs
Gerri L. Sperling, Esquire for the Defendant

OPINION

Bozza, John A., J.

This matter is before the Court on cross Motions for Summary Judgment filed by plaintiffs, Terry and Denise Ferri, and defendant, Highmark Blue Cross/Blue Shield (herein "Highmark"). The factual history of the case is as follows. On July 31, 1999, plaintiff Terry Ferri was operating his motorcycle when he collided with an automobile operated by Frank Alvin Moore. Mr. Ferri sustained numerous injuries, requiring extended hospitalization. Mr. Ferri's medical expenses were paid by Highmark through his health care plan with his employer, Dresser Industries, Inc. and the plaintiffs have settled their third party action against Mr. Moore with his insurance carrier, Erie Insurance Exchange. Highmark informed plaintiffs that it would seek subrogation to recover $32,857.53 from plaintiffs' third party settlement, arguing that because Mr. Ferri was operating a motorcycle at the time of his accident, the anti-subrogation provisions of the Pennsylvania Motor Vehicle Financial Responsibility Act would not be applicable. On September 21, 2000, plaintiffs filed an Action for Declarative Judgment, in which they seek a judicial determination of whether the defendant has a right of subrogation.

Summary judgment may be granted only in those cases in which there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law. *Harleysville Insurance Cos. v. Aetna Cas. & Sur. Ins. Co.*, 795 A.2d 383 (Pa. 2002). The parties agree that the matter is ripe for summary judgment.

The purpose of subrogation is to "place the burden of debt upon the person who should bear it." *Allstate Ins. Co. v. Clarke*, 364 Pa.Super. 196,

202, 527 A.2d 1021, 1024 (1987). Further, "the equitable doctrine of subrogation places the subrogee in the precise position of the one to whose rights and disabilities he is subrogated." *Id*., *citing Michel v. City of Bethlehem*, 84 Pa.Cmwlth. 43, 478 A.2d 164 (1984). An insurer who indemnifies a party for a loss on which that party has also recovered from a third party should be restored for those costs. *Id*. In this way, the cost of the harm will be placed on the party who should bear it, and the insured will not enjoy a "double recovery" to the detriment of the insurer. *Id*. It should be noted that the insurer's restoration "should be limited to recovering in subrogation the amount received by the subrogor *relative* to the claim paid by the subrogee, for equity will not allow the subrogee's claim to be placed ahead of the subrogor's." *Id*., 364 Pa.Super. at 201-202, 527 A.2d at 1024 (emphasis in the original).

According to the contract between Highmark and Dresser Industries, Inc, Mr. Ferri's employer, Highmark has the right of subrogation to "succeed to any rights or recovery of a Subscriber for expenses incurred against any person or organization except insurers or policies or health insurance issued to and in the name of the Subscriber," and has the right to recover "to the extent that benefits for Covered Services are provided or paid under this Contract." Primary Care Designated Gatekeeper Health Care Contract, p. 64, T. *Subrogation* (1). The contract specifically mandates that those portions of the contract concerning subrogation "shall not apply where subrogation is specifically prohibited by law." Primary Care Designated Gatekeeper Health Care Contract, p. 64, T. *Subrogation* (3). Highmark's contract also precludes coverage for treatment associated with injuries received from the maintenance or use of a motor vehicle if such treatment "is paid or payable under a plan or policy of motor vehicle insurance including…any medical benefits payable in any manner under the Pennsylvania Motor Vehicle Financial Responsibility Act." Primary Care Designated Gatekeeper Health Care Contract, p. 59. The Court's analysis must then turn to the relevant portions of the Pennsylvania Motor Vehicle Financial Responsibility Act (herein "MVFRA").

Section 1720 prohibits subrogation "in actions arising out of the maintenance or use of a motor vehicle" with respect to a claimant's recovery of benefits

> with respect to workers' compensation benefits, benefits available under section 1711 (relating to required benefits), 1712 (relating to availability of benefits) or 1715 (relating to availability of adequate limits) or benefits paid or payable by a program, group contract or other arrangement whether primary or excess under section 1719 (relating to coordination of benefits).

75 P.S. §1720

Therefore in order for the anti-subrogation section to be applicable to plaintiffs' situation, the accident must have occurred as the result of the maintenance or use of a motor vehicle.

Since it is undisputed that Mr. Ferri was operating a motorcycle at the time of the accident, the Court must determine if the term "motor vehicle" as used in section 1720 includes a "motorcycle". Although the term "motor vehicle" is not defined in MVFRA it is defined in the Pennsylvania Motor Vehicle Code, as "a vehicle which is self-propelled except one which is propelled solely by human power or by electric power…", while "motorcycle" is defined as "a motor vehicle having a seat or saddle for the use of the rider and designed to travel on no more than three wheels in contact with the ground." 75 P.S. §102.

Highmark correctly notes that within the MVFRA, motorcycles are treated differently than other motor vehicles with regard to certain benefit provisions. For example, Section 1711 of the MVFRA requires that coverage for medical benefits in the amount of $5,000 be provided for "any motor vehicle of the type required to be registered under this title, except…motorcycles" and several other specified vehicles. 75 P.S. §1711(A). First-party benefits for medical treatment, income loss, accidental death, and other similar benefits must also be made available for purchase to cover any motor vehicle, except motorcycles and other specified vehicles. 75 P.S. §1712. An operator of a motorcycle cannot recover first party benefits. 75 P.S. §1714. In addition,

> in any action for damages against a tortfeasor, or in any uninsured or underinsured motorist proceeding, arising out of the maintenance or use of a motor vehicle, a person who is eligible to receive benefits under the coverages set forth in this subchapter…or any program, group contract or other arrangement for payment of benefits as defined in section 1719 (relating to coordination of benefits) shall be precluded from recovering the amount of benefits paid or payable under this subchapter…or any program, group contact or other arrangement for payment of benefits as defined in section 1719.[1] 75 P.S. §1722.

Highmark argues that by making these distinctions that the legislature intended to treat operators of motor vehicles differently with regard to the right to subrogation.

When the language of a statute is free from all ambiguity, the plain language of the statute is not to be disregarded under the pretext of

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[1] Section 1719 defines the term "program, group contract or other arrangement" to include "benefits payable by a hospital plan corporation or a professional health service corporation subject to Pa.C.S. Ch. 61." 75 P.S. §1719. Defendant is a hospital plan corporation governed by 40 P.S. §61, since it is an entity that provides benefits in the Commonwealth for medical and other like expenses, provides these benefits by reimbursement, and is not subject to the jurisdiction of another agency of the Commonwealth or the Federal Government with respect to financial solvency. 40 P.S. §61(a).

pursuing its spirit. 1 P.S. §1921(b). When the language of a statute is ambiguous, statutory interpretation must be performed and may include consideration of the legislative history of the relevant statute, the purpose of the statute, and the consequences of a particular interpretation 1 P.S. §1921(c); *Oberneder v. Link Computer Corp.*, 548 Pa. 201, 696 A.2d 148 (1997). Moreover, a Court must construe a statute in a manner intended to give effect to every word contained in the statute. *Robson v. EMC Ins. Cos.*, 785 A.2d 507 (Pa.Super. 2001).

In this case, the plain language of section 1720 states that subrogation is not permitted in actions arising out of the maintenance or use of a motor vehicle. The Motor Vehicle Code unambiguously states that a "motorcycle" is a "motor vehicle." In those instances where the Pennsylvania legislature chose to treat motorcycles differently in the MVFRA, it set forth its intention with specificity. The legislature chose not to make such a distinction with regard to the subrogation provision. To conclude that the legislature meant something entirely different would require the court to speculate, substitute its judgment for that of the legislature, and ignore the necessity to give effect to the plain language of the relevant statutory provisions.

While the Court is most cognizant of Highmark's conceptual arguments, limitations on the right of subrogation are consistent with the conceptual foundation of the MVFRA. Preventing double recovery by an injured party and limiting the financial exposure of third party liability carriers are important components of a legislative scheme intended to control the costs of motor vehicle insurance. So even if the Court were to assume, *arguendo*, that the statutory language is not sufficiently clear, the intent of the legislature is not thwarted in any way by including motorcycles in the definition of motor vehicles in section 1720. Insurers of persons operating motorcycles would receive the same financial benefits as insurers of operators of other motor vehicles which would result in lower costs to the consumer.

On the basis of the foregoing analysis, it must be concluded that Highmark's subrogation claim cannot stand and an appropriate order shall follow.

ORDER

AND NOW, to-wit, this 24th day of July, 2002, upon consideration of the plaintiffs' and defendant's Motions for Summary Judgment, and argument thereon, it is hereby **ORDERED, ADJUDGED and DECREED** that plaintiffs' Motion is **GRANTED** and defendant's Motion is **DENIED**.

Signed this 24th day of July 2002.

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

MILLCREEK TOWNSHIP

v.

TRANSPORTATION INVESTMENT GROUP and JOSEPH BENACCI

TRANSPORTATION INVESTMENT GROUP

v.

MILLCREEK TOWNSHIP

CIVIL PROCEDURE/PLEADINGS/PRELIMINARY OBJECTIONS

When considering Preliminary Objections in the nature of a Demurrer, the Court must accept as true all well-pleaded material facts set forth in the Complaint and give the Plaintiff the benefit of all inferences reasonably deductible therefrom.

Plaintiff's failed to plead sufficient facts to establish their cause of action.

CONSTITUTIONAL LAW/CIVIL RIGHTS/DUE PROCESS/ EQUAL PROTECTION

Plaintiffs failed to allege sufficient facts to state a claim for violations of 42 U.S.C. §1983. Plaintiffs failed to allege sufficient facts to show that Defendant deprived them of a property interest that falls within the ambit of substantive due process and further that the Defendant acted for reasons that are arbitrary, irrational, or tainted by improper motive or by means of government conduct so egregious that it shocks the conscience.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 10577 – 2001

Appearances: G. Jay Habas, Esquire for Millcreek Township
John R. Wingerter, Esquire for Transportation Investment Group and Benacci

OPINION

Bozza, John A., J.

This matter is before the Court on the Rule 1925(b) Statement of Matters Complained of on Appeal filed by defendants, Transportation Investment Group and Joseph Benacci (herein jointly "TIG"). The history of this case is as follows. On February 14, 2001, plaintiff Millcreek Township filed a Notice of Appeal from District Justice Judgment. On February 20, 2001, Millcreek Township then filed a Complaint, seeking six hundred dollars ($600) for each day that TIG was in violation of Millcreek Township's Subdivision and Land Development Ordinance and Stormwater Management Ordinance. In its Complaint, Millcreek Township alleged TIG had undertaken land excavation, paving and construction beyond the scope of the Township's approved Land Development Plan

with TIG for TIG's Lake Erie Warehouse and Distribution Center. Millcreek Township also alleged that although TIG had an approved Stormwater Management Plan, the plan had not been certified as having been completed pursuant to the relevant ordinance.

On April 25, 2001, TIG filed an Answer, New Matter, and Counterclaims, in which TIG alleged that Millcreek Township violated TIG's substantive due process rights and equal protection rights by depriving TIG of its ability to use and develop its property. On August 8, 2001, Millcreek Township filed Preliminary Objections to TIG's Counterclaim. On December 13, 2001, the Court issued an Order sustaining Millcreek Township's Preliminary Objections, dismissing portions of TIG's counterclaim, with prejudice, for failure to state a claim under Pennsylvania state law, and failure to state a claim pursuant to 42 U.S.C. §1983. The Court also ordered that Joseph Benacci could not assert a claim in his individual capacity, and that TIG could not seek punitive damages against Millcreek Township. However, the Court did permit TIG twenty (20) days to file an amended pleading with respect to its claim under 42 U.S.C. §1983.

On January 2, 2002, TIG filed an Amended Answer, New Matter, and Counterclaim, in which TIG again alleged that Millcreek Township violated TIG's constitutional rights. On January 22, 2002, Millcreek Township filed Preliminary Objections, and on May 23, 2002, the Court issued an Order sustaining Millcreek Township's objections and dismissing TIG's Counterclaim for failure to state a claim. On June 17, 2002, TIG filed a Notice of Appeal to the Superior Court of Pennsylvania, and filed a timely 1925(b) Statement of Matters Complained of on Appeal. In its 1925(b) Statement, TIG asserts the Court erred in its Order of May 23, 2002 when it sustained each of Millcreek Township's Preliminary Objections to TIG's Amended Counterclaim. TIG's assertions of error are without merit.

When considering preliminary objections in the nature of a demurrer, the Court must accept as true all well-pleaded material facts set forth in the complaint and give the plaintiff the benefit of all inferences reasonable deductible therefrom. *Cardenas v. Schober*, 783 A.2d 317, 321 (Pa. Super. 2001)(citing *Corestates Bank, Nat'l Assn. v. Cutillo*, 723 A.2d 1053, 1057 (Pa. Super. 1999)). Further, the Court must overrule a demurrer unless it is certain that there is no set of facts under which the plaintiff could recover. *Id*. It must appear with certainty that, upon the facts averred, the law would not permit recovery by the plaintiff. *Id*. Any doubt must be resolved in favor of overruling the demurrer. *Id*. Finally, the issues presented by the demurrer must be resolved solely on the basis of the pleadings; no testimony or other evidence outside of the complaint may be considered. *Williams v. Nationwide Mutual Ins.*, 750 A.2d 881 (Pa. Super. 2000). Applying these criteria to the present case, the Court accepted the material

facts set forth in TIG's Amended Counterclaim as true, and concluded that TIG did not sufficiently state a cause of action upon which relief may be granted.

In order for TIG to state a claim for violation of 42 U.S.C. §1983, TIG must allege sufficient facts to show that Millcreek Township deprived TIG of a "property interest that falls within the ambit of substantive due process" which was taken away by Millcreek Township for reasons that are "… 'arbitrary, irrational, or tainted by improper motive' … or by means of government conduct so egregious that it 'shocks the conscience' …." *Nicholas v. Pennsylvania State University*, 227 F.3d 133, 139 (3rd Cir. 2000)(citations omitted). Further, TIG must also allege sufficient facts to show that the egregious conduct on the part of Millcreek Township which caused the harm to TIG was the result of the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Monell v. Department of Social Services*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

TIG alleges that it is "the victim of governmental action taken by Millcreek Township," because Richard Morris, its engineer, rejected TIG's "submissions" to Millcreek for the purpose of complying with certain legal requirements associated with TIG's property. In its Counterclaim, TIG sets forth its position as follows, accusing Millcreek Township of:

a) routinely and arbitrarily ignoring, critiquing, and rejecting submissions of engineers retained by Transportation Investment Group;
b) refusing to evaluate and arbitrarily rejecting submissions, and overcharging for the cost of any review conducted through its agent Hill & Hill Engineers;
c) arbitrarily setting different standards for property to be developed by Transportation Investment Group;
d) wrongfully retaining monies supplied by Transportation Investment Group, and depriving Transportation Investment Group of its ability to utilize its properties and develop its business in accordance with the rights guaranteed under the Constitution of the United States.

(1925(b) Statement ¶ 3).

Pennsylvania is a fact pleading jurisdiction, requiring the parties to set forth with specificity those facts upon which its cause of action relies. Pa.R.Civ.P. 1019; *Line Lexington Lumber & Millwork Co, Inc. v. Pennsylvania Publishing Corp.*, 451 Pa. 154 162, 301 A.2d 684 (1973)("as a minimum, a pleader must set forth concisely the facts upon which is cause of action is based."). Here TIG has failed to do that. There is no indication anywhere in TIG's Counterclaim with regard to the nature of

the "submissions" in question. There is no mention of the particular project at issue, or the legal requirements TIG sought to meet.[1] Even an approximate time frame within which the "submissions" occurred is omitted. Moreover, TIG recites no facts concerning what appear to be the engineering and development matters in dispute or how its "submissions" addressed those disputed matters. While characterizing Millcreek Township's actions as "arbitrarily ignoring, critiquing, and rejecting," TIG fails to include any facts supporting such conclusionary allegations. TIG also accuses Millcreek Township of "overcharging" for the cost of reviewing submissions by its engineer without offering any facts describing how it was overcharged. After reading the defendant's Counterclaim one is left wondering what it is that Millcreek actually did.

TIG's attempt to compare its situation with that of the plaintiffs in *Wood Estates, Ltd. v. Gretkowski*, 205 F.3rd 118 (2000), is misguided. In *Woodwind*, a group of citizens opposed the plaintiff's plan for a subdivision containing low-income housing. *Woodwind*, 205 F.3rd at 120. Plaintiff Woodwind Estates, Ltd. submitted a preliminary development plan, which all parties to the litigation agreed was deemed sufficient by the Stroud Township Planning Commission for approval as a subdivision. *Id*. However, due to concerns that had nothing to do with the conditions for subdivision approval under the Township's ordinance, the Planning Commission of Stroud Township denied approval of the plaintiff's plan. *Id*. In support of its allegations, plaintiff presented evidence at the time of trial that: (1) defendants had "no legitimate basis under the ordinance" for inquiring about the economic background of prospective tenants as a condition of plan approval; (2) defendants used large portions of a letter written by the attorney for the citizens group opposed to the subdivision plan in defendants' denial of the plan; and (3) "the defendants intentionally blocked or delayed the issuance of the permit for subdivision approval because they were aware that by doing so the developer would be unable to meet the building deadline for financing the project." *Id*., at 125. The Court of Appeals concluded that plaintiff had provided sufficient evidence from which a jury "could reasonably find that the decision of the defendants to deny approval was made in bad faith or was based upon an improper motive." *Id.*

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[1] While Millcreek Township's Complaint alleges that TIG developed certain land in violation of the Township's Subdivision and Land Development Ordinance and Stormwater Management Ordinance, the Counterclaim does not recite that its submissions were directed to those alleged violations or for that matter, to the same land development project. In fact, TIG seems to be complaining of a variety of governmental transgressions implicating "zoning decisions, building permits or other government permission." (Amended Counterclaim, ¶13).

In contrast to *Woodwind*, TIG has not alleged any facts which would be sufficient to state a claim for relief. There are no allegations in the Amended Counterclaim that TIG was denied any permit. Moreover, assuming that TIG's complaint concerns a denial of a permit or some other necessary land use approval, TIG has not alleged that it complied with all ordinance or other applicable requirements and that, notwithstanding its compliance, Millcreek Township denied its requests. Pennsylvania courts have held that a subdivision plan "must be approved if it complies with [the] applicable regulations." *Woodwind*, 205 F.3d at 123, fn. 1 (*citing Anderson v. Board of Supervisors of Price Twp.*, 63 Pa.Cmwlth. 335, 437 A.2d 1308 (1981); *Pace Resources, Inc. v. Shrewsbury Twp. Planning Commission*, 89 Pa.Cmwlth. 468, 492 A.2d 818 (1985)(alteration in the original).[2]

TIG also asserts the Court erred in dismissing TIG's equal protection claim pursuant to 42 U.S.C. §1983, a claim which "was not addressed or challenged in Millcreek Township's Preliminary Objections and Brief in support thereof." (1925(b) Statement ¶ 2). This assertion is without merit. TIG also did not address the issue of its equal protection claim in its Brief in Opposition to Millcreek Township's Preliminary Objections, counsel for TIG asserted that the case of *Marchese v. Umstead*, 110 F.Supp.2d 361 (E.D. Pa. 2000), provides support for TIG's equal protection claim. In *Marchese*, an owner of a car dealership alleged that he was the victim of disparate treatment for having to submit a land development plan and a stormwater management plan, while other individuals were allowed to sell cars on their property without first submitting such plans. *Id*., 110 F.Supp.2d at 370-371. TIG, however, has not alleged any facts which indicate that other land owners similarly situated to TIG were treated differently. Indeed, as discussed above, TIG has alleged wrongdoing by Millcreek Township only in the most general terms. This lack of any factual basis in the Amended Counterclaim justified the Court's dismissal of TIG's equal protection claim.

