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Erie County for the Year

2003

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ERIE, PA

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

COURTS OF COMMON PLEAS

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HONORABLE ELIZABETH K. KELLY ----------------------------- *Judge*
HONORABLE JOHN J. TRUCILLA -------------------------------- *Judge*

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COMMONWEALTH OF PENNSYLVANIA
v.
CORRINE D. WILCOTT

CRIMINAL PROCEDURE

The term "unborn child" is defined as "an individual organism of the species homo sapiens from fertilization until live birth." 18 Pa. C.S. §3203

The Pennsylvania Crimes Against Unborn Children Act specifically excludes acts committed during any lawful or unlawful abortion procedure in which the pregnant woman cooperated or consented, during any consensual or good faith medical procedure, or any acts that the pregnant woman commits against her unborn child. 18 Pa. C.S. §2608(a)

The Crimes Against Unborn Children Act holds a defendant criminally culpable for causing the death of a living human species inside its mother's womb, regardless of this developmental stage.

An individual who recklessly or negligently causes the death of an unborn child cannot be convicted of third degree murder because the malicious state of mind is lacking.

The Crimes Against Unborn Children Act excludes from culpability the involuntary manslaughter of an unborn child.

CONSTITUTIONAL LAW

Legislative acts of the general assembly enjoy a strong presumption of constitutionality, and the party challenging the legislation bears a heavy burden of persuasion.

If a law is susceptible to a reasonable interpretation that supports its constitutionality, the court must accord the law that meaning.

Legislation will not be invalidated unless it clearly, palpably and plainly violates the constitution.

Only a clear violation of the Constitution will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void.

The void for vagueness doctrine requires that a penal statute define a criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited, in a manner that does not encourage arbitrary and discriminatory enforcement.

A criminal statute must be sufficiently certain and definite to inform the accused of acts that the statute is intended to prohibit and for which penalties will be imposed.

Pennsylvania's Crimes Against Unborn Children Act is not void for vagueness because it provides notice of the conduct that is prohibited and all that must be proven is that life once existed and now no longer does due to the defendant's actions.

Equal protection under the law requires that like persons in like circumstances will be treated similarly.

Equal protection classifications are (1) classifications that implicate a "suspect" class or a fundamental right, (2) classifications that implicate an "important" though not fundamental right or a "sensitive" classification, (3) classifications that involve none of these.

A pregnant woman who chooses to terminate her pregnancy and an individual who assaults a pregnant woman causing the death of her fetus are not similarly situated.

There is a two-step application for the rational basis test: (1) whether the challenged statute seeks to promote any legitimate state interest or public welfare, and (2) if so, whether the classification adopted in the legislation is reasonably related to accomplishing that articulated state interest.

The legitimate state interest underlying the Crimes Against Unborn Children Act is to protect the potential life developing within a pregnant woman's womb at anytime after conception.

Judicial review must not be used as a means by which the courts might substitute its judgment as to public policy for that of the legislature.

STATUTES/CONSTRUCTION

In construing a statute, the legislative intent controls.

Where the plain and ordinary meaning of a statute is clear, judicial construction is neither necessary nor permitted.

MISCELLANEOUS

The State has a legitimate interest in protecting the potentiality of life and punishing the violent conduct that deprives pregnant women of their procreative choice.

A third party has no fundamental liberty interest in terminating another's pregnancy.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION NO. 2426 A & B of 2002

Appearances: John H. Daneri, Esquire, for the Commonwealth
Timothy J. Lucas, Esquire for the Defendant

OPINION

I. PROCEDURAL HISTORY

On July 2, 2002, the Erie Police Department filed a Criminal Complaint against Corrine D. Wilcott (hereinafter "Defendant") charging her with Criminal Homicide of An Unborn Child[1], Aggravated Assault of An Unborn Child[2], Aggravated Assault[3], Simple Assault[4] and making

[1] 18 Pa. C.S.A. §§2603, 2604 & 2605.
[2] 18 Pa. C.S.A.§2606.
[3] 18 Pa. C.S.A §2702(a)(1).
[4] 18 Pa. C.S.A. §2701(a)(1).

Terroristic Threats[5]. A Preliminary Hearing was held on August 30, 2002, and after testimony was presented, including that of the unborn child's mother and victim in this case, Sheena Carson, the District Justice held that the Commonwealth had met its burden of proving a *prima facie* case against the Defendant. Subsequently, on October 2, 2002, the Erie County District Attorney's Office filed a Criminal Information charging Ms. Wilcott with the above-referenced crimes.

This matter is before the Court on the Defendant's challenge to the constitutionality of the Pennsylvania Crimes Against Unborn Children Act (hereinafter "PACAUCA ") raised in her Omnibus Pre-Trial Motion filed on November 27, 2002, by the Defendant's attorney, Timothy J. Lucas, Esquire. The Court resolved each of the issues raised in Defendant's Omnibus Pre-Trial Motion, except the issue regarding the constitutionality of the PACAUCA.

Subsequently, on December 13, 2002, the Court heard oral arguments from both counsel on this issue and a briefing schedule was set. Defendant filed a Supplemental Omnibus Pre-Trial Motion on December 18, 2002, setting forth an additional basis challenging the PACAUCA's constitutionality. On December 31, 2002, the Defendant filed a Memorandum of Law supporting her argument that the PACAUCA is unconstitutional. The Commonwealth responded with a Memorandum of Law received by this Court on January 13, 2003.

For the reasons set forth herein, this Court finds the "Crimes Against the Unborn Child Act," as set forth in 18 Pa. C.S.A. §2603, *et. seq.* is constitutional.

II. FACTUAL BACKGROUND[6]

The victim, Sheena Carson, was the sole witness presented at the Preliminary Hearing. She testified that a few years ago she began having an intimate relationship with the Defendant's husband, Kareem Wilcott. Notes of Testimony (hereinafter "N.T."), Wilcott Preliminary Hearing, 8/30/02, p. 5. Kareem Wilcott eventually impregnated Ms. Carson. The Defendant was informed that Ms. Carson's pregnancy was caused by her husband. *(Id.* at 5-7).

Ms. Carson alleges that, at approximately 1:30 A.M. on June 8, 2002, at 2046 Downing Avenue in Erie, Pennsylvania, the Defendant grabbed her from behind by the hair, pulled her to the ground, and dragged her approximately six to ten feet along the sidewalk. *(Id.* at 12-13). During the alleged assault, Defendant kicked the right side of Ms. Carson's abdomen at least two times with the side of her right foot. *(Id.* at 14-16). At the time of this incident, the victim was approximately 15.2 weeks pregnant with Mr. Wilcott's unborn child. Ms. Carson further alleges that while kicking

[5] 18 Pa. C.S.A. §2706.

[6] The Court is in no way assessing the merits of the allegations underlying the Criminal Information filed in this case. These facts have been gleaned from a review of the recorded Transcript of Testimony of Sheena Carson during the Preliminary Hearing, the Criminal Information and the Criminal Complaint.

her, the Defendant stated "I told you I was going to get you for sleeping with my husband" and "I hope this bastard dies." *(Id.* at 14).

Someone pulled the Defendant off Ms. Carson. Approximately forty-five minutes to an hour later, Ms. Carson went to Saint Vincent's Hospital because she felt a cramping pain in her stomach area. Members of the hospital's staff could not hear the baby's heartbeat. *(Id.* at 18-21). A few days later, the victim saw her OB/GYN physician, Dr. Bu, who also could not detect a fetal heartbeat. He subsequently removed the fetus stillborn. Prior to this incident, Ms. Carson had seen Dr. Bu on two occasions and he indicated the baby had no health problems. *(Id.* at 24, 26-27).

III. DEFENDANT'S CHALLENGES

The Defendant asserts the PACAUCA is unconstitutional because it violates the Due Process clause of the Fourteenth Amendment to the United States Constitution "as being void for vagueness generally and in that it fails to give a person of ordinary intelligence fair notice that the contemplated conduct is forbidden by the statute and/or because it encourages arbitrary and erratic arrests and convictions." (Defendant's Omnibus Pre-Trial Motion, 11/25/02, ¶9). The Defendant also claims the statute is unconstitutional because "it attempts to engraft on the Pennsylvania Crimes Code an additional category of victim, that being, 'unborn child'." (Defendant's Omnibus Pre-Trial Motion, 11/25/02, ¶13).[7] In addition, the Defendant asserts the PACAUCA is unconstitutional because it does not allow a jury to find a person guilty of involuntary manslaughter of an unborn child. Her claim is based upon Pennsylvania case law requiring a judge in a criminal homicide to instruct the jury on involuntary manslaughter when the evidence possibly supports this charge. (Defendant's Supplemental Omnibus Pre-Trial Motion, 12/18/02).

Finally, in her Memorandum of Law, 12/31/02, the Defendant asserts that the PACAUCA is unconstitutionally vague because 18 Pa. C. S. A. §2603 contemplates a negligent or reckless homicide, yet the Act excludes involuntary manslaughter, thereby making any homicide other than voluntary manslaughter a third degree murder. Thus, the effect is to render the statute vague because it makes a negligent or reckless homicide of an unborn child a murder without requiring proof of malice. The Defendant contends this is illogical because a malicious state of mind does not exist with reckless or negligent conduct. Consequently, the Defendant claims a reasonable person cannot understand and comply with the PACAUCA because it is too confusing.

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[7] These claims, however, appear to have been abandoned by defense counsel and are only superficially raised. Nevertheless, due to the complexity of this case and because the PACAUCA has not been reviewed by our appellate courts, this Court finds it necessary, if not obligatory, to address these claims on their merits. Moreover, several other due process claims were alluded to by defense counsel during oral argument and will be analyzed for the sake of completeness. The issue of whether the PACAUCA also violates the equal protection clause of the U.S. Constitution's Fourteenth Amendment will also be analyzed herein.

This Opinion addresses these assertions *seriatim* and finds each to be without factual or legal merit.

IV. CONSTITUTIONALITY OF THE PACAUCA

Our Pennsylvania appellate courts have not addressed the constitutionality of the PACAUCA. Therefore, a brief historical overview of the PACAUCA is deemed warranted under these contentious circumstances.

A. *INTRODUCTION: THE PACAUCA*

On October 2, 1997, the Pennsylvania Legislature enacted the "Crimes Against the Unborn Child Act" [18 Pa. C. S. A. §§2601-2609] which became effective on April 2, 1998. Title 18 §2603 of the PACAUCA makes it a "criminal homicide of an unborn child if the individual intentionally, knowingly, recklessly or negligently causes the death of an unborn child." Further, 18 Pa. C. S. A. §3203 defines an "unborn child" as "an individual organism of the species *homo sapiens* from fertilization until live birth." The PACAUCA created the crimes of first degree [18 Pa. C. S. A. §2604(a)(1)], second degree [18 Pa. C. S. A. §2604(b)(1)] and third degree [18 Pa. C. S. A. §2604(c)(1)] murder of an unborn child. It also criminalized voluntary manslaughter [18 Pa. C. S. A. §2605] and aggravated assault [18 Pa. C. S. A. §2606] of an unborn child. Penalties for convictions under the PACAUCA parallel the penalties for convictions of killing or aggravated assault of another person. *(See,* the specific statutory sections cited above). The death penalty cannot be imposed pursuant to this Act. [18 Pa. C. S. A. §1102(a)(2)].

The PACAUCA's purpose is to protect the life and health of the unborn child while still respecting a woman's right to an abortion. (Pennsylvania Legislative Journal - Senate, 6/10/97, pp. 730-31). *See also, Commonwealth v. Highhawk*, 455 Pa. Super. 186, 687 A.2d 1123 (1996) (wherein the court held that when construing a statute, the legislative intent controls.); 1 Pa. C. S. A §1921(c). The Defendant asserts "[t]he Act was not passed without a great deal of consternation by the Legislators and evidently without the normal review by typically consulted outside groups such as the Pennsylvania District Attorney's Association and Criminal Defense Lawyers or Defense Organization." (Defendant's Memorandum of Law, 12/31/02, p. 1). This Court expects that this Act would have been heatedly debated, as would any other piece of significant legislation. However, the Act was passed with a large margin of support in both the Pennsylvania House and Senate,[8] thereby demonstrating that it was heavily favored even though it may have been hotly debated. *See* Title I Pa. C. S. A. §1921(c)(2) (Court can look to the circumstances under which the statute was enacted.)

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[8] In the House, the legislation passed 171 Yeas to 23 Nays (Pennsylvania Legislative Journal-House, 9/22/97, pp. 1541-1542) and in the Senate, it passed 38 Yeas to 11 Nays (Pennsylvania Legislative Journal-Senate, 6/10/97, p. 734).

The PACAUCA explicitly excludes acts committed during any lawful or unlawful abortion procedure in which the pregnant woman cooperated or consented, during any consensual or good faith medical procedure, and any acts the pregnant woman commits against her unborn child. [18 Pa. C. S. A. §2608(a)]. Within this context, Defendant's counsel has attacked the constitutionality of the PACAUCA on several fronts.

B. *CONSTITUTIONAL REVIEW OF THE PACAUCA*

1. Standard for Reviewing the Constitutionality of a Law

The Pennsylvania Supreme Court has held that "legislative acts of the General Assembly enjoy a strong presumption of constitutionality, and the party challenging the legislation bears a heavy burden of persuasion." *DeFazio v. Civil Service Comm'n of Allegheny County*, 562 Pa. 431, 435, 756 A.2d 1103, 1005 (2000) (*citing Consumer Party of Pennsylvania v. Commonwealth*, 510 Pa. 158, 507 A.2d 323 (1986)); *Commonwealth v. Cotto*, 708 A.2d 806, 810 (Pa. Super. 1998). The Pennsylvania Supreme Court has also stated: "It is axiomatic that he who asks to have a law declared unconstitutional takes upon himself the burden of proving beyond all doubt that it is so. All presumptions are in favor of the constitutionality of acts and courts are not to be astute in finding or sustaining objections to them." *Sablosky v. Messner*, 372 Pa. 47, 58- 59, 92 A.2d 411, 416 (1952) *(quoting Hadley's Case*, 336 Pa. 100, 104, 6 A.2d 874, 877 (1939)). Similarly, the United States Supreme Court has held "a facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *U.S. v. Salerno*, 481 U.S. 739,745, 107 S. Ct. 2095, 2100, 95 L. Ed. 2d 697, 707 (1987). If a law is susceptible to a reasonable interpretation which supports its constitutionality, the Court must accord the law that meaning. *U.S. v. National Dairy Products Corp.*, 372 U.S. 29, 32, 83 S. Ct. 594, 598, 9 L. Ed. 2d 561, 565 (1963).

Moreover, "'[l]egislation will not be invalidated unless it clearly, palpably, and plainly violates the constitution.'" *Defazio*, *supra* at 435-36,756 A.2d at 1105 *(quoting Consumer Party of Pennsylvania*, *supra* at 75, 507 A.2d at 331-32); *Commonwealth v. Swineheart*, *supra* at 508, 664 A.2d at 961; *Commonwealth v. McMullen,* 756 A.2d 58, 61 (Pa. Super. 2000); *Commonwealth v. Cotto*, *supra* at 810. In overturning a statute, only "a clear violation of the Constitution - a clear usurpation of power prohibited - will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void." *Commonwealth v. Smith*, 732 A.2d 1226, 1235 (Pa. Super. 1999) (*quoting Glancey v. Casey*, 447 Pa. 77, 88, 288 A.2d 812, 818 (1972) (other citations omitted)). The courts must "exercise every reasonable attempt to vindicate the constitutionality of a statute and uphold its provisions." *Id. (quoting Commonwealth v. Chilcote,* 396 Pa. Super. 106, 119, 578 A.2d 429, 435

(1990) (other citations omitted)).

It is not the role or duty of this or any Court to superimpose its judgment regarding the wisdom or worth of a statute. This Court's duty is only to decide whether the challenged legislation (PACAUCA), which is presumed to be constitutional, is actually so.

2. Legal Analysis

The constitutionality of the PACAUCA has not yet been determined by a Pennsylvania appellate court, or by the U.S. Supreme Court, or any other federal court to which this Court is bound. However, twenty-five other states have enacted statutes that criminalize homicide of an unborn child. *See,* Cari Leventhalt, Comment, *The Crimes Against the Unborn Child Act. Recognizing Potential Human Life in Pennsylvania Criminal Law,* 103 Dick. L. Rev. 73 (1998). These states differ in the period of gestation at which criminal culpability attaches. Tara Kole & Laura Kadetski, Recent Development, *The Unborn Victims of Violence Act,* 39 Harv. J. Legis. 215, 218 (Winter 2002). South Carolina, Iowa, and New York attach culpability at viability, which is generally between twenty and twenty-four weeks gestation. *Id.* at note 28. Georgia, Nevada, Oklahoma, Washington, Florida, Michigan, Mississippi and Rhode Island attach culpability at "quickening", which occurs between the sixteenth and twentieth week of pregnancy. *Id.* at note 29. California criminalizes feticide at the post-embryo stage, approximately seven to eight weeks into gestation. *Id.* at note 30. Finally, Arizona, Illinois, Louisiana, Minnesota, Missouri, North Dakota, Ohio, Pennsylvania, South Dakota, Utah and Wisconsin criminalize feticide immediately after conception and beyond. *Id.* at note 31. Furthermore, the United States House of Representatives has passed the "Unborn Victims of Violence Act" which criminalizes feticide from the moment of conception and the bill currently awaits a vote in the United States Senate. *Id.* at 215; *See also, 2003 Senate Bill 146*.

Since current mandatory authority addressing the PACAUCA's constitutionality does not exist, the persuasive authority of sister states with similar legislation will be examined. As noted above, several states have criminalized feticide prior to viability. Many of these states have statutes similar to the PACAUCA, i.e. Minnesota, Illinois, and Ohio. These courts have feticide statutes similar to Pennsylvania's statute and they have addressed the constitutionality of their respective feticide laws. Each of these jurisdictions has upheld the constitutionality of their respective feticide legislation. [*State v. Merrill*, 450 N.W.2d 318 (Minn. 1990); *People v. Ford*, 221 Ill. App. 3d 354, 581 N.E.2d 1189 (Ill. App. 4th 1991); *State v. Coleman*, 124 Ohio App. 3d 78, 705 N .E.2d 419 (Ohio Ct. App. 3d 1997); *State v. Alfieri*, 132 Ohio App. 3d 69, 724 N.E.2d 477 (Ohio Ct. App. 3d 1998)]. Therefore, the Court finds the rationale utilized by these states in upholding their respective feticide statutes useful and persuasive due to the similarity between their feticide statutes and the

PACAUCA. Application of these cases and their holdings are discussed at length in this Opinion.

a. The Due Process Challenges: Void for Vagueness

The Defendant has raised an assortment of claims under the rubric of void for vagueness. "The void for vagueness doctrine requires that a penal statute define a criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited, in a manner that does not encourage arbitrary and discriminatory enforcement." *Commonwealth v. Coleman*, 713 A.2d 1167 (Pa. Super. 1998) (*citing Commonwealth v. Barud*, 545 Pa. 297, 681 A.2d 162 (1996). The Pennsylvania Supreme Court further stated that "[a] criminal statute must be sufficiently certain and definite to inform an accused of acts that the statute is intended to prohibit and for which penalties will be imposed." *Id.* at 1167. However, the challenger of a statute must demonstrate that the law is impermissibly vague in all its applications, *Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 497, 102 S. Ct. 1186, 1193,71 L. Ed. 2d 362, 371 (1982), and that the statute could never be applied in a valid manner. *Salerno*, *supra* at 745, 107 S. Ct. at 2100, 95 L. Ed. 2d at 707. The Defendant's void for vagueness claims will be addressed in the following sub-headings.

1. Fair Notice and Arbitrary Enforcement

The Defendant in the case *sub judice* claims the PACAUCA violates due process because it fails to give her "fair notice that the contemplated conduct is forbidden by the statute and/or because it encourages arbitrary and erratic arrests and convictions." (Defendant's Omnibus Pre-Trial Motion, 11/25/02, ¶9). The Defendant also maintains criminal homicide requires the taking of a "human life" and therefore, the statute is unconstitutional because "it attempts to engraft on the Pennsylvania Crimes Code an additional category of victim, that being, 'unborn child'." (Defendant's Omnibus Pre-Trial Motion, 11/25/02, ¶13). Stated another way, the Defendant claims the PACAUCA is unconstitutionally vague because it fails to specifically define when life begins.

During oral argument, the Defendant's counsel, Attorney Lucas, was reluctant to commit to a definition of when life begins; however, he conceded it was certainly prior to viability. He intimated that this would lead to arbitrary and discriminatory enforcement of the statute because judges and jurors of different religious, political or moral convictions will use their own notions of when life occurs resulting in an arbitrary and discriminatory application of the PACAUCA. For example, a jury believing life starts at conception would find a defendant who kills a five-week old fetus guilty. However, a jury believing life starts at birth would not find that same defendant guilty. Defendant argues her due process rights were violated because without defining when life begins the statute is unconstitutionally void for vagueness.

Essentially the PACAUCA is under the same attack (*i.e.* void for vagueness) that confronted the courts in *Merrill*, *Ford*, and *Alfieri*. Minnesota, like Pennsylvania, criminalizes the feticide of any unborn child from conception to birth; the viability of the fetus is not a necessary element of the offense. *Merrill*, *supra* at 320-21. Minnesota defines an "unborn child" as "the unborn offspring of a human being conceived but not yet born." *Id.* In *Merrill*, the defendant shot a victim who was pregnant with a twenty-seven or twenty-eight day-old embryo. The defendant was charged with Murder of an Unborn Child in the First Degree (Minn. Stat. §609.2661) and Murder of an Unborn Child in the Second Degree (Minn. Stat. §609.2662). *Id.* at 321. Continuing in *Merrill*, the statutes were challenged as unconstitutionally vague because they failed "to give fair warning of the prohibited conduct and because [it] encourage[d] arbitrary discriminatory enforcement". *Id.* at 322. On appeal, the Minnesota Supreme Court upheld the constitutionality of the statutes.

In thwarting the defendant's attack on Minnesota feticide statute, the Minnesota Supreme Court reasoned:

> Whatever one might think of the wisdom of this legislation, and notwithstanding the difficulty of proof involved, we do not think it can be said the offense is vaguely defined. An embryo or nonviable fetus when it is within the mother's womb is 'the unborn offspring of a human being.' . . . The state must prove only that the implanted embryo or the fetus in the mother's womb was living, that it had life, and that it has life no longer. To have life, as that term is commonly understood, means to have the property of all living things to grow, to become. It is not necessary to prove, nor does the statute require, that the living organism in the womb in its embryonic or fetal state be considered a person or a human being. People are free to differ or abstain on the profound philosophical and moral questions of whether an embryo is a human being, or on whether or at what stage the embryo or fetus is ensouled or acquires 'personhood.' These questions are entirely irrelevant to criminal liability under the statute. Criminal liability here requires only that the genetically human embryo be a living organism that is growing into a human being. Death occurs when the embryo is no longer living, when it ceases to have the properties of life. *Id.* at 324.

The Illinois Court of Appeals for the Fourth District confronted this same issue in *Ford*. The Illinois feticide statute prohibited the killing of any "unborn child" which was defined as "any individual of the human species from fertilization to birth." [Ill. Rev 1989, ch. 38, par 9-1.2(b)(l)]. In *Ford*, the defendant stomped and kicked his stepdaughter's stomach, who was five and one-half months pregnant, and thus caused the death of

her unborn child. He was convicted of intentional homicide of an unborn child (Ill. Rev. Stat. 1989, ch. 38, par 9-1.2) and sentenced to twenty years imprisonment. *Ford*, *supra* at 358,581 N.E.2d at 1190.

Notwithstanding defendant's claims that the feticide statute violated his equal protection and due process rights, the Illinois Court held the feticide statute was not void for vagueness simply because it did not define when life begins or ends. The Court stated, "the trier of fact need not decide whether the entity within the mother's womb is a person or human being, but only that it once had life which was snuffed out by the acts of the defendant." *Id* at 372, 581 N.E.2d at 1202. The Illinois Court further noted, "[t]his is a reasonable interpretation of the law. Thus, the statute will not be applied in an arbitrary or discriminatory manner and therefore does not violate the due process clause of the United States Constitution." *Id.*

Ohio's feticide statute is also similar to the PACAUCA. In 1996, the Ohio Legislature "expanded the definition of 'persons' for purposes of the Criminal Code to include an unborn human." *Coleman*, *supra* at 80, 705 N.E.2d at 420 (*citing* Ohio Rev. Code 2901.01(B)(l)(a)(ii)). Unborn children were now considered 'persons' under the law, as well as those subsequently born alive. Criminal liability for causing the 'unlawful termination of another's pregnancy' was established and defined as 'causing the death of an unborn member of the species *homo sapiens,* who is or was carried in the womb of another, as a result of injuries inflicted during that period that begins with fertilization and that continues unless and until live birth occurs.' *Coleman*, *supra* at 80, 705 N.E.2d at 420 (*citing* Ohio Rev. Code. 2903.09(A)).

In *Coleman*, the Ohio Court of Appeals addressed whether the Ohio feticide statute was constitutional. The defendant in *Coleman* beat and kicked the pregnant victim in the stomach and prevented her from seeking medical care. When she eventually did so, the embryo was dead. *ld.* The defendant was charged with, among other things, murder for the unlawful termination of the victim's pregnancy pursuant to Ohio Rev. Code 2901 *et seq*. He pled no contest to involuntary manslaughter and felonious assault.

On appeal, the defendant challenged the constitutionality of the feticide law which was upheld by the Ohio Court of Appeals for the Tenth District. The Ohio Court held the statute was not facially void for vagueness and recognized the legitimate state interest in protecting the potentiality of life. The Court stated: "...given that the state can impose a penalty for the damage done to any part of the body, it can create criminal liability for damage to a part of the body that subsequently may grow into a viable human being...." *Coleman, supra* at 82, 705 N .E.2d at 421. This Court agrees.

Subsequently, the Ohio Court of Appeals for the First District

addressed the constitutionality of the Ohio feticide statute in *State v. Alfieri, infra*. In that case, the defendant recklessly caused an accident on an interstate highway. As a result, the victim, who was six months pregnant, was propelled from her vehicle and onto the highway. This crash caused the victim's placenta to separate from her uterus and the twenty-five week old unborn child died. *Id.* at 73-74, 724 N.E.2d at 479. The defendant was convicted of aggravated vehicle homicide of an unborn child [Ohio Rev. Code 2903.06(A)] for recklessly causing the unlawful termination of the victim's pregnancy.

The Ohio Court found no merit to defendant's constitutional attack on Ohio's feticide statute. In *Alfieri,* the court found that the Ohio feticide statute provided sufficient notice to ordinary persons and held:

> These statutes, in combination, provide definite notice to ordinary persons that the unborn are protected from the moment of fertilization. Furthermore, by defining with clarity and precision the times at which criminal liability may attach for harm caused to a fetus, the statutes guard against arbitrary and discriminatory enforcement. *Id.* at 78,724 N.E.2d at 483.

Regarding whether the statute was void for vagueness for failing to define when life begins, the Ohio Court stated:

> Contrary to [defendant's] contention, the definition of the conduct prohibited by [Ohio Rev. Code] 2903.06(A) does not bring into play any ambiguities that may attend the debate over the question of when the life of a human person begins or ends. Instead, the section makes relevant a narrow inquiry into whether one has recklessly caused the 'unlawful termination of another's pregnancy. *Id.*

The Defendant's claim in the instant case can be analyzed using the same reasoning utilized by the Minnesota, Illinois and Ohio Courts. The PACAUCA is similar to the statutes of these states because it holds a defendant criminally culpable for causing the death of a living human species inside its mother's womb, irrespective of its particular developmental stage. Thus, the statute is not void for vagueness because it provides notice of the conduct that is prohibited and all that must be proven is that life once existed and now no longer does due to the defendant's actions. As contemplated by the Pennsylvania Legislature, the question of whether someone can determine the death of an unborn child can be answered in the affirmative. "That is why we have medical examiners, pathologists, and other doctors who can do these things." (Pennsylvania Legislative Journal-House, 4/29/97, p. 881). Consequently, the Defendant has failed to prove that the PACAUCA clearly, palpably and plainly violates the Fourteenth Amendment's due process clause. *See, DeFazio*, *supra* at 435-36,756 A.2d at 1105.

2. Exclusion of Involuntary Manslaughter from the PACAUCA

The Defendant's next claim is based upon Pennsylvania case law requiring a judge in a criminal homicide case to instruct the jury on involuntary manslaughter when the evidence possibly supports this charge. The Defendant contends that the PACAUCA is unconstitutional because it does not allow a jury to consider involuntary manslaughter for the death of an unborn child. (Defendant's Supplemental Omnibus Pre-Trial Motion, 12/18/02 & Defendant's Memorandum of Law, 12/31/02, p. 7).

Whether this is an accurate statement of the law regarding the criminal homicide of an adult is irrelevant in the instant case. The Court recognizes the criminal homicide statutes include involuntary manslaughter for a defendant's reckless or grossly negligent conduct. The Court is also fully cognizant that the PACAUCA does not have an involuntary manslaughter provision. The Defendant's contention misses the mark because she fails to grasp that the PACAUCA is not a duplication of the criminal homicide statutes set forth in Title 18, Chapter 25. The Pennsylvania Legislature purposefully chose to delineate separate statutes for criminal conduct protecting the potentiality of life of an unborn child and punishing those who terminate it. The *mens rea* necessary under the PACAUCA is specifically and concretely set forth in Title 18, §§2603-2606. No statute exists prohibiting the involuntary manslaughter of an unborn child. Thus, it would be permissible for a court to instruct a jury to potentially find the Defendant guilty of a crime that does not even exist. That, in this Court's eyes, would be a blatant violation of the Defendant's due process rights.

Similarly, the Defendant contends the PACAUCA is unconstitutionally void for vagueness "because an ordinary person of reasonable intelligence cannot determine from a fair reading of the statute the possible outcome of a reckless or negligent killing." (Defendant's Memorandum of Law, 12/31/02, p. 1). Specifically, she claims the PACAUCA is unconstitutionally vague because 18 Pa. C. S. A. §2603 contemplates a negligent or reckless homicide, yet it excludes the charge of involuntary manslaughter, thereby making any homicide other than voluntary manslaughter a third degree murder. The Defendant asserts that the statute is vague and violates her due process rights because it makes a negligent or reckless homicide of an unborn child a murder, which requires malice. The Defendant argues the Act is illogical because a malicious state of mind does not exist with reckless or negligent conduct. Consequently, a reasonable person cannot understand and comply with the PACAUCA because it is too confusing [The Court previously addressed whether the statute was void for vagueness in this Opinion at pp. 9-16] This argument regarding void for vagueness represents a slight twist because it focuses on the PACAUCA's exclusion of involuntary

manslaughter of an unborn child.

An examination of the PACAUCA's language reveals that the Defendant's claim is simply mistaken and misplaced. As noted previously in this Opinion, "The void for vagueness doctrine requires that a penal statute define a criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited, in a manner that does not encourage arbitrary and discriminatory enforcement." *Commonwealth v. Coleman,* 713 A.2d 1167 (Pa.Super. 1998) (*citing Commonwealth v. Barud,* 545 Pa. 297, 681 A.2d 162 (Pa. 1996)).

Title 18, §2603(a) provides "[a]n individual commits criminal homicide of an unborn child if the individual intentionally, knowingly, recklessly or negligently causes the death of an unborn child in violation of §2604 (relating to murder of unborn child) or 2605 (relating to voluntary manslaughter of unborn child)." The terms '"reckless" and "negligent" used in 18 Pa. C. S. A. §2603 apply to the crime of voluntary manslaughter of an unborn child pursuant to 18 Pa. C. S.A. §2605, which reads, in part:

> (a) Offense defined. A person who kills an unborn child without lawful justification commits voluntary manslaughter of an unborn child if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:
>
> (1) the mother of the unborn child whom the actor endeavors to kill, but he *negligently* or *accidentally* causes the death of the unborn child; or
>
> (2) another whom the actor endeavors to kill, but he *negligently* or *accidentally* causes the death of the unborn child.

18 Pa. C. S. A. §2605.

Moreover, the PACAUCA's definition of murder includes malice [18 Pa. C. S. A. §2602] which exists "where there is a wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured." *Commonwealth v. Reilly*, 519 Pa. 550, 564, 549 A.2d 503, 510 (1988) (*quoting Commonwealth v. Drum,* 58 Pa. 9, 15 (1868). Therefore, an individual who recklessly or negligently causes the death of an unborn child cannot be convicted of third-degree murder, as the Defendant claims, because the malicious state of mind would be lacking. The Defendant, in forming her argument, has failed to read Title 18, §§2604 and 2605 in conjunction with §2603. Simply stated, §2603 must be read in its proper context and in its entirety including §§2604 and 2605. Isolating the references to "negligence" and "recklessness" in §2603 without reference to §§2604 and 2605 is incorrect and ignores the direct language of §2603 incorporating those sections.

The Pennsylvania Superior Court has recently stated "[i]f the plain and ordinary meaning of a statute is clear, judicial construction is neither necessary nor permitted." *Holland v. Marcy,* 2002 PA Super LEXIS 3776 (Pa.Super. 2002). Further, in construing a statute, the legislative intent controls. 1 Pa. C. S. A. § 1921; *Highhawk*, *supra.* It is evident from the legislative history of the PACAUCA that our Pennsylvania Legislature chose not to punish reckless or negligent conduct causing the death of an unborn child *unless* serious provocation by the mother or another whom the actor intended to kill existed sufficient to satisfy voluntary manslaughter. (Pennsylvania Legislative Journal House, 4/29/97, p. 878). For example, a bartender who serves a pregnant woman a drink causing damage or death to the unborn child would not be punished pursuant to the statute. *Id* While the bartender's actions may be negligent in some way, they are excluded from criminal liability under the PACAUCA.

In the present case, the PACAUCA excludes from culpability the involuntary manslaughter of an unborn child. This is a legislative choice. By doing so, the Pennsylvania Legislature narrowed the class of defendants who may be culpable under this Act. Its intent was not to duplicate the Pennsylvania Criminal Homicide statute. Rather, the purpose of the Act was to recognize the potentiality of human life and protect it while also preserving a mother's right to privacy (*i.e.* abortion). (Pennsylvania Legislative Journal - Senate, 6/10/97, pp. 730-31). Despite Defendant's suggestion, no reason exists for this Court to criminalize something that the legislature clearly intended not to be a crime. To do so would be an impermissible usurpation of the legislature's power by this Court, which is something it is not willing to do.

3. Commonwealth's Legitimate Interest in Protecting a Non-Viable Fetus

During oral argument, the Defendant inadvertently attacked the PACAUCA's constitutionality on the ground that it violated due process because it could potentially predicate criminal liability for the killing of a non-viable fetus. Relying on *Roe v. Wade,* 410 U.S. 113, 93 S. Ct. 705*,* 35 L. Ed.2d 147 (1973) and its progeny, the Defendant contends that the embryo in this case was non-viable (15.2 weeks in gestational development) and therefore, was not a "person" that could be murdered. Apparently, the Defendant's constitutional argument is that pursuant to *Roe*, the State does not have a compelling interest in protecting the life of an unborn child. The Defendant's claim is baseless since the State does have a legitimate interest in protecting the potentiality of life. *See Roe supra* at 162. Defendant's claim must also fail because she has no right, fundamental or otherwise, to deprive Ms. Carson of her unborn child. In *Alfieri*, the Ohio Court reiterated its holding in *Coleman* that "[Q]uite simply, there has never been any notion that a third party, as appellant here, has a fundamental liberty interest in terminating another's

pregnancy." *Alfieri*, *supra* at 79, 724 N.E.2d at 483 *(quoting Coleman, supra* at 81, 705 N.E.2d at 421).

The Court previously addressed a similar argument that the PACAUCA was unconstitutionally vague for failing to define when life begins. [*See,* Opinion at pp. 10-15]. The Court will not be drawn into this tantalizing debate as to when life begins or when something becomes a "person." This Court is persuaded by the language of *Merrill* wherein the Minnesota Supreme Court stated:

> The statutes do not raise the issue of when life as a human begins or ends. The state must prove only that the implanted embryo or fetus in the mother's womb was living, that it had life, and that it has life no longer. To have life, as that term is commonly understood, means to have the property of all living things to grow, to become." *Id.* at 324

In other words, the potentiality of life must be protected from the actions of defendants who interfere with this legitimate state interest.

In *Ford*, the Illinois feticide statute defined "unborn child" as indicative of the human species from fertility until birth The Court held the statute was constitutional because proof that an unborn child is a person or human being was unnecessary. The court only required proof that "whatever the entity within the mother's womb is called, it had life and, because of the acts of the defendant, it no longer does." *Id.* at 372, 581 N.E.2d at 1201 .

Instantly, the Commonwealth of Pennsylvania does have an interest in protecting the potentiality of human life and punishing violent conduct that deprives pregnant women of their procreative choice. Tara Kole & Laura Kadetski, Recent Development, *The Unborn Victims of Violence Act,* 39 Harv. J. Legis. 215, 227 (Winter 2002). This interest is legitimate and, some may contend, compelling. Nevertheless, it is certainly sufficient to justify state action. In *Alfieri,* the Ohio Court recognized that:

> the holding of *Roe* was not inconsistent with a compelling state interest in protecting a fetus prior to viability. Rather, in *Roe,* the United States Supreme Court recognized that the state had an 'important and legitimate interest in protecting the potentiality of human life,' but held that, at a certain stage of pregnancy, a woman's privacy interest in determining whether to terminate her pregnancy outweighed this interest. Certainly, the state's interest in protecting pregnant women and unborn children outweighs a third party's right to terminate another's pregnancy by specifically defined conduct that is deemed to be criminal. *Id.* at 79, 724 N.E.2d at 483 (*quoting Roe, supra* at 162, 93 S.Ct. at 731, 35 L.Ed.2d at 182).

In *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S. Ct.

3040, 106 L. Ed. 2d 410 (1989), Chief Justice Rehnquist stated, "we do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability." *Id.* at 519, 109 S. Ct at 3057, 106 L. Ed. 2d at 436. Thus, this holding intimates that if a woman's right of privacy is not infringed, then a state may enact legislation to protect the potentiality of life at any stage it deems appropriate.

Similarly, in *People v. Davis,* 7 Cal. 4th 797, 30 Cal. Rptr.2d 50, 872 P.2d 591 (Cal. 1994), the California Supreme Court held viability of a fetus was not necessary in order for a defendant to be charged with homicide of an unborn child for the killing of a fetus. *Davis*, *supra* at 816-17. In *Davis*, defendant approached the victim, who was between twenty-three and twenty-five weeks pregnant, and her 20-month-old son after she had cashed her check at a check-cashing store. The defendant pulled a gun and demanded her money. When she refused, he shot her in the chest. While surgery saved the mother's life, the baby was stillborn due to her blood loss, low blood pressure and shock. *Id* at 800. The defendant was later convicted of the murder of a fetus during the course of a robbery, [Cal. Stat §187, subd. (a); Cal. Stat §190.2, subd. (a)(17)(i)] , as well as other offenses. *Id.* at 801. Despite the defendant's challenges, the California Supreme Court upheld the constitutionality of the feticide statute stating:

> [U]nlike the situation in *Roe*, *supra* there is no competing constitutionally protected interest at stake, the state's decision to criminalize the conduct can be justified even if the state does not have a compelling interest in protecting potential human life. Moreover, when a fetus dies as the result of a criminal assault on a pregnant woman, the state's interest extends beyond the protection of potential human life. The state has an interest in punishing violent conduct that deprives a pregnant woman of her procreative choice. *Id.* at 817.

In the case *sub judice,* the Defendant had no fundamental right to terminate Ms. Carson's pregnancy and the Commonwealth has, at the least, a legitimate interest in protecting the unborn child's right to grow into a human being and Ms. Carson's right to procreate.

If *Roe* protects a woman's right to choose to abort her child (albeit within a context of time constraints, *i.e.* trimesters), then it must also be recognized as protecting and upholding a woman's fundamental right of choice to carry her child to term. Ms. Carson possesses that fundamental right. However, the Defendant has no right to terminate the "potentiality of life" recognized in *Roe*, and its progeny. Pennsylvania has a legitimate interest in protecting the potentiality of life of an unborn child and in punishing third parties who violate this interest under the parameters set forth in the PACAUCA.

b. The Equal Protection Challenge

The Defendant also argues the PACAUCA is unconstitutional because it violates her equal protection rights under the Fourteenth Amendment to the United States Constitution. She claims the Act penalizes her for destroying a non-viable fetus, yet allows the pregnant woman to abort that same fetus, therefore because she is not treated the same her equal protection rights are violated. This claim, however, fails because the Defendant and pregnant women are not similarly situated.

Recently, the Pennsylvania Supreme Court in *Commonwealth v. Albert*, 563 Pa. 133, 758 A.2d 49 (2000), held "the essence of the constitutional principle of equal protection under the law is that like persons in like circumstances will be treated similarly." *Id.* at 138, 758 A.2d at 151 (*quoting Laudenberg v. Port Authority of Allegheny County*, 496 Pa. 52, 436 A.2d 147 (1981)). In determining whether a statute violates equal protection, the Pennsylvania Supreme Court set forth the following criteria:

> The types of classifications are: (1) classifications which implicate a 'suspect' class or a fundamental right; (2) classifications implicating an 'important' though not fundamental right or a 'sensitive' classification; and (3) classifications which involve none of these. Should the statutory classification fall into the first category, the statute is strictly construed in light of a 'compelling' governmental purpose; if the classification falls into the second category, a heightened standard of scrutiny is applied to an 'important' governmental purpose; and if the statutory scheme falls into the third category, the statute is upheld if there is any rational basis for the classification. *Id.* at 139,758 A.2d at 1152; *See also, Ford, supra* at 369, 581 N.E.2d at 1199-1200.

Applying these criteria to the PACAUCA, the Act does not discriminate against any suspect or "sensitive" class. Under the PACAUCA, "an individual" is any person who commits one of these crimes against an unborn child. 18 Pa. C. S. A. §2603. Individuals who assault pregnant women and unborn children are neither a suspect nor a "sensitive" class pursuant to the equal protection clause. Therefore, strict scrutiny analysis based upon suspect class or heightened scrutiny of a "sensitive" class is not required.

Next, the PACAUCA does not deprive the Defendant of a fundamental or "important" right. The Illinois Court in *Ford*, opined, "clearly a pregnant woman who chooses to terminate her pregnancy and the defendant who assaults a pregnant woman causing the death of her fetus, are not similarly situated. A woman consents to the abortion and has the absolute right, at least during the first trimester of the pregnancy, to choose to terminate the pregnancy. A woman has a privacy interest in

terminating her pregnancy; however, a defendant has no such interest." *Id.* at 369, 581 N.E.2d at 1199. Similarly, the Minnesota Court in *Merrill,* held, "[t]he situations are not similar. Defendant who assaults a pregnant woman causing the death of the fetus she is carrying destroys the fetus without the consent of the woman. This is not the same as the woman who elects to have her pregnancy terminated by one legally authorized to perform the act." *Id.* at 321-22. Likewise, the Ohio Court in *Alfieri* stated:

> [w]e are in accord with the Supreme Court of Minnesota's determination in *State v. Merill,* and with the Second Appellate District's determination in *State* v. *Moore,* that a criminal defendant who assaults a pregnant woman, causing the death of the fetus she is carrying, is not similarly situated to a pregnant woman who elects to have her pregnancy terminated by one legally authorized to perform the act. *Id.* at 77, 724 N .E.2d at 482.

These decisions are based upon the distinction that while a woman's right to privacy right may outweigh the state's right to prohibit her from having an abortion, that right does not extend to the perpetrator of violence upon a pregnant woman. California Court in *Davis* explained that "while the decision in *Roe* declares that the state may not protect the potential life of the human fetus from the moment of conception, it does so only in the very narrow context of the mother's abortion decision." *Id.* at 807. The defendant has no fundamental or "important" right to assault the woman or her fetus. Actually, quite the opposite is true because "[t]here is simply no fundamental right to cause harm to another, whether living or not living." *Coleman*, *supra* at 81, 705 N.E.2d at 421. Therefore, since the Defendant is not part of a suspect or "sensitive" class, or being deprived of a fundamental or "important" liberty, the state must only have a rational basis for enacting the PACAUCA.

In *Albert,* the Pennsylvania Supreme Court adopted a two-step application of the rational basis test. "First, we must determine whether the challenged statute seeks to promote any legitimate state interest or public value. If so, we must next determine whether the classification adopted in the legislation is reasonably related to accomplishing that articulated state interest or interests." *Id.* at 140, 758 A.2d at 1152.

The legitimate state interest underlying the PACAUCA is to protect the potential life developing within a pregnant woman's womb at anytime after conception. The Illinois Court in *Ford* cited *Roe* in holding the state does indeed have an "important and legitimate interest in protecting the potentiality of human life." *Ford, supra,* at 368, 581 N.E.2d at 1199. Likewise, the Ohio Court in *Coleman* stated "that 'the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.'" *Id.* at 81, 705 N.E.2d at 421 *(quoting Planned Parenthood v. Casey.* 505 U.S. 833, 846, 112 S.Ct. 2791, 2804, 120 L.Ed.2d 674, 694 (1992).

The PACAUCA is reasonably related to protecting the potentiality of human life by criminalizing violent acts perpetrated upon pregnant women or their unborn children. The Defendant's claim that the PACAUCA violates her equal protection rights is unfounded. This statute rationally serves the legitimate state interest of protecting potential life and does not compromise any of the Defendant's fundamental rights

V. DOES THE PACAUCA ALTER THE DEFINITION OF A PERSON?

Finally, the Defendant claims the PACAUCA conflicts with Pennsylvania tort law that does not recognize a non-viable fetus as a person capable of asserting a wrongful death action.[9] The Defendant correctly states the law in Pennsylvania that a non-viable fetus has no cause of action for wrongful death. *See, Coveleski v. Bubnis,* 535 Pa. 166, 634 A.2d 608 (1993). By asserting this inconsistency claim, the Defendant asks this Court to substitute itself for the Pennsylvania Legislature and declare what the public policy should be in the areas of tort reform or criminal liability; something this Court is unwilling to do. In fact, "[t]he power of judicial review must not be used as a means by which the court might substitute its judgment as to public policy for that of the legislature. The role of the judiciary is not to question the wisdom of the action of [the] legislative body, but only to see that it passes constitutional muster." *Smith*, *supra* at 1235-36 (*quoting Einucane v. Pennsylvania Marketing Bd.*, 582 A.2d 1152, 1154 (Pa.Commw.1990)). Therefore, regardless of whether the PACAUCA defines a "person" differently than other laws or cases, this Court will not question the Pennsylvania Legislature on its policy choices, so long as those choices are consistent with the Constitution.

VI. CONCLUSION

Since this Court must make every reasonable attempt to find a statute constitutional [*See,* Opinion at pp. 6-8], it finds the Defendant has not met its heavy burden in challenging the constitutionality of the PACAUCA. The Defendant's due process and equal protection arguments are without merit because she has not shown that any set of circumstances exist where the PACAUCA is invalid. *See, Salerno, supra.* To the contrary, the above analysis demonstrates that the Act is in accord with constitutional jurisprudence. The Pennsylvania Legislature has a legitimate interest in protecting the potentiality of human life and preserving a mother's right to privacy. The PACAUCA accomplishes both of these goals. The PACAUCA is not void for vagueness because it clearly informs an individual of the proscribed conduct (*i.e.* the killing or assaulting of an

[9] This issue was not raised in any motion, supplemental motion or memorandum of law filed by the Defendant in this case. It was raised by defense counsel only during oral argument on December 13, 2002.

unborn species of the human race at any point during gestation). The prosecution must only prove that life once existed, and now no longer exists because of the Defendant's actions. The PACAUCA also does not violate the Defendant's equal protection rights because she is not similarly situated to the expectant mother. No right to assault the mother or unborn child is conferred upon the Defendant by virtue of the pregnant woman's right to privacy. Hence, the Commonwealth is rationally pursuing a legitimate interest in protecting the potentiality of human life without infringing upon a pregnant woman's right of privacy. In addition, an expectant mother must be afforded the protections necessary to enable her to exercise her fundamental right of choice to carry her unborn child to term.

Consequently, for the reasons set forth above, the Defendant's pre-trial motions challenging the constitutionality of the PACAUCA are denied.

An Order will follow.

ORDER

AND NOW, to-wit this 24th day of January 2003, it is hereby **ORDERED, ADJUDGED and DECREED** that Defendant's pre-trial motions challenging the constitutionality of the Pennsylvania Crimes Against Unborn Children Act, pursuant to 18 Pa. C.S.A. §2601 *et seq.,* are hereby **DENIED.**

BY THE COURT:
/s/ **John J. Trucilla, Judge**

ANITA CZECH

v.

ANDREW MUKINA and HELEN BLANK, Executrix and Personal Representative of the Estate of ANNA MUKINA, Deceased

CIVIL PROCEDURE/MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

A judgment notwithstanding the verdict may be entered when either the movant is entitled to judgment as a matter of law and/or the evidence was such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant.

EVIDENCE

The Court sitting as factfinder is entitled to disregard any or all of the witness's testimony, including testimony of an expert.

PARTNERSHIP/DEFINITION

Partnership is defined as "an association of two or more persons to carry on as co-owners of a business for profit." 15 P.A. §8311(A). No person can become a member of a partnership without the consent of all the partners. 15 P.S.§8331(7). Testimony at trial did not produce any evidence of a partnership as defined under the Uniform Partnership Act.

CIVIL PROCEDURE/POST-TRIAL MOTIONS

A verdict will be against the weight of the evidence and a new trial will be awarded only when the verdict is so contrary to the evidence it shocks ones sense of justice. If the factfinder could have decided the case either way this remedy is not appropriate. *Hohns v. Gain*, 806 A.2d 16, 22 (Pa. Super. 2002). Credible evidence was before the Court sufficient to establish that the parties were not partners in the Crossroads Dinor. Therefore a new trial will not be awarded.

CIVIL PROCEDURE/SERVICE

Dismissal of a party from an action for lack of personal jurisdiction will be upheld where service was made on a purported partner and the evidence establishes that no partnership actually existed.

CIVIL PROCEDURE/POST-TRIAL MOTIONS

Where a party did not file a post-trial motion, grounds contained in an appeal are waived per Pa. R.C.P. 227.1(b)(2).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 11855-1997

Appearances: Tibor R. Solymosi, Esq., for Plaintiff
Mario P. Restifo, Esq., for Defendant

MEMORANDUM

Bozza, John A., J.

This matter is currently before the Court on the 1925(b) Statements of Matters filed by both plaintiff, Anita Czech, and defendant, Helen Blank, Executrix and Personal Representative of the Estate of Anna Mukina,

deceased. The history of this case may briefly be summarized as follows. Plaintiff Anita Czech filed a Writ of Summons on June 2, 1997, and a Complaint on August 11, 1999. In her Complaint, Ms. Czech alleged that she and the defendants were partners in two businesses, namely Mukina's Car Wash and the Crossroads Dinor. She further asserted that when the businesses were sold in 1991, each party was to receive one-third of the proceeds, paid in installments. Czech stopped receiving proceeds of the sale of the businesses in July of 1994, and was informed by counsel for Anna Mukina that the proceeds were a gift, and would no longer be paid to Ms. Czech. Ms. Czech filed suit, demanding an accounting of the partnership monies, and alleging breach of the partnership agreement, fraud and civil conspiracy. On October 13, 1999, Ms. Czech filed an Amended Complaint, seeking an imposition of a constructive trust against the defendants, and alleging breach of fiduciary duty against Anna Mukina only. A Second Amended Complaint was filed containing the same allegations on December 29, 1999.

On January 18, 2000, the defendants filed Preliminary Objections to the Second Amended Complaint, and these were granted in part in an Order dated June 6, 2000. As a result, the Complaint was stricken as to defendant Andrew Mukina for lack of personal jurisdiction as Mr. Mukina had not been served with the Complaint. Although Ms. Czech had repeatedly reissued the Writ of Summons, she was not successful in serving him.[1] A non-jury trial was scheduled for November 28, 2001, but the Court was notified that defendant Anna Mukina died November 16, 2001. Ms. Mukina's sister, Helen Blank, was named Executrix of her Estate, and was substituted as a party on January 16, 2002.

A non-jury trial was conducted on April 29-30, 2002. A verdict was entered May 24, 2002, with the Court finding that (1) the evidence was sufficient to establish that Ms. Czech and Andrew Mukina were partners in a business known as the Crossroads Dinor; (2) the evidence was insufficient to find that Anna Mukina had a partnership interest in the dinor; (3) the evidence was sufficient to conclude that Anna Mukina had a partnership interest with Andrew Mukina in the car wash business; and (4) the evidence was insufficient to conclude that Ms. Czech had a partnership interest in the car wash business with Andrew Mukina and Anna Mukina. As a consequence, Anna Mukina was not liable to Ms. Czech as a partner in the Crossroads Dinor.[2]

On June 6, 2002, Ms. Czech filed a Motion for Post-Trial Relief, requesting that the Court enter Judgment Notwithstanding the Verdict in favor of Ms. Czech. Ms Czech also requested a new trial, arguing that service on Anna Mukina should have been deemed service on Andrew

[1] No request to allow alternate service was made to the Court.

[2] The issue of the liability of Andrew Mukina to Ms. Czech was not before the Court.

Mukina, since the two were deemed partners. The Court denied Ms. Czech's motion in an Order dated August 30, 2002, and Ms. Czech filed a Praecipe to Enter Judgment After Verdict on September 17, 2002. Ms. Czech then filed a Notice of Appeal to the Superior Court of Pennsylvania on September 30, 2002, and filed a timely 1925(b) Statement of Matters Complained of on Appeal. Defendant Helen Blank filed a Notice of Cross-Appeal on October 9, 2002, and also filed a timely 1925(b) Statement.

In her 1925(b) Statement, Ms. Czech alleges that the Court erred by (1) finding that there was insufficient evidence to find that Anna Mukina had a partnership interest in the Crossroads Dinor; (2) treating the Crossroads Dinor and Mukina's Car Wash as separate entities; (3) dismissing defendant Andrew Mukina for lack of personal jurisdiction; (4) entering a verdict that was against the weight of the evidence; and (5) dismissing Andrew Mukina from this action for lack of personal jurisdiction. In the defendant's 1925(b) Statement, Ms. Blank alleges that the Court erred in finding that there was sufficient evidence to establish that Ms. Czech and Andrew Mukina were partners in the Crossroads Dinor. The assertions of error made by both parties are without merit.

When considering a Motion for Judgment Notwithstanding the Verdict, the Court must note the "two bases on which argument n.o.v. can be entered: one, the movant was entitled to judgment as a matter of law, and/or two, the evidence was such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant." *Rohm & Haas Co. v. Continental Cas. Co.,* 566 Pa. 464, 471, 781 A.2d 1172, 1176 (2001)(*citing Moure v. Raeuchle,* 529 Pa. 394, 604 A.2d 1003 (1992)). Applying these criteria to the present case and granting Anna Mukina as the verdict winner every favorable inference, the Court denied Ms. Czech's motion for judgment n.o.v.

Under the Uniform Partnership Act,[3] a partnership is defined as "an association of two or more persons to carry on as co-owners of a business for profit." 15 P.S. §8311(A).[4] The UPA also mandates that "no person can

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[3] 15 P.S. 8301 et seq. (hereinafter "UPA").

[4] The UPA provides specific guidelines to consider in determining whether a partnership exists. These include:

> (3) The sharing of gross returns does not of itself establish a partnership whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.
>
> (4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if the profits were received in payment:
>
> > (i) As a debt by installments or otherwise.
> > (ii) As wages of an employee or rent to a landlord...
> > (v) As the consideration for the sale of the goodwill of a business or other property by installments or otherwise.

15 P.S. §8312(3)-(4).

become a member of a partnership without the consent of all the partners." 15 P.S. §8331(7). Further, a partnership by estoppel may be created in limited circumstances.[5]

At trial, Ms. Czech testified and offered the deposition testimony of Anna Mukina in an attempt to show that Ms. Mukina was a partner with Andrew Mukina and Ms. Czech in both the Crossroads Dinor and Mukina's Car Wash. However, Ms. Mukina's testimony clearly established that Ms. Mukina never considered herself to be a partner with Andrew Mukina in the Crossroads Dinor. Ms. Mukina specifically testified that "The only thing if — the thing I would have expected would be my share of the car wash, which I was co-owner, but I had no partnership in the diner." (Trial, 4/30/02, p. 15). *See also* Trial Transcript, 4/30/02, p. 21-22, 24, 26. Ms. Czech also acknowledged this fact in her testimony:

> Q. ...As far as the car wash-or as far as the diner itself, do you claim that Andy and Anna were partners in the diner? You don't have any evidence of that do you?
>
> A. No, I don't.

Trial, 4/29/02, p. 78.

Ms. Czech also argues that the evidence showed that the Crossroads Dinor and Mukina's Car Wash were one business entity, known as "Mukina's Car Wash and Dinor," and therefore that Anna Mukina should be deemed a partner in the Crossroads Dinor because she was a partner in the Mukina Car Wash. However, the only evidence presented to show that the two operations were actually one business entity were the tax returns of Ms. Czech and Ms. Mukina following the sale of the two operations in 1991. Yet, Ms. Mukina filed a tax return in 1990 which indicated partnership income on the "Mukina Car Wash" alone. There is no evidence in the record that the two operations were ever referred to collectively as "Mukina Car Wash and Dinor" other than in the tax returns filed in 1991. Mr. William Bolash testified as an expert witness in accounting for the plaintiff, and indicated that he believed the intention of the parties was to act as partners because of the way in which the sale proceeds were divided and listed on each party's tax returns. The Court as the finder of fact is entitled to disregard any or all of the witness'

[5] "When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to the person to whom the representation has been made who has, on the faith of the representation, given credit to the actual or apparent partnership, and if he has made the representation or consented to its being made in a public manner he is liable to that person, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made." 15 P.S. §8328(A)(1).

testimony. *Kovach v. Cent. Trucking, Inc.* 2002 Pa.Super. 313 (October 7, 2002)("The opinion of an...expert is evidence. If the fact finder chooses to believe it, he can find as fact what the expert gave as an opinion.")(quoting *Cohen v. Albert Einstein Medical Center, Northern Div.,* 405 Pa.Super. 392, 592 A2d 720, 723-724 (1991). Upon consideration of this testimony, the Court declined to accept Mr. Bolash's subjective belief.

Ms. Czech also argues that the verdict was against the weight of the evidence. A verdict will be against the weight of the evidence and a new trial will be awarded only when the verdict is "so contrary to the evidence it shocks one's sense of justice"...such a remedy will not be appropriate, however, if the fact finder "could have decided [the case] either way." *Hohns v. Gain,* 806 A.2d 16, 22 (Pa. Super. 2002)(quotations omitted)(alteration in the original). The record does not support Ms. Czech's allegation that the verdict was so contrary to the evidence as to shock one's conscience. The credible evidence before the Court was sufficient to establish that Anna Mukina and Andrew Mukina were partners only in the Mukina Car Wash, and as such, service on Anna Mukina would not be effective to bind Andrew Mukina to the case in terms of the Crossroads Dinor. Hence, Ms. Czech had no cause of action against Anna Mukina for breach of Ms. Czech's partnership with Andrew Mukina in the Crossroads Dinor.

Ms. Czech also asserts the Court erred by dismissing Andrew Mukina from this action for lack of personal jurisdiction due to Ms. Czech's failure to serve the Writ of Summons on Mr. Mukina. Ms. Czech argues that because she served Anna Mukina, service was also accomplished on Andrew Mukina, since service on one partner is service on all partners. As was established at the time of trial, Anna Mukina and Andrew Mukina were partners only in the Mukina Car Wash, not the Crossroads Dinor. As such, service by Ms. Czech on Anna Mukina would not have effected service on Andrew Mukina for purposes of the Crossroads Dinor.[6] This dismissal of Andrew Mukina for lack of personal jurisdiction was proper.