TIG asserts the Court erred in sustaining Millcreek Township's Preliminary Objection that TIG's Counterclaim failed to sufficiently allege "that the Millcreek Township Supervisors and the Township Engineer were policy makers for Millcreek Township within the meaning of 42 U.S.C.A. §1983," (1925(b) Statement ¶ 4). This assertion is also without merit. In its counterclaim TIG alleges that both Mr. Morris and the Board

[2] At most, TIG asserts that it "submitted various plans, schematics, books, statistical compilations and other information required, requested or believed to be required or requested...for the purpose of complying with all laws and ordinances." (Amended Couterclaim, ¶ 16). Such provision of information is not the same thing as compliance with the relevant ordinances.

of Supervisors possess "final policy-making authority" with regard to the enforcement of certain ordinances and land use development approvals. Nothing further is alleged which would implicate such authority in the circumstances of this case. There is no description of the decisions that either Mr. Morris or the Supervisors made that evidence the furtherance of a Township policy. There is no indication that the actions of Millcreek Township in response to TIG's submissions, either through the decisions of Mr. Morris or the Supervisors, were a part of a governmental policy such that the *Monell* test would be met. Perhaps most significantly, there is absolutely no indication as to what the asserted policy might be. TIG has not alleged facts sufficient to show a practice so permanent and well-defined that it represents official policy of Millcreek Township.

Mr. Morris is responsible for the enforcement of the Subdivision and Land Development Ordinance and Stormwater Management Ordinance due to his position as Township engineer. In turn, the Millcreek Township Board of Supervisors has final authority with respect to Mr. Morris's decisions, pursuant to the Second Class Township Code. 53 P.S. §66201. However, Mr. Morris has discretion in his position in which to decide whether a property owner has sufficiently complied with the ordinances which Mr. Morris must enforce. TIG has not alleged facts sufficient to show that Mr. Morris acted beyond the scope of his discretionary powers.

Although a single decision by a policymaking official may be sufficient to subject a municipality to liability under section 1983, "the fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, *without more*, give rise to municipal liability based on the exercise of that discretion." *Pembaur v. Cincinnati*, 475 U.S. 469, 481-482, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986)(emphasis added). Even accepting as true the defendant's broad allegation that Mr. Morris has final decision-making authority for the Township, TIG's counterclaim remains woefully inadequate. A fair reading of the claim does not even allow for a determination of which decision or decisions of Mr. Morris, or for that matter of the Board of Supervisors, are at issue and therefore there is no way to know if a Township policy is implicated by whatever it is that TIG experienced.

For the reasons set forth above this Order of May 23, 2002 should be affirmed.

Signed this 6th day of August, 2002.

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

REBECCA N. BENTLEY

v.

BENJAMIN N. BENTLEY

FAMILY LAW/MARRIAGE SETTLEMENT AGREEMENTS

It is currently not necessary that parties to a settlement agreement have "an informed understanding" of the statutory rights they are surrendering by signing an agreement.

FAMILY LAW/MARRIAGE SETTLEMENT AGREEMENTS

"[C]ase law requires affirmative disclosure of relevant financial information unless there is clear evidence that the other party already possesses the information."... In *Ebersole*, full and fair disclosure was not found where the wife lacked involvement in the business and financial affairs of the husband, who had managed all the assets.

CONTRACTS/ACCEPTANCE/UNCONSCIONABLE

[A] marriage-dissolving agreement is considered unconscionable if both " 'the contractual terms are unreasonably favorable to the drafter,' and there is no meaningful choice on the part of the other party regarding acceptance of the provisions."

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 13780-2001

Appearances: Amy E. Jones, Esquire for Rebecca N. Bentley
Karen L. Klapsinos, Esquire for Benjamin N. Bentley

MEMORANDUM OPINION

June 6, 2002: Currently before the Court is a Petition to Enforce Marital Property Settlement Agreement filed on behalf of the Petitioner, Benjamin N. Bentley, by and through his attorney, Karen L. Klapsinos, Esquire. The Respondent, Rebecca N. Bentley, by and through her counsel, Amy E. Jones, Esquire, opposed the enforcement of the Marital Property Settlement Agreement for a number of reasons which will be discussed below.

A hearing was conducted before the Court on May 29, 2002 and the Court considered testimony of the parties, exhibits, and arguments of counsel. At the heart of the controversy is the Marital Property Settlement Agreement (hereinafter Agreement), which was executed by the parties on April 23, 2001. This document was admitted and entered into evidence as Petitioner's Exhibit A. (*See* attached copy). Essentially, the Petitioner contends that this Agreement was voluntarily entered into between the parties. Petitioner alleges that there was no coercion involved, and that the Agreement was signed by the parties with "full knowledge that the Agreement represented the parties' assets." (*See* Petition to Enforce

Martial Property Settlement at page 2). Therefore, Petitioner contends that this was a valid Agreement and should be enforced.

However, and to the contrary, Respondent, through her attorney, contends that this was not an enforceable Agreement because it was not made with full and fair disclosure of the marital assets and the statutory rights available to her client. Consequently, the issue before the Court is whether the Marital Property Settlement Agreement, entered on April 23, 2001, was a valid contract premised on full and fair disclosure of the marital assets. This Court finds that there was not a full and fair disclosure of the couple's financial status and, therefore, will deny the Petition to Enforce Marital Property Settlement Agreement for the reasons set forth below.

I. Factual History

The parties were married on June 10, 1989 and the Respondent filed for divorce on October 24, 2001. However, it is clear that the ultimate breakdown and dissolution of this marriage occurred at least by April 23, 2001, the date that the parties signed a document entitled "Property and Custody Agreement - Marriage Separation/Divorce." It is this Agreement and its contents which are at the center of controversy in the current matter.

Testimony revealed that this document was prepared by the Petitioner, Benjamin N. Bentley, several weeks prior to the execution of the document on April 23, 2001. Mr. Bentley indicated that he had no legal counsel assisting him in drafting this, but had the foresight to address separate sections, entitled separately as: Property, Custody, and Separation/ Divorce. There were three paragraphs devoted to the property assets from the marriage. Scrutiny of this document suggests that a certain level of sophistication and ample fore planning were expended in preparation of this contractual Agreement.

The Respondent testified that she had never received a copy of this document and to this date, still does not have a copy of it. Respondent testified that she only intermittently discussed this document and its preparation with the Petitioner shortly before signing it on April 23, 2001.

Petitioner, Benjamin N. Bentley, is a graduate of California University of Pennsylvania, who has completed several credits of graduate work for purposes of his teacher certification. He currently is a teacher in the Millcreek School District and has been since 1995. He has a Millcreek Township pension as a result of his employment with the School District. The teacher's pension governed by the Petitioner is part of the controversy at issue in the current matter. The Petitioner contends that he had informed the Respondent of the existence of his pension and that she was aware of it, although the value and worth of this pension is still unclear. The Respondent had testified that she was only made aware of the pension sometime in December of 2001 when Mr. Bentley was

contemplating and entertaining the thought of purchasing term and/or whole life insurance. Regardless of whether Ms. Bentley was aware of the pension, it is clear that she did not know its value or worth, nor was she kept abreast of the status of the pension, or any other financial matter affecting the couple.

Testimony was undisputed that, throughout the course of the marriage, it was Mr. Bentley who was in the position of financial superiority. Testimony revealed that there was no joint checking account and no joint savings account. The checking and savings accounts were kept in Mr. Bentley's name only. There was testimony that these banking statements were kept in a desk drawer, which Mr. Bentley contended Ms. Bentley had access to. This testimony was clearly form over substance because Ms. Bentley never handled any financial affairs involving Mr. Bentley's checking account. Mr. Bentley knew he was in a position of financial superiority and any intimation that Ms. Bentley was involved with the marital finances, premised on the assertion she had access to the desk drawer containing bank statements, is misleading. There was also testimony that the yearly pension statements provided to Mr. Bentley were not shown to Ms. Bentley.

The hearing also revealed that there were vehicles owned by the parties and that Ms. Bentley owned her own vehicle and assumed her own debt for the vehicle. Mr. Bentley owned his own vehicle, as well as a motorcycle, and that he took care of his own debt with respect to these items. The credit cards were issued only in Mr. Bentley's name, and Ms. Bentley did not have access to them. Although Ms. Bentley would, on occasion, deposit Mr. Bentley's check into his account, this was simply a ministerial duty and courtesy performed for Mr. Bentley and not something that rose to the level of involvement or interaction of the banking activities of Mr. Bentley.

Ms. Bentley is a high school graduate, who had worked at Giant Eagle grocery store for seven years, and maintained a checking account and what appeared to be an in-store 401k-pension account at Giant Eagle. Ms. Bentley testified that it was Mr. Bentley who handled all the financial affairs and that, for lack of a better description, she was kept in the dark with respect to these financial matters.

The Bentley's never owned a home during the course of their marriage and, curiously, Mr. Bentley purchased a home within a few days of executing the April 23, 2001 Agreement. Throughout the course of the marriage, the couple had rented apartments or townhouses, and it was Mr. Bentley who paid the rent on these leases.

Ms. Bentley also testified that she did not know her husband's salary and that she only learned about his pension in December of 2000 during a discussion with an insurance agent. However, no details of the pension or its worth were discussed at this meeting.

These facts, and others, made part of the record at the time of the hearing, indicate that Mr. Bentley maintained the financial matters of the marriage, and that there was no interaction between the parties regarding marital financial issues.

II. Legal Discussion

A post-marriage settlement agreement should be analyzed using the same legal principles as those used in contract law. *Luber v. Luber,* 418 Pa.Super. 452, 546, 614 A.2d 771, 773 (1992) (citing *Lipschutz v. Lipschutz,* 391 Pa.Super. 537, 571 A.2d 1046 (1990)). *See also, Mormello v. Mormello,* 452 Pa.Super. 590, 597-98, 682 A.2d 824, 828 (1996). Furthermore, "the same principles apply to both anti-nuptial and post-nuptial agreements." *Id.* at 596, 682 A.2d at 826 (citations omitted). In the instant case, Petitioner argues that the settlement Agreement signed on April 23, 2001, should bind both parties by its terms. Respondent counters and asserts that this Agreement should not be controlling because it is essentially unfair and ultimately invalid. She cites two grounds for why this Agreement is void. First, she claims that the Agreement is invalid because Petitioner, Mr. Bentley, never informed her of the statutory rights she was surrendering by signing the Agreement. Second, the Respondent asserts that the marital Agreement was not valid because, being a contract, it is unconscionable in that Petitioner did not fully and fairly disclose the couple's financial situation to her. There is no question that the Respondent entered into the Agreement knowingly and voluntarily. The only issues are whether the Agreement is invalid because Petitioner did not disclose the statutory rights that Ms. Bentley was surrendering and/or whether Petitioner fully and fairly disclosed the couple's financial status.

A. Is the settlement agreement invalid because Petitioner did not inform Respondent of the statutory rights she was waiving by signing the agreement?

No. Petitioner cited this Court to *Ebersole v. Ebersole*, *infra*, wherein the Superior Court held that "it is incumbent upon the enforcing party [to a marriage settlement agreement] to ensure their spouse is aware of the statutory rights relinquished [by signing an agreement]." *Ebersole v. Ebersole,* 713 A.2d 103, 105 (Pa.Super. 1998). These rights include dower, curtesy, widow's rights, family exemption, support, maintenance, alimony, alimony *pendente lite*, and award of counsel fees. *Mormello supra,* at 599, 682 A.2d at 828. In the present case, there was no evidence presented by Petitioner Benjamin Bentley that he informed his wife Rebecca Bentley of these rights that she was surrendering by signing the Agreement on April 23. Respondent, in fact, testified that she was not made aware of these rights at all. Pursuant to the decision in *Ebersole,* Ms. Bentley's claim that the Agreement is void on these grounds would have merit. However, this requirement of *Ebersole* was overturned by a more recent

Superior Court decision. *Colonna v. Colonna,* 791 A.2d 353, 357 (Pa.Super. 2001). It is currently not necessary that parties to a settlement agreement have "an informed understanding" of the statutory rights they are surrendering by signing an agreement. *Id.* Therefore, in the instant case, Respondent Rebecca Bentley's claim that the Agreement is void because she was not informed by Petitioner of the statutory rights she was surrendering is unsupported by current law. However, the assessment of the validity of this Agreement continues. The next question is set forth as follows:

B. Is the settlement agreement invalid because there was not full and fair disclosure of the parties' financial positions?

Yes. Case law is clear that in order for an anti-nuptial agreement to be enforceable (i.e., the marital Agreement in this case), the parties must make full and fair disclosure of their financial positions. See *Colonna, supra,* 791 A.2d at 355; *Simeone v. Simeone,* 525 Pa. 392, 581 A.2d 162, 167 (1990) (citation omitted); *Ebersole, supra,* 713 A.2d at 104; *Mormello, supra,* 682 A.2d at 828. This disclosure must be full and fair, but it need not be exact. *Colonna, supra,* 791 A.2d at 355; *Simeone, supra,* 581 A.2d at 167.

To determine whether disclosure has been full and fair, a court can consider whether there was significant involvement by the parties in each other's financial affairs. *See,* e.g., *Mormello, supra,* 682 A.2d 824, 828 (wherein the court relied on appellant's lack of involvement in spouse's financial affairs in finding appellant was not fully and fairly aware of marital estate); *see also, Adams v. Adams,* 414 Pa.Super. 634, 607 A.2d 1016 (1992) (the court held that appellant's participation in her spouse's business and her knowledge of parties' general financial resources were sufficient for full and fair disclosure); *Nigro v. Nigro,* 371 Pa.Super. 625, 538 A.2d 910 (1988) (full and fair disclosure demonstrated where appellant had significant work experience in family pizza business). In *Ebersole, supra,* the court also recognized that "[a]vailability of information, however, is not equivalent to disclosure." *Id.* 713 A.2d at 104. In fact, the court in *Ebersole* went further and stated that "case law requires affirmative disclosure of relevant financial information unless there is clear evidence that the other party already possesses the information." *Id., supra,* 713 A.2d at 105 (See, e.g., *Mormello, supra.*) In *Ebersole,* full and fair disclosure was not found where the wife lacked involvement in the business and financial affairs of the husband, who had managed all the assets. The wife in *Ebersole, supra,* was never prevented from accessing financial information and had only general discussions with her husband about overall net worth. *Id.* However, the Court concluded that this did not amount to full and fair disclosure. *Id.*

The instant case is squarely on point with *Ebersole.* Ms. Bentley had virtually no involvement in the couple's financial matters except paying a

few minor bills and sometimes buying groceries. She deposited her husband's employment checks, but never examined them to any extent. Mr. Bentley earned most of the couple's income and paid almost all of the bills. Ms. Bentley knew little about the couple's assets. Each spouse had their own separate checking account, with Mr. Bentley's account being the family's primary account. Mr. Bentley also had the family's only savings account in his own name. Ms. Bentley knew nothing about the existence of this account. The couple's credit cards were issued solely in Mr. Bentley's name. Ms. Bentley never even opened the statements on these accounts. She also had no access to the use of the credit cards. Furthermore, Mr. Bentley also had an automobile and motorcycle in his own name. Respondent had, if any, a modicum of knowledge as to the value of these assets.

Even though Petitioner admits to not informing Respondent to any specific values of the couple's assets, he argues that Ms. Bentley had access to some of this information because financial statements were in an unlocked drawer in the couple's family room. However, this was not enough, because availability of information is not equivalent to disclosure. See *Ebersole, supra,* 713 A.2d at 104. There was no evidence to suggest that Ms. Bentley had any relevant financial information regarding the marital assets, or any significant involvement with the marital finances. Mr. Bentley was aware of his financial superiority and did nothing to affirmatively apprise Ms. Bentley of either his financial status or the status of the marital assets.

It is clear that Mr. Bentley had not made full and fair disclosure of his financial position or the marital assets in the Agreement executed in this matter.

i. Are the terms of the Agreement unconscionable?

The marital Agreement at issue in this case has been assessed as a contract. Therefore, in *Colonna v. Colonna, supra*, 791 A.2d at 357, the court recognized that to be enforceable, a marital settlement agreement must not be unconscionable. The court continued and stated that a marriage-dissolving agreement is considered unconscionable if both "'the contractual terms are unreasonably favorable to the drafter,' and there is no meaningful choice on the part of the other party regarding acceptance of the provisions." *Id.* (quoting *Todd Heller, Inc. v. United Parcel Service, Inc.*, 754 A.2d 689, 701 (Pa.Super. 2000)). Therefore, this Court will assess whether or not this Agreement was also unconscionable.

Based on the facts and circumstances presented to the Court in this case, the Agreement is unreasonably favorable to Mr. Bentley. It was Mr. Bentley who drafted the document and only allowed a cursory review by Ms. Bentley before she signed it. In fact, a copy was never even provided to Ms. Bentley. There were no specific evaluations provided in the marital property section of the Agreement and only vague terms were utilized.

Pursuant to the Agreement, the parties were to keep everything that they had acquired as individuals before the marriage, any items which were given to them individually during the marriage, and any items purchased separately during the marriage. A review of the record indicates that Mr. Bentley clearly had acquired a significant amount of the couple's assets and stood to benefit from the wording of his own Agreement. Mr. Bentley kept an automobile, a motorcycle, his individual checking and savings accounts, and his entire pension assets. The Agreement also provided that Mr. Bentley would not pay any support to Respondent despite the fact that he was the primary income earner in the family and had been throughout the life of the marriage. Ms. Bentley was to keep her own automobile, which also included her own debt obligation associated with the vehicle, and her own checking account, which had an estimated value of $300.00. Each individual was responsible for paying their own debt obligations. However, the document clearly favored Mr. Bentley and his financial status. Mr. Bentley enjoyed financial superiority and, not surprisingly, he crafted a document devoid of financial factual specificity to protect his assets.

Another factor in determining whether the Agreement was unconscionable is whether or not there was a meaningful choice on the part of the other party regarding acceptance of the provisions. In other words, *Colonna* stated that when parties make a full and fair disclosure of their financial positions, the settlement agreement is not unconscionable. *Colonna*,*supra*, 791 A.2d at 357. Again, referencing the discussion previously undertaken by the Court in this Opinion, it is clear that there was not full and fair disclosure of the parties' financial positions, and the marital assets involved in this matter. Mr. Bentley never took any affirmative action to fully disclose the specifics of this financial information to Ms. Bentley and only relied on the vagaries of the document in which he crafted. This Court, therefore, finds that the Agreement of April 23, 2001, was unconscionable and invalid.

C. Conclusion

Based on the factors set forth above, this Court finds that there was not full and fair disclosure of the parties' financial positions, thereby rendering the marital Agreement of April 23, 2001, invalid.

An Order will follow.

ORDER

AND NOW, to-wit, this 6th day of June 2002, it is hereby **ORDERED, ADJUDGED** and **DECREED** that the Petitioner's Petition to Enforce Marital Property Settlement Agreement is hereby **DENIED.** The marital Agreement is **INVALID.**

BY THE COURT:
/s/ **John J. Trucilla, Judge**

COMMONWEALTH OF PENNSYLVANIA

v.

NATHANIEL K. PRIVOTT

CRIMINAL LAW

When reviewing the sufficiency of the evidence, the court must determine whether the evidence, and all reasonable inferences deducible from that, viewed in the light most favorable to the Commonwealth as verdict winner, are sufficient to establish all of the elements of the offense beyond a reasonable doubt.

CRIMINAL LAW

To sustain a conviction for robbery, the Commonwealth must prove the defendant threatened another with, or intentionally put another in fear of, serious bodily injury while attempting to commit a theft. 18 Pa.C.S.A. § 3701(a), 18 Pa.C.S.A. § 3921(a); 18 Pa.C.S.A. § 2301.

CRIMINAL LAW

To sustain a conviction for burglary, the Commonwealth must establish that the defendant entered a building or occupied structure with the intent to commit a crime therein, that the building was not open to the public and that the defendant was not licensed or privileged to enter. 18 Pa.C.S.A. § 3502.

CRIMINAL LAW

Sufficient evidence existed to support convictions for robbery and burglary where defendant entered a home, reached into an individual's pocket, announced "give me all of your shit or I'll fuck you up" and held a knife to another individual's throat.

CRIMINAL LAW

Whether the verdict is against the weight of the evidence is addressed to the sound discretion of the trial judge, and the operative test is whether the verdict is so contrary to the evidence as to shock one's sense of justice making the award of a new trial imperative.

CRIMINAL LAW

Jury's verdict was not against the weight of the evidence where the Commonwealth provided consistent and credible evidence that the defendant entered a home, threatened the occupants with a knife and demanded their valuables.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION NO. 3078 OF 2001 SUPERIOR CT. NO. 819 WDA 2002

Appearances: Keith H. Clelland, Esquire for Nathaniel K. Privott
Robert A. Sambroak, Jr., Esquire for Commonwealth

OPINION

July 22, 2002: This opinion addresses Defendant Nathaniel K. Privott's Statement of Matters Complained of on Appeal filed pursuant to Pa. R.A.P. 1925 (b). In his 1925 (b) Statement, the Defendant argues that this Court erred in not finding the jury's verdict contrary to the weight of the evidence presented at trial. He also argues that this Court erred in finding the evidence sufficient to support his convictions for burglary and robbery.

PROCEDURAL AND FACTUAL HISTORY

On November 29, 2001, the Erie Police Department filed criminal charges against Nathaniel K. Privott for an incident that occurred on August 18, 2001. Mr. Privott pleaded not guilty to these charges. A jury trial commenced on March 14, 2002. The Defendant was found guilty on March 15, 2002 of burglary, robbery, possessing instruments of crime, and recklessly endangering another person. 18 Pa. C.S.A. §§3502, 3701 (A)(1)(ii), 907 and 2705. This Court, on April 18, 2002, sentenced Mr. Privott to three to ten years in state prison and a $100.00 fine for the burglary conviction, and five to ten years and a $100.00 fine for the robbery conviction. The terms of the sentences were ordered to run consecutively. The possessing instruments of crime and recklessly endangering another person convictions merged with the robbery conviction for sentencing purposes. On April 23, 2002, the Defendant filed a motion to reconsider the sentences. This request was denied. On May 14, 2002, the Defendant filed a Notice of Appeal with the Erie County Clerk of Courts. On May 21, 2002, this Court ordered the Defendant to comply with Pa.R.A.P. 1925 (b). On May 24, 2002, the Defendant timely filed his 1925(b) Statement with the Clerk of Courts. This Opinion is issued pursuant to Pa.R.A.P. 1925(a).

The factual findings are as follows: On August 18, 2001, a group of friends were gathered socially at an apartment at 656 East 11th Street in Erie, Pennsylvania. This group consisted of Brooke Rhodes, Christian Darling, Nicole Ortmann, Tom Austin, Michael Regan and Keith Wurster. *See* Trial Transcript Day 1, 3/14/02 at p. 33 (hereinafter "Tr."). The apartment was being rented by Brooke Rhodes, Christian Darling, Meredith Lynch and Joe Fiorie. Tr. at 81-82. Sometime after midnight, the group was shocked when a man wearing all dark clothes walked in through the unlocked front door with a nylon stocking over his head. *Id.* at 39, 58, 70, and 84. The perpetrator's face was still visible through the stocking to several of the victims. *Id.* at 39, 58, 71. At no time on this night was this person invited into the apartment. *Id.* at 99. He entered through an unlocked, but closed, front door. *Id.* at 84.

Immediately after entering the apartment the man approached Tom Austin, who was standing nearest the front door. *Id.* at 40, 59, 71 and 84. He then tried to get his hand into Tom's pocket. *Id.* Tom pushed the

Defendant away. *Id*. at 40. After this, the Defendant pulled out a knife and put the blade to Christian Darling's throat. *Id.* at 41, 59, 72 and 86. At some point while threatening the group, the Defendant said something to the effect of "give me all of your shit or I'll fuck you up." *Id*. at 40, 59, 71 and 86.

When seeing a knife to her friend's throat, Brooke Rhodes jumped up, grabbed the telephone with one hand and the Defendant's sweatshirt with the other. *Id*. at 86. She screamed at the Defendant to leave and that she was calling the police. *Id* at 88. In response to this, the Defendant stated that he was just "kidding" or "playing" and went out the front door. *Id.* at 42, 60, 73 and 88. Tom Austin and Keith Wurster tried to see where the perpetrator went, but they were not successful. *Id.* at 88. Later, Brooke Rhodes and Keith Wurster each independently picked the Defendant out of a photo line-up as the perpetrator. *See* Trial Transcript Day 2, 3/15/02 at 31-35. All four of the testifying victims identified, in open court, Mr. Privott as the man who came uninvited into Brooke's apartment and held a knife to Christian's throat while commanding the group to give him their possessions. Tr. at 45, 61, 74 and 87.

LEGAL ANALYSIS

The Defendant claims both that the evidence presented at trial was insufficient to sustain his convictions for burglary and robbery and that the jury's finding of guilt was against the weight of the evidence. These are two distinct legal concepts. *Commonwealth v. Davis,* 2002 Pa.Super. 167, 2002 Pa.Super. LEXIS 1069 (2002). Sufficient evidence is evidence "sufficient to prove guilt beyond a reasonable doubt." *Id*. A verdict that is against the weight of the evidence is one that "is so contrary to the evidence as to make the award of a new trial imperative so that right may be given another opportunity to prevail." *Id.* This Opinion will now apply these concepts to the evidence presented at trial regarding Defendant's convictions for burglary and robbery (both first degree felonies).

I. Sufficiency of the Evidence

The standard applied in assessing a claim of insufficient evidence is axiomatic, practically requiring no citation. However, recently this standard was again set forth by the Superior Court in *Commonwealth v. Davis*, *supra*, wherein the Court stated: "[i]n reviewing the sufficiency of the evidence, we must view the evidence presented and all reasonable inferences taken therefrom in the light most favorable to the Commonwealth, as verdict winner. The test is whether the evidence, thus viewed, is sufficient to prove guilt beyond a reasonable doubt." *Id.* at ¶12. Evidence is "sufficient to support [a guilty] verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt." *Id.* at ¶14 (quoting *Commonwealth v. Weston*, 561 Pa. 199, 749, A.2d 458, 461 (2000)). The evidence "need not be absolutely incompatible with the defendant's

innocence, but the question of any doubt is for the trier of fact unless the evidence [is] so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances." *Id.* (quoting *Commonwealth v. Seibert*, 424 Pa.Super. 242, 622 A.2d 361, 363 (1993), *appeal denied*, 642 A.2d 485 (Pa. 1994)). The jury as fact-finder "may believe any, all or none of the party's evidence." *Commonwealth v. Lawley*, 741 A.2d 205, 212 (Pa.Super. 1999) (citing *Commonwealth v. Henry*, 524 Pa. 135, 148, 569 A. 2d. 929, 939 (1990) *cert. denied*, 499 U.S. 931, 111 S. Ct. 1338, 113 L.Ed.2d 269 (1991)).

A. Robbery

In order to sustain a conviction for robbery the Commonwealth must prove all of the elements of robbery beyond a reasonable doubt. *Commonwealth v. Ennis*, 394 Pa.Super. 1, 8-9, 574 A.2d 1116, 1119. *See also Commonwealth v. Davis*, *supra*, 2002 Pa.Super. 167, 2002 Pa. Super. LEXIS 1069 (setting forth the general standard for a review of sufficiency of evidence). In pertinent part, the Robbery statute states:

> (A) OFFENSE DEFINED -
>
> (1) A person is guilty of robbery if, in the course of committing a theft he:
>
> (ii) threatens another with or intentionally puts him in fear of immediate serious bodily injury.
>
> (2) An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft or in flight after the attempt or commission.

18 Pa.C.S.A. §3701(a). "A person commits the crime of "theft by unlawful taking" if he unlawfully takes moveable property of another with intent to deprive him thereof." *Commonwealth v. Hopkins*, 747 A.2d 910 (Pa.Super. 2000) (quoting 18 Pa. C.S.A. §3921(a)). Serious bodily injury is "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." 18 Pa.C.S.A. §2301. The commission of a robbery pursuant to this subsection is a felony of the first degree. 18 Pa.C.S.A. §3701(b).

Applying the facts of the present case to this statute, this Court finds the evidence presented at trial to be sufficient to sustain Mr. Privott's conviction for first-degree robbery. The first required element, that the Defendant was attempting to commit a theft, is sufficiently supported by the evidence. The defendant was wearing a stocking over his head when he entered the apartment. Tr. at 39, 58, 70 and 84. He first approached Tom Austin, who was closest to the door. *Id.* at 40, 59, 71 and 84. The Defendant then reached into Tom's pocket. *Id.* at 40, 59, 71 and 86. All four of the Commonwealth's victim witnesses testified that this is what occurred. *Id.* At some point while reaching into Tom's pocket, or shortly

after, the Defendant demanded all of the victims to "give me all of your shit or I'll fuck you up." *Id*. Mr. Privott then moved to Christian Darling, who was seated on the floor, placing the knife blade to his throat. *Id*. at 41, 59, 72 and 86.

It is the jury's discretion to determine who and what to believe. *Lawley, supra*, at 212. In the instant case, the jury did, and could reasonable infer that by the Defendant's words and conduct, he attempted to unlawfully take another's movable property with the intent to deprive them of it. This conduct included holding a knife to one victim's throat while wearing a stocking to cover his face at one o'clock in the morning and ordering everyone to give him their stuff or they will be "fucked-up." Also, the Defendant reached into one victim's pants pocket illustrating that he was attempting a theft. Although the Defendant never actually obtained any of the victims' property, his clear attempt to take things from the victims by force or the threat of force satisfies the element of "in the course of committing a theft" because §3701(a)(2) only requires that an attempt at theft be made. Case law also states that "a robbery is completed when an attempt is made to take the property of another by force or threat of force. There is no requirement that the robbery be successful." *Commonwealth v. Natividad*, 565 Pa. 348, 364, 773 A.2d 167, 176 (2001) (citations omitted). *See also Commonwealth v. Lloyd*, 376 Pa.Super. 188, 545 A2d. 890 (1988) (holding that a completed theft is not necessary to sustain a robbery conviction). Based on the above facts, the jury could, and did, reasonably find that the Defendant took a substantial step to permanently deprive the victims of their moveable property satisfying the first element of robbery.

Next, another material element of robbery is that the defendant threaten another with or intentionally put him in fear of immediate serious bodily injury. This element was also sufficiently satisfied by the evidence presented at trial. By placing a knife's blade to Christian Darling's throat while commanding that Darling and the others give him all of their stuff, the Defendant threatened another with bodily injury that created a substantial risk of death. The proper focus under § 3701(a)(1)(ii) is the type of bodily harm threatened and the Defendant's intent and actions. *See Commonwealth v. Ross*, 391 Pa.Super. 32, 35, 570 A.2d 86, 87 (1990).

Clearly, in the case sub judice, Mr. Privott's placing a knife directly to the victim's throat and stating that he was going to "fuck" somebody up is sufficient to show that during the commission of a theft (attempted), Mr. Privott intentionally threatened Christian Darling with serious bodily injury. Mr. Darling could have easily had his throat slashed. Further, the others present in the apartment could have been killed or seriously injured. Thus, the jury, within its discretion as fact-finder, sufficiently found that the Commonwealth proved all the elements of first-degree robbery beyond a reasonable doubt.

Finally, the Defendant's claim that he withdrew his threat when

confronted by his victims has no merit. The Defendant manifested the necessary intent to commit robbery and, as indicated above, the crime had already been committed when he uttered these hollow words. Defendant's claim teeters on the verge of the ridiculous and is dismissed as such.

B. Burglary

"In order to be convicted of burglary, the Commonwealth must establish that the defendant 'enter[ed] a building or occupied structure, or separately secured or occupied portion thereof, with the intent to commit a crime therein unless the premises are at the time open to the public or the actor is licensed or privileged to enter.'" *Commonwealth v. Lilliock,* 740 A.2d 237, 242 (Pa.Super. 1999) (quoting 18 Pa. C.S.A. §3502). In order for the evidence to be sufficient to convict a defendant, all of the material elements of burglary must be proven beyond a reasonable doubt by the Commonwealth. *Davis, supra,* 2002 Pa.Super. 167, 2002 Pa.Super. LEXIS 1069 (2002) at ¶14. However, the evidence must be viewed in "the light most favorable to the Commonwealth as verdict winner." *Commonwealth v. Ford,* 539 Pa. 85, 94, 650 A.2d 433, 436 (1994).

In the instant case, all of the required elements were proven by the Commonwealth. First, the evidence is uncontradicted that the Defendant entered the residence of several young men and women at around one o'clock in the morning of August 18, 2001. Tr. 39, 58, 70 and 84. He was not a resident there nor did any of the tenants or their guests invite the Defendant inside. Tr. at 99. He was not the landlord or a maintenance worker. The Defendant entered a private residence without license or privilege. This apartment was not open to the public. Although the Defendant entered the apartment through an unlocked door, forcible entry is not required as an element to be proven by the Commonwealth. *Lilliock, supra,* at 242. The jury reasonably could, and did, find that the Defendant entered a private residence without license or privilege, satisfying the first element of burglary.

Second, the evidence presented at trial is sufficient to prove beyond a reasonable doubt that the Defendant entered this apartment with the intent to commit a crime therein. The "[s]pecific intent to commit a crime may be established through defendant's words or acts or circumstantial evidence, together with all reasonable inferences therefrom." *Ford, supra,* at 95, 650 A.2d at 437. The jury reasonably inferred that the Defendant entered the residence at 656 East 11th Street with the intent to commit a crime therein, namely robbery. He was wearing a nylon stocking over his head, he went through one victim's pocket, he held a knife to another victim's throat and he commanded the victims to give him their stuff or he would do violence to them. His intent to commit this crime upon entry can be easily inferred from his attempt to disguise his identity as he entered as well as his later criminal activities. Furthermore, as stated

earlier, even though the Defendant claims that he withdrew his threat when confronted by his victims, this Court does not find this argument credible or persuasive nor did the jury. This Court can find no case law to support the Defendant's assertion that once a burglary is committed the Defendant's guilt is absolved because he claims it was a joke. This may focus on the Defendant's lack of criminal intent, however, in this case the Defendant clearly manifested the necessary intent to commit both robbery and burglary.

Even assuming *arguendo* that the Defendant's claim of withdraw had some legal merit, "the question of doubt is for the trier of fact unless the evidence [is] so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances." *Davis, supra,* at ¶14 (quoting *Commonwealth v. Rodriquez,* 673 A. 2d 962, 965 (Pa. Super. 1996)). Here, the evidence presented overwhelmingly established that the Defendant committed the acts necessary to sustain his conviction. The Commonwealth's evidence was sufficient for a jury to find that all of the required elements of burglary were proven beyond a reasonable doubt.

II. Weight of the Evidence

The Defendant's second claim is that the jury's verdict was against the weight of the evidence. "What weight to accord to evidence is exclusively for the finder of fact, who is free to believe all, part, or none of the evidence and to determine the credibility of witnesses." *Commonwealth v. Rice,* 795 A.2d 340, 346 (Pa. 2002) (citing, *Commonwealth v. Small,* 559 Pa. 423, 741 A.2d 666, 672 (1999), *cert. denied,* 531 U.S. 829, 121 S.Ct. 80, 148 L.Ed.2d 42 (2000)). Whether the verdict "is against the weight of the evidence is addressed to the sound discretion of the trial judge, and his decision will not be reversed on appeal unless there has been an abuse of discretion. The test is...whether the verdict is so contrary to the evidence as to make the award of a new trial imperative so that right may be given another opportunity to prevail." *Davis, supra,* at ¶12. The Superior Court has held that "[a] claim that the evidence presented at trial was contradictory and unable to support the verdict requires that grant of a new trial only when the verdict is so contrary to the evidence as to shock one's sense of justice." *Commonwealth v. Griffin,* 453 Pa.Super. 657, 673, 684 A.2d 589, 596 (1996). Furthermore, "'[a] true weight of the evidence challenge 'concedes that sufficient evidence exists to sustain the verdict'' but questions which evidence is to be believed." *Commonwealth v. Galindes,* 786 A.2d 1004 (Pa.Super. 2001) (quoting *Armbruster v. Horowitz,* 744 A.2d 285, 286 (Pa.Super. 1999)).

Applying the above law to the instant case, this Court holds that the jury's verdict of guilty of both robbery and burglary is not against the weight of the evidence. The Commonwealth's witnesses provided

consistent and credible evidence of Defendant's commission of these crimes. The jury's verdicts were reflective of their acceptance of the Commonwealth's evidence. The claim by the defendant that when he was confronted by Brooke Rhodes, he withdrew his threats, does not convince this Court that the jury's guilty verdicts shock one's sense of justice. The Defendant had already committed the crimes for which he was convicted when he decided to retreat upon the victim's calling of the police. Entering a private apartment late at night while wearing a stocking over one's head and face and holding a knife to someone's throat while commanding victims to "give me all your shit or I'll fuck you up," shocks this Court only in that the Defendant did that to a group of young men and women trying to enjoy a summer night with each other. The Defendant's claim that this was merely a joke and that he was "playing" are hollow words falling on deaf ears. Therefore, this Court cannot say that the jury's guilty verdicts, in any way, shock its sense of justice. The verdicts are supported by the weight of the evidence against the Defendant.

CONCLUSION

For the reasons set forth above, the Defendant's convictions are supported by the sufficiency and weight of the evidence.

BY THE COURT:
/s/ **John J. Trucilla, Judge**

COMMONWEALTH OF PENNSYLVANIA

v.

JOHNNIE MCDOWELL, JR.

CRIMINAL PROCEDURE/AUTOMOBILE SEARCHES

A warrant is generally required prior to the search or seizure of property and signifies that a neutral magistrate has determined the existence of probable cause, *i.e.*, facts and circumstances sufficient to assure a reasonable person that evidence of a crime is present in a certain location. A magistrate's decision is to be based upon the affidavit and the magistrate's function is to examine all circumstances, including veracity and the basis of the knowledge of the persons supplying hearsay information to determine if there is a fair probability that evidence will be found.

The facts set forth in the affidavit at issue in this case included the defendant's prior history of involvement in drug activity, including the sale of cocaine just four days prior to the request for a warrant, his use of a car in the past for the sale of crack cocaine, and the defendant's suspicious activities involving the use of the vehicle subject to the search on the day of the application for the search warrant. The totality of the circumstances as set forth in the affidavit were sufficient to justify the issuance of this search.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 438 of 2002

Appearances: Office of District Attorney for the Commonwealth
Andrew Weinraub, Esquire for the Defendant

OPINION

Bozza, John A., J.