In the defendant's 1925(b) Statement, Ms. Blank alleges that the Court erred in finding that there was sufficient evidence to establish that Ms. Czech and Andrew Mukina were partners in the Crossroads Dinor. However, Ms. Blank did not file a Post-Trial Motion. Grounds not specified by post-trial motion are waived on appeal. Pa.R.Civ.P. 227.1(b)(2). The purpose of this rule is "to provide the trial court the first

[6] It appears Mz. Czech [sic] succeeded in serving Andrew Mukina for the cause of action concerning the Mukina Car Wash, since Andrew Mukina and Anna Mukina were partners in that business and Ms. Czech did succeed in serving Anna Mukina. However, Ms. Czech was not a partner in the Mukina Car Wash, and hence, whether Andrew Mukina was successfully served for this cause of action is a moot point for purposes of this appeal.

opportunity to review and reconsider its earlier rulings and correct its own error." *Soderberg v. Weisel,* 455 Pa.Super. 158, 687 A.2d 839, 845 (1997)(citations omitted). Because Ms. Blank did not preserve this issue for appeal, it is now waived. Further, even if this issue were not waived, the evidence was sufficient to support the Court's conclusion that Ms. Czech did have a partnership in the Crossroads Dinor with Andrew Mukina.

For the reasons set forth above, this Court's Order dated May 24, 2002 should be affirmed.

Signed this 4 day of December, 2002.

BY THE COURT:
/s/ **John A. Bozza, Judge**

MAJEED ALTAMIMI, Plaintiff
v.
DANIEL J. BRABENDER, JR., An individual and W. RICHARD COWELL, JOHN R. WINGERTER, LEE C. FULLER, TED J. PADDEN, DONALD J. ROGALA, BRADLEY K. ENTERLINE, MARY PAYTON JARVIE, individuals and partners and CARNEY & GOOD, a professional partnership, Defendants

CIVIL PROCEDURE/MOTION FOR JUDGMENT ON PLEADINGS

The Court may grant judgment on the pleadings only where the moving party's right to succeed is certain in the case and the case is so free from doubt that the trial would clearly be a fruitless exercise.

LEGAL MALPRACTICE

The Statute of Limitations begins to run in a legal malpractice action either at the time the harm was suffered or alternatively at the time that the purported malpractice is discovered.

LEGAL MALPRACTICE

Criminal malpractice actions commence at the date of sentencing or, no later than the termination date of the attorney/client relationship.

CIVIL PROCEDURE/MOTION FOR JUDGMENT ON PLEADINGS

Where an attorney's representation ends by the end of October, 1995, and an action is filed on February 15, 2002, the action is untimely and the motion for judgment on the pleadings is granted.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 10635 - 02

Appearances: Alexander Jamiolkowski, Esq. for the Plaintiff
Amy J. Coco, Esq. for the Defendants

OPINION

The matter before the Court is the Defendants' Motion for Judgment on the Pleadings. For the following reasons, the Motion is granted.

FACTUAL HISTORY

This case was filed as a legal malpractice action following Plaintiff's criminal convictions for Indecent Assault and Corruption of a Minor. Plaintiff was originally charged with Criminal Solicitation, Indecent Assault and Corruption of the Morals of a Minor. Through Attorney Daniel Brabender, Jr., who represented Plaintiff, the Plaintiff signed a plea agreement February 13, 1995 whereby Plaintiff would be entering a plea of guilty to Indecent Assault and Corruption of the Morals of a Minor and the Commonwealth would be withdrawing the charge of Criminal Solicitation.

Pursuant to the plea agreement, on September 6, 1995, Plaintiff entered a plea of guilty to one count of Indecent Assault and one count of

Corruption of the Morals of a Minor. The solicitation charge was withdrawn. Plaintiff was sentenced on October 10, 1995 to an aggregate term of incarceration of one to five years. Attorney Brabender filed a timely Motion to Modify and Reduce Sentence which was denied. Attorney Brabender's representation of the Plaintiff then terminated.

After exhausting appeals in Pennsylvania, Plaintiff filed a Writ of Habeas Corpus in the United States District Court for the Western District of Pennsylvania. By Order dated August 28, 2001, the Writ of Habeas Corpus was granted vacating Plaintiff's convictions. On February 15, 2002 Plaintiff instituted the within lawsuit.

The pleadings are now closed. The Defendants' have filed a Motion for Judgment on the Pleadings claiming the statute of limitations has expired. In fact the statute has passed and this case must be dismissed.

The standard of review for the present Motion is well established:

> "A trial court must confine its consideration to the pleadings and relevant documents and accept as true all well-pleaded statements of fact, admissions and any documents properly attached to the pleadings presented to the party against whom the motion is filed. The Court may grant judgment on the pleadings only where the moving party's right to succeed is certain and the case is so free from doubt that the trial would clearly be a fruitless exercise." *Fokes v. Shoemaker*, 661 A.2d 877, at 878 (Pa. Super. 1995) quoting *McAllister v. Millville Company Mutual Insurance*, 640 A.2d 1283, 1285 (Pa.Super. 1994).

In the case *sub judice* there are no factual disputes regarding the relevant time periods and therefore it is clear the present action was not filed within the applicable statute of limitations.

DISCUSSION

Pennsylvania law requires that a legal malpractice action for negligence must be brought within two years of the date the cause of action begins. See 42 Pa. C.S.A §5524. If the legal malpractice action is based on contract, it must be brought within four years of the date the cause of action arises. See 42 Pa. C.S.A §5525.

The threshold issue is when Plaintiff's cause of action arose. Generally, the statute of limitations begins to run in legal malpractice actions either at the time the harm is suffered or alternatively at the time the purported malpractice is discovered. See, *Robbins and Seventko Orthopedic Surgeons Inc. v. Geigenberger*, 674 A.2 244 (1996). However, for a host of policy reasons, the Pennsylvania Supreme Court developed a more restrictive rule for criminal malpractice actions holding the statute of limitations commences at the date of sentencing or, no later than Z the

termination date of the attorney/client relationship. *Bailey v. Tucker*, 621 A.2d 108, 116 (Pa. 1993).

In the case at bar, it is uncontroverted the Plaintiff's date of sentencing was October 10, 1995. While Attorney Brabender subsequently filed a Motion to Modify Sentence, Plaintiff concedes Attorney Brabender's representation ended then such that the attorney/client relationship was terminated by the end of October 1995. See Plaintiff's Reply to Defendant's New Matter, Paragraphs 58, 59. Hence there is no factual issue as to when the attorney/client relationship ended. Plaintiff further concedes, as he must, that the statute of limitations was not tolled until the filing of this present action on February 15, 2002. Thus Plaintiff's lawsuit was not instituted until five years and nearly four months after the statute of limitations began. As such, more than two years have lapsed for purposes of filing a legal malpractice action based on negligence and more than four years have lapsed based on legal malpractice action under a theory of contract. Hence this case must be dismissed.

This Court is sympathetic to Plaintiff's argument that the statute of limitations should not begin to run until August 28, 2001 when Plaintiff's federal Writ of Habeas Corpus was granted. Plaintiff makes a powerful argument all of the elements for a malpractice action do not exist until there is appellate exoneration. However, this argument was specifically considered and rejected by the Pennsylvania Supreme Court in *Bailey v. Tucker, supra.* Hence this Court is dutibound to follow the *Bailey* precedent.

ORDER

AND NOW to-wit this 17 day of December 2002, for the reasons set forth in the accompanying Opinion, the Motion for Judgment on the Pleadings as filed by the above captioned Defendants is hereby **GRANTED** and this case is dismissed.

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

DAVID L. HENRY and MARILYN HENRY, Plaintiffs

v.

HOME DEPOT, USA, INC., t/d/b/a THE HOME DEPOT, Defendants

CIVIL PROCEDURE/POST-TRIAL MOTIONS/REMITTITUR

A remittitur may only be granted only where the trial court determines that the verdict so shocks the court's sense of justice as to suggest that the jury was influenced by partiality, prejudice, mistake, or corruption. It is the duty of the court to enforce the jury's verdict unless the circumstances cry out for judicial interference.

CIVIL PROCEDURES/POST-TRIAL MOTIONS/REMITTITUR

There are six factors used to determine whether a jury's award of damages is supported by the evidence: (1) the severity of the injury, (2) whether the injury is demonstrated by objective physical evidence or subjective evidence, (3) whether the injury is permanent, (4) the plaintiff's ability to continue employment, (5) the disparity between the out-of-pocket expenses and the amount of the verdict, and (6) the damages plaintiff requested in his complaint.

CIVIL PROCEDURES/POST-TRIAL MOTIONS/REMITTITUR

A substantial verdict for plaintiff will not be reduced where (1) plaintiff presented evidence that the injured party had a total of six surgeries as a result of his injuries and plaintiff was rendered impotent, (2) the six surgeries provide ample objective evidence of plaintiff's injuries, (3) plaintiff's physicians testified that plaintiff's condition was permanent, (4) plaintiff's physicians found that plaintiff had been disabled from working as a crane operator following the accident, (5) plaintiff presented the testimony of an economic expert who testified that plaintiff suffered an economic loss of $526,000.00 in addition to plaintiff's out-of-pocket medical expenses of $48,000.00, and (6) the plaintiff demanded an amount in excess of the jurisdictional limits of arbitration.

CIVIL PROCEDURE/POST-TRIAL MOTIONS/NEW TRIAL

A new trial should not be granted because of a mere conflict in testimony or because a trial judge on the same facts would have arrived at a different conclusion. It should ordinarily not be granted on the ground that the verdict was against the weight of the evidence or where the evidence is conflicting and jury might have found for either party.

CIVIL PROCEDURES/POST-TRIAL MOTIONS/NEW TRIAL

A new trial should be awarded on the ground that the verdict is against the weight of the evidence only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that the right may be given another opportunity to prevail.

CIVIL PROCEDURES/POST-TRIAL MOTIONS/NEW TRIAL

In determining whether there is sufficient competent evidence to sustain the verdict, the court must grant the verdict winner the benefit of every inference which may be reasonably drawn from the evidence.

CIVIL PROCEDURES/POST-TRIAL MOTIONS/NEW TRIAL

Where there was no evidence that plaintiff was speeding or in violation of any applicable traffic law and the jury could consider emergent circumstances of the accident on the sudden emergency doctrine, the court does not find the jury's verdict so contrary to the evidence as to shock one's sense of justice to require the awarding of a new trial.

NEGLIGENCE/SUDDEN EMERGENCY

The sudden emergency doctrine is available as a defense to a party who suddenly and unexpectedly finds him or herself confronted with a perilous situation which permits little or no opportunity to apprehend the situation and act accordingly. The sudden emergency doctrine is frequently employed in motor vehicle accident cases wherein a driver was confronted with a perilous situation requiring a quick response in order to avoid a collision.

NEGLIGENCE/SUDDEN EMERGENCY

The sudden emergency rule provides generally that an individual will not be held to the usual degree of care or be required to exercise his or her best judgment when confronted with a sudden and unexpected position of peril created in whole or in part by someone other than the person claiming protection under the doctrine.

NEGLIGENCE/SUDDEN EMERGENCY

The sudden emergency rule recognizes that a driver who, although driving in a prudent manner, is confronted with a sudden or unexpected event which leaves little or no time to apprehend a situation and act accordingly should not be subject to liability simply because another perhaps more prudent course of action was available. Rather, under such circumstances, a person is required to exhibit only an honest exercise of judgment.

NEGLIGENCE/SUDDEN EMERGENCY

A person cannot avail himself of the protection of the sudden emergency rule if that person was himself driving carelessly or recklessly.

NEGLIGENCE/SUDDEN EMERGENCY

While the assured clear distance ahead rule generally applies to static or essentially static objects and the sudden emergency rule applies to moving instrumentalities unexpectedly thrust into the driver's path, the distinction between fixed and moving objects is not inflexible. The distinction between fixed and moving objects is rendered meaningless where the evidence at least arguably suggests either that the driver would not have seen the obstacle in time to avoid a collision and/or would not have reasonably foreseen the occurrence of the obstacle even if prudent.

NEGLIGENCE/SUDDEN EMERGENCY

Where there was no evidence to suggest that plaintiff was driving carelessly or recklessly on his motorcycle and where there was evidence that he would not have been able to see the block in the roadway until the motorcycles in front of plaintiff made an abrupt swerve to avoid the block which fell from the defendant's truck, where it was impossible for him to swerve left as there was a car approaching in the oncoming lane, where he did not have time to check his rearview mirror to determine whether it was safe to move to the right-hand portion of the roadway, and where he could have struck another motorcycle if he had swerved right, there was ample factual support in the record to entitle plaintiff to a jury charge on sudden emergency.

NEGLIGENCE/OPERATION OF VEHICLE/ASSURED CLEAR DISTANCE

The presence of a sudden emergency negates the applicability of the "assured clear distance" rule.

CIVIL PROCEDURE/TRIAL/POINTS FOR CHARGE

A trial court is bound to charge only on that law for which there is some factual support in the record.

NEGLIGENCE/OPERATION OF VEHICLE/ASSURED CLEAR DISTANCE RULE

Since the assured cleared distance rule applies only to those objects which a reasonable and prudent driver should be able to see, the rule may be inapplicable to cases in which the object ahead, for whatever reason, is indiscernible.

NEGLIGENCE/OPERATION OF VEHICLE/ASSURED CLEAR DISTANCE RULE

Given the fact that there was no evidence of excessive speed on the part of the plaintiff and the fact that the concrete block which fell from defendant's truck was almost indiscernible until a person was almost on top of it, the trial court properly refused to charge the jury on the assured clear distance rule.

DAMAGES/FUTURE MEDICAL EXPENSES

The plaintiff need not undertake to show in dollars and cents exactly how much money he would have to spend for future treatment to alleviate his pain and suffering. He need only point to testimony which tends to prove that he was permanently injured and will have to continue under the care of several doctors, whose bills showing periods of attendance, charges, etc., to date were offered in evidence and accepted at trial.

DAMAGES/FUTURE MEDICAL EXPENSES

Where the evidence in a personal injury action shows the value of medical services already rendered the injured person and that such service will be required in the future, the jury may determine from the past service and the value what reasonably may be required in the future, although there is no other evidence of the value of the future services.

DAMAGES/FUTURE MEDICAL EXPENSES

Where plaintiff's medical experts testified that he was disabled and that his neck fusion and low back operation were causally related to the accident, where one physician testified that a left wrist injury and subsequent fusion were causally related to the accident, where plaintiff's urologist stated that plaintiff had been rendered permanently impotent as a result of the accident, where plaintiff introduced past medical expenses into evidence, and where plaintiff's expert physicians testified that plaintiff would require additional medical treatment in the future, the facts provided a sufficient evidentiary foundation for a charge on future medical expenses.

EVIDENCE/MISSING WITNESS RULE

If a party fails to call a witness or other evidence within his or her control, the fact finder may be permitted to draw an adverse inference. However, the witness or evidence must not be equally available to both parties, or the inference may not be drawn. A decision whether to tell the jury they might drawn an unfavorable inference from the failure of a party to call a witness is a matter within the trial court's discretion.

EVIDENCE/MISSING WITNESS RULE

The missing witness rule is inapplicable where the likelihood exists that the testimony of the uncalled witness would be unimportant, cumulative, or inferior to evidence already presented.

EVIDENCE/MISSING WITNESS RULE

Where the defendant was free to make arrangements for the testimony of any of the physicians not called by plaintiff and since the testimony of other physicians would have been cumulative to the testimony of other medical evidence, the

defendant was not entitled to have the jury charged with a missing witness instruction.

CIVIL PROCEDURES/TRIAL

Questions regarding the admissibility or exclusion of evidence are within the sound discretion of trial court and will not be disturbed absent an abuse of discretion. An abuse requires prejudice, partiality, bias, ill-will, or misapplication of law.

EVIDENCE/RELEVANCY/PREJUDICE

The trial court must view the various aspects of the trial and determine whether the probative value of the offer is outweighed by the risk that its admission will create substantial danger of undue prejudice or of misleading the jury.

EVIDENCE/RELEVANCY

The fact that defendant's employee stopped his truck to reapply shrink wrap that had come loose from a pallet of block that he was carrying shortly after he had passed through the area where plaintiff struck a cement block is relevant to show ownership of the block.

EVIDENCE/RELEVANCY/PREJUDICE

The jury was entitled to infer that the defendant's employee left the scene due to his guilt, thereby providing evidence of ownership. The contact of plaintiff's employee can be analogized to the rule in criminal cases that flight constitutes evidence of guilt.

EVIDENCE/RELEVANCY

No witness can be contradicted on everything he testified to in order to test his credibility. The pivotal issues in the trial cannot be side-tracked for the determination whether or not a witness lied in making a statement about something which had no relationship to the case on trial. A witness can be contradicted only on matters germane to the issue trying.

EVIDENCE/RELEVANCY

No contradiction shall be permitted on collateral matters; and the only true test of collateralness is, could the fact, as to which error is predicated, have been shown in evidence for any purpose independently of the contradiction?

EVIDENCE/RELEVANCY

Where plaintiff's prior carpel tunnel and cubital tunnel release did not contribute to his wrist injury caused by the accident and defendant offered no testimony to refute plaintiff's assertion that a left fusion was necessitated by the accident, any evidence that plaintiff suffered from a preexisting carpal tunnel syndrome or cubital tunnel syndrome was not relevant and would have only served to have confused the jury.

EVIDENCE/OPINION/EXPERT TESTIMONY

When a party must prove causation through expert testimony, the expert must testify with "reasonable certainty" that "in his professional opinion" the result in question did come from the cause alleged. An expert fails the standard if he testifies that the alleged cause "possibly" or "could have" led to the result, that it "could very properly account" for the result, or even that it was "very highly probable" that it caused the result.

EVIDENCE/OPINION/EXPERT TESTIMONY

An expert need not testify with absolute certainty or rule out all possible causes of a condition. Expert testimony is admissible when, taken in its entirety, it expresses reasonable certainty that the accident was a substantial factor in

bringing about the injury. The expert need not express his opinion in precisely the same language used to enunciate the legal standard. That an expert may, at some point during his testimony, qualify his assertion does not necessarily render his opinion inadmissibly speculative.

EVIDENCE/OPINION/EXPERT TESTIMONY

Plaintiff's expert met the standard necessary to establish causation where his opinion taken in its entirety expressed reasonable certainty that the accident was a substantial factor in bringing about plaintiff's injuries and subsequent surgeries.

EVIDENCE/OPINION/EXPERT TESTIMONY

In using hypothetical questions propounded to an expert, a party may state specifically the particular facts he believes to be shown by the evidence or such facts as the jury would be warranted in finding from the evidence and ask the opinion of the expert on such facts, assuming them to be true. The other side may likewise put a hypothetical question based upon such facts as he alleges are shown by the evidence or the jury would be justified in finding from the evidence.

EVIDENCE/OPINION/EXPERT TESTIMONY

The expert testimony of plaintiff's economist was properly admitted as to future lost wages where assumptions propounded to the expert on hypothetical questioning were supported by the evidence.

TRIAL/DISCOVERY/ INDEPENDENT MEDICAL EXAM

The trial court properly exercised its discretion not to compel another independent medical examination to investigate injuries to plaintiff's wrist where defendant and its independent medical expert had ample opportunity to investigate and address the injuries but failed to do so. Rule 4010, Pa. R. Civ. P.

CIVIL PROCEDURES/TRIAL/JURY IRREGULARITIES

Under the "no impeachment rule," a juror is incompetent to testified as to what occurred during the deliberations.

CIVIL PROCEDURES/TRIAL/JURY IRREGULARITIES

A narrow exception to the rule against impeachment by a juror as to what happened during deliberations permits post-trial testimony of extraneous influences which might have affected or prejudiced the jury during deliberations. Under this exception the juror may testify only as to the existence of the outside influence but not as to the effect this outside influence may have had on deliberations. Under no circumstances may jurors testify regarding their subjective reasoning processes.

CIVIL PROCEDURES/TRIAL/JURY IRREGULARITIES

Under the rule against impeachment of a jury's verdict, defendant is not entitled to a new trial because of a newspaper article in which an unnamed juror indicated that he and another juror did not agree with the verdict in contradiction to the polling of the jury after the verdict.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY
NO. 12955 - 1999

Appearances: Kevin Burger, Esq., on behalf of Defendant
Stephen J. Summers, Esquire, on behalf of Plaintiffs
Joseph A. Hudock, Jr., Esq., on behalf of Plaintiffs

OPINION

Domitrovich, J., January 27, 2003

FACTUAL AND PROCEDURAL HISTORY:

This case arises from a motorcycle accident that occurred on June 6, 1998, on Route 6 in Leboeuf Township, Erie County, Pennsylvania. (N. T. 10/14/02, pp. 85-86). Route 6, the scene of the accident, is a two-lane roadway running generally east and west and divided by a double yellow center line. Plaintiff, David L. Henry, was riding his motorcycle in the east bound lane of Route 6 at approximately 42 to 45 miles per hour with a group of 20 to 25 of other motorcyclists in staggered formation such that they formed two single file lines in the eastbound lane of Route 6. (N.T. 10/14/02, pp. 87). Plaintiff was riding in approximately the middle of the left hand line of motorcyclists when he observed the motorcyclist in front of him swerve suddenly and without warning to avoid a concrete block which was lying in the left-hand side of the eastbound travel lane. (N.T. 10/14/02, pp. 87-89), (N.T. 10/15/02, p. 100).

The concrete block in question is trapezoid in shape and measures 11" x 7-3/4" x 4". This block was introduced into evidence at trial (N. T. 10/14/02, p. 57). As the motorcycle in front of him swerved right, Plaintiff observed a vehicle approaching in the westbound lane of Route 6, thus permitting him no opportunity to proceed to the left to avoid the collision. (N. T. 10/15/02, p. 89). Plaintiff also had no opportunity to determine whether it was safe to move over to the right hand portion of the eastbound lane. (N. T. 10/15/02, p. 103). Plaintiff stated. “if I go right I could possibly take out another motorcycle, injure somebody seriously, and then have two motorcycles down on the road, which could cause a chain reaction coming up the road.” 10/15/02, p. 103). Plaintiff also stated, “I touched my brakes some, but I didn’t want to possibly throw myself into a skid. If I went into a skid, I could have possibly taken down everybody behind me.” (N. T. 10/14/02, p. 89).

Unable to avoid a collision, Mr. Henry had no alternative but to drive his motorcycle over the concrete block. (N.T. 10/14/02, pp. 89-90), (N.T. 10/15/02, pp. 101, 103). When Plaintiff’s motorcycle struck the concrete block, Plaintiff was propelled into the air on his motorcycle. (N.T. 10/14/02, pp. 90-91). When the motorcycle landed, Mr. Henry realized both of his tires blew out, and the rims of both wheels were deformed by the collision with the concrete bock. (N.T. 10/14/02, pp. 90-91). Mr. Henry was unable to control his motorcycle in its damaged condition, and initially his motorcycle fell over onto its right side. (N.T. 10/14/02, p. 99). This motorcycle, with Mr. Henry still on it, then flipped onto its left side, crossed the center line and came to rest in a homeowner’s yard after dragging Plaintiff approximately eighty feet from the point of the initial collision. (N.T. 10/14/02, p. 92). Plaintiff was found lying on his left side with his motorcycle on top of him. (N.T. 10/14/02, p. 92). Several of the

other motorcyclists stopped and helped to pull this motorcycle off Plaintiff. (N. T. 10/14/02, p. 92).

Other motorcyclists in the group noticed a Home Depot truck approximately 200 yards away from the scene of the accident parked along the right-hand berm of the eastbound lane of Route 6. (N. T. 10/14/02, p. 59). Several of the motorcyclists observed the driver of the Home Depot truck, Timothy Rollinger, strapping down a load of concrete block. (N. T. 10/14/02. p. 60), (Deposition Transcript, Mr. Banta, p. 12, hereinafter referred to as "D.T."). One or more of the motorcyclists informed Mr. Rollinger that he had dropped some of his concrete block onto the roadway and requested that he remain at the scene until the police arrived. However, Mr. Rollinger refused to wait at the scene for the police. (N. T. 10/14/02, p. 61). In fact, Mr. Rollinger admitted that he never spoke to the police at any time after the accident, although the investigating state trooper testified he made more than a few attempts to contact Mr. Rollinger. (N.T. 10/14/02, pp. 131-132).

Most importantly, the motorcyclists who observed the block in the roadway and the block on Mr. Rollinger's truck, stated that it was the same block. (N. T. 10/14/02, pp. 103-104), (D.T. Mr. Banta, pp. 11-12). Since Mr. Rollinger never returned to the scene of the accident, he could not refute these observations of the motorcyclists. Mr. Rollinger did admit that when he drove through the scene of the accident approximately ten minutes before the accident occurred, there was no concrete block in the roadway. (N.T. 10/15/02, pp. 122, 124). Mr. Rollinger also admitted that he would have seen any block that would have been lying in the roadway. (N.T. 10/14/02, p. 122). Moreover, Mr. Rollinger stated that no trucks carrying any type of concrete block passed him as he was pulled over to the side of the road. (N. T. 10/14/02, p. 125). In addition, one of the other motorcyclists, William J. Rosenthal, stated that Mr. Rollinger admitted that his load on his truck had shifted. (N. T. 10/14/02, pp. 60, 77). In fact, the evidence at trial was so overwhelming that the concrete block came from Home Depot's truck, that counsel for Defendant was resigned to say during his closing statement: "On behalf of Home Depot, I recognize the fact that the Home Depot truck stopped 200 or 250 yards up the road from where the accident occurred is very compelling. It almost begs the conclusion that the block fell off the truck." (N.T. 10.17/02, pp. 9-10).

As a result of the accident Mr. Henry sustained significant, disabling injuries which ultimately resulted in two ankle surgeries, a right knee surgery, a left shoulder surgery, a neck fusion, a laminectomy of the low back and a fusion of the left wrist. Mr. Henry was also rendered permanently impotent as a result of the accident. In addition, Mr. Henry was rendered disabled and was/is unable to work as a crane operator or in other manual labor activities.

Plaintiffs, David L. Henry and his wife Marilyn Henry, initiated this

action by serving Defendants, Timothy Rollinger and Home Depot, USA, INC. (hereinafter referred to as Home Depot), with the Complaint on September 10th and 15th of 1999, respectively. In the Complaint, Plaintiffs allege that the concrete block Mr. Henry struck with his motorcycle fell off the Home Depot truck driven by Timothy Rollinger. (N.T. 10/14/02, pp. 103-104). The case proceeded to trial on October 14, 2002, and on October 18, 2002, concluded with a verdict in favor of Plaintiffs against Defendant Home Depot. Specifically, the jury awarded Plaintiff, David L. Henry the following damages[1]: medical expenses $202,000.00; past lost wages $61,000.00; future lost wages $400,000.00; past and future pain and suffering $1,500,000.00; loss of enjoyment of life $500,000.00; and impotency $200,000.00. The jury also awarded Plaintiff, Marilyn Henry, $500,000.00 for her loss of consortium. (N.T. 10/18/02, pp. 53-54). Following the trial, Defendant filed Post-Trial Motions on October 28, 2002.

I. LEGAL ANALYSIS:

A. Whether a remittitur and/or new trial should be granted.

Although the Trial Court has the authority to order a remittitur of excessive damages, a remittitur may only be granted where the trial court determines that the verdict so shocks the court's sense of justice as to suggest that the jury was influenced by partiality, prejudice, mistake, or corruption. *Goldberg v. Isdaner,* 780 A.2d 654 (2001). Therefore, it is the duty of the court to enforce the jury's verdict unless the circumstances cry out for judicial interference. *Taylor v. Celotex Corp.,* 393 Pa.Super. 566, 547 A.2d 1084 (1990).

In determining whether a jury's award of damages is supported by the evidence, the Pennsylvania Superior Court has identified the following six factors: 1) the severity of the injury; 2) whether the injury is demonstrated by objective physical evidence or subjective evidence; 3) whether the injury is permanent; 4) the plaintiff's ability to continue employment; 5) disparity between the amount of out of pocket expenses and the amount of the verdict; and 6) damages plaintiff requested in his complaint. *Stoughton v. Kinzey,* 299 Pa. Super. 499, 445 A.2d 1240 (1982)

Applying these factors to the instant case, this verdict does not shock the Court's sense of justice as to suggest that the jury was influenced by partiality, prejudice, mistake, or corruption. First, Plaintiffs presented evidence at trial that Mr. Henry had a total of six surgeries as a result of his accident including a neck fusion and a wrist fusion. (D.T. Dr. Thomas,

[1] On November 12, 2002, after Defendant stipulated to Plaintiff's Motion for Delay Damages, the Court granted said Motion, and molded the verdict to include Delay Damages which amounted to $515,320.38. Thus, the total molded verdict in favor of Plaintiffs and against Defendant Home Depot is in the amount of $3,878,320.38.

pp. 43-44); (D.T. Dr. Hood, pp. 14, 25). In addition, the accident rendered Mr. Henry impotent, which has prevented Plaintiffs, a married couple, from having sexual relations with each other even once since the accident. (N. T. 10/15/02, pp. 24-26); (N. T 10/16/02, p. 84). Second, the fact that Mr. Henry underwent six surgeries as a result of his accident provides ample objective evidence of his injuries. Third, Plaintiff's physicians testified that Plaintiff's condition was permanent. Fourth, the Plaintiff's physicians found that Plaintiff had been disabled from working as a crane operator following the accident. Fifth, Plaintiff presented the testimony of economic expert, Jay Jarrell, who opined that the plaintiff suffered an economic loss of over $526,000, in addition to Plaintiff's out-of-pocket medical expenses of $48,000. Sixth, the Plaintiff demanded in his complaint an amount in excess of the jurisdictional limits of arbitration. Thus, after considering all of the above-mentioned factors, this verdict does not shock this Court's sense of justice and does not suggest that the jury was influenced by partiality, prejudice, mistake, or corruption. Therefore, for all of the foregoing reasons, Defendant's request for a remittitur is denied.

B. Whether the verdict was against the weight of the evidence.

Defendant asserts that the jury ignored the instruction of contributory negligence. Specifically, Defendant argues since the other motorcycle drivers ahead of Plaintiff were able to avoid the cement block that fell from Home Depot's truck, Plaintiff should have been able to avoid this block as well, and his failure to do so constitutes contributory negligence. However, the Pennsylvania Superior Court has stated:

> We have frequently set forth the standards governing the grant of a new trial on the ground that the verdict was against the weight of the evidence. The grant of a new trial is within the sound discretion of the trial judge, who is present at the offering of all relevant testimony, but that discretion is not absolute; this Court will review the action of the court below and will reverse if it determines that it acted capriciously or palpably abused its discretion. A new trial should not be granted because of a mere conflict in testimony or because the trial judge on the same facts would have arrived at a different conclusion: [citation omitted]. Neither should it ordinarily be granted on the ground that the verdict was against the weight of the evidence where the evidence is conflicting and the jury might have found for either party. A new trial should be awarded on the ground that the verdict is against the weight of the evidence only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail.

Burrell v. Philadelphia Electric Co., 438 Pa. 286, 265 A.2d 516 (1970)(citations omitted). Furthermore, in determining whether there is sufficient competent evidence to sustain the verdict, the Court must grant the verdict winner the benefit of every inference which may be reasonably drawn from the evidence. *Korn v. Epstein,* 727 A.2d 1130 (Pa.Super. 1999).

In the instant case, there was no evidence presented at trial that Plaintiff was speeding or in violation of any applicable traffic law. At the time of the accident, Plaintiff was traveling 42 to 45 miles per hour at the time of the accident. (N.T. 10/14/02, pp. 87-88). In addition, Plaintiff was three to four motorcycle lengths, or a distance of 15 to 20 feet, behind the motorcycle in front of him when the accident occurred. (N.T. 10/15/02, p. 101). Moreover, William J. Rosenthal, one of the drivers ahead of Plaintiff in the group, stated that while he was able to avoid hitting the block with his motorcycle, his left heel struck the block when he swerved to avoid a collision. (N.T. 10/14/02, pp. 57-58). Another motorcyclist that day, Mr. Banta stated that the block blended in with the road surface and was very difficult to see. (D.T. Mr. Banta, pp. 8-9). In fact, Mr. Banta stated that he came within two feet of striking the block himself. (D.T. Mr. Banta, pp. 8-9).

Moreover, the jury was instructed on the sudden emergency doctrine, and could, therefore, consider the emergent circumstances of the accident when determining whether Plaintiff acted in a reasonable manner. (N.T. 10/18/02, pp. 30-32). In the instant case, Plaintiff stated that he had approximately a second to a second and a half to react when he saw the motorcycle in front of him swerve to the right to avoid the block. (N.T. 10/15/02, p. 123). Plaintiff also stated that there was a car approaching in the oncoming lane travel, preventing him from swerving into the left hand lane. (N.T. 10/14/02, p. 89). Lastly, Plaintiff stated that he was not sure whether there was another motorcycle to the right of him at the time of the accident, therefore, he did not swerve to the right because to do so could result in a collision and "cause a chain reaction [with other motorcycles] coming up the road." (N. T. 10/15/02, p. 103).

Based on the foregoing evidence presented at trial, there was sufficient competent evidence for the jury to find that Plaintiff was faced with a sudden emergency and, therefore, was not contributorily negligent. Furthermore, after a thorough review of the record, this Trial Court does not find the jury's verdict was so contrary to the evidence as to shock one's sense of justice to require the awarding of a new trial. This verdict is consistent with the evidence. Therefore, for all of the above-mentioned reasons, Defendant's request for a new trial is denied

C. Whether the Court's charge to the jury was proper.

1. Sudden Emergency

Defendant claims that "the Court, in charging on the sudden emergency charge and failing to charge on assured clear distance, essentially

directed a verdict for the Plaintiff on the issue of contributory negligence." *See, Defendant's Brief in Support of Post Trial Motions, p. 15.* However, in *Lockhart v. List,* 542 Pa. 141, 665 A.2d 1176 (1995), the Pennsylvania Supreme Court stated:

> The sudden emergency doctrine...is available as a defense to a party who suddenly and unexpectedly finds him or herself confronted with a perilous situation which permits little or no opportunity to apprehend the situation and act accordingly. *Liuzzo v. McKay,* 396 Pa. 183, 152 A.2d 265 (1959). The sudden emergency doctrine is frequently employed in motor vehicle accident cases wherein a driver was confronted with a perilous situation requiring a quick response in order to avoid a collision. The rule provides generally, that an individual will not be held to the "usual degree of care" or be required to exercise his or her "best judgment" when confronted with a sudden and unexpected position of peril created in whole or in part by someone other than the person claiming protection under the doctrine. *See, Amodei v. Saunders,* 374 Pa. 180, 97 A.2d 362 (1953).

Id. 542 Pa. at 150. The Supreme Court held as follows:

> The rule recognizes that a driver who, although driving in a prudent manner, is confronted with a sudden or unexpected event which leaves little or no time to apprehend a situation and act accordingly should not be subject to liability simply because another perhaps more prudent course of action was available. Rather, under such circumstances, a person is required to exhibit only an honest exercise of judgment. *Noll v. Marian,* 347 Pa. 213, 32 A.2d 18 (1943). The purpose behind the rule is clear: a person confronted with a sudden and unforeseeable occurrence, because of the shortness of time in which to react, should not be held to the same standard of care as someone confronted with a foreseeable occurrence. It is important to recognize, however, that a person cannot avail himself of the protection of this doctrine if that person was himself driving carelessly or recklessly. *Chadwick v. Popadick,* 399 Pa. 88, 159 A.2d 907 (1960).

Id. 542 Pa. at 150-151.

In *Lockhart, supra,* the Supreme Court recognizes a line of cases from the Superior Court, beginning with *Unangst* v. *Whitehouse,* 235 Pa.Super. 458, 344 A.2d 695 (1995), which holds that the assured clear distance ahead rule generally applies to static or essentially static objects while the sudden emergency applies to moving instrumentalities unexpectedly thrust into the driver's path. *Lockhart,* 542 Pa. at 154. The Pennsylvania Supreme Court stated that it "agrees generally with the distinction between fixed and moving objects," but opined that the distinction is not as "inflexible a rule as that ascribed to it by the lower courts." *Id.* at 154-

155. The Supreme Court explained that the distinction between fixed and moving objects is "rendered meaningless where the evidence, at least arguably, suggests either that the driver would not have seen the obstacle in time to avoid a collision and/or would not have reasonably foreseen the occurrence of the obstacle, even if prudent." *Id.* at 155.

In the instant case, there was no evidence to suggest that Plaintiff created the emergency by driving carelessly or recklessly. Plaintiff was traveling 42 to 45 miles per hour which was within the lawful speed limit. (N. T. 10/14/02, pp. 87-88). In addition, Plaintiff would not have been able to see the block in the roadway until the motorcyclist in front of Plaintiff made his abrupt swerve to the right to avoid the block. Furthermore, Plaintiff stated that it was impossible for him to swerve left as there was a car approaching in the oncoming lane. (N. T. 10/15/02, p. 89). Plaintiff also stated he did not have time to check his rearview mirror to determine whether it was safe to move to the right-hand portion of the roadway. Plaintiff stated if he had swerved to the right without looking he "could [have] possibly take[n] out another motorcycle, injure[d] somebody seriously, and then have two motorcycles down on the road, which could cause a chain reaction [with other motorcycles] coming up the road." (N.T. 10/15/02, p. 103). Moreover, Plaintiff stated that he had approximately a second to a second and a half to react when he saw the motorcycle in front of him swerve to the right to avoid the block. (N.T. 10/15/02, p. 123).

Thus, based on the evidence presented at trial, there was ample factual support in the record to entitle Plaintiff to a jury charge on sudden emergency. Therefore for all of the foregoing reasons, Defendant's request for a new trial is denied.

2. Assured Clear Distance

Defendant asserts that the Trial Court erred in refusing to charge the jury on the assured clear distance ahead rule. *See, Defendant's Brief in Support of Post Trial Motions, p. 17.* However, the Pennsylvania Superior Court has stated, "the presence of a sudden emergency negates the applicability of the 'assured clear distance' rule[.]" *Polumbo v. DeStefano,* 329 Pa.Super. 360, 366, 478 A.2d 828, 831 (1984); *Chiodo v. Gargloff & Downham Trucking Co.,* 308 Pa.Super. 498, 454 A.2d 645 (1983) (where a sudden emergency arises the "assured clear distance ahead" rule is inapplicable). The Pennsylvania Supreme Court has also stated that "in reviewing a claim regarding the refusal of a court to give a specific instruction... [t]he law is clear that a trial court is bound to charge only on that law for which there is some factual support in the record." *Lockhart v. List, supra.* Moreover, the Pennsylvania Superior Court has held that the assured clear distance rule:

> should only be presented to the jury where the facts introduced at trial, either conceded or disputed, conceivably develop a factual

> scenario which evokes the principles fundamental to the rule. There are a number of factors which may preclude the rule's applicability.... Furthermore, since the rule applies only to those objects which a reasonable and prudent driver should be able to see, the rule may be inapplicable to cases in which the object ahead, for whatever reason, is indiscernible, See, e.g. *Stano v. Rearick,* 441 Pa, 72, 271 A.2d 251(1970); *Colonial Trust v. Elmer* C. *Breuer, Inc.,* 363 Pa. 101, 69 A.2d 126 (1949); *Farley v. Ventresco,* 307 Pa. 441, 161 A. 534 (1932); *Heffner by Heffner v. Schad,* 330 Pa. Super. 101, 478 A.2d 1372 (1984); *Brown v. Schriver, supra.*

Cannon v. Tabor, 642 A.2d 1108, 1112 (Pa.Super. 1994).

In the instant case there was uncontradicted evidence that the concrete block in question was difficult to see. William J. Rosenthal stated that he was riding in the front of the line of motorcyclists on the left-hand portion of the roadway when he observed the concrete block only at the last second. (N.T. 10/14/02, p. 57). Mr. Rosenthal further stated that the block was directly in his path of travel and that he struck the block with his left heel when he swerved to the right to avoid it. (N.T. 10/14/02, p. 58). Mr. Banta, another motorcyclist in the group that day, stated that the concrete block blended in with the roadway and was very difficult to see. (D. T. Mr. Banta, pp. 8-9).

Furthermore, the evidence at trial established that Plaintiff was operating his motorcycle between 42 and 45 miles per hour which was within the speed limit. (N. T. 10/14/02, pp. 87-88). Plaintiff also stated that he was traveling approximately 15 to 20 feet behind the motorcycle in front of him when the operator of that motorcycle swerved to his right to avoid the block in the roadway. (N. T. 10/15/02, p. 100).

Therefore, given the fact that there was no evidence of excessive speed on the part of Plaintiff, combined with the fact that the concrete block was almost indiscernible until a person was almost on top of it, the Trial Court properly refused to charge the jury on assured clear ahead rule. Thus, for all of the foregoing reasons Defendant's request for a new trial is denied.

3. Plaintiff's future medical expenses

Defendant asserts that, "although there was evidence that future medical treatment may have been required, there was no evidence of future medical expenses." *See, Defendant's Brief in Support of Post Trial Motions, p. 22*. However, in *Rogers v. Philadelphia & R. Ry. Co.,* 263 Pa 429, 106 A. 734 (1919), the Pennsylvania Supreme Court held that a plaintiff is not required to prove the amount of any future medical expenses where past medical bills have been offered into evidence and there is testimony that Plaintiff will require future treatment. In *Rodgers,* the Pennsylvania Supreme Court stated:

> While plaintiff did not undertake to show, in dollars and cents,

> exactly how much money he would have to spend for future treatment to alleviate his pain and suffering, he points to testimony which tends to prove he was permanently injured and will have to continue under the care of several doctors, whose bills, showing periods of attendance, charges, etc., to date, were offered in evidence and accepted at the trial; and this, under the authorities, fully justifies the instruction complained of.
>
> In *Amos v. Delaware River Ferry Co.,* 228 Pa. 362, 369, answering a contention that, where it was not shown with any degree of certainty how long an injured person would be subject to medical treatment, such treatment should not be considered, in estimating damages, we said: 'In this, as in all elements of damage which have regard to the future, it is a question of likelihood as to continuance, but that is always for the jury; a sufficient basis was here afforded by the evidence for an intelligent judgment, and that was all that was required': *see also Scurlock v. City of Boone,* 142 Iowa 685, which rules that 'Where the evidence in a personal injury action shows the value of medical services already rendered the injured person, and that such service will be required in the future, the jury may determine from the past service, and its value, what may reasonably be required in the future, although there is no other evidence of the value of the future services'; and *Sotebier v. St. Louis Transit Co.,* 203 Missouri 702, to like effect. The latter was a case similar to the one at bar, in that, owing to the nature of the injuries, it would not have been reasonably possible to show precisely the cost of future medical treatment.

Id at 433-434. *See also, Pratt v. Stein,* 298 Pa.Super. 92, 444 A.2d 674 (1982)(quoting with approval the foregoing language from *Rogers, supra,).*

In the instant case, Plaintiff's medical experts all testified that he was disabled. Dr. Joseph Thomas indicated that plaintiff's neck fusion and low back operation were causally related to the accident. (D.T. Dr. Thomas, pp. 43-44). Plaintiff's wrist surgeon, Dr. Thomas Hood, stated that the left wrist injury and the subsequent fusion were causally related to the accident. (D.T. Dr. Hood, pp. 14,25). In addition, Plaintiff's urologist, Dr. Thomas Lund, stated that Plaintiff had been rendered permanently impotent as a result of the accident. (N. T 10/16/02, pp. 24-26). Plaintiff also introduced into evidence past medical expenses in the amount of $48,000.00. (N.T. 10/16/02, p. 86). Plaintiff's medical experts, Dr. Lund and Dr. Thomas, both stated that Plaintiff would require additional medical treatment in the future. (N. T. 10/16/02. pp. 24-25). (D. T. Dr. Thomas. p. 30). Therefore, the facts provide a sufficient evidentiary foundation for a charge on future medical expenses. Thus, Defendant's request for a new

trial is denied.

4. Missing witness instruction

Defendant asserts that the Court should have charged the jury "regarding the inference under Pennsylvania law for not calling witnesses under a party's control who would generally offer testimony favorable to a party, and are not called." *See, Defendant's Brief in Support of Post Trial Motions, p. 23.* However the Pennsylvania Superior Court has stated:

> The general rule in Pennsylvania is that 'if a party fails to call a witness or other evidence within his or her control, the fact finder may be permitted to draw an adverse inference.' Leonard Packel and Anne Poulin, *Pennsylvania Evidence* § 419 at 248, note 1 (West's Pennsylvania Practice 1987, pocket part 1997, 1998 New Rules Supplement). However, the witness (or evidence) must not be equally available to both parties, or the inference may not be drawn. *Bennett v. Sakel,* 725 A.2d 1195, 1999 Pa. LEXIS 444 (1999); *Bentivoglio v. Ralston,* 447 Pa. 24, 288 A.2d 745 (1972).

Kovach v. Solomon, 732 A.2d 1 (Pa.Super. 1999). Furthermore, in *O'Rourke v. Rao,* 602 A.2d 362 (Pa.Super 1992), the Superior Court stated, "[i]t is well established in this Commonwealth the decision whether to tell the jury they might draw an unfavorable inference from the failure of a party to call a witness is a matter within the trial court's discretion which this Court will not overturn absent manifest abuse." *Id.* at 664, *citing Rupnik v. Pa. Railroad Co..* 412 Pa. 460, 194 A.2d 906 (1963). Moreover, the Superior Court in *O'Rourke, supra,* also noted that the missing witness rule is also inapplicable where the likelihood exists that the testimony of the uncalled witness would be unimportant, cumulative or inferior to evidence already presented. *Id., citing Downey v. Weston,* 451 Pa. 259, 301 A.2d 635 (1973).

In the instant case, none of the physicians in question were within Plaintiff's exclusive control. Plaintiff previously provided Defendant all medical records and reports from Plaintiff's treating physicians. Defendant was free to make arrangements with any of the physicians not called by Plaintiff, and have theses physicians testify at trial. Therefore, since Plaintiff's physicians could have been called by Defendant to testify at trial, Defendant was not entitled to a missing witness instruction.

Furthermore, Plaintiff presented three expert medical witnesses at trial, Dr. Hood. Dr. Thomas and Dr. Lund. It was not necessary for Plaintiff to call Dr. Kastrup or Dr. Bruno to testify because Defendant's own IME physician, Dr. Liefeld, conceded that four of the surgeries that Plaintiff underwent were related to the accident (D. T. Dr. Liefeld pp. 83-84).
Therefore, the testimony of Dr. Kastrup and Dr. Bruno would have been cumulative to the testimony of the independent medical evaluation of Dr. Liefeld. Therefore, since the testimony of Plaintiff's other treating

physicians would have been cumulative to the other evidence presented at trial, Defendant was not entitled to have the jury charged with the missing witness instruction. Thus, Defendant's request for a new trial is denied

5. Plaintiff's expert on lost wages

Defendant asserts that the Court should have "instructed[ed] the jury that it could disregard the testimony of Plaintiff's expert regarding the Plaintiff's lost earning potential and lost personal services, unless the jury found there was unequivocal medical testimony that Plaintiff was permanently disabled." *See, Defendant's Brief in Support of Post Trial Motions, p. 24.* Defendant asserts that this instruction was appropriate since "plaintiff's medical experts did not testify that the plaintiff was permanently disabled." *Id.* As stated above, "a trial court is bound to charge only on that law for which there is some factual support in the record." *Lockhart v. List,* 542 Pa. 141,665 A.2d 1176 (1995).

In the instant case, a review of the medical evidence reveals that all of the experts concluded that Plaintiff was permanently disabled from working as a crane operator or in other manual labor activities. (D.T. Dr. Hood, pp. 29, 43), (D.T. Dr. Thomas, pp. 46-48). Defendant never retained a vocational expert to determine whether Plaintiff was capable of working in any other capacity. Furthermore, Defendant stated in his closing argument that, "[i]t is not Home Depot's position, nor have we argued in this case that Mr. Henry is not disabled. We acknowledge he is disabled." (N.T. 10/17/02, pp. 37-38). In effect, Defendant stipulated to the fact that Plaintiff was permanently disabled. Therefore, this Trial Court properly denied Defendant's request as to Plaintiff's expert on lost wages. Thus for the above stated reasons Defendant's request for a new trial is denied.

This opinion will be continued in the next issue of the
Erie County Legal Journal Vol. 86, No. 10

DAVID L. HENRY and MARILYN HENRY, Plaintiffs
v.
HOME DEPOT, USA, INC., t/d/b/a THE HOME DEPOT, Defendants

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY
NO. 12955 - 1999

Appearances: Kevin Burger, Esq., on behalf of Defendant
Stephen J. Summers, Esquire, on behalf of Plaintiffs
Joseph A. Hudock, Jr., Esq., on behalf of Plaintiffs

This opinion is continued from the previous issue of the Erie County Legal Journal Vol. 86, No. 9

OPINION

Domitrovich, J., January 27, 2003

D. Whether Defendant is entitled to a new trial based on the Court's evidentiary rulings at trial.

1. Admission of Defendant's activities following the accident

Defendant asserts the fact that "Timothy Rollinger did not go back to the accident scene after being advised by the other motorcycle riders that an accident had occurred...was not relevant." *See, Defendant's Brief in Support of Post Trial Motions, p. 20.* However, the Pennsylvania Superior Court has stated, "[i]t has long been clear that questions regarding the admissibility or exclusion of evidence are within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. An abuse of discretion requires prejudice, partiality, bias, ill-will, *or* misapplication of law." *Rogers v. Johnson & Johnson Products, Inc.,* 401 Pa. Super. 430, 585 A.2d 1004 (1990). In exercising its discretion, the Pennsylvania Supreme Court stated:

> [T]he trial court must view the various aspects of the trial and determine whether the probative value of the offer is outweighed by the risk that its admission will create substantial danger of undue prejudice or of misleading the jury....

Flowers v. Green, 420 Pa. 481, 218 A.2d 219 (1966) (quoting *Keough v. Republic Fuel and Burner Co.,* 382 Pa. 593, 116 A.2d 671 (1959)).

In *Dean v. Trembly,* 11 D. &C. 2d 1, aff'd 137 A.2d 880 (Pa.Super 1958), where a similar issue was raised, the Trial Court held that it was proper for a jury to consider, in determining whether the defendant was negligent, that the defendant failed to provide his name and address to the plaintiff or to offer the plaintiff any assistance at the scene of an accident.

In the instant case, Defendants did not admit that the concrete block which was lying on the roadway had fallen from Defendant's truck. At trial, Mr. Rollinger admitted that there was no cement block in the roadway when he passed through the area where the accident occurred.

(N.T. 10/14/02, pp. 121-122). However, Mr. Rollinger admitted that just after he passed the area where the accident occurred he looked in his side-view mirror and noticed that the shrink wrap used to secure a load of concrete block that he was carrying had come loose. (N.T. 10/14/02, pp. 122-123). A short time after Mr. Rollinger had pulled his truck over to re-shrink wrap the block on his truck "that was flipping" in the wind. (N.T . 10/14/02, p. 123). A group of motorcyclists approached Mr. Rollinger and told him that Mr. Henry had just hit a cement block that was lying in the roadway a short distance behind him. (N.T. 10/14/02, pp. 123-125). Mr. Rollinger, however, claimed that "[t]here was no certainty of a block coming off my truck." (N.T. 10/14/02, p. 126). Mr. Rollinger also claimed that the he did not return to the scene or wait to speak with the police since he did not believe the block came from his truck. (N.T. 10/14/02, pp. 126, 132).

The fact that Mr. Rollinger stopped his truck to reapply shrink wrap that had come loose from a pallet of block that he was carrying shortly after he had passed through the area where Mr. Henry struck a cement block is clearly relevant to show ownership of the block. By negative implication, the case of *Smith v. Barker,* 534 A.2d 533 (Pa. Super. 1987), supports this Trial Court's ruling. In *Smith,* the Pennsylvania Superior Court held that it was not error for a trial judge to exclude evidence that the defendant left the scene *where liability was admitted* and the only issue before the court was that of damages. In the instant case, however, Defendant did not admit liability and ownership of the block was contested.

In addition, the jury was entitled to infer that Mr. Rollinger left the scene due to his guilt, thereby providing evidence of ownership. In this regard, the conduct of Mr. Rollinger can be analogized to the rule in criminal cases that flight constitutes evidence of guilt. The fact that Mr. Rollinger left the scene and failed to return could be construed by the jury as an attempt by Mr. Rollinger to distance himself both literally and figuratively from the accident and the cement block.

Therefore, for all of the foregoing reasons, this Trial Court did not abuse its discretion in determining that the probative value of Defendant's actions following the accident outweighed any risk of prejudice or misleading the jury. Thus, Defendant's request for a new trial is denied.

2. Prohibiting Defendant from cross examining Plaintiff concerning a settlement offer

Defendant claims that, "the Court required the parties to stipulate that Home Depot did not contact the Plaintiff after the accident." *See, Defendant's Brief in Support of Post Trial Motions, p. 21*. However the Pennsylvania Superior Court has stated, "[t]he Pennsylvania rule on stipulations is long-settled: parties may bind themselves, even by a statement made in court, on matters relating to individual rights and obligations, so long as their stipulations do not affect the court's

jurisdiction or due order of business." *Tyler v. King,* 344 Pa.Super. 78, 496 A.2d 16 (1985)(citations omitted). The Superior Court went on to say, "a party [is] bound to his stipulation: concessions made in stipulations are judicial admissions, and accordingly may not later in the proceeding be contradicted by the party who made them." *Id.* 344 Pa.Super at 89.

In the instant case, Plaintiff testified that no one from Home Depot called him after the accident to find out how he was doing. (N.T. 10/15/02, p. 124). On defense counsel's cross examination, Plaintiff was on the verge of testifying concerning a settlement offer when Plaintiff's counsel objected and requested a side bar conference. (N. T. 10/15/02, p. 125). During the side bar, defense counsel initially offered to withdraw his question, but then voluntarily stipulated with opposing counsel that no one from Home Depot called Plaintiff following his accident to inquire as to the accident or about Plaintiff's injuries. (N. T. 10/15/02, pp. 126, 128).

Therefore, since the record clearly indicates that parties voluntarily agreed to stipulate to the above mentioned fact, Defendant's request for a new trial is denied.

3. Exclusion of prior injuries

Defendant asserts that evidence of Plaintiff's prior carpel tunnel syndrome or cubital tunnel syndrome was "relevant to the jury's assessment of the credibility of Dr. John M. Hood." *See, Defendant's Brief in Support of Post Trial Motions, p. 28.* As stated above, the decision to admit or exclude evidence is a matter "within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. An abuse of discretion requires prejudice, partiality, bias, ill-will, or misapplication of law." *Rogers v. Johnson & Johnson Products, Inc.,* supra. Furthermore, the Pennsylvania Supreme Court has long held that a witness cannot be impeached on collateral matters. *Commonwealth v. Petrillo,* 341 Pa. 209, 19 A.2d 288 (1941). In *Petrillo, supra,* the Supreme Court stated:

> No witness can be contradicted *on everything he testifies* to in order to 'test his credibility.' The pivotal issues in a trial cannot be 'side-tracked' for the determination of whether or not a witness lied in making a statement about something which had no relationship to the case on trial. The purpose of trials is not to determine the ratings of witnesses for general veracity. A witness can be contradicted only on matters germane to the issue trying. There is no rule more firmly established than this: 'No contradiction shall be permitted on collateral matters.'

Id at 223. The Supreme Court in *Petrillo, supra,* continued in its opinion by quoting from 3 Wigmore (3rd ed.), § 1003, which states, "[t]he only true test [of "collateralness"] is... 'Could the fact, as to which error is predicated, have been shown in evidence for any purpose independently of the contradiction?'"

In a more recent case, *Papa v. Pittsburgh Penn-Center Corp.,* 421 Pa. 228, 218 A.2d 783 (1966), the Pennsylvania Supreme Court adopted the opinion of the Honorable David Olbum of the Court of Common Pleas for Allegheny County and affirmed a judgment in favor of the plaintiff in a fall-down case. In *Papa, supra,* the trial court stated:

> [T]he alleged prior fall in the instant case was a collateral matter. Independently of the contradiction, defendant was not entitled to introduce evidence that the wife-plaintiff simply had fallen on a prior occasion. Whether plaintiff had fallen once or a dozen times, *without more,* was not material to the issue being tried. Testimony concerning any prior fall was not admissible for any purpose unless the injuries from that alleged accident could be connected to those claimed in the present suit, so as to raise the inference of a preexisting condition. Defendant did not offer to prove any such connection.

See, Papa v. Pittsburgh Penn-Center Corp., 38 Pa. D. & C.2d 756 (1965).

In the instant case, Plaintiff had undergone a carpel tunnel release surgery to each wrist approximately eight years before the accident. He had also undergone a cubital tunnel release approximately six years before the accident. Plaintiff did not attempt to relate any aggravation of his carpal tunnel or cubital tunnel syndrome to the accident, nor did his physician offer any such testimony. Dr. Hood, in his expert medical opinion, stated that plaintiff's wrist injury and subsequent fusion operation were caused by the accident. (D.T. Dr. Hood, pp. 14, 25). In addition, Dr. Hood stated that Plaintiff's prior carpal tunnel and cubital tunnel release did not contribute to his wrist injury caused by the accident. Importantly, Defendant offered no testimony to refute Plaintiff's assertion that the left wrist fusion was necessitated by the accident. In this case, any evidence that Plaintiff suffered from pre-existing carpal tunnel syndrome or cubital tunnel syndrome was not relevant and would have only served to confuse the jury. Therefore, the Court properly excluded evidence of prior injuries where there was no evidence that the prior injuries were related to the injuries in the instant case. Thus, Defendant's request for a new trial is denied.

E. Whether the Court properly denied Defendant's Motions in Limine with regard to Plaintiff's expert witnesses.

1. Dr. Thomas

Defendant asserts that Dr. Thomas should have been precluded from testifying because "Dr. Thomas did not causally relate the accident to the later back injuries and surgery...." *See, Defendant's Brief in Support of Post Trial Motions, p. 27.* The degree of medical certainty necessary to prove causation was reviewed by the Superior Court in *Kravinsky v. Glover,* 263 Pa.Super. 8, 396 A.2d 1349 (1979). The Court in *Kravinsky* stated:

When a party must prove causation through expert testimony the expert must testify with "reasonable certainty" that "in his 'professional opinion, the result in question did come from the cause alleged.'" An expert fails this standard of certainty if he testifies "'that the alleged cause "possibly", or "could have" led to the result, that it "could very properly account" for the result, or even that it was "very highly probable" that it caused the result.'

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

(citations omitted). See also, Kovach v. *Cent. Trucking, Inc.,* 808 A.2d 958 (Pa.Super. 2002) (quoting with approval the foregoing language from *Kravinski, supra,).*

In the instant case, after Dr. Thomas stated his clinical findings and Plaintiff's treatment history, the following discussion took place:

[Attorney]. Doctor, do you have an opinion based on your treatment, based on your knowledge of Mr. Henry, do you have an opinion within a reasonable degree of medical certainty as to whether Mr. Henry's neck and back complaints were caused by the motor vehicle accident which occurred in June of 1998?

[Dr. Thomas]. Yes, they were.

[Attorney]. Your opinion is what, Doctor?

[Dr. Thomas]. My opinion is that they were caused by the accident.

[Attorney]. Doctor, do you have an opinion within a reasonable degree of medical certainty as to whether the cervical fusion which Mr. Henry

underwent in February of 2000 was caused by and made necessary by the motorcycle accident that he was involved in June of 1998?

[Dr. Thomas]. Yes it was. I felt the accident was a cause of his need to have surgery on his neck and fusion.

[Attorney]. Doctor, likewise I'd like to ask you about the lumbar surgery which Mr. Henry underwent.

Do you have an opinion within a reasonable degree of medical certainty as to whether the automobile accident which he - motorcycle accident which he was involved in June of 1998 caused him to undergo the lumbar surgery?