On May 17, 2002, defendant, Johnnie McDowell, Jr., was found guilty by a jury of the crimes of manufacture, delivery or possession with intent to manufacture or deliver a controlled substance (crack cocaine)[1] and manufacture, delivery or possession with intent to manufacture or deliver a controlled substance (marijuana).[2] On June 21, 2002, defendant was sentenced as follows:

> Count I - Possession with Intent to Deliver (crack cocaine) - costs; sixty (60) months to one hundred and twenty (120) months incarceration, consecutive to sentence imposed at docket number 2113 of 2001;
>
> Count II - Possession with Intent to Deliver (marijuana) costs; (120) months probation, consecutive to Count I.

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[1] 35 P.S. § 780-113(a)(30).
[2] 35 P.S. § 780-113(a)(30).

On June 26, 2002, Mr. McDowell filed a Post-Sentence Motion to Modify Sentence and a Motion for a New Trial, both of which the Honorable John J. Trucilla denied in an Order dated July 3, 2002. Prior to trial, on April 18, 2002, Mr. McDowell filed a Motion to Suppress, which the Court denied in an Order dated April 23, 2002. Mr. McDowell filed a Motion to Reconsider the Denial of the Motion to Suppress on June 26, 2002, which the Court denied in an Order entered July 25, 2002. On July 26, 2002, Mr. McDowell filed a Notice of Appeal to the Superior Court of Pennsylvania, and filed a timely 1925(b) Statement of Matters Complained of on Appeal. In his 1925(b) Statement, Mr. McDowell alleges the Honorable John A. Bozza erred in denying his Motion to Suppress, and the Honorable John J. Trucilla erred in Denying his Motion to Modify Sentence and Motion for New Trial. The sole issue of the denial of Mr. McDowell's Motion to Suppress will be addressed in this Opinion.

In his Motion to Suppress, Mr. McDowell sought to suppress the evidence of crack cocaine and marijuana found in the trunk of a white 1991 Cadillac, described in the May 25, 2001 application for search warrant filed by Detective Michael Nolan of the Erie Police Department. Mr. McDowell asserted that the evidence was obtained in violation of Article 1, Section 8 of the Pennsylvania Constitution and the Fourth and Fourteenth Amendments to the United States Constitution, since there was no probable cause to believe illegal drugs were in the car.

The Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution protect individuals from unreasonable government intrusions into their legitimate expectation of privacy. *Commonwealth v. Rekasie*, 566 Pa. 85, 778 A.2d 624 (2001)(*citing Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507 (1967)). Generally, a warrant is required prior to the search or seizure of person or property. A search warrant signifies that a neutral and detached magistrate was convinced by the police that there was probable cause to believe that evidence of a crime is present in a particular place. Probable cause exists where the facts and circumstances within the officers' knowledge are sufficient to assure a reasonable person that an offense has been or is being committed and that evidence of the crime is present in a certain location. *Commonwealth v. Gutierrez*, 750 A.2d 906, 909 (Pa. Super. 2000); *Commonwealth v. Jones*, 542 Pa. 418, 424, 668 A.2d 114, 116-117 (1995).

Further, "the magistrate's decision must be based on the four corners of the affidavit in support of the issuance of the warrant." *Commonwealth v. Wilkinson*, 436 Pa.Super. 233, 238, 647 A.2d 583, 586 (1994)(*citing Commonwealth v. Dennis*, 421 Pa.Super. 600, 618 A.2d 982 (1992)). The standard for determining whether probable cause exists is the "totality of the circumstances" test, which requires the magistrate

> 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.

Commonwealth v. Gray, 509 Pa. 476, 484, 503 A.2d 921, 925 (1985).

In Mr. McDowell's case the search warrant affidavit included the following factual assertions:

1) Crack cocaine was purchased from Mr. McDowell on February 14, 2001 at his residence at 539 West 17th Street, second floor apartment;
2) He had previously been arrested for having crack cocaine in 1995 and 1996 and most recently in 2001 following a search of his residence;
3) The search of Mr. McDowell's apartment on February 16, 2001 yielded two grams of cocaine and drug trafficking paraphernalia;
4) A search of the trunk of Mr. McDowell's gray 1989 Cadillac on February 16, 2001 yielded $4100 in cash packaged in individual baggies, with cocaine residue several times higher than the norm;
5) Following his release on bond on February 16, 2001, Mr. McDowell parked his gray 1989 Cadillac around the corner from his residence, despite the availability of parking close to his residence;
6) On April 18, 2001, a known drug user was observed with cocaine moments after leaving Mr. McDowell's residence and she informed police officers that she purchased it from Mr. McDowell;
7) On May 3, 2001, Mr. McDowell agreed to plead guilty to the charges from February 16, 2001;
8) On May 16, 2001, a known drug user was observed with cocaine shortly after leaving Mr. McDowell's residence and she informed police officers that she purchased it from Mr. McDowell;
9) Within the past 48 hours, a confidential informant made a controlled buy of crack cocaine from Mr. McDowell at his residence. This informant had previously provided the police with information leading to two arrests and one conviction for drug dealing;
10) One-half hour before the controlled buy, Mr. McDowell was observed driving the white 1991 Cadillac in question;
11) The white 1991 Cadillac was observed parked approximately a block from Mr. McDowell's residence on May 25, 2001;
12) On May 25, 2001 Mr. McDowell came outside his residence and for several minutes looked in a suspicious manner up and down the street;
13) A female arrived in a taxi, entered Mr. McDowell's residence and exited with Mr. McDowell a short time later. They proceeded to walk towards the white 1991 Cadillac and police observed Mr. McDowell open the trunk with the keys long enough to either place or remove something in the trunk. He looked around in a suspicious manner both before and after opening the trunk;
14) Mr. McDowell's female companion then drove the vehicle with Mr.

McDowell in the passenger seat towards Mr. McDowell's residence;

15) At Mr. McDowell's residence, the police executed a previously issued search warrant and found on the defendant's person $410, including two twenty dollar bills matching the money used in the controlled buy approximately two days earlier;
16) Although evidence of cocaine packaging material was present, no cocaine was found in Mr. McDowell's residence;
17) Upon advice from Mr. McDowell, his female companion refused to consent to a search of the white 1991 Cadillac.

It must be noted that the application for search warrant contained ample information concerning Detective Nolan's participation in drug dealing investigations, as well as surveillance of drug dealers and their activities in the Erie area. Detective Nolan also indicated his familiarity with the methods used by local drug dealers to hide their activities from law enforcement officials. This court concluded the facts set forth in the affidavit were sufficient to assure a reasonable person that evidence of a crime would be found in the trunk of the white 1991 Cadillac, and the district justice had "a substantial basis for concluding that probable cause existed." *Commonwealth v. Schickler*, 451 Pa. 415, 420, 679 A.2d 1291, 1293 (1996)(*citing Commonwealth v. Weidenmoyer*, 518 Pa. 2, 539 A.2d 1291 (1988)).

Based on the information in the affidavit, it was reasonable for the magistrate to conclude that Mr. McDowell had been involved in either the sale or possession of drugs for a long period of time, with almost continual involvement since February, 2001. Just four days prior to the request for a warrant, Mr. McDowell sold cocaine for at least the fourth time since February, 2001. Based on his previous conduct and the observations of an experienced investigator, it was reasonable to conclude that Mr. McDowell's activities on May 25, 2001 shortly before the police executed the search warrant for his residence, were indicative of ongoing criminal drug activity. Moreover, having used a car in the business of selling crack cocaine in the past, there was probable cause to believe under the circumstances presented to the police that Mr. McDowell was using the white 1991 Cadillac in some manner to facilitate such activity, and that evidence of the crime would be found in it.

Based on the foregoing analysis, this court concluded that the issuance of a search warrant for Mr. McDowell's vehicle was proper.

Signed this 9 day of September, 2002

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

BISHOP OF THE ERIE CATHOLIC DIOCESE IN TRUST FOR ST. JUDE THE APOSTLE CATHOLIC CHURCH

v.

ERIE COUNTY BOARD OF ASSESSMENT APPEALS

v.

MILLCREEK TOWNSHIP SCHOOL DISTRICT

REAL ESTATE/PROPERTY TAX ASSESSMENT/RELIGIOUS WORSHIP

Exemptions are allowed from taxation for all churches, meeting-houses or other actual places of regularly stated religious worship, with the ground thereto annexed necessary for the occupancy and enjoyment of the same. 72 P.S. 5020-204(a)(1).

As a taxpayer, the diocese has the burden to prove it is entitled to an exemption, and must show that the primary purpose of the property is worship.

Where only a portion of the total parcel is devoted to worship (limited to containing the Stations of the Cross) 1.25 acres of the 3.5 acre parcel will be subject to exemption.

The mere existence of an established schedule is not the controlling criteria for regularly stated worship.

Worship may be by either a group or individual forum. By its very nature the Stations of the Cross are intended to take place in a location dedicated to that purpose and therefore it is a stated or fixed activity.

In addition to the areas reserved for praying the Stations of the Cross a 1 acre portion is reasonable and necessary to provide for ingress and egress and will be included in the exemption.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 14230 - 2001

Appearances: Michael J. Visnosky, Esq.
for Millcreek Twp. School Dist.
Lee S. Acquista, Esquire
for Erie County Bd. of Assessment Appeals
David E. Holland, Esq.
for St. Jude the Apostle Catholic Church

OPINION

Bozza, John A., J.

This matter is before the Court on the 1925(b) Statement of Matters Complained of on Appeal filed by Millcreek Township School District. The history of this case is as follows. On July 7, 2001, the Bishop of the Erie Catholic Diocese (herein "Diocese") had filed an exemption application, docketed E01-126, for 3.5 acres of property located on the southeast corner of West Sixth Street and Peninsula Drive in Erie, with the

tax identification number of (33) 29-50-1. This park-like property is situated next to St. Jude the Apostle Catholic Church, and contains a bell tower, a sign indicating mass times and worship services, a fifteen-cross Stations of the Cross, and a paved parking lot. On July 31, 2001, Millcreek Township School District (herein "District") filed a Notice of Intention to Appeal Property Assessment for the 3.5 acres. On October 7, 2001, a hearing was conducted before the Erie County Board of Assessment Appeals (herein "Board"), in which the Diocese argued that the property in question should be exempt from real estate taxation because it is used as a memorial garden, site for occasional religious services and Stations of the Cross, and a playground. On November 7, 2001, the Board ruled in favor of the Diocese.

On November 28, 2001, the District filed a Notice of Assessment Appeal. On May 23, 2002, an evidentiary hearing was conducted, and on June 20, 2002, the Court granted the District's appeal in part. The Court held, based upon review of the evidence and consideration of ingress and egress to the location of the Stations of the Cross, that 1.25 acres of the 3.5 acre parcel were subject to exemption. On July 18, 2002, the District filed a Notice of Appeal to the Commonwealth Court of Pennsylvania, and filed a timely 1925(b) Statement of Matters Complained of on Appeal. The District asserts the Court erred because (1) there are no regularly scheduled worship services at the Stations of the Cross even though its primary purpose is religious; (2) the Diocese failed to introduce any evidence indicating regularly scheduled worship services as required by 72 P.S. §5020-204(a)(1); (3) the allocation of ingress and egress is excessive.

Pennsylvania General County Assessment Law allows for exemptions from taxation for "all churches, meeting-houses or other actual places of regularly stated religious worship, with the ground thereto annexed necessary for the occupancy and enjoyment of the same." 72 P.S. 5020-204(a)(1).[1] Statutory provisions exempting property from taxation must be strictly construed, and the right to tax exemption must be clearly established. *In re Wincester Group*, 687 A.2d 52 (Pa.Cmwlth. 1996). As the taxpayer, the Diocese has the burden to prove it is entitled to an exemption, and must show that the primary purpose of the property is worship. *Mt. Zion New Life Center v. Board of Assessment,* 94 Pa.Cmwlth. 439, 503 A.2d 1065 (1986). The record before the court indicates that only a portion of the total parcel is devoted to worship. While a large part of the property is available to parishioners and others for private meditation, worship in the traditional sense is limited to the portion of the parcel

[1] Article 8, §2(a) of the Pennsylvania Constitution permits the General Assembly to exempt from taxation actual places of regularly stated worship.

containing the Stations of the Cross, an area of about 6000 square feet. The area reserved for the Stations of the Cross contains fifteen wooden crosses appropriately set apart and marked. The parties do not dispute that the Stations of the Cross are "well known places of adoration and worship" within the Catholic tradition. *Laymen's Weekend Retreat League v. Butler,* 83 Pa. Super. 1 (1924). There is a need to have access to this area of the parcel from the adjoining church property and the road that abuts the property.

The main issue seems to be a concern on the part of the School District that there has been no regularly scheduled times during which the Stations of the Cross are recited in the disputed location. Relying on *Mt. Zion New Life Center*, the School District has argued that in the absence of regularly scheduled religious events, the land cannot be exempt from property taxation. However, the language of the statute indicates "regularly **stated** religious worship," which Pennsylvania courts have interpreted to mean gathering "together in some form of worship and not merely individual communion with one's Maker," *Laymen's Weekend R.L. of Philadelphia,* 83 Pa.Super. at 6. In *Mt. Zion New Life Center,* the Court looked closely at the definition of, "regularly stated" as it was interpreted in *Laymen's,* and concluded that while having a regular schedule of worship is a manifestation of the intent of the property owner to have individuals gather together in worship, "the mere existence of an established schedule [is not] the controlling criteria for regularly stated worship." *Mt. Zion New Life Center,* 94 Pa.Cmwlth. at 445, 503 A.2d at 1069. Despite the fact that group recitation of the Stations of the Cross had not been scheduled at the outdoor facility by St. Jude parish, the area in question was clearly dedicated to regularly stated worship.

Praying the Stations of the Cross is a long established and broadly recognized form of religious worship that is customarily recited in a particular place where individual "stations" have been placed. It may either be a group or individual form of worship, although by its very nature it is intended to take place in a location dedicated to that purpose. Indeed, it is a stated or "fixed" activity. The Commonwealth Court's refusal in *Mt. Zion New Life Center* to grant exemption to the "outdoor chapel, prayer garden of love, and circle of faith" is instructive. In that case, the request for an exemption was for a place that was the rough equivalent of a church and not intended as a location for engaging in a particular religious practice that required certain embellishments. In that circumstance, the existence of a regular schedule of worship activity would be of particular significance in determining the intention of the property owner.

Here, the land has been set aside, designed and adapted exclusively for engaging in an established form of religious worship, not at particular times but all the time. Moreover, unlike the circumstances discussed in

City of Philadelphia to Use of State Paving & Constr. Co. v. Overbrook Park Congregation, 171 Pa.Super. 581, 91 A.2d 310 (1952), where a religious organization claimed an exemption for a vacant lot on which they conducted services in a tent for an eight day period, the Stations of the Cross are a fixed part of the land.[2] There is nothing in the record to indicate that the Stations of the Cross adjoining St. Jude's constitute a temporary improvement to the land. As the Court noted in *Laymen's Weekend R.L. of Philadelphia,* there is no reason to deny the Stations of the Cross their status as a place of worship because they are located out of doors so long as the "land is set aside for that use alone." *Laymen's Weekend R.L. of Philadelphia,* 83 Pa. Super. at 6.

In allocating a total of 1.25 acres for the exempt portion of the larger parcel consideration was given to the need to enter and exit the area reserved for praying the Stations of the Cross in a manner appropriate for its intended use. In *Mt. Zion New Life Center,* the Commonwealth Court noted that "the courts have commonly concluded that one acre for each place of worship is reasonably necessary to provide for ingress and egress." *Mt. Zion New Life Center,* 94 Pa.Cmwlth. at 451, 503 A.2d at 1072 *(citing First Baptist Church of Pittsburgh v. Pittsburgh,* 341 Pa. 568, 576, 20 A.2d 209, 213 (1941)). Reasonable necessity has been described to consider "among other matters the inclusion of sufficient ground for entrance and exit and for light and air." *Id.* The District argues that "the Stations of the Cross of and in itself only occupy 3,200 sq. ft. and with the addition of a 10 ft. buffer around the perimeter for access only occupy 6,000 sq. ft." (1925(b) Statement ¶3). This Court allocated only approximately a third of the entire parcel for the Stations of the Cross, in order to provide for appropriate space to enter and exit the area and carry on ancillary activities such as maintenance. This decision was made in light of the configuration of the area and its location within the larger parcel and its proximity to other church areas including parking facilities. As noted in *Mt. Zion,* an acre is a reasonable amount to allot for such a purpose and the Court's allotment of 1.25 acres was not excessive.

For the reasons set forth above, this Court entered its Order of June 20, 2002.

Signed this 1st day of September, 2002.

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

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[2] In *City of Philadelphia,* the Court commented "...it is the character of the use and not the amount of it that determines the rights to exemption...neither a contemplated future use nor an abondoned temporary use is sufficient to bring the property within the exemption clause." *Id.* at 313.

KELSO WOODS ASSOCIATION, INC.

v.

WILLIAM K. SWANSON, JR.

CIVIL PROCEDURE/CONTEMPT OF COURT

In Pennsylvania contempt of court may be characterized as either civil or criminal. If the court's objective is to force an individual to comply with an order of court, the contempt is considered civil in nature with a conditional sentence which may be avoided or "purged" by complying with the court's order. The direct outcome of a finding of criminal contempt is punishment

CIVIL PROCEDURE/CONTEMPT OF COURT

The order that forms the basis of the contempt process in a civil proceeding must be definitely and strictly construed.

CIVIL PROCEDURE/CONTEMPT OF COURT

As the court's previous order did not determine whether a quorum would be ascertained by counting the members present or by counting the number of lots represented by the members who were present, it cannot be stated that the plaintiff intentionally violated any order of court by counting only members present and concluding that a quorum was not reached.

REAL ESTATE/SUBDIVISION BYLAWS

The association of owners of a subdivision did not act improperly in imposing double assessments on lots with two buildings where the bylaws of the association only required members to pay a "pro rata share" of common expenses and where it was reasonable to determine that two liveable buildings would cause approximately twice as much expense.

REAL ESTATE/SUBDIVISION BYLAWS

The court did not abuse its discretion or commit an error of law by finding that double road assessments on lots having two buildings were appropriate and reasonable where the bylaws required only that members pay a "pro rata share" of common expenses.

CIVIL PROCEDURE/CONTEMPT OF COURT

The Court did not abuse its discretion and commit an error of law by finding that the association was entitled to receive penalties and interest on disputed amounts where assessment statements specified that there would be a 10% penalty due on all payments not received by September 1 and an imposition of a finance charge of 1% per month and the bylaws set forth no exception when assessments are contested

CIVIL PROCEDURE/INTEREST

The Court did not abuse its discretion and commit an error of law by not fixing a sum due as to assessments on disputed lots when the mathematical calculation could be easily made by applying the amount of penalties and interest owed pursuant to the formula provided in the defendant's assessment notices.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 10017-1993

Appearances: Mario P. Restifo, Esquire for plaintiff
Evan E. Adair, Esquire for defendant

OPINION

Bozza, John A., J.