[Dr. Thomas]. The change in lumbar disk at L/3-4 and L/4 did lead to spinal stenosis and led to the decompression at those levels. I thought that was related to the accident as well.

(D.T. Dr. Thomas, pp. 43-44).

A review of the record demonstrates that Dr. Thomas's expert medical opinion met the standard necessary to establish causation. When taken in its entirety, Dr. Thomas's expert medical opinion expressed reasonable certainty that the accident was a substantial factor in bringing about Plaintiff's injuries and subsequent surgeries. Dr. Thomas did not base his opinion on mere conjecture or speculation. Dr. Thomas unequivocally stated that it was his opinion that the accident caused damage to neck and back. He did not testify that the alleged accident "possibly," or "could have" led to Plaintiff's injuries and late surgeries, that it "could very properly account" for the result, or even that it was "very highly probable" that it caused the result. When asked whether Plaintiff's cervical fusion was related to the motorcycle accident, Dr. Thomas stated clearly, "Yes it was. I felt the accident was a cause of his need to have surgery on his neck and fusion." When asked whether the motorcycle accident caused Plaintiff to undergo lumbar surgery, Dr. Thomas explained, "[t]he change in lumbar disk at L/3-4 and L/4 did lead to spinal stenosis and led to the decompression at those levels. I thought that was related to the accident as well." Therefore, Dr. Thomas's expert opinion regarding the issue of causation was adequately stated to a degree of medical certainty so as to be properly admissible at trial. Thus, Defendant's request for a new trial is denied.

2. Jay Jarrell

Defendant asserts that the Court erred in denying Defendant's Motions in Limine to preclude the testimony of J.K. Jarrell, an economist called by Plaintiff to testify concerning he [sic] wage loss. *See, Defendant's Brief in Support of Post Trial Motions, p. 25*. Defendant sought to exclude the testimony of Mr. Jarrell because he was asked to assume that Plaintiff was disabled and unable to work. Defendant asserts that, "the physicians

who offered testimony in this matter found that Mr. Henry was permanently disabled from any gainful employment. Rather, Dr. Hood specifically testified that Mr. Henry could no longer operate a crane." *Id.*

In the instant case, Dr. John Hood, a board certified orthopedic hand surgeon who performed a fusion of Plaintiff's, offered the following expert medical opinion:

> [Attorney]. Did you form an opinion and do you have an opinion within a reasonable degree of medical certainty as to whether or not Mr. Henry is disabled because of the wrist injury and the wrist fusion which he underwent?
>
> [Dr. Hood]. Yes.
>
> [Attorney]. What is your opinion?
>
> [Dr. Hood]. My opinion is that the wrist injury and the subsequent treatment has disabled him from his ability to be gainfully employed in manual labor activities.

(D.T. Dr. Hood, p. 29).

When questioned further, Dr. Hood elaborated on his expert medical opinion as follows:

> [Attorney]. Doctor, when you say you're pessimistic about his ability to go back to work you're just talking about the wrist injury alone?
>
> [Dr. Hood]. Yes, sir
>
> [Attorney]. Okay. If you throw on top of that some of the other surgeries which Mr. Henry has undergone to his ankles, to his shoulders, to his neck, to his back, his cervical fusion, surgeries to his knees, do think he's ever going to be able to work?
>
> [Dr. Hood]. I would be surprised if he did.

(D.T. Dr. Hood, p. 49).

In addition, Dr. Thomas testified that as a result of plaintiff's neck and back injuries he is permanently disabled from his job as a crane operator. (D.T. Dr. Thomas, pp. 46-48). As quoted above, Defense counsel conceded and judicially admitted that plaintiff was in fact disabled. Defense counsel in his closing statement stated, "It is not Home Depot's position, nor have we argued in this case, that Mr. Henry is not disabled. We acknowledge he is disabled." (N. T. 10/17/02, pp. 37-38).

Furthermore, before Mr. Jarrell was asked to give his expert opinion regarding Plaintiff's future lost wages, Plaintiff's counsel made clear to the jury that his opinion included particular assumptions based on the evidence presented at trial. Specifically counsel stated:

> Doctor, for my question I'd like you to make certain assumptions. I would like you to assume that David Henry's doctors have disabled

> him from working as a crane operator at General Electric, that he is permanently disabled from that position and will never return to that position at general electric, I'd like you to assume those facts.

(N.T. 10/16/02, pp. 63-64). Based on this hypothetical, Mr. Jarrell concluded that Plaintiff would sustain a future loss of $464,926.00, and a total of $526,589 in past and future wages and benefits. (N.T. 10/16/02, pp. 65, 67). Similarly, Defense counsel asked Mr. Jarrell to assume, "if it were established that Mr. Henry's disability is not related to the accident, your economic loss evaluation wouldn't show what Mr. Henry's economic loss was as a result of this accident, would it?" (N. T. 10/16/02, p. 72). Mr. Jarrell responded that the loss would be the same, but it would "not be attributable to the accident." (N.T. 10/16/02, p. 72).

After a review of the record, Defendant's complaint regarding Mr. Jarrell's expert opinion and the scope of a hypothetical question has been addressed by the Pennsylvania Supreme Court in *Gillman v. Media,* 224 Pa. 267, 73 A. 342 (1909). In *Gillman, supra,* Justice Mestrezat opined:

> Where the facts are admitted or proved by evidence which is not conflicting, an expert may be asked his opinion upon such facts. As, however, it is the province of the jury to determine the facts, an expert cannot be asked his opinion upon the whole evidence in the case where that is conflicting. But a party may state specifically the particular facts he believes to be shown by evidence or such facts as the jury would be warranted in finding from the evidence, and ask the opinion of the expert on such facts, assuming them to be true. The other side may likewise put a hypothetical question based upon such facts as he alleges are shown by the evidence or the jury would be justified in finding from the evidence. Neither side is required in putting the hypothetical question to include therein any other facts than those which he may reasonably deem established by the evidence. The purpose of a hypothetical question is to elicit from the expert an opinion upon facts either admitted or established by the evidence, and the facts upon which the question is predicated should be clearly stated so that the jury may know upon what the opinion is based.

Id. at 274.

The record shows that defense counsel had the opportunity to cross-examine the Plaintiff's expert fully and fairly on the basis for the opinions which he rendered. In particular, defense counsel was able to show through cross-examination that if the facts established that Plaintiff's disability was not caused by the motorcycle accident, then Plaintiff's resulting economic loss would not be attributable to the accident either. Certainly, such cross-examination was quite effective and beneficial to the defense in mitigating the impact of Mr. Jarrell's opinion on that point.

Therefore, the assumptions Mr. Jarrell was asked to make in calculating Plaintiff's economic loss were based on facts that could be reasonably shown by the evidence in the record. As this Trial Court explained to the jury in its charge, it is for the jury to determine whether or not the assumptions upon which an expert bases his opinions are valid. Thus, the Court did not err by allowing the witness to answer the hypothetical questions posed by either counsel. Accordingly, Defendant's request for a new trial is denied.

F. Whether the Court properly denied Defendant's request for a third independent medical exam.

Defendant asserts that President Judge William R. Cunningham erred in refusing Defendant's pre-trial request for a third independent medical examination to investigate the injuries to Plaintiff's wrist. Physical and mental examination of persons are governed by Pennsylvania Rule of Civil Procedure 4010. Rule 4010 states:

> (a)(l) As used in this rule, 'examiner' means a licensed physician, licensed dentist or licensed psychologist.
>
> (2) When the mental or physical condition of a party, or of a person in custody or under the legal control of a party, is in controversy, the court in which the action is pending *may order* the party to submit to a physical or mental examination by an examiner or to produce for examination the person in the party's custody of legal control.
>
> (3) The order may be made only on a motion for good cause shown and upon notice to the persons to be examined and to all the parties and shall specify the time, place, manner and conditions and scope of the examination and the person or persons by whom it is made.

42 Pa.C.S. § 4011. (emphasis added).

Pursuant to Rule 4010, a court is only authorized to grant a motion for physical or mental examination where the requisite cause is shown to exist. Whether good cause has been established is a determination at the discretion of the court. *John M. v. Paula T.*, 524 Pa. 306, 571 A.2d 1380 (1990), cert. denied, 498 U.S. 850.

In the instant case, Plaintiff had already traveled to Pittsburgh, Pennsylvania, on two separate occasions in order to be examined. The first examination was conducted by Dr. Paul Liefeld, a board certified orthopedic surgeon, on January 11, 2002. Prior to the exam, Defendant had possession of all of Plaintiff's medical records and depositions which documented Plaintiff's complaints of wrist pain following the accident and provided it to Dr. Liefeld. Following the exam, Dr. Liefeld produced a report indicating that he examined Plaintiff's wrists. Furthermore, Dr. Liefeld admitted in his trial deposition that he had reviewed a copy of Plaintiff's deposition and, therefore, knew that Plaintiff had been having wrist

problems for at least the past eight months. (D.T. Dr. Liefeld, pp. 87-88). Therefore, since Defendant and its IME had ample opportunity to investigate and address the injuries to Plaintiff's wrist, but failed to do so, the Court did not abuse its discretion refusing to compel Plaintiff to submit to a third independent examination. Thus, Defendant's request for a new trial is denied.

G. Whether the Court properly granted Plaintiff's Motion to Dismiss Defendant's truck driver, Timothy Rollinger.

Defendant asserts that "the dismissal of Timothy Rollinger operated to the prejudice of the remaining Defendant, Home Depot." As stated in *Tyler, supra,* "a party [is] bound to his stipulation: concessions made in stipulations are judicial admissions, and accordingly may not later in the proceeding be contradicted by the party who made them." *Id.* 344 Pa.Super at 89.

In the instant case, Defendant signed a stipulation stating, "[t]he undersigned, counsel for the parties involved in the above-captioned litigation, hereby stipulate to discontinue the above-captioned litigation as to Timothy M. Rollinger." As such, Defendant cannot contradict this signed stipulation. In addition, since Defendant did not enter a timely objection on the record, this issue is waived. Therefore, the Court properly accepted the parties' stipulation to voluntarily dismiss all claims against Timothy Rollinger. Thus, Defendant's request for a new trial is denied.

H. Whether the Court should grant a new trial based on alleged jury irregularities reported in the local newspaper.

Defendant claims that there were "potential" juror irregularities. After the verdict was read in open court, counsel for Defendant requested that the jury be polled. (N.T. 10/18/02, p. 54). Each juror was asked in turn, "Is the verdict as read your verdict?" (N.T. 10/18/02, pp. 54-56). Each juror answered yes. (N. T. 10/18/02, p. 54-56).

Defendant does not assert that there was any misconduct on the part of the jury or that the jury was exposed to any extraneous influence. Rather, Defendant points to a newspaper article, where an unnamed juror indicated that he and another juror did not agree with the verdict. However, it has long been the law of the Commonwealth of Pennsylvania that a jury is not permitted to impeach its own verdict. *Friedman v. Ralph Brothers, Inc.,* 314 Pa. 247, 171 A. 900 (1934); *Wolf v. Riggle,* 407 Pa. 172, 180 A.2d 220 (1962). In *Carter v. United States Steel Corporation,* 529 Pa. 409, 604 A.2d 1010 (1992), the Pennsylvania Supreme Court stated:

> The rule in Pennsylvania, as well as in a majority of jurisdictions, is that a juror is incompetent to testify as to what occurred during deliberations. *Pittsburgh National Bank v. Mutual Life Insurance Company,* 493 Pa. 96, 425 A.2d 383 (1981). This rule is often referred to as the 'no impeachment' rule. However, in order to accommodate

> the competing policies in this area, a narrow exception has been recognized. The exception permits 'post trial testimony of extraneous influences which might have affected [prejudiced] the jury during deliberations.' *(Id.* at 493 Pa. 101, 425 A.2d 383). Under this exception, the juror may testify only as to the existence of the outside influence, but not as to the effect this outside influence may have had on deliberations. *Pittsburgh National Bank, citing Commonwealth v. Zlatovich,* 440 Pa. 388, 269 A.2d 469 (1970). Under no circumstances may jurors testify regarding their subjective reasoning processes.

Id. at 415.

This Trial Court accepts the verdict of the jury as read in open court, and disregards the alleged statement of a purported, but unnamed juror. Therefore, Defendant's request for a new trial on this basis is meritless. Accordingly, Defendant's request for a new trial is denied.

For all of the foregoing reasons, the Trial Court enters the following ORDER:

ORDER

AND NOW, to-wit, this 27th day of January, 2003, after consideration of Defendant Home Depot USA, Inc., t/d/b/a The Home Depot's Post-Trial Motions, Plaintiff's Motion in Opposition, briefs and argument from all counsel, it is hereby **ORDERED**, **ADJUDGED AND DECREED**, that Defendant Home Depot's Post Trial Motions are DENIED for the reasons as set forth in the foregoing Opinion, dated January 27, 2003.

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

DR. TROY JONES and HEATHER JONES
v.
SCRIPTO-TOKAI CORPORATION and WAL-MART STORES, INC.

DISCOVERY/EXPERTS

Rule 4003.5(a)(2) of the Pennsylvania Rules of Civil Procedure permits the court, upon cause shown, to order further discovery by other means of facts known and opinions held by an expert, otherwise discoverable under the provisions of Rule 4003.1 and acquired or developed in anticipation of litigation or for trial. Such further discovery is subject to restrictions as to scope and such provisions concerning fees and expenses as the court may deem appropriate.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 13988-2001

Appearances: Gregory P. Zimmerman, Esquire and Gabriel J. Oros, Esquire for the Plaintiffs
Paul R. Robinson, Esquire and Carl A. Eck, Esquire for the Defendants

OPINION

Bozza, John A., Judge

This is a civil action involving a claim that a lighter manufactured and/or distributed by the defendants was defective. It is alleged that the plaintiffs' four-year-old son used the lighter to start a fire in their home. With the exception of discovery this action was stayed while certain issues were being resolved in the appellate courts.

Discovery has been a problem. Most recently the parties have been unable to agree as to whether the plaintiffs' expert, Brian Gray, is subject to deposition and, if so, whether the defendants should be obligated to pay the costs. In addition Scripto-Tokai and Wal-Mart have requested that plaintiffs make available for inspection various items that were removed by Mr. Gray from the scene of the fire that is the subject of the parties' lawsuit. Plaintiffs have indicated that they would like those items to be inspected only in Mr. Gray's office. Scripto-Tokai does not care for that idea. So the parties find themselves in Court seeking a wise resolution of this profound dispute.

Like approximately ninety (90%) percent of all civil lawsuits, this one is likely to be resolved without resort to trial. If it does find its way into a courtroom, the parties' respective litigation teams will have to address relatively straightforward issues of product liability. Experts will likely be called to testify concerning the character of the lighter and its need for "childproof" design. The cause of the fire may be at issue as well, perhaps

requiring further expert testimony. The jury will decide whether a defective lighter caused the fire. Such a trial will probably last no more than two or three days. Unfortunately, the journey towards getting there has already taken more than a year and has required judicial intervention to resolve two routine discovery matters and a considerable waste of resources.[1]

At issue now are matters which should be, and almost always are, resolved with a modicum of discussion between attorneys of good will who are expected to not only have legal acumen, but also good practical judgment sufficient to avoid unnecessary conflict and expense. How would such attorneys answer the following questions?

1. In a case in which the cause of a fire may well be at issue, should a party accused of being responsible for the fire be allowed to examine evidence removed from the scene by an expert employed by the accuser?

   Answer: Of Course

2. Is there a need to assure that an inspection of such items is carried out in a manner calculated to ensure the physical integrity of the items?

   Answer: Most Certainly

3. If there are costs associated with the inspection, should they be equitably apportioned?

   Answer: Yes, by all means.

4. Should information obtained by Mr. Gray during his investigation on behalf of the plaintiffs, be subject to discovery by deposition where defendants have agreed to limit their inquiry to what he observed upon his inspection of the premises?

   Answer: Yup. I consulted Rule 4003.5(a)(2) and this appears to be reasonable.

5. Should the defendant be expected to pay the cost of Mr. Gray's deposition?

   Answer: That sounds fair.

Surely these are questions that could be resolved with very little effort by attorneys mindful of the big picture and not preoccupied with the

[1] In the first dispute, the parties could not agree on a procedure to have the lighter examined.

competitive minutia of the litigation process.

Unfortunately, there is something about the character of the present dispute, the parties and/or the lawyers, that has prevented a dispassionate and reasoned approach. So, in an effort to avoid further difficulties, the Court concludes that the parties need a time-out. An appropriate Order follows.

ORDER

AND NOW, to-wit, this 7th day of February, 2003, upon consideration of defendant's Motion to Compel Production of Evidence and the Deposition of Brian Gray, and Motion for Sanctions and plaintiffs' Reply to defendant's Motion to Compel, Reply to Motion for Sanctions, and plaintiffs' Motion for Protective Order and hearing thereon, it is hereby **ORDERED, ADJUDGED and DECREED** that the Motions are **GRANTED** to the extent as set forth below. In all other respects, the parties respective requests will be **DENIED**. The parties shall have twenty (20) days to comply with the requirements of this Order. **No further discovery of any kind shall be allowed until such time that the stay is lifted.**

1. The defendants are entitled to have access to evidence removed from the scene by the Jones' expert fire investigator.

2. The items may be initially examined at the offices of Mr. Gray. If further testing requiring the removal of the items is necessary, then the defendants shall be responsible for maintaining their physical integrity and the costs associated with their removal.

3. The plaintiffs shall make available for deposition Mr. Brian Gray as provided by Rule 4003.5(a)(2), with inquiry being limited to his observations during his inspection, accumulation of evidence, discussion with the plaintiffs, and other factual matters, and not for the purpose of obtaining information concerning his expert opinion.

4. Because the defendants believe it is necessary to obtain certain factual information through deposition and deviate from the normal discovery limitations, they shall be required to pay the costs of Mr. Gray's services associated with the taking of his deposition.

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

COMMONWEALTH OF PENNSYLVANIA
v.
DEVONNE S. WILLIAMS, Defendant

CRIMINAL PROCEDURE/AUTOMOBILE SEARCHES/WARRANTLESS

A police officer may conduct a traffic stop when the officer has articulable and reasonable grounds to suspect a violation of the Motor Vehicle Code.

Where a police officer may have initially had reasonable grounds to stop a vehicle because the officer believed the driver to be an individual known to be unlicensed, but learns upon stopping the vehicle that he had misidentified the driver, the officer no longer has reasonable grounds to suspect that the driver was unlicensed.

A violation of the Motor Vehicle Code is not found where the driver activates the right turn signals but does not make a right turn. The acts of the defendant in turning on the right turn signal but continuing straight therefore do not constitute reasonable grounds for a vehicle stop.

There having been no reasonable grounds for the police officer to believe defendant violated any provision of the Motor Vehicle Code, the stop of the defendant's vehicle was improper. The court therefore grants the motion to suppress evidence.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION Case No.: 2986 of 2002

Appearances: District Attorney's Office for the Commonwealth
Paul Susko, Esquire for the Defendant

OPINION

Anthony, J. February 10, 2003

This matter comes before the Court on Defendant's Motion to Suppress Evidence. After an evidentiary hearing on the matter and considering the arguments of counsel, the Court will grant the motion. The factual and procedural history is as follows.

On October 9, 2002 at approximately 6:00 P.M., Officers Donald Sornberger and Nick Stadler of the Erie Bureau of Police were on routine patrol in a marked police unit. The officers were traveling west on East 7th Street. As they approached the intersection of East 7th and Reed Streets, Officer Sornberger noticed a vehicle coming south on Reed Street and approaching the same intersection. Officer Sornberger was able to see the driver and believed him to be Darryl Henderson, a person known to him who did not possess a valid driver's license. The driver was wearing a light blue cap as Darryl Henderson often did. However, Officer Sornberger had never seen Darryl Henderson drive this particular vehicle.

Officer Sornberger also noticed that the vehicle's right turn signal was activated. Officer Sornberger proceeded through the intersection of 7th

and Reed and waited for the vehicle to turn onto East 7th behind him so that he could get a better look at the driver in the rearview mirror. However, the vehicle did not turn right onto East 7th Street, but rather continued straight on Reed Street.

Officer Sornberger turned his vehicle around and saw Defendant turn left at the next intersection at what Officer Sornberger described as a high rate of speed. Defendant parked the car and got out of the vehicle. Officer Sornberger instructed Defendant to get back into the vehicle. Because the passenger had moved over to the driver's side of the vehicle, Defendant re-entered on the passenger side of the car. As Defendant turned to get back into the car, Officer Sornberger realized that he was not Darryl Henderson as he had previously believed. Nonetheless, Officer Sornberger proceeded with a routine traffic stop.

Officer Sornberger approached the driver side of the vehicle while Officer Stadler approached the passenger side of the vehicle. Officer Sornberger detected a strong odor of marijuana emanating from the vehicle. Neither Defendant nor his juvenile passenger could provide the police officers with a valid license. Officer Stadler had Defendant step out of the vehicle and asked him if he had anything the officer should know about. Defendant replied that he had a bag of weed. Officer Stadler recovered the bag of marijuana and placed Defendant under arrent.

Officer Sornberger asked Defendant if he would consent to a search of the vehicle. He read Defendant a consent to search form which Defendant appeared to understand. Officer Sornberger found a large and a small bag of marijuana under the front passenger seat of the vehicle.

Defendant was charged with Possession With Intent to Deliver, Paraphernalia, Turning Movements and Required Signals, Drivers Required to Be Licensed, and Driving While Privilege is Suspended or Revoked. Defendant filed the instant Motion to Suppress Evidence. The Court held an evidentiary hearing at which all parties were represented.

Defendant argues that officers illegally stopped his car because he had not committed any traffic violations. Additionally, he argues the consent to search the car was illegal because it was obtained under duress and because the vehicle did not belong to Defendant, but was a vehicle that had been leased to his cousin.

It is well established that a police officer may conduct a traffic stop when he has articulable and reasonable grounds to suspect a violation of the motor vehicle code. *See* 75 Pa.C.S.A § 6308(b); *Commonwealth v. Whitmyer*, 542 Pa. 545, 668 A.2d 1113 (1995). When asked on what basis he had stopped the vehicle, Officer Sornberger replied that he had reasonable and articulable grounds to stop Defendant on the basis that he believed he was an unlicensed driver. While it may be true that Officer Sornberger initially had reasonable grounds to stop the vehicle on the basis that he believed Defendant to be Darryl Henderson, an unlicensed

driver, this reasonable basis vanished when Officer Sornberger realized that Defendant was not Henderson. Officer Sornberger did not know Defendant by sight, and therefore had no reason to believe that Defendant was an unlicensed driver. Despite the fact that Officer Sornberger's own testimony established that he knew the driver was not Henderson before Defendant stepped back into the car, the officers approached the vehicle and initiated a routine traffic stop.

Officer Sornberger then stated that he also had reasonable and articulable grounds to stop Defendant's vehicle on the basis that he had violated section 3334 of the Motor Vehicle Code relating to turn signals. Specifically, Officer Sornberger believed Defendant was in violation of this particular section because his turn signal was flashing, but Defendant drove straight through the intersection rather than turning as indicated. Section 3334 of the Vehicle Code provides:

> **§ 3334. Turning movements and required signals**
>
> **(a) General rule**.-Upon a roadway no person shall turn a vehicle or move from one traffic lane to another or enter the traffic stream from a parked position unless and until the movement can be made with reasonable safety nor without giving an appropriate signal in the manner provided in this section.
>
> **(b) Signals on turning and starting**.-At speeds of less than 35 miles per hour, an appropriate signal of intention to turn right or left shall be given continuously during not less than the last 100 feet traveled by the vehicle before turning. The signal shall be given during not less than the last 300 feet at speeds in excess of 35 miles per hour. The signal shall also be given prior to entry of the vehicle into the traffic stream from a parked position.
>
> **(c) Limitations on use of certain signals.**- The signals required on vehicles by section 3335(b) (relating to signals by hand and arm or signal lamps) shall not be flashed on one side only on a disabled vehicle, flashed as a courtesy or "do pass" signal to operators of other vehicles approaching from the rear, nor be flashed on one side only of a parked vehicle except as may be necessary for compliance with this section.
>
> **(d) Discontinuing turn signals.**- Turn signals shall be discontinued immediately after completing the turn or movement from one traffic lane to another traffic lane.

Nothing in this section indicates that a person commits a violation when he fails to make a turn when his turn signal is indicated. The Commonwealth argued that Defendant could have been in violation of subsection (d) for failing to discontinue a signal; however there was no testimony indicating that Defendant had made a right hand turn and then

failed to discontinue his signal. The testimony indicated that the officers saw him driving south on Reed Street. Neither officer testified that he observed Defendant make a right hand turn. Thus, Officer Sornberger did not have articulable and reasonable grounds to believe that Defendant had violated this section of the motor vehicle code. Accordingly, the Court finds that the stop of Defendant's vehicle was improper.

Defendant also argued in his motion that the search of the vehicle should be suppressed because his consent was obtained by coercion and because the officers failed to obtain the consent of the vehicle's owner prior to the search. Because the Court has found that the stop of the vehicle was illegal, there is no need to discuss these contentions at length. Nonetheless, the Court notes that nothing presented at the hearing indicates that Defendant was coerced into signing the consent to search the vehicle. Additionally, Defendant did not advance the argument that officers needed the consent of the vehicle owner to search the car.

For all the foregoing reasons, the motion to suppress is granted.

ORDER

AND NOW to-wit, this 11 day of February 2003, it is hereby ORDERED and DECREED that Defendant's Motion to Suppress Evidence is GRANTED.

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

ESTHER M. VIDALE, Administratrix of the estate of VINCENT H. VIDALE, Plaintiff
v.
PENNSYLVANIA ELECTRIC COMPANY; DROTT MANUFACTURING, a division of J.I. CASE COMPANY; CASE POWER & EQUIPMENT COMPANY, now by merger and/or acquisition MONROE TRACTOR IMPLEMENT COMPANY; and RUPP RENTAL & SALES CORPORATION, Defendants
v.
CLIFTON W. SEE and SOUTHERN TIER ERECTORS, INC., Additional Defendants

KIMBERLY BRINKER, Administratrix of the estate of JOHN E. BRINKER, Plaintiff
v.
PENNSYLVANIA ELECTRIC COMPANY; DROTT MANUFACTURING, a division of J.I. CASE COMPANY; CASE POWER & EQUIPMENT COMPANY, now by merger and/or acquisition MONROE TRACTOR IMPLEMENT COMPANY; and RUPP RENTAL & SALES CORPORATION, Defendants
v.
CLIFTON W. SEE and SOUTHERN TIER ERECTORS, INC., Additional Defendants

CIVIL PROCEDURE/MOTION FOR SUMMARY JUDGMENT

Summary judgment may only be granted in cases where there is no genuine issue of material fact, and the moving party is entitled to summary judgment as a matter of law. Failure of a non-moving party to adduce sufficient evidence on an issue essential to a case, and on which that party bears the burden of proof, establishes the entitlement of the moving party to summary judgment as a matter of law. The Court must view the evidence in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine material fact must be resolved against the moving party.

TORTS/NEGLIGENCE

The standard of care imposed upon a supplier of electric power is among the highest recognized in the law of negligence. A supplier of electric current is bound not only to know the extent of the danger, but to use the very highest degree of care practicable to avoid injury to every one who may be lawfully in proximity to its wires, and liable to come accidentally or otherwise, in contact with them. *Brillhart v. Edison Light & Power Co.*, 368 Pa. 307, 312, 82 A.2d 44, 47 (1951).

TORTS/NEGLIGENCE

In determining the liability of an electric company for personal injury alleged to have been caused by negligence, the company is bound to anticipate only such combinations of circumstances, and accidents and injuries therefrom, as they may reasonably forecast as likely to happen.

There is no duty on the part of a supplier of electric power to keep the land underneath the lines under constant surveillance when the lines are properly installed and maintained.

TORTS/NEGLIGENCE

In order for constructive notice to be imposed on a power company for a dangerous condition, the condition must have existed a sufficient length of time for its due discovery and must be capable of ascertainment upon the inspection, observation or supervision legally required of the power company.

TORTS/NEGLIGENCE

Under Pennsylvania law, the "highest degree of care" standard for a supplier of electric power includes, in appropriate circumstances, the duty to warn an independent contractor of non-obvious dangers inherent in working in close proximity with high-tension wires.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 2289 - A - 1989

Appearances: James P. Lay, III, Esq. for Plaintiff Brinker
Mark E. Mioduszewski, Esq. for Penelec
Raymond J. Seals, Esq. for Plaintiff Vidale

OPINION

Bozza, John A., J.

This case is currently before the Court on a Motion for Summary Judgment filed by defendant, Pennsylvania Electric Company (hereinafter “Penelec"). The facts surround the accidental electrocution of Vincent H. Vidale and John E. Brinker on May 28, 1987, which occurred while the two men were relocating bundles of iron reinforcement bars on the construction site of the City of Corry’s Waste Water Treatment Plant. Mr. Vidale and Mr. Brinker were killed when the crane that was being used to transport the bars came into contact with a power line above the construction area.

Gerald Martin, job superintendent for Whipple-Allen, the general contractor on the project, testified that he told Mr. Vidale on the morning of the accident that the bars had to be moved within a few days. (R., p. 76). There was no requirement that the bars be moved on the day of the accident; rather, Mr. Vidale decided to accomplish this brief task before the end of the work day.[1] The plaintiffs do not dispute the characterization

[1] Specifically, Mr. Martin testified that the bars had to be moved within “a couple days. It was just directed it had to be moved within a couple days.” (R., p. 76). Donald Flex, a Whipple-Allen employee, testified that the work was completed so close to the end of the work day because “that’s the way Vince [Vidale] was. Vince wanted to get it done today. That was his attitude. As far as when there’s work to be done, it gets done today.” (R., p. 124).

of the events leading up to the accident as a "last minute" project; they merely state in their briefs in opposition to summary judgment that an accident occurred while the bars were being relocated. All parties agree, however, that Penelec personnel were not present at the construction site at the time of the accident.

On the date of the accident, Mr. Martin spoke with Mr. Vidale to determine where the reinforcement bars were to be placed. The bars had originally been delivered to a location on the construction site that was to be used for sludge drying beds; hence, the bars had to be moved to facilitate the excavation for the beds. Mr. Martin wanted the bars to be moved to a location along the north fence of the site, so the bars would be centrally located for future aspects of the construction project and so that the workers would not have to be concerned about any overhead power lines when working with the bars. Mr. Vidale, Mr. Brinker, and Mr. Flex began moving the bars approximately forty-five minutes to an hour before the scheduled close of the workday, using a crane operated by Clifton W. See, owner of Southern Tier Erectors, Inc. No one from Penelec was contacted, apparently because Mr. Martin had instructed the men to place the bars away from the power lines overhead and because the task would take a relatively short time to complete.

When the men began the task of moving the bars, they placed them along the west fence of the site, at a different location than had been pointed out by Mr. Martin. Mr. See testified that he picked up the first bundle of bars with the crane, and was attempting to be mindful of the overhead power lines. (R., p. 47).[2] Mr. See felt that he had ample room to place the bars in the spot Mr. Martin had chosen and proceeded to lift the bars with the crane. Mr. Vidale and Mr. Brinker motioned for Mr. See to lower the bars into the selected position, then signaled Mr. See to raise the bars again. Mr. See watched as Mr. Brinker and Mr. Vidale had a brief conversation, and then signaled Mr. See to move forward again. This decision by Mr. Brinker and Mr. Vidale meant that the bars were no longer to be placed in the position indicated by Mr. Martin. It was during this second movement of the crane that contact was made with the power lines. Mr. Brinker and Mr. Vidale were then electrocuted.

Summary judgment may only be granted in cases where there is no genuine issue of material fact, and the moving party is entitled to summary judgment as a matter of law. *Harleysville Insurance Co. v. Aetna*

[2] Donald Flex testified that the accident occurred while the parties were attempting to move a second or third bundle of bars. (R., p. 119). However, the remainder of his testimony is comparable to Mr. See's, in that Mr. Flex stated that Mr. Vidale chose to move the bars further than the original position chosen for the relocation and that the accident occurred following that decision. (R., p. 120). Mr. Flex further testified that he was in the process of asking Mr. Vidale why he had chosen a different area to place the bars when the accident occurred. (R., p. 120).

Casualty & Surety Co., 795 A.2d 383, (Pa. 2002). Where the non-moving party bears the burden of proof on an issue, that party may not rely on its pleadings to survive summary judgment. *Murphy v. Duquesne University of Holy Ghost,* 565 Pa. 571,777 A.2d 418 (2001). "Failure of a non-moving party to adduce sufficient evidence on an issue essential to a case, and on which that party bears the burden of proof, establishes the entitlement of the moving party to summary judgment as a matter of law." *Young v. PA Dept. of Transportation,* 560 Pa. 373, 744 A.2d 1277 (2000). Also, the Court must view the evidence in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine material fact must be resolved against the moving party. *Pennsylvania State University v. County of Centre,* 532 Pa. 142, 615 A.2d 303 (1992).

Upon viewing the evidence in the light most favorable to the plaintiffs, it is apparent that Penelec is entitled to summary judgment. The evidence in the record before the Court indicates that (1) Penelec was involved in the planning stages of the construction project; and (2) Penelec personnel were aware that cranes were being used on the construction site. However, these two facts are not sufficient to survive summary judgment.

A. Standard of Care

The standard of care imposed upon a supplier of electric power has been set forth by Pennsylvania courts as follows:

> the standard of care imposed upon a supplier of electric power, particularly when that power is supplied at high voltage, is among the highest recognized in the law of negligence. 'A supplier of electric current is bound not only to know the extent of the danger, but to use the very highest degree of care practicable to avoid injury to every one who may be lawfully in proximity to its wires, and liable to come accidentally or otherwise, in contact with them.' *Brillhart v. Edison Light & Power Co.,* 368 Pa. 307, 312, 82 A.2d 44, 47 (1951) [citations omitted]. 'That a transmission line is a dangerous instrumentality is recognized everywhere. No matter where located it is a source of grave peril and the law requires that the possessor of such an instrumentality exercise a high degree of care.' *Yoffee v. Pa. Power & Light Co.,* 385 Pa. 520, 536, 123 A.2d 636, 645 (1956).

Colloi v. Philadelphia Electric Co., 332 Pa. Super. 284, 292-293, 481 A.2d 616, 620 (1984).

Further, in determining the liability of an electric company for personal injury alleged to have been caused by negligence, "in the erection and maintenance of their poles, wires and other appliances, they are bound to anticipate only such combinations of circumstances, and accidents and injuries therefrom, as they may reasonably forecast as likely to happen." *Mirnek v. West Penn Power Co.,* 279 Pa. 188, 191-192, 123 A. 769, 770 (1924). There is no duty on the part of a supplier of electric power to

continually inspect their lines, thereby keeping the land underneath the lines under "constant surveillance," when the lines are properly installed and maintained. *Reed v. Duquesne Light Co.,* 354 Pa. 325, 331, 47 A.2d 136, 139 (1946).

Counsel for Mr. Vidale and Mr. Brinker argue that Penelec had constructive knowledge that cranes were being used near the power lines.[3] In order for constructive notice to be imposed on a power company, "the situation must not only have existed a sufficient length of time for its due discovery but it must also be capable of ascertainment upon the inspection, observation or supervision legally required of the one sought to be bound with such knowledge." *Reed v. Duquesne Light Co.*, 354 Pa. 325, 330,47 A.2d 136, 139 (1946). In *Reed,* the decedent was an employee of the American Bridge Company and was electrocuted when a cable from a crane contacted high tension wires over the area where he was working. When the lines were installed, the land under them was not used by the Bridge Company, and the power company was aware of this fact. *Id.,* 354 Pa. at 328-329, 47 A.2d at 138. However, as years went by, the Bridge Company used the land under the wires for storage, and used cranes under the wires for a period of six months leading up to the accident in question. *Id.* The Bridge Company never notified the power company that cranes were being used under the wires. *Id.* The cranes were used elsewhere on the Bridge Company's property, and although a power company representative would have seen the cranes on the property during periodic inspections, there was no way for the power company to know that the cranes were periodically used near the high tension wires. *Id.,* 354 Pa. at 330-331, 47 A.2d at 139. Following a verdict against the power company, the court granted judgment n.o.v. On appeal, the Pennsylvania Supreme Court found that there was no duty on the part of the defendant to conduct "constant surveillance" and affirmed the trial court's decision.

The present case is similar to *Reed,* in that the activities which led to the accident did not exist for a sufficient length of time such that Penelec could have discovered the situation upon inspection. Penelec's occasional presence at the construction site did not provide it with constructive notice that a crane would be used close to a power line on the date of the accident. The mere fact that Penelec was aware that cranes were being used somewhere on the construction site is not sufficient to conclude that it had notice of the somewhat spontaneous activity that gave rise to this tragic accident. The plaintiffs argue that the involvement of Penelec as so substantial that constructive notice should be imparted

[3] Although the plaintiffs originally claimed that Penelec had actual knowledge of the use of the cranes near the power lines, the plaintiffs have conceded that there is no evidence to support that assertion.

to Penelec. However, the factual record provides no support for this conclusion. Indeed, the only reasonable conclusion is that there was no way for Penelec to know when or where the crane would be used. The task that Mr. Vidale and Mr. Brinker were engaged in at the time of their deaths was spontaneous in nature, and Penelec did not have any knowledge of its occurrence.

The plaintiffs rely heavily on the case of *Ashby v. Philadelphia Electric Co.,* 328 Pa. 474, 195 A. 887 (1938), which involved the death of a bridge worker when a crane became electrified by a near-by high tension line. However, *Ashby* involved a very different fact pattern from the case presently before the Court. In *Ashby,* the power company was asked numerous times by the bridge construction company to remove and relocate its poles and wires because of their dangerous proximity to the bridge workers and cranes. *Ashby,* 328 Pa. at 476, 195 A.2d at 888. The poles and wires had to be moved to accommodate bridge work that was being conducted, as requests by the bridge company and a state highway inspector showed. *Id.* The power company complied with the requests and removed the poles, but replaced the poles shortly before the accident occurred. *Id.,* 328 Pa. at 477,195 A.2d at 888.

In the present case, there is no indication that the wires offered any impediment to the construction work on the project up to that point, even that which involved the use of a crane. At the time of argument on Penelec's Motion to Dismiss for Non Pros, counsel for Mr. Brinker stated that the plaintiffs have no evidence to establish that there was any request to relocate the lines which caused the accident.[4] Gerald Martin did testify that the lines would eventually have to be moved because the sludge drying bed buildings, when completed, would be too close to the lines overhead. (R., p. 102). However, at the time of the accident, the lines did not yet have to be relocated to accommodate the construction work.[5] Moreover, Penelec did not remove poles and wires and then replace them before construction work was completed, as occurred in *Ashby.*

Several other cases involve situations similar to the present case. In *Stark v. Lehigh Foundries, Inc.,* 388 Pa. 1, 130 A.2d 123 (1957), an employee of a crane company was electrocuted when the crane made contact with overhead power lines while the decedent was unloading railroad cars underneath for a railroad and siding company. The crane company had been hired for two days, and the accident occurred on the

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[4] R., p. 192. This refers to the testimony of Mr. Jack Harmon, a construction inspector at the site, who testified earlier that "someone" had requested that those particular lines be moved. Counsel stated that this testimony would not be offered in the case, since it could not be corroborated.

[5] A close reading of Mr. Martin's testimony indicates that any requests to de-energize or relocate wires were made **after** the accident had occurred. (See R., p. 102-103).

second day of work. *Stark,* 388 Pa. at 6, 130 A.2d at 127. The unloading of materials had taken place on the first day away from the power lines, and there was no requirement that the work proceed under the power lines. *Id.* The power supply company in this case argued that it had no notice that mobile cranes were being used under the power lines, since such use was occasional, and reasonable inspection would not have disclosed this use. *Id.,* 388 Pa. at 12-15, 130 A.2d at 130-132. Further, the power supply company argued that it had no duty to anticipate a dangerous condition created by third parties. *Id.* The plaintiffs attempted to impart constructive knowledge to the power supply company by virtue of the fact that power supply company employees drove past the site and had seen cranes being operated on the property prior to the accident. *Id.* Citing *Reed,* the Court agreed that there was no reason for the power company to anticipate the use of a crane near the power lines when there was ample room elsewhere on the property to unload the rail car. *Id.*

In the case presently before the Court, while the crane was needed to move the reinforcement bars, there was room elsewhere to place the bars that would have not taken the crane too close to the power lines. The lines in this case were properly maintained and located, and became unsafe due to a decision by Mr. Brinker and Mr. Vidale to proceed closer to the power lines than they had been instructed to do so. Penelec could not have anticipated either that the defendants would be conducting the activity in question or that the plaintiffs would, at the last minute, make a decision that would take the crane into such close proximity to the power lines.

In *Guglielmo v. Scotti & Sons, Inc.* 58 F.R.D. 413 (W.D. Pa. 1973) the decedent was electrocuted when the boom of his brick truck made contact with or came close to power lines overhead. In that case, a power company official had been at the site prior to the accident to ensure the safe use of a large crane at the jobsite. *Guglielmo,* 58 F.R.D. at 422. However, the brick truck was placed under the lines temporarily so the bricks could be unloaded, and the placement of the truck under the lines was temporary. *Id.* There was evidence that the truck could have been safely unloaded elsewhere on the site, and there was nothing to indicate that the power company could have known or should have known about the placement of the truck. *Id.* Citing *Reed,* the court noted that the power company has no duty of continuing surveillance and granted the power company's Motion for judgment notwithstanding the verdict. *Id.,* 58 F.R.D. at 423.

The case of *Guglielmo* is similar to the present case, in that the use of the crane for the relocation of the reinforcement bars was a temporary project, and was not supposed to occur near the wires. Mr. Martin testified that he gave instructions to have the bars moved away from the power lines, and Mr. See and Mr. Flex both testified that Mr. Vidale decided at the last minute to place the bars closer to the wires. There is nothing to indicate that the crane had to work that close to the lines, and

there is nothing to indicate that Penelec should have known about this use in that fashion. The plaintiffs described the contact of the power company in *Guglielmo* as an "isolated visit to a construction site," yet the visits by Penelec in the present case are no more isolated than the visits in *Guglielmo*. Although Penelec was present for the planning of the construction project, there is nothing in the record to indicate that Penelec could have known the circumstances under which a crane would be employed in proximity to the power lines.

Finally, the case of *Nationwide Mut. Ins. Co. v. Philadelphia Electric Co.,* 443 F. Supp. 1140 (E.D. Pa. 1977), is particularly instructive. In that case, a carpentry subcontractor's employee was electrocuted when the cable of a truck crane came in contact with overhead power lines while wood was being lifted on a construction site. The court noted that while the power company was aware that cranes were being used and that a four story building was being constructed, the power company did not have actual knowledge of the position and use of the crane on the day of the accident (citing *Stark* and *Dunnaway). Nationwide,* 443 F.Supp. at 1150-1151. There was no duty of the power company to keep the lines under constant surveillance, and no way for the power company to know that a crane would be operated directly under the wires in the manner which caused the accident. *Id.* The present case is analogous to this situation, in that it is apparent that Penelec did not know that a crane would be operated in the fashion that it was operated on the day of the accident.

B. Failure to Warn

The plaintiffs argue that even without constructive knowledge of the use of cranes near the power lines, Penelec should be held liable for a failure to warn of the danger of the nearby lines. However, a close reading of the cases relied on by the plaintiffs does not support their position.

Under Pennsylvania law, the "highest degree of care" standard for a supplier of electric power "includes, in appropriate circumstances, the duty to warn an independent contractor of **non-obvious dangers** inherent in working in close proximity with high-tension wires." *Colloi v. Philadelphia Electric Co.,* 332 Pa. Super. 284, 293, 481 A.2d 616, 620 (1984)(citations omitted)(emphasis added). The plaintiffs argue that the issue of whether Penelec breached its duty to warn should be submitted to the jury for resolution regardless of whether or not there is any evidence of Penelec's actual knowledge of the task leading up to the accident. In support of this argument, they point to *Colloi.*

In *Colloi,* an employee of an independent contractor was killed when his jackhammer came into contact with an underground electrical conduct, which he was totally unaware was present in the sidewalk below him. *Colloi,* 332 Pa.Super. at 289-290, 481 A.2d at 618-619. A power company employee was present at the time the work was being performed and had

all available maps and blueprints that would have showed the presence of the electrical conduct in the cement. *Colloi,* 332 Pa.Super. at 294, 481 A.2d at 621. The power company could not relieve itself of this duty by arguing that the independent contractor did not ask whether any electrical circuits were running under the sidewalk. *Id.* However, the duty to warn in *Colloi* was of **non-obvious** dangers, which is not the kind of danger that was present in the instant case. Here the overhead power lines were an open and obvious danger, and there is every indication that the decedents were aware of their presence and no evidence that the decedents thought the lines were de-energized, or insulated in any way. Indeed, the record indicates that Mr. See, Mr. Vidale, and Mr. Brinker worked under the assumption that the lines were energized and sought to avoid them by maintaining a minimum of ten feet from the lines. *See* Record, pp. 27-28, 32, 43, 45, 50, 137, 147. Hence, the duty to warn is not implicated in the instant case.

An appropriate Order shall follow

ORDER

AND NOW, to-wit, this 3 day of March, 2003, upon consideration of the defendant Pennsylvania Electric Company's Motion for Summary Judgment, and argument thereon, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** that the defendant's Motion is **GRANTED**.

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

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION
v.
G.L. MILLER t/d/b/a GARY MILLER CHRYSLER PLYMOUTH, INC.

APPEAL/LICENSE SUSPENSION/FAILURE TO ISSUE PROPER WORK ORDER

Pennsylvania Vehicle Equipment and Inspection Regulations require that "the vehicle owner shall be informed in writing on the repair order of any parts which, although in passing condition, the mechanic believes may become dangerous before the next inspection period. The brake and tire readings shall be indicated in writing on the repair order. 67 Pa. Code §175.29(f)(4). Miller's failure to include brake and tire readings for the front tires of the car on the work order constituted a failure to issue a proper work order.

APPEAL/LICENSE SUSPENSION/CARELESS RECORD KEEPING

According to inspection regulations, "[t]he owner of an inspection station is required to keep current inspection records at the inspection station for examination and audit by the inspection station supervisor and other authorized persons." 67 Pa. Code §175.29(a)(4). By his own testimony, Miller's service writer admitted that Miller engaged in careless record keeping, defined by Pennsylvania courts to mean "neglectful or inattentive." *Commonwealth, DOT, Bureau of Motor Vehicles v. Tutt*, 133 Pa. Cmwlth. 537, 542, 576 A.2d 1186, 1189 (1990).

APPEAL/LICENSE SUSPENSION

Inspection regulations provide that the Department "may suspend the certificate of appointment issued to a station which it finds is not properly equipped or conducted or which has violated or failed to comply with any of the provisions of this chapter or regulations adopted by the department." 75 P.S. §4724(a).

APPEAL/LICENSE SUSPENSION/ASSIGNMENT OF POINTS

Points may be assigned in lieu of a suspension where it is determined by the Department that "the station owner, manager, supervisor or other management level employee was without knowledge of the violation and should not have known of the violation." 67 Pa. Code 175.51(b). The station owner bears the burden of proof to show that proper supervision of the employee who committed the violation was provided, but that supervision could not have prevented the violation. *Id.*

APPEAL/LICENSE SUSPENSION/ASSIGNMENT OF POINTS

The Department is required to consider whether a station owner has demonstrated that it should receive an assessment of points in lieu of a license suspension. *See Strickland v. Commonwealth of Pennsylvania, DOT*, 574 A.2d 110 (Pa. Cmwlth. 1990).

APPEAL/LICENSE SUSPENSION/CARELESS RECORD KEEPING

Section 4724(c) was amended to require that "the Department prior to suspending a certificate of appointment of an official inspection station on the grounds of careless recordkeeping or the Court on appeal from a suspension may consider the volume of inspections conducted by the inspection station and provide to the owner or operator of the inspection station the opportunity to correct any inaccurate records. 75 P.S. §4724(c). This change, however was not enacted until after Miller had allegedly engaged in careless record keeping.

EVIDENCE/HABIT

Rule 406 of the Pennsylvania Rules of Evidence mandates that "evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to provide that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." Pa.R.Evid. 406. Miller did not present a witness who was familiar with Miller's inspection records and history in order to establish Miller's routine practice with respect to those records.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 11630 - 2002

Appearances: John R. Wingerter, Esquire for the Defendant
Chester J. Karas, Jr., Esquire for the Plaintiff

OPINION

Bozza, John A., J.

This case is currently before the Court on the 1925(b) Statement of Matters Complained of on Appeal filed by the defendant, G.L. Miller, t/d/b/a Gary Miller Chrysler Plymouth, Inc. (hereinafter "Miller"). The history of this case may briefly be summarized as follows. On April 19, 2002, the Commonwealth of Pennsylvania Department of Transportation (hereinafter "the Department") entered an Order of Suspension of Official Inspection Station, suspending Miller's Certificate of Appointment as an Official Safety Inspection Station for requiring unnecessary repairs, improper record keeping, and failure to issue a work order with required information. The total time of suspension for these violations was to be eight (8) months. On May 7, 2002, Miller filed an appeal from this Order to this Court.

On December 19, 2002, following argument on the appeal, the Court entered an Order sustaining the suspension in part and overruling the suspension in part. Specifically, the Court found that Miller required unnecessary repairs, engaged in careless record keeping, and failed to issue a proper work order containing required information. The Court

sustained the four (4) months suspension for unnecessary repairs, and the two (2) months suspension for failure to write a proper work order. The Court overruled the two (2) months suspension for improper record keeping, and instead ordered that an appropriate sanction in the nature of a warning should be imposed for careless record keeping. On January 7, 2003, Miller filed a Motion for Reconsideration, which was denied by the Court in an Order dated January 10, 2003. On January 17, 2003, Miller filed a Notice of Appeal to the Commonwealth Court of Pennsylvania, and filed a timely 1925(b) Statement of Matters Complained of on Appeal.

In its 1925(b) Statement, Miller asserts the Court erred on the following issues:

(1) in finding that Miller required unnecessary repairs for the purpose of inspecting the vehicle in question with regard to rear brake pads and rotors, rear tires and a ‘sway bar link’;

(2) in finding that Miller engaged in careless record keeping;

(3) in finding that Miller failed to issue a proper work order containing required information;

(4) in failing to permit Miller to present testimony and evidence on the issues of supervision of inspections and the attendant ramifications by the Department in failing to permit Miller to consent to the acceptance of points in lieu of suspension;

(5) in failing to permit Miller to present testimony and evidence concerning the awarding of points pursuant to Department Regulation 175.51(b);

(6) in failing to permit Miller to present testimony and evidence concerning the application of 75 P.S. §4724 to this matter;

(7) in failing to permit Miller to present testimony and evidence concerning a twenty-five (25) year history of inspecting motor vehicles and the 75,000 to 80,000 vehicles that had been inspected;

(8) in failing to permit Miller to present testimony and evidence concerning the Department’s failure to comply with *Strickland v. Department of Transportation,* 574 A.2d 110, 113 (Pa.Cmwlth. 1990);

(9) in failing to recognize that all of the errors alleged by the Department were at best correctable clerical errors and were not a basis for suspension of Miller’s inspection license;

(10) in failing to apply the law set forth in Pennsylvania Department of Transportation regulations and 75 P.S. §4724 to this case;

(11) in determining that the Department presented sufficient credible testimony to meet its burden of proof with regard to the three alleged violations (requiring unnecessary repairs, engaging in careless record keeping, and failing to issue a proper work order);

(12) in finding that the Department's evidence was sufficient to suspend the inspection license of Miller for a period of six months for first time violations without previous warnings and

in light of Miller's inspection history.

The facts surrounding the suspension of Miller's inspection license were developed at the time of argument on Miller's appeal. On July 9, 2001, Karen Wojciki took her vehicle, a 1996 Chrysler Sebring IX Convertible, to Miller's facility, the dealership where she had purchased the vehicle, for a Pennsylvania state vehicle safety inspection. Mrs. Wojciki left her vehicle there overnight, and called the next day to determine if her vehicle's inspection was finished. (H.T., 9/24/02, p. 8). Mrs. Wojciki was informed that her car would need approximately $1,100.00 in repairs to pass inspection, including a rear taillight bulb, rear tires, rear pads and rotors, and replacement of the left front sway bar link pin. (H.T., 9/24/02, p. 9-10). Mrs. Wojciki informed Miller that she could not afford all the repairs at the moment, but did permit Miller to replace the left front link pin because Miller had told her that the car was unsafe to drive without having the pin put in. (H.T., 9/24/02, p. 9-10). Mrs. Wojciki received a work order that included all of these repairs, but the work order contained no information concerning readings of her tires' tread depth or brake lining measurements. (H.T., 9/24/02, p. 11-12). Mrs. Wojciki testified that she was never verbally informed of those readings. (H.T., 9/24/02, p. 12).

Mrs. Wojciki, after consulting with her husband, determined that her vehicle did not have rear pads and rotors. (H.T., 9/24/02, p. 13). Mrs. Wojciki then contacted the Pennsylvania State Police, who referred her to Trooper Peter Harvey, a vehicle fraud investigator. (H.T., 9/24/02, p. 13). Trooper Harvey had Mrs. Wojciki schedule another inspection with Miller, and on July 26, 2001, Trooper Harvey met Mrs. Wojciki at Miller for the second inspection. (H.T., 9/24/02, p. 13). Mrs. Wojciki testified that she did not make any alterations to her vehicle from the time of the first inspection to the time of the second inspection, and only drove occasionally during that time. (H.T., 9/24/02, p. 14). At the second inspection, Trooper Harvey requested that Michael Nichols, the mechanic who first inspected the vehicle, conduct another inspection of the vehicle in his presence. (H.T., 9/24/02, p. 31). Trooper Harvey requested that Mr. Nichols produce his credentials, his inspection license and his operator's license. (H.T., 9/24/02, p. 31). Trooper Harvey then requested that Mr. Nichols perform the inspection as he normally would

do, and provided him with the prior work order. (H.T., 9/24/02, p. 32).

During the course of the second inspection, Trooper Harvey noted to Mr. Nichols that the vehicle was not equipped with rear brake pads and rotors. (H.T., 9/24/02, p. 33). Trooper Harvey testified that, in response, Mr. Nichols "merely shrugged his shoulders and made admission that yeah, that the vehicle was equipped with drum brakes on the rear." (H.T., 9/24/02, p. 33). The front brakes' lining measurements were sufficient to pass inspection, although they would need to be replaced in the near future. (H.T., 9/24/02, p. 33). The first inspection's work order did not contain any measurement for the front brakes. *Id.* The tire tread depths were adequate to pass the inspection when measured the second time, despite the fact that the tires were not changed from the first inspection. (H.T., 9/24/02, p. 34-35). The first inspection's work order did not contain any tire tread depth readings for the front tires. *Id.* Further, the sway bar link pin was examined, and Mr. Nichols stated that he replaced it during the first inspection because there was excessive movement in the pin. (H.T., 9/24/02, p. 37). However, Trooper Harvey explained to Mr. Nichols that excessive movement is not provided for in Department regulations as being a rejectable item for state inspection. (H.T., 9/24/02, p. 37). Based on the fact that the work order did not contain information concerning the tire tread depth and brake lining measurements for the front tires, Trooper Harvey testified that Miller's required state inspection records were incomplete. (H.T., 9/24/02, p. 46). Trooper Harvey also testified that the replacement of the link pin constituted unnecessary repairs. (H.T., 9/24/02, p. 63-64).

Miller repeatedly questions the sufficiency of the evidence which supports the Court's finding that Miller required unnecessary repairs, engaged in careless record keeping, and failed to issue a proper work order. (1925(b) Statement,¶¶ 1-3, 11-12). Based on the testimony offered at both hearings and importantly, the determination of the credibility of the witnesses, there was more than adequate evidence to support the Court's findings on these three issues.

Failure to Issue a Proper Work Order

Pennsylvania Vehicle Equipment and Inspection Regulations require that

> the vehicle owner shall be informed in writing on the repair order of any parts which, although in passing condition, the mechanic believes may become dangerous before the next inspection period. **The brake and tire readings shall be indicated in writing on the repair order.** (emphasis added)

67 Pa. Code §175.29(f)(4).

Trooper Harvey and Mrs. Wojciki both testified that the original work order received by Mrs. Wojciki did not contain any tire readings for the

vehicle's front tires, which clearly constituted a failure to issue a proper work order. In addition the repair order did not contain the brake readings of either the front or rear brakes. (H.T., 9/24/02, p. 27-29). Also, upon re-inspection, it was learned that the front brakes, although within specifications, would likely need to be replaced before the next inspection period and this was not noted on the work order as required. Further, the rear tires passed upon re-inspection, despite the testimony of Mrs. Wojciki that she did not replace the tires during the time between the two inspections. There was no evidence presented to the contrary concerning any of these facts, and therefore the evidence was sufficient to support the Department's case.

Improper Record Keeping

While there was insufficient evidence to show that Miller had engaged in improper record keeping, there was sufficient evidence to prove that Miller engaged in careless record keeping. According to inspection regulations, "[t]he owner of an inspection station is required to keep current inspection records at the inspection station for examination and audit by the inspection station supervisor and other authorized persons." 67 Pa. Code §175.29(a)(4). Kenneth Hinkle, Miller's service writer, testified that he is responsible for entering all information generated by the service technicians regarding each customer's order into a computer, so that the customer can have a receipt. (H.T., 9/24/02, p. 95). Mr. Hinkle testified that he processed Mrs. Wojciki's vehicle after it was dropped off and dispatched it to Mr. Nichols for service. (H.T., 9/24/02, p. 96). Mr. Hinkle noted that the inspection worksheet returned by Mr. Nichols indicated that the "front brakes were down to the rivets and the rotors were below specs... [and] the rear tires were dry rotted and cracking on the sidewall of the tire." (H.T., 9/24/02, p. 97).

After contacting Mrs. Wojciki and returning the vehicle to Mr. Nichols for the replacement of the left front sway bar link pin, Mr. Hinkle testified that he entered the recommendations of the technician into the computer. (H.T., 9/24/02, p. 99). However, Mr. Hinkle testified that he typed in "rear" instead of "front" when referring to the required repairs to the vehicle's brake pads and rotors. (H.T., 9/24/02, p. 99). Mr. Hinkle asserted that the rest of the information was correct; however, he based this assertion on the information provided by Mr. Nichols and not from his own observations of the vehicle. (p. 100-101)[1]. It is noteworthy that the inspection report prepared by Mr. Nichols for the first inspection

[1] It is questionable whether the other information was accurate. Upon subsequent inspection the front brakes, argued by Miller to be the ones actually defective, were found to be within specifications and did not require immediate repair.

contained very different information from the report prepared at the second inspection. There was no credible evidence that the owners altered the vehicle in any way during the time between the two inspections. Such marked differences between the two reports cannot be attributed to mere "clerical" error.

By his own testimony, Mr. Hinkle admitted that Miller engaged in careless record keeping, defined by Pennsylvania courts to mean "neglectful or inattentive." *Commonwealth, DOT: Bureau of Motor Vehicles v. Tutt,* 133 Pa. Cmwlth. 537, 542, 576 A.2d 1186,1189 (1990). In fact, the Court partially agreed with Miller, reducing the violation from improper record keeping to careless record keeping. Improper record keeping has been defined by Pennsylvania courts to mean "essentially inaccurate or incorrect." *Commonwealth, DOT, Bureau of Motor Vehicles v. Tutt,* 133 Pa. Cmwlth. 537, 542, 576 A.2d 1186, 1189 (1990). Here, the Court agreed that the evidence presented showed that Miller was merely careless in its record keeping, and modified the penalty accordingly.

Requiring Unnecessary Repairs

When Mrs. Wojciki called about the results of the inspection on her car, she was told that one of the reasons that her vehicle failed its inspection was because it needed a new "pin" and that it was "unsafe" to drive the car without it. She then authorized Miller to replace the pin. Trooper Harvey testified that Mr. Nichols, the mechanic who performed the original inspection, stated that the left front sway bar link pin was replaced because it had "too much movement". However, inspection regulations mandate that a sway bar should be rejected only if it is broken or missing. 67 Pa. Code §175.80(d)(3)(v). There is nothing in the regulations that mentions excessive movement and the replacement of the left front sway bar link pin for this reason constituted an unnecessary repair. Replacing the pin was obviously not required. Unfortunately, Miller incorrectly told Mrs. Wojciki that it had to be replaced immediately. There was no contrary evidence introduced.

Miller also told Mrs. Wojciki that the rear brake pads and rotors had to be replaced, even though the car in question did not have this type of rear brake mechanism. In this regard, it was Miller's position that the notation of "rear" was a clerical error and it was meant to be "front". Accepting that it was the result of a careless error in record keeping, the re-inspection demonstrated that the front brake pads were within acceptable limits and did not require replacement. Similarly, re-inspection demonstrated that the rear tires were also within acceptable limits (no indication of dry rot and cracking was noted) and did not need to be replaced. This was directly contrary to Miller's assertion that the tires were defective. (H.T., 9/24/02, p. 97).

Suspension/Assignment of Points

The issue of employee supervision was relevant to the assessment of

points in lieu of a suspension of inspection license. Inspection regulations provide that the Department "may suspend the certificate of appointment issued to a station which it finds is not properly equipped or conducted or which has violated or failed to comply with any of the provisions of this chapter or regulations adopted by the department." 75 P.S. §4724(a). Points may be assigned in lieu of a suspension where it is determined by the Department that "the station owner, manager, supervisor or other management level employee was without knowledge of the violation and should not have known of the violation." 67 Pa. Code 175.51(b). The station owner bears the burden of proof to show that proper supervision of the employee who committed the violation was provided, but that supervision could not have prevented the violation. *Id.* Further, the Department is required to consider whether a station owner has demonstrated that it should receive an assessment of points in lieu of a license suspension. *See Strickland v. Commonwealth of Pennsylvania, DOT,* 574 A.2d 110 (Pa. Cmwlth. 1990).

Miller asserts that the Court erred by failing to permit testimony and evidence on the issue of supervision of inspections and awarding of points, citing *Strickland v. Commonwealth of Pennsylvania, DOT,* 574 A.2d 110 (Pa. Cmwlth. 1990). (1925(b) Statement, ¶¶ 4-5, 8). These allegations are contradicted by the record. During the proceedings, the Court *sua sponte* reminded the parties that the issue before it was whether Miller was responsible for three alleged violations: unnecessary repairs, improper record keeping, and failure to issue appropriate work orders. (H.T., 9/24/02, p. 77). The Court noted that there was nothing concerning the substance of these alleged violations that had to do with a lack of supervision. (H.T., 9/24/02, p. 78).[2] In fact, the Court had previously sustained an objection by Miller to Trooper Harvey's testimony, on the basis that lack of supervision was not an element of any of the alleged violations. (H.T., 9/24/02, p. 40). More importantly, the Court, in order to logically structure the order of testimony in what was becoming a somewhat confusing presentation, advised the parties that the issue of supervision which related to the character of the penalty imposed by the Department, could be addressed following the testimony concerning the

[2] Inspection regulations mandate that it is the responsibility owner [sic] of an inspection station "to assure full responsibility, **with or without actual knowledge**, for: (i) every inspection conducted by an employee of the inspection station; (ii) every inspection conducted on the premises; (iii) every certificate of inspection issued to the inspection station; (iv) every certificate of inspection issued by the inspection station; and (v) any violation of the Vehicle Code or this chapter related to inspections committee by any employee of the inspection station. 67 Pa. Code §175.29(a)(6)(emphasis added).

actual violations. (H.T., 9/26/02, p. 78.) No one objected to this approach or indicated a contrary view as to how to proceed.[3]

Miller was not in any way precluded from introducing testimony concerning the supervision of the employees in question. Indeed Gary Miller, owner of the station testified at some length at the second hearing regarding the supervision of the employees and his limited knowledge of the alleged violations. Mr. Miller observed that Mr. McDaniel, the service manager, was responsible for supervising the technicians, reviewing inspection records and ensuring that work orders given to customers contained accurate information. (H.T., 10/21/02, pp. 16, 37-38). Miller did not offer testimony as to how supervision of inspections was conducted and Mr. McDaniel did not testify as to his involvement in the inspection process. No testimony was offered as to whether any management personnel observed the inspection of Ms. Wojciki's car, in order to determine that it was conducted properly. In fact, Mr. McDaniel did not even supervise the re-inspection of the Wojciki vehicle after Trooper Harvey informed him that one was to be performed. (H.T., 9/24/02, p. 86).[4] Moreover, Trooper Harvey testified that

[Trooper Harvey]: ... The thrust of the entire investigation lies primarily with the role of the mechanic when I arrived at the facility. I can only tell what occurred during the inspection by observing what notes he's taken and what observations he's made at the time of the inspection. When I asked the mechanic regarding the fact that we measured the tires and they were not four thirty-seconds of an inch and he had no logical explanation for why the tire readings were grossly off, more importantly there were no notes in his shop work order for the tires of the vehicle, I wasn't able to determine if these were the same tires. My assumption was that somebody changed some tires or the readings were incorrect.

The Court: One or the other?

[Trooper Harvey]: Yes, Your Honor. The fact that the front tires weren't listed on the work order tells me that he just missed it. I mean, he made an error.

The Court: Is that uncommon, that they don't include all the-

[Trooper Harvey]: It's very uncommon. You look at the document in front of you. You know the front tires and rear tires. When you see two of them are empty, the mechanic should have seen that and caught it. The next person who entered the information from that order to the typed order should have caught that, and then the individual who reviews those documents should have caught that.

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[3] It should be noted that at this point in the proceedings, counsel for Miller began to ask Mr. McDaniel about the certification of the mechanics at Miller. (H.T ., 9/24/02, pp. 76-77). The Department stipulated to their certification and this was not a contested issue

[4] Trooper Harvey did indicate that "some of the management would come over and just poke an eye in and then leave, but they didn't stand by and actually observe the inspection." (H.T., 9/24/02, p. 39).

(H.T., 10/21/02, pp. 54-55).
The issue was whether Miller "should not have known" that the mechanic required unnecessary repairs or that there was careless record keeping and the issuance of an improper work order. There was no evidence that these things could not have been prevented by reasonable oversight. Indeed, quite the opposite occurred. Even the most rudimentary inquiry of the mechanic would have disclosed the error with regard to the sway bar pin, the tires and the "clerical" error concerning the brakes.

The Department also entered into evidence a document entitled "Consideration of Point Assessment in Lieu of Suspension," which indicated that the Department denied Miller's eligibility for points because Miller did not establish evidence of proper supervision and because the station owner is responsible for proper record keeping. *(See* Cmwlth. Exhibit 2). Based on the *Strickland* standard, the Department showed it considered permitting Miller to consent to the acceptance of a point assessment in lieu of a suspension.

Change in the Law-- 75 P.S. 4724(C)

Miller also asserts the Court erred when it did not permit Miller to present testimony and evidence concerning the application of 75 P.S. §4724 to the matter before the Court. Miller's argument on this issue surrounds a change in the Pennsylvania statutes pertaining to vehicles, namely suspension of certificates of appointment. On June 25, 2002, Section 4724(C) was amended to require that

> ... The Department prior to suspending a certificate of appointment of an official inspection station on the grounds of careless recordkeeping or the Court on appeal from a suspension may consider the volume of inspections conducted by the inspection station and provide to the owner or operator of the inspection station the opportunity to correct any inaccurate records.

Senate Bill 1225 P.N. 2149 (June 25, 2002).
However, this change in the law did not become effective until sixty (60) days after its enactment, which occurred on September 4, 2002. Hence, this change was not in effect at the time Miller was alleged to have engaged in careless record keeping. Despite this fact, the Court did permit testimony from Gary Miller that he had not been given the opportunity to correct his records after the alleged violations occurred. (H.T., 10/21/02, p. 30-31).

The only time Miller was precluded from asking a witness about the change in this statute was during the cross-examination of Trooper Harvey. Trooper Harvey testified that he was not familiar with the change in the law and had not read it. (H.T., 9/24/02, p. 68). However, at that point in the hearing, counsel for Mr. Miller stated that he wanted to ask the trooper about this section in order to prove that it is "not negligence, it is not bad record keeping, it is a typo, we are going to establish, and we

wanted to show that it is not reckless, it is not bad supervision when we get into this." (H.T., 9/24/02, p. 69-70). The statute at issue allows the Court to consider the volume of inspections before deciding whether to suspend a station's license for "careless record keeping". The witness's knowledge of the statute per se was of no consequence to the determination before the Court. In any case, Miller's license was not suspended for "careless record keeping". Rather, Miller received only a warning for that violation.

Evidence of Prior Inspection History

Miller also alleges that the Court erred by failing to permit him to present testimony and evidence of Miller's favorable history of inspecting vehicles to show that "it is not negligence, it is not bad record keeping, it is a typo, we are going to establish, and we wanted to show that it is not reckless, it is not bad supervision when we get into this." (H.T., 9/24/02, p. 70). Ostensibly Miller sought to introduce this evidence to show Miller's habit of performing proper inspections, and reinforce how the change in the law concerning careless record keeping applies to his particular case. Notwithstanding the fact that the change in the law was not applicable to its case, Miller did not present this evidence in an admissible fashion. The witness (Trooper Harvey) was being questioned on cross-examination and it was not established that he knew anything about the history of Miller's inspection results. The question initially put to him had to do with his knowledge of a statute. The information described by Miller was never actually offered for introduction through an appropriate witness.

Assuming it was being offered as evidence of habit or routine, Rule 406 of the Pennsylvania Rules of Evidence mandates that "evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." Pa.R.Evid. 406. Here, Miller would have been required to elicit the testimony from a witness who was familiar with Miller's inspection records and history in order to establish Miller's routine practice with respect to those records. Instead, Miller raised this issue in the wrong posture, attempting to ask Trooper Harvey if he was familiar with the change in the law and the fact that Miller had been conducting inspections for twenty-two years.[5] (H.T., 9/24/02, pp. 67-70). Neither Gary Miller nor Mr. McDaniel, two witnesses who may have had the requisite

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[5] Miller's "offer if proof" was that it had conducted 44,000 inspections and had only been sanctioned "one point". (H.T., 9/24/02, p.70)

knowledge to answer this question, was asked about issue. Further, it appeared that all of this information was for the purpose of showing that the mistake concerning the rear brakes was only a “typo”.

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

Signed this 17 day of March, 2003.

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

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY
v.
JOHN R. KRAMER and KEMPER/AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY

AUTOMOBILE INSURANCE / STACKING

Pennsylvania courts have differentiated between classes of insured motorists for purposes of determining an insured's right to accumulate or stack benefits under multiple policies. Three different classes of insured have been recognized by the courts: (a) the named insured and any designated insured and, while residents of the same household, the spouse and relatives of either, (b) any other person while occupying an insured highway vehicle, and (c) any person with respect to damages he was entitled to recover because of bodily injury to which the insurance applies sustained by the insured under (a) and (b). *Utica Mutual Insurance Co. v. Contrisciane,* 504 Pa. 328, 473 A.2d 1005 (1984).

AUTOMOBILE INSURANCE / STACKING

Historically, the most significant consideration in determining whether one is entitled to stack underinsured or uninsured motor vehicle coverage benefits is whether an insured is classified as a "class one" or "class two" insured. A person who is insured only because he is an occupant in a vehicle insured under a fleet policy (and therefore a class two insured) is not entitled to stack benefits. Such an individual did not pay premiums for the coverage, and was not a "specifically intended beneficiary of the insurance policy." *Utica Mutual Insurance Co. v. Contrisciane,* 504 Pa. 328, 473 A.2d 1005 (1984).

AUTOMOBILE INSURANCE / STACKING

In 1990, the legislature adopted Section 1738 of Motor Vehicle Financial Responsibility Law (MVFRL) requiring the stacking of uninsured or underinsured benefits unless such coverage was specifically waived by the "named insured." 75 P.S. §1738(a).

CONTRACTS / INTERPRETATION

There is no explanation of the "Stacking Option" in the policy at issue before the Court. While stacking is available, the question of who may take advantage of such a benefit is not separately addressed. There is no exclusion for a "class two" insured nor is there any indication of a limitation with regard to "fleet" policies. Since there is absolutely no explanation in the policy as to what the "Stacking Option" encompasses, it is necessary for the Court to interpret the contract.

CONTRACTS / INTERPRETATION

The principles controlling the interpretation of insurance contracts are well established. The goal is to give effect to the intentions of the parties as manifested by the language of the contract. *Mutual Benefit Ins. Co. v. Haver,* 555 Pa. 534, 540,725 A.2d 743,746 (1999). The goal is not to re-write the clear language of the parties' agreement, but any ambiguity in a policy

provision must be resolved in favor of the insured and against the drafter. *Werkman v. Erie Insurance Exchange,* 427 Pa.Super. 621, 627, 629 A.2d 1024, 1045 (1993). The Court must give effect to clear and unambiguous language in the policy. *Id.*

CONTRACTS / INTERPRETATION

There is an exception to the rule requiring the Court to give effect to the intentions of the parties in circumstances where to do so would violate public policy. *Mutual Benefit Ins. Co. v. Haver,* 555 Pa. 534, 541,725 A.2d 743,747 (1999)(Against public policy for an insurance company to pay benefits for damages assessed as an illegal or evil act). While it is clear that "class two" insureds both prior to and following the adoption of Section 1738 have no "right" to stack underinsurance benefits, there is no public policy rationale expressed either in case law or the statute that prohibits an insurance company from providing such a benefit.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 12321 - 2002

Appearances: William C. Wagner, Esquire for Plaintiff, State Farm
Craig A. Markham, Esquire, for Defendant, John R. Kramer
William R. Haushalter, Esquire, for Defendant,
Kemper/American Manu. Mut. Ins. Co.

OPINION

Bozza, John A., J.

This issue is before the Court on Cross-Motions for Summary Judgment. The issue is whether John R. Kramer is entitled to "stack" the underinsured motorist benefits contained in two motor vehicle insurance policies issued by State Farm Mutual Automobile Insurance Company to Brocki Electric, Inc. The facts of the case may be briefly summarized as follows.

On February 13, 1999, the defendant, John R. Kramer, was operating a 1999 Dodge B-1500 Ram Truck owned by Brocki Electric, Inc. Mr. Kramer was using the vehicle in the course of his employment when he became involved in a motor vehicle accident in which he sustained significant injuries. The accident was the fault of the driver of the other vehicle, Mr. James R. Love. Mr. Love was insured by Liberty Mutual Insurance Company, who paid his policy limits to Mr. Kramer. Mr. Kramer then sought to obtain underinsurance motorist benefits provided by a State Farm policy covering two vehicles issued to Brocki Electric. State Farm maintained that Mr. Kramer was only entitled to collect the underinsurance proceeds from the policy covering the vehicle that he was driving, and could not "stack" the underinsured motorist coverage on the

two Brocki Electric, Inc., vehicles.

The State Farm policy issued to Brocki Electric, Inc., provided underinsured motorists' coverage for two vehicles, one of which, the Dodge Ram, had been added effective February 1, 1999. The policy identifies the insured's name as Brocki Electric, Inc. and is described in the application of insurance as a "commercial vehicle" policy. It provides for underinsured motorist coverage with a "(Stacking Option)" State Farm has taken the position that Mr. Kramer is a "class two" insured and is therefore not entitled to stack underinsured motorist benefits provided through a commercial motor vehicle insurance policy. In support of its position, State Farm relies in part on the Pennsylvania Supreme Court's decision in *Utica Mutual Insurance Co. v. Contrisciane,* 504 Pa. 328, 473 A.2d 1005 (1984). In that decision, the Court differentiated between classes of insured motorists for purposes of determining an insured's right to accumulate or stack benefits under multiple policies. Specifically, the Court decided that a "person who is insured only because he is an occupant in a vehicle insured under a fleet policy" is not entitled to stack benefits. *Contrisciane,* 504 Pa. at 337-338, 473 A.2d at 1010. On the other hand, the Court decided that Mr. Contrisciane was entitled to stacked benefits from a policy issued by Aetna to his father because for purposes of that policy he was considered to be a "class one" insured.[1] *Id.,* 504 Pa. at 339-341, 473 A.2d at 1011-1012.

Since *Contrisciane,* there have been a number of other decisions addressing the issue of stacking in a conceptually similar manner. *Thompson v. Royal Insurance.,* 361 Pa.Super. 78, 521 A.2d 936 (1986)(a "class one" insured could not stack coverages provided in an employer's fleet policies); *Miller v. Royal Insurance Co.,* 354 Pa.Super. 20, 510 A.2d 1257 (1986); *Bowdren v. Aetna Life & Casualty,* 404 Pa.Super. 595, 591 A.2d 571 (1991); *Werkman v. Erie Insurance Exchange,* 427 Pa. Super. 621, 629 A.2d 1043 (1993). It is apparent that historically, the most significant consideration in determining whether one is entitled to stack underinsured or uninsured motor vehicle coverage benefits is whether an insured is classified as a "class one" or "class two" insured.[2] In this case,

[1] The Aetna policy provided coverage for the "named insured and any relative."

[2] In *Utica Mutual Insurance Co. v. Contrisciane, supra,* the Court noted that the Utica policy described three different classes, "(a) the named insured and any designated insured and, while residents of the same household, the spouse and relatives of either, (b) any other person while occupying an insured highway vehicle, and (c) any person with respect to damages he was entitled to recover because of bodily injury to which the insurance applies sustained by the insured under (a) and (b)," 504 Pa. at 338, 473 A.2d at 1010.

the policy provides that for purposes of underinsured motor vehicle coverage, an insured is

1. The first person named in the declarations;
2. his or her spouse;
3. their relatives; and
4. any other person while occupying
   a. your car . . .
5. any person entitled to recover damages because of bodily injury to an insured under 1 through 4 above.

(Section III, Uninsured Motor Vehicles and Underinsured Motor Vehicle Coverages, Underinsured Motor Vehicle Coverages W(Stacking Option) and W3(Non-Stacking Option), p. 19).

While this provision seems to contemplate more than the three classes of potential claimants identified in *Contrisciane,* provision No. 4 is closely related to what has been referred to as a "class two" claimant. While Mr. Kramer agrees that he is an insured solely because he was "occupying" a covered vehicle and therefore a "class two" claimant, he argues that he is eligible to stack underinsurance benefits for two reasons:

1. The law changed in 1990 and the legislature adopted Section 1738 of the MVFRA, requiring stacking; and

2. The provisions of the Brocki policy explicitly provide for stacking.

In order to address these issues, it is necessary to briefly review the development of Pennsylvania law providing for the stacking of uninsured and underinsured motorist benefits.

In 1968, the Supreme Court of Pennsylvania decided *Harleysville Mutual Casualty Co. v. Blumling,* 429 Pa. 389, 241 A.2d 112 (1968), rejecting an "other insurance" limitation on liability clause which purported to prohibit any stacking of uninsured motorist benefits. The Court concluded that such a limitation was not consistent with the intention of the Pennsylvania Vehicle Code and allowed the insured to recover uninsured motorists benefits provided through both his employer's policy and his own policy. *Blumling,* 429 Pa. at 395-396, 241 A.2d at 115. In *State Farm Mutual Automobile Co. v. Williams,* 481 Pa. 130, 392 A.2d 281 (1978), the Supreme Court similarly allowed stacking by a claimant under two policies; one issued to his wife and his own. Specifically, the Court noted that an insured may stack uninsured motorist benefits:

1. If the injured party paid the premiums of the policy and was the named insured; and

2. If the recovery under the second uninsured motorist coverage was limited to actual damages; and

3. If the recovery is not limited by the statutory exclusions. *Williams,* 481 Pa. at 143, 392 A.2d at 287

In both *Blumling* and *Williams,* the Court allowed the insured to stack benefits even though policies contained language that was ostensibly intended to exclude it. Although, at the time each case was decided, there was no explicit statutory provision requiring stacking, the Court concluded that to prohibit such benefits violated legislative intent. However, the ability to stack was not to be without limitations.

As noted above, the Court in *Utica Mutual Ins. Co. v. Costrisciane,* 504 Pa. 328, 473 A.2d 1005 (1984), determined that not all those identified as an insured were to be treated alike with regard to stacking benefits. Specifically, a person who was an insured under a policy provision solely because of his or her status as an "occupier" of an insured vehicle could not stack uninsured motorists' benefits provided under a fleet policy. The Court noted that such an individual had not met the requirements set forth in *Williams* because the person had not paid premiums for the coverage, and was not a "specifically intended beneficiary of the insurance policy." *Contrisciane,* 504 Pa. at 339, 473 A.2d at 101. Then, in *Miller v. Royal Insurance Co.,* 354 Pa.Super. 20, 510 A.2d 1257 (1986), the Superior Court decided that a "class one" insured (a spouse of the named insured) could not stack uninsured motorists benefits under a "fleet" policy even where it only involved three vehicles. *But see: Werkman v. Erie Insurance Exchange,* 427 Pa.Super. 621, 629 A.2d 1042 (1993)(the Court allowed stacking for a "class one" insured where it involved a commercial policy rather than a fleet policy). In *Selected Risks Ins. Co. v. Thompson,* 520 Pa. 130, 552 A.2d 1382 (1989), the Court regarded a volunteer firefighter as a "class two" insured and decided that he was not entitled to stack uninsured motorist coverage under a fire department's policy. A similar result was reached in *Bowdren* v. *Aetna Life and Casualty,* 404 Pa.Super. 595, 591 A.2d 751 (1991). In each of these cases, the Court was basing its decision on the interpretation of legislative intent.

In 1990, the legislature adopted Section 1738 of Motor Vehicle Financial Responsibility Law (MVFRL) requiring the stacking of uninsured or underinsured benefits unless such coverage was specifically waived by the "named insured." Specifically, 1738 states:

a. **Limit for each vehicle -** When more than one vehicle is insured under one or more policies providing uninsured or underinsured motorist coverage, the stated limit for uninsured or underinsured coverage shall apply separately to each vehicle so insured. The limits of coverages available under

> this subchapter for an insured shall be the sum of the limits for each motor vehicle as to which the injured person is an insured.

75 P.S. §1738(a).

With the adoption of Section 1738 in 1990, every insurer was required to provide for the stacking of uninsured/underinsured motorist benefits for "an insured." The MVFRL defines an insured as:

> **"Insured."** Any of the following:
> (1) An individual identified by name as an insured in a policy of motor vehicle liability insurance.
> (2) If residing in the household of the named insured:
> (i) a spouse or other relative of the named insured; or
> (ii) a minor in the custody of either the named insured or relative of the named insured.

75 P.S. §1702.

This definition is limited to those individuals who would be included in the "class one" category as defined by the Court in *Williams*, 481 Pa. 130, 392 A.2d 281 (1978). There is no mention in the definition of an "occupier" as an insured. Moreover, the statute includes language in the context of its required benefits waiver form that reinforces this interpretation:

> By signing this waiver, I am rejecting stacked limits of underinsured motorist coverage under the policy **for myself and members of my household** under which the limits of coverage available would be the sum of limits for each motor vehicle insured under the policy. . . .

75 P.S. 1738(d)(2).

It is apparent that the legislature, by adopting Section 1738, was implementing in statutory form the rule that had been adopted through case law, and therefore, the ability to stack benefits was codified but not expanded. As a result, this Court disagrees that Mr. Kramer, as a "class two" insured, is entitled to accumulate underinsurance benefits as a result of the adoption of section 1738.

Finally, Mr. Kramer has argued that he is entitled to stack underinsured motorist benefits because the State Farm policy provides for stacking and does not distinguish between classes of insured motorists. While he is correct that the policy in question provides for stacking, State Farm's policy has not, for reasons that are not at all apparent, defined the term in any way nor explained in any comprehensible way the nature of the stacking concept. Indeed, the only references to stacking are found in the index of the policy where it notes that the "W" symbol used to designate a certain form of coverage means "Underinsured Motor Vehicle (Stacking

Option)", and in the headings preceding an explanation of underinsurance benefits where it states "UNDERINSURED MOTOR COVERAGES W (STACKING OPTION) AND W3 (NON-STACKING OPTION)" The policy goes on to state:

> **Coverages W and W3**
> We will pay damages for *bodily injury* an ***insured*** is legally entitled to collect from the owner or driver of an *underinsured motor vehicle*. The *bodily injury* must be sustained by an *insured* and caused by accident arising out of the ownership, maintenance or use of an *underinsured motor vehicle*.

Who is an Insured- Coverages U, U3, W and W3
Insured - means...

1. The first person named in the declarations;
2. his or her spouse;
3. their relatives; and
4. any other person while occupying
   a. your car . . .
5. any person entitled to recover damages because of bodily injury to an insured under 1 through 4 above.

(Section III, Uninsured Motor Vehicles and Underinsured Motor Vehicle Coverages, Underinsured Motor Vehicle Coverages W(Stacking Option) and W3(Non-Stacking Option), p. 18-19).

There is no explanation of the "Stacking Option". So while stacking is available, the question of who may take advantage of such a benefit is not separately addressed. There is no exclusion for a "class two" insured nor is there any indication of a limitation with regard to "fleet" policies.[3] While State Farm was obligated to provide stacking benefits consistent with the requirements of Section 1738, there is no prohibition in the statute against offering such benefits to "class two" insureds or for that matter any other type of stacking benefits. Those cases that limited stacking rights to class one insureds did so in circumstances where the policy either attempted to exclude stacking or perhaps did not address it. Since there is absolutely no explanation in the policy as to what the "Stacking Option" encompasses, it is necessary for the Court to interpret the contract.

The principles controlling the interpretation of insurance contracts are well established. The goal is to give effect to the intentions of the parties as manifested by the language of the contract. *Mutual Benefit Ins. Co. v.*

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[3] There are several provisions of the policy that limit or explain other aspects of underinsurance coverage but do not define or address the limitations of the stacking option.

Haver, 555 Pa. 534, 540, 725 A.2d 743, 746 (1999)*(quoting Standard Venetian Blind Co. v. American Empire Ins. Co.,* 503 Pa. 300, 305, 469 A.2d 563, 566 (1983)). The goal is not to re-write the clear language of the parties' agreement, but any ambiguity in a policy provision must be resolved in favor of the insured and against the drafter, *Werkman v. Erie Insurance Exchange,* 427 Pa.Super. 621, 627, 629 A.2d 1024, 1045 (1993) (*citing Standard Venetian Blind Co. v. American Empire Ins. Co.,* 503 Pa. 300, 305, 469 A.2d 563, 566 (1983)). The Court must give effect to clear and unambiguous language in the policy. *Id.* Since the policy at issue provides coverage for underinsured motor vehicle coverage with a "Stacking Option" to those it describes as an "Insured" and does not limit the stacking benefit to those characterized as "class one" insureds, one can only conclude that the parties intended that individuals in Mr. Kramer's position were to be covered by the stacking benefit conclusion is reinforced by State Farm's failure to specifically exclude "occupiers" from stacking benefits even after the issue had been repeatedly addressed by Pennsylvania courts prior to the adoption of Section 1738(a). State Farm was free to define its stacking option and expressly exclude from its policy stacking coverage for one who was "occupying" a covered vehicle. *See: Werkman v. Erie Insurance Exchange,* 427 Pa.Super. 621, 629 A.2d 1042 (1993). This result would also be dictated by an analysis focusing on the ambiguous nature of the undefined "Stacking Option" provision. Viewing such a term in a light most favorable to the insured, as the law requires, it must be concluded that the "Stacking Option" would be available to all those defined as class two insureds in the policy. *Mutual Benefit Ins. Co. v. Haver, supra.*

State Farm erroneously relies on *Insurance Company of Evanston v. Bowers,* 758 A.2d 213 (2000) to support its position that Mr. Kramer was not an insured under its policy. In *Evanston,* the Court decided a juvenile placed by the Court in a residential treatment facility was not an insured because he was not a "family member" of the named insured, i.e. the residential facility. There was no category of insured applicable to the claimant. Here, the opposite is true. Mr. Kramer, as the parties agree, fits squarely into a category of insureds specified in the Underinsured Motor Vehicle (Stacking Option) section of the policy, as one who was "occupying" a covered vehicle. There is simply no question that Mr. Kramer was classified in the policy as an insured.

There is, however, an exception to the rule requiring the Court to give effect to the intentions of the parties in circumstances where to do so would violate public policy. *Mutual Benefit Ins. Co. v. Haver*, 555 Pa. 534, 541, 725 A.2d 743, 747 (1999)(Against public policy for an insurance company to pay benefits for damages assessed as an illegal or evil act). As noted above, Pennsylvania's appellate courts have decided on a number of occasions that there were limitations with regard to an

insured's right to stack underinsured or uninsured motor vehicle benefits, particularly for "class two" claimants. The question is whether these limitations were the result of a public policy determination. In *Contrisciane*, the Court explained that the rationale for recognizing the right to stack was rooted in both the concern for furthering the "policies sought to be accomplished by the act" and the conclusion that an intended beneficiary who has paid multiple premiums is entitled to multiple coverages. *Contrisciane*, 504 Pa. at 338, 473 A.2d at 1010. In *Williams*, the Court similarly emphasized it was recognizing the right to stack benefits based on its assessment of "legislative intent". *Williams*, 481 Pa. at 142, 392 A.2d at 287. While it is clear that "class two" insured both prior to and following the adoption of Section 1738 have no "right" to stack underinsurance benefits, there is no public policy rationale expressed either in case law or the statute that prohibits an insurance company from providing such a benefit. Therefore, Mr. Kramer is entitled to the benefit of his employer's selection of the "W" coverage for "Underinsured Motor Vehicle (Stacking Option)" for which his employer most certainly paid a premium.

An appropriate Order will be entered.

ORDER

AND NOW, to-wit, this 31 day of March, 2003, upon consideration of the Cross-Motions for Summary Judgment and argument thereon, and in accordance with the foregoing Memorandum, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** as follows:

(1) the Motion for Summary Judgment file by plaintiff, State Farm Mutual Automobile Insurance company, is **DENIED**;

(2) the Motion for Summary Judgment filed by the defendant, John R. Kramer, is **GRANTED**.

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

KAREN L. BUTTS
v.
KATHRYN SCHELL a/k/a KATHERINE SCHELL

CIVIL PROCEDURE / SERVICE

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)). A plaintiff's good faith effort is assessed on a case-by-case basis, and the plaintiff bears the burden of showing that their efforts were reasonable. *Rosenberg v. Nicholson,* 408 Pa. Super. 502, 597 A.2d 145 (1991).

CIVIL PROCEDURE / SERVICE

Rule 401 of the Pennsylvania Rules of Civil Procedure requires that original process of a Complaint shall be served within thirty days of the filing of the Complaint. Pa.R.Civ.P. 401(a). If the Complaint is not served within the original thirty days, the Complaint may be reinstated upon praecipe and presentation of the original process. Pa.R.Civ.P. 401(b)(1).

CIVIL PROCEDURE / SERVICE

If a Complaint is not served within thirty days of issuance, it is considered "dead". *Twp. of Lycoming v. Shannon,* 780 A.2d 835 (Pa. Cmwlth. 2001). A Complaint reinstated after the running of the statute of limitations is a nullity. *Moses v. T.N.T. Red Star Express,* 725 A.2d 792 (1999).

CIVIL PROCEDURE / PLEADINGS

Defects in service of process must be raised in Preliminary Objections. *Cinque* v. *Asare,* 401 Pa. Super. 339, 585 A.2d 490 (1990). A defendant waives any potential defect of service by failing to raise a service issue by Preliminary Objections. *Id.* All affirmative defenses including, *inter alia,* the defense of statute of limitations, must be pleaded in a responsive pleading under the heading "New Matter." Pa.R.Civ.P. 1030(a).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 11529 - 2000

Appearances: James L. Moran, Esquire, for plaintiff
Gregory J. Zimmerman, Esquire, for defendant

OPINION

Bozza, John A., J.

This matter is currently before the Court on the 1925(b) Statement of Matters Complained of on Appeal filed by the plaintiff, Karen L. Butts. The facts of this case may briefly be summarized as follows. This action stems from a motor vehicle accident which was alleged to have occurred

on May 19, 1998 on Interstate 90 in Erie County, Pennsylvania. On May 1, 2000, Ms. Butts filed a Civil Complaint, and attempted to serve the defendant Kathryn Schell a/k/a Katherine Schell. Ms. Butts also mailed a copy of the Complaint to Ms. Schell's insurance carrier, Erie Insurance, at that time. The Sheriff of Erie County, Pennsylvania (hereinafter "Sheriff") filed a return of service on May 25, 2000, stating that Ms. Schell was not served because she could not be located in the bailiwick of Erie County, Pennsylvania. The return of service also had a notation that the Sheriff had been informed by Danielle Gamble, the adult in charge at the address listed in the Compliant, that Ms. Schell was living in Charlotte, North Carolina, and would move back in late June or early July.

Ms. Butts then filed a praecipe to reinstate her Complaint on June 30, 2000, and again attempted to serve Ms. Schell. On July 17, 2000, the Sheriff again filed a return of service, with a notation that Ms. Schell could not be served because she lived in South Carolina and would return in two months. Ms. Butts again filed a praecipe to reinstate her Complaint on October 10, 2000. The Sheriff again filed a return of service on November 1, 2000, with a notation that Ms. Schell could not be served because she moved to Canapolis, North Carolina two years ago. The notation indicated that Ms. Schell's son provided the Sheriff with his mother's phone number in North Carolina, and that the number was no longer in service.

Ms. Butts then filed a praecipe to reinstate her Complaint on May 16, 2001 and September 21, 2001. On October 12, 2001, the Sheriff filed a return of service, with a notation that the Complaint could not be served and that Ms. Schell's son refused to provide any further information concerning his mother's location in North Carolina. On July 29, 2002, Ms. Schell filed Preliminary Objections, asking the Court to strike service of the Complaint by regular mail on Ms. Schell's insurance carrier. The Court granted the Preliminary Objections in an Order dated October 2, 2002. On November 4, 2002, Ms. Schell filed an Answer and New Matter, as well as a Motion for Judgment on the Pleadings, which the Court granted in an Order dated January 10, 2003. Ms. Butts filed a Notice of Appeal on February 10, 2003, and filed a timely 1925(b) Statement of Matters. In her 1925(b) Statement, Ms. Butts argues that (1) she did in fact make a good faith effort to serve original process on Ms. Schell, and (2) Ms. Schell has waived any defective service issue by filing an Answer and New Matter prior to the filing of additional Preliminary Objections addressing service of process other than service on the insurer.

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 plaintiff bears 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 plaintiff failed to effect service of the Complaint on the defendant before the thirty day time limit expired on the original Complaint, and also failed to effect service before the two year statute of limitations expired on May 19, 2000. Ms. Butts argues that she adequately informed the defendant of the initiation of a lawsuit against her by attempting service of the Complaint at the address listed on the defendant's driver's license, citing *Ball v. Barber,* 423 Pa. Super. 358, 621 A.2d 156 (1993). The plaintiff's reliance on *Ball* is misplaced.

In *Ball* the issue was whether the defendant resided at the home where the writ of summons was served. The defendant had filed Preliminary Objections, arguing that service was improper because he no longer lived at that address. The trial court denied his objections, and the Superior Court of Pennsylvania affirmed the denial, holding that 75 P.S. §1510(a) required a driver's license to contain a driver's address. *Ball,* 423 Pa. Super. at 361, 621 A.2d at 157. The defendant's official address was listed on his license was that of his mother, and the defendant had the burden to notify the Department of Transportation that this was no longer his address. *Ball,* 423 Pa. Super. at 361, 621 A.2d at 158. However, the Court noted in *Ball* that the defendant actually received the writ of summons, since his mother, an adult in charge at the residence, accepted it and then gave it to the defendant. *Id.* Also, the Court noted that there were other indications that the address on the defendant's license was his resident address, namely that he received his federal and state tax forms and insurance information for his vehicle, as well as all driver's license and registration information in the mail at that address. *Ball,* 423 Pa.Super. at 360, 621 A.2d at 157.

The present case is factually and legally distinguishable from Ball. At the time Ms. Schell filed Preliminary Objections asserting ineffective service because a copy of the Complaint had been mailed to her insurance carrier, no issue was raised as to Ms. Schell's actual address. Ms. Butts did not present any evidence to indicate that there was a factual dispute because of the address listed with the Department of Transportation. There was no indication that Ms. Schell's Pennsylvania license remained active as of the dates that service was attempted. It may be that Ms. Schell moved from the Commonwealth following the accident, and no longer maintained a license in Pennsylvania, rendering the license information

she may have provided at the time of the accident incorrect.[1] The mere fact that Ms. Butts had a driver's license address for the defendant from 1998, the year when the accident allegedly occurred, means little in the year 2000, when individuals who answer the door at that address repeatedly state that the defendant has moved out of state. There is no indication that Ms. Butts held a current license at the time service was attempted.[2] Further, there was no indication that Ms. Schell received any mail at this address, or any suggestion that other records such as voting registration, showed that Ms. Schell resided at this address.

Perhaps most significantly, although Ms. Butts repeatedly attempted to serve the defendant, no copy of the Complaint was ever left with an adult member of the family or an adult in charge of the residence at the address given for Ms. Schell on the Complaint. *See:* Pa.R.Civ.P. 402. Hence, service was never effected. The only actual service of a Complaint on anyone was the mailing of a Complaint to the defendant's insurance company. This attempt at service was stricken as a result of the filing of Preliminary Objections.

Rule 401 of the Pennsylvania Rules of Civil Procedure requires that original process of a Complaint shall be served within thirty days of the filing of the Complaint. Pa.R.Civ.P. 401(a). If the Complaint is not served within the original thirty days, the Complaint may be reinstated upon praecipe and presentation of the original process. Pa.R.Civ.P. 401(b)(1). However, this reinstated Complaint must still be served within thirty days of its filing. Pa.R.Civ.P. 401(b)(4). Ms. Butts actions clearly did not follow the requirements of Rule 401. The first time Ms. Butts reinstated the Complaint was June 30, 2000, thirty days after the original Complaint had expired. Ms. Butts then waited until October 10, 2000, almost three and a half months later, to file another praecipe to reinstate her Complaint. Ms. Butts then waited until May 16, 2001, approximately seven months, and filed another praecipe to reinstate her Complaint. Ms. Butts filed her last praecipe to reinstate her Complaint on September 21, 2001, approximately four months after her last praecipe. She has offered no explanation for the complete absence of service activity since September 2001, no explanation for her failure to reinstate her original Complaint within thirty days, and no explanation for her sporadic filing of praecipes to reinstate

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[1] In fact, Ms. Butts never explicitly stated when and where she obtained the address of Ms. Schell that is listed in the Complaint.

[2] Moreover, if this was in fact an issue, since Pennsylvania law prohibits drivers from possessing both a Pennsylvania driver's license and a driver's license issued by any other state, Ms. Butts could have shown that Ms. Schell did not have a North Carolina license and that Ms. Schell likely still resided in Pennsylvania. *See* 75 P.S. 1501(b).

her Complaint. In such circumstances, this Court cannot conclude that the plaintiff acted in good faith.

The plaintiff 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[3], and held that "the process must be immediately and continually reissued until service is made." *Witherspoon,* 564 Pa. at 398,768 A.2d at 1084. There is simply no question that Ms. Butts failed to meet this standard.

Ms. Butts also argues that the defendant waived any potential defect of service beyond service on the insurance company by failing to raise any other service issue by Preliminary Objections, citing *Cinque v. Asare,* 401 Pa. Super. 339, 585 A.2d 490 (1990). Ms. Butts' reliance on *Cinque* is misplaced, and her argument fails to accurately construe the somewhat unusual facts of the instant case. In *Cinque,* defendant Neill's attorney entered an appearance and filed an Answer and New Matter upon receiving a copy of the Complaint in the mail from plaintiffs' counsel, doing so shortly after the Complaint was filed. *Cinque,* 401 Pa. Super. at 341- 342, 585 A.2d at 491. The defendants were never served however. Two and one half years later, defendant Neill's co-defendants filed Preliminary Objections after the plaintiffs again tried to serve them by mail. *Cinque,* 401 Pa. Super. at 342, 585 A.2d at 492. The trial court sustained the objections and permitted the plaintiffs to refile their Complaint. *Id.* The plaintiffs then properly served the defendants. *Id.* Defendant Neill then filed a Motion for Summary Judgment, alleging that service occurred after the statute of limitations had run. *Id.* The Superior Court reversed the trial

[3] 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, 768 A.2d at 1082.

court's granting of summary judgment in favor of defendant Neill, stating that the filing of an appearance and an Answer by Neill's attorney shortly after the accident commenced constituted a waiver of any defects in service. *Id.*

Ms. Butts' case is factually distinguishable from *Cinque.* Ms. Schell had not filed anything in this matter until she filed Preliminary Objections in July 2002, arguing that service on her insurance carrier by regular mail was not sufficient to effect service. The Court agreed and sustained the defendant's Preliminary Objections, setting aside the service made to the insurance carrier. There was no other actual service of the Complaint and the defendant did not raise any other service issue. As noted above, there were only unsuccessful attempts to serve the defendant at the address listed in the Complaint. In short, the defendant could not preliminarily object to something that had never occurred. There is no indication in the record that Ms. Schell had ever received a copy of the Complaint. In this circumstance, the filing of a responsive pleading for the purpose of raising a statute of limitations defense does not constitute a waiver of service.

Assuming, *arguendo,* the defendant did waive the requirement of service when she filed her Answer and New Matter, Ms. Butts' claim was still outside of the statute of limitations. A civil action to recover damages for personal injury caused by the negligence of another must be commenced within two years of the date of the injury. 42 P.S. §5524(2). As the accident was alleged to have occurred on May 19, 1998, Ms. Butts had to file suit by May 19, 2000. Ms. Butts attempted to toll the statute of limitations by the filing of her lawsuit, but she did not serve her Complaint within thirty days of its issuance, nor did she reinstate the Complaint in a timely fashion. In fact, the Complaint was not in effect at the time Ms. Schell's Answer was filed, since it had not been reissued since September 21, 2001. If a Complaint is not served within thirty days of issuance, it is considered "dead", and in this case it had been "dead" at least since October 21, 2001. *Twp. of Lycoming v. Shannon,* 780 A.2d 835 (Pa. Cmwlth. 2001). A Complaint reinstated after the running of the statute of limitations is a nullity. *Moses v. T.N.T. Red Star Express,* 725 A.2d 792 (1999). So if Ms. Schell did waive service, it would have been service of a Complaint that was a nullity because the statute of limitations had long since run. In these circumstances, the fact that the defendant filed an Answer and New Matter on November 4, 2002 is of no consequence to the viability of her statute of limitations defense.[4]

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[4] Further, Ms. Schell had to file an Answer and New Matter to the Complaint in order to raise the defense of the statute of limitations. Rule 1030 of the Pennsylvania Rules of Civil Procedure mandates that all affirmative defenses including, *inter alia,* the defense of statute of limitations, must be pleaded in a responsive pleading under the heading "New Matter." Pa.RCiv.P. 1030(a).

Based on the record before the Court and upon review of controlling authority, Ms. Butts' Complaint did not effectively toll the two (2) year statute of limitations, and the Court properly entered judgment on the pleadings in favor of the defendant.

For the reasons set forth above, this Court's Order dated January 10, 2003 should be affirmed .

Signed this 4 day of April, 2003.

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

ANNA C. SHIREY, now by marriage,
ANNA C. INGLEHART, Plaintiff
v.
JOHN A. SHIREY, Defendant

CIVIL PROCEDURE/JURISDICTION

Pennsylvania courts have personal jurisdiction over non-resident pursuant to 23 Pa. C.S. §7201(2) where non-resident participated in telephone conference call.

FAMILY LAW/CHILD SUPPORT

Pennsylvania courts must give full faith and credit to continuous and exclusive jurisdiction of sister state that has issued a child support order pursuant to a substantially similar law. 23 Pa. C.S. §7205(a).

Under 23 Pa. C.S. §7205(b), a tribunal is restricted from exercising continuous and exclusive jurisdiction to modify a child support order if that order has already been modified by a sister state.

Pennsylvania does not have authority to modify sister state's child support order where plaintiff has not met the requirements of 23 Pa. C.S. §7611(a) and (b).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA DOMESTIC RELATIONS SECTION
PACSES Case No. 038105043 Docket No. NS200202717

Appearances: Tammi L. Elkin, Esq., Attorney for Plaintiff
Brian M. DiMasi, Esq., Attorney for Defendant

OPINION

Connelly, J., April 8, 2003

Procedural History

Plaintiff, Anna (Shirey) Inglehart, a resident of Pennsylvania, filed her petition in Erie County for an increase of child support for three minor children on November 18, 2001. Plaintiff requested modification of an existing Texas child support order, citing changes in financial circumstances. After a support conference on January 21, 2003, in which the Defendant participated via telephone, the Support Officer determined that under the Pennsylvania Support Guidelines the Defendant should pay $625.00 in child support per month, maintain health insurance for the children, and pay 50% of any unreimbursed medical expenses. Defendant then filed a demand for a hearing on February 12, 2003 raising jurisdictional questions.

Specifically, the Defendant, John A. Shirey, opposes Plaintiff's petition on the grounds that: (1) Plaintiff to date has failed to properly serve Defendant with the new petition for child support; (2) Pennsylvania lacks personal jurisdiction over the Defendant; (3) Texas has continuing and

exclusive jurisdiction over matters of child support and custody; and (4) Pennsylvania lacks the authority to modify the Texas order. The Court addresses each of these issues in turn.

Findings of Fact and Conclusions of Law

Service of process and personal jurisdiction:

Defendant claims that he has not been properly served with a copy of the Plaintiff's petition in Texas and therefore Pennsylvania cannot exercise personal jurisdiction over him. Pa. R.C.P. 404 and 1910.6. In her brief submitted to the Court, Plaintiff neither admits nor denies that valid service has been rendered. No proof that service was effectuated or even attempted in Texas was presented before the Court either.

Since the Defendant attended the January support by telephone, the Court finds pursuant to 23 Pa. C.S.A. 7201(2), that the Defendant submitted to the personal jurisdiction of Pennsylvania by telephonic appearance at the conference and later by filing a demand for a hearing in Pennsylvania.

Consequently, Defendant counter-argues that if Pennsylvania has personal jurisdiction over him, it does not have subject matter jurisdiction over the issue of child support. Based on the following, the Court is inclined to agree.

Continuing and exclusive jurisdiction:

Pennsylvania and Texas have adopted similar provisions of the Uniform Interstate Family Support Act (UIFSA), 23 Pa. C.S.A. 7101-7901. Under 7205(d), a Pennsylvania tribunal shall give full faith and credit to the continuing and exclusive jurisdiction of a sister state which has issued a child support order pursuant to a substantially similar law, in this case Tex. Fam. Code 159.203. Further, under Section 7205(b), the tribunal is restricted from exercising continuing and exclusive jurisdiction to modify a child support order if that order has already been modified by a sister state.

The September 26, 2001 child support order was filed in Tarrant County, Texas on September 26, 2001. (Defendant's Exhibit A, Texas Order F70195). It also modified the parties' original child support arrangements made in the final divorce decree of April 3, 2001. The Plaintiff, who was awarded primary residential custody of the children, Molly, John, and Betsy, agreed to reside within the 48 contiguous United States. *(Id.* at 4-5). Defendant's child support obligation was terminated by the order, except for his paying health insurance costs for the children. Defendant agreed to pay the children's health insurance costs through his employer and/or reimburse the Plaintiff for any health insurance costs her employer might cover. *(Id.* at 12-16). Any traveling arrangements (i.e. plane tickets) made for the children when they visit their father are also paid by the Defendant. *(Id.* at 10-11).

As to the matter of child support, the Tarrant County Court held that

"...the parties have agreed to terminate any and all prior orders for the support of the children of this suit." [emphasis added] and then ordered, "...that any and all prior child support orders imposed against [Defendant] to pay to [Plaintiff] for the support of [the minor children] are hereby terminated effective the date of entry of this modification order. *Id.* at 11.

Plaintiff's counsel misstates the Texas Order, alleging that, "[t]he parties agreed to terminate the child support order," (Plaintiffs Brief at 3, 5). Upon review of the order itself, this Court does not find a complete and total termination of the child support order. An order still exists, but in its present form does not require the Defendant to pay any child support monies, nor does it expressly terminate the Defendant's obligation to pay child support. The Court agrees with Defendant's contention that his nonpayment of support was in lieu of allowing the Plaintiff and children to relocate and that his assumption of the children's health insurance and travel expenses for visitation are approximately the same amount that ordinary support payments would be. (Defendant's letter to Court, March 26, 2003)

Further, as defense counsel succinctly puts it, "[t]he Texas order terminating one component of the support issue (basic child support) does not equate to Texas relinquishing jurisdiction over support for which it has already exercised jurisdiction." *Id.* The order may be changed in the future to require the Defendant to pay child support, but this Court does not have the authority to do so because it lacks continuing and exclusive jurisdiction over the matter.

Modification of child support order from another state:

Pennsylvania also does not have the authority to modify the Texas child support order because the Plaintiff has not satisfied the requirements set forth by § 7611 (a) and (b) for modification of child support orders from other states. Section 7611 states that a responding tribunal may only modify another state's child support order if that order has been registered in the responding state and that the jurisdictional requirements set forth by §7613 do not apply. *(See* Defendant's Brief at 5).

UIFSA § 7611 (a.1) has three conditions that must be met pursuant to § 7613 provisions for jurisdiction over child support orders. First, the child, obligee, or obligor must not reside in the issuing state. This fails because the Defendant's primary residence in maintained in Texas, despite his current deployment. See *Reichenbacher v. Reichenbacher,* 729 A.2d 97 (1999), (Massachusetts child support order can be modified by Pennsylvania courts because *all parties resided in Pennsylvania).*

Second, the Petitioner must be a nonresident of Pennsylvania. This also fails because it has been clearly established that the Plaintiff is a Pennsylvania resident and has filed her petition for child support in Pennsylvania.

Third, the Respondent must not be subject to the personal jurisdiction

of a Pennsylvania tribunal. As previously discussed, the Defendant is already subject to Pennsylvania personal jurisdiction as a result of his appearance at the support conference and subsequent demand for a hearing.

According to Section 7611(b). Pennsylvania jurisdiction over this matter is also barred because the parties have not mutually consented to submit to the same jurisdiction.

Recognition of controlling orders:

Plaintiff is further barred from seeking Pennsylvania modification of the Texas order because she did not register it in Pennsylvania, as required by UIFSA § 7609 and as previously stated, the first provision of Section 7611. The Court therefore recognizes the Texas order as the controlling child support order in accordance with Section 7207 (a.1) which gives preference to the order of the tribunal with continuing and exclusive jurisdiction.

Additionally, Plaintiff argues that Defendant cannot bargain away the rights of his children. *Sonder v. Sonder,* 549 A.2d at 164 n.4, Plaintiff raises the best interest of the child standard for determining visitation, custody matters, and child support orders as a basis for the Court to intervene. *Thomson v. Rose,* 698 A.2d 1321(1997). However, since this Court has no jurisdictional authority here, it truly cannot reach the merits of Plaintiff's argument. Therefore, the issues of child support and what is in the best interests of the children remain questions for the Texas courts to decide.

Finally, the Court looks to the factually similar circumstances of the decision reached in *Casiano v. Casiano,* 815 A.2d 638 (2002) for direction. The parties obtained a divorce in Georgia where the husband was stationed in the military. Husband moved to Pennsylvania and attempted to modify the Georgia Order there. Wife opposed the petition, arguing for jurisdiction in her state of residence, California. The *Casiano* Court found that Pennsylvania had no jurisdiction over the Georgia order because Section 7611 requirements were not satisfied. However, the Court recommended that the parties could leave the Georgia Order intact or initiate a two-state action in California. In the present case, this Court suggests that a similar course of action might be a viable option for both the parties and the Texas courts to consider.

Conclusion

The Court concludes that Pennsylvania does not have continuing and exclusive jurisdiction over the Texas Order for child support and therefore does not have the authority to modify the Order as requested by the Plaintiff. While personal jurisdiction over the Defendant can be exercised by Pennsylvania due to the Defendant's voluntary appearance at a support conference, that jurisdiction does not automatically extend to the particulars of the Order itself. The Court thereby grants Defendant's jurisdictional challenge.

ORDER

AND NOW, to-wit, this 8th day of April, 2003, for the reasons set forth in the foregoing Opinion, it is hereby **ORDERED, ADJUDGED and DECREED** that the Plaintiff's Complaint for Support is **DISMISSED** for lack of jurisdiction.

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

COMMONWEALTH OF PENNSYLVANIA
v.
MICHAEL GUZZARDO

CRIMINAL PROCEDURE/BAIL

After the Pennsylvania Constitution was amended in 1998, bail is allowable to all prisoners unless for capital offenses or for offenses for which the maximum sentence is life imprisonment or unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any persons and the community when the proof is evident or presumption great. Pa. Const. art. I, § 14.

CRIMINAL PROCEDURE/BAIL

The amendment to Article 1, Section 14, to the Pennsylvania Constitution in 1998 had one core purpose and only one substantive change, that is, to reinforce public safety by making it more difficult for seriously dangerous accused criminals to obtain bail.

CRIMINAL PROCEDURE/BAIL

The Commonwealth bears the burden of proof to show that the defendant is not entitled to bail but can satisfy its burden by establishing a prima facie case of murder in the first degree.

CRIMINAL PROCEDURE/BAIL

Once the homicide charge has been bound over from a preliminary hearing, that may be sufficient for the court to deny bail to the defendant.

CRIMINAL PROCEDURE/BAIL

The Commonwealth is not entitled to an automatic presumption by simply asserting that it will seek a first or second-degree murder conviction but must rather offer some proof that the offense falls into a category which makes it non-bailable.

CRIMINAL PROCEDURE/BAIL

Where the Commonwealth did not present any evidence and only presented the fact that it had charged the defendant with criminal homicide and asserted that it will seek a first-degree murder conviction, the defendant is entitled to bail, which is set at $20,000.00 cash.

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

Appearances: Matthew DiGiacomo, Esquire for the Commonwealth
Leonard G. Ambrose, III, Esquire for the Defendant

OPINION

This case comes before the Court on the defendant's Motion To Set Bail.

I. FACTUAL AND PROCEDURAL HISTORY

The defendant is charged with Criminal Homicide and related offenses

arising out of an incident which allegedly occurred on April 26, 2003 in which the victim, Michael Irish, was shot and killed. The defendant is currently being held without bond. His attorneys filed a motion to set bail and a hearing was held on April 30, 2003. At that time, his preliminary hearing had not been held. The Commonwealth offered no evidence, but rather took the position that the defendant was not entitled to bail because of the charge and because it will seek a first degree murder conviction. The defendant argued that the Court could, and should, set bail and presented brief testimony.

II. LEGAL DISCUSSION

At issue in this case is whether the defendant is entitled to bail. In Pennsylvania, prior to 1998, the only offense for which a defendant did not have an absolute right to bail was capital murder. *See, Commonwealth v. Truesdale,* 296 A.2d 829 (Pa 1972). However, in November, 1998, Article 1, Section 14 of the Pennsylvania Constitution was amended to provide in part:

> All prisoners shall be bailable by sufficient sureties, unless for capital offenses *or for offenses for which the maximum sentence is life imprisonment or unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community when the proof is evident or presumption great; . . .*

(Emphasis added.)[1]

The predecessor constitutional provision provided in relevant part that: "All prisoners shall be bailable by sufficient sureties, unless for capital offenses when proof is evident or presumption great *Commonwealth v. Truesdale, supra* at 831. As the *Truesdale* Court further noted:

> "In the recent past this has meant that all persons, except those charged with murder in the first degree, n.4, had a right to bail while awaiting trial, subject to the accused giving adequate assurance he would appear for trial. If a person was charged with murder which rose to the level of murder in the first degree, he could be denied bail when the proof was evident or the presumption great.

Id.

See also, Commonwealth v. Hill, 736 A.2d 578, 583 (Pa. 1999).

There is no Pennsylvania appellate case law directly interpreting the new constitutional provision, or for that matter, the correlative rules of

[1] This constitutional amendment, along with Article 1, Section 6 was adopted by the electorate at the November 3, 1998 General Election.

criminal procedure.[2] However, there is some relevant discussion in the case of *Grimaud v. Commonwealth,* 806 A.2d 923 (Pa. Cmwlth. 2002). There, the Commonwealth Court noted: "In the present case, the proposed changes to Article 1, Section 14 constitute a single amendment because they serve one core purpose and effectuate only one substantive change: that is, to reinforce public safety by making it more difficult for seriously dangerous accused criminals to obtain bail." *Id* at 930. Citing the Pennsylvania Attorney General's statement which was to accompany the ballot Question, the Commonwealth Court noted:

> The ballot question would extend to these two new categories of cases in which bail must be denied the same limitation that the Constitution currently applies to capital cases. It would require that the proof be evident or presumption great that the accused committed the crime or that imprisonment of the accused is necessary to assure the safety of any person in the community. ... The proposed amendment would have two effects. First, it would require a court to deny bail when the proof is evident or presumption great that the accused committed a crime punishable by death or life imprisonment. Second, it would require a court deciding whether or not to allow bail in a case in which the accused is charged with a crime not punishable by death or life imprisonment to consider not only the risk that the accused will fail to appear for trial, but also the danger that release of the accused would pose to any person and the community.

Id at 931.

It is clear from the legislative history of Article 1, Section 14 that the members of the General Assembly understood that this amendment would have the effect of denying bail to persons charged with certain offenses, including first and second-degree murder, subject to the limitation "when the proof is evident or presumption great". *See,* Exhibit A attached. In response to criticism that the amendment was poorly drafted *(see,* statement of Senator Williams, Exhibit A, 32) Senator Fisher responded:

> Mr. President, I had indicated earlier that, in fact, if this bill is passed and approved by the voters of this Commonwealth, which a constitutional amendment takes, the definition of what will happen and how the procedures would be administered most likely in our Commonwealth would be decided by the further implementation of the Rules of Criminal Procedure. . . . I would fully believe that procedures will be set out and that various tests will be specified for

[2] See, Pa. R. Crim. P. 520 *et seq*.

> the courts that will be dealing with the bail questions, but clearly it will be safety, and safety is connected to dangerous.

See, statement of Senator Fisher, Exhibit A, 33.[3]

The bail rule was amended by the Supreme Court in reaction to the constitutional amendment. However, the language of the bail rule does not mirror the constitutional amendment, although it refers to it by comment. *See,* Pa. R. Crim. P. 520, comment. Continuing, Rule 521 absolutely prohibits bail in capital and life imprisonment cases, but only after a finding of guilt.

The defendant takes the position that reading the amendment and bail rule together leads to the conclusion that bail shall be denied when the Commonwealth has presented some evidence that the proof is evident or presumption great that the case is one in which a sentence of death or life imprisonment may be imposed. The Commonwealth argues that the fact of the charge, and its good faith assertion that it will seek a first degree murder conviction are sufficient.

A review of Article 1, Section 14, its legislative history, the Attorney General's comment in *Commonwealth v. Grimaud, supra* and *Commonwealth v. Truesdale, supra* offer this Court some assistance. In *Truesdale,* the defendant's application for bail occurred after the preliminary hearing, i.e. after presentation of evidence which established a *prima facie* case. Continuing, in *Commonwealth v. Heiser,* 478 A.2d 1355 (Pa.Super. 1984) (another pre-amendment case), the Superior Court stated:

> At a bail hearing, the Commonwealth bears the burden of proof. *Commonwealth v. Truesdale,* 449 Pa. 325, 296 A.2d 829 (1972). It can satisfy its burden to prove that a defendant is not entitled to bail by establishing a prima facie of murder in the first degree. *Commonwealth v. Farris,* 443 Pa. 251, 278 A.2d 906 (1971); Cf. *Commonwealth ex rel. Albert v. Boyle,* 412 Pa. 398, 195 A.2d 97 (1963).