This matter is before the Court on the Rule 1925(b) Statement of Matters Complained of on Appeal filed by defendant William K. Swanson, Jr. The defendant asserts that the Court abused its discretion and committed errors of law in its Order dated February 13, 2002 and entered February 14, 2002, which denied the defendant's Petition for Enforcement and a Finding of Contempt, and which denied the parties' Motions for Post-Trial Relief from the Court's Order entered December 18, 2001. The defendant asserts the Court erred and committed an abuse of discretion when the Court: (1) failed to find the plaintiff, Kelso Woods Association, in contempt of the Court's prior orders; (2) denied the defendant's request in his June 1999 Petition for Enforcement for attorney's fees and sanctions due to the plaintiff's alleged contempt; (3) determined that the plaintiff's continuing imposition of double assessments on lots with two buildings erected upon them and in the light of completion of public water lines was not unreasonable; (4) found that imposition of double road assessments on those lots having two buildings erected on them was appropriate and reasonable; (5) found that the plaintiff is entitled to receive penalties and interest on the disputed amounts; and (6) did not fix or establish a sum due as to assessments on disputed lots. The defendant also incorporated his Post-Trial Motion by reference. For the following reasons, the Court finds the defendant's assertions of error to be without merit.

The defendant's first assertion is that the Court abused its discretion and committed an error of law by failing to find the plaintiff in contempt of the Court's prior Orders and to impose sanctions for contempt pursuant to the defendant's June 1999 Petition for Enforcement. Under Pennsylvania law, contempt of court may be characterized as either civil or criminal. The distinguishing factor between the two is the objective of the court's determination. *C.R. by Dunn v. Travelers*, 426 Pa.Super. 92, 626 A.2d 588 (1993). If the court's objective is to force an individual to comply with an order of court, then the contempt is considered civil in nature. *Id.* 426 Pa.Super. at 99 (citing *Neshamy Water Resources Authority v. Del-Aware Unlimited, Inc.*, 332 Pa.Super. 461, 481 A.2d 879 (1984)). With a finding of civil contempt the court imposes a conditional sentence which may be avoided or "purged" by the contemptuous party by complying

with the court's order. *Ingebrethsen v. Ingebrethsen*, 443 Pa.Super. 256, 661 A.2d 403 (1995). The direct outcome of a finding of criminal contempt is punishment. In the present case, it appears that the petitioner, now appellant, was seeking a finding of civil contempt.

On May 23, 1996, the Honorable Michael T. Joyce entered an initial Order declaring that the plaintiff could not mail ballots to Kelso Woods Association (herein "Association") members in order to attempt to change the Association's bylaws and implicitly concluding that a meeting of association members would have to be convened. The Court declined to rule on whether the formulation for the assessment of individual lot owners was correct. On August 13, 1998, the Honorable Michael M. Palmisano issued an Order which directed the plaintiff, among other things, to restore its original bylaws, which permitted a lot owner one vote for each parcel of property owned within the Kelso Woods Subdivision. On May 25, 1999, Judge Palmisano issued an Order in which the Court directed the plaintiff to comply with the Court's previous Orders, and allow the defendant one vote for each property the defendant owned within the subdivision on which the defendant was currently not in arrears. As of the date of that Order, the defendant was current on payments for ten (10) properties, and the Court thereby ordered that he be permitted ten (10) votes at any and all future Association meetings, including the Association's next meeting on June 5, 1999.

On June 15, 1999, the defendant filed a Petition for Enforcement requesting that the Court enforce the May 1999 Order. In his petition, the defendant complained that the plaintiff did not allow the defendant to vote at the Association's June 5, 1999 meeting, despite the Court's previous order to the contrary, and complained regarding the Association's view of what constituted a quorum. In addition to the relief necessary to effectuate the Court's prior Orders, the defendant sought an award of attorneys' fees incurred by the defendant in seeking enforcement. While the defendant properly defined his action in terms of indirect civil contempt, the record did not support the defendant's position.

Initially, it is noted that the Court's determination of the "enforcement" issue was based on the record (in the form of a transcript) of a hearing on the defendant's Petition for Enforcement held on July 9, 1999 before Judge Palmisano, and the transcript of a hearing held on August 23, 1995 before Judge Joyce. Only limited evidence related to this issue was presented at the most recent hearing. Judge Palmisano did not resolve the issue of contempt because of multiple appeals pending in the Commonwealth Court and a new petition was not filed by the defendant thereafter. While it is always difficult for a fact finder to make a judgment as to the credibility of the testimony of the witnesses without benefit of personal observation, it remained necessary for the Court to review the available evidence and

ascertain whether the Association should be held in contempt.

Upon close examination of the transcripts of the relevant proceedings, this Court concluded that the defendant did not meet his burden of proving that the defendant intentionally violated any the prior orders of court in question. The testimony admitted at the July 9, 1999 hearing on the defendant's Petition revealed that the reason that a vote was not taken at the June 5, 1999 Association meeting was because a proper quorum had not been established. (July 9, 1999 R.T. pp. 8-9). Mr. Swanson argued that the Association's conclusion that for purposes of determining the existence of a quorum each member present was counted as "one" regardless of the number of lots the member owned, violated an order of court. A review of both Judge Palmisano's and Judge Joyce's orders reveals no indication as to the resolution of this question. "The order that forms the basis of the contempt process in civil proceedings must be definitely and strictly construed." *C.R. by Dunn v. Travelers*, 426 Pa.Super. 92, 100, 626 A.2d 588, 592 (1993). Judge Palmisano's Order of August 13, 1998 stated that the Association must comply with the requirement that a member was entitled to one vote for each lot the person owned. In addition, in his Order of May 25, 1999 Judge Palmisano stated that the plaintiff was directed to allow the defendant "one vote for each property within the subdivision owed by him as to which assessments have been paid, assessments for ten (10) of Defendant's properties being paid in full as of the date of this Order ... If Plaintiff fails to comply with this Order, it shall be subject to sanctions for contempt ...." In neither Order did the Court address the issue as to how the Association should count for purposes of determining the existence of a quorum.

It is also noteworthy that there was discussion at the July 9, 1999 hearing as to whether the quorum of twenty-nine (29) should be determined by counting the number of actual persons present, or by counting the number of lots represented by members who were present. (July 9, 1999 R.T. pp. 8-11, 14-26, 30-33, 37, 43, 50-60). However, that issue was not resolved by the Court despite the defendant's desire to have the Court make a determination that the plaintiff needed to count its members differently for purposes of a quorum. The defendant's attorney claimed at one point in the July 9, 1999 hearing that Judge Joyce had rejected the plaintiff's method of counting members in order to establish a quorum at a hearing in 1995. (July 9, 1999 R.T., pp. 24-26). However, a close review of the record shows that Judge Joyce's position on the issue of the determination of a quorum is by no means clear. In his Opinion and Order of May 23, 1996, Judge Joyce disagreed with the pro-rata assessment among members, but he did not specifically criticize the plaintiff's definition of a member or the way in which a quorum was reached.

The Association's position that the quorum of twenty-nine (29) referred to individual members present appeared to have been reached in

good faith. There were only twenty-eight (28) members actually present at the June 5, 1999 meeting and therefore no votes on substantive matters could take place. Based on the Court's conclusion that the plaintiff had not intentionally violated an Order of the Court, the Court did not find the plaintiff to be in contempt. Hence, the Court's refusal to impose any "sanctions" including attorney fees against the Association was proper.

The defendant's next assertion is that the Court abused its discretion and committed an error of law by determining that the plaintiff's imposition of double assessments was not unreasonable on lots with two buildings erected upon them and of additional assessments without revision on apartment and motel room units subsequent to lot owners' connection to new public water lines. Defendant's assertion is without merit. Section 5544(a) of the Nonprofit Corporation Law of 1988 states that "[a] nonprofit corporation may levy dues or assessments, or both, on its members, if authority to do so is conferred by the bylaws, subject to any limitations therein imposed." 15 P.S. § 5544(a)(cited in Cmwlth.Ct Opinion, 1997, p.6). The plaintiff's bylaws specifically set forth the plaintiff's ability to establish assessments, such that the Association may only require members pay a "pro rata share" of the common expenses. (By-Laws of Kelso Woods Association, Inc. 1.3 (5), *attached* to Stipulation of Facts on Remand).

Further, Judge Palmisano determined that such double assessments were reasonable, and the Commonwealth Court upheld that determination. In his August 13, 1998 Opinion, Judge Palmisano wrote that

> "the Association acted reasonably with respect to the imposition of a full assessment on second and additional buildings existing on one lot ...a 10% increase is not egregious change in light of the increased expenses...to assume that one lot with two livable buildings uses twice as much water compared to one lot with one building is perfectly reasonable where individual water consumption is neither metered nor reasonably implemented and on-site inspections not authorized or utilized...the Court believes it is also safe and reasonable to assume that if two or more houses are on one lot, more individuals are capable of subjecting to their personal use and enjoyment of paved roads, lawns, common areas, and general maintenance of the subdivision for which the Association is responsible. Accordingly, Mr. Swanson and other individuals facing the same type of multiple-building assessment are charged their fare share of the expenses." (pp. 9-10) (footnote omitted).

In its May 3, 2000 Opinion, the Commonwealth Court specifically rejected the defendant's contention that additional assessments on lots with more

than one building were unreasonable. (May 3, 2000 Opinion, p. 11). The Commonwealth Court outlined numerous services the defendant received as a member of the Association, including road maintenance, electricity and maintenance of street lights, common area maintenance, liability insurance for playground facility, and so forth. *Id*. The Commonwealth Court concluded that because the inhabitants of these additional buildings use all these common facilities, it is reasonable for the lot owner to pay an increased assessment. *Id*.

More to the point, the issue before the Court is not whether the Association *should* impose these extra assessments, but whether the Association *may* impose these extra assessments. The Association may impose such assessments, so long as those assessments comply with the Association's bylaws and the Pennsylvania Nonprofit Corporation law. In this case, the evidence is insufficient to conclude that the double assessments were unreasonable, even in light of the completion of public water lines in June, 2000. Further, although water would no longer be paid for by the Association, there was a transitional period associated with the change. Additionally, there was no indication that the other services the Association provided, such as those the Commonwealth Court noted in its May 3, 2000 Opinion, would no longer be expenses paid for by the Association. Based on the record before the Court, the Court's finding that such double assessments were unreasonable was proper.

The defendant's next assertion is that the Court abused its discretion and committed an error of law by finding that the double road assessments on those lots having two buildings erected on them are appropriate and reasonable. This assertion is also without merit. As discussed above, both Judge Palmisano and the Commonwealth Court determined it is reasonable to require an owner of a lot with more than one building to pay for the increased use of the common facilities by the tenants on that lot. (August 13, 1998 Ct. of Common Pleas Opinion, p. 10; May 3, 2000 Cmwlth. Ct. Opinion, pp. 6, 11). This Court's determination that such assessments were appropriate and reasonable was proper.

Mr. Swanson has also asserted that the Court abused its discretion and committed an error of law by finding that the Association is entitled to receive penalties and interest on the disputed amounts. This assertion is also without merit. The plaintiff's assessment statements specify that all payments not received by September 1 each year will be assessed a ten percent (10%) penalty. In addition, any unpaid balance will be assessed a one percent (1%) finance charge. The defendant asserts in his Motion for Post-Trial Relief, filed December 27, 2001, that "while the Association's authority to impose penalties for late payment has not been challenged in this case, this action from its start has involved a challenge to validity and propriety of assessments. That challenge has been found to be meritorious, and Mr. Swanson has not been responsible for delay in a final

disposition of issues. In the circumstances, there is no basis for late payment penalties." (Defendant's Motion for Post-Trial Relief, ¶ 6, H-I). Defendant has incorrectly characterized the penalties and interest to which the plaintiff has been declared to be entitled. There is no exception in the plaintiff's by-laws or any other document of the plaintiff which exempts persons from paying such penalties and interest when assessments are contested. Moreover the Court has not imposed interest and penalties on assessments that were found to be improper by the Court. Therefore, the Court's finding that the plaintiff is entitled to receive these penalties was proper.

In addition, the defendant's assertion that the Court erred when the Court did not specify when or at what rate interest might begin to accrue is also meritless. The percentage of penalties and finance charges are set forth on the assessment statements the defendant receives, and the Court has determined that the defendant was never excused from paying these penalties on the assessments he currently owes. Hence, the defendant owes a ten percent (10%) penalty for each year that he failed to pay his assessments by September 1, as well as twelve percent (12%) in finance charges on the balances owed on each lot for each month after the September deadline.

The defendant's next assertion is that the Court abused its discretion and committed an error of law by "excusing on the one hand the Association's ongoing violation of three Orders of this Court in continuing to deny Mr. Swanson his voting rights as member while, on the other, holding the imposition of interest and/or penalties on disputed sums never resolved because of appeals was appropriate." The Court is uncertain as to the point of this allegation of error. As discussed above, there is insufficient evidence in the record to hold the plaintiff in contempt, and the plaintiff is entitled to receive penalties and interest pursuant to the by-laws and deed restrictions of the Association.

The defendant's final allegation of error is that the Court abused its discretion and committed an error of law by not fixing or establishing a sum due as to assessments on disputed lots. As stated in the parties' Stipulation of Facts on Remand, the defendant has not paid assessments on the properties known as 142 Kelso Drive, 161 Kelso Drive (which includes properties known as 151 Kelso Drive, 161 Kelso Drive, 3140 Whitehouse and 3136 Whitehouse) and 412 Kelso Drive. In order to calculate the amount of assessments due on the disputed lots, the defendant need only look to the information provided by the defendant in his Stipulation of Facts as to the value of assessments due on each property, and then add the amount of penalties and interest owed pursuant to the formula provided in the defendant's assessment notices. The Court's lack of mathematical calculation in this matter was proper, as the parties were already aware from the Court's previous orders as to how

the calculations should be made.[1]

For the reasons set forth above, this Court's Order dated February 13, 2002 should be affirmed.

Signed this 10 day of May, 2002.

ORDER

AND NOW, to-wit, this 10th day of May, 2002, upon consideration of the defendant's Petition to Strike Off Judgment Entry and argument thereon, it is hereby **ORDERED, ADJUDGED and DECREED** that the defendant's Petition is **DENIED**.

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

[1] It should be noted that on March 27, 2002, the plaintiff filed a Praecipe for Entry of Judgment in favor of the plaintiff in the amount of $22,341.69. The plaintiff reached this sum based on the Court's Orders of December 18, 2001 and February 13, 2002. In response, on April 15, 2002, the defendant filed a Petition to Strike Off Judgment Entry, and a Brief in Support of Petition. On May 10, 2002, the Court denied the defendant's Petition. The plaintiff's Entry of Judgment was a ministerial action and an enforcement of a prior Order of this Court, and was proper pursuant to Rule 1701 of the Pennsylvania Rules of Appellate Procedure.

BARBARA ODOM and JEROME ODOM, her husband

v.

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, A DIVISION OF KEMPER INSURANCE COMPANIES

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.

INSURANCE / AMBIGUITY / INTERPRETATION OF POLICIES

Contractual terms are deemed ambiguous if they are susceptible of more than one reasonable interpretation when applied to a particular set of facts. Where a contract of insurance is ambiguous, courts must ascertain the intent of the parties, as reflected in language of the policy.

INSURANCE / NOTICE / CONSENT TO SETTLEMENT

In order for an underinsured motorist (UIM) insurer to deny coverage following an insured's settlement with a tort-feasor for the limits of available coverage, in technical violation of a consent-to-settle clause, such a violation must prejudice the UIM insurer's interests.

INSURANCE / PREJUDICE / BURDEN OF PROOF

Where it is alleged that an insured violated a provision of a consent-to-settle clause, the UIM insurer has the burden of proving the violation caused prejudice.

INSURANCE / CONSENT TO SETTLE

The purpose of a consent-to-settle clause in an insurance policy is to protect against an insured prejudicing the underinsured motorist UIM insurer's interests.

INSURANCE / PREJUDICE

Despite a technical violation of a consent-to-settle clause, the UIM insurer's interests are not prejudiced by a settlement without its consent where the circumstances of record render subrogation against the tort-feasor impracticable.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY. PENNSYLVANIA NO. 13114-1999

Appearances: Thomas S. Talarico, Esquire for the Plaintiffs
William R. Haushalter, Esquire for the Defendant

Bozza, John A., J.

On September 8, 1999, the plaintiffs, Barbara and Jerome Odom, filed an action for declaratory judgment seeking a determination of the defendant, American Manufacturers Mutual Insurance Company's, a division of Kemper Insurance Companies, (hereinafter "Kemper"), obligation to pay benefits pursuant to underinsured motorists' coverage. An Answer and

New Matter were filed, some discovery was completed, and the matter is now before the Court on Cross-Motions for Summary Judgment. Upon a review of the record, it appears that there are no issues of material fact in dispute and that the plaintiffs are entitled to judgment as a matter of law.

The undisputed facts in this case indicate that in June of 1994, Ms. Odom sustained serious injuries after she was rear-ended by a vehicle owned and operated by Kirk P. Hulick. At the time of the accident, Ms. Odom was operating a bus as an employee of the Erie Metropolitan Transit Authority, (hereinafter "EMTA"). A lawsuit was ultimately filed against Mr. Hulick and a trial was commenced in October, 1998. In January, 1998, Ms. Odom notified EMTA of a potential under-insurance claim against its carrier, AI Transport. Prior to the conclusion of the trial, Mr. Hulick's insurance carrier tendered its policy limits of $25,000.00, which was accepted by Ms. Odom. A general release was executed in November of 1998.

On February 9, 1999, the Odoms informed Kemper that they were seeking UIM benefits pursuant to a policy it issued to the Odoms. AI Transport agreed to provide the limits of its UIM policy to the Odoms on April 8, 1999. However, on April 23, 1999, Kemper refused the Odoms' claim because they had failed to "promptly notify us in writing of a tentative settlement." *See:* Complaint (Action for Declaratory Judgment) Exhibit "I." This action for declaratory judgment resulted.

The provisions of the Kemper policy concerning UIM coverage are found in the policy endorsement PP 04 19, titled "Uninsured Motorist Coverage - Pennsylvania (stacked)." The endorsement states as follows:

> A . We will pay compensatory damages which an "insured" is legally entitled to recover from the owner or operator of an "underinsured motor vehicle" because of "bodily injury":
>
> 1. Sustained by an "insured"; and
>
> 2. Caused by an accident.
>
> The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the "underinsured motor vehicle."
>
> We will pay under this coverage only if 1. or 2. below applies:
>
> 1. The limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements; or
>
> 2. A **tentative settlement** has been made between an "insured" and the insurer of the "underinsured motor vehicle" and we:

(a) Have been given prompt written notice of such tentative settlement; and

(b) Advanced payment to the "insured" in an amount equal to the tentative settlement within thirty (30) days after receipt of notification.

No judgment for damages arising out of a suit brought against the owner or operator of an "underinsured motor vehicle" is binding on us unless we:

1. Received reasonable notice of the pendency of the suit resulting in a judgment; and

2. Had a reasonable opportunity to protect our interests in the suit.

(Endorsement PP 04 19, p. 1)(emphasis added).

There is an additional portion of the endorsement which state as follows:

ADDITIONAL DUTY

A person seeking Underinsured Motorists Coverage must also promptly notify us in writing of a **tentative settlement** between the "insured" and the insurer of the "underinsured motor vehicle" and allow us 30 days to advance payment to that "insured" in an amount equal to the tentative settlement to preserve our rights against the insurer, owner or operator of such "underinsured motor vehicle."

(Endorsement PP 04 19, p. 3)(emphasis added).