Id. at 1356

This Court is unable to find any support for the proposition that the Commonwealth is entitled to an automatic presumption by simply asserting that it will seek a first or second-degree murder conviction. The language and historical background of Article 1, Section 14 require some proof be offered by the Commonwealth that the offense falls into a

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[3] For an example of a more detailed release and detention statute, see 18 U.S.C.A. §3142. It is interesting to note that a presumption under that statute is rebuttable. Neither Article I, Section 14 nor the bail rule address that issue.

category which makes it non-bailable.[4]

III. CONCLUSION

In light of the above, the Court concludes that pursuant to Article 1, Section 14 and the Pennsylvania Rules of Criminal Procedure governing bail, a defendant shall be denied bail in capital cases or in cases where life imprisonment may be imposed where the "proof is evident or presumption great". Under the unique factual circumstances of this case, the Court further concludes that the Commonwealth is not entitled to an automatic presumption based solely upon the charge and its assertion that it will seek a first degree murder conviction. Given the fact that the Commonwealth did not present any evidence, and being unable to conclude from the evidence offered by the defense that the proof is evident or presumption great that life imprisonment may be imposed, this Court determines that the defendant is entitled to bail.

DATE: May 19, 2003

ORDER

AND NOW, this 19th day of May, 2003, for the reasons set forth in the accompanying opinion, it is hereby ORDERED that the defendant is entitled to bail and sets bail in the amount of $20,000.00 cash. In addition, the defendant shall be required to execute the applicable bond documents which set forth the standard conditions of bail.

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

[4] *See also, Commonwealth ex rel. Albert v. Boyle,* 195 A.2d at 98. There, the Supreme Court clearly anticipated that some evidence would be presented at the bail hearing from which a court could determine whether the "proof was evident or presumption great. . . ." What is sufficient proof is another question. It appears clear that once the homicide charge has been bound over from a preliminary hearing, that may be sufficient. It may be that the introduction of the criminal complaint - or asking the Court to take judicial notice of it - may also be sufficient because it is based upon probable cause. However, the Court need not make that determination because in this case the Commonwealth elected not to introduce anything other than the fact of the charge and its assertion that it would seek a first degree murder conviction.

COMMONWEALTH OF PENNSYLVANIA
v.
ROBERT N. GRINNELL

CRIMINAL PROCEDURE/SENTENCING

A defendant shall not be ordered to pay a fine unless it appears of record that the defendant is able to pay the fine and the court makes findings pertaining to the defendant's financial ability. If a defendant is unable to pay a fine at the time of sentencing, alternative penalties should be considered.

Where an offender may be sentenced to a period of confinement for failure to pay fines or costs, a hearing should be conducted.

The Department of Corrections may, pursuant to the Pennsylvania Sentencing Code, deduct amounts from an inmate's personal account for payment of costs ordered as part of an offender's sentence. It is not necessary that there be a hearing before the Department of Corrections prior to the deductions being taken nor is prior court authorization required.

The provision of the Sentencing Code authorizing the Clerk of Courts to transmit certified copies of judgments to the prothonotary is applicable where the aggregate amount of restitution, reparation, fees, costs, fines and penalties does not exceed $1,000.00; 42 P.S. §9728(b)(2). Moreover, this section deals only with docketing and does not deal with the authority of the Department of Corrections to deduct monies from the accounts of inmates.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NOS. 248 & 304 - 1992

Appearances: Office of the District Attorney
Robert N. Grinnell, pro se

OPINION

Bozza, John A., J.

This matter is currently before the Court on an appeal filed by the defendant, Robert N. Grinnell. The facts of this case are briefly summarized as follows. On May 14, 1992, Mr. Grinnell was found guilty by a jury of the crimes of felony murder[1], robbery[2], criminal conspiracy[3], recklessly endangering another person[4], and terroristic threats[5]. On June 22, 1992, Mr. Grinnell was sentenced to life imprisonment for the offense of felony murder, costs in the amount of $202.50, and an additional

[1] 18 P.S. § 2501(a).
[2] 18 P.S. § 3701.
[3] 18 P.S. § 903.
[4] 18 P.S. § 2705.
[5] 18 P.S. § 2706.

period of incarceration for each of the other offenses. A Court Commitment was filed, indicating the length of Mr. Grinnell's sentence, as well as the amount of sentenced costs. The Department of Corrections (hereinafter "DOC") apparently treated the Court Commitment as a Court Order directing the DOC to deduct funds from Mr. Grinnell's prison account in order to pay the sentenced costs.[6] Accordingly, the Business Office at the State Correctional Institution at Frackville (where Mr. Grinnell is currently housed) sent a Memorandum to Mr. Grinnell, dated October 9, 2002, stating that, pursuant to the Court Commitment, costs of $202.50 were assessed to Mr. Grinnell's inmate account and that twenty percent (20%) deductions would be done automatically. The DOC was not ordered by the Court to deduct any amount from Mr. Grinnell's account.

On March 11, 2003, Mr. Grinnell filed a document titled "Petition to Stop Deduction of Act 84, from Prison Account" in the Court of Common Pleas at his original criminal docket numbers. In this document, Mr. Grinnell sought to have the Court stop the DOC and the Business Office at the State Correctional Institution at Frackville from making deductions from his inmate account in order to pay the costs owed to the Court. On March 26, 2003, the Court entered an Order denying Mr. Grinnell's petition because there was no Court Order that directed these costs to be deducted from Mr. Grinnell's account.

On May 7, 2003, Mr. Grinnell filed a document titled "Direct Appeal from Order Denying Petition to Stop Twenty Percent Deductions from Inmates (sic) Private Account." In this document, Mr. Grinnell asserts that he is appealing on the following two issues: 1) the twenty percent deductions were taken without a hearing or a Court Order in violation of Mr. Grinnell's right to due process of law; and 2) the "laws and procedures (sic) of Act 84 were "violated."[7] Based on the foregoing reasons, Mr. Grinnell's appeal is without merit.

Pennsylvania law requires that a sentencing court shall not order a defendant to pay a fine unless it appears of record that the defendant is able to pay. 42 P.S. § 9726(c). Before a fine may be imposed, the sentencing court must make findings on a defendant's financial ability to pay the fine.

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[6] Mr. Grinnell included copies of the Court Commitments, as well as a copy of a memorandum sent by the business office of the institution where he is housed. This memorandum, discussed more fully below, indicated that the institution would begin collecting a percentage of Mr. Grinnell's prison account based on "a court order" it had received. The "court order" which is referenced in this memorandum is interpreted by this Court to mean the Court Commitment documents.

[7] As Mr. Grinnell stated the basis for his appeal in this document, the Court did not request that Mr. Grinnell file a separate 1925(b) Statement of Matters Complained of on Appeal.

42 P.S. § 9726(d). If a defendant appears unable to pay the fine at the time of sentencing, the sentencing court should consider alternative penalties.[8] *George v. Beard*, 2003 Pa. Cmwlth. LEXIS 366, *3 (May 22, 2003)(citing *Commonwealth v. Schwartz*, 275 Pa. Super. 112, 418 A.2d 637 (1980)). Mr. Grinnell was not ordered to pay a fine, but was assessed "costs". An offender may be incarcerated for failure to pay court-ordered fines and costs, but a hearing must first be conducted on that offender's financial ability to pay. *Id.* at *5-6. A hearing must also be conducted when

> the failure to pay sentenced financial obligations exposes an offender to initial confinement, additional confinement or increased conditions of supervision. . . stated differently, if an offender is notified that he or she is charged with contempt or with probation or parole violations as a result of failure to pay fines, costs or restitution, the offender should be afforded a hearing. *Id*. at *7.

None of these things occurred in the present case.

Pennsylvania's Sentencing Code sets forth the procedure for collection of restitution, fines, and costs, and it was recently amended in 1998. Section 9728, referred to as Act 84, describes the procedure by which the county Clerk of Courts transmits the relevant information concerning fines, costs, and fees to the Prothonotary. The Clerk of Courts then notifies the Department of Probation and the county correctional facility, or the Department of Corrections, whichever is appropriate and forwards copies of all orders for restitution, reparation, fees, costs, fines and penalties. After this transmittal,

> the county correctional facility to which the offender has been sentenced or the Department of Corrections shall be authorized to make monetary deductions from inmate personal accounts for the purpose of collecting restitution or any other court-ordered obligation.

42 P.S. § 9728(b)(5).

Section 9730 provides that if a defendant defaults in the payment of a fine, court costs or restitution after imposition of sentence, a hearing may be conducted to determine whether the defendant is financially able to pay.

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[8] In his direct appeal, Mr. Grinnell argues that his due process rights were violated due to a failure to have a hearing before he was ordered to pay costs. Mr. Grinnell was assessed "costs", which are "... 'penal sanctions' arising from a criminal conviction... [that are] part of the judgment of sentence." *Commonwealth v. Larsen*, 452 Pa. Super. 508, 531, 682 A.2d 783, 794 (1996). Pennsylvania law permits a court to impose the costs of prosecution upon a defendant who has been convicted of a crime, and there is no requirement of a hearing prior to the judgment of sentence imposing costs. Hence, Mr. Grinnell's due process rights have not been violated.

42 P.S. § 9730(b)(1). The defendant's account may be turned over to a collection agency or the defendant may be incarcerated if the defendant is found able to pay, or the defendant may be permitted to pay in installments if the defendant is unable to pay the fines or costs in a single payment. 42 P.S. § 9730(b)(2)-(3).

It should first be noted that Mr. Grinnell has not challenged the Court's authority to impose these costs as a part of his sentence. Rather, Mr. Grinnell claims that, pursuant to *Boofer v. Lotz*, 797 A.2d 1047 (Pa. Commw. 2002), *petition for allowance of appeal granted* 817 A.2d 1079 (Pa. 2003), the Court must conduct a §9730(b) hearing to determine Mr. Grinnell's ability to pay the costs before any money in his inmate account is deducted by prison officials. In *Boofer*, the Commonwealth Court concluded that a hearing pursuant to 42 P.S. § 9730(b), is required when the inmate is determined to be in default in his payment of a fine, court costs or restitution. However, the Commonwealth Court's analysis in *Boofer* is not applicable to the facts of this case.

In *Boofer* the Court's discussion of Mr. Boofer's entitlement to a § 9730(b) hearing appears to be centered on the assumption that the Commonwealth was proceeding on the basis that the trial court found Mr. Boofer to be in default of his obligations and that it was trying to collect twenty percent of Mr. Boofer's earnings. *Boofer*, 797 A.2d at 1049. Here, there was no assertion that the deduction of money from Mr. Grinnell's inmate account was the result of a default in payment, and there was no attempt to send his account to a private collection agency or to imprison him for the failure to pay, as §9730 would provide. Moreover, the Court in *Boofer* focused on the fact that the DOC was garnishing Mr. Boofer's wages while in the hands of his employer. Here, there was no indication that this was an action with regard to the attachment of Mr. Grinnell's wages.[9]

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[9] To the extent that the DOC's action may be viewed as a wage attachment, the law authorizes the DOC's deduction from Mr. Grinell's account. Section 8127 of the Judicial Code states that

> the wages, salaries and commissions of individuals shall **while in the hands of the employer** be exempt from any attachment, execution, or other process except upon an action or proceeding:
>
> (5) for restitution to crime victims, costs, fines or bail judgments pursuant to an order entered by a court in a criminal proceeding. 42 P.S. §8127(a).

The language of Sections 9728 and 8127 is different, in that, Section 8127 refers to income that is still in the hands of the employer, meaning the inmate had yet to receive it. Section 9728 refers to deductions from personal inmate accounts, which can include money from multiple sources other than prison wages. However, there is no indication in the pleadings that the funds in Mr. Grinnell's inmate personal account are wages or derived from wages or from some other source.

Most significantly, Section 9728 of the statute does not require a hearing before the DOC is authorized to deduct an unspecified amount from an inmate's personal account. *See George v. Beard*, 2003 Pa. Cmwlth. LEXIS 366, *9 (May 22, 2003)(§ 9728(b)(5) does not impose prior court authorization as a threshold condition)). In addition, there is nothing in Section 9728 which requires a hearing before the Clerk of Court is permitted to comply with its duty to transmit orders for the payment of costs to state correctional institutions, a fact which was noted by the Pennsylvania Supreme Court in its recent Opinion and Order granting the Petition for Allowance of Appeal in *Boofer v. Lotz*, 817 A.2d 1079 (2003).[10]

As to his second assertion of error, Mr. Grinnell argues that he is exempt from having to pay any costs because the amount of costs in his case is under $1,000.00. Specifically, Mr. Grinnell quotes Section 9728(b)(1), arguing that the Clerk of Courts shall transmit to the Prothonotary only those fines **exceeding** $1,000.00. Mr. Grinnell is incorrect, and has overlooked the language of Section 9728(b)(2). This subsection states that the Clerk of Courts

> . . . **may** transmit to the Prothonotary of the respective county certified copies of all judgments for restitution, reparation, fees, costs, fines and penalties which, in the aggregate, **do not exceed $1,000**. . .

42 P.S. §9728(b)(2)(emphasis added). As Mr. Grinnell owes $202.50, this amount is clearly within the limits of the statute, and Mr. Grinnell is not exempt from having to pay these costs. Most importantly, this is not the section under which the DOC is proceeding. This section relates to the docketing of judgments and not to the authority of the DOC to deduct funds from inmate accounts.

For the reasons set forth above, this Court's Order dated March 26, 2003 should be affirmed.

Signed this 11 day of June, 2003.

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

[10] It is noteworthy that the statute does notify a particular amount to be deducted from a inmate's account, but requires the DOC to establish guidelines with regard to its duties.

GUSTEE BROWN, Plaintiff
v.
CATHERINE BROWN, Defendant

JUDGMENTS/APPEAL

Failure to serve court with statement of matters complained of on appeal pursuant to Pa. R.A.P. 1925(b) resulted in waiver of issues raised in appeal.

JURISDICTION

FAMILY LAW/CHILD CUSTODY

Pennsylvania court was not home state under Uniform Child Custody Act where child resides in Tennessee and did not reside in Pennsylvania for at least six months preceding filing of complaint in custody.

Pennsylvania refused to assume jurisdiction over custody dispute where child may have been within its jurisdiction for more than six months after father unilaterally decided to extend child's visitation beyond time period agreed upon by parties.

Past, present and future care of child is more readily in Tennessee. Thus, Tennessee is appropriate home state under Uniform Child Custody Jurisdiction Act.

Pending custody action in Tennessee deprived Pennsylvania court from exercising jurisdiction in custody dispute. 23 Pa. C.S. §5347(a).

Court will not promote unilateral decision of parent to retain child after visitation by accepting jurisdiction in order to allow parent to obtain custody award.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY PENNSYLVANIA NO. 13073-2001

Appearances: Gustee Brown, Pro Se
Catherine Brown, Pro Se, via telephone

OPINION

May 7, 2003: This custody jurisdictional issue is before the Court on remand to fully explore the issues of abduction, unilateral removal, and home state, issues apparently raised by Attorney Gustee Brown (hereinafter "Attorney Brown") in his Statement of Matters Complained of on Appeal, a Statement which Attorney Brown never served upon this Court.

BACKGROUND

This dispute involves the custody of Kofi Brown (hereinafter "Child"), the four year-old son of Attorney Brown and Catherine Brown (hereinafter "Mother"). From June 9, 1998, the date of the child's birth, until July of 1999, the child lived in Ohio with mother, Attorney Brown and

the child's maternal grandmother.[1] In July of 1999, mother, Attorney Brown, and the child moved to Nashville, Tennessee to pursue her medical career. In December of 1999, mother filed for divorce in Tennessee. Thereafter, in January of 1999, Attorney Brown moved to Erie, Pennsylvania and the child stayed with mother in Nashville, Tennessee. Subsequently, in February or March of 2001, mother and Attorney Brown agreed that the child could visit Attorney Brown and his paternal grandmother in Pennsylvania until mother's employment in internal medicine switched to a lighter rotation. In the summer of 2001, mother's work schedule eased, however, mother had difficulty retrieving the child from Attorney Brown. As a result, mother, on July 24, 2001, filed a Motion in The Fourth Circuit Court for Davison County, Tennessee (hereinafter the "Tennessee Court") requesting that the Court order Attorney Brown to return the child to Tennessee. Thereafter, mother came to Erie and retrieved her son.

The Tennessee court awarded mother temporary custody of the child on August 17, 2001. On September 7, 2001, the Tennessee Court heard testimony on Attorney Brown's Motion to Strike or Amend the August 7, 2001 Order. By Order dated October 5, 2001, the Tennessee Court denied Attorney Brown's Motion to Strike or Amend the August 7, 2001 Order and further ordered that "the state of Tennessee is the only state that has jurisdiction over custody over the minor child."

Despite his participation in the Tennessee proceedings, Attorney Brown initiated additional proceedings in this Court when, on September 6, 2001, he filed a Complaint for Custody in the Court of Common Pleas of Erie County, Pennsylvania. Thereafter, Attorney Brown presented an *ex parte* Motion to Determine Jurisdiction and Emergency Relief with this Court. In response, by Memorandum Opinion and Order dated October 10, 2001, Senior Judge Roger M. Fischer, noting that Attorney Brown alleged a *prima facie* statement of this Court's jurisdiction by alleging that the child was present in Erie County, Pennsylvania for more than six months, set a hearing to take testimony regarding the child's residence for the six months prior to September 7, 2001. By Order dated November 1, 2001, Senior Judge Roger M. Fischer of this Court determined that the child resided in Pennsylvania for fifteen of the eighteen months preceding the mother's removal of the child from Pennsylvania and thereby found that Pennsylvania and Erie County had jurisdiction over the custody dispute. As a result, Judge Fischer scheduled a Custody Trial for December 14, 2001.

[1] The parties dispute the child's place of residence for several points of time throughout the child's life. As this Court finds mother credible, while Attorney Brown is not, it accepts mother's version of the facts as recited to this Court at the Special Relief Hearing held on April 29, 2003. *See* Hearing for Special Relief Transcript, April 29, 2003, at pp. 10-12.

Meanwhile, on November 20, 2001, the Tennessee Court held a hearing to determine whether it had jurisdiction over the custody dispute. By Order dated December 10, 2001, the Tennessee Court stated that Attorney Brown was not credible, that the Complaint for Divorce was filed in December of 1999, that the child resided in Tennessee for six (6) months prior to filing the Complaint for Divorce, that Tennessee was the child's home state within the meaning of the Uniform Child Custody Jurisdiction Enforcement Act and that the Tennessee Court had jurisdiction over the issue of custody. In a Final Decree of Divorce, dated December 10, 2001, the Tennessee Court awarded full custody to mother. The Tennessee Court forwarded copies of its Orders, as well as correspondence detailing its action, to this Court.

As a result of this Court's receipt of the Tennessee Court's December 10, 2001 action, as well as a request for continuance filed by Ms. Brown, this Court, by Order dated December 14, 2001, continued the December 14, 2001 Custody Trial. Ultimately, this Court heard testimony on the subject of jurisdiction on April 19, 2002. By Order dated July 8, 2002, this Court issued its determination that the State of Tennessee was the appropriate forum to hear the custody issue.

On August 6, 2002, Attorney Brown filed a Notice of Appeal from this Court's July 8, 2002 Order. In response, this Court, by Order dated September 12, 2002, ordered Attorney Brown to "comply with Rule 1925(b) of the Pennsylvania Rules of Appellate Procedure and file of record and ***serve*** on this Court a statement of the matters complained of on appeal within fourteen (14) days of entry of this Order" (emphasis added). The docket sheet maintained by the Erie County Prothonotary indicates that Attorney Brown, on September 20, 2002, filed a Statement of Matters Complained of on Appeal with a verification and certificate of service, however, Attorney Brown **did not serve** said Statement of Matters Complained of on Appeal on this Court. To this day, this Court still does not have a copy of Attorney Brown's Statement of Matters Complained of on Appeal.[2] Furthermore, mother indicated to this Court that she was not served with said Statement of Matters Complained of on Appeal. See Hearing for Special Relief Transcript, April 29, 2003, at pp. 13-14. When this Court addressed the issue of failure to serve to Attorney Brown, he provided the Court with no explanation or response. *See* Hearing for Special Relief Transcript at pp.4, 13-14.

By Opinion dated March 10, 2003, the Superior Court remanded the case to this Court with directions to hold a hearing to explore the issues of abduction, unilateral removal and home state within thirty (30) days of the

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[2] This Court could not obtain a copy from the Erie County Prothonotary as the entire record was sent to the Superior Court for purposes of appeal and because the Honorable Superior Court retained the record after remand.

filing of the Superior Court's Opinion, to continue to consult with the Tennessee court in determining jurisdiction, and to issue an order and file an opinion explaining the reasons for its decision within ten (10) days after the conclusion of the hearing. This Court did not receive a copy of the Superior Court's Opinion until April 10, 2003, when Attorney Brown attempted to use the Superior Court's Opinion to schedule a Custody Trial before this Court. At that time, the Erie County Office of Court Administration obtained a copy of the Superior Court's Opinion, which it forwarded to this Court. As a result, this Court, unable to comply with the thirty (30) day time frame, immediately scheduled a Special Relief Hearing in accordance with the Superior Court's direction. This Court adhered to the Superior Court's directive as soon as feasible and held the Special Relief Hearing on April 29, 2003.

DISCUSSION

This Court believes that Attorney Brown waived all objections to this Court's July 8, 2002 Order by failing to serve upon this Court his concise Statement of Matters Complained of on Appeal.[3] *Commonwealth v. Butler*, 812 A.2d 631, 632-33 (Pa. 2002) (all issues raised on appeal automatically waived when appellant failed to comply with Court's Order to file a Rule 1925(b) Statement); *Commonwealth v. Wassman*, 2003 Pa.Super. 99 (Pa.Super. 2003) (automatic waiver for failure to comply with 1925(b) waiver, even when trial court overlooks failure by addressing issues it assumed would be raised); *Everett Cash Mut. Ins. Co. v. T. H. E. Ins. Co.*, 804 A.2d 31, 33-34 (Pa.Super 2002)(filing and service requirements under Pa.R.A.P. 1925(b) are distinct requirements such that failure to comply with one of the requirements constitutes waiver of all issues raised on appeal). Nevertheless, in compliance with the Superior Court's March 10, 2003 Opinion, this Court writes its Opinion as it discerns the matters complained of on appeal from the Superior Court's Opinion. Specifically, this Court, as directed by the Superior heard testimony to determine whether father's allegations of kidnapping and home state, issues apparently raised in Attorney Brown's Statement of

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[3] This Court realizes that Attorney Brown is proceeding pro se and that, at the time that he filed his appeal he was practicing law without a valid license, however, his failure to maintain a valid license does not impact his effectiveness as counsel. *Commonwealth v. Jamar Phillips*, Pennsylvania Superior Court Docket Number 1827 WDA 2002, Erie County Criminal Docket Number 1887 of 2001. As an attorney, this Court expects him to act as an officer of the Court and hold him to the same level of professional conduct as any other attorney. Attorney Brown, like any other Attorney to appear before this Court was expected to comply with this Court's September 12, 2002 Order and adhere to the Rules of Appellate Procedure. He failed to do so.

Matters Complained of on Appeal, and/or other matters relevant to jurisdiction have merit under Section 5342(a)(5) and 5344 of the Uniform Child Custody Jurisdiction Act (UCCJA), 23 Pa.C.S.A. §§ 5341 *et. seq*.

After considering the testimony presented to this Court on April 29, 2003, this Court determines that father's allegations of kidnapping and home state have no merit. The child continues to reside in Tennessee with his mother and father, by his own testimony, has not seen the child in over two (2) years. The Tennessee Court continues to maintain jurisdiction pursuant to its prior Order.

The Uniform Child Custody Jurisdiction Act (hereinafter "UCCJA"), which governs this jurisdictional matter, provides, in relevant part:

> (a) **General rule**-A court of this Commonwealth which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
>
> (1) this Commonwealth:
> (i) is the home state of the child at the time of commencement of the proceeding; or
> (ii) had been the home state of the child within six months before commencement of the proceeding and the child is absent from this Commonwealth because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this Commonwealth:
>
> (2) it is in the best interest of the child that a court of this Commonwealth assume jurisdiction because:
> (i) the child and his parents, or the child and at least one contestant, have a significant connection with this Commonwealth: and
> (ii) there is available in this Commonwealth substantial evidence concerning the present or future care, protection, training and personal relationships of the child.

23 Pa.C.S.A. §5344(a). Furthermore, the UCCJA defines "home state," as:

> The state in which the child immediately preceding the time involved lived with his parents, a parent or a person acting as parent, or in an institution, for at least six consecutive months, and, in the case of a child less than six months old, the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six-month or other period.

23 Pa.C.S.A. §5343

A. <u>Home State Jurisdiction</u>

This Court does not have home state jurisdiction over the child.

It is undisputed that both the child and mother are now and were, at the time Attorney Brown filed his Custody Complaint in Pennsylvania, residing in Tennessee. However, the parties dispute the child's place of residence for several points of time throughout the child's life, including the six-month period immediately preceding the filing of Attorney Brown's Custody Complaint. When this Court issued its July 8, 2002 Order, it, like the Tennessee Court, determined that Attorney Brown was not a credible witness. In that regard, this Court doubted Attorney Brown's argument that mother, rather than he, had wrongful possession of the child. Instead, based upon correspondence between this Court and the Tennessee Court, this Court accepted the Tennessee Court's determination that Tennessee was the child's home state under the UCCJA.

The testimony presented to this Court on April 29, 2003 affirms this Court's acceptance of Tennessee as the child's home state. Specifically, the testimony presented by mother on April 29, 2003 reveals that the child resided with mother in Tennessee from July of 1999 through present, with the exception of a temporary absence when the child visited Attorney Brown and his paternal grandmother in Pennsylvania. While the parties are unable to recall how long the child's visit to Pennsylvania lasted, this Court believes, from the evidence before it, that the visit was merely a temporary absence from Tennessee due to the parties' agreement. Pursuant to UCCJA §5343 a temporary absence is counted as part of the six months used in determining home state jurisdiction. Therefore, the child's temporary absence from Tennessee is properly allotted to Tennessee, the child's permanent place of residence.

Even if the child was in Pennsylvania visiting his father for six months immediately preceding Attorney Brown's Pennsylvania filing, the visit was extended to create a six month stay solely because of Attorney Brown's actions outside of the parties agreement. Clearly, in accordance with the parties' agreement, mother wanted the child returned to her custody in July, rather than August, of 2001. Mother's filing, on July 24, 2001, of a Motion requesting the Tennessee Court to order Attorney Brown to return the child to Tennessee demonstrates this point.

In that regard, this Court believes that Pennsylvania is not the child's home state, that Tennessee is the child's home state, that mother took action consistent with the parties' agreement, that mother and child are in Tennessee for legitimate reasons, that father's allegations of kidnapping or unilateral removal lack merit and that if anyone took unilateral action inconsistent with the UCCJA, it was Attorney Brown, not mother. To find otherwise would go against the policy behind the UCCJA of deterring abductions and other unilateral removals of children undertaken to obtain custody awards. This Court refuses to assume jurisdiction over a custody matter merely because the child may have been within its

jurisdiction for more than six months due to the father's unilateral decision to keep the child beyond the time period agreed upon by the parties for visitation. *Warman v. Warman*, 439 A.2d 1203 (Pa.Super. 1982).

B. Significant Connections Jurisdiction

Similarly, it is not in the best interest of the child that Pennsylvania assume jurisdiction.

Clearly, it is significant that Pennsylvania is and, since January of 1999, has been Attorney Brown's place of residence. As a result, the child has visited Attorney Brown in Pennsylvania and, therefore, has a connection to Pennsylvania. Attorney Brown even enrolled the child in day care while he was visiting Pennsylvania. In this regard, there is a small amount of evidence concerning the care, protection, and training of the child in Pennsylvania.

Nevertheless, this Court believes that Tennessee's home state jurisdiction predominates over any potential significant contact grounds that this Court may have to exercise jurisdiction. *Black v. Black*, 657 A.2d 964 (Pa.Super. 1995) (home state jurisdiction is the preferred basis for jurisdiction under the UCCJA and trumps other jurisdictional grounds). The child has lived in Tennessee for the majority of his life and Tennessee has a closer connection to the child. For example, all of the child's medical records and doctors are in Tennessee. Attorney Brown himself acknowledges that his son has an extensive medical history and that all of his medical records were shipped to Tennessee from Ohio, that Mother maintains the child's medical insurance in Tennessee and that during the periods of time when he had visitation with the child he took the child to Tennessee to see his Tennessee doctors. *See* Transcript of Proceedings, April 19, 2002, at p.25. Compared to the substantial amount of evidence regarding the present or future care, protection, training and personal relationships of the child in Tennessee, the place where the child resided for the majority of his life, the amount of evidence available in Pennsylvania is inconsequential.

Similarly, even if this Court had jurisdiction it was proper to decline jurisdiction as Tennessee was the more appropriate forum. 23 Pa.C.S.A. §5348; *Merman v. Merman*, 603 A.2d 201 (Pa.Super. 1992). In relevant part, the UCCJA, 23 Pa.C.S.A §5348 addresses the issue of inconvenient forum as follows:

> (a) **General rule**-A court which has jurisdiction under this subchapter to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.
>
> (b) **Moving party**-A finding of inconvenient forum may be made upon

the court's own motion or upon motion of a party or a guardian ad litem or other representative of the child.

(c) **Factors to be considered**-In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose, it may take into account the following factors, among others:
(1) If another state is or recently was the home state of the child.
(2) If another state has a closer connection with the child and his family or with the child and one or more of the contestants.
(3) If substantial evidence concerning the present or future care, protection, training and personal relationships of the child is more readily available in another state.
(4) If the parties have agreed on another forum which is no less appropriate.
(5) If the exercise of jurisdiction by a court of this Commonwealth would contravene any of the purposes stated in section 5342 (relating to purposes and construction of subchapter).

23 Pa.C.S.A §5348

As noted above, substantial evidence concerning the past, present and future care of the child is more readily available in Tennessee than in Pennsylvania. The child has lived in Tennessee for the majority of his life, the child continues to live in Tennessee, the child's mother has secured gainful employment in Tennessee with an apparent intent to reside there permanently and, therefore, Tennessee has a closer connection to the child and maintains a substantial amount of the evidence regarding the child's care.

The only evidence available in Pennsylvania is that accumulated during the brief period of time during which the child visited his father in Pennsylvania. Because of the child's significant connection and contacts with Tennessee, Tennessee is obviously the more appropriate forum. *See Dincer v. Dincer*, 701 A.2d 210 (Pa. 1997); *Black v. Black*, 657 A.2d 964 (Pa.Super. 1995); *Merman v. Merman*, 603 A.2d 201 (Pa.Super. 1992).

C. Prior Tennessee Proceedings

Furthermore, this Court determined that a custody action was already pending in Tennessee at the time Attorney Brown filed the Pennsylvania action. Therefore, even if this court found jurisdiction to lie in Pennsylvania, it could not exercise jurisdiction because of the pending Tennessee proceedings. *Simpkins v. Disney*, 610 A.2d 1062, 1065 (Pa.Super. 1992); *Carpenter v. Carpenter*, 474 A.2d 1124, 1128-29 (Pa.Super. 1984).

Under the UCCJA, a Pennsylvania court "*shall* not exercise its jurisdiction" if, at the time the petition was filed, a proceeding concerning the child's custody was pending in another state's Court exercising its

jurisdiction substantially in conformity with the UCCJA. 23 Pa.C.S.A. §5347(a) (emphasis added). By the time that Attorney Brown filed his Complaint for Custody in the Court of Common Pleas of Erie County, Pennsylvania, the Tennessee Court had already assumed jurisdiction of mother's divorce complaint[4], issued a temporary custody order, and scheduled a hearing on Attorney Brown's Motion to Strike or Amend the August 7, 2001 Order that granted mother
temporary custody. The outcome of said hearing was an Order, dated October 5, 2001, clearly setting forth the Tennessee Court's intention to exercise continuing jurisdiction over the case by stating "the state of Tennessee is the only state that has jurisdiction over custody over the minor child."

Once Tennessee assumed jurisdiction over the custody dispute, the underlying policy of the UCCJA against simultaneous custody proceedings supports this court's decision not to exercise jurisdiction, even if the Tennessee Court lacked jurisdiction. Specifically, the Commissioners' Note to Section 6 of the UCCJA states:

> When the courts of more than one state have jurisdiction... priority in time determines which court will proceed in the action... . While jurisdiction need not be yielded. . . if the other court would not have jurisdiction under the criteria of the Act, the policy against simultaneous Custody proceedings is so strong that it might in a particular situation be appropriate to leave the case to the other court even under such circumstances.

Carpenter, 474 A.2d at 1129 *quoting* Commissioners' Note, 9 Uniform Laws Annotated, p. 135, West Publishing Co. 1979.

Therefore, based upon the pending Tennessee proceedings, this Court properly declined any jurisdictional claim that it may have had.

D. <u>Purposes of the UCCJA</u>

This Court's decision to relinquish jurisdiction in favor of Tennessee furthers the purposes of the UCCJA, Pa.C.S.A. §5342. By relinquishing

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[4] While it is not clear to this Court whether mother's Tennessee divorce complaint asserts a claim for custody, the Tennessee Court recognizes mother's initiation of divorce proceedings as the time of the commencement of the custody proceedings and this Court respects the decision of her sister state and, under tile principles of comity, as well as this Court's correspondence with the Tennessee Court, this Court believes that the Tennessee Court made its jurisdictional determination in accordance with the UCCJA. Further, this Court notes that, under Section 5343 of the UCCJA, a Custody Proceeding is defined to include "proceedings in which a custody determination is one of several issues, such as an action for divorce or separation. . .".

jurisdiction, this Court avoids a jurisdictional conflict and competition with Tennessee, which could have resulted in the shifting of this young child from Tennessee to Pennsylvania and vise versa, and which would have had a harmful and detrimental effect on the child's well-being. Because this Court, pursuant to the UCCJA, communicated with the Tennessee court, which expressed its strong belief that it was the state with sole jurisdiction and that it intended to exercise continuing jurisdiction over the matter, this Court's decision to decline jurisdiction also furthers the goals of the UCCJA by promoting and expanding the exchange of information and other forms of mutual assistance between the courts of this Commonwealth and that of another state concerned with the same child. In that regard, this Court's decision will promote cooperation with Tennessee courts.

This decision also ensures that a custody decree is rendered in the state that can best decide the case in the best interests of the child, namely, Tennessee. Declining jurisdiction in this matter paves the way for this custody litigation to continue in Tennessee, the state with more significant contacts with the child, the state where the child and his mother have the closest connection and where the majority of the evidence concerning his present and future care, protection, training and personal relationships is most readily available.

On the other hand, a decision by this Court to exercise jurisdiction in this matter would contravene the purposes stated in the UCCJA, 23 Pa.C.S.A. §5342. First, if anyone took unilateral action to obtain custody in this case, it was Attorney Brown. This Court will not promote the unilateral decision of a parent to retain a child after visitation by accepting jurisdiction in order to allow the parent to obtain a custody award. Further, a decision to exercise jurisdiction would promote jurisdictional competition and would result in shifting this young child from one state to another. It would also create instability in the child's home environment and family relationships. In addition, such a decision would contravene the purposes of the UCCJA because the child has a closer connection with Tennessee than Pennsylvania and there is little evidence in Pennsylvania concerning the child's present and future care, protection, training and personal relationships.

CONCLUSION

In declining jurisdiction, the Court attaches great importance to the fact that Mother, child, and, for a period of time, Attorney Brown, made Tennessee their permanent place of residence. In other words, the relocation from Ohio to Tennessee was obviously made in good faith as the parties moved there as a family unit. Furthermore, this Court finds no merit to the contention that mother kidnapped or unilaterally moved the child from Erie, Pennsylvania. Instead, this Court finds that the parties had an agreement whereby the child, who lived primarily with mother in

Tennessee, was to visit Attorney Brown in Erie for a temporary stay until mother's work schedule eased. Based upon the testimony and evidence, it is this Court's belief that mother removed the child from Pennsylvania with the belief that she was acting in accordance with the parties' agreement.

In summary, this Court's decision to decline jurisdiction in this case is based on the following findings: Tennessee is the child's home state; a proceeding concerning the custody of the child was pending in Tennessee at the time of Attorney Brown's Pennsylvania filing; Tennessee is the more appropriate and the more convenient forum for this custody action; Attorney Brown's allegations of abduction/unilateral removal are without merit; and, this Court's decision advances the purposes of the UCCJA.

For the foregoing reasons, this Court affirms its July 8, 2002 Order.

By the Court
/s/ **Elizabeth K. Kelly, Judge**

COMMONWEALTH OF PENNSYLVANIA
v.
RICKY VANGEL OLMSTEAD

CRIMINAL PROCEDURE/SENTENCING GUIDELINES

A sentencing court is required to state on the record its reasons for the sentence imposed. *Commonwealth v. Brown*, 741 A.2d 726 (Pa.Super. 1999). In addition, the Court enjoys broad discretion in choosing a penalty from sentencing alternatives and the range of permissible confinements, provided the choices are consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant. *Commonwealth v. Devers*, 519 Pa. 86, 546 A.2d 12 (1988).

CRIMINAL PROCEDURE/SENTENCING

While Section 9721(b) of the Sentencing Code does mandate that the court provide a "contemporaneous written statement" in every case where the Court imposes a sentence outside the sentencing guidelines, case law indicates that this requirement is satisfied when the judge states his reasons for the sentence on the record and in the defendant's presence. *See* 42 P.S. §9721(b); *Commonwealth v. Widmer*, 446 Pa.Super. 408, 667 A.2d 215 (1995), r*eversed on other grounds*, 547 Pa. 137, 689 A.2d 211 (1997).

CRIMINAL PROCEDURE/SENTENCING GUIDELINES

A sentencing court should not sentence in the mitigated minimum range, the aggravated minimum range, or outside the applicable guideline ranges solely based upon criterion already incorporated into the guidelines. However, when relevant sentencing factors have not been incorporated into the computation of the standard minimum range, those factors may be considered as factors to justify a sentence outside the guidelines. Also, an unincorporated record of criminal conduct constitutes a significant aggravating factor.
Commonwealth v. Darden, 366 Pa. Super. 597, 606-607, 531 A.2d 1144, 1148-1149 (1987)(citations omitted).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 2568 & 3169 - 2001

Appearances: Ross C. Prather, Esquire for the Defendant
Office of the District Attorney for the Commonwealth

OPINION

Bozza, John A., J.

On April 4, 2002, defendant Ricky Vangel Olmstead entered a plea of guilty to the following crimes: one count each of driving under the

influence of alcohol[1] (hereinafter "DUI"), careless driving[2], and driving under suspension pursuant to § 3731[3] at Docket Number 2568 - 2001, and one count each of driving under the influence of alcohol[4], careless driving[5], and driving under suspension[6] at Docket Number 3169 - 2011. [sic] On May 9, 2002, Mr. Olmstead was sentenced as follows:

At Docket Number 2568 - 2001:

Count I - Driving Under the Influence - twelve (12) months to twenty-four (24) months incarceration, mandatory ignition interlock device, fine and costs;

Count II - Careless Driving - fine and costs;

Count IV - Driving Under Suspension - ninety (90) days incarceration, concurrent to sentence imposed at Count I, fine and costs.

At Docket Number 3169 - 2001:

Count I - Driving Under the Influence - twelve (12) months to twenty-four (24) months incarceration, consecutive to sentence imposed at Count I of Docket Number 2568- 2001, mandatory ignition interlock device, fines and costs;

Count III - Careless Driving - fines and costs;

Count IV - Driving Under Suspension - fines and costs.

On April 15, 2003, Mr. Olmstead filed a Petition for Post-Conviction Collateral Relief, seeking to have his appellate rights reinstated *nunc pro tunc*. On April 17, 2003, this Court entered an Order requiring the Commonwealth to file a response to Mr. Olmstead's petition. On April 25, 2003, the Commonwealth's representative, Robert A. Sambroak, Jr., Esquire, indicated in correspondence to the Court that the Commonwealth had no objection to the reinstatement of Mr. Olmstead's appellate rights *nunc pro tunc*. On April 29, 2003, the Court entered an Order granting the reinstatement of Mr. Olmstead's appellate rights, and on May 21, 2003, Mr. Olmstead filed a Notice of Appeal to the Superior Court of Pennsylvania.

Mr. Olmstead filed a timely 1925(b) Statement of Matters Complained of on Appeal, in which he asserts the Court erred and abused its discretion for the following reasons:

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[1] 75 P.S. § 3731.
[2] 75 P.S. § 3714.
[3] 75 P.S. § 1543(b)(1).
[4] 75 P.S. § 3731.
[5] 75 P.S, § 3714.
[6] 75 P.S. § 1543(a).

1. the Court considered Mr. Olmstead's prior offenses and the number of prior offenses, which Mr. Olmstead argues are already considered and calculated within the Prior Record Score, and which are not adequate reasons for departure from the sentencing guidelines;

2. the Court considered community safety as a basis for a departure from the sentencing guidelines, which is not an adequate reason for said departure;

3. the Court did not consider the "positive aspects" of Mr. Olmstead's background and character and therefore did not have an adequate reason for departure from the sentencing guidelines;

4. the Court incorrectly concluded that Mr. Olmstead is "an incurable recidivist", yet Mr. Olmstead has not had the proper opportunities for medical rehabilitation;

5. the totality of the reasons stated on the record, in addition to the absence of a written contemporaneous statement, do not provide an adequate reason for departure from the sentencing guidelines;

6. the Court erroneously applied inappropriate factors in assuming and determining that Mr. Olmstead had committed five (5) prior DUI offenses, and used that determination as a reason for departure from the sentencing guidelines; and

7. the Court imposed an unreasonable, excessive sentence, based on the information before the Court at the time of sentencing.

Mr. Olmstead's allegations of error surround the Court's decision to upwardly depart from the sentencing guidelines and the reasons or lack thereof provided by the Court for that departure. According to the Pennsylvania Guidelines for Sentencing, Mr. Olmstead faced a standard sentence of restorative sanctions to three (3) months incarceration and an aggravated sentence of six (6) months incarceration, with a thirty (30) day mandatory minimum sentence, for each driving under the influence offense at each of Mr. Olmstead's two docket numbers. 204 Pa. Code §303.16. Mr. Olmstead, as noted above, received an aggregate sentence of twenty-four (24) months to forty-eight (48) months incarceration.

A sentencing court is required to state on the record its reasons for the sentence imposed. *Commonwealth v. Brown,* 741 A.2d 726 (Pa. Super. 1999). In addition, the Court enjoys broad discretion in choosing a penalty from sentencing alternatives and the range of permissible confinements, provided the choices are consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant. *Commonwealth v. Devers,* 519 Pa. 86, 546 A.2d 12 (1988).

Further, it is presumed that where a pre-sentence report exists, the sentencing court is aware of relevant information concerning the defendant's character, and considered the information along with mitigating statutory factors when imposing sentence. *Id.* While Section 9721 (b) of the Sentencing Code does mandate that the Court provide a "contemporaneous written statement" in every case where the Court imposes a sentence outside the sentencing guidelines, case law indicates that this requirement is satisfied when the judge states his reasons for the sentence on the record and in the defendant's presence. *See* 42 P .S. §9721 (b); *Commonwealth v. Widmer,* 446 Pa. Super. 408, 667 A.2d 215 (1995), *reversed on other grounds,* 547 Pa. 137, 689 A.2d 211 (1997).

In Mr. Olmstead's case, the Court stated specific reasons on the record and in the presence of the defendant for the sentence imposed and for the decision to depart from the sentencing guidelines. The Court engaged in a discussion with Mr. Olmstead concerning his numerous prior DUI convictions, both in Pennsylvania and in North Carolina. Mr. Olmstead stated that he was not certain how many prior DUI convictions he had on his record, but did state that he believed he had been convicted of committing four DUI offenses in North Carolina. (S. T., 5/9/02, p. 10-12). Mr. Olmstead's Pre-Sentence Investigation Report contained information that Mr. Olmstead had been convicted of the offense of habitual impaired driving in Raleigh, North Carolina on December 20, 1991. Mr. Olmstead was sentenced to two years state incarceration on March 16, 1992, and was paroled on June 23, 1992.

As the Court explained to Mr. Olmstead at the time of his sentencing, a person commits the offense of habitual impaired driving under North Carolina law if he drives while impaired and has been convicted of three or more offenses involving impaired driving within seven years of the date of the current offense. N.C. Gen. Stat. § 20-138.5(a). This section further mandates that a defendant shall be sentenced to a minimum term of twelve (12) months incarceration for this offense, and that this shall be classified as a felony. N.C. Gen. Stat. § 20-138.5(b). Hence, Mr. Olmstead had four prior convictions for DUI in North Carolina. The Pre-Sentence Investigation Report also revealed that Mr. Olmstead was convicted of DUI in Erie County on October 2, 1998, and that the two DUIs that were committed at the above-captioned docket numbers were committed while Mr. Olmstead was still on parole for this prior 1998 DUI conviction. Hence, the Court's calculation that Mr. Olmstead had committed five prior DUI offenses was correct, and provided adequate support for the Court's decision to upwardly depart from the sentencing guidelines.

Mr. Olmstead alleges that the Court improperly considered prior offenses that were already included in the calculation of his prior record score. The Pennsylvania Superior Court has stated that

> It is true that a sentencing court should not sentence in the mitigated minimum range, the aggravated minimum range, or

> outside the applicable guideline ranges solely upon criterion already incorporated into the guidelines. . . When relevant sentencing factors have not been incorporated into the computation of the standard minimum range, it necessarily follows that such factors may be considered as factors to justify a sentence in the mitigated minimum range, the aggravated minimum range, or outside the guideline ranges... [an] unincorporated record of criminal conduct constitutes a significant aggravating factor.

Commonwealth v. *Darden,* 366 Pa. Super. 597, 606-607, 531 A.2d 1144, 1148-1149 (1987)(citations omitted).

Here, Mr. Olmstead was not sentenced outside of the guideline ranges solely because of criteria already incorporated into the guidelines. As discussed above, Mr. Olmstead had been convicted of the offense of habitual impaired driving in North Carolina, which meant that he had been convicted of four DUI offenses in that state. The prior record score did not reflect at least three of Mr. Olmstead's prior DUI convictions in North Carolina. As such, these convictions were properly considered by the Court in its decision to depart from the sentencing guidelines. In addition, the Court noted that at the time of the most recent offenses, Mr. Olmstead was on parole for a DUI conviction and this fact was also not accounted for in the guidelines.

Mr. Olmstead also alleges that the Court failed to consider the "positive aspects" of the defendant's background and character. While the Court is not certain what "positive aspects" to which the defendant is referring, the Court did consider information contained in the Pre-Sentence Investigation Report and presented by the defendant at the time of the sentencing hearing that Mr. Olmstead did have some history of employment and an honorable discharge from the military. These facts could not possibly outweigh his incredible history of drunken driving and alcohol abuse, as well as his poor response to prior correctional strategies. Indeed, at the time of sentencing, the Court expressly took note of Mr. Olmstead's drinking and driving history and the overwhelming need to protect the public, stating:

> The Court: ... You've had a number of prior incidents involving alcohol, in addition—in addition to the fact that you have had a number of driving while under the influence. I've never had anybody—well, I guess I shouldn't say that. I have had somebody that's had more than seven actually, but you are close to setting a record. No one's been killed yet...
>
> . . . You make everybody in the community nervous, Mr. Olmstead and, of course, your prior record score doesn't even come close to reflecting actually what you've done in the past with regard to driving under the influence. Doesn't even come close to accurately

> calculating or should I say reflecting what you've done. You committed two additional driving under the influence offenses this time while you were on supervision for doing that and that's really very bad.
>
> The Defendant: Fact is, once I get on alcohol I got no control over that.
>
> The Court: I suspect that. I understand that. I suspect that, yeah, we don't really even need to come up with an answer, we just have to recognize that you are a dangerous person because you cannot control your alcohol and when you drink, you drive. Bottom line, we can't have that.
>
> Because of those reasons that I just stated I'm going to depart from the sentencing guidelines so that my sentence can reflect the true danger that you are to the community and the need to protect the community from your being on the road under any circumstances. And I need to note, of course, that the guidelines in this case call for sentences in the aggravated range of—they're both the same, of six months in the standard range, of restorative sanctions to three and in the mitigated range essentially no sentence.
> (Sentencing Proceeding, 5/9/02, pp. 13-15).

Mr. Olmstead argues that he should not have been deemed by the Court to be "an incurable recidivist" since he had not had the proper opportunity for medical rehabilitation. The Court discussed with Mr. Olmstead his long-standing abuse of alcohol. Mr. Olmstead conceded that he realized that he has a problem with alcohol, and admitted that "once I started back drinking again it took right back over my life." (S. T., 5/9/02, p. 13). Section 9721 (b) of the Sentencing Code expressly permits the Court to consider the protection of the public when imposing its sentence, and Mr. Olmstead's actions clearly presented a danger to the community. He was being sentenced for his sixth and seventh DUI, he had previous convictions related to leaving the scene of an accident, resisting arrest (after a DUI stop) and numerous summary offenses including reckless driving. Twice Mr. Olmstead had been convicted of driving while his license had been suspended or revoked. As a result of his drunk driving in one of the incidents before the Court, a person was significantly injured. He previously had been placed on probation, fined, incarcerated and paroled. In these circumstances, it was reasonable for the Court to conclude that Mr. Olmstead was dangerous and that prior responses to his behavior had not worked.

Contrary to his assertion, Mr. Olmstead also had prior alcohol treatment. At the time of his 1998 DUI conviction, Mr. Olmstead was

ordered to participate in drug and alcohol inpatient treatment and outpatient counseling. Mr. Olmstead was also ordered to participate in Alcoholics Anonymous and attend DUI education classes. Further, the Pre-Sentence Investigation Report indicates that Mr. Olmstead completed drug and alcohol treatment with the Greater Erie Community Action Council (GECAC) on January 17, 2001. While the Court did not specifically state that Mr. Olmstead was "an incurable recidivist", it would not have been an unreasonable conclusion. By his own admission, the defendant was out of control when he drank. (S. T. 5/9/02, p. 14). While Mr. Olmstead asserts that he was sober for a substantial period prior to his arrest for public drunkenness in May of 1997, it is obvious that he could not maintain it and was deeply involved in alcohol abuse at the time of his most recent DUI incidents in 2001. [7]

Moreover, Mr. Olmstead's allegation that he did not receive adequate medical rehabilitation assumes that there is a predictably successful "treatment" regiment available for the asking. There is not. There is no known cure for the compulsion to drink alcohol or use drugs. There are a variety of therapeutic strategies, largely involving some form of "talk therapy", employed in an attempt to encourage individuals to avoid alcohol and drug consumption and some undetermined number of individuals respond favorably. These strategies should be liberally employed in an effort to help defendants who experience such difficulties. But for individuals like Mr. Olmstead who persistently engage in alcohol-fueled conduct that risks harm to himself and others, depending on the uncertain outcome of the vague notion of "medical rehabilitation" would be a foolish undertaking.

Mr. Olmstead's sentence was not excessive. When he drinks, he engages in dangerous behavior. He has demonstrated that, in spite of having been given every opportunity, he cannot avoid drinking. Having committed five DUI offenses in the past, with his sixth and seventh DUIs committed while he was under community supervision, Mr. Olmstead and the community are living on borrowed time. While the sentence of the court was fashioned with the intention of providing a measure of protection, it was not imposed with belief that it offered a long-term solution to Mr. Olmstead's problem. Perhaps someday science will do that.

For the reasons set forth above, the Court's judgment of sentence should be affirmed.

Signed this 20 day of June, 2003.

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

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[7] Mr. Olmstead self reported drinking 24 beers per week to the probation officer. *See Pre-Sentence Investigation Report, IV. Treatment Information.*

MARTIN J. FARRELL, Plaintiff

v.

WADE SCHULZE and PATRICIA SCHULZE, Defendants

JUDGMENTS/APPEALS

Interlocutory appeal may be appealable as of right or by permission. Pa. R.A.P. 311(a), 312, 313.

An appeal may be taken as of right from an order in a civil action or proceeding sustaining the venue of the matter or jurisdiction over the person or over real or personal property if: (1) the plaintiff, petitioner, or other party benefiting from the order files of record within ten days after entry of the order an election that the order shall be deemed final; or (2) the court states in the order that a substantial issue of venue or jurisdiction is presented. Pa. R.A.P. 311(b).

Where party benefiting from trial court's order does not elect to designate the order as final under Pa. R.A.P. 311(b) and court does not state that order presents a substantial issue of venue or jurisdiction, non-benefiting party may not appeal as of right.

CIVIL PROCEDURE/PLEADINGS/PRELIMINARY OBJECTIONS

Preliminary objections filed by non-party who was not an attorney were a nullity.

Defective service of process must be raised by way of preliminary objection. Pa. R.C.P. No. 1028(a)(1).

Preliminary objection to service of process is waived if not made within twenty days after service of complaint. Pa. R.C.P. No. 1026, 1028.

JURISDICTION

Party waives right to object to defective service of process where she voluntarily subjects herself to the court's jurisdiction.

Party can waive improper service of process by voluntary appearance.

AGENCY/POWER OF ATTORNEY

The authority expressly granted an agent by way of power of attorney, letter of attorney or agent's written authority, should be strictly interpreted and should be confined to that which is given in express terms or that which is necessary and proper to carry it into effect.

Where a power of attorney confers no express power to accept service of process, such power must be derived from other language in the document.

Power of attorney specifically granted appellant's son power to accept service of process on her behalf where document authorized him to execute all documents in conjunction with appellant's property.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 11611 of 2002

Appearances: Joseph J. May, Esquire for the Plaintiff
Wade Schulz, pro se
Patricia Schulz, pro se

OPINION

Before the Court is an appeal from an Interlocutory Order issued April 7, 2003, denying a Motion to Void Entire Civil Action, Motion for Declaratory Judgment and Objection to Notice of Scheduled Deposition all as filed by Appellant, Patricia Schulze. Because Appellant may not appeal the Order of April 7th as of right, this appeal must be dismissed. Further, Appellant's appellate assertion is untimely and/or waived. If reviewable on the merits, Appellant's claim is nonetheless without merit

PROCEDURAL/FACTUAL HISTORY

According to Plaintiff's Complaint, on December 24, 2001, Martin Farrell (hereinafter Plaintiff), and Appellant's son, Wade Schulze, entered into a written Agreement for the sale of real estate located at 7777 Hamot Road, Erie, Pennsylvania. At the time of the Agreement, Wade Schulze had a Power of Attorney from Appellant to enter into the Agreement on her behalf. The Agreement stated the above named property would be sold and conveyed to the Plaintiff for the purchase price of $200,000.00 dollars, with $10,000.00 due at signing and settlement to be made on or before June 30, 2002.

On February 2, 2002 the parties signed an Addendum to the Agreement which provided the purchase price would be paid in installments incorporated into a Note for $50,000.00 dollars over four months. The first payment was to be due at closing with final settlement to be made on February 15, 2002 instead of June 30th, No closing, settlement or conveyance of the Hamot Road property took place by the February 15th date.

On May 3, 2002, Plaintiff filed a Complaint for Specific Performance claiming a breach of contract after he received a letter dated March 18, 2002, signed by Wade Schulze which stated he no longer wanted to sell the property. Plaintiff stated in his Complaint that he was ready to proceed to closing and settlement on February 22, 2002, after all necessary searches, inspections and surveys on the property had been completed. On May 28, 2002, the Deputy Sheriff served the Complaint on Wade Schulze personally and on Appellant by way of her son's acceptance for her at the Hamot Road residence.

On June 3, 2002, Appellant's husband, Clayton Schulze, filed a Brief in Objection to the Complaint for Specific Performance on behalf of Appellant and their son, Wade, in which it was asserted Plaintiff breached by failing to make scheduled payments as provided for in the Agreement.

On June 21, 2002, Plaintiff's counsel sent Default Notices to Appellant

and her son for failure to enter their appearance and file defenses or objections to Plaintiff's claim. On June 24, 2002, a praecipe for Appearance was entered *pro se* by Appellant, her husband, Clayton and her son, Wade. On this same day, Clayton Schulze filed a Motion to Dismiss Plaintiff's Action.

On June 25, 2002, Plaintiff filed a Notice to Plead and an Amended Complaint adding "Count II" requesting the return of the $10,000.00 dollar down payment to Appellant and her son, plus interests and the costs of the suit. On July 2, 2002, Clayton Schulze filed Objections to Plaintiff's Amended Complaint Count II, claiming ownership of the funds due to Plaintiff's alleged breach of the terms of the Agreement.

On July 11, 2002, Plaintiff filed a praecipe for entry of Default Judgment (Non-Monetary) against Appellant and her son. On July 16, 2002, judgment was entered by default and a "Notice of Entry of Default" was sent to both parties. Clayton Schulze filed a praecipe to "Contest Default Judgment in the Above Matter" on July 22, 2002. That same day, First Deputy Prothonotary, Kenneth Gamble, struck entry of Default Judgment from the record after review of the documents filed revealed procedural peculiarities which made evaluation of default judgment difficult.[1]

On August 5, 2002, Plaintiff filed a Motion to Enjoin both Appellant and her son, from being represented by Clayton Schulze. By Order dated August 8, 2002, the Motion to Enjoin was granted since Clayton Schulze is not a member of the Pennsylvania Bar nor otherwise permitted to practice law in this Commonwealth. It was further ordered that all documents and/or pleadings and/or briefs filed by Clayton Schulze were a legal nullity in the case.

On August 13, 2002, Clayton Schulze filed a Motion for Reconsideration of the Motion to Enjoin as granted in the August 8th Order. He also filed a Praecipe for Permissive Joinder of Defendants and Clayton E. Schulze on August 15, 2002, which was denied by Order dated August 20, 2002. On August 23, 2002, Plaintiff again sent Default Notices to Appellant and her son, Wade.

On August 26, 2002, Clayton Schulze filed a Notice of Appeal from the August 20th Order denying permissive joinder, demanding a trial by jury.

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[1] The procedural peculiarities included: 1) the documents being filed on behalf of Appellant and her son by a non-party to the action; 2) a "brief in objection: complaint for specific performance" rather than preliminary objections was filed in response to Plaintiff's complaint and referred by the latter as a responsive pleading in his Amended Complaint and was followed by objections to the Amended Complaint by the opposing party; and 3) the praecipe for default judgment requested only the equitable relief requested in the original complaint, possibly requiring ultimate disposition by the Court. *See* July 22, 2002 Correspondence, Clerk of Records, Erie, PA.

On the same day, Appellant filed a Motion to Void Entire Trial on her own behalf, in response to the Default Notice. On September 16, 2002, the Superior Court issued an Order dismissing *sua sponte* Clayton Schulze's appeal as premature, finding the denial of a petition to leave to join an additional defendant is not an appealable order.

On September 24, 2002, Appellant and her son filed New Matter and a Counter Claim followed by a Brief to support their position. On October 14, 2002, Plaintiff filed an Answer to the New Matter and Counterclaim raised by Appellant and her son, to which the latter responded by filing a Brief in Opposition to Plaintiff's Answer to the New Matter and Counterclaim on October 28, 2002.

On November 7, 2002, Plaintiff filed a Notice of Scheduled Deposition of Wade Schulze to be held on December 5, 2002. On November 27, 2002, Wade Schulze filed Objections to Notice of Scheduled Deposition.

On March 24,2003, Appellant filed a Motion for Declaratory Judgment claiming she was not properly served on the above action and this Court had no jurisdiction as to her on this matter. By Order of the same day, oral arguments on Wade Schulze's objections to the scheduled deposition and Appellant's Motion for Declaratory Judgment were set for April 4, 2003.

On April 14, 2003, Appellant filed a Brief to Support Lack of Jurisdiction. After oral argument, by Order dated April 7, 2003, this Court denied Wade Schulze's Objection to Notice of Scheduled Deposition and Appellant's Motion to Void Entire Civil Action and Motion for Declaratory Judgment.

On April 14, 2003, Appellant filed a Notice of Appeal from the April 7th Order denying her Motion to Void Entire Civil Action and Motion for Declaratory Judgment. On April 23, 2003, the Superior Court returned the appeal filed on April 14th for corrections, requesting Appellant to specify the nature of the complaint and to provide correct proof of service. On this same day Appellant filed a Statement of Matters Complained of on Appeal. This Opinion is in response thereto.

DISCUSSION

Appellant asserts error in the April 7, 2003 Order denying her Motion to Void Entire Civil Action, Motion for Declaratory Judgment and Objection to Notice of Scheduled Deposition. Appellant bases this assertion on the alleged lack of jurisdiction due to improper service of process.

Although in some instances an interlocutory order may be appealable as of right or by permission, neither is applicable in this case. See Pa. R. App. P. 311(a), Interlocutory Appeals as of Right; 312, Interlocutory Appeals by Permission; and 313, Collateral Orders. Appellant has failed to demonstrate that she may appeal as of right pursuant to 311 (b) of the Pennsylvania Rules of Appellate Procedure which reads:

> An appeal may be taken as of right from an order in a civil action or proceeding sustaining the venue of the matter or jurisdiction over the

person or over real or personal property if: (1) the plaintiff, petitioner or other party benefitting from the order files of record within 10 days after the entry of the order an election that the order shall be deemed final; or (2) the court states in the order that a substantial issue of venue or jurisdiction is presented. Pa. R. App. P. 311(b).

In the case *sub judice,* this Court's April 7th Order did not state a substantial issue of venue or jurisdiction was presented; thus, any possible jurisdictional question must rest on subsection (1) of the rule. Subsection (1) grants an appeal as of right when either the plaintiff, petitioner, or the benefitting party files a timely notice of election. The plaintiff in this case is Martin Farrell. The Order from which Appellant raises her claim maintains jurisdiction remains with this Court and Appellant shall be available for deposition. Order also denies Appellant's Motion to Void Entire Trial and Motion for Declaratory Judgment. Farrell is, therefore, the benefitting party and he has not filed a notice of election that the order be deemed final from which Appellant may take a proper appeal as of right. Thus, because neither subsection b(1) nor b(2) of Rule 311 is applicable in the present case, the appeal is interlocutory and must be dismissed. *See Nepo Associates, Inc. v. Gloria Dei Outreach Corp.*, 700 A.2d 1017, (Pa. Super. 1997).

Even if it is found Appellant properly raises an appeal from the Apri1 7th Order, her claim of defective service of process is nonetheless untimely and must be dismissed.

The Order of August 8, 2002, denying permissive joinder to Clayton Schulze made all documents, pleadings and/or briefs signed and filed by Clayton Schulze on behalf of Appellant and her son a legal nullity in this case. It is well settled that, with a few exceptions not applicable here, non-attorneys may not represent parties before the Pennsylvania courts and most administrative agencies. *See Shortz v. Farrell*, 193 A. 20 (Pa. 1937); *Kohlman v. Western Pennsylvania Hospital, Corp.*, 652 A.2d 849 (Pa. Super. 1994); *Spirit of Avenger Ministries v. Commonwealth*, 767 A.2d 1130, 1131 (Pa. Commw. 2001). Proceedings commenced by persons unauthorized to practice law are a nullity. *See Spirit supra.* at 1131 (the Court further held it did not have jurisdiction to consider the claims raised on appeal by the Pastor on behalf of non-profit association because he was not licensed to practice law in this Commonwealth). Thus, the claims of defective service of process contained in the pleadings filed by Clayton Schulze were of no legal consequence.

Therefore, the first objection to service of process attempted by Appellant was in the Motion to Avoid Entire Trial filed by Appellant on her own behalf on August 26, 2002. Defects in service of process due to lack of personal jurisdiction must be raised in preliminary objections and are waivable if preliminary objections to a complaint raising the issue are

not filed within twenty (20) days after service. Pa. R. Civ. P. 1026, 1028, & 1032(a); *see also Cinque v. Asare*, 585 A.2d 490, 492 (1990). Even if Appellant's Motion was to be construed as a "preliminary objection," it was untimely filed because it was brought more than twenty (20) days after Plaintiff's Amended Complaint (his last recorded pleading) was filed on June 25, 2002. Notably, Plaintiff's Amended Complaint was served on Appellant on the same day via regular U.S. Mail to the Hamot Road residence. Appellant received the Amended Complaint because she filed a responsive pleading (albeit through her husband) on July 2, 2002. Therefore, Appellant's claim of lack of jurisdiction due to defective service of process must be dismissed as untimely.

Assuming *arguendo* Appellant's claim is timely, she has waived the right to object to defective service of process where she has voluntarily subjected herself to this Court's jurisdiction. The Appellate Courts in Pennsylvania have established, "[O]nce a party takes action on the merits of a case, he waives his right to object to defective service of process." *Ball v. Barber*, 621 A.2d 156, 158 (Pa. Super. 1993). One can waive improper service of process by various means and become a party to a suit by voluntary appearance. *See Philadelphia Suburban Transportation Co.*, 255 A.2d 577, 583 (Pa. 1969); *see also Weaver v. Martin*, 655 A.2d 180, 184 (Pa. Super.1995)(holding that defendant became party to an action by voluntarily entering an appearance before filing preliminary objection to improper service of process).

In the case *sub judice* Appellant has participated in the merits of this case for over one year by filing various documents, pleadings and briefs to which Plaintiff has responded. Appellant did not object to service of process or jurisdiction until two months after the suit commenced in her Motion to Void Entire Trial filed on August 26, 2002. Prior to this Motion, Appellant filed an Answer to Plaintiff's Complaint on June 3, 2002 in the form of a Brief in Objection to the Complaint for Specific Performance in which she admitted and denied Plaintiff's claims instead of filing a preliminary objection to service or lack of jurisdiction. Appellant shortly thereafter entered her appearance *pro se* on June 24, 2002. In response to Appellant's Brief in Objection, Plaintiff filed an Amended Complaint to which Appellant responded by filing Objections to Plaintiff's Amended Complaint Count II on July 2, 2002. Appellant has participated in the merits of this case at every opportunity.

At best, the first filing by Appellant contesting jurisdiction was her Motion to Void Entire Trial filed on August 26, 2002. However, before this Court could hold a hearing on her Motion or make a ruling on service of process, Appellant filed New Matter and a Counter Claim followed by a Brief to Support her claim on September 24, 2002 to which Plaintiff responded by filing an Answer to New Matter and Counter Claim on October 28, 2002. Thus, Appellant has voluntarily subjected herself to

this Court's jurisdiction and waived her right to object to defective service by filing responsive pleadings and taking action on the merits of this case for over one year.

Assuming Appellant's objection to service of process was timely and not waived, the service of process on Appellant's son, Wade Schulze was proper. Appellant granted her son the power of attorney to "execute all documents in conjunction with the following property description...7777 Hamot Road, Erie Pa 16509." It has been established that "...[t]he authority expressly granted an agent should be strictly construed, and a power of attorney, letter of attorney or agent's written authority should be strictly interpreted confining the authority to that which is given [a] in express terms or [b] *necessary and proper to carry it into effect unless the contrary is clearly intended"* (Emphasis in original); See *In re estate of Riefsnieder*, 610 A.2d 958, 960 (Pa. 1992); *Schenker v. Indemnity Insurance Company of North America*, 16 A.2d 304 (1940). Where a power of attorney confers no *express* power to accept service of process, such power must be derived from other language in the document. *See e.g., Wandschnieder v. Romascavage*, 43 Pa. D. & C.3d 607, 613(C.P. 1983)

In accordance with Appellant's power of attorney, Wade Schulze was the agent for Appellant regarding the subject property. The basis of Plaintiff's complaint served on Wade Schulze specifically concerned the property as described in Appellant's power of attorney and the agreement Wade Schulze signed on Appellant's behalf pursuant to the power of attorney. Accordingly, it can be inferred from the language contained in Appellant's power of attorney that Wade Schulze was authorized to accept service on behalf of Appellant where the power of attorney authorized him to execute *all documents in conjunction with the property.* After all, if Plaintiff is successful in his lawsuit, Wade Schulze will be obligated to proceed with the sale of the property on behalf of Appellant pursuant to the power of attorney. Moreover, Appellant's power of attorney did not except any document from coming within Wade's power to execute with regards to the Hamot Road property. As such, Wade Schulze's acceptance of service for Appellant was consistent with his duties as described in Appellant's power of attorney. Thus, service of process was properly served on Appellant's son, Wade Schulze.

CONCLUSION

For the foregoing reasons, this appeal should be denied. The Order is not appealable. Appellant's allegations are untimely or waived. When reviewed on the merits, the appeal must be dismissed.

BY THE COURT:
/s/ **William R. Cunningham**
President Judge

LEON C. FISH and BERTHA E. FISH, his wife
v.
PATRICIA McCRAY and DEBRA HELIKER
v.
LEON C. FISH

CIVIL PROCEDURE/MOTION FOR 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. Where the non-moving party bears the burden of proof on an issue, that party may not merely rely on its pleadings in order to survive summary judgment. Failure of a non-moving party to adduce sufficient evidence on an issue essential to his case on which it bears the burden of proof establishes the entitlement of the moving party to judgment as a matter of law. The Court must view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.

CIVIL PROCEDURE/APPEALS

An order is not final for purposes of an appeal unless the order dismisses all claims against all parties, is defined as final by statue, or includes an express determination that an immediate appeal will facilitate resolution of the entire case. *Kuhn v. Chambersburg Hosp.*, 739 A.2d 198 (1999); Pa.R.A.P. 341(b), (c).

CIVIL PROCEDURE/ADMISSIONS

Judicial admissions are formal concessions in the pleadings in the case or stipulations by a party or its counsel that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. *Bartholomew v. State Ethics Comm'n*, 795 A.2d 1073 (Pa. Commw. 2002). Judicial admissions are conclusive and a party may not offer evidence to contradict the judicially admitted facts. Concessions made in stipulations are judicial admissions, and are subject to these requirements. *Fierst v. Commonwealth Land Title Ins. Co.*, 369 Pa. Super, 355, 535 A.2d 196 (1987).

CIVIL PROCEDURE/JUDICIAL ESTOPPEL DOCTRINE

As a general rule, a party to an action is estopped from assuming a position inconsistent with that party's assertion in a previous action, if that party's position was successfully maintained. *Trowbridge v. Scranton Artificial Limb Co.*, 560 Pa. 640, 747 A.2d 862 (2000). The purpose of the Judicial Estoppel doctrine is to uphold the integrity of the courts by preventing parties from abusing the judicial process by changing positions as the moment requires.

CIVIL PROCEDURE/COLLATERAL ESTOPPEL DOCTRINE

The Collateral Estoppel doctrine mandates that a party cannot maintain a claim when (1) the issue decided in the prior case is identical to the one

presented in the later case; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party to or in privity with a party in the prior case; (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding and (5) the determination in the prior proceeding was essential to the judgment. *Sterling v. Fineman*, 428 Pa. Super. 233, 630 A.2d 1224 (1993).

INSURANCE/AUTOMOBILE INSURANCE

A passenger cannot recover benefits under the uninsured motorist provisions of the named insured's insurance policy, once the passenger has recovered liability coverage under that same policy, and this limitation applies to the named insured and their spouse. *Pempkowski v. State Farm Mut. Auto, Ins. Co.*, 451 Pa. Super. 61, 678 A.2d 398 (1996).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 13208 - 1994

Appearances: Burton L. Fish, Esq. for plaintiff, Bertha E. Fish
Bruce G. Sandmeyer, Esq. for Defendant, Debra Heliker

OPINION

Bozza, John A., J.

This matter is currently before the Court on the 1925(b) Statement of Matters Complained of on Appeal filed by the plaintiff, Bertha E. Fish. This lawsuit arose out of an automobile accident which occurred on October 21, 1987, in Erie County, Pennsylvania. A vehicle owned by Patricia McCray, and operated by Debra Heliker, collided with a vehicle operated by Mr. Fish, in which Mrs. Fish was a passenger. Both Mr. and Mrs. Fish suffered injuries in the accident, with Mrs. Fish receiving more serious injuries. On July 28, 1989, Mr. and Mrs. Fish filed suit against Patricia McCray and Debra Heliker, alleging negligence.[1] On October 20, 1989, Mrs. Fish instituted suit against her husband, alleging that the accident was caused by his negligence.[2] On April 24, 1991, the Court entered an Order consolidating these two cases, and the case was renumbered several years later.[3]

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[1] The docket number for this suit was 2587 - A - 1989, and was captioned "Leon C. Fish and Bertha E. Fish, his wife, versus Debra Lynn Heliker and Patricia McCray."

[2] The docket number for this suit was 4416 - A - 1989, and was captioned "Bertha E. Fish, versus Leon C. Fish."

[3] The docket number for this suit is as captioned above, 13208 - 1994, and Leon C. Fish is listed as a plaintiff and an additional defendant.

On June 18, 1993, Leon C. Fish, additional defendant, filed a Motion for Summary Judgment, asserting that Bertha E. Fish had stipulated that Mr. Fish was not negligent in his operation of his vehicle at the time of the accident, and could not now assert a contrary position. The Honorable Michael T. Joyce entered summary judgment in favor of Mr. Fish and against all other parties in an Order entered May 24, 1994. On August 25, 2000, defendant Patricia McCray filed a Motion for Summary Judgment, asserting that the plaintiffs had admitted that they had no proof that Ms. McCray had any knowledge that Ms. Heliker was an immature or careless driver and did not possess a valid Pennsylvania drivers license. The Honorable John A. Bozza entered summary judgment in favor of Ms. McCray and against all other defendants in an Order entered August 22, 2000. On April 23, 2003, counsel for Ms. Heliker filed a Motion to Dismiss on her behalf, asserting that Ms. Heliker is currently deceased, having died November 26, 2000, and does not have an estate. On April 25, 2003, the Court entered an Order granting the motion with the consent of the plaintiff.

On May 20, 2003, Mrs. Fish filed a Notice of Appeal, and filed a timely 1925(b) Statement of Matters Complained of on Appeal. In her 1925(b) Statement. Mrs. Fish asserts that the Court erred by

1. "entertaining a motion for summary judgment that was not timely, in the sense that the supposed post-pleading events that it refers to had grown stale by the date of the motion;

2. entertaining a motion for summary judgment that was not timely, in the sense that its belated presentation, at a pre-trial conference, would cause an unnecessary delay of the trial;

3. entertaining a motion for summary judgment that was not supported, either by adequate affidavits, etc., nor by any affidavit whatsoever (Brydon, not Klemensic, who signed and presented the motion for summary judgment, was the Marsh firm's participant in the uninsured motorist arbitration, and even Klemensic's signature is not in affidavit form, he merely endorsed the motion in his role as attorney. (sic);

4. refusing reconsideration, while the motion for summary judgment was pending, which would have enabled both sides to attempt compliance with the rules, the proponent going first;

5. determining that conduct in a common law arbitration, which is not of record of any government unit (as might be a statutory arbitration, an unemployment compensation hearing, a workers' compensation hearing, another judicial proceeding), incidentallly (sic) involving different parties, can be the basis for a judicial estoppel, as opposed to a mere impeachment;

6. determining, on the basis of a purported arbitration brief of Leon C. Fish, or otherwise, that Bertha E. Fish was guilty, in any event, of conduct that might raise such judicial estoppel, (conflicting testimony by Attorney Brydon and Attorney Fish, had such testimony been before the court, by way of affidavit or deposition, would have raised a question of credibility for the jury, see Nanty-Glo, etc);

7. granting summary judgment as requested";

8. depriving Bertha E. Fish of her "rights to trial by jury, to due process, and to equal protection of the laws."

(1925(b) Statement, ¶2(a) - (g), (3)).

Mrs. Fish's assertions of error essentially relate to the Honorable Michael T. Joyce's granting of the motion for summary judgment filed by Leon C. Fish as additional defendant on June 18, 1993, thereby preventing Mrs. Fish from seeking recovery against Mr. Fish for negligence. 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). Where the non-moving party bears the burden of proof on an issue, that party may not merely rely on its pleadings in order to survive summary judgment. *Murphy v. Duquesne Univ. of the Holy Ghost*, 565 Pa. 571, 777 A.2d 418 (2001). "Failure of a non-moving party to adduce sufficient evidence on an issue essential to his case on which it bears the burden of proof...establishes the entitlement of the moving party to judgment as a matter of law." *Young v. Pennsylvania Department of Transportation*, 560 Pa. 373,744 A.2d 1277 (2000). Also, the Court must view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Pennsylvania State University v. County of Centre*, 532 Pa. 142, 615 A.2d 303 (1992).

Further, an order is not final for purposes of an appeal unless the order dismisses all claims against all parties, is defined as final by statute, or includes an express determination that an immediate appeal will facilitate resolution of the entire case. *Kuhn v. Chambersburg Hosp.*, 739 A.2d 198, 1999 (1999)(*citing* Pa.R.A.P. 341(b), (c)). The Motion for Summary Judgment granted by Judge Joyce in favor of Mr. Fish in 1994 did not dismiss the remaining defendants, Ms. McCray and Ms. Heliker. Hence, that Order could not be appealed until the recent conclusion of the suit against the remaining party, Ms. Heliker. Upon viewing all the evidence in the light most favorable to the plaintiff, Judge Joyce concluded that Mr. Fish was entitled to judgment as a matter of law.

It should be noted that this Motion for Summary Judgment was granted nine years ago, by a former jurist of this Court. As such, the information in

the record from which the Court can address the appeal is somewhat limited. In order to dispose of this appeal, the Court had before it the following items:

1. a Motion for Summary Judgment and Brief in Support of Motion for Summary Judgment, filed on behalf of Mr. Fish as additional defendant, with no exhibits attached;

2. a Brief in Opposition to Additional Defendant's Motion for Summary Judgment, filed on behalf of the plaintiff, Bertha E. Fish, with eight exhibits attached, including correspondence between the parties during an earlier uninsured motorist arbitration proceeding:

3. an Order entered by the Honorable Michael T. Joyce granting the Motion for Summary Judgment.

The Court also found in the record a document entitled "Fish v. Ohio Casualty, Plaintiff's Trial Brief", which was apparently filed by Mr. Fish as a part of the earlier uninsured motorist arbitration proceeding.[4] This document was referred to as an exhibit to Mr. Fish's Motion for Summary Judgment and Brief in Support, but it is not clear if this document was ever attached to these filings by Mr. Fish. The Court is not certain whether Judge Joyce relied on this document in making his determination concerning the Motion for Summary Judgment.

As Mr. Fish noted in his Motion for Summary Judgment and Brief in Support thereof, apparently neither defendant Ms. McCray or Ms. Heliker were insured at the time of the accident, and an Uninsured Motorists Arbitration was conducted as a result. This arbitration included Mrs. Fish's claims for loss of consortium. At the time of arbitration, Mr. Fish apparently entered a binding stipulation that Mr. Fish was not guilty of contributory or comparative negligence in his operation of the Fish vehicle at the time of the accident. A document entitled "Plaintiff's Trial Brief" was filed by Mr. Fish for the arbitration proceedings, which was captioned "Fish v. Ohio Casualty." In this document, Mr. Fish stated that "Leon Fish, insured claimant, was guilty of no contributory or comparative negligence". (Plaintiff's Trial Brief. p. 1). This same phrase was repeated in a section of the document entitled "Leon Fish vs. Ohio Casualty Stipulations". (Trial Brief, p. 10).

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[4] It should be noted that Attorney Burton Fish filed this Trial Brief on behalf of Leon C. Fish. Hence, it appears that Attorney Fish represented Leon C. Fish in the uninsured motorist arbitration while at the same time suing Leon C. Fish on behalf of Bertha E. Fish. This circumstance may explain the apparent confusion concerning Mrs. Fish's participation in a stipulation regarding Leon C. Fish's liability while maintaining the separate action against him.

However, it is not clear from the record whether Mrs. Fish was also a party to this "stipulation", as her name was not mentioned in the caption for the arbitration proceeding, nor in any of the alleged "stipulations". Mrs. Fish argued in her Brief in Opposition to Additional Defendant's Motion for Summary Judgment that she was not the subject of this stipulation and should not be bound by it. Mr. Fish claimed that his wife's claims were briefed and set forth before the arbitrators. In the trial brief, Mr. Fish stated that

> Leon Fish, the insured claimant, maintains that the value of his claim, together with his wife's claim for loss of consortium, clearly exceeds that amount...Because a spouse's right to such recovery is derivative, it is the right of recovery belonging to Bertha Fish for injuries sustained by Leon Fish which is before the arbitrators.

(Plaintiff's Trial Brief, p. 2)

Also, the arbitration panel apparently considered Mrs. Fish's claims for loss of consortium and awarded policy limits to Mr. and Mrs. Fish. It is not clear on the record currently before the Court what Judge Joyce's basis was for his determination that Mr. Fish was entitled to summary judgment in his favor, as the Order granting judgment is nine years old and the record is somewhat limited. If Judge Joyce accepted Mr. Fish's position, it was likely because he concluded that the "Plaintiff's Trial Brief" was sufficient evidence of a judicial admission, and granted summary judgment in favor of Mr. Fish on that basis.

Judicial admissions are "formal concessions in the pleadings in the case or stipulations by, a party or its counsel that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." *Bartholomew v. State Ethics Comm'n*, 795 A.2d 1073, 1078 (Pa. Commw. 2002). Judicial admissions are conclusive and a party may not offer evidence to contradict the judicially admitted facts. *Id.* Concessions made in stipulations are judicial admissions, and are subject to these requirements. *Fierst v. Commonwealth Land Title Ins. Co.*, 369 Pa. Super. 355, 535 A.2d 196 (1987)(citations omitted). Further, as a general rule, a party to an action is estopped from assuming a position inconsistent with that party's assertion in a previous action, if that party's position was successfully maintained. *Trowbridge v. Scranton Artificial Limb Co.*, 560 Pa. 640, 644-645, 747 A.2d 862, 864-865 (2000)(quoting *Associated Hospital Service of Philadelphia v. Pustilnik*, 497 Pa. 221,439 A.2d 1149 (1981). The purpose of the Judicial Estoppel doctrine is "to uphold the integrity of the courts by 'preventing parties from abusing the judicial process by changing positions as the moment requires.'..." *Id.(quoting) Gross v. City of Pittsburgh*, 686 A.2d 864, 867 (Pa.Cmwlth. 1997).

Here, Judge Joyce apparently accepted Mr. Fish's argument that the stipulations entered into by Mr. Fish at the time of the uninsured motorist arbitration bound both Mr. and Mrs. Fish to the position that Mr. Fish was not guilty of contributory or comparative negligence for his conduct in the accident. As such, Judge Joyce apparently concluded that the Rule of Judicial Estoppel precluded Mrs. Fish from now asserting the contrary position that her husband, Mr. Fish, was negligent, since Mrs. Fish had succeeded receiving an award of policy limits at the time of arbitration. Due to this doctrine, there were no genuine issues of material fact as to Mr. Fish's liability, and Judge Joyce entered summary judgment in favor of Mr. Fish accordingly.

Mrs. Fish's current allegations of error are not supported by the record before the Court. There is no reason that the Court can discern why the uninsured motorist arbitration should have been deemed "stale" by Judge Joyce, and thereby not considered in determining the motion for summary judgment. There is also no reason why the uninsured motorist arbitration could not be used as "a basis for judicial estoppel", as the admissions contained in the record are sufficient admissions upon which the Court could have based its decision. Also, it is not clear on the record before the Court that the presentation of the motion for summary judgment was made at a time when an unnecessary delay of the trial would result. Judge Joyce apparently determined that the presentation of the motion would not unreasonably delay trial, and this Court can find no reason on the record currently before the Court to disturb that finding.

The Court is not certain why Mrs. Fish asserts that the motion for summary judgment should have been reconsidered, to allow "both sides to attempt compliance with the rules." The only rule that Mrs. Fish has referred to is Rule 1035.4 of the Pennsylvania Rules of Civil Procedure, which requires that supporting affidavits be filed with a motion for summary judgment. However, Judge Joyce apparently believed that the admissions contained in the above-noted "Plaintiff's Trial Brief" were part of the record before the Court, such that the Court did not require a supporting affidavit filed by Attorney John Brydon, who participated in the uninsured motorist arbitration. In Rule 1035.1 , the "record" is defined to include admissions, and Judge Joyce apparently believed that the stipulations in the trial brief were admissions that were part of the record before the Court.

Also, Mrs. Fish's claims that her participation in the stipulations was a "question of credibility for the jury" do not appear to be supported by the record. Judge Joyce appears to have accepted Mr. Fish's assertion that Mrs. Fish had raised her claims for loss of consortium at the time of the uninsured motorist arbitration, and the issue was briefed before the arbitration panel. As a result of that conclusion, Mrs. Fish was collaterally estopped from arguing that her claims were not addressed in the

arbitration proceeding. The Collateral Estoppel doctrine mandates that the doctrine applies if

> (1) the issue decided in the prior case is identical to the one presented in the later case; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party to or in privity with a party in the prior case; (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding and (5) the determination in the prior proceeding was essential to the judgment.

Sterling v. Fineman, 428 Pa. Super. 233, 241 630 A.2d 1224, 1228 (1993)(fn 4)(citations omitted).

Mrs. Fish received the policy limits of her insurance policy with Ohio Casualty Insurance Company for her loss of consortium claims, and Judge Joyce determined that she could not maintain that same claim against her husband at the above-captioned suit. A passenger cannot recover benefits under the uninsured motorist provisions of the named insured's insurance policy, once the passenger has recovered liability coverage under that same policy, and this limitation applies to the named insured and their spouse. *See Pempkowski v. State Farm Mut. Auto. Ins. Co.*, 451 Pa. Super. 61,678 A.2d 398 (1996); *Newkirk v. United Services Automobile Association*, 388 Pa. Super. 54, 564 A.2d 1263 (1989); *Woglemuth v. Harleysville Mutual Insurance Co.*, 370 Pa. Super. 51, 535 A.2d 1145 (1988). As such, Mrs. Fish was not deprived of her right to trial by jury, due process and equal protection since she had already successfully litigated her claim for loss of consortium, and could not seek to recover uninsured motorist benefits after she had received liability coverage.

For the reasons set forth above, the Court's Order granting summary judgment should be affirmed.

Signed this 2 day of July, 2003.

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

CHARLES BRETER, individually and CHRISTINE JEWELL, as Guardian ad litem for the minor, KRISTINA BRETER, Plaintiffs
v.
ANN NECKERS, an individual and HARBORCREEK TOWNSHIP, and COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, Defendants

CIVIL PROCEDURE/MOTION FOR SUMMARY JUDGMENT

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 judgment as a matter of law. Additionally, the record must be looked at in the light most favorable to the non-moving party.

CIVIL PROCEDURE/MOTION FOR SUMMARY JUDGMENT

In resisting a motion for summary judgment, the non-moving party may not rest upon the pleadings but, 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. Civ. P. 1035.2 and 1035.3

NEGLIGENCE/GOVERNMENTAL IMMUNITY

Under the Tort Claims Act, local government agencies are generally immune from tort liability, except in circumstances where immunity is expressly waived. 42 Pa. C.S. § 8541

NEGLIGENCE/GOVERNMENTAL IMMUNITY

Governmental immunity is waived when two conditions are satisfied: (1) damages would be recoverable under statutory or common law against a person unprotected by governmental immunity and (2) the negligent act of the political subdivision which caused the injury falls within one of the eight enumerated categories listed in Section 8542(b) of the Tort Claim Act.

NEGLIGENCE/GOVERNMENTAL IMMUNITY

Under the trees, traffic controls, and street lighting exception to governmental immunity, immunity is waived for dangerous conditions of trees, traffic signs, lights, or other traffic controls, streets lights, or street lighting systems under the care, custody, or control of the local agency except that the claimant must establish a reasonably foreseeable risk of the kind of injury which occurred and that the local agency had actual notice or could reasonably be charged with notice of the dangerous condition at a time sufficiently prior to the event to have taken measures to protect against the dangerous condition.

NEGLIGENCE/GOVERNMENTAL IMMUNITY

A municipality’s responsibility to maintain its roadways free of dangerous conditions could include a duty to install an appropriate traffic control device where to do so would alleviate a known dangerous condition.

NEGLIGENCE/GOVERNMENTAL IMMUNITY

The questions of what is or is not a dangerous condition is generally

one that must be answered by a jury. Unless the municipality did not have actual notice of a dangerous condition, the court cannot grant summary judgment in favor of the municipality.

NEGLIGENCE/GOVERNMENTAL IMMUNITY

Even though no township road was involved with the accident at issue, action taken on behalf of the township may have played a part in the accident so as to allow liability to be imposed even though the accident occurred on a state-owned road.

NEGLIGENCE/GOVERNMENTAL IMMUNITY

The township is entitled to summary judgment on plaintiff's claim that it was negligent for failing to provide adequate lighting for a roadway because there is no duty imposed on municipalities to illuminate roadways within their jurisdiction

NEGLIGENCE/GOVERNMENTAL IMMUNITY

The doctrine of sovereign immunity applies to the state of Pennsylvania and provides that the Commonwealth generally enjoys immunity from suit, but such immunity is waived where damages arising out of a negligent act where the damages would be recoverable under the common law or a statute creating a cause of action if the injury were caused by a person not having available the defense of sovereign immunity. 42 Pa. C.S. §§8521 and 8522(a).

NEGLIGENCE/GOVERNMENTAL IMMUNITY

Under the real estate exception to sovereign immunity, such immunity is waived for a dangerous condition of Commonwealth agency real estate and sidewalks and highways under the jurisdiction of a Commonwealth agency. 42 Pa. C.S. § 8522(b)(4).

NEGLIGENCE/GOVERNMENTAL IMMUNITY

Local municipalities do not need prior approval from the Pennsylvania Department of Transportation before installing traffic signs, signals, and markings on state-designed highways relating to crosswalks except where the crosswalk is not at an intersection. 67 Pa. Code § 211.6(b)(3)(vi).

NEGLIGENCE/GOVERNMENTAL IMMUNITY

Where there is evidence to suggest that the crosswalk in question was not at an intersection but was rather located some distance from the intersection, there is a question of fact as to whether the township was required to obtain approval from the Pennsylvania Department of Transportation prior to installing a crosswalk at the intersection in question.

NEGLIGENCE/GOVERNMENTAL IMMUNITY

Where there is a dispute as to whether the crosswalk was located at an intersection across a state-owned highway, whether the township had the authority to select the placement of the crosswalk, or whether it needed the approval of the Pennsylvania Department of Transportation before doing so, it cannot be ruled as a matter of law that PennDOT has no duty

to monitor, supervise, or inspect the township's actions in installing the crosswalk at issue.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW No. 13752 - 2000

Appearances: Sean P. Duff, Esquire for the Plaintiff
Rolf Patberg, Esquire for the Plaintiff
T. Warren Jones, Esquire for Defendant Neckers
John Guinta, Esquire for Defendant Harborcreek Twp.
William Dopierala, Esquire for Defendant
Commonwealth of Pennsylvania Dept. of Trans.

OPINION

Anthony, J., May 29, 2003

This matter comes before the Court on motions for summary judgment filed on behalf of Harborcreek Township and the Commonwealth of Pennsylvania, Department of Transportation. After a review of the record and considering the arguments of counsel, the Court will grant the motions in part and deny them in part. The factual and procedural history is as follows.

The instant action arises out of a motor vehicle accident that occurred on November 3, 1998. At approximately 6:15 P.M. that evening, Plaintiff Kristina Breter, who was 13 at the time, was attempting to cross Buffalo Road in Harborcreek Township. Ms. Breter was traveling south across Buffalo Road in a marked crosswalk. *See* Pls.' Consolidated Reply to Accident Report of Nov. 3, 1998. The crosswalk was near the intersection of Buffalo Road and Bartlett Road, but was not located right at the intersection. *See id.* The crosswalk was located an undetermined distance west of the intersection. *See id.* Ms. Breter had crossed three lanes of traffic and was nearly across the fourth lane when she was struck by a vehicle driven eastbound on Buffalo Road by Defendant Ann Neckers. As a result of the accident, Ms. Breter suffered significant injuries.

Plaintiffs commenced the instant action by Writ of Summons on October 2, 2000. The Complaint was filed on July 16, 2001. The pleadings are closed, and discovery has been completed. On January 31, 2003, Defendant Harborcreek Township filed its Motion for Summary Judgment and Brief in Support. The Department of Transportation filed its Motion for Summary Judgment and Brief in Support on February 19, 2003. Plaintiffs filed a consolidated response to the two motions on March 14, 2003. Argument was held in chambers at which all parties were represented. Following the argument, Plaintiffs were granted permission to supplement the record with recently received documents, and Defendant Ann Neckers was given the opportunity to file a response to

Harborcreek's motion for summary judgment since she had filed cross-claims against Harborcreek. On April 9, 2003, Plaintiffs filed a supplemental brief and exhibits in opposition to the motions for summary judgment. Harborcreek filed a supplemental brief in support of its motion on April 15, 2003, and Defendant Neckers filed her response to Harborcreek's motion for summary judgment on April 23, 2003.

The standard when reviewing a motion 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). Additionally, 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.

Harborcreek moves for summary judgment on the basis that it is entitled to governmental immunity, it does not owe a duty to Ms. Breter, and that it did not have actual notice of the alleged dangerous condition of the roadway. In the case at bar, Plaintiffs allege that Harborcreek was negligent in:

a. Failing to properly design and maintain the particular roadway;
b. Failing to provide adequate lighting for this roadway;
c. Failing to provide appropriate signage indicating pedestrian crossing for this roadway;
d. Failing to install appropriate traffic control devises [sic] to ensure the safety of pedestrians crossing this roadway;
e. Failing to provide appropriate road markings to ensure the safety of pedestrians crossing this roadway;
f. Failing to set appropriate speed limits to ensure the safety of pedestrians crossing this roadway;
g. Failing to inspect the roadway for the dangerous conditions of the roadway after actual notice of them;
h. Failing to patrol and monitor the roadway for the dangerous conditions of the roadway after actual notice; and
i. Failing to warn the minor Plaintiff of the dangerous conditions.

Pls.' Compl. ¶ 29.

Under the Tort Claims Act, local government agencies are generally immune from tort liability, except in circumstances where immunity is expressly waived. *See* 42 Pa.C.S.A. § 8541. Governmental immunity is waived when two conditions are satisfied: (1) the damages would be recoverable under statutory or common law against a person unprotected by governmental immunity, and (2) the negligent act of the political subdivision which caused the injury falls within one of the eight

enumerated categories listed in Section 8542(b) of the Tort Claims Act. *See Starr* v. *Veneziano,* 560 Pa. 650, 747 A.2d 867 (2000). Here, Plaintiffs contend that their claims fall within the trees, traffic controls and street lighting exception to governmental immunity. That provision provides that immunity is waived for:

> A dangerous condition of trees, traffic signs, lights or other traffic controls, street lights or street lighting systems under the care, custody or control of the local agency, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition.

42 Pa.C.S.A. § 8542(b)(4)

Harborcreek argues that it had no duty to erect traffic control devices under either the common law or under statute, and therefore cannot be held liable for the failure to do so. *See Sloneker v. Martin,* 144 Pa. Commw. 190, 604 A.2d 751 (1991)(holding that while municipalities have been granted the authority to erect traffic control devices on roadways within their boundaries, that authority is discretionary, and there is not an obligation on the part of the municipalities to erect such devices.). However, in *Starr,* the supreme court held that a municipality's responsibility to maintain its roadways free of dangerous conditions could include a duty to install an appropriate traffic control device where to do so would alleviate a known dangerous condition. *See Starr, supra.* Thus, Harborcreek may have had a duty to employ an appropriate traffic control device at the crosswalk at issue if Plaintiffs can establish that: 1) the municipality had actual or constructive notice of the dangerous condition that caused the plaintiff's injuries; 2) the pertinent device would have constituted an appropriate remedial measure; and 3) the municipality's authority was such that it can fairly be charged with the failure to install the device. *See id.*

Harborcreek argues that it did not have actual notice of the dangerous condition surrounding this particular crosswalk, and thus cannot be held liable for the failure to employ an appropriate traffic control device at this intersection. The question of what is or is not a dangerous condition is generally one that must be answered by a jury. *See McCalla v. Mura,* 538 Pa. 527, 649 A.2d 646 (1994). Unless it is clear that Harborcreek did not have actual notice of the dangerous condition, the Court cannot grant summary judgment.

Plaintiffs have provided evidence which would tend to show that Harborcreek was aware of the allegedly dangerous condition for pedestrians along this stretch of Buffalo Road. In a letter dated

September 30, 1992, Mark Corey, a Township Engineer for Harborcreek, requested assistance from PennDOT in conducting a traffic control study along Buffalo Road. *See* Pls.' Supp. Br. and Exs. in Opp'n to Government Defs.' Mots. for Summ. J., Ex. 27. The letter states, in part:

> I would like to request the Department's assistance in evaluating the need for some type of traffic control along Route 20 [Buffalo Road] through the Village of Harborcreek. The area of concern extends from the underpass at the intersection of State Route 955 to the intersection at Bartlett Road.
>
> Recently, a young child was struck by a vehicle within this area of concern. This incident, along with other expressed concerns, has prompted the Board of Supervisors to evaluate the need for some type of traffic control in this area (e.g. signalization, installation of cross-walks, warning signs, etc.). With the mix of small commercial and residential developments, there seems to be a large number of pedestrians crossing Route 20 [Buffalo Road].

Id. This "area of concern" includes the crosswalk where the accident at issue occurred. Although there is no evidence to suggest that the child who was struck was in this same cross-walk, or even that the other concerns which had been raised to the Township involved condition for pedestrians who were attempting to cross Buffalo Road in this area. Moreover, there were other accidents involving pedestrians in this area, and public meeting with the Township supervisors wherein possible solutions to the problem were discussed. *See* Depo. of Mark Corey; Depo. of David Bossart; Depo. of Karl Ishman; Depo. of John Waitkus. Indeed, a list compiled by Harborcreek Engineer Mark Corey containing ideas designed to improve safety in the area specifically states "traffic signal at Bartlett Road." Pls.' Consol. Reply, Ex. 8. This is sufficient evidence to create an issue of fact for the jury.

Next, Harborcreek argues that it owed Ms. Breter no duty because the accident occurred on a state-maintained road, not on a Township road. Harborcreek directs the Court's attention to the case of *Griffith v. Snader,* 795 A.2d 502 (Pa. Commw. 2002) for the proposition that where an accident occurred exclusively on state-owned roads, a municipality cannot be held liable merely because one of its roads intersects with the state roads at the point of the accident. In *Griffith*, the township road was not involved at all, and summary judgment was granted on that basis.

In this case, there is no township road involved in the accident. However, Harborcreek Township officials were the ones who decided where the cross-walk would be placed, and what signage would be erected in the area. Thus while no township road was involved in the accident, action taken on behalf of Harborcreek may have played a part in the accident. This is sufficient to distinguish the instant case from *Griffith.*

Additionally, the Court finds that Plaintiffs have provided sufficient evidence that there was an appropriate remedial measure and that Harborcreek had the authority to erect a traffic control device to create a question for the jury as to whether Harborcreek owed Ms. Breter a duty. Plaintiffs have produced the expert opinion of Steven M. Schorr, PE who opines that "Crosswalk" warning signs and advanced warning signs would be appropriate in light of the unusual location of this crosswalk. *See* Pls.' Consol. Reply, Ex. 23. Plaintiffs have also produced the discovery responses of PennDOT which indicate that Harborcreek was responsible for road markings for crosswalks and crosswalk warning signs. *See* Pls.' Consol. Reply, Ex. 24; *see also,* Depo. of David Bossart. Thus, the Court finds that Plaintiffs have created a genuine issue of material fact as to whether Harborcreek owed Ms. Breter a duty. The Court further finds that Harborcreek is not entitled to governmental immunity because Plaintiffs' claims fit within the trees, traffic controls and street lighting exception to governmental immunity. Accordingly, the motion for summary judgment on this basis is denied.

Next, Harborcreek argues that it is entitled to summary judgment on Plaintiffs' claim that it was negligent for failing to provide adequate lighting for this roadway. *See* Compl. ¶29(b). The Court agrees. There is no duty imposed on municipalities to illuminate roadways within their jurisdiction. *See Sloneker v. Martin,* 114 Pa. Commw. 190, 604 A.2d 751 (1991). Accordingly, Harborcreek cannot be held liable for choosing not to illuminate this stretch of roadway, and the motion for summary judgment on this claim is granted.

The Court now turns to the motion for summary judgment filed on behalf of PennDOT. PennDOT raises similar issues to those raised by Harborcreek. As with Harborcreek, Plaintiffs allege that PennDOT was negligent in:

a. Failing to properly design and maintain the particular roadway;
b. Failing to provide adequate lighting for this roadway;
c. Failing to provide appropriate signage indicating pedestrian crossing for this roadway;
d. Failing to install appropriate traffic control devises [sic] to ensure the safety of pedestrians crossing this roadway;
e. Failing to provide appropriate road markings to ensure the safety of pedestrians crossing this roadway
f. Failing to set appropriate speed limits to ensure the safety of pedestrians crossing this roadway;
g. Failing to inspect the roadway for the dangerous conditions of the roadway after actual notice of them;
h. Failing to patrol and monitor the roadway for the dangerous conditions of the roadway after actual notice; and
i. Failing to warn the minor Plaintiff of the dangerous conditions.

Pls.' Compl. ¶ 36.

First, PennDOT argues that it is entitled to sovereign immunity, and that Plaintiffs claims do not fit within any of the exceptions to the doctrine of sovereign immunity. As with the doctrine of governmental immunity, the doctrine of sovereign immunity provides that the Commonwealth generally enjoys immunity from suit. *See* 42 Pa.C.S.A. § 8521. However, immunity is waived where "damages arising out of a negligent act where the damages would be recoverable under the common law or a statute creating a cause of action if the injury were caused by a person not having available the defense of sovereign immunity." 42 Pa.C.S.A. § 8522(a). Here, Plaintiffs contend that their claims fall within the real estate exception to sovereign immunity. That provision provides that immunity is waived for:

> A dangerous condition of Commonwealth agency real estate and sidewalks, including Commonwealth-owned real property, leaseholds in the possession of a Commonwealth agency and Commonwealth real property leased by a Commonwealth agency to private persons, and highways under the jurisdiction of a Commonwealth agency, except conditions described in paragraph (5).

42 Pa.C.S.A. § 8522(b)(4)

PennDOT contends that it is not liable because the dangerous condition did not arise from or have as its source Commonwealth real estate. *See Jones v. Septa*, 565 Pa. 211, 772 A.2d 435 (2001). PennDOT further argues that it did not owe a duty to Ms. Breter because Harborcreek installed the crosswalk, and did not need permission from PennDOT to do so. *See* 75 Pa.C.S.A.§6122. Pursuant to Title 67 of the Pennsylvania Code, local municipalities do not need prior approval from PennDOT before installing traffic signs, signals and markings on State-designed highways relating to crosswalks except where the crosswalk is not at an intersection. *See* 67 Pa. Code §211.6(b)(3)(vi). However as the Court noted above, there is evidence to suggest that the intersection at issue was not located at a crosswalk, but rather was located some distance west of the intersection. Thus, there is a question of fact as to whether or not Harborcreek was required to obtain approval from PennDOT prior to installing a crosswalk at this location. Accordingly, the motion for summary judgment is denied on this issue.

Next, PennDOT contends that it cannot be held liable for negligent issuance of a permit to install the crosswalk. *See Bendas v. Upper Caucon Township*, 127 Pa. Commw. 378, 561 A.2d 1290 (1989). While this is a correct statement of the law, Plaintiffs are not contending that PennDOT negligently issued a permit allowing Harborcreek to place a crosswalk at this location. Accordingly, the motion for summary judgment on this basis is denied.

Turning to the allegation that PennDOT was negligent in the design and maintenance of Buffalo Road, PennDOT argues that it cannot be held liable for a design defect or a dangerous condition of the roadway where the road is flat and unobstructed, the speed limit is appropriate, and a crosswalk has been installed. *See Dankulich v. Tarantino,* 110 Pa. Commw. 559, 561 A.2d 1290 (1986). In *Dankulich,* the trial judge found that, even when viewed in the light most favorable to the plaintiff, the evidence presented tended to refute the existence of the alleged dangerous condition. The road was flat and unobstructed, and the speed limit was sufficiently slow to permit a reasonably competent and careful driver to avoid pedestrian traffic. *See id.* In the case at bar, the evidence of the outcry from the public suggests that there may have been a dangerous condition on Buffalo Road. Thus, the Court finds *Dankulich* to be factually distinguishable from the instant situation, and the motion for summary judgment on this basis is denied.

PennDOT also argues that it is entitled to summary judgment on the issue of whether it was negligent for failing to provide lighting in the area. For the reasons already stated above in relation to Harborcreek's similar argument, the motion on this issue is granted.

Next, PennDOT argues that it has no duty to monitor, supervise, or inspect Harborcreek's actions in installing the crosswalk at issue, nor does it have a duty to supervise, monitor, or inspect the intersection. As the Court has previously stated, there does seem to be some dispute as to whether the crosswalk was located at an intersection, and whether Harborcreek had the authority to select the placement of the crosswalk or whether it needed PennDOT's approval before doing so. For these reasons, the Court finds that there is a factual issue as to whether PennDOT had a responsibility to supervise, monitor, or inspect this crosswalk and intersection. Accordingly, the motion for summary judgment on this basis is denied.

Finally, PennDOT contends that Plaintiffs have failed to present the expert testimony required to prove their claims of defective highway design and failure to provide appropriate signage. *See Tennis v. Fedorwicz,* 40 Pa. Commw. 7, 592 A.2d 16 (1991); *Young v. Commonwealth of Pennsylvania, Dept. of Transp.,* 560 Pa. 373, 744 A.2d 1276 (2000). The Court finds that the expert report of Steven Schorr, PE indicates that Plaintiffs will be able to provide expert testimony as to the issues of highway design and appropriate signage at the time of trial. Accordingly, the motion for summary judgment on this issue is denied.

For all the foregoing reasons, the motions for summary judgment are granted in part and denied in part.

ORDER

AND NOW, to-wit, this 30 day of May 2003, it is hereby ORDERED and DECREED that Harborcreek Township's Motion for Summary Judgment is GRANTED in part and DENIED in part per this opinion. It is further ORDERED and DECREED that the Commonwealth of Pennsylvania, Department of Transportation's Motion for Summary Judgment is GRANTED in part and DENIED in part per this opinion.

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

COMMONWEALTH OF PENNSYLVANIA
v.
ELMER ERNEST HICKS

CRIMINAL PROCEDURE/RESISTING ARREST

In order to be convicted of resisting arrest, the arrest must be lawful, the defendant must have created a substantial risk of bodily injury to a police officer, and the defendant must have done this with the intent of preventing the police officer from effecting a lawful arrest. 18 Pa. C.S.A. §5104.

CRIMINAL PROCEDURE/RESISTING ARREST

Where a defendant pushes one officer into another, where the arresting officer feels the defendant's level of resistance to the arrest is high, and where the officers testify that the defendant hid his arms from view and refused to cooperate even when maced and struck with a baton, the totality of the resistance by the defendant was substantial and did not amount to just a "minor scuffle" or "wiggle" to escape conviction under this section. *Cf. Commonwealth v. Eberhardt*, 450 A.2d 651 (Pa.Super 1982); *Commonwealth v. Rainey*, 426 A.2d 1148 (Pa.Super 1981).

CRIMINAL PROCEDURE/RESISTING ARREST

Resisting arrest does not require the aggressive use of force such as striking and kicking an officer. *Commonwealth v. Miller,* 475 A.2d 145 (Pa.Super. 1984).

CRIMINAL PROCEDURE/APPEALS/WEIGHT OF EVIDENCE

The weight of the 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 the witnesses. *See, Commonwealth v. Gooding*, 818 A.2d 546 (Pa.Super. 2003); *Commonwealth v. Begley,* 780 A.2d 605 (Pa. 2001). A jury's verdict can only be reversed if it is so contrary to the evidence as to shock one's sense of justice.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION NO. 3429 OF 2002

Appearances: Ines M. Massella, Esquire for the Defendant
John H. Daneri, Esquire, First Assistant District Attorney

MEMORANDUM OPINION & ORDER

I. FACTUAL AND PROCEDURAL HISTORY

July 1, 2003: This Opinion is issued pursuant to Pa.R.A.P. 1925(a). Defendant Elmer Ernest Hicks filed a Notice of Appeal on May 19, 2003. This Court, on May 20, 2003, ordered Plaintiff to comply with Pa.R.A.P. 1925(b) by filing a Statement of Matters Complained of on Appeal within fourteen days. Plaintiff filed his Statement of Matters Complained of on Appeal on June 3, 2003. The appeal was certified on June 24, 2003.

On March 7, 2002, a Criminal Information was filed by the Erie County District Attorney's Office charging Elmer Ernest Hicks with Aggravated Assault, two (2) counts of Resisting Arrest, one (1) count of Disorderly Conduct, and two (2) counts of Compliance with Police Order. 18 Pa.C.S.A. §§2702(a)(2), 5104, 5503(a)(1)(2)(3)(4) and City of Erie Ordinance (C.O.) 701.01. A jury trial commenced on March 10, 2003. Following pretrial discovery and argument several charges were dismissed and withdrawn. The only charge presented to this jury was one count of Resisting Arrest. The Court was also confronted with one Summary count of Compliance with a Police Order.

Upon the closing of the case, this Court gave the standard jury instructions for Resisting Arrest. (Ct. Tr. of 03/10/2003 at 62-67; §5104 of the Pennsylvania Suggested Standard Jury Instructions.) Having heard the testimony and this Court's instructions, the jury reached a verdict on March 10, 2003, finding the Defendant guilty of Resisting Arrest. The Court found the Defendant guilty of the summary offense of Compliance with a Police Order, which merged with the charge of Resisting Arrest. Sentencing took place on April 17, 2003. The Defendant's sentencing guidelines were computed and the three ranges considered were: the mitigated range of Restorative Sanctions; the standard range of one (1) to nine (9) months; and the aggravated range of twelve (12) months to twenty-four (24) months. The Defendant's sentence of nine (9) months to twenty-three and one half (23.5) months (with one hundred fifty-five (155) days credit to be applied) was within the standard range. The Defendant's appeal now follows.

II. FACTS

On March 7, 2002, at approximately 11:30 a.m., Officer Popovic and Officer Victory went to the home of Elmer Hicks to serve an arrest warrant on Mr. Hicks (hereinafter the Defendant). After the officers knocked and announced their presence, the Defendant's sister answered the door. The officers informed the Defendant's sister that they were there to serve an arrest warrant on the Defendant. The sister granted them access to the house, led the officers to the Defendant's bedroom and opened the door for them.

Upon entering the small room, which consisted mostly of a bed, (the dimensions of the room were eight (8) feet by six (6) feet), the officers observed the Defendant lying on the bed under the blankets. The officers informed the Defendant he was under arrest. At this point, the officers testified, the Defendant sat up. After Officer Victory placed a handcuff on one hand, the Defendant claimed to have bad shoulders and asked the officers to handcuff his hands in the front. The police officers testified that being handcuffed in front is not standard policy based on security concerns and consequently did not do so with the Defendant.

When Officer Victory continued in his attempt to handcuff Defendant

behind his back, the Defendant pulled his cuffed hand from the officer, threw himself onto the bed with his arms underneath him, and refused to move. The officers informed the Defendant that he was resisting arrest. While refusing to move, the Defendant repeatedly claimed that the police did not have a warrant for his arrest. The officers again told the Defendant he was under arrest and tried to remove his arms from underneath him. When this attempt failed, Defendant was informed that further noncompliance with their orders would result in a mace spray.

Upon telling the Defendant about the mace spray, the officers testified the Defendant began to scream that he was not resisting arrest. After numerous warnings and continued noncompliance, Officer Victory finally sprayed the Defendant with a quick burst of mace to the face. The Defendant still did not comply. Officer Popovic then tried to use his baton to pry the Defendant's arms from beneath him but this attempt was resisted and Defendant did not yield. Officer Popovic then struck the Defendant in the thigh with his baton, as he was trained to do when trying to arrest a person who is resisting.

The officers repeatedly requested and attempted to have the Defendant comply with the arrest procedures. The Defendant continued to scream that he was not resisting arrest and yelled obscenities at the officers. Throughout this occurrence, Defendant never relinquished his hands. Eventually, after use of substantial force, the officers were able to free the Defendant's hands from beneath him and handcuff Mr. Hicks. Defendant then complained of having knee problems, which he claimed would keep him from moving. In spite of this, the officers were able to get Defendant on his feet and escort him to their police cruiser. Even though his hands were behind his back, Defendant did not complain about his shoulder problems as they escorted him out of the house and into the police cruiser. In addition, he complained of no pain in his knees even though he had to walk to get into the police cruiser. Subsequently, the Defendant was charged, *inter alia,* with Resisting Arrest.

III. LAW AND LEGAL

The controlling statute here is 18 Pa. C.S.A. §5104 (Resisting Arrest or Other Law Enforcement). The language of the statute is quite clear and unambiguous. In order to be convicted of resisting arrest, the following elements must be proven beyond a reasonable doubt. First, the arrest must be lawful. Second, the defendant must have created a substantial risk of bodily injury to a police officer. Third, the defendant must have done this with the intent of preventing the police officer from effecting a lawful arrest. *See*, §5104. There is no question that the officers presently had a legal warrant and were acting pursuant to that warrant. The Defendant never disputed the legality of their warrant, the subsequent arrest, nor whether the officers had been put at risk.

The main thrust, however, of the Defendant's argument centered not on

the lawfulness of the arrest but rather on what amount of resistance constitutes the offense of Resisting Arrest. The Defendant contends that his conduct did not rise to the level of resistance as defined by the law. Defendant cited the Court to *Commonwealth v. Eberhardt,* 450 A.2d 651 (Pa. Super 1982) and *Commonwealth v. Rainey,* 426 A.2d 1148 (Pa.Super 1981). Defendant contends these cases set forth the applicable standard for what defines as resistance pursuant to §5104, and the Court should apply them to the present case. A careful analysis of these cases reveals they are distinguishable from the instant matter and are, therefore, not applicable.

In *Rainey,* the police attempted to remove a drunken defendant from a home he had entered illegally. *See Rainey*, 426 A.2d at 1148. When confronted by the police, the defendant tried to leave but was restrained by an officer's grip on his neck. *Id*. While one officer spoke to the tenant and owner of the building the defendant had illegally entered, another escorted the defendant to the police van. *Id*. at 1149. Only upon reaching the police van did the Defendant attempt to flee. *Id*. The officer who was escorting the Defendant gave chase and caught him by the sleeve. *Id*. The defendant proceeded to wiggle and squirm violently, attempting to escape capture. *Id*. After a brief struggle, which ended when three officers were able to subdue the defendant, the officers were finally able to place the defendant in police custody. *Id*. The officers' own testimony stated that the defendant never struck, pushed or kicked anyone but only attempted to free himself from the officers by wiggling. *Id*.

The court in *Rainey* held the events that transpired amounted to nothing other than a "minor scuffle" incident to an arrest. *Id*. at 1150. They specifically point out that the defendant never struck out, kicked or pushed the officers. In addition, the court held the defendant's actions were only done to "shake off the policeman's detaining arm." *Id*. at 1150.

Neither of these assertions are true in the instant case. Presently, Officer Victory testified that while trying to handcuff the Defendant, Mr. Hicks pushed him into the other officer who was also trying to arrest the Defendant. (Ct. Tr. of 03/10/2003 at 39.) Also, Officer Victory testified he felt the Defendant's level of resistance to the arrest he and his fellow officer were trying to effect was "high." (Ct. Tr. of 03/10/2003 at 42.) Both officers testified as to how the Defendant hid his arms from view and refused to cooperate even when maced and struck with a baton. The totality of the resistance by the Defendant was substantial and did not amount to just a "minor scuffle." He did not simply struggle with the officers or "wiggle" as did the Defendant in *Rainey*, *supra*. In addition, it is clear that the Defendant's actions were not meant to merely shake off the "policeman's detaining arm." *Cf. Rainey, supra*. Furthermore, the Defendant, through his demeanor, words, and motions, showed more than just an attempt to flee or a desire to not be detained. By aggressively

asserting physical force, resisting all efforts to submit to the officers until forced to do so by mace and a baton, the Defendant's actions rose far above those of the defendant in *Rainey*, *supra*.

The Defendant also relied on *Eberhardt*, *supra,* to support his position. In *Eberhardt*, the police attempted to serve a warrant on the defendant at his home. *Id*. The officers were admitted into defendant's home by his brothers and sisters. *Id*. A search of the home revealed the defendant hiding underneath a bed. *Id*. A scuffle ensued between the defendant and the officers when they attempted to remove him from the bedroom. *Id.* During this fight, furniture was overturned and an officer was bruised as the fight traversed from one room to the next. *Id.* Eventually, the defendant eluded the officers' grasp, escaped through a third floor window, and was apprehended three days later without incident. *Id.*

While *Eberhardt* contains some factual similarities to the one before this Court, there are glaring factual and legal differences which leaves this Court unpersuaded by the holding in *Eberhardt* as applied to the facts in the case *sub judice.*

In *Eberhardt,* the court, consistent with the holding in *Rainey,* held that defendant's actions were not consistent with Resisting Arrest, as those actions were in conformance with an attempt to escape the officers and were not aggressive assertions of physical force. *Eberhardt,* 450 A.2d at 653. The court placed emphasis on defendant's failure to strike or kick the officers and the fact that he only tried to free himself from the officer's grasp. *Id.* However, as the defendant was not charged with the second half of §5104 (dealing with the language involving whether the officers were required to employ substantial force to overcome the defendant's resistance), the court in *Eberhardt* was restricted from considering whether the defendant employed means justifying or requiring substantial force to overcome his resistance. *Id.* That situation differs greatly from the factual scenario now before this Court. The information filed in this matter included the *entire* text of §5104, and this Court instructed the jury on each facet of §5104. (Ct. Tr. of 03/10/2003 at 109-110.) On this basis, *Eberhardt* is distinguishable.

The Defendant presently did much more than simply try to escape. Initially, while trying to keep the officers from arresting him and placing handcuffs on him, the Defendant pushed them away. (Ct. Tr. of 03/10/2003 at 39 and 48.) Then, instead of trying to flee, the Defendant placed himself in a position in which he could not flee by lying down on his bed with his hands underneath him. Having already had his attempt at flight thwarted, as his aggressive assertions of physical force were not successful, he attempted a different approach. Defendant proceeded to scream, struggle and swear at the officers, all while they attempted to place him under arrest. In their efforts to place Defendant under arrest, the officers were forced to use a baton and mace to assist them. Only after repeated

attempts were they finally able to subdue the Defendant. Rather than calmly sit as the Defendant in *Eberhardt* did, Mr. Hicks flailed his arms, pushed the officers, resisted being detained by rolling over onto his hands and then refused to respond to verbal commands, a mace spray, and a baton.

Because of the factual discrepancies, the holdings in *Rainey* and *Eberhardt* are narrowly prescribed for their unique facts and are not applicable in this case. Consequently, while the companion cases of *Eberhardt* and *Rainey* hold that Resisting Arrest contemplates an affirmative, aggressive strike or kick by the defendant against the officer, §5104 covers a broader base of facts than those confronted by the courts in *Rainey* and *Eberhardt* and the facts set forth instantly.