It is the application of this paragraph combined with the Odoms' failure to provide notice of a "tentative settlement" that Kemper believes relieves it of the responsibility of paying underinsured motorists' coverage benefits.

The Odoms argue that Kemper is required to pay UIM benefits because the limits of liability of both Mr. Hulick's insurance and EMTA's insurance had been exhausted by settlement and, therefore, they have met one of the alternative requirements for coverage as set forth in the very first section of the policy endorsement set forth above. The policy reads that "we will pay under this coverage only if 1. or 2. below applies." (Endorsement PP 04 19, p. l). The "1. below" states as follows:

1. The limits of liability under any applicable bodily injury, liability bonds or policies have been exhausted by payment of judgments or settlements; or. . .

(Endorsement PP 04 19, A1., p. 1).

The limits of liability under Hulick's policy have been exhausted by settlement.

Alternately, the Odoms have argued that if they were required to notify Kemper in writing of a "tentative settlement," the failure to do so did not in any way prejudice Kemper's rights under the policy. In support of this position, the Odoms rely on *Nationwide Mutual Insurance Co. v. Lehman,* 743 A.2d 933 (Pa.Super. 1999). Kemper agrees that in the absence of a showing of prejudice, it cannot deny underinsured motorist benefits to the Odoms. However, Kemper maintains that in the circumstances of this case, its right to subrogation was detrimentally affected by the Odoms failure to timely notify it of their tentative settlement with Hulick.

1. The Odom's Duty to Provide Written Notice

The Odom's policy endorsement provides for UIM in either of two circumstances. The policy distinguishes the situation where the limits of the liability policy have been exhausted by settlement from the situation where there is a "tentative settlement." Section A.2. (a & b) provides that written notice must be provided to Kemper where an insured seeks UIM coverage based on reaching a "tentative settlement" with an insurer. (Endorsement PP 04 19, p. l). However, for some reason, the endorsement includes a paragraph entitled "Additional Duty" which repeats in almost verbatim fashion the requirement of Section A.2. that an insured who seeks UIM coverage because of a "tentative settlement" must notify Kemper in writing. (Endorsement PP 04 19. p. 3). The effect of these duplicate provisions on the issue before the Court is not clear. In this respect, the policy is ambiguous and requires a determination of the intent of the parties. *Mellon Bank, NA. v. National Union Ins. Co.*, 768 A.2d 865, 869 (Pa.Super. 2001).

Turning to the plain language of the policy, the endorsement provides for alternate means of recovering UIM benefits. The first one, stated in easily understood language, indicates that the Odoms are eligible for UIM coverage once they have exhausted the coverage limits of Hulick's liability carrier and requires no written notice to Kemper. (Endorsement PP 04 19, A.1., p. 1). The second alternative relates to circumstances involving a "tentative settlement" and is therefore not applicable. (Endorsement PP 04 19, A.2., p. l). Therefore, it must be concluded that because the Odoms completed the settlement arrangement with Hulick's motor vehicle liability carrier for no less than the policy limits, they were not required to provide written notification to Kemper.[1]

[1] Kemper also made reference to a portion of the policy entitled, **"OUR RIGHT TO RECOVER PAYMENT."** (Endorsement PP 04 19, p. 3). This provision apparently sets forth the conditions under which Kemper has certain specified subrogation rights set forth in Part F of the policy. That section also states that Kemper must have been given notice of a "tentative settlement" and take certain steps in order to have those rights preserved. That section makes no mention of settlement that exhausts policy limits.

2. Was Kemper Prejudiced by the Odoms Failure to Notify It of Settlement?

If it should be determined that the contract of insurance required notification, the parties agree that Kemper must show prejudice in order to deny UIM benefits. *Nationwide Mutual Insurance Co. v. Lehman*, 743 A.2d 933, 941-942 (Pa.Super. 1999); *Cerankowski v. State Farm Mutual Auto. Ins. Co.*, 783 A.2d 343, 347-348 (Pa.Super. 2001). Kemper asserts that it has been prejudiced because settlement with Hulick ended its ability to recover pursuant to its subrogation interest. Kemper points to information revealed during discovery concerning Mr. Hulick's financial position. In his testimony, Mr. Hulick noted that all of his assets were held in joint tenancy with his wife, with the exception of a joint interest in a truck held with his uncle. It is this interest in the truck that Kemper argues would have justified a subrogation action. Kemper also claims that subrogation was a viable alternative because Mr. Hulick was a financially responsible person.

The practical realities of Mr. Hulick's financial circumstances seriously undermine Kemper's assertion that it was prejudiced.[2] There is nothing in the record that reveals the nature, extent, or the duration of Mr. Hulick's joint interest in the truck, nor is there any indication of the truck's value. Therefore, it can not be determined whether the truck was a financially meaningful asset likely to be reached by Kemper following litigation and the entry of a judgment. Similarly, the fact that Mr. Hulick has asserted that he is a responsible person does not reveal anything about the reality of Kemper being able to collect a portion of its subrogation interest sufficient to justify the effort. An insurance carrier asserting failure to notify as a defense to its duty to provide underinsurance coverage has the burden of proving prejudice. *Nationwide Mutual Ins. Co. v. Lehman* 743 A.2d 933, 941 (Pa.Super. 1999).

Whether prejudice exists may not be a matter of speculation, but must be a reasonably foreseeable consequence of an insured's failure to meet a contractual duty and must be based on a sufficient factual record.[3] To conclude that Kemper would be likely to pursue an action against Mr. Hulick with the hope of ultimately obtaining proceeds from the sale of his unspecified interest in a truck of undetermined value would require a record that would support the notion that such an action would be commercially reasonable. The record before the Court provided by

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[2] It is noteworthy that AI Transport, EMTA's UIM carrier, had also paid the limits of its policy in the amount of $35,000.00 and may well have had subrogation rights against Mr. Hulick which would have diminished further his reachable estate.

[3] Kemper has not taken the position that there are material issues of fact in dispute.

Kemper in opposition to the Odoms' Motion for Summary Judgment and in support of its Cross-Motion for Summary Judgment is not adequate to allow this court to conclude that Kemper has been prejudiced by the plaintiffs' failure to provide written notification of the settlement.

For all the reasons set forth above, the plaintiffs' Motion for Summary Judgment will be granted and the defendant's Cross-Motion for Summary Judgment will be denied. An appropriate Order will follow.

ORDER

AND NOW, to-wit, this 4th day of October, 2002, upon consideration of the Motion for Summary Judgment filed on behalf of the plaintiffs, and the Cross-Motion for Summary Judgment filed on behalf of the defendant, and in accordance with the foregoing Opinion, it is hereby **ORDERED, ADJUDGED and DECREED** that the plaintiffs' Motion for Summary Judgment is **GRANTED** and the defendant's Motion for Summary Judgment is **DENIED**.

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

COMMONWEALTH OF PENNSYLVANIA

v.

JAMAR PHILLIPS

CRIMINAL PROCEDURE/INEFFECTIVE ASSISTANCE OF COUNSEL

The Trial Court held a person's fundamental right to counsel embodied in the United States and Pennsylvania Constitutions encompasses both the issue of the attorney's capacity to practice law, as well as, the effectiveness of the attorney's representation. Therefore, a person's fundamental right to counsel is not violated per se if an attorney is not permitted to practice law because of a technical violation unrelated to the attorney's moral fitness, training, education, experience or ability to practice his or her craft.

The Trial Court held an attorney was not ineffective for failing to raise meritless issues (i.e. failing to pursue information in the police report concerning the weapon when defendant informed counsel the gun used was not one of the weapons contained in the report; failing to pursue information that defendant's brother possessed the gun used in the shooting on a different occasion; and failing to call a witness who did not observe the shooting) because (1) there was no merit to the underlying claims; (2) counsel had a reasonable basis for his course of conduct; and (3) there was no reasonable probability that but for the omissions challenged the outcome of the proceeding would have been different.

CRIMINAL PROCEDURE/SENTENCING

The Trial Court is required to place on the record its reasons for the sentence imposed upon a person pursuant to 42 Pa. C. S. Section 9721(b). This requirement is met by the sentencing judge identifying on the record that he/she was informed by a pre-sentence report.

Sentencing is a matter vested in the sound discretion of the Trial Court whose judgment will not be disturbed on appeal absent an abuse of discretion. A Trial Court has not abused its discretion unless the record discloses that the judgement exercised was manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will. In this case, Defendant was sentenced in the aggravated range after considering the pre-sentence report, the Pennsylvania Sentencing Code, the Pennsylvania Sentencing Guidelines and the comments of both counsel and the Defendant at the sentencing proceeding.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION NO: 1887 of 2001

Appearances: Robert Sambroak, Esquire for the Commonwealth
William Hathaway, Esquire for the Defendant

OPINION AND ORDER

This matter comes before the Court pursuant to the defendant's amended post-sentence motion nunc pro tunc alleging denial of, and ineffective assistance of counsel. He also asked for a reconsideration of his sentence.

I. Factual and Procedural History

On March 21, 2002, the defendant, Jamar Phillips, was found guilty by a jury Count I, Aggravated Assault, Count III, Recklessly Endangering Another Person, Count V, Firearms Not to be Carried Without a License, and Count VI, Possessing Instruments of a Crime.[1] The offenses arose from a shooting which occurred on June 16, 2001 at an after hours establishment known as Big Daddy's in Erie, Pennsylvania. He was sentenced on May 3, 2002 to serve a period of confinement consisting of a minimum of eighty-four (84) months and a maximum of one hundred sixty-eight (168) months, plus costs and fines[2]. On May 13, 2002, the defendant filed post-trial motions in the form of Motion for Judgment Notwithstanding the Verdict (based upon double jeopardy grounds and a lack of sufficient evidence to prove identification of the perpetrator of the crimes), and a Motion for New Trial alleging that the prosecution withheld exculpatory evidence. A hearing was conducted on June 11, 2002. An opinion and order denying the defendant post-trial relief was issued on June 25, 2002. On July 8, 2002, this Court advised the defendant that it learned that his trial counsel, Attorney Gustee Brown, Esquire had not been licensed to practice law at the time of his trial[3]. [On November 8, 2000, the Pennsylvania Supreme Court placed Attorney Brown on inactive status (effective November 30, 2000) for failing to pay the required annual fee required by Pa. R.D.E. 219]. On July 8, the Court appointed William Hathaway, Esquire as counsel for the defendant. On July 11, 2002, Attorney Hathaway filed an amended post-sentence motion nunc pro tunc requesting a new trial based upon a claim of ineffective assistance. The Court permitted the pleading. In that motion, the defendant alleges that the defendant was denied his right to counsel because Attorney Brown: (1) failed to maintain a license to practice law, (2) did not pursue information contained in a police report, (3) did not investigate the possibility that the defendant's brother, Lamont Phillips, may have been involved in the offenses, and (4) failed to call two trial witnesses requested by the defendant. A hearing on those claims was held on August 6, 2002. The parties' briefs were submitted August 27, 2002 and September 13, 2002 respectively.

Regarding the licensing issue, Attorney Brown testified that he first

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[1] This was the defendant's second trial. His first trial was held on November 6, 2001 before the Honorable Shad Connelly. It ended in a mistrial when Judge Connelly declared the jury deadlocked.

[2] This is an aggravated range sentence and the reasons were set forth on the record at time of sentencing.

[3] This Court learned this fact shortly before this date.

learned of his placement on inactive status from a July, 2002 newspaper report. [Hearing Transcript (H. T.) at page 31]. He was unaware of the Pennsylvania Supreme Court's order placing him on inactive status because his mail was sent to his previous address in Richmond, Virginia. (H. T. 32). He maintained the Richmond address because his life was unsettled in Erie, and he was not certain that he would be staying for any extended period. (H. T. 32). His family had access to his mail in Richmond and would periodically send it to him - approximately once a month. He did not know if his family forwarded the Supreme Court's order placing him on inactive status. (H. T. 33, 34).

Attorney Brown has been practicing law approximately eight years and was aware that the licensing provisions in Pennsylvania required an annual fee. (H. T. 33). He admitted that he received the licensing fee forms, but did not send the required amount because "a lot of things were going on" in his personal life, and because he believed that he would not be placed on inactive status. (H.T. 34, 47) Instead, he thought he would receive solely a late fee for not paying on time. (H.T. 47). He never made any inquiries to the Supreme Court regarding a change in his status. (H. T. 47). Attorney Brown testified that he was issued a bar certification card on July 1, 2002 after paying his arrearages and current dues. He is currently licensed to practice law in the Commonwealth. (H. T. 48, 59).

In this case Attorney Brown was hired by the defendant to represent him prior to his first trial (H. T. 30). There is conflicting testimony between Attorney Brown and the defendant as to whether he was hired to represent the defendant only for trial or through appeal. (H.T. 10). Nevertheless, he represented the defendant at the first trial, and filed a notice of appeal. (H. T . 36). Attorney Brown did not pursue the appeal because he thought he had been fired. (H. T. 36). Instead, Joseph Burt, Esquire, of the Erie County Public Defender's office undertook the defendant's appeal and withdrew it, (H. T. 9, 36). Subsequently, the defendant's mother contacted Attorney Brown regarding the appeal and he was again retained by the defendant to represent him during his second trial. (H. T. 47).

Regarding the other ineffectiveness claims, the defendant testified that as part of the discovery process he received a police report indicating that Erie Police Officer Robert Borland witnessed two individuals fleeing Big Daddy's night club near the time of the shooting, who discarded two guns. (H.T.12). Attorney Brown testified, however, that he did not call Officer Borland as a witness because the defendant told him that he knew that those guns were not involved in this incident.[4] (H. T. 41). [The

[4] In the first post-sentencing motion, Attorney Brown asserted that he wasn't provided police reports describing Officer Borland's observations of one individual leaving Big Daddy's and discarding a gun. (H. T. 44). The issue was resolved at the June 11, 2002 hearing when it was discovered that the defense had access to the relevant reports.

defendant did not disclose to Attorney Brown how he knew this. (H.T. 55).]

The defendant also alleges that Attorney Brown was ineffective for not calling Mr. Jamie Pacely and Erie Police Officer(s) to testify at his second trial. (H. T. 13). Attorney Brown testified that the only witness he recalls the defendant requesting was Officer Dunmire. (42, 43). Officer Dunmire cataloged the evidence at the crime scene. (H. T. 57). The defendant wanted Officer Dunmire to testify about a blood splatter on the floor of the crime scene. (H. T. 57). Attorney Brown did not call him as a witness, however, because Officer Dunmire is not an expert and this evidence did not fit his defense theory[5]. (H. T. 38, 57). Moreover, Mr. Pacely testified at the July, 2002 hearing. His testimony clearly showed that he was not an eyewitness to the shooting and would not have aided the defense. (H. T. 20, 24). Finally, other police officers that might have been suggested by the defendant as witnesses were not identified. Furthermore, a review of the police reports discloses that other officers were involved in unrelated events and could not have offered relevant evidence. See, June 25, 2002 Opinion and Order.

Additionally, no testimony or evidence was presented at the July 8 hearing regarding the issue of the possible involvement of the defendant's brother, Lamont Phillips.

II. LEGAL DISCUSSION

A. THE ISSUE OF JURISDICTION.

The Commonwealth argues that this Court does not have jurisdiction. This Court respectfully disagrees. The defendant was sentenced on May 3, 2002 and his first post-trial motions were filed May 13, 2002. A hearing was conducted on those motions on July 11, 2002 and on July 25, 2002 they were denied by opinion and order of this Court. Shortly after learning of Mr. Brown's situation, this Court scheduled a hearing (which necessitated returning the defendant from the state correctional facility where he was incarcerated). The hearing was held on July 8, 2002. At that time, the defendant was advised of Mr. Brown's situation and the Court appointed new counsel, Attorney Hathaway, for him. Attorney Hathaway filed an amended post-sentencing motion *nunc pro tunc* on July 11, 2002.

Pa.R.Crim.P. 720 governs post-sentence procedures. Paraphrasing the rule, the optional post-trial motion shall be filed no later than 10 days after imposition of sentence. Therefore, the defendant's first post-trial motions were timely filed. The court had 30 days in which to decide that motion. The time period in which the defendant can file an appeal (which would divest this Court of jurisdiction) is 30 days from the denial of the post-sentence motion. Therefore, the defendant had until July 25, 2002 in

[5] The defendant's defense was that the victim possessed the gun during the scuffle and shot himself. (H. T. 53, 54).

which to file an appeal from this Court's order of June 25, 2002. Given the extraordinary circumstances of the case, the Court scheduled a hearing within the time period during which the defendant could file an appeal. Moreover, it appointed counsel during that period and new counsel filed the amended post-sentence motion *nunc pro tunc* within that period. The Court's election to accept that motion for consideration maintained jurisdiction with this Court. This also allowed this Court to address all the ineffectiveness claims prior to appeal. It should also be noted that the amended post-sentence motion included a challenge to the defendant's sentence. Pursuant to Pa.R.Crim.P. 721(c)(2), this Court has 120-days to decide that motion. The 120-day period expired on November 8, 2002.

Therefore, this Court has jurisdiction.

B. THE RIGHT TO COUNSEL ISSUE

Two constitutional provisions govern the defendant's case. The Sixth Amendment of the United States Constitution provides, in part;
"In all criminal prosecutions, the accused shall enjoy. . . the assistance of counsel for his defense." Co-extensive with this provision, Article 1, Section 9 of the Pennsylvania Constitution provides: "In all criminal prosecutions the accused has a right to be heard by himself and his counsel. . . .".

Furthermore, the Supreme Court of Pennsylvania has the inherent and exclusive power to oversee the conduct of attorneys. Pa.R.D.E. 103. Pursuant to Pa.R.D.E. 19, attorneys are required to pay an annual fee of $130.00.

The defendant claims that his right to counsel was abridged because of Mr. Brown's failure to pay his annual fee. There are basically two views on this subject. The first holds that the failure to be admitted or licensed to practice law constitutes a *per se* violation of one's right to counsel. The second analyzes the reason for the incapacity in light of the standards of effectiveness of representation.

There are no Pennsylvania cases directly on point. However, in *Commonwealth v. Vance*, 546 A.2d 632 (Pa.Super. 1988), a first-degree murder case, the defendant sought to withdraw his guilty plea alleging that his defense counsel was not a member of the bar and for abuse of cocaine. However, counsel's incapacity occurred after he had represented the defendant. *Id.* at 635. It is important to note that the Superior Court did not find that counsel's admission to the bar (once he was revoked) rendered his membership void *ab initio.* Furthermore, the Court was not inclined to adopt a *per se* rule, even in those instances when counsel was disbarred at the time s/he represented the defendant, *Id.* at 637. Therefore, the Court treated the issues of the capacity to practice law and ineffectiveness separately. *Id.*

Pennsylvania's sister states (as well as the federal courts) have addressed the issue.

Exemplifying the first school of thought is *Ex parte Williams*, 870 S.W.2d 343 (CA. Tex. 2nd Dist., 1994). There, defense counsel represented the defendant at a time when he was disbarred. Before verdict, the lower court granted a mistrial and appointed new counsel. On appeal of the mistrial ruling, the appellate court noted: "Since Duggins (trial counsel) was disbarred nearly two months before trial began, he was no longer 'counsel'. Thus, he should never have represented Williams in this case." *Id.* at 347. Continuing, the Court stated:

> Thus, from the inception of the proceeding, Williams was deprived of a fundamental right guaranteed to all felony defendants, and the trial judge had no choice but to declare a mistrial. The basis for manifest necessity in this case was not merely Duggins' disbarment; rather, mistrial was necessary because, without waiving his fundamental right to counsel, Williams was deprived of same during the part of the trial that had already occurred.

Id. at 347.

Defendant-Williams relied upon *Parrish v. State*, 840 S.W.2d 63 (Tex.App. - Amarillo 1992) arguing that the right to assistance of counsel requires only effective assistance of counsel. *Id.* at 66. The *Williams* court, unpersuaded by the argument, said that:

> First, in Texas, a disbarred lawyer is deemed incompetent to represent a criminal defendant as a matter of law. (citations omitted).
>
> Second, *Parrish* cites *Strickland v. Washington*. 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984), as authority for the Amarillo court's conclusion that assistance of counsel means only effective assistance of counsel. (citations omitted). With all due respect to our sister court, we read *Strickland* as holding that the constitutional guarantee to assistance of counsel means an accused is entitled both to counsel and to reasonably effective assistance from that counsel. . . .

Id. at 347-348.

It is interesting that the *Williams* court Quoted this portion of *Strickland*:

> Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. [citations omitted]. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to

> produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." [citations omitted].

Id. at 848 (citing *Strickland* 466 U.S. at 685-86). (emphasis added) *See also, Solina v. United States,* 709 F.2d 160 (2d Cir. 1983); *People v. Hinkley,* 193 Cal. App. 3d 383 (C.A. Calif., Fifth Appellate District, 1987).

The second view (which analyzes the cases in effectiveness terms) is exemplified by *State v. Brigham,* 600 N.E. 2d 1178 (Ill., 1992). In *Brigham,* the issue before the Illinois Supreme Court was whether defendant was denied his right to counsel because counsel had been removed from the master roll of attorneys for failure to pay his attorney registration dues before he undertook the representation of defendant. *Id*. at 1179. (This is the precise factual situation before this Court.)

In its analysis the Court discussed a number of similar cases, including *People v. Elvart,* 545 N.E.2d 331 (Ill. 1989) and *People v. Schlaiss,* 528 N.E.2d 334 (Ill. 1988). In arriving at its decision, the *Brigham* court stated:

> Although the present issue is one of first impression for this court, other jurisdictions have dealt with it on numerous occasions, almost unanimously concluding that an attorney whose license has been suspended for failure to pay his dues still may be "counsel" for Sixth Amendment purposes. *Reese v. Peters,* (7th Cir. 1991), 926 F.2d 668; *United States v. Mouzin,* (9th Cir. 1986), 785 F.2d 682; *United States v. Hoffman,* (9th Cir. 1984), 733 F.2d 596; *Beto v. Barfield,* (5th Cir. 1968), 391 F.2d 275; *People v. Medler,* (1986),177 Cal. App. 3d 927, 223 Cal. Rptr. 401; *People v. Garcia* (1983), 147 Cal. App. 3d 409, 195 Cal. Rptr. 138; *Dolan v. State,* (Fla. App. 1985), 469 So.2d 142; *White v. State,* (Fla. App. 1985), 464 So. 2d 185; *Johnson v. State,* (1979), 225 Kan. 458, 590 P.2d 1082; *State v. Smith,* (Minn. 1991), 476 N.W. 2d 511; *Jones v. State* (Mo. App. 1988),747 S.W. 2d 651; *Hill v. State,* (Tex. Crim. App. 1965), 393 S.W. 2d 901.

Id. at 1181.

Citing *Reese v. Peters.* 926 F.2d 668 (7th Cir. 1991), the court placed the right to counsel in a historical context when it stated:

> "'Counsel' in 1791 meant a person deemed by the court fit to act as another's legal representative and inscribed on the list of attorneys. See §35 of the Judiciary Act of 1789. There were no bar exams, no unified bars, no annual dues, no formal Qualifications. Although there were a handful of law schools, none was accredited by the ABA (there was no ABA), and few students completed the program. John Marshall dropped out of

> law school after a few months of study. Leonard Baker, *John Marshall A Life in Law* 61-66 (1974). Would-be lawyers earned the right to practice through apprenticeship, appearing in court under the tutelage of a practitioner until they satisfied the presiding judge that they could handle cases independently. Part of that tradition survives in the practice of admission *pro hac vice.* Courts grant motions allowing representation by persons who do not belong to their bars. Usually the person admitted *pro hac vice* belongs to *some* bar, but it may be the bar of a distant state or foreign nation. The enduring practice of admission *pro hac vice* demonstrates that there is no one-to-one correspondence between 'Counsel' and membership in the local bar.
>
> The *constitutional* question is whether the court has satisfied itself of the advocate's competence and authorized him to practice law. Persons who obtain credentials by fraud are classes apart from persons who satisfied the court of their legal skills but later ran afoul of some technical rule. Lawyers who do not pay their dues violate a legal norm, but not one established for the protection of clients; suspensions used to wring money from lawyers' pockets do not stem from any doubt about their ability to furnish zealous and effective assistance. [Defendant's representative at trial] may well have belonged to the bar of a federal district court and his failure to pay his state dues would not have produced automatic suspension from the federal bar. *(In re: Ruffalo,* 390 U.S. 544, 88 S.Ct. 1222. 20 L.Ed. 2d 117 (1968).) Federal courts do not collect annual dues and a state may not hold membership in the federal bar hostage to extract its own tribute.
>
> It would make no sense to say that [defendant's representative] could furnish 'Counsel' in a federal prosecution, to which the Sixth Amendment applies directly, but not in a state prosecution, to which the Sixth Amendment applies only by its absorption through the due process clause of the Fourteenth. What matters for constitutional purposes is that the legal representative was enrolled after the court concluded that he was fit to render legal assistance." (emphasis in original) *Reese*, 926 F.2d at 669-70.

Id. at 1181-82

This view is also adopted in our federal circuit. In *Vance v. Lehman*, 64 F.3d 119 (C.A. 3d 1995), the Third Circuit Court of Appeals had an opportunity to evaluate the *Vance* decision, *supra*. Judge Stapleton, in a well-reasoned opinion stated:

> The right to the effective assistance of counsel is . . .the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted - - even if defense counsel may have made demonstrable errors - - the kind of testing envisioned by the Sixth Amendment has occurred.

Id. at 122. [citing *United States v. Cronic*, 466 U.S. 648 (1984)].

The Court clearly drew a distinction between those situations that might require application of a *per se* rule finding a violation of the Sixth Amendment and those that would not. *Id.* at 122-126.

This approach is consistent with the seminal right to counsel cases. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the United States Supreme Court, holding that the Sixth Amendment right to counsel was fundamental and incorporated into the law of the states, stated:

> ["The assistance of counsel"] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. . . . The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done'". *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938). To the same effect, *see*, *Avery v. Alabama*, 308 U.S. 444 (1940), and *Smith v. O'Grady*, 312 U.S. 329 (1941).

It further noted:

> That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. Defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in *Powell v. Alabama:*
>
> > The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of

> evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he would have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.
> 287 U.S. at 68-69.

Id. at 344-45.

In *Strickland v. Washington,* 466 U.S. 668 (1984), the pivotal effective assistance of counsel case, the Supreme Court's analysis is a refinement of its holding in *Gideon*. Proceeding *a priori* it noted:

> [i]n a long line of cases that includes *Powell v. Alabama*, 287 U.S. 45 (1932), *Johnson v. Zerbst,* 304 U.S. 458 (1938), and *Gideon v. Wainwright,* 372 U.S. 335 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial.

Id. at 684.

Recalling this court's earlier references to Strickland, the Supreme Court defined the guarantee in this way: "the right to counsel is the right to the effective assistance of counsel." (citation omitted). *Id*. at 685. After its review, this Court concludes that the fundamental right to counsel embodied in the United States and Pennsylvania constitutions encompasses both the issue of the capacity of the advocate to practice, as well as the effectiveness of the representation. Furthermore, it adopts the prevailing view that rejects a *per se* rule. Rather, the determination of the right to counsel issue should be made on a case-by-case basis. If an attorney is not permitted to practice because of a technical violation (unrelated to the attorney's moral fitness, training, education, experience or ability to practice his or her craft), it would be unwise to automatically vitiate a decision of a judicial tribunal on that basis alone. It has long been accepted in another that a criminal defendant is entitled to a fair trial, not a perfect one. *See, Commonwealth v. Story,* 303 A.2d 155, 164 (Pa. 1978). Therefore, this Court finds that Mr. Phillip's fundamental right to counsel was not violated.[4[sic]]

[4 [sic]] This Court has reviewed the cases cited by the defendant and finds each of them to be distinguishable. In fact, all but one (*Jordan*) deal with representation by a non-lawyer.

C. THE DEFENDANT'S OTHER INEFFECTIVENESS CLAIMS

In analyzing defendant's other ineffective assistance of counsel claims, this Court is guided by the long-standing principles articulated by the Pennsylvania Supreme Court in *Commonweath v. Pierce*, 827 A.2d 973 (Pa. 1987) which adopted the Supreme Court of the United States' position articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). Quoting *Strickland*, the *Pierce* court stated:

> Convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction. . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced that defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless the defendant makes both showings, it cannot be said that the conviction. . . resulted from a breakdown in the adversary process that renders the result reliable.

Strickland, 466 U.S. at 687. (other citations omitted).
Commonwealth v. Pierce, *supra* at 157-158.

More recently, the Pennsylvania Supreme Court in *Commonwealth v. Rivers*, 786 A.2d 923 (Pa. 2001) articulated the standard in this manner:

> (1) that there is merit to the underlying claim; (2) that counsel had no reasonable basis for his or her course of conduct; and (3) that there is a reasonable probability that, but for the act or omission challenged, the outcome of the proceeding would have been different. *Commonwealth v. Jones*, 546 Pa. 161, 175, 683 A.2d 1181, 1188 (1996). Counsel is presumed to be effective and appellant has the burden of proving otherwise. *Commonwealth v. Marshall*, 534 Pa. 488, 633 A.2d 1100 (1993). Additionally, counsel cannot be considered ineffective for failing to raise a claim that is without merit. *Commonwealth v. Peterkin*, 538 Pa. 455, 469, 649 A.2d 121 (1994). . . .
>
> *Commonwealth v. Holloway*, 559 Pa. 258,739 A.2d 1039, 1044 (1999).

Id. at 930.

A review of the evidence in this case indicates that the defendant's claims are meritless. First, there is no basis to the defendant's claim that Mr. Brown failed to pursue information in the police report (Exhibit 1. pp. 15-16) relative to the guns. The Court found credible Mr. Brown's

testimony that the defendant informed him that he (the defendant) knew that the gun used in this case was not one of those guns. Therefore, it would have been a futile gesture for Mr. Brown to pursue this line of inquiry.

Second, relative to defendant's claim that Mr. Brown was ineffective for not pursuing alleged information that the defendant's brother, Lamont Phillips possessed the gun used in this shooting on a different occasion is meritless because no testimony or other evidence was introduced at the hearing to support this claim or to demonstrate its relevance. Moreover, this relates to Exhibit 3 (another Erie Police Department report) which refers to a separate incident which occurred two days after the shooting in this case.

Third, the defendant's claim that Mr. Brown was ineffective for failing to call Mr. Jamie Pacely as a witness is meritless because Mr. Pacely (as he testified at the hearing) never witnessed the shooting. Therefore, he was not an eyewitness, nor would his testimony have been helpful.

For all the above reasons, this Court finds that the defendant has failed to meet his burden of demonstrating Attorney Brown's ineffectiveness.

D. THE DEFENDANT'S SENTENCING CHALLENGE.

A sentencing court is required to place on the record its reasons for imposition of sentence. 42 Pa. Cons. Stat. § 9721(b). The sentencing judge can satisfy this requirement by identifying on the record that s/he was informed by a presentence report. *Commonwealth v. Devers*, 546 A.2d 12 (Pa. 1988).

Furthermore, sentencing is a matter vested in the second discretion of the trial court whose judgment will not be disturbed on appeal absent an abuse of discretion. "A sentencing court has not abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will. *Commonwealth v. Johnson*, 758 A.2d 1214, 1216 (Pa. Super. 2000). When considering whether a sentence is manifestly excessive, the appellate court must give great weight to the sentencing court's discretion because it is in the best position to measure the nature of the crime, the defendant's character, and the defendant's display of remorse, defiance or indifference. *Commonwealth v. Ellis*, 700 A.2d 948, 958 (Pa. Super. 1997). Moreover, the sentencing guidelines are merely advisory, and if the court finds it appropriate to sentence outside the guidelines, then it may do so. *Commonwealth v. Gibson*, 716 A.2d 1275, 1277 (Pa. Super. 1998).

Here, the defendant was sentenced in the aggravated range of the sentencing guidelines after this Court considered, *inter alia:*

(1) the presentence investigative report;
(2) the Pennsylvania Sentencing Code;
(3) the Pennsylvania Sentencing Guidelines; and
(4) the comments of both counsel and statements of the defendant.

Therefore, because the sentence imposed was within the sentencing guidelines and the reasons for the sentencing are adequately stated on the record, the court finds the defendant's sentencing challenge meritless.

III. CONCLUSION

Based upon the above, this Court finds first that it has jurisdiction to decide the issues presented. Second, although Mr. Brown's conduct was not commendable, the defendant's right to counsel was not denied by virtue of the fact that Mr. Brown had failed to pay his licensing fees. In all other respects, as corroborated by the Supreme Court's most recent reinstatement of Attorney Brown, he was competent to practice law before the courts of this Commonwealth. The Court rejects a *per se* rule which would automatically require a new trial. Third, the Court finds that the defendant has failed to substantiate his other ineffectiveness claims. Finally, there is no merit to the defendant's sentencing challenge.

ORDER

AND NOW, this 26th day of September, 2002, for the reasons set forth in the accompanying opinion, it is hereby ORDERED that the defendant's amended post-sentence motion *nunc pro tunc* (in the nature of a motion for new trial and motion for reconsideration of sentence) is hereby DENIED.

BY THE COURT:

/s/ **Ernest J. DiSantis, Jr., Judge**

MARIA BIBLE, TAMMY BRYAN, KAREN E. LOREI, BEVERLY A. PARIS, KATHRYN A. SMIALEK and LOUISE A. VOGT, Plaintiffs

v.

GIRARD SCHOOL DISTRICT, Defendants

CIVIL PROCEDURE/PRELIMINARY OBJECTIONS

The question presented by preliminary objections in the nature of a demurrer is whether on the facts averred the law says with certainty that no recovery is possible.

CIVIL PROCEDURE/PRELIMINARY OBJECTIONS

In ruling on preliminary objections, the court must accept as true all well-pleaded allegations of material fact and all inferences which may be reasonably deduced from those averments. Preliminary objections which result in the dismissal of a claim should be sustained only in cases clear and free from doubt. Where any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the demurrer.

LABOR AND EMPLOYMENT/COLLECTIVE BARGAINING

Where a collective bargaining agreement creates an exclusive grievance and arbitration procedure, the wrong done the employer may only be redressed by the union, and only under the procedures specified in the contract.

LABOR AND EMPLOYMENT/COLLECTIVE BARGAINING

Under the "essence test," where a task of an arbitrator is to determine the intention of the contracting parties as evidenced by their collective bargaining agreement and the circumstances surrounding its execution, then the arbitrator's award is based on a resolution of a question of fact and is to be respected by the judiciary if the interpretation can in any rational way be derived from the agreement, viewed in light of its language, its context, and any other indicia of the parties' intention.

LABOR AND EMPLOYMENT/COLLECTIVE BARGAINING

Having urged the existence of an agreement before the arbitrator, plaintiffs cannot now deny the existence of the written contract in order to establish jurisdiction of the Court of Common Pleas.

CONTRACTS/UNJUST ENRICHMENT

The plaintiffs' complaint is legally insufficient to state a cause of action for unjust enrichment where a written or expressed contract exists between the parties.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 60005 - 2002

Appearances: Richard T. Ruth, Esquire for the plaintiffs
Richard W. Perhacs, Esquire for the defendant

OPINION

The present issue is whether employees of a school district who are also members of a collective bargaining unit can bring an action in equity in their individual capacities seeking to enjoin the school district from withholding wages after the issue was decided by an arbitrator pursuant to a Collective Bargaining Agreement. Because this Court lacks subject matter jurisdiction, the Defendant's Preliminary Objections must be granted and the case dismissed.

FACTS

The Girard School District ("District") operates the public schools in Girard, Pennsylvania and employs approximately seventy non-professional employees. These employees are represented for purposes of collective bargaining by the International Brotherhood of Painters and Allied Trades, Local Number 1968 ("Union"). The Plaintiffs are members of the Union and are employed as educational aides by the District.

In May 2001, as a result of an audit, the District discovered that several aides had been paid for one-half hour per day in excess of the time they were authorized to work. District Superintendent Walter Blucas sought reimbursement for the two year period reflected in the audit and gave each employee the opportunity to make arrangements for repayment. When no employee responded, the District elected to recover the money at the same rate it had been improperly paid by deducting one-half hour per day from the employees' wages.

In response, the Union filed a grievance alleging an unspecified violation of the Collective Bargaining Agreement. The District denied the grievance and the matter proceeded through the contractual process to arbitration. On October 31, 2001, a hearing was held before Arbitrator John G. Watson who, by award dated December 28, 2001, denied the grievance because the District's wage withholding did not violate any provision of the Collective Bargaining Agreement.

On February 26, 2002, the Plaintiffs filed a Complaint in Equity seeking injunctive relief, restitution, prejudgment interest and attorney's fees and costs. The complaint asserts that due to the District's ongoing deductions, the Plaintiffs are not being paid their full wages earned by them each week. On April 11, 2002, the District filed Preliminary Objections to Plaintiffs' Complaint in Equity. The Plaintiffs filed an Answer to the District's Preliminary Objections on April 29, 2002.

The District's Preliminary Objections are three fold. First, the District asserts a lack of subject matter jurisdiction because the exclusive remedy is binding arbitration under the Collective Bargaining Agreement. Second, the Plaintiffs' complaint is legally insufficient to state a cause of action for unjust enrichment because of the existence of a written contract between the parties. Third, the District is exempt from the provisions of the Wage Payment and Collection Law, 43 P.S. §260.2 *et seq.* Only the

first two objections need be addressed.

DISCUSSION

The question presented by Preliminary Objections in the nature of a demurrer is whether on the facts averred, the law says with certainty that no recovery is possible. *Shick v. Shirey*, 552 Pa. 590, 593,716 A.2d 1231, 1233 (1998). In ruling on Preliminary Objections, the Court must accept as true all well-pleaded allegations of material fact and all inferences which may be reasonably deduced from those averments. *Wagner v. Borough of Rainsburg*, 714 A.2d 164, 1166 (Pa. Com. 1998). Preliminary Objections which result in the dismissal of a claim should be sustained only in cases clear and free from doubt. *Drain v. Covenant Life Insurance Company*, 551 Pa. 570, 575, 712 A.2d 273, 275 (1998). Where any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the demurrer. *Shick*, *supra*.

Applying these strict criteria to the instant case, the District's Preliminary Objections must nonetheless be sustained.

The Preamble to the Collective Bargaining Agreement dated July 1, 1997 provides, in part:

> "...It is the intent and purpose of the parties hereto to set forth a complete agreement relating to rates of pay, hours of work and other terms and conditions of employment, to increase efficiency in the operations of the School District, to provide a procedure for the prompt and equitable disposition of alleged grievances,...".

Furthermore, Article XXI, Section 1 states:

> "This agreement sets forth the entire and final understanding of the parties on all matters affecting wages, hours, and other terms and conditions of employment...."