The Court now turns to the case of *Commonwealth v. Miller*, 475 A.2d 145 (Pa. Super. 1984), which was advocated by the Commonwealth. In *Miller*, the defendant was told by Officer McEwen that he was being issued a citation for Disorderly Conduct, would be frisked, and then be released as soon as a citation had been prepared. *Id.* at 146. Defendant yelled that he was being arrested to his brother, who was with Officer McCurdy, another policeman, in another portion of the parking lot. *Id.* at 146-147. Defendant then began to struggle with Officer McEwen. When Officer McEwen, assisted by Lt. Rager, attempted to grab and pinion his arms, appellant struggled by flailing his arms and by moving the upper part of his body horizontally back and forth in a rapid manner. *Id.* Defendant also attempted to "push through" Officer McEwen to go to the aid of his brother who had begun to struggle with McCurdy. *Id.* Officer McEwen and Lt. Rager then attempted to place handcuffs on defendant, but he resisted their efforts by "straining" against them with his arms and the upper part of his body. He continued to struggle as the police officers attempted to place him in the rear of a police car. *Id.* To get him in the car, the police found it necessary to lift appellant from the ground and physically push him into the rear of the police vehicle. *Id.* at 146-147.

The court in *Miller* referenced *Eberhardt* and *Rainey* when it stated "there is dictum in several prior decisions of this Court from which it can be inferred that we deem it an essential element of the crime of resisting arrest that the actor strike or kick the arresting officer." *See, Miller*, 475 A.2d at 146. However, the court continued, and held, "such an interpretation of the statute is contrary to the express language thereof. We decline to follow that dictum in the instant case." *Id.*

Continuing, the court held that while generally it is not criminal to merely flee an arrest, "the statue, it is clear, *does not require the aggressive use of force such as striking and kicking of the officer"* (emphasis added by this Court) in order for there to be a charge of Resisting Arrest. *Id.* As noted *infra*, the Commonwealth in the present case included in its Resisting Arrest charge that the Defendant employed

means justifying or requiring substantial force to overcome the resistance put forth by him. The court in *Eberhardt* did not have the ability to consider such language in its case because that portion of §5104 was not charged. *Eberhardt, supra* at 653.

Consequently, in the instant case, the Commonwealth did argue that the Defendant acted in such a manner as to necessitate substantial force to overcome his resistance. The Defendant refused to cooperate in all the ways that have been previously listed, leaving the officers no choice but to employ substantial force to overcome his resistance. *See, Miller, supra.* As has been stated, the officers verbally commanded the Defendant to cease resisting. Officer Victory maced the Defendant in the face. Officer Popovic had to strike the Defendant repeatedly in a known pressure point in an attempt to free the Defendant's hands to be cuffed. Both officers had a reasonable apprehension that the Defendant was hiding weapons underneath his person while he was lying on the bed. The officers were pushed, berated, cursed at, and had to struggle with a Defendant whom, according to the testimony of Officer Victory, gave a resistance level to their arrest that was "high." (Ct. Tr. of 03/10/2003 at 42.)

Therefore, consistent with Miller, the Commonwealth was entitled to argue to the jury that Resisting Arrest is not confined only to where a defendant kicks or punches an officer, but may also include the circumstance when a defendant resists to the extent that the police utilize substantial force to overcome the resistance. As acknowledged by the jury's verdict, this type of resistance falls under the umbrella set forth by 18 Pa. C.S.A. §5104 (Resisting Arrest and Other Law Enforcement) and may be punished as such.

This Court, therefore, took time to review all the cases presented before it by both sides and entertained lengthy discussion at trial on this subject before finally allowing the jury to decide the case. (Ct. Tr. of 03/10/2003 at 62-67.) *Rainey* and *Eberhardt* have not been overturned and therefore still represent good law, albeit narrowly confined to their facts. However, *Miller* specifically differentiated both the legal and factual scenarios in those cases from its own. *See*, *Miller*, *supra* at 146 n.4.

Upon concluding in the instant case that an interpretation of the Defendant's actions with regard to the definition of Resisting Arrest was at issue and the facts were not disputed, this Court denied the Motion for Judgment of Acquittal. Finding that Miller was persuasive and is distinguishable from *Eberhardt* and *Rainey*, this Court allowed the jury to continue to hear the case.

At that time, the Defendant was provided an opportunity to present evidence. The Defendant provided testimony regarding his actions and conduct on the date in question. He stated that he had simply refused to be placed in handcuffs, which did not constitute the charge of Resisting Arrest. The jury was provided with standard jury instructions regarding

their role as judges of the facts and credibility of witnesses. The jury was free to believe all, part, or none of the witnesses' testimony. In this matter, the jury did not find the testimony of the Defendant to be credible and therefore found the testimony of the officers to be believable. After finding the facts and determining the credibility of the witnesses, the jury applied its findings of fact to the law provided to them by the Court and concluded that the Commonwealth had met its burden beyond a reasonable doubt. Therefore, the Defendant was found guilty of Resisting Arrest.

V. ISSUES COMPLAINED OF ON APPEAL

Presently, the Defendant first contends that the weight of the evidence shows that the Defendant did nothing more than refuse to cooperate by not giving up his arms to be handcuffed. Subsequently, he calls for the guilty verdict to be set aside.

The weight of the 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 the witnesses. *See, Commonwealth v. Gooding,* 818 A.2d 546 (Pa. Super 2003); *Commonwealth v. Begley,* 780 A.2d 605 (Pa. 2001). A jury's verdict can only be reversed if it is so contrary to the evidence as to shock one's sense of justice. *Gooding, supra* at 11.

There were no discrepancies in the Commonwealth's witnesses' respective testimonies which would rise to a level that would shock this Court's conscience or sense of justice. Neither officer contradicted the other with his testimony. The jury found no reason to disbelieve the testimony of either officer. Both officers were dutifully cross-examined by counsel for the Defendant who had every opportunity to show bias, motive, or intent for the officers to have fabricated their testimony.

In addition, the Defendant chose to testify on his own behalf. The jury was able to hear the Defendant's testimony and give it the proper weight they felt it deserved. Subsequently, a reasonable jury could have found that the officers were telling the truth and reasonably find the Defendant guilty given the facts and the law which were presented before them. The verdict in this case did not shock this Court's sense of justice and was consistent with the application of the law to the facts found by the jury. Thus, the jury's verdict was not contrary to the weight of the evidence presented at trial.

Next, the Defendant contends that the evidence was legally insufficient and the verdict should be set aside on those grounds. Defendant claims that the evidence showed he did nothing more than refuse to cooperate.

The question of sufficiency of evidence is settled by determining whether the trier of fact could have found that each and every element of the crime charged was established beyond a reasonable doubt. It is a question of law. *See, Commonwealth v. Maxon,* 798 A.2d 761 (Pa.Super 2002). It is within the province of the fact finder to determine the weight to

be given to the testimony and to believe all, part, or none of the evidence. *See, Commonwealth v. Gruff,* 2003 Pa.Super Lexis 444; *Commonwealth v. Hargrave,* 745 A.2d 20 (Pa.Super 2000); *Commonwealth v. Barzyk,* 692 A.2d 211 (Pa. Super 1997).

Here, the Commonwealth bore the burden of proof to show beyond a reasonable doubt that Defendant violated 18 Pa. C.S.A. §5104 (Resisting Arrest and Other Law Enforcement). Specifically, Section 5104 provides as follows:

> **§ 5104. Resisting Arrest or Other Law Enforcement**
> A person commits a misdemeanor of the second degree if, with the intent of preventing a public servant from effecting a lawful arrest or discharging any other duty, the person creates a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the resistance.

The Defendant here did more than simply refuse to give his hands up to be handcuffed. As set forth previously in this Opinion, the Defendant refused the officers' commands, pushed an officer, repudiated application of mace and a baton. His level of resistance was high and he employed the officers to use substantial force in order to overcome this resistance. Also, in the course of Defendant's conduct, one officer struck his partner with a baton in the elbow. This act further reasonably demonstrated that Defendant had also exposed each officer to a substantial risk of bodily injury, all resulting from Defendant's conduct.

Accordingly, the jury's verdict revealed their belief that the Commonwealth had proven its case beyond a reasonable doubt. As a result, the evidence presented by the Commonwealth was sufficient to establish the Defendant's guilt.

VI. CONCLUSION

In light of the above, the Court concludes pursuant to 18 Pa. C.S.A. §5104 that the Defendant did resist arrest on the date in question. There was sufficient evidence presented at trial for a jury to conclude that each element of Resisting Arrest had been proven beyond a reasonable doubt. Furthermore, the jury's verdict was not against the weight of the evidence, as it did not shock this Court's sense of justice. Consequently, the Defendant's motion and request for a new trial are DENIED.

VII. ORDER

AND NOW, to-wit, this 11th day of July 2003, for the reasons set forth in the accompanying Opinion, this Court finds that the verdict returned by the jury was in accordance with both the weight and sufficiency of the evidence and, therefore, **AFFIRMS** the conviction and subsequent sentence imposed.

BY THE COURT
/s/ **John J. Trucilla, Judge**

COMMONWEALTH OF PENNSYLVANIA
v.
RANDY DONNELL PETTY

CRIMINAL LAW/NEW TRIAL/CONFLICT OF INTEREST

Defendant was not entitled to a new trial where he failed to demonstrate prejudice due to prosecuting attorney's prior representation.

Where an actual conflict of interest as to district attorney's office exists, a criminal defendant is entitled to have the conflict removed without any further showing of prejudice.

A mere allegation or appearance of impropriety is insufficient to establish an actual conflict of interest as to district attorney's office.

CRIMINAL LAW/NEW TRIAL/WEIGHT OF THE EVIDENCE

The test for determining the sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the Commonwealth as verdict winner and drawing all reasonable inferences there from, the fact finder could reasonably have concluded that all elements of the crime have been established beyond a reasonable doubt.

A verdict is against the weight of the evidence where it is so contrary to the evidence that it "shocks one's sense of justice."

CRIMINAL LAW/SENTENCING

The decision to run a sentence concurrently or consecutively to another sentence is within the sound discretion of the sentencing court.

EVIDENCE

It is within the province of the fact finder to resolve all issues of credibility, resolve conflicts in evidence, make reasonable inferences from the evidence, and believe all, none or some of the evidence presented.

After-discovered evidence can be the basis for a new trial if it: (1) has been discovered after the trial and could not have been obtained prior to or at the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach the credibility of a witness; and (4) is of such nature and character that a different verdict will likely result if a new trial is granted.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION NO. 2270 of 2002

Appearances: Robert A. Sambroak, Esquire, for the Commonwealth
Gustee Brown, Esquire for the Defendant

MEMORANDUM OPINION & ORDER

February 18, 2003: Upon consideration of the Defendant, Randy Donnell Petty's, Motion for New Trial (Conflict of Interest), Motion for New Trial (Lack of Weight and/or Sufficiency of the Evidence), Motion for New Trial (New Evidence), Motion for Judgment of Acquittal Notwithstanding the Verdict (Possession of an Instrument of a Crime), all

filed on December 2, 2002,[1] his *pro se* Motion for New Trial and *pro se* Motion to Modify Sentence received by this Court on January 22, 2003, and the arguments from both counsel heard on February 6, 2003, it is hereby **ORDERED, ADJUDGED and DECREED** as follows.

1) Defendant's Motion for New Trial (Conflict of Interest) is **DENIED.** "Where an actual conflict of interest exists, the defendant is entitled to have the conflict removed without any further showing of prejudice. On the other hand, a mere allegation or appearance of impropriety is insufficient to establish an actual conflict of interest." *Commonwealth v. Sims, 799* A.2d 853, 856-857 (Pa. Super. 2002). "A defendant cannot prevail on a conflict of interest claim absent a showing of actual prejudice." *Commonwealth v. Karenbauer,* 552 Pa. 420, 437, 715 A.2d 1086, 1094 (1998).

In this case, the Defendant has not shown that he was actually prejudiced by First Assistant District Attorney Robert Sambroak's prosecution of the case against him at the February 6, 2003 hearing on this motion. Defense counsel failed to articulate any specific facts demonstrating prejudice and merely asserted the "appearance of impropriety," which is insufficient. Furthermore, Attorney Sambroak had no recollection of his prior representation of the Defendant. It was merely an afterthought and he did not gain a strategic advantage in his prosecution of the Defendant's case. Moreover, the jury was not aware of Attorney Sambroak's prior representation of the Defendant and could not draw any inferences therefrom. Consequently, Defendant cannot offer any specific allegations to support his assertion of "conflict of interest" and thus, this baseless claim must fail.

2) Defendant's Motion for New Trial (Lack of Weight and/or Sufficiency of the Evidence) is **DENIED**. "The test for determining the sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the Commonwealth as verdict winner and drawing all proper inferences favorable to the Commonwealth, the fact-finder could reasonably have determined that all elements of the crime to have been established beyond a reasonable doubt." *Commonwealth v. Bishop*, 742 A.2d 178, 188 (Pa. Super. 1999); *Commonwealth v. Widmer,* 560 Pa. 308, 319, 744 A.2d 745, 751 (2000). A verdict is against the weight of the evidence only when it is "so contrary to the evidence as to shock one's sense of justice." *Commonwealth v. Mason,* 559 Pa. 500, 513,741 A.2d 708, 715 (1999); *Commonwealth v. Brown,* 538 Pa. 410, 435, 648 A.2d 1177, 1189 (1994); *Commonwealth v. Zugay,* 745 A.2d 639, 645 (Pa. Super. 2000).

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[1] The Court notes the Defendant should have made oral motions pursuant to Pa. R. Crim. P. 704(8). In its Memorandum Opinion and Order dated January 7, 2003, the Court considered these motions prior to sentencing, concluded they were premature and decided to treat them as post-sentencing motions. *See, Commonwealth v. Fisher,* 764 A.2d 82 (Pa. Super. 2000).

"Moreover, it is within the province of the fact-finder to resolve all issues of credibility, resolve conflicts in evidence, make reasonable inferences from the evidence, and believe all, none, or some of the evidence presented." *Bishop, supra* at 189; *Zugay*, *supra* at 645.

Applying that law to this case, the record demonstrates that all the elements of the various crimes the Defendant was convicted of were established. The jury, as fact-finder, considered all of the evidence, including the Commonwealth's two eyewitnesses, Germaine Spain and Dion Bishop, who testified the Defendant fired the weapon. Furthermore, the Commonwealth presented motive evidence that Germaine Spain had been tried and acquitted of killing the Defendant's brother five years earlier. Although Jason Evans testified at trial that he did not know who fired the weapon, his videotaped statement taken by Officers Frank Kwitowski and Ed Yeaney indicated the Defendant fired the shots. On the videotape, Jason Evans stated the Defendant admitted that he shot the car up, the .45 shots were loud, and he wanted them to "pay for it" (i.e. revenge). *See*, Commonwealth Exhibit #9 (video of Evans' statement). Following the Court's limiting instruction, the jury was directed to consider. If they chose to do so, the inconsistent statements as substantive evidence and not merely for impeachment purposes. Of course the jurors were again reminded that they were the sole judges of credibility. Therefore, the verdicts are not "so contrary to the evidence as to shock one's sense of justice," and certainly not this Court's. *See, Commonwealth v. Mason, supra.;*

3) Defendant's Motion for New Trial (New Evidence) is **DENIED**. "After-discovered evidence can be the basis for a new trial if it: (1) has been discovered after the trial and could not have been obtained at or prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach the credibility of a witness; and (4) is of such nature and character that a different verdict will likely result if a new trial is granted." *Commonwealth v. Detman,* 2001 Pa. Super. 76, 770 A.2d 359, 360 (2001). *See also, Commonwealth v. McCracken,* 540 Pa. 531, 549, 659 A.2d 541, 545 (1995).

In the case *sub judice,* the Defendant claims that Dion Bishop (an eyewitness who testified at trial that the Defendant had fired the weapon on the night in question) had told others that it was, in fact, Jason Evans who was the shooter, and not Randy Petty. Defendant claims further that Dion Bishop obtained a sawed-off shotgun shortly after the shooting, because he wanted to shoot Evans because Bishop had claimed that it was Evans who did the shooting. *See*, Defendant's Motion for New Trial - New Evidence, at page 1).

To support this claim, at the February 6, 2003 hearing, Defendant called Yaphet Ettison to testify. Mr. Ettison was an inmate at the time that Dion Bishop was incarcerated and was also present in the same cellblock as Jason Evans. Mr. Ettison testified that he took it upon himself to approach Mr. Bishop in the cellblock to question him with regards to the events

surrounding the Defendant. At this time, which was testified to as some time in February of 2002, Ettison testified that Dion Bishop stated to him that Randy Petty did not do anything on the night of the shooting. Ettison also claimed that Bishop only told authorities that Petty was the shooter because he was going along with his cousin, Germaine Spain, (Spain had told the police that Petty was the shooter).

As noted by the testimony of Mr. Ettison, the information that was obtained from Commonwealth witness Dion Bishop occurred sometime in February of 2002, months prior to the Defendant's trial. Further, Ettison continued and testified that he had shared this information with Randy Petty when Randy Petty and this witness were incarcerated together sometime in October of 2002. The Court notes that this trial commenced with jury selection on November 18, 2002. Consequently, based on the testimony of Mr. Ettison, this Court does not believe this information qualifies as "newly discovered" evidence because Defendant was informed of it prior to trial. Furthermore, based on this account, it is also apparent to this Court that any exercise of due diligence should have and would have uncovered this information, if it truly did exist.[2]

Continuing, this alleged new evidence is merely corroborative and cumulative of the Defendant's witness, Terry Porter. Terry Porter testified that Jason Evans was the one who had the weapon and fired it on the date in question. Porter was an inmate with Evans at the Erie County Prison and testified regarding his relationship with Evans during this prison stay, and the statements that Evans had made to him about this shooting. Consequently, the Defendant did present evidence on his behalf that Jason Evans was the shooter, and the credibility of Terry Porter was assessed by this jury. Therefore, the testimony of Mr. Ettison, if believed, is not only cumulative of the testimony given by both Terry Porter and the Defendant, who himself testified at trial that he had no involvement in the shooting, but it also is being used simply to impeach the credibility of Mr. Bishop.

The Defendant also claims that the newly-acquired evidence would include a prison document and record (*See*, Defendant's Exhibit #1 admitted at the February 6, 2003 hearing), which indicated that Dion Bishop had requested a transfer in the Erie County Prison to be separated from Ricky Gibbs and Jason Evans. The prison transfer record offered by the Defendant indicates that Ricky Gibbs and Jason Evans were identified as individuals who tried to kill Bishop. The Defendant attempts to

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[2] This Court finds it curious that Mr. Ettison, a lifelong friend of the Defendant, took it upon himself to question Mr. Bishop about a shooting that occurred late in November of 2001. Additionally, the Court is suspicious of the circumstance that Mr. Bishop, according to Mr. Ettison, would have been so free with information regarding the shooting with someone who he really didn't even know. However, for purposes of this Opinion and Order, the Court is proceeding on the premise that Ettison's testimony is credible.

articulate that because he was not named in this transfer request, this would be further evidence and corroboration that Bishop had stated that Randy Petty was not the shooter. The Court does not come to the same conclusion. As acknowledged at the time of this incident by practically each of the witnesses involved in this matter, Ricky Gibbs and Jason Evans were present when the shooting occurred. There was further testimony at trial that Ricky Gibbs and/or Jason Evans had handed the gun to Randy Petty just prior to the shooting. Consequently, it was not only reasonable, but foreseeable, that Dion Bishop would ask to be separated from the presence of Ricky Gibbs and Jason Evans because they were present and arguably involved in the shooting that occurred in November of 2001.

Further, and most importantly, Petty was not listed on the transfer order because he had yet to be incarcerated. According to the Commonwealth attorney prosecuting this case, it was represented to the Court that the defendant was in Buffalo at the time that Mr. Bishop had filed his request contained in Defendant's Exhibit #1. In fact, the Defendant was not picked up until sometime later on an arrest warrant and then incarcerated. Therefore, this Court is not persuaded by the Defendant's evidence and proffer submitted at Exhibit #1 with regard to the prison transfer order as any proof that this evidence would contradict the trial testimony of Dion Bishop. Again, even if it did, this would only be utilized to impeach the credibility of Dion Bishop. Mr. Bishop was subjected to vigorous cross-examination at time of trial, and his credibility was assessed. Also, for purposes of newly-discovered evidence, the standards clearly indicate that the newly-discovered evidence cannot be used solely to impeach the credibility of a witness, which apparently would be the purpose in this case. *See Commonwealth v. Detman, supra*.

This testimony and the evidence proffered by the Defendant are not of the nature and character that would result in a different verdict if the Defendant were granted a new trial and permitted to present this evidence. Again, the jury had the opportunity to asses the credibility of all of the witnesses. The jury had an opportunity to observe Jason Evans and his testimony, as well as the opportunity to observe the videotaped statement given by Jason Evans which was used by the Commonwealth to contradict his in-court testimony. Further, the jury also had the opportunity to assess the testimony of Terry Porter and the credibility and testimony of the Defendant. The Commonwealth's witnesses were subjected to thorough challenges on cross-examination, and any inconsistencies were certainly illuminated and presented to them. The jury rendered a unanimous verdict and this Court has previously stated that this verdict was supported by sufficient evidence to prove the crimes beyond a reasonable doubt.

Consequently, for the reasons set forth above, the newly-discovered evidence proffered by the Defendant is not sufficient to support a motion for a new trial and, therefore, this request is **DENIED**.

4) Defendant's Motion for Judgment of Acquittal Notwithstanding the Verdict is **DENIED**.[3] The Defendant relies upon *Commonwealth v. Bey*, 306 Pa. Super. 288, 452 A.2d 729 (1982), to assert that his convictions for both Possession of an Instrument of a Crime and Aggravated Assault are barred by 18 Pa.C.S.A. §906 and, therefore, a judgment of acquittal should be entered on that conviction. The Superior Court in *Bey* held 18 Pa.C.S.A. §906 (Multiple Convictions of Inchoate Crimes Barred) prohibited a person from being convicted of both possession of an instrument of a crime and attempted murder stemming from a single incident. These crimes represented two inchoate crimes pursuant to 18 Pa.C.S.A §907 and §901. *Bey* held that, statutorily, §906 prohibits conviction and subsequent sentencing for two inchoate crimes. The Defendant's reliance on *Bey* is misplaced because he was convicted of Possession of an Instrument of a Crime (an inchoate crime pursuant to 18 Pa.C.S.A. §907), and Aggravated Assault, which is not an inchoate crime. Therefore, Defendant was not convicted and sentenced for two inchoate crimes as was the Defendant in *Bey*.

Finally, the Court notes the Defendant is not prejudiced because his sentence for Possession of an Instrument of a Crime (Count 18) was made concurrent to the sentence for Carrying a Firearm Without a License (Count 19), and thus Defendant did not receive any added sentencing exposure for this conviction.

5) Defendant's *pro se* Motion for New Trial is **DENIED** for the reasons set forth above; and

6) Defendant's *pro se* Motion to Modify Sentence is **DENIED**. The Defendant's motion was not filed in the Erie County Clerk of Courts Office within ten (10) days of his sentence or by January 20, 2003. *See*, Pa.R.Crim. P. 720(A)(1). Moreover, the Defendant is represented by counsel, Attorney Gustee Brown, and must file all papers through counsel. Lastly, the Defendant's bald assertion that his sentence "is clearly excessive, and an abuse of the sentencing discretion of the court" is unsubstantiated and merely boilerplate. The Defendant was sentenced to the mandatory minimum of five (5) to ten (10) years for each of his five (5) convictions of Aggravated Assault. Each count of the Defendant's sentence was run consecutively for an aggregate sentence of twenty-five (25) to fifty (50) years incarceration, which is within the standard range of the Sentencing Guidelines. The Defendant also received a sentence of three (3) to six (6)

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[3] The Court will treat this as a Motion for Judgment of Acquittal since Judgment Notwithstanding the Verdict is not available in criminal prosecutions. *See, Commonwealth v. Dewald,* 426 Pa. Super. 445, 627 A.2d 759 (1993) overruled on other grounds, *Commonwealth v. Feathers,* 442 Pa. Super. 490, 660 A.2d 90 (1995). The Court further notes the Defendant improperly filed this motion since the jury had already reached a verdict. *See*, Pa. R. Crim. P. 608(A)(2). Nevertheless, the Court will address the motion on its merits.

months incarceration for Possession of an Instrument of a Crime, which runs concurrent to the sentence of six (6) months to two (2) years incarceration for Carrying a Firearm Without a License. This sentence of six (6) months to two (2) years was made consecutive to the Aggravated Assault conviction listed above. All of the Defendant's sentences were within the standard range of the Pennsylvania Sentencing Guidelines. Furthermore, the decision to run a sentence concurrent or consecutively to another sentence is within the sound discretion of the sentencing court. *See, Commonwealth v. Druce*, 796 A.2d 321, 338 (Pa.Super. 2002).

Therefore, for the reasons set forth above, the Defendant's pro se motions are hereby **DENIED**.

BY THE COURT:
/s/ **John J. Trucilla, Judge**

COMMONWEALTH OF PENNSYLVANIA
v.
JAMES AUGUST LEHMAN

CONSTITUTIONAL LAW/EXECUTIVE POWERS

Pursuant to 14 U.S.C. §89(a), the United States Coast Guard may exercise plenary authority to stop and board American vessels on the high seas for the purpose of conducting safety and documentation inspections even in the complete absence of suspicion of criminal activity.

The United States Coast Guard has the authority to board vessels to inspect manifests and papers without a warrant or any level of suspicion; however, such searches are limited to "documents" inspections.

It is proper for the United States Coast Guard to entertain a dual purpose under 14 U.S.C. §89(a) to conduct safety and documentation inspections and to look for obvious customs and narcotics violations.

CONSTITUTIONAL LAW/JUDICIAL POWERS

In interpreting the Pennsylvania Constitution, the Pennsylvania Supreme Court is not bound by the interpretations given by the United States Supreme Court.

In interpreting Article 1, Section 8 of the Pennsylvania Constitution, the courts consider four factors: 1) the text of the Pennsylvania constitutional provision, 2) the history of the provision, 3) related case law from other states and 4), policy considerations.

CRIMINAL LAW

Under the Vehicle Code, police officers cannot conduct a warrantless administrative search to advance a criminal investigation under the pretext of addressing a specific, compelling interest advanced by a statutory scheme.

Information provided to the United States Coast Guard was insufficient to establish reasonable suspicion of criminal activity; therefore, stop and subsequent boarding of vessel was in violation of the defendant's Fourth Amendment right to be free of unreasonable searches and seizures.

In order to conduct a stop of a motor vehicle, law enforcement officers must have an articulable violation of the Vehicle Code.

Under 30 Pa. C.S. §901(a)(10), waterway officers need no level of suspicion to stop vessels for boat and boating regulations.

30 Pa. C.S. §901(a)(10) requires that waterway officers have probable cause to stop and board a vessel for purposes other than boat and boating regulations.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 3579 - 2002

Appearances: Chad Vilushis, Esquire for the Commonwealth
J. Timothy George, Esquire for the Defendants

OPINION

This matter comes before the Court on the defendant's Omnibus Pretrial Motion to suppress evidence, petition for Writ of Habeas Corpus, and reserve time for additional motions. The defendant is charged with Boating Under the Influence ("BUI", 30 Pa. C.S.A. §5502(a)(1) and (a)(4)(i)).

I. Factual and Procedural History[1]

On July 26, 2002, United States Coast Guard Officer Jeffrey Jobczyski, Water Conservation Officer Thomas H. Edwards, Jr. and Erie County Detective Daniel Powell were on patrol at Presque Isle Bay on Lake Erie, Pennsylvania.[2] (Tr. 5, 20, 34). During their patrol, Officer Jobczyski and Detective Powell were summoned to Rum Runners[3] by one of it's employees (herein referred to as "employee") (Tr. 5). The employee told the officers that some men were rowdy and had just left the bar with an open beer container and boarded a boat. (Tr. 5). The employee pointed out the vessel (a 32 foot Baha known as the "Janice Ann") to the officers which was within sight. (Tr. 21). The officers then pursued the vessel, stopped and boarded it. (Tr. 5, 21). The stop was made without any evidence of erratic or unusual driving. (Tr. 10, 11). Once stopped, the officers noticed the defendant on the "flying bridge" of the vessel.[4] (Tr. 6). They further noticed that he had trouble walking down from the bridge. This, however, is not uncommon (Tr. 7). As the defendant came down the ladder, Detective Powell detected an odor of alcohol. (Tr. 7, 22). The defendant was then administered a number of field sobriety tests, which he failed. (Tr. 7, 22-23). He was subsequently arrested and charged with BUI. (Tr. 23, 37-39).

A preliminary hearing was conducted on December 23, 2002. The charges were bound over to court. On February 24, 2003, he was formally arraigned. On March 21, 2003 the defendant timely filed his Omnibus Pretrial Motion for relief. On April 30, 2003, a suppression hearing was conducted by this Court.[5]

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[1] The factual history is derived from the preliminary hearing transcript denoted as "Tr."

[2] Officer Jobzyski [sic] and Detective Powell were on patrol together. Officer Edwards was called to the scene after the initial stop was made. (Tr. 24, 34). This was a joint federal-state operation.

[3] Rum Runners is a bar on the shore of Presque Isle Bay in Erie, Pennsylvania near Dobbins Landing.

[4] The "flying bridge" is one of two areas from which the vessel can be operated. The other area is located beneath the deck. *Id.* at 15.

[5] At the suppression hearing the Court admitted the preliminary hearing transcript. Neither the Commonwealth nor the defendant presented any further evidence. The Court then provided both parties 20 days to submit briefs.

II. Legal Discussion

A. Fourth Amendment Analysis

The United States Coast Guard, "may, consistent with the Fourth Amendment of the U.S. Constitution, exercise plenary authority under 14 U.S.C. §89(a) to stop and board American vessels on the high seas to conduct safety and documentation inspections even in the complete absence of suspicion of criminal authority. Specifically, 14 U.S.C. §89, states that:

> (a) The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquires, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.

As early as 1790, Congress provided certain officers the authority to board vessels to conduct examinations of manifests and papers without a warrant or any level of suspicion. *Act of Aug. 4, 1790*, 1 Stat. 141. However, these searches are limited to "document" inspection recognizing the unique nature of ships. *See, United States v. Villamonte Marquez, et al.*, 462 U.S. 579, 592-93 (1982).[6]

The federal circuits are split as to whether an inspection to search for unlawful activity based upon a safety inspection pretext violates the Fourth Amendment. *See*, 16 Tul.Mar. L.J. 319, 340 (Spring 1992).[7] The Eleventh Circuit Court of Appeals stated that "[t]he mere fact that the boarding officers may also suspect narcotics violations does not taint the

[6] In *Villamonte-Marquez*, the controlling statute is 19 U.S.C.A §1581(a) which authorizes U.S. customs officials to conduct inspections.

[7] This article cites federal cases that hold that the Coast Guard may not use a safety and document inspection as a pretext to search for criminal violations. *See Generally*, *U.S. v. Aikens*, 685 F.Supp. 733, 738 (D. Haw. 1988); *U.S. v. Jonas*, 639 F.2d 200 (5th Cir. 1981); *U.S. v. Cilley*, 785 F.2d 651 (9th Cir. 1985).

validity of the safety and documentation inspection." *U.S. v. Luis-Gonzalez*, 719 F.2d 1539, 1549 (11th Cir. 1983). Furthermore, "[i]t is proper for the Coast Guard to entertain a dual purpose in boarding under section 89(a); to conduct a safety and documentation inspection and to look for obvious customs and narcotics violations." *Id.*, *see also*, *U.S. v. Clark*, 664 F.2d 1174, 1175 11th Cir. 1981); *U.S. v. Jonas*, 639 F.2d 200, 203 (5th Cir. 1981).

One can also analogize these inspections to administrative searches. One of the leading cases in that area is *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967). There, the appellant contested a city ordinance which permitted building inspectors the right to enter a building at reasonable times in furtherance of their code enforcement duties. The appellant denied entry to the inspectors on three different occasions because they did not possess a warrant. The appellant was subsequently charged criminally with refusal to comply with the ordinance. The Supreme Court reasoned that a broad area administrative inspection is permitted without a warrant, but "...'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." *Id.*, at 538.

Similarly, in *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), the Supreme Court determined that administrative inspections for a highly regulated industry such as liquor retail were permissible without a warrant. However, a warrant is needed when officials lack consent to enter commercial premises not open to the public.

In *Commonwealth v. Petron*, 738 A.2d 993, a speeding tractor-trailer crashed into the back of a stopped car killing the occupants. Investigators entered the truck to inspect for possible safety violations. During the investigation, they seized the driver's logbook and travel-related receipts. The Pennsylvania Supreme Court acknowledged that investigators had statutory authority to inspect vehicles to prevent ongoing violations of the Motor Vehicle Code to prevent future harm.[8] However, "[t]he police cannot conduct a warrantless administrative search to advance a criminal investigation under the pretext of addressing a specific, compelling interest advanced by a statutory scheme." *Id.* at 1003-04 (citations omitted).

Therefore, administrative searches without warrants for highly regulated activities are permissible. However, if the search is either individualized or opposed, then there must be compliance with Fourth Amendment warrant requirements.

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[8] Federal and Pennsylvania courts have approved random safety inspections in other contexts. (i.e., DUI checkpoints). *See, Michigan Dept of State Police v. Sitz*, 496 U.S. 444 (1990); *Commonwealth v. Tarbert*, 535 A.2d 1035 (Pa. 1987). *See also*, *United States v. Martinez-Fuerte*, 482 U.S. 543 (1976).

Relative to Section 89 (a), the Third Circuit Court of Appeals (although not directly addressing the issue) interprets the act in a way that allows warrantless searches of vessels for criminal activity based upon reasonable suspicion. *See, United States v. Varlack Ventures, Inc.*, 149 F.2d 212, 217 (3rd. Cir. 1999).

In the instant case, Officer Jobczyski's preliminary hearing testimony reflected the following:

> Q. What exactly did the person at Rum Runners tell you concerning someone on the Janice Ann?
> A. Told me that was a group of fellas in. That they were asked- they were getting a little rowdy, they were asked to leave. One of them gave them a hard time and took one of the beers from the bar with him onto the boat.
> Q. Do you know how many people were involved in the group that was asked to leave?
> A. No, he didn't say. He just pointed to the vessel because it was still in sight. He said, you know, that vessel. He didn't even refer to it by name.
> Q. Do you know which one of them was a particular problem?
> A. No. He did not state. That didn't seem his concern. His concern was the open container leaving the bar.

(Tr. 8-9).

Continuing, he was asked and responded as follows:

> Q. You can't say with any kind of certainty whether or not the one that was causing a problem at Rum Runners is Mr. Lehman?
> A. No. I never stated that.

(Tr. 9, (lines 22, 23)).

Relevant to his intent to stop the vessel, the transcript discloses the following:

> Q. Your intention was simply to stop the boat to inquire whether or not they had, in fact, taken alcoholic beverages onto the boat?
> A. We were going to stop and inquire and conduct a Coast Guard boarding of their vessel.
> Q. Based solely on the report that the passengers on that boat may have taken alcoholic beverages on the boat?
> A. It was a random boarding. We did not -- the gentlemen at Rum Runners didn't have -- didn't say that he was planning to press any charges. He just informed us of that, so we decided to conduct a random boarding on the vessel.
> Q. Well, it wasn't a random boarding, was it, Officer?
> A. Sure. We didn't have any intention - that's why I didn't go into any complaint or anything. We didn't have any intention of making

any arrest or pressing any charges because he just -- the gentleman from Rum Runners was just concerned about the open container.
Q. But you use the term “random boarding” , correct?
A. Uh-huh
Q. “Random boarding” means you stop a boat at random, correct?
A. Right. For the sole purpose of conducting a Coast Guard safety check.

(Tr. 11, 12)

Based upon the totality of the circumstances, this Court concludes that, although §89(a) permits “suspicionless” boardings and inspections in some instances, the sole purpose for the stop and boarding of the “Janice Ann” was to investigate possible criminal behavior by the operator or the occupants based upon the information received from the employee. There is no evidence in the record indicating that once the vessel was stopped, the officers asked to review documents or attempted to perform a safety inspection. This fact directly contradicts any claim of a dual purpose. The officers would not have stopped the vessel had it not been for information supplied to them by the employee. Therefore, under federal law, reasonable suspicion of criminal activity was required to effectuate the stop and subsequent boarding of the “Janice Ann” and the information provided to them by the employee was insufficient to establish reasonable suspicion. It follows, then, that the defendant’s Fourth Amendment rights were violated.

B. Article I §8 Analysis

The Pennsylvania Supreme Court has often interpreted the Pennsylvania Constitution more liberally than the United States Supreme Court has construed the Fourth Amendment *See, Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991). (In *Edmunds*, the Court refused to find the good faith exception to the warrant requirement within Article I §8 of the Pennsylvania Constitution). As the Court noted:

> [t]his Court has long emphasized that, in interpreting a provision of the Pennsylvania Constitution, we are not bound by the decisions of the United States Supreme Court which interpret similar (yet distinct) federal constitutional provisions. *See, Commonwealth v. Sell*, 504 Pa. 46, 470 A.2d 457 (1983); *Commonwealth v. Melilli*, 521 Pa. 405, 555 A.2d 1254 (1989); *Commonwealth v. Bussey*, 486 Pa. 221, 404 A.2d 1309 (1979); *Commonwealth v. DeJohn*, 486 Pa. 32, 403 A.2d 1283 (1979), *cert. denied*, 444 U.S. 1032, 100 S.Ct. 704, 62 L.Ed.2d 668 (1980). *Commonwealth v. Triplett*, 462 Pa. 244, 341 A.2d 62 (1975); *Commonwealth v. Richman*, 458 Pa. 167, 320 A.2d 351 (1974); *Commonwealth v. Campana*, 452 Pa. 233, 304 A.2d 432, vacated, 414 U.S. 808, 94 S.Ct. 73, 38 L.Ed.2d 44 *on remand*, 455 Pa. 622, 314 A.2d 854, *cert. denied*, 417 U.S. 969, 94 S.Ct. 3172, 41 L.Ed.2d 1139 (1974).

Id. at 894.

In determining the scope of Article I §8, the Pennsylvania appellate courts have considered four factors: 1) text to the Pennsylvania constitution provision; 2) history of the provision, including Pennsylvania case-law; 3) related case-law from other states; 4) policy considerations, including unique issues of local concern, and applicability within modern Pennsylvania jurisprudence. *Id.* at 895.

(1) The text of the Article I §8

Article I §8 states:

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

In *Edmunds*, Mr. Justice Cappy stated:

> Although the wording of the Pennsylvania Constitution is similar in language to the Fourth Amendment of the United States Constitution, we are not bound to interpret the two provisions as if they were mirror images, even where the text is similar or identical. (Footnote omitted). *Id.* at 895, 896.

The Court also noted that the "constitutional protection against unreasonable searches and seizures existed in Pennsylvania more than a decade before the adoption of the federal constitution, and fifteen years prior to the promulgation of the Fourth Amendment." *Id.* at 896 (citation omitted).

(2) History of the Amendment

The *Edmunds* Court set forth a detailed history of Article I §8. *Id.* at 896-899. This Court incorporates that analysis by reference.

(3) Related Case-law from other states

In *State v. Arnold*, 2001 WL 985101 (Del. Super.), the Delaware Superior Court held that the random stopping of a boat to inspect for boating and fishing regulations did not violate the Fourth Amendment. In so holding, the *Arnold* court analyzed *U.S. v. Villamonte-Marquez, supra.* and three state cases.[9]

The three state court decisions are factually similar to one another. Each one involved an administrative stop of a waterborne vessel based upon statutory authority which allowed the stop without any level of suspicion. In addition, the respective courts found that the state had a high interest in boater safety and that such stops were not so intrusive as

[9] *State v. Pike*, 532 S.E.2d 543 (N.C. App. 2000), *Schenekl v. The State of Texas*, 30 S.W.3d 412 (Tex.Crim.App. 2000), *State v. Casal and Garcia*, 410 S. 2d 152 (Fla. 1982).

to violate the Fourth Amendment. This Court notes, however, that each stop was executed on a random basis for the purpose of an administrative inspection. Here, the stop of the "Janice Ann" was not random, nor was it stopped for the purpose of a safety and document inspection.[10]

(4) Policy Considerations

Although vessel and motor vehicle stops are distinguishable, the Pennsylvania courts' treatment of vehicle stops is emblematic of policy considerations.

In Pennsylvania, in order to conduct the stop of a motor vehicle, law enforcement agents must have an articulable violation of the vehicle code. This has been interpreted as probable cause, *See, Commonwealth v. Gleason*, 785 A.2d 983 (Pa. 2001); *Commonwealth v. Witmeyer*, 668 A.2d 1113 (Pa. 1995); *Commonwealth v. Swanger*, 307 A.2d 875 (Pa. 1973). Only in limited circumstances and under strict requirements are stops allowed absent any level of suspicion. (i.e. DUI checkpoints).[11]

Turning to vessel stops, Pennsylvania has a statute that corresponds to 14 U.S.C.A §89(a). Pursuant to 30 Pa.C.S.A. 901 (a) (10), waterways officers need no level of suspicion to stop vessels for boat and boating regulations relating to Part III of the statute. Beyond that, the statute requires probable cause in order to stop/board a vessel for other purposes. *See*, §901 (a) (5). Therefore, the Pennsylvania General Assembly's legislative intent, as reflected by the statute, restricts executive branch power once the search goes beyond document and/or safety inspections.

Reconciling the above, this Court concludes that the actions of the federal and state agents violated Article I §8 of the Pennsylvania Constitution. Their motive in criminal activity for which there was no reasonable suspicion nor probable cause. Therefore, the evidence obtained as a result of their conduct must be suppressed.

III. Conclusion

In this case, the investigating officers stopped and boarded the "Janice Ann" based upon the information that they received from the employee, and for no other purpose. This was not authorized under 14 U.S.C.§ 89 (a). Furthermore, the evidence available to them did not rise to the level of reasonable suspicion nor probable cause. Therefore, the stop violated

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[10] These cases further buttress this Court's Fourth Amendment analysis because the reason for the stop of the "Janice Ann" was not for the purpose of an inspection, nor was it random.

[11] Pennsylvania has recognized mixed-motive searches. However, the invalidity turns upon an objective assessment of the grounds for the search. The relevant cases do not eliminate the need for the requisite level of suspicion. *See, Commonwealth v. Jones*, 578 A.2d 527 (Pa. Super. 1990), *citing, Whren v. United States*, 517 U.S. 806, 813-14 (1996). *See also, Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001). (decided upon Fourth Amendment grounds).

both the Fourth Amendment of the U.S. Constitution, and Article I, §8 of the Pennsylvania Constitution.[12]

ORDER

AND NOW, this 9th day of July 2003, for the reasons set forth in the accompanying opinion, it is hereby **ORDERED** that the defendant's Omnibus Pretrial Motion in the nature to suppress evidence is hereby **GRANTED**. The defendant's request for Habeas Corpus relief is **DENIED** as moot.

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

[12] In light of the Court's finding, it is unnecessary to address the defendant's request for Habeas Corpus relief.

COMMONWEALTH OF PENNSYLVANIA
v.
MYRON A. MOFFETT

CRIMINAL PROCEDURE / APPEALS / SUFFICIENCY OF EVIDENCE

A defendant may challenge the sufficiency of the evidence to sustain a conviction by filing a motion for judgment of acquittal after sentence is imposed pursuant to Rule 720(b) of the Pennsylvania Rules of Criminal Procedure. Pa.R.Crim.P. 606(A)(6).

CRIMINAL PROCEDURE / APPEALS / SUFFICIENCY OF EVIDENCE

When considering a challenge to the sufficiency of the evidence, the Court must view the evidence and all reasonable inferences to be drawn from the evidence in the light most favorable to the Commonwealth as verdict winner and determine if the evidence was sufficient to enable the fact-finder to establish all the elements of the offense. *Commonwealth v. Rios,* 546 Pa. 271, 279,684 A.2d 1025, 1028 (1996).

CRIMINAL PROCEDURE / CONSPIRACY

Criminal conspiracy requires proof of intent to promote or facilitate a crime, agreement to commit or aid in the commission of an unlawful act, and an overt act in furtherance thereof *Commonwealth v. Andrews,* 564 Pa. 321, 768 A.2d 309 (2001). The defendant had to have: (1) agreed with another person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or (2) agreed to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime. 18 P.S. § 903(a).

CRIMINAL PROCEDURE / ACCOMPLICE LIABILITY

An individual is legally accountable for the conduct of another person when he is an accomplice of another in the commission of the offense. 18 P.S. § 306(b)(3). The relevant portion of the definition of “accomplice” is that of a person who, with the intent of promoting or facilitating the commission of the offense, aids or agrees or attempts to aid another person in planning or committing it. 18 P.S. § 306(c)(1)(ii).

CRIMINAL PROCEDURE / CONSPIRACY

As conspiracy requires proof only of an agreement and an overt act in furtherance of the conspiracy, a defendant may be found guilty of conspiracy without being convicted of the underlying offense. *Commonwealth v. Riley,* 811 A.2d 610 (Pa. Super. 2002); 18 P.S. § 903.

CRIMINAL PROCEDURE / SENTENCING

A sentencing court is required to state on the record its reasons for the sentence imposed. In addition, the Court enjoys broad discretion in choosing a penalty from sentencing alternatives and the range of permissible confinements, provided the choices are consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant. Further, it is presumed that where a pre-sentence

report exists, the sentencing court is aware of relevant information concerning the defendant's character, and considers the information along with mitigating statutory factors when imposing sentence.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY. PENNSYLVANIA NO. 830, 831, 832, 833, & 834 - 2002

Appearances: Office of the District Attorney
Mark Richmond, Esq. prosecuted at trial
Lisa R. Stine, Esq. addressed Mr. Moffett's request to reinstate his appellate rights
William J. Hathaway, Esq., counsel for defendant

OPINION

Bozza, John A, J.

On July 15, 2002, defendant Myron A. Moffett was found guilty by a jury of the following crimes at the following Docket Numbers:

At Docket No. **830** of 2002:

Count I - Robbery - Inflict Serious Bodily Injury (Second Degree);[1]
Count III- Robbery - Inflict Serious Bodily Injury (Second Degree);[2]
Count IV - Conspiracy to Commit Robbery - Inflict Serious Bodily Injury;[3]
Count V - Conspiracy to Commit Robbery - Inflict Serious Bodily Injury;[4]
Count VI - Conspiracy to Commit Robbery - Inflict Serious Bodily Injury;[5]
Count VII - Theft by Unlawful Taking - Movable Property;[6]
Count IX - Theft by Unlawful Taking - Movable Property;[7]

At Docket No. **831** of 2002:

Count I - Conspiracy to Commit Robbery - Threat of Immediate Serious Bodily Injury;[8]

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[1] 18 P.S. §3701(a)(1)(i).
[2] 18 P.S. §3701(a)(1)(i).
[3] 18 P.S. §903(a)(1).
[4] 18 P.S. §903(a)(1).
[5] 18 P.S. §903(a)(1).
[6] 18 P.S. §3921(a).
[7] 18 P.S. §3921(a).
[8] 18 P.S. §903(a)(1).

Count II - Robbery - Threat of Immediate Serious Bodily Injury (Third Degree);[9]
Count III - Terroristic Threats with Intent to Terrorize;[10]
Count V - Receiving Stolen Property;[11]

At Docket No. **832** of 2002:

Count I - Conspiracy to Commit Robbery - Threat of Immediate Serious Bodily Injury;[12]
Count II- Robbery - Threat of Immediate Serious Bodily Injury (Second Degree);[13]
Count III- Conspiracy to Commit Simple Assault;[14]
Count IV - Simple Assault;[15]

At Docket No. **833** of 2002:

Count I - Conspiracy to Commit Robbery - Inflict Serious Bodily Injury;[16]

At Docket No. **834** of 2002:

Count I - Conspiracy to Commit Robbery - Inflict Serious Bodily Injury;[17]
Count II- Robbery - Inflict Serious Bodily Injury (First Degree);[18]
Count III - Conspiracy to Commit Aggravated Assault;[19]
Count IV - Aggravated Assault.[20]

On August 23, 2002, Mr. Moffett was sentenced as follows:

At Docket No. **830** of 2002

Count I - Robbery - Inflict Serious Bodily Injury - twelve (12) months to thirty-six (36) months incarceration, costs;

Count III - Robbery - Inflict Serious Bodily Injury - costs; twelve

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[9] 18 P.S. §3701(a)(1)(ii).
[10] 18 P.S. §2706(a)(1).
[11] 18 P .S. §392S(a).
[12] 18 P.S. §903(a)(1).
[13] 18 P.S. §3701(a)(1)(ii).
[14] 18 P.S. §903(a)(1).
[15] 18 P.S. §2701(a)(1).
[16] 18 P.S. §903(a)(1).
[17] 18 P.S. §903(a)(1).
[18] 18 P.S. §3701(a)(1)(i).
[19] 18 P.S. §903(a)(1).
[20] 18 P.S. §2702(a)(1).

(12) months to thirty-six (36) months incarceration, concurrent to Count I;

Count IV - Conspiracy to Commit Robbery - Inflict Serious Bodily Injury - costs; twelve (12) months to thirty-six (36) months incarceration, concurrent to Count I;

Count V - Conspiracy to Commit Robbery - Inflict Serious Bodily Injury - costs; twelve (12) months to thirty-six (36) months incarceration, concurrent to Count I;

Count VI - Conspiracy to Commit Robbery - Inflict Serious Bodily Injury - costs; twelve (12) months to thirty-six (36) months incarceration, concurrent to Count I;

Count VII - Theft by Unlawful Taking - Movable Property - costs, merges with Count I;

Count IX - Theft by Unlawful Taking - Movable Property - costs, merges with Count III;

At Docket No. **831** of 2002

Count I - Conspiracy to Commit Robbery - Threat of Immediate Serious Bodily Injury - costs; six (6) months to twenty-four (24) months incarceration, concurrent to 830 of 2002;

Count II - Robbery - Threat of Immediate Serious Bodily Injury - costs; six (6) months to twenty-four (24) months incarceration, concurrent to Count I above and concurrent to 830 of 2002;

Count III - Terroristic Threats with Intent to Terrorize - costs; merges with Count II;

Count V - Receiving Stolen Property - costs; merges with Count II;

At Docket No. **832** of 2002

Count I - Conspiracy to Commit Robbery - Threat of Immediate Serious Bodily Injury - twelve (12) months to thirty-six (36) months incarceration, consecutive to the sentence imposed at Count I of Docket No. 830 of 2002; costs;

Count II - Robbery - Threat of Immediate Serious Bodily Injury - costs; twelve (12) months to thirty-six (36) months incarceration, concurrent to Count I above;

Count III - Conspiracy to Commit Simple Assault - costs; one (1) year probation consecutive to the sentence imposed Count I of

Docket No. 832 of 2002;

Count IV - Simple Assault - costs; one (1) year probation consecutive to the sentence imposed at Count III above;

At Docket No. **833** of 2002

Count I - Conspiracy to Commit Robbery - Inflict Serious Bodily Injury - costs; twelve (12) months to twenty-four (24) months incarceration, consecutive to the sentence imposed Count I of Docket No. 832;

At Docket No. **834** of 2002

Count I - Conspiracy to Commit Robbery - Inflict Serious Bodily Injury - costs; thirty-six (36) months to seventy-two (72) months incarceration, consecutive to the sentence imposed at Docket No. 833 of 2002;

Count II - Robbery - Inflict Serious Bodily Injury - costs; thirty-six (36) months to seventy-two (72) months incarceration, concurrent to the sentence imposed at Count I above;

Count III - Conspiracy to Commit Aggravated Assault - costs; thirty-six (36) months to seventy-two (72) months incarceration, concurrent to the sentence imposed at Count I above;

Count IV - Aggravated Assault - costs; thirty-six (36) months to seventy-two (72) months incarceration, concurrent to the sentence imposed at Count I above;

Mr. Moffett made a Motion for Judgment of Acquittal for the charges at Docket Number 833 of 2002. The Court granted this motion only to the extent of the amount of money that was allegedly taken, but denied the remainder of the motion. A Motion for Reconsideration or Modification of Sentence was filed on September 20, 2002. On September 30, 2002, the Court entered an Order granting Mr. Moffett's motion to modify his sentence in part, modifying his sentence as follows:

At Docket No. **830** of 2002

Count V - twelve (12) months to thirty-six (36) months incarceration reduced to six (6) months to twenty-four (24) months incarceration, concurrent to Count I, and the grading of Count 5 reduced to a felony of the third degree;

At Docket No. **833** of 2002:

Count I - twelve (12) months to twenty-four (24) months incarceration reduced to six (6) months to twenty-four (24) months

incarceration, consecutive to Docket No. 832 of 2002: and the grading of Count I reduced to a felony of the third degree.

On April 24, 2003, Mr. Moffett filed a Motion for Post Conviction Collateral Relief, seeking to have his appellate rights reinstated *nunc pro tunc*. In correspondence to the Court, the Commonwealth's representative, Assistant District Attorney Lisa R. Stine, Esquire, stipulated to the reinstatement of Mr. Moffett's appellate rights. The Court entered an order on May 7, 2003, granting the reinstatement of Mr. Moffett's appellate rights *nunc pro tunc*. On May 20, 2003, Mr. Moffett filed a timely Notice of Appeal, and filed a timely 1925(b) Statement of Matters Complained of on Appeal.

In his 1925(b) Statement, Mr. Moffett asserts that the Court erred and abused its discretion by failing to grant his Motion for Acquittal, and in failing to grant his Post-Sentence Motion in its entirety. These assertions of error are without merit and are not supported by the record. Mr. Moffett's assertions of error will be discussed in terms of the individual docket numbers at which he alleges errors occurred, namely 833 and 834 of 2002. Although Mr. Moffett has filed a Notice of Appeal at all five Docket Numbers, he has only raised issues with respect to two of his cases. Mr. Moffett's convictions surround a series of robberies and assaults which took place on the evening of February 15, 2001, at various locations in the City of Erie.

I. Docket Number 833 - Enrique Sanchez

The conviction at Docket Number 833 of 2002 surrounds the robbery of Enrique Sanchez at the 1200 block of Payne Avenue in Erie. During the trial, Mr. Moffett made a Motion for Judgment of Acquittal, arguing that there was no evidence that a crime had been committed since the victim did not appear to testify. (T. T., 7/12/02, pp. 164-165). The Court stated that the testimony presented at trial was sufficient for the jury to find Mr. Moffett guilty if they believed him to be an aider and abettor in that circumstance, and denied Mr. Moffett's motion. (T. T., 7/12/02, p. 171). However, the Court did grant Mr. Moffett's motion to the extent that there was insufficient evidence as to the value of the property taken, and reduced the charge of receiving stolen property to a third-degree misdemeanor. (T. T., 7/12/02, pp. 171-172). On appeal, Mr. Moffett argues that the Court erred in failing to grant the entire Motion for Judgment of Acquittal.

A defendant may challenge the sufficiency of the evidence to sustain a conviction by filing a motion for judgment of acquittal after sentence is imposed pursuant to Rule 720(b) of the Pennsylvania Rules of Criminal Procedure. Pa.R.Crim.P. 606(A)(6). When considering a challenge to the

sufficiency of the evidence, the Court must

> view the evidence and all reasonable inferences to be drawn from the evidence in the light most favorable to the Commonwealth as verdict winner and determine if the evidence was sufficient to enable the fact-finder to establish all the elements of the offense.

Commonwealth v. *Rios,* 546 Pa. 271, 279, 684 A.2d 1025, 1028 (1996).

Mr. Moffett was charged with criminal conspiracy which "requires proof of intent to promote or facilitate a crime, agreement to commit or aid in the commission of an unlawful act, and an overt act in furtherance thereof" *Commonwealth v. Andrews,* 564 Pa. 321, 325,768 A.2d 309, 311 (2001)(*citing* 18 P. S. §903(a), (e)). This meant that the Commonwealth had to show that Mr. Moffett, with the intent of promoting or facilitating the commission of a crime, either

> 1. agreed with another person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime;
>
> or
>
> 2. agreed to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

18 P.S. § 903 (a).

At trial, Adam Norman, one of Mr. Moffett's co-defendants, testified that another co-defendant, George Lucas, brandished a knife and confronted Mr. Sanchez. (Trial Transcript, 7/12/02, pp. 20-21). At the same time, Mr. Moffett and the other co-defendants exited the vehicle and stood near Mr. Sanchez. (Trial 7/12/02, p. 21). Mr. Norman testified that

> I can't tell you exactly where I was standing. I think it was more like almost in front of him, not right directly, but I was towards more like on his —by his shoulder, right where his shoulder side, like that.

(T. T., 7/12/02. p. 21).

Mr. Norman also testified that the individual that they robbed was Puerto Rican, and that the group participated as "more of a conspiracy" in the robbery of Mr. Sanchez. (Trial, 7/12/02, 45- 46). Specifically, Mr. Norman testified

> Q: As a matter of fact, the robbery of Mr. Sanchez was Mr. Lucas's work alone, wasn't it?
>
> [Mr. Norman]: No. I mean, pretty much it was, yeah. But, I mean, all of us, we were just there because, like I said, he was more of a friend, so if anything happened I would have his back and stuff like that. But

> he was not like a friend like that, but he was with me and my boy and stuff. But it was more of a conspiracy, conspire, all of us there.

(T. T., 7/12/02, p. 46).
Baron Noaks, another co-defendant, also recalled that the individual robbed at 12th and Payne was “an Hispanic guy,” (T.T., 7/12/02, p. 74). Mr. Noaks also testified concerning the robbery that he and all his co-defendants exited the vehicle and they all approached Mr. Sanchez. (T. T. 7/12/02, p. 74). Mr. Noaks also testified that they were “right in front of him...right up on him.” (T.T., 7/12/02, p. 74). Mr. Norman and Mr. Noaks were able to describe the events surrounding the robbery of Mr. Sanchez, and Mr. Moffett’s participation as a part of the group.

Viewing the evidence and all reasonable inferences to be drawn from the evidence in the light most favorable to the Commonwealth as verdict winner, the evidence was sufficient to enable the jury to find Mr. Moffett guilty of conspiracy to commit robbery. At trial, the jury heard testimony concerning a series of robberies and assaults committed by Mr. Moffett and his co-defendants which took place on the evening of February 15, 2001, at various locations in the city of Erie. These crimes were committed over a relatively brief period of time, and involved similar criminal conduct, i.e. exiting a vehicle, accosting and assaulting nearby pedestrians. Evidence concerning the robbery of Nathan Babay[21] at the 1800 block of Sassafras Street and/or Payne Avenue in Erie was presented before the evidence concerning Mr. Sanchez was presented, and evidence concerning the robbery and assault of Robert Baker[22] at the 400 block of West 16th Street in Erie was presented afterwards. Based on this testimony, the jury could infer that Mr. Moffett was involved in a course of criminal conduct on that evening, which included the robbery of Mr. Sanchez. The testimony of Mr. Moffett’s co-defendants placing Mr. Moffett at the scene, as well as the testimony concerning the other robberies and assaults, were sufficient to support the jury’s conclusions. In fact, the robbery and assault of Mr. Babay, which occurred shortly before the robbery of Mr. Sanchez, was committed near to the area where Mr. Sanchez was assaulted. The fact that Mr. Sanchez did not testify at the time of trial was of little consequence.

The evidence was also sufficient for the jury to conclude that Mr. Moffett aided and abetted Mr. Lucas and the other co-defendants in the commission of this robbery. Under Pennsylvania law, an individual is

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[21] Mr. Babay’s robbery and assault is the basis for the charges filed at Docket Number 832 of 2002.

[22] Mr. Baker’s robbery and assault, which will be discussed below, is the basis for the charges filed at Docket Number 834 of 2002.

legally accountable for the conduct of another person when he is an accomplice of another in the commission of the offense. 18 P.S. § 306(b)(3). The definition of accomplice which is applicable to Mr. Moffett is that of a person who, with the intent of promoting or facilitating the commission of the offense, aids or agrees or attempts to aid another person in planning or committing it. 18 P.S. § 306(c)(1)(ii). The evidence presented at trial was sufficient for the jury to conclude that Mr. Moffett aided Mr. Lucas and the other co-defendants in the robbery of Mr. Sanchez. The Court's denial of Mr. Moffett's Motion for Judgment of Acquittal was proper.