Exhibit A of the Collective Bargaining Agreement is a table specifying the wage paid for each covered employee classification, including the Plaintiffs in this case.

Article VIII of the Collective Bargaining Agreement sets forth the grievance procedure including arbitration. Article VIII, Section 1 defines a grievance "as disagreement or dispute as to the meaning or application of the express provisions of this agreement". Article VIII, Section 7(c) provides that:

> "The decision of the Arbitrator on any matter properly before him and within the limits of his jurisdiction shall be final and binding on the parties."

Unquestionably, the Collective Bargaining Agreement establishes arbitration as the exclusive remedy for resolving disputes arising under

its terms. Therefore, this Court lacks subject matter jurisdiction. In *Gingrich v. City of Lebanon*, 57 Pa. Com. 594, 427 A.2d 278 (1981) the Pennsylvania Commonwealth Court stated:

> "where a collective bargaining agreement creates an exclusive grievance and arbitration procedure, the wrong done the employer may only be redressed by the union, and only under the procedures specified in the contract."

The Commonwealth Court reviewed the grievance procedure provisions of the Collective Bargaining Agreement which stated that "the impartial arbitrator shall issue his decision as soon as practical and his decision **shall be final and binding on both parties to this Agreement**. The arbitrator shall not add to, subtract from or modify the specific provisions of this Agreement." (emphasis added.) The Court held these provisions of the collective bargaining agreement required the grievant to pursue binding arbitration as the exclusive remedy for resolving disputes arising under the terms of the agreement. *Id*. at 597-598, 427 A.2d at 279.

Plaintiffs assert the Court does have subject matter jurisdiction because this dispute is not governed by the language of the Collective Bargaining Agreement and the arbitrator has made such a finding. However, in *Scranton Federation of Teachers, Local 1147 v. Scranton School District*, 498 Pa. 58,44 A.2d 1144 (1982) the Pennsylvania Supreme Court stated:

> "In labor disputes resolved by arbitration machinery, the less judicial participation the better. ...Accordingly, the oft-repeated 'essence' test was adopted by this Court in 1977. To state the matter more precisely, where a task of an arbitrator, P.E.R.A. or otherwise, has been to determine the intention of the contracting parties as evidenced by their collective bargaining agreement and the circumstances surrounding its execution, then the arbitrator's award is based on a resolution of a question of fact and is to be respected by the judiciary if the interpretation can in any rational way be derived from the agreement, viewed in light of its language, its context, and any other indicia of the parties' intention.'.... The parties to this collective bargaining agreement had bargained for the arbitrator's construction, and not the Court's; thus a Court has no business intruding into the domain of the arbitrator because its interpretation of the agreement differs from his." *Id.* at 64-65, 444 A.2d at 1147 (citations omitted).

In the present case, the arbitrator reviewed the Collective Bargaining Agreement and concluded that "the wage withholding against the Grievants' wages does not violate any provision of the Collective Bargaining Agreement. The grievances are, therefore, denied." *See*, Award of Arbitration, December 28, 2001, pp. 6 & 8.

In essence, the Arbitrator could find no basis for relief for the Plaintiffs under the terms of the Collective Bargaining Agreement. It is now a matter of sophistry for the Plaintiffs to argue the dispute is not governed by the agreement. Plaintiffs sought relief under the Collective Bargaining Agreement and lost. Plaintiffs cannot now deny the existence of the written contract in order to establish jurisdiction for this attempted second bite of the apple.

The District's Preliminary Objection that the Plaintiffs' Complaint is legally insufficient to state a cause of action for unjust enrichment is also meritorious. In *Mitchell v. Moore*, 729 A.2d 1200 (Pa. Super. 1999) the Pennsylvania Superior Court held that a finding of unjust enrichment could not be made where a written or express contract existed between the parties. In the case *sub judice*, the Collective Bargaining Agreement sets forth in writing the relationship between the parties regarding rates of pay, hours of work and other terms and conditions of employment. Indeed the Plaintiffs sought relief through the grievance procedure set forth in the Collective Bargaining Agreement. Simply because the Plaintiffs lost in arbitration does not make the Collective Bargaining Agreement disappear.

Undaunted, Plaintiffs now assert that no contract exists between each individual Plaintiff and the District. Plaintiffs cannot ignore the fact each is a member of the Union enjoying the benefits of the Collective Bargaining Agreement, and even seeking relief thereunder. Plaintiffs have a contractual relationship with the District through the Collective Bargaining Agreement. Plaintiffs' inconsistent positions are untenable.

Based upon the foregoing analysis sustaining the District's first two Preliminary Objections, the issue of whether a claim of unjust enrichment would be precluded by the Wage Payment and Collection Law, 43 P.S. §260.2, *et. seq.* is not reached.

CONCLUSION

For the foregoing reasons, the District's Preliminary Objections to the Plaintiffs' Complaint are hereby **SUSTAINED** by the Court.

ORDER

AND NOW, to-wit this 2 day of October, 2002, for the reasons set forth in the accompanying Opinion, the Preliminary Objections of the Defendant are **GRANTED** and this case is **DISMISSED**.

BY THE COURT
/s/ **William R. Cunningham**
President Judge

BETSY A. LYNN

v.

EDWARD POWELL and DANIEL MARK LYNN

FAMILY LAW/CHILDREN OUT-OF-WEDLOCK

Generally, child conceived or born during marriage is presumed to be child of marriage.

Presumption that child conceived or born during marriage is child of marriage may be overcome by clear and convincing evidence that presumptive father had no access to mother or that presumptive father was physically incapable of procreation at time of conception.

Public policy in support of presumption of paternity of child born during marriage is concern that marriages that function as family units should not be destroyed by disputes over parentage of children conceived or born during marriage.

In paternity action concerning child conceived or born during marriage, legal analysis consists of determination of whether presumption of paternity applies, determination of whether presumption has been rebutted, and, if presumption does not apply or has been rebutted, consideration of doctrine of estoppel; if presumption has been rebutted or does not apply, and if facts of case include estoppel evidence, such evidence must be considered.

A person might be estopped from challenging paternity where that person has by his or her conduct accepted a given person as the father of the child.

Presumption that child conceived or born during marriage is child of marriage applies only where policy upon which presumption is based would be advanced, that policy being the preservation of marriage.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW
PACSES #420104072 NS200102957
PACSES #700104076 NS200102956

Appearances: Tammi L. Elkin, Esquire for the Plaintiff
Edward Powell & Daniel Lynn, pro se

MEMORANDUM OPINION & ORDER

February 15, 2002: Before this Court is a Motion to Adjudicate Presumption of Paternity. This Court conducted a hearing on January 25, 2002 and received testimony and argument. Petitioner, through counsel, Tammi L. Elkin, Esquire, subsequently filed a Brief in Support of Motion to Adjudicate Presumption of Paternity. This memorandum opinion and order now follows.

Factually, Daniel and Betsy Lynn were married on June 1, 1990. They are

currently married and have six children. Four of these children were fathered by Daniel. The focus in this case concerns the child, Bryce Patrick Lynn, who was conceived in August 1999 and born April 21, 2000. At the hearing, both Betsy Lynn and Daniel Lynn testified. Testimony was uncontradicted that at the time of Bryce's conception in August 1999, Betsy and Daniel were separated. The separation lasted from July 1999 through September 1999. Betsy and Daniel did not have sexual relations during that time period. Petitioner had testified that she had relations with another man; specifically, Defendant, Edward Powell. She further testified that during this time period she was not having sex with anyone other than the Defendant, Mr. Powell.

Testimony continued and, although the date of reconciliation is unclear, the couple reconciled in the Fall of 1999. Betsy Lynn testified that she informed Daniel that he was not the father in November 1999. Daniel testified that sometime in February 2000 he was told that he was not the father of the child. Regardless of the date, Betsy Lynn did inform Daniel that the biological father was Edward Powell and there is no dispute that this revelation came prior to Bryce's birth.

A DNA test was performed on Daniel in June of 2000 and the test results were available on July 26, 2000; however, Betsy and Daniel were unable to pay for the cost of the test until May or June of 2001. The couple opened the test results together. The results revealed that Daniel was, in fact, excluded as the father of Bryce. Testimony from both Betsy and Daniel indicated that their marriage is intact and they are living as a family unit with Bryce and the other children. Since their reconciliation in the Fall of 1999, the couple has remained together despite Betsy's revelation to Daniel that she had an affair during their three-month separation and she was pregnant with Defendant's child. In fact, the couple has remained together despite national disclosure on the television show "Primetime" that Daniel was not the biological father of Bryce.

Daniel Lynn testified that he was present at Bryce's birth and he also was listed as the father on Bryce's birth certificate. Daniel Lynn also supports Bryce financially and he intends to claim Bryce as an exemption on the couple's tax returns. Bryce is also covered under Daniel's insurance policy. The Lynn children have been informed that Daniel Lynn is not the biological father of Bryce and Daniel Lynn testified further that he has not held himself out to be the biological father of Bryce.

Betsy Lynn subsequently has filed this Motion for Paternity and seeks to adjudicate and overcome the presumption of paternity and the application of the doctrine of estoppel to pursue a child support claim against Edward Powell.

Legal Discussion

The legal exercise which must be performed by this Court was best stated in *Brinkley v. King*, 549 Pa. 241, 250, 701 A.2d 176, 180 (1997),

wherein the Pennsylvania Supreme Court set forth the analysis required to determine the paternity of a child conceived or born during a marriage. The Court in *Brinkley* stated:

> [T]he 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.

Id. See also, Fish v. Behers, 559 Pa. 523, 527-528, 741 A.2d 721, 723 (1999).

I. Is the presumption applicable to the Lynn case?

First, this Court will examine whether the presumption of paternity applies. The presumption of paternity only applies in cases where the policy of preserving marriages "would be advanced by the application; otherwise, it does not apply." *Fish v. Behers*, 559 Pa. 523, 528, 741 A.2d 721, 723 (1999). In *Fish*, the court held that since the husband and wife were divorced, "there was no longer an intact family or a marriage to preserve." *Id*. This meant that the presumption was not applicable. *See also, Sekol v. Delsantro*, 763 A.2d 405 (Pa.Super. 2000) (holding that the presumption was not applicable to a husband where a separation and divorce proceedings began before the support hearing). The present case differs from these cases in that the Lynn's marriage is currently intact. However, a recent Superior Court case suggests that it is not necessary for a marriage to be destroyed for the preservation of marriages policy to be relevant.

In *B.S. & R.S. v. T.M.*, 782 A.2d 1031 (Pa.Super. 2001), the Superior Court held the presumption to be inapplicable in a case where the husband and wife reconciled their separation after the wife was impregnated by another man. The court held that the presumption was inapplicable because its application would not preserve the marriage. *Id*. at 1036. In *B.S. & R.S.*, the presumption was inapplicable even though the marriage remained intact. The Court held that allowing the paternity action to continue would not harm R.S. & B.S.'s relationship. *Id*. As stated in *B.S. & R.S.*, "[t]he parties in this marriage have already acknowledged the affair and subsequent birth of J., the public separation, and B.S.'s holding T.M. out as the father of J. This marriage will succeed or perhaps fail with or without the application of the presumption." *Id*. at 1037. Consequently, the Court upheld the trial court's refusal to apply the presumption. *Id*.

Applying this law to case *sub judice*, the presumption does not apply. Daniel Lynn testified that the family and marriage would remain intact

regardless of whether the presumption is applied to Bryce. The court finds Mr. Lynn's testimony on this to be credible. Betsy Lynn's testimony also reaffirmed this. In fact, Betsy testified that if the presumption did apply and it was overcome, it would have no detrimental affect on the marriage. Also, both husband and wife have acknowledged Mrs. Lynn's affair with Ed Powell, and both, of course, recognize Ed Powell as Bryce's biological father. Furthermore, the couple publicly announced the DNA test results eliminating Mr. Lynn as Bryce's father on national television. Because of this similarity to *B.S. & R.S.*, the Court finds that the policy of preserving marriages would not be furthered by the application of the presumption in the present case. The marriage will fail or succeed regardless of whether the presumption is applied. Therefore, this Court finds the presumption of paternity to be inapplicable to Daniel Lynn. This does not mean, however, that Daniel Lynn may legally deny his paternity of Bryce. The Court must determine whether the doctrine of estoppel applies to Daniel Lynn. This is examined in part three (III) of this Opinion.

II. If the presumption is applicable, was it rebutted?

Assuming *arguendo* that the presumption applies, the Court then examines whether the evidence presented by Daniel and Betsy Lynn overcomes the presumption that Daniel is Bryce's father. If the presumption applies and is not rebutted, Daniel may not legally deny that he is Bryce's father. If, on the other hand, the presumption is rebutted by the evidence presented at the hearing, the Court must then, again, examine whether estoppel prevents Daniel from denying that Bryce is his son.

It is "one of the strongest presumptions known to the law" that "a child born to a married woman is the child of the woman's husband." *Strauser v. Stahr*, 556 Pa. 83, 87, 726 A.2d 1052, 1053-1054 (1999). The presumption that a husband is the father of his wife's children can be rebutted only by "proof that the husband did not have access to his wife during the period of possible conception, or by proof of the husband's impotency or sterility." *Miscovich v. Miscovich*, 455 Pa.Super. 437, 442, 688 A.2d 726 (1997). However, The Pennsylvania Superior Court held that "the presumption is irrebuttable where mother, child and husband live together as an intact family and husband assumes parental responsibility for the child." *B.S. & R.S.*, *supra*, 782 A.2d at 1034 (*citing Sekol v. Delsantro*, 763 A.2d 405, 408 (Pa.Super. 2000)). *See also, Miscovich v. Miscovich*, 455 Pa.Super. 437, 445-446, 688 A.2d 726, 730 (1997) ("the presumption is irrefutable where the mother, child and husband live together as an intact family, with the husband assuming parental responsibility"); *Strauser*, *supra*, 556 Pa. at 88, 726 A.2d at 1054 (1999) ("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") (citing *Freedman v. McCandless*, 539 Pa. 584, 592, 654 A.2d 529, 533 (1995)). Based upon the

uncontradicted evidence that Mr. and Mrs. Lynn, along with Bryce, remain part of an intact family that includes Mr. Lynn taking parental responsibility for Bryce, this Court holds that the presumption that Daniel is Bryce's father is irrebuttable. The testimony revealed that the couple has been married for over twelve years and only separated for three months. Further, eighteen months after Bryce's birth on April 21, 2000, the family is still intact and Daniel has taken parental responsibility for Bryce by caring for and supporting him. Mr. Lynn is listed as the father on Bryce's birth certificate. Daniel has included Bryce on his insurance plan, he will claim Bryce as a tax exemption and he has financially supported Bryce since birth. Clearly, Daniel has taken parental responsibility for Bryce. Consequently, because the mother, child and husband live together as an intact family, with Daniel Lynn taking parental responsibility, the presumption is irrebuttable and no further analysis would be necessary. However, as discussed previously, this Court finds the presumption does not apply and, therefore, we move to the question of estoppel.

III. If the presumption is inapplicable or rebutted, does the doctrine of estoppel nevertheless prevent Daniel Lynn from denying the paternity of Bryce?

The Court next examines whether the doctrine of estoppel would prevent Daniel from denying that he is Bryce's legal father. In *Freedman v. McCandless*, the Pennsylvania Supreme Court defined estoppel as:

> Estoppel in paternity actions is merely the legal determination that because of a person's conduct (e.g., holding out the child as his own, or supporting the child) that person, regardless of his true biological status, will not be permitted to deny parentage, nor will the child's mother who has participated in this conduct be permitted to sue a third party for support, claiming that the third party is the true father. As the Superior Court has observed, the doctrine of estoppel in paternity actions is aimed at "achieving fairness as between the parents by holding them, both mother and father, to their prior conduct regarding the paternity of the child." (citation omitted).

539 Pa. 584, 591-92, 654 A.2d 529, 532-33 (1995). *See also Brinkley v. King*, 549 Pa. 241, 248, 701 A.2d 176, 180 (1997).

In *Jones v. Trojak*, 535 Pa. 95, 634 A.2d 201 (1993), the Court held that "...under certain circumstances, a person might be estopped from challenging paternity where that person has by his or her conduct accepted a given person as the father of the child."

The evidence presented at the hearing indicated that Daniel Lynn has held himself out to be Bryce's father. This Court draws a distinction between holding one's self out as a child's biological father and holding

one's self out as a child's father by assuming traditional fatherly responsibilities. The Court agrees with Petitioner and her husband that Mr. Lynn has not held himself out to be Bryce's biological father. Mr. and Mrs. Lynn have told the world that Daniel is not Bryce's biological father by appearing on the national television show "Primetime" to reveal the DNA test results that excluded Daniel as the father. On the other hand, Daniel Lynn has, in fact, held himself out to be Bryce's legal father.

First, Daniel was present at Bryce's birth. Edward Powell (the biological father) was not. Second, Daniel listed himself as the father on Bryce's birth certificate. Up to the time of the hearing, more than eighteen months after Bryce's birth, Mr. Lynn has not thought it necessary to amend Bryce's birth certificate. Third, Bryce shares Daniel Lynn's last name. Fourth, Mr. Lynn has placed Bryce on his health insurance policy. Fifth, Daniel Lynn claims Bryce as an exemption on his income tax forms. This, however, may be the joint income tax return of Daniel and Betsy Lynn. Regardless, Mr. Lynn receives a monetary benefit by doing this. This Court finds also that Mr. Lynn, in some way or another, financially supports Bryce and has accepted and performed parental responsibilities for Bryce. Bryce has been and, testimony indicated, will continue to be a welcome member of this family. Finally, Edward Powell has not been involved in Bryce's life to even the slightest degree since his birth almost two years ago and he stated to the Court that he does not intend to be involved because he has a family of his own. Based on these facts, this Court finds that Daniel Lynn has held himself out to be Bryce Lynn's legal father. He has been the only father that Bryce has ever known. He has accepted Bryce and supported him. Consequently, although Daniel is not Bryce's biological father, he has accepted Bryce as his as evidenced by conduct and actions enumerated above.

Conclusion

The Court has determined that Mr. Daniel Powell is legally estopped from denying that he is Bryce's father. This result was reached by applying the unique facts of the present case to the two-step test given by the Pennsylvania Supreme Court in *Brinkley, supra.* 549 Pa. 241, 250, 701 A.2d 176, 180 (1997). First, this Court found the presumption of paternity to be inapplicable to Daniel Lynn because the presumption's underlying policy will not be advanced by its application. The marriage will succeed or fail regardless of the application of the presumption. Because the Court found the presumption to be inapplicable, the doctrine of estoppel was next examined. However, for the purpose of argument, the Court finds that if the presumption was applicable, Daniel could not rebut it because he remains part of an intact family and he has taken parental responsibility for Bryce. In this case, Daniel would be legally prohibited from denying his paternity. But, that analysis was conducted only for the purpose of explication. Holding that the presumption is inapplicable to the Lynn case,

the next step is then to determine whether Daniel, by his conduct, is estopped from denying his paternity of Bryce. This Court finds that even though Daniel has told the world he is not Bryce's biological father, he has, by his conduct, held himself out to be Bryce's legal father.

Thereby, Petitioner's Motion to Adjudicate Presumption of Paternity is **DENIED**.

BY THE COURT:
/s/ **John J. Trucilla, Judge**

Note: Petitioner appealed to the Superior Court of Pennsylvania. The Order was affirmed. 2002 Pa. Super 317, 809 A.2d 927.