Mr. Moffett also challenges the Court's denial of his Post-Sentence Motion concerning this docket number, in which Mr. Moffett argued that

1. he should not have been found guilty of conspiracy since he was not found guilty of the charges of robbery and theft, despite all of the charges being based on the same facts; and
2. the jury was not instructed that the conspiracy charge would be graded the same as the robbery charge; since Mr. Moffett was not convicted of robbery and theft, he should not have received a sentence on the conspiracy charge or should have received a grading of third-degree felony, not first-degree felony.

(Post-Sentencing Motion, p. 1)

The Court did grant this motion in part, in that the Court agreed that the conspiracy conviction should be graded as a third-degree felony, and Mr. Moffett's sentence was reduced accordingly. As noted above, there was sufficient evidence for the jury to find Mr. Moffett guilty of conspiracy, regardless of the charges of robbery and theft. In fact, the evidence at trial indicated that Mr. Moffett was guilty <u>only</u> of conspiracy to commit robbery and theft at this docket number. Furthermore, there is no error with the jury finding Mr. Moffett guilty of conspiracy, but not the underlying offenses of robbery or theft. As the Pennsylvania Superior Court recently noted, "as conspiracy requires proof only of an agreement and an overt act in furtherance of the conspiracy, a defendant may be found guilty of conspiracy without being convicted of the underlying offense." *Commonwealth v. Riley,* 811 A.2d 610, 617 (Pa. Super. 2002)(*citing* 18 P.S § 903). As such, the Court's refusal to grant Mr. Moffett's Post-Sentence Motion in its entirety was proper.

II. Docket Number 834 - Robert Baker

The convictions at Docket Number 834 of 2002 surround the robbery and assault of Robert Baker at the 400 block of West 16th Street in Erie. Mr. Moffett again challenges the Court's denial of his Post-Sentence Motion concerning this docket number, in which Mr. Moffett argued that his prior record, coupled with his rehabilitative potential, should give rise

to consideration of concurrent sentences for all or part of this sentence.

The Court did grant this motion in part, in that the Court agreed that the conspiracy conviction should be graded as a third-degree felony, and Mr. Moffett's sentence was reduced accordingly. As noted above, there was sufficient evidence for the jury to find Mr. Moffett guilty of conspiracy, regardless of the charges of robbery and theft. In fact, the evidence at trial indicated that Mr. Moffett was guilty only of conspiracy to commit robbery and theft at this docket number. As such, the Court's refusal to grant Mr. Moffett's Post-Sentence Motion in its entirety was proper.

As for Mr. Moffett's claims that the Court should have considered his lack of a prior record and his rehabilitative potential when fashioning its sentence, the Court did consider these factors at the time of sentencing. The Court heard the testimony of Mr. Moffett's fiancée, Christy McLaughlin, who testified to Mr. Moffett's good character and positive interaction with her children. (S. T., 8/23/02, pp. 5-7). The Court also heard Mr. Moffett's testimony that he was gainfully employed, and that he had an addiction to alcohol. (S. T., 8/23/02, p. 9). A sentencing court is required to state on the record its reasons for the sentence imposed. *Commonwealth v. Brown,* 741 A.2d 726 (Pa. Super. 1999). In addition, the Court enjoys broad discretion in choosing a penalty from sentencing alternatives and the range of permissible confinements, provided the choices are consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant. *Commonwealth v. Devers,* 519 Pa. 86, 546 A.2d 12 (1988). Further, it is presumed that where a pre-sentence report exists, the sentencing court is aware of relevant information concerning the defendant's character, and considered the information along with mitigating statutory factors when imposing sentence. *Id*

Here, the Court specifically acknowledged Mr. Moffett's prior criminal record and rehabilitative potential, stating

> The Court: . . . I believe that although your blameworthiness was considerably more than the three younger gentlemen that have already been sentenced by me and other judges it's less than Mr. Lucas [a co-defendant]. Now I suppose how much less can be argued about but somewhat less anyway.
>
> You are also different than Mr. Lucas because your prior criminal history isn't as bad and because you don't have the poor history of performance of community supervision that he had. You also seem to have at least some attachment to the community in a positive way and that's a good thing.
>
> You have a serious problem with alcohol and it appears to me that you've had at least four different opportunities where you've been involved with treatment. Interestingly — and unfortunately — they

have not worked. I certainly believe that alcohol intoxication played a role in the events that unfolded on the night in question and that they affected your behavior. But you knew better, Mr. Moffett. Here you are in court telling me about your children and your responsibilities but you forgot them on that occasion, didn't you?

The Defendant: Yes.

The Court: That's not a good thing. My observations concerning the actual crimes in question I previously made with regard to Mr. Lucas—and they apply at least in substantial part to you, certainly with regard to the kind of injuries and the general circumstances of the offenses... I've considered all of those things in fashioning a sentence...

(S. T., 8/23/02, pp. 10-11).

For the reasons set forth above, the Court's judgment of sentence should be affirmed.

Signed this 2 day of July, 2003.

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

COMMONWEALTH OF PENNSYLVANIA
v.
DORRELL SMITH

CRIMINAL PROCEDURE / DISMISSAL OF JURY

Where no request was made by the defendant or the Commonwealth to dismiss the jury pool, the Court did not err in not dismissing the jurors. Further, there was no abuse of discretion where the Court questioned the selected jurors regarding a statement made in the presence of the jury concerning the racial makeup of the jury. *Commonwealth v. Garnett,* 405 A.2d 1293 (Pa. Super. 1979).

CRIMINAL PROCEDURE / APPEAL / CONCISE STATEMENT OF MATTERS COMPLAINED

Where the Court is unable to identify the issue raised on appeal it is waived. *Commonwealth v. Dowling,* 778 A.2d 683 (Pa. Super. 2001).

CRIMINAL PROCEDURE / APPEAL / VERDICT AGAINST THE WEIGHT OF THE EVIDENCE

In order to preserve a claim challenging the weight of the evidence for appeal, it must first be made to the trial court or it is waived. *Commonwealth v. Steward,* 762 A.2d 721, 724 (Pa. Super 2000). Even if the issue was preserved, the verdict was not "shocking to one's sense of justice." *(Id. Steward, see also Commonwealth v. Hodge,* 658 A.2d 386, 388 (Pa. Super. 1995). (A trial court should award a new trial on the ground that the verdict is against the weight of the evidence only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and make the award of a new trial imperative so that right may be given another opportunity to prevail.)

CRIMINAL PROCEDURE / APPEAL / VERDICT AGAINST THE WEIGHT OF THE EVIDENCE

Where appellant gave a writing statement to the police that the cocaine in question was in fact his and that he "bought it to smoke and sell some", the guilty verdict that followed was not contrary to the evidence and did not shock one's sense of justice or make the grant of a new trial imperative.

CRIMINAL PROCEDURE / APPEAL / SUFFICIENCY OF THE EVIDENCE

The test for sufficiency of the evidence is whether viewing the evidence in a light most favorable to the Commonwealth, together with all inferences therefrom, the evidence is sufficient to prove guilt beyond a reasonable doubt. *Commonwealth v. Edwards*, 426 A.2d 550 (Pa. 1981); *see also Commonwealth v. Widmer,* 560 Pa. 308, 744 A.2d 745 (2000). The evidence presented at trial was sufficient to sustain appellant's conviction for possession with intent to deliver crack cocaine in accordance with 35 Pa. C.S. §780-113(A)30. Possession of cocaine may be established by constructive possession, that is, power to control the

contraband and intent to exercise that control. *Commonwealth v. Haskins,* 677 A.2d 328 (Pa. Super. 1996).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION NO. 1746 OF 2002

Appearances: District Attorney's Office for the Commonwealth
Andrew Weinraub, Esquire for the Defendant

OPINION

Before the Court is an appeal from the denial of Appellant's Motion to Modify Sentence. As this appeal is without merit, it must be dismissed.

PROCEDURAL / FACTUAL HISTORY

On August 23, 2002, Appellant filed a Motion to Suppress his statement given to police following his arrest on February 13, 2002. The Honorable Fred P. Anthony denied Appellant's Motion to Suppress by Order dated October 21, 2002 and filed an Opinion addressing the appeal of said Order on February 11, 2003, which opinion is incorporated herein by reference.

On November 14, 2002, Appellant appeared before this Court where a jury found him guilty of the following six (6) Counts:

(1) Possession With Intent to Deliver Crack Cocaine
(2) Driving While Operating Privilege is Suspended or Revoked
(3) Driving Unregistered Vehicle
(4) Operation of Vehicle Without Official Certificate of Inspection
(5-6) Restraint Systems

The charges follow a traffic stop made of Appellant by the Lawrence Park Police Department at the 1100 block of Water Street on February 13, 2002. At the time of the stop, Appellant had in his possession 11 grams of crack cocaine.

On December 18, 2002, Appellant was sentenced to a total of three (3) to six (6) years incarceration for the above charges. On December 27, 2002, Appellant filed a Motion to Modify Sentence that was denied by Order dated January 6, 2003. On January 22, 2003, Appellant filed a timely Notice of Appeal and Statement of Matters Complained of on Appeal on January 27, 2002. This Opinion is in response thereto.

DISCUSSION

Appellant asserts error in not dismissing the jury pool when Appellant and the Commonwealth allegedly requested that said pool be dismissed after a potential juror made a comment about the absence of any African-American jurors, which Appellant claims "irreversibly" tainted the jury pool. Appellant's averment is unsupported by the record.

In the case at hand, the prospective juror who made the statement was

the only African-American among the pool of jurors. Appellant's assertion that he and the Commonwealth concurrently requested that the pool be dismissed after the comment was made is not supported by the record. No such dismissal was ever requested by either party before this Court. In fact, the parties had already selected a jury of twelve and one alternate before the incident with the prospective juror was brought to this Court's attention. *See* Jury Trial - Day 1 Transcripts, November 14, 2002, p. 7. Moreover, a meeting in chambers following jury selection addressed Appellant's concerns regarding the statement made by the prospective juror and this Court proposed to address the jury as a group. *Id.* at p. 8. The curative instruction given properly ensured the impartiality of the jurors. The record reflects:

> THE COURT: Good afternoon ladies and gentlemen. I'm Judge Cunningham. I have the privilege of presiding over this case and I appreciate your willingness to come and serve as a juror. . .
>
> I do want to make sure, in the interest of having a fair trial here, to clarify one matter, and it's an important tenet of our criminal justice system. And the reason we have jury trials is that we ask people that can be fair and impartial to sit and hear evidence and serve in a fair and impartial capacity. That's why you've already been asked the list of questions that you've been asked. It's my understanding that during that questioning process, at the very end there was a question asked about the racial composition of the jury pool. And I think the record will reflect that the jury pooling consisted of members of the Caucasian race. The defendant himself is not a member of the Caucasian race but is African-American. I want to make sure if there is any concerns about that. I can tell you that the way jurors are summoned is they're randomly taken from the driver's license registration pool and from voter registration pools. So that is how people are randomly drawn. So it happens to be out of a panel that you are on, that was the random sampling. But what I want to make sure is whether that's a concern for anybody in this trial. Because your decision in this case has to based on the evidence and cannot be based in any way on race, whether it's the defendant's race or your concern - the fact that there are no African-Americans in the jury pool. So I guess what I want to ask is if there is anyone who has any concerns about race or whether it would affect anyone's ability to serve as a juror in this case. And if you have any concerns, just raise your hand and let me know. And if you feel that you want to discuss it in private, we can do that also.
>
> (No response.)

THE COURT: Okay. I think the record should reflect that none of the jurors have responded. And, therefore, the record would reflect that none of the jurors believe that race would affect their ability to decide this case. Am I correct on that?

(Jury nod affirmatively.)

THE COURT: Again, I think we will have the record reflect that the jurors have nodded affirmatively. I'm not going to go around and ask each one of you to say that. *(Id.* Jury Trial - Day 1, pp.9-11).

There was no error in not dismissing the jurors. Nor was there an abuse of discretion where this Court questioned the selected jurors regarding the statement, asked specifically if there was any concern as a result of hearing the statement and whether they would be able to be fair and impartial toward the defendant. *See Commonwealth v. Garnett*, 405 A.2d 1293 (Pa. Super. 1979).[1] Thus, Appellant's assertion of error is without merit.

Appellant next asserts the jury verdict was inconsistent to the facts presented at trial. It is not clear from this vague statement whether Appellant is raising a claim assailing the verdict as against the weight of the evidence or a claim challenging the sufficiency of the evidence. Because this Court is unable to identify the issue being raised on appeal, it is waived. *See Commonwealth v. Dowling*, 778 A.2d 683 (Pa. Super. 2001)(a concise statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no concise statement at all and thus, such issues will be waived.)

Assuming *arguendo* Appellant is asserting a verdict as against the weight of the evidence, this claim must be waived as Appellant is raising it for the first time on appeal. In order to preserve a claim challenging the weight of the evidence for appeal, it must first be made to the trial court or it is waived. *Commonwealth v. Steward*, 762 A.2d 724 (Pa. Super 2000). Appellant did not properly preserve the issue before or during trial nor did

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[1] The court held that there was no error where the trial court itself questioned the panel regarding whether they would be unable to render a verdict on the law and the evidence because the defendant was a black man. That the court exercised proper precautions to insure a fair jury is demonstrated, inter alia, by its cautionary statement to the prospective jurors that no racial bias or prejudice should be allowed to influence their decision in the case and that any member of the panel who felt unable to render a verdict without racial prejudice should not be timid but indicate that inability. The trial judge saw no extraordinary circumstances in the case which might have led to a further probe into the area of racial prejudice.

he raise the issue in his post-sentence Motion to Modify Sentence filed on December 20, 2002. Therefore, the issue is waived for purposes of appeal.

Even if the issue was preserved, the verdict was not "shocking to one's sense of justice." *Id. Steward*, *see also Commonwealth v. Hodge*, 658 A.2d 386, 388 (Pa. Super 1995)(a trial court should award a new trial on the ground that the verdict is against the weight of the evidence only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and make the award of a new trial imperative so that right may be given another opportunity to prevail.) "Moreover, it is the province of the trier of fact to pass upon credibility of witnesses and the weight accorded the evidence produced. The factfinder is free to believe all, part or none of the evidence." *Id.* at 387 *citing Commonwealth v. Tate*, 401 A.2d 353, 354 (Pa. Super. 1979).

Appellant asserts the cocaine in question was found in his girlfriend's purse and thus, he could not have the power to possess the cocaine. However, on the night of the arrest, Appellant gave a written statement to the police that the cocaine in question was in fact his and that, "I bought it to smoke and sell some." *See* Jury Trial - Day 1 Transcripts, November 14, 2002, p. 97. When asked how the cocaine got inside his girlfriend's purse, Appellant replied in his statement, "After I bought it, I gave it to Ruiz to put in her purse." *Id.* Appellant's statement was introduced as substantive evidence. Where the jury, as factfinder, chose to believe Appellant was in possession of the cocaine as recorded in his statement, the guilty verdict with regards to this charge was not contrary at all to the evidence and did not shock one's sense of justice and make the grant of a new trial imperative. Thus, a verdict as against the weight of the evidence claim must be dismissed.

Assuming *arguendo* Appellant is challenging the sufficiency of the evidence, this claim must also fail on the merits. The test for sufficiency of the evidence is whether viewing the evidence in a light most favorable to the Commonwealth, together with all inferences therefrom, the evidence is sufficient to prove guilt beyond a reasonable doubt. *Commonwealth v. Edwards*, 426 A.2d 550 (Pa. 1981); *see also Commonwealth v. Widme*r, 560 Pa. 308, 744 A.2d 745 (2000).

Applying this test to the present case, the evidence was sufficient to sustain Appellant's conviction for Possession With Intent to Deliver Crack Cocaine. In accordance with 35 Pa. C.S. §780-113(A)30, one must not unlawfully, feloniously and knowingly possess with the intent to deliver a controlled substance not being licensed or registered as required by the Acts of Assembly of the Commonwealth of Pennsylvania in violation of the Controlled Substance, Drug, Device and Cosmetic Act.

The record in this case contains sufficient evidence supporting the guilty verdict on this charge. Appellant claims that he could not have the

power to possess the cocaine in question because it was found in his girlfriend's purse.

> Where contraband is not found on defendant's person, Commonwealth must establish "constructive possession" that is, power to control contraband and intent to exercise that control. Constructive possession of contraband may be proven by circumstantial evidence; requisite knowledge and intent may be inferred from examination of totality of circumstances. *Commonwealth v. Haskins*, 677 A.2d 328 (Pa. Super. 1996).

As previously stated, Appellant gave a signed statement to the Lawrence Park Police Department at the time of his arrest confirming the cocaine found belonged to him and that he put it in his girlfriend's purse after purchasing it, with the intent to "smoke and sell some." *See supra.* Jury Trial - Day 1 Transcripts, p. 97; *see also* Defendant's Exhibit B. Additionally, Appellant's girlfriend gave a statement, as well as provided testimony at trial, which corroborated the written statement given by Appellant. *Id.* at p. 29. Furthermore, this Court questioned Appellant regarding his statement to clarify the validity of the statement given to police. *Id.* at pp. 41-42. Clearly, from Appellant's own admission, he was unlawfully, feloniously, and knowingly in constructive possession with the intent to deliver the crack cocaine that he put in his girlfriend's purse. Therefore, the evidence was sufficient to prove guilt beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons this appeal should be denied, as there is no basis in law or fact for the relief requested.

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

COMMONWEALTH OF PENNSYLVANIA
v.
DONALD CHANEY, III

CRIMINAL PROCEDURE/SEARCH WARRANT/PROBABLE CAUSE

Probable cause for a search warrant is the same under both the United States Constitution, Fourth Amendment, and the Pennsylvania Constitution, Article I, Section 8: the totality of the circumstances test.

CRIMINAL PROCEDURE/SEARCH WARRANT/PROBABLE CAUSE

Probable cause for a search warrant exists when, given all of the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of the persons supplying information, the issuing authority finds there is a fair probability that contraband or evidence of a crime will be found in a particular place.

CRIMINAL PROCEDURE/SEARCH WARRANT/PROBABLE CAUSE

The reliability of an informant should be established by some objective facts that would enable a court to conclude that the informant was reliable. It is only where the facts provide inside information, which represents a special familiarity with a defendant's affairs that police corroboration of the information imparts indicia of reliability to the tip to support a finding of probable cause.

CRIMINAL PROCEDURE/SEARCH WARRANT/PROBABLE CAUSE

Where an identified individual identified defendant as the seller of drugs to him, where defendant was arrested for burglary after he returned from his buyer's residence to steal a television set as payment for what the buyer owed for drugs, where the defendant was identified by a confidential informant who told the police that defendant was known for selling large amounts of crack cocaine, the confidential informant was then involved in two separate transactions of purchasing drugs from the defendant, and the confidential informer was working on other cases in which he was found to be reliable, the search warrant established a sufficient predicate of the reliability of the confidential informant.

CRIMINAL PROCEDURE/RIGHT TO CONFRONTATION

Defendant was not denied his right to confront a confidential informant where the Commonwealth did not call the confidential informant as a witness at the suppression hearing and defendant did not request that the Commonwealth produce the confidential informant for purposes of examination.

CRIMINAL PROCEDURE/SEARCH WARRANT

The police properly executed a search warrant where the evidence indicated that the officer made a reasonable effort to give notice of his identity, authority, and purpose to execute the warrant. Pa. R. Crim. P. 2007 (a).

CRIMINAL PROCEDURE/INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant's counsel was not ineffective when he articulated claims in support of suppression of physical evidence and insufficient probable cause for a search warrant and, in fact, there was sufficient probable cause.

CRIMINAL PROCEDURE/INEFFECTIVE ASSISTANCE OF COUNSEL

To prove that counsel was ineffective for failing to call or investigate a witness, a defendant must show how the testimony of the witness would have been beneficial under the circumstances of the case. In addition a defendant must demonstrate that (1) the witness existed (2) the witness was available to testify for the defense, (3) counsel knew or should have known of the existence of the witness, (4) the witness was willing to testify for the defense, and (5) the absence of the witness' testimony was so prejudicial as to have denied the defendant a fair trial.

CRIMINAL PROCEDURE/INEFFECTIVE ASSISTANCE OF COUNSEL

Although trial counsel was aware that a confidential informant existed, defendant did not establish ineffectiveness of counsel where defendant failed to demonstrate whether the confidential informant was available to testify for the defense and there was sufficient evidence to find defendant guilty of possession with intent to deliver a controlled substance and possession of drug paraphernalia.

CRIMINAL PROCEDURE/DRUG OFFENSES/SUFFICIENCY OF EVIDENCE

Where contraband was not found on the defendant's person, the Commonwealth must establish "constructive possession," that is, power to control contraband and intent to exercise that control. Constructive possession of contraband may be proven by circumstantial evidence; requisite knowledge and intent may be inferred from examination from the totality of circumstances.

CRIMINAL PROCEDURE/DRUG OFFENSES/SUFFICIENCY OF EVIDENCE

There was sufficient evidence to sustain the defendant's conviction for possession with intent to deliver a controlled substance and possession with intent to use drug paraphernalia for the purpose of processing, preparing, packing, etc., into the human body a controlled substances where the drugs were located in room identified as the defendant's room, and baggies of crack cocaine, money in marked bills used for the purchase, and items used in the processing of crack cocaine were found in the defendant's room and clothing. 35 Pa. C.S. §780-113 (a)(30) and (32).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION NO. 569 OF 2002

Appearances: District Attorneys' Office for the Commonwealth
William Hathaway, Esquire for the Defendant

OPINION

Before the Court is an appeal permitted *Nunc Pro Tunc* from Appellant's conviction of Possession With Intent to Deliver Crack Cocaine and Possession of Drug Paraphernalia. As this appeal is without merit, it must be denied.

PROCEDURAL/FACTUAL HISTORY

On August 26, 2002, this Court found Appellant guilty at Count 1 of Possession With Intent to Deliver 75.67 grams of Crack Cocaine and Count 2 of Possession of Drug Paraphernalia. On September 19, 2002, Appellant was sentenced to three (3) to six (6) years incarceration and four (4) years probation for the PWID charge at Count 1 and twelve (12) months probation at Count 2 consecutive to Count 1.

On December 17, 2002, Appellant filed a *pro se* Motion for Post Conviction Collateral Relief. By Order dated December 18, 2002, PCRA counsel was appointed and given until February 1, 2003 to file an amended Post Conviction petition. On January 16, 2003, Appellant filed a Supplemental Motion for Post Conviction Collateral Relief and by Order dated January 22, 2003, the Motion was granted such that Petitioner's appellate rights were reinstated. Appellant was given thirty days to perfect a direct appeal.

On February 14, 2003, Appellant filed a Notice of Appeal and on March 4, 2003, Appellant filed a Concise Statement of Matters Complained of on Appeal. This Opinion is in response thereto.

DISCUSSION

Appellant asserts error in not granting the Motion to Suppress Evidence secured from Appellant's residence based upon the following allegations:

(a) probable cause was not established for the issuance of a search warrant where there was an insufficient predicate relating to the reliability of the confidential informant;

(b) Appellant was deprived of his right to confront the confidential informant for purposes of subjecting him to cross-examination as to his credibility; and

(c) execution of the search warrant was illegal in that the police officers gained entry with a key obtained from the housing authority while Appellant was not home whereupon the search was pursued without the police agents announcing their intentions or wearing any identification as police agents.

Appellant's assertion that probable cause was not established for the issuance of the search warrant where the reliability of the confidential informant was in question is without merit, as it is not supported by the record.

The standard for evaluating whether probable cause exists for the issuance of a search warrant is the same under both the United States Constitution, Fourth Amendment and the Pennsylvania Constitution,

Article I, Section 8: the totality of the circumstances test.

> [T]he task of an issuing authority is simply to make a practical, common-sense decision whether, given all of 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. [T]he reliability of an informant should be established by some objective facts that would enable any court to conclude that the informant was reliable. It is only where the facts provide inside information, which represent a special familiarity with a defendant's affairs, that police corroboration of the information imparts indicia of reliability to the tip to support a finding of probable cause. *Commonwealth v. Smith*, 784 A.2d 182, 187 (Pa. Super. 2001)(citations omitted); *see also Commonwealth v. Torres*, 764 A.2d 532 (Pa. 2001).

In the case *sub judice,* the search warrant established a sufficient predicate relating to the reliability of the confidential informant (hereinafter "CI"). The following information was contained therein: On November 2, 1999, Edguardo Figora identified Appellant as the seller of the drugs found in Figora's residence. Figora told police that he still owed Appellant money for the drugs and Appellant agreed that it could be paid at a later date. The information was corroborated when Appellant was arrested for burglary on November 11, 1999 after he returned to Figora's residence to steal a television set as payment for what Figora owed Appellant. On January 17, 2002, Appellant was again identified by a CI who told police Appellant was known for selling large amounts of crack cocaine from his mother's house. The CI was then involved in two separate transactions of purchasing drugs from Appellant at the residence listed in the search warrant. Both transactions were under surveillance by the Erie Police Department. The latter transaction occurred within forty-eight (48) hours of the issuance of the search warrant. The CI's information was corroborated by other sources and police observations. At the time the warrant was issued, the CI was working on other cases in which the CI was found to be reliable. *See* Affidavit of Probable Cause, Exhibit A.

At the suppression hearing this Court established the following finding of facts which where stated on the record:

> "First of all, I've read the search warrant that's been introduced as Exhibit A, and I find that contained within the four corners of that document sufficient probable cause for the issuance of the search warrant, and it includes two separate controlled buys from [Appellant's] residence. The second [buy], being within forty-eight

> hours of the issuance of the warrant, includes information received from a confidential informant. And there [are] facts set forth in there as to why that confidential informant is reliable. It's also corroborated by the events that occurred in November of 1999 in terms of finding Mr. Chaney at Mr. Figora's residence, indicating Figora owed him money and was there to take a television as payment. *See* Suppression Hearing/Trial Without A Jury, August 26, 2002, p. 36.

Thus, as reflected in the search warrant and on the record, there was sufficient evidence to find probable cause to issue the search warrant where there was sufficient proof as to the CI's reliability.

Appellant next asserts he was deprived of his right to confront the confidential informant who constituted the material witness against him. The Commonwealth did not call the CI as a witness at the suppression hearing nor does the record reflect that Appellant requested the Commonwealth to produce the CI for purposes of examination. Further, the other witnesses produced by the Commonwealth did not rely on any statements made by the CI during their testimony, which prevented a hearsay problem. In accordance with the "Four Corners Doctrine," this Court found sufficient probable cause for the issuance of the search warrant without additional testimony. *See supra.* Suppression Hearing at p. 36. The Commonwealth was under no legal obligation to call the CI as a witness at the Suppression Hearing and its failure to do so does not affect the contents of the search warrant.

Appellant also asserts the execution of the search warrant was undertaken in an illegal manner. This allegation is also not supported by the record.

The "knock and announce" rule provides that a law enforcement officer executing a search warrant shall, before entry, give, or make reasonable effort to give, notice of his identity, authority, and purpose to any occupant of the premises specified in the warrant, unless exigent circumstances require his immediate forcible entry. Pa. R. Crim. P. 2007(a); 42 Pa. Cons. Stat. Ann.

The record reflects that Detective Matthew Fischer, who assumed the role of knock and announce officer in serving the search warrant, did in fact knock on the door of Appellant's residence before entering:

> [DETECTIVE FISCHER:] I knocked on the door for approximately forty-five seconds, the entire time stating that we had a search warrant for the residence and we were the police department. I could hear children on the other side of the door playing. It must have been the living room. After forty-five seconds to one minute, we used a key that we had retained from the housing authority [;] we opened the door and made entry into the residence. *See supra.* Suppression Hearing at p. 7 .

Detective Fischer's testimony was corroborated by the two other Detectives involved in serving the search warrant. Detective Michael Nolan was present with Detective Fischer as he was knocking on the front door of the residence. He stated, "[Detective Fischer] was knocking at the door, announced, 'Police. Search Warrant.' And we got no response. We could hear that there were people inside...I believe we heard some children...I'm not sure how many times he knocked. But eventually, after almost a minute, he ended up using a key to gain entry." *Id.* at pp. 16-17. Detective Donald Dacus, who was at the *back* door of the residence, testified that he heard Detective Fischer's knocks from where he was located. *Id.* at p. 24. After being asked how many times he heard the knocks Detective Dacus stated, "I could hear it a few times, just boom, boom, boom, boom, I could hear the base of the door being pounded on," *Id.* Detective Dacus also stated that he could hear people in the inside of the residence, more specifically, "voices and people walking about inside the apartment." *Id.* at p. 25.

There were reasonable efforts made by Detective Fischer to give notice of his identity, authority and purpose to the occupant's inside of Appellant's residence. Thus, the search warrant was undertaken in a legal manner as was concluded by this Court in the finding of facts. *See supra.* Suppression Hearing, pp. 36-37.

Appellant next asserts ineffective assistance of counsel in that the foregoing claims involving the suppression of the evidence secured from his residence were not properly exhausted or articulated.

In order to establish ineffective assistance of counsel, Appellant must show: 1) there is merit to the underlying claim; 2) counsel had no reasonable basis for his course of conduct; and 3) there is a reasonable probability that the act or omission prejudiced Appellant in such a way that the outcome of the proceeding would have been different. *Commonwealth v. Lowry*, 784 A.2d 795, 798-99 (Pa. Super. 2001); *Commonwealth v. Fletcher*, 750 A.2d 261, 273 (Pa. 2000). If the record shows that the third prong is not met, we need not determine whether the first two prongs are satisfied. *Id.*

The record reflects Appellant's trial counsel did articulate the foregoing claims in support of suppression of the physical evidence and insufficient probable cause for the issuance of the search warrant. *See supra.* Suppression Hearing, pp. 4-5; *see also* Omnibus Pre-Trial Motion filed on May 16, 2002. However, as set forth in this Opinion, there was sufficient probable cause for the issuance of the search warrant and the reliability of the CI was established. *Id.* at p. 36. Also, the search warrant was properly executed where the evidence revealed the detectives did knock and announce their presence before entering Appellant's residence. Trial

counsel for Appellant presented all these issues and there was enough evidence to deny Appellant's Motion to Suppress. Therefore, Appellant has failed to show how he was prejudiced by trial counsel's action or omission in this case and Appellant's claim should be dismissed.

Additionally, Appellant asserts trial counsel's ineffectiveness with regard to his right to confront the CI on cross-examination as to the CI's credibility.

> "To prove that counsel was ineffective for failing to call or investigate a witness, a defendant must show how the testimony of the witness would have been beneficial under the circumstances of the case... In addition, a defendant must demonstrate that (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew or should have known of the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the witness' testimony was so prejudicial as to have denied the defendant a fair trial."

This claim is without merit as the Commonwealth did not call the CI as a witness nor did any of the other witnesses presented by the Commonwealth testify as to any statements made by the CI. Although trial counsel was aware the CI witness existed, as was evidenced in the search warrant, Appellant failed to demonstrate whether the CI witness was available to testify for the defense. The CI was involved in a controlled buy arranged by the Erie Police Department to observe drugs being sold from Appellant's residence by Appellant. The CI was given marked and recorded EPD funds ("buy money") to engage in a drug transaction, with Appellant selling the CI drugs. *See* Affidavit of Probable Cause, Commonwealth Exhibit A. These funds were later found incident to the search warrant in Appellant's coat located in his room, where drugs were also found. *See* Suppression Hearing, p. 58.

Consequently, even if the CI had been called as a witness and his/her credibility placed at issue, the testimony of the police officers, together with the evidence of the marked bills found in Appellant's coat and the seized drugs found in Appellant's room, was sufficient to find Appellant guilty of Possession With Intent to Deliver Crack Cocaine and Possession of Drug Paraphernalia. Thus, Appellant has failed to show how the absence of the CI witness testimony prejudiced him in such a way as to have denied him a fair trial.

Appellant also challenges the sufficiency of the evidence alleging the Commonwealth did not establish sufficient proof of ownership of the drugs or a nexus with the contraband in that Appellant was not the only resident of the room which was subject to the warrant.

The test for sufficiency of the evidence is whether viewing the evidence in a light most favorable to the Commonwealth, together with all inferences therefrom, the evidence is sufficient to prove guilt beyond a reasonable doubt. *Commonwealth v. Edwards*, 426 A.2d 550 (Pa. 1981); *see also Commonwealth v. Widmer*, 560 Pa. 308, 744 A.2d 745 (2000).

Applying this test to the present case, the evidence was sufficient to sustain Appellant's conviction for Possession With Intent to Deliver Crack Cocaine and Possession of Drug Paraphernalia. In accordance with 35 Pa. C.S. §§780-113(A)30, one must not unlawfully, feloniously and knowingly possess with the intent to deliver a controlled substance not being licensed or registered as required by the Acts of Assembly of the Commonwealth of Pennsylvania in violation of the Controlled Substance, Drug, Device and Cosmetic Act. Likewise, in accordance with 35 Pa. C.S. §780-113(A)(32), one must not use or possess with intent to use, drug paraphernalia for the purpose of...processing, preparing...packing, repacking, storing, containing, concealing...or otherwise introducing into the human body a controlled substance, in violation of this Act.

Despite Appellant's claim that he was not the only resident of the room subject to the search warrant, the record in this case contains sufficient evidence supporting a guilty verdict for the above charges.

> Where contraband is not found on defendant's person, Commonwealth must establish "constructive possession" that is, power to control contraband and intent to exercise that control. Constructive possession of contraband may be proven by circumstantial evidence; requisite knowledge and intent may be inferred from examination of totality of circumstances. *Commonwealth v. Haskins*, 677 A.2d 328 (Pa. Super. 1996).

The record reflects the room in which the drugs were located was identified by Appellant's mother to be Appellant's bedroom. *See* Suppression Hearing/Trial Without A Jury, August 26, 2002, p. 41. Once inside the bedroom, Detectives Nolan and Dacus found identification on the dresser with Appellant's name and photograph on it, which also suggested Appellant was the occupant of the bedroom. *Id.; see also* Commonwealth Exhibit C. As a result of their search Detectives Nolan and Dacus found three baggies of crack cocaine inside a jean jacket pocket hanging in Appellant's closet, a pill bottle and another baggie on Appellant's dresser, each containing crack cocaine. *Id.* at pp. 43-45; *see also* Commonwealth Exhibits D- G. In total 75.67 grams of crack cocaine was found in Appellant's possession.

Detective Nolan stated five hundred and twenty ($520.00) dollars was found in the same jean jacket in which the drugs were found. *Id* at p. 47. He

also found another one hundred and fourteen dollars under the mattress in Appellant's bedroom and seized sixty ($60.00) dollars from Appellant's person after he was arrested. *Id.* at p. 48. Detective Fischer who inventoried the money seized stated that one hundred ($100.00) dollars of the money found in the jean jacket was in fact the buy money given to the CI to make the drug transaction with Appellant just forty-eight hours before the search warrant was served. *See supra.* Suppression Hearing/ Trial Without A Jury, pp. 60-61. When asked about the ownership of the jean jacket from which the drugs and money were seized, Detective Fischer stated, "[I]t was found with his other property and it's of the size that would be appropriate for Mr. Chaney." *Id.* at p. 63.

In addition to the drugs and money found in what was identified to be Appellant's room, the Detectives seized several items of paraphernalia. The items included: a plastic CD case containing residue of crack cocaine, two boxes of straight-edged razor blades, an electronic scale, bulk quantities of small ziplock baggies with marijuana leaves stamped on them, two cellphones, a pager, and a Ruger P95DC semi-automatic pistol with ammunition. *Id.* at pp. 46-51; *see also* Commonwealth Exhibits H-N. With regards to all of the items seized from Appellant's residence, Detective Fischer stated on the record

> "Well, the amount of drugs alone is a red flag that this is a dealt quantity. Users do not have that type of quantity in their possession. Also, you have the electronic scale which is used for measuring different amounts for sale. You have packaging materials, electronic devices used for communication in furtherance of the drug business. And I also - I believe by Mr. Chaney's own admission, he does not use drugs, which would be contained on his booking sheet, when he was booked into the Erie Police jail. *Id.* at p. 62.

The record reflects a clear nexus and/or proof of ownership of the drugs as to Appellant. All of the contraband was seized from what was identified as Appellant's bedroom with no evidence that anyone besides Appellant had control over the drugs or paraphernalia found therein. As such, Appellant was unlawfully, feloniously and knowingly in constructive possession with the intent to deliver the 75.67 grams of crack cocaine as well as in possession of drug paraphernalia. Thus, there was sufficient evidence to prove guilt beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, this Appeal must be denied.

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

COMMONWEALTH OF PENNSYLVANIA
v.
CHARLES G. WAYNE

CRIMINAL PROCEDURE / POST-TRIAL PROCEDURE / SUFFICIENCY OF EVIDENCE

When considering a challenge to the sufficiency of the evidence, the Court must view the evidence and all reasonable inferences to be drawn from the evidence in the light most favorable to the Commonwealth as verdict winner and determine if the evidence was sufficient to enable the fact-finder to establish all the elements of the offense. *Commonwealth v. Rios*, 546 Pa. 271, 279, 684 A.2d 1025, 1028 (1996).

CRIMINAL PROCEDURE / POST-TRIAL PROCEDURE / WEIGHT OF EVIDENCE

When considering whether a conviction was against the weight of the evidence, a new trial will only be awarded where it appears that the verdict was so contrary to evidence as to shock one's sense of justice. *Commonwealth v. Simmons*, 541 Pa. 211, 229, 662 A.2d 621, 630 (1995). Further, the weight of the 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 the witnesses. *Id.*

CRIMINAL PROCEDURE / DRUG OFFENSES

Possession of a controlled substance can be shown by either proof of actual possession or by showing that a defendant constructively possessed it. *Commonwealth v. Macolino*, 503 Pa. 201, 469 A.2d 132 (1983). In order to be in constructive possession of contraband, a person must have "conscious dominion" over it. *Commonwealth v. Carroll*, 510 Pa. 299, 507 A.2d 819 (1986).

CRIMINAL PROCEDURE / DRUG OFFENSES

Possession of a controlled substance is not an absolute liability offense. The Commonwealth must prove that the defendant had the intent to control the contraband. *Commonwealth v. Miley*, 314 Pa. Super. 88, 460 A.2d 778 (1983). Although knowledge is not a required element of the offense, proof of intent to control requires that the Commonwealth demonstrate that the defendant had conscious dominion of the substance. *Commonwealth v. Fortune*, 456 Pa. 365, 318 A.2d 327 (1974).

CRIMINAL PROCEDURE / DRUG OFFENSES

There is no minimum quantitative requirement to be convicted of possession of a controlled substance under Pennsylvania law, a defendant should have enough of the substance to be able to exercise some control over that substance. *United States ex rel. Jones v. Rundle*, 329 F. Supp. 381, (E.D. Pa. 1971). In order for one to have the intent and the ability to control a controlled substance, there must be evidence that the individual was aware of its presence on his person or otherwise. *Commonwealth v. Stephens*, 231 Pa. Super 481, 331 A.2d 719 (1974).

CRIMINAL PROCEDURE / DRUG OFFENSES

An intent to maintain a conscious dominion may be inferred from the totality of the circumstances. Further, circumstantial evidence may be used to establish a defendant's possession of drugs or contraband. *Commonwealth v. Macolino*, 503 Pa. 201, 206, 469 A.2d 132, 134-135 (1983)(citations omitted).

CRIMINAL PROCEDURE / DRUG OFFENSES

Constructive possession may be found in circumstances where the defendant had joint control of and equal access to an area with others. "Constructive possession is an inference arising from a set of facts that possession of the contraband was more likely than not." *Commonwealth v. Mudrick*, 510 Pa. 305, 308, 507 A.2d 1212, 1213 (1986).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 2030 & 2031-2001

Appearances: David C. Agresti, Esquire for the Commonwealth
Lisa R. Stine, Esquire for the Commonwealth
Bruce G. Sandmeyer, Esquire for the Defendant

OPINION

Bozza, John A., J.

This matter is currently before the Court on a Post-Sentencing Motion filed by defendant, Charles G. Wayne. On January 15, 2003, Mr. Wayne was found guilty by a jury of the following crimes after a combined trial: possession of a controlled substance[1] (cocaine) at Docket Number 2030 - 2001; and possession of a controlled substance[2] (crack cocaine); possession with intent to deliver[3] (crack cocaine); and possession of drug paraphernalia[4] (plate and razor blades) at Docket Number 2031 - 2001. On February 19, 2003, Mr. Wayne was sentenced as follows:

At Docket Number 2030 - 2001:
Count I - Possession of a Controlled Substance (Cocaine) - costs, one year probation concurrent to Count III of Docket Number 2031 - 2001.

At Docket Number 2031- 2001:
Count I - Possession of a Controlled Substance (Crack Cocaine) - costs, merges with Count II;

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[1] 35 P.S. § 780-113(A)16.
[2] 35 P.S. § 780-113(A)16.
[3] 35 P.S. § 780-113(A)30.
[4] 35 P.S. § 780-113(A)32.

> Count II- Possession with Intent to Deliver (Crack Cocaine) - twelve (12) months to thirty-six (36) months incarceration, costs;
>
> Count III - Possession of Drug Paraphernalia (Plate and Razor Blades) - one year probation consecutive to Count II.

On February 28, 2003, Mr. Wayne filed a Post Sentencing Motion, challenging the sufficiency of the evidence and seeking a judgment of acquittal at both docket numbers.

I. Docket Number 2030 - 2001

A defendant may challenge the sufficiency of the evidence to sustain a conviction by filing a motion for judgment of acquittal after sentence is imposed pursuant to Rule 720(b) of the Pennsylvania Rules of Criminal Procedure. Pa.R.Crim.P. 606(A)(6). When considering a challenge to the sufficiency of the evidence, the Court must

> view the evidence and all reasonable inferences to be drawn from the evidence in the light most favorable to the Commonwealth as verdict winner and determine if the evidence was sufficient to enable the fact-finder to establish all the elements of the offense.

Commonwealth v. Rios, 546 Pa. 271, 279, 684 A.2d 1025, 1028 (1996). When considering whether a conviction was against the weight of the evidence, a new trial will only be awarded where it appears that the verdict was "so contrary to evidence as to shock one's sense of justice." *Commonwealth v. Simmons,* 541 Pa. 211, 229, 662 A.2d 621, 630 (1995). Further, "the weight of the 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 the witnesses." *Id.*

Mr. Wayne's first challenge is to the sufficiency and weight of the evidence to sustain his conviction of possession of cocaine at docket number 2030 - 2001. This case surrounds a raid by members of the Erie Police Department at 323 West 18th Street, Erie, Pennsylvania, on June 20, 2001. Mr. Wayne was seen through the windows of the residence by Detective Sergeant Michael A. Nolan, and upon seeing Detective Sgt. Nolan, Mr. Wayne ran towards the back of the residence, later determined to be near the bathroom. Mr. Wayne was next seen by Detective Sgt. Nolan on the floor next to the bathroom door, and upon being lifted up a brown vial with cocaine residue was found underneath his body. He was not charged with possession of the vial. Once Mr. Wayne was taken outside of the apartment, Lieutenant Joe Kress of the Erie Police Department collected samples from Mr. Wayne's hands so that the samples could be tested with a Berringer ion scan. The test was positive, and Mr. Wayne was charged with possession of cocaine for the substance found to be on his hands.

Sergeant First Class Randy Wasserleben of the Pennsylvania Army National Guard testified that a DC remote collector is used to collect a sample. (T. T., 1/14/03, p. 11). The collector looks like a small portable vacuum, and has a small filter which traps any particles for testing with the ion scan. *Id.* Sgt. Wasserleben testified that Mr. Wayne's hands had a reading of fourteen hundred and thirty-one (1,431) digital units for cocaine, which is about seven times the reading that would result from "casual contact" with the drug. *Id.* Sgt. Wasserleben testified that his use of the term "casual contact" meant, "what you would expect of drug residue on currency in the local community", and that the state average ion scan reading for casual contact is two hundred and thirty-four (234) digital units. (T. T., 1/14/03, p. 11, 13). Sgt. Wasserleben also testified that it was the first time that Lt. Kress had been trained to use the DC remote collector and that an operator was present with Lt. Kress to ensure the correct operation of the collector. (T.T., 1/14/03, p. 28).

Cases involving allegations of drug possession require that the Commonwealth "prove that a defendant had knowing or intentional possession of a controlled substance, and if the substance is not found on the defendant's person,...by proof of 'constructive possession.'" *Commonwealth v. Vallette,* 531 Pa. 384, 388, 613 A.2d 548,549-550 (1992). Upon review of the record the Court has come to the conclusion that the evidence was insufficient to prove beyond a reasonable doubt that Mr. Wayne had the power of control and the intent to exercise that control over any amount of cocaine in this case.

According to the testimony, the Berringer ion scan registers trace amounts of controlled substances, and has been used primarily to detect drug residue on currency.[5] However, the ion scan can only record whether a person has come into contact with the drug at some point in time, not how that contact was made. In this case, the ion scan reading was the only way that police could connect Mr. Wayne to any amount of cocaine. No visible amount of cocaine was found on his body, and no visible cocaine residue could be seen on his hands. As defense counsel correctly noted, there is apparently no case law that discusses the use of an ion scanner on human subjects since it is a relatively new technological development. Further, there is also a lack of case law dealing with "invisible" residue of drugs found on either objects or human subjects.

The only case that is somewhat analogous to the present case is *Commonwealth v. Dasch,* 218 Pa. Super. 43, 269 A.2d 359 (1970). In that

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[5] Sgt. Wasserleben testified that "ninety percent of what we do is currency. Last year we scanned 2.8 million dollars." (T. T., 1/14/03, p. 14). Sgt. Wasserleben also testified that he had performed scans on about twenty or thirty people in the time he has worked with the ion scan, which he testified had been since 1996. (T. T., 1/14/03, p. 4, 14).

case, a defendant was charged with possession of marijuana due to the finding of a microscopic amount of marijuana that was mixed with dirt and debris taken from the crevices under the back of the front seats and the floor under the rear seat in a vehicle. The Pennsylvania Superior Court stated that

> As to possession, it is difficult to conceive of any one having possession of the scraps of marijuana contained in the refuse swept from the car. It is even more difficult to conceive of any one controlling this marijuana and there is no evidence of knowledge except the fact that he had driven his mother's car. If, in fact, he had knowledge of the existence of the marijuana described by the Commonwealth, in order to exercise possession and control he would have to have an expert on drugs to separate it from the refuse as was done by the Commonwealth. There is no evidence that this defendant had that expertise.

Dasch, 218 Pa. Super. at 48, 269 A.2d at 362.

The Court further stated that the proof of the defendant's knowledge of and intent to control the marijuana particles could be inferred from all the surrounding circumstances, but that such proof could not be based upon conjecture or suspicion. *Id.* As the proof of possession, control, and knowledge in *Dasch* was based on conjecture and suspicion, the Court held that this was insufficient to establish the defendant's guilt beyond a reasonable doubt. *Dasch,* 218 Pa. Super. at 49, 269 A.2d at 362.

Mr. Wayne was charged with possession of cocaine based upon the presence of essentially microscopic particles of the substance, which could only be detected by the use of an ion scanner. While the evidence presented at trial indicated that Mr. Wayne might have had more than casual contact with an amount of cocaine, there was no evidence as to the circumstances of that contact.[6] Possession of a controlled substance is not an absolute liability offense. The Commonwealth must prove that a defendant had "knowingly or intentionally" possessed a controlled substance or where the theory is based on constructive possession prove that the defendant had the intent to control the contraband. 35 Pa.C.S.A § 780-113(a)16; *Commonwealth v. Vallette,* 531 Pa. 384, 388, 613 A.2d 548, 549-550 (1992), *Commonwealth v. Miley,* 314 Pa. Super. 88, 460 A.2d 778 (1983). Proof of intent to control requires that the Commonwealth demonstrate that the defendant had conscious dominion of the substance. *Commonwealth v. Fortune*, 456 Pa. 365, 318 A.2d 327 (1974). Moreover, while there is no minimum quantitative requirement to be

[6] As Sgt. Wasserleben conceded, the ion scan cannot indicate whether a defendant *intentionally* came into contact with the controlled substance. (T. T., 1/14/03, p. 28).

convicted of possession of a controlled substance under Pennsylvania law, a defendant needs to have enough of the substance to know of its existence or to be able to exercise "conscious" control over it.[7] In order for one to have the intent and the ability to control a controlled substance, there must be evidence that the individual was aware of its presence on his person or otherwise. *Commonwealth v. Stephens*, 231 Pa. Super 481, 331 A.2d 719 (1974). Ordinarily the question of control is not in issue where the contraband is found on the person. More often, it is the essential issue where the Commonwealth is proceeding on a "constructive possession" theory.

Here, however, there was no evidence, circumstantial or otherwise, that the defendant was aware or should have been aware of the presence of microscopic particles of cocaine on his hands. As the Court noted in *Dasch,* in order for Mr. Wayne to have either known of its presence or exercised conscious dominion of the cocaine, he would have had to take extraordinary measures. Someone would have had to "scan" his hands and tell him of its presence. Then, Mr. Wayne would have had to have somehow collected the cocaine in a form that allowed him to manipulate it in some way. Here there was no evidence of this sort of activity. In these circumstances the court must conclude that the evidence was insufficient to support the jury's culpability.

II. Docket Number 2031- 2001

Mr. Wayne also challenges the sufficiency of the evidence to sustain his conviction for possession of crack cocaine, possession with intent to distribute crack cocaine, and possession of drug paraphernalia at docket number 2031 - 2001. The charges at this docket number also came about as a result of the raid on June 20, 2001. Shortly after the raid on the residence on West 18th Street, Detective Sgt. Nolan and Detective Sergeant Goodzich went to 1120 Tacoma Road, apartment A, number 4, Erie, Pennsylvania. This apartment was identified as the residence of Mr. Wayne's grandmother, Jacqueline Tangle. Upon arrival, the detectives identified themselves to Ms. Tangle, and informed her that her grandson,

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[7] *See United States ex rel. Jones v. Rundle,* 329 F. Supp. 381, (E.D. Pa. l971)(precise law as to quantitative possession unclear in Pennsylvania). The relevant statute provides:
(a) The following acts and the causing thereof within the Commonwealth are hereby prohibited:

> (16) Knowingly or intentionally possessing a controlled or counterfeit substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, unless the substance was obtained directly from, or pursuant to, a valid prescription order or order of a practitioner, or except as otherwise authorized by this act.

Mr. Wayne, had been arrested for drug dealing. The detectives also informed her that they believed that Mr. Wayne had more drugs in the Tacoma Road apartment, and asked whether Mr. Wayne lived there and whether he had been there that evening. The detectives also asked Ms. Tangle for her permission to search the residence.

Ms. Tangle permitted the detectives to enter her apartment and signed a document indicating her consent to have the apartment searched without a warrant. In response to their statements and questions, Ms. Tangle escorted the detectives to a small second floor bedroom, which had a dresser, a closet full of young men's clothing, and other items scattered around the room.[8] The clothing in the closet appeared to be of the style and fashion currently favored by young urban men, and included baggy jeans, oversized shirts, sports jerseys, and jogging outfits.[9] The detectives then found the following items of evidence in the room:

1. a plastic sandwich bag which contained large chunks of what was later confirmed to be crack cocaine, located in the pocket of a white windbreaker hanging in the closet;

2. over $400 in cash in a black pair of sweatpants hanging next to the white windbreaker in the closet;

3. a Pennsylvania-issued identification card with the defendant's name and photograph on it, located on top of the dresser, approximately five feet away from the closet;

4. a plate and razor blades on the dresser, and the razor blades had what was later confirmed to be crack cocaine residue on them.

The crack cocaine was determined to have a weight of 6.4 grams, and a street value of approximately six hundred and fifty ($650) dollars.

Mr. Wayne argues that the evidence introduced at trial was not sufficient to show that he had an ability to control the areas where the crack cocaine was found, the evidence did not support the conclusion that his clothes contained the substance, and that the verdict was against the weight of the evidence. As noted above, a defendant may challenge the sufficiency of the evidence to sustain a conviction by filing a motion

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[8] Ms. Tangle appears to have said something to the detectives that would indicate her reason for escorting the detectives to this particular bedroom. This testimony, however, was not offered at trial by the Commonwealth.

[9] Testimony was also offered to show that Mr. Wayne was wearing similar clothing at the time of his arrest.

for judgment of acquittal after sentence is imposed pursuant to Rule 720(b) of the Pennsylvania Rules of Criminal Procedure. Pa.R.Crim.P. 606(A)(6). When considering a challenge to the sufficiency of the evidence, the Court must

> view the evidence and all reasonable inferences to be drawn from the evidence in the light most favorable to the Commonwealth as verdict winner and determine if the evidence was sufficient to enable the fact-finder to establish all the elements of the offense.

Commonwealth v. Rios, 546 Pa. 271, 279, 684 A.2d 1025, 1028 (1996). When considering whether a conviction was against the weight of the evidence, a new trial will only be awarded where it appears that the verdict was "so contrary to evidence as to shock one's sense of justice." *Commonwealth v. Simmons,* 541 Pa. 211, 229, 662 A.2d 621, 630 (1995). Further, "the weight of the 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 the witnesses." *Id.* Upon a review of the record, the Court concludes that there was sufficient evidence upon which a jury could have found Mr. Wayne guilty beyond a reasonable doubt of all of the charges at this docket number.

Possession of a controlled substance can be shown by either proof of actual possession or by showing that a defendant constructively possessed it. *Commonwealth v. Macolino*, 503 Pa. 201, 469 A.2d 132 (1983). In order to be in constructive possession of contraband, a person must have "conscious dominion" over it. *Commonwealth v. Carroll*, 510 Pa. 299, 507 A.2d 819 (1986). After a through review of the record, the Court must conclude that the Commonwealth introduced sufficient evidence of Mr. Wayne's constructive possession of the cocaine to support the verdict of the jury. In summary, the jury, after considering the credibility of the witnesses and their testimony and making reasonable inferences therefore, could have found the following facts:

> 1. At the time the defendant was arrested he indicated on the booking sheet that his address was 1120 Tacoma Rd. Apt. 4, the apartment where his grandmother Jacqueline Tangle resided.
>
> 2. Upon arriving at the defendant's address, the police advised Ms. Tangle that they had arrested her grandson, Mr. Wayne, for drug dealing, that they believed he had more drugs in the apartment and asked if they could search for them.
>
> 3. Following her consent, Ms. Tangle led the police directly to the bedroom.
>
> 4. In the bedroom, the police found a Pennsylvania identification card with the defendant's name and picture on it on a dresser.

5. On the dresser, the police found a plate with a razor blade. The blade contained cocaine residue.

6. In a closet five feet from his identification card, the police found a plastic sandwich bag which contained large chunks of crack cocaine in the pocket of a white windbreaker.

7. Next to the windbreaker, in a pair of sweatpants, police found $400 in cash.

8. The clothes in the closet were comprised entirely of fashionable young men's items of the same style that the defendant was wearing at the time of his arrest.

9. Following his arrest, while in a police holding cell and before being told that the police found drugs in the bedroom, the defendant commented to the effect that he was not worried because they only got him with an "eight ball".

10. Earlier in the day, Mr. Wayne was seen in a residence where, after he ran from the police during the execution of a search warrant, he was found laying in close proximity to a vial containing cocaine residue.

11. On the day of his arrest he had an amount of microscopic cocaine on his hands inconsistent with mere casual contact.

12. The defendant lived at 1120 Tacoma, Apt. 4, and the room searched by the police where the drugs and paraphernalia were found was the defendant's bedroom.

13. Mr. Wayne had been at the Tacoma Road apartment earlier on the day of the search and his arrest, and had made himself something to eat in the kitchen.

At trial, Mr. Wayne claimed that he resided at 2631 Monroe with his father, and that all the clothes at the Tacoma Road address were old and belonged to other individuals. His grandmother, Ms. Tangle, also testified that Mr. Wayne had not lived with her in quite some time, and that the bedroom was used by overnight guests, including two boyfriends of her daughter. However, the jury as the finder of fact was free to evaluate the credibility of these witnesses and disbelieve their testimony.

As to the issue of control, the Pennsylvania Superior Court has noted "...an intent to maintain a conscious dominion may be inferred from the totality of the circumstances. Further, circumstantial evidence may be

used to establish a defendant's possession of drugs or contraband". *Commonwealth* v. *Macolino.* 503 Pa. 201, 206, 469 A.2d 132, 134-135 (1983)(citations omitted). Here, the circumstantial evidence, as well as Mr. Wayne's own indication that he resided at the Tacoma Road address, provide more than ample support for the jury's conclusion that he exercised control over the contents of the bedroom. As the Court has previously stated, "one's bedroom closet is normally in the exclusive province of the individual who possesses the bedroom." *Commonwealth v. Hunt,* 256 Pa. Super. 140, 149, 389 A.2d 640, 644 (1978). A bedroom closet is "normally accessible only to the [owner]." *Hunt,* 256 Pa. Super. at 148, 389 A.2d at 644 *(quoting Commonwealth v. Ferguson,* 231 Pa. Super. 327, 333, 331 A.2d 856, 860 (1974)

Here, there was testimony offered by the defendant to show that Ms. Tangle permitted her other grandchildren, as well as her daughter and her boyfriends, to use the bedroom on occasion. Ms. Tangle testified that her grandchildren besides the defendant were ages three, six, twelve and thirteen. (T.T., 1/15/03, p. 7). Ms. Tangle testified that one of her daughter's boyfriend, identified as "Nugget", is fifty-one years old and her daughter's other boyfriend, identified as "Delmar", is twenty-five years old. *Id.* However, there was no testimony as to how often or when these two boyfriends stayed in the room. Also, Ms. Tangle indicated that Delmar might have only left one or two items of clothing in the room. *Id.* She also testified that Mr. Wayne had lived with her for a period of time and was present at her house for some time on the day the police conducted the search, in the kitchen fixing something to eat. *Id.* at 4, 9-10. As noted above, the jury was free to reject this testimony or to treat it in a manner inconsistent with the defendant's position.

Moreover, constructive possession may be found in circumstances where the defendant had joint control of and equal access to an area with others. "Constructive possession is an inference arising from a set of facts that possession of the contraband was more likely than not." *Commonwealth v. Mudrick,* 510 Pa. 305, 308, 507 A.2d 1212, 1213 (1986). Here the jury, had they accepted Ms. Tangle's testimony, could have reasonably inferred that, at minimum, the defendant had equal access and joint control of the bedroom. The jury also could have found that other individuals' access to the room, with the exception of Ms. Tangle, was very limited. Indeed, the record is silent as to the extent other individuals actually stayed there. With the possible exception of a 25 year old male named Delmar who "might have left something there"[10], none of the individuals who may have on occasion stayed there, including four children aged 13 and under and a 51 year old man, would have been

[10] (T.T., 1/15/03, p. 7).

expected to own the kind of clothing that the police found.

There are several Pennsylvania cases that involve the discovery of a controlled substance in various areas of a residence. *See: Commonwealth v. DeCampli,* 243 Pa. Super. 69, 364 A.2d 454 (l976)(defendant was sole occupant of dwelling); *Commonwealth v. Hannan,* 229 Pa. Super. 540, 331 A.2d 503 (1974)(defendant owned handbag and formerly occupied room where substance was found); *Commonwealth v. Ferguson,* 231 Pa. Super. 327, 331 A.2d 856 (1974)(defendant possessed substance found in garage based on surrounding circumstances); *Commonwealth v. Fortune,* 456 Pa. 365, 318 A.2d 327 (1974)(kitchen floor not in exclusive province of the resident defendant). The case of *Commonwealth v. Hannan* is of particular interest to the present case, as that case involved a bedroom that had previously been occupied by the defendant. As in the present case, there was not sufficient evidence to show that others had access to the areas of the bedroom such that the defendant could be deemed not to have sufficient dominion or control over the contraband. Here, while others may have on occasion slept in the second bedroom at the Tacoma Road apartment, there was sufficient evidence for the jury to conclude that Mr. Wayne was the only one who had resided there on an ongoing basis, and that Mr. Wayne was still residing there at the time of his arrest.

In addition to the facts noted above, the Commonwealth presented testimony from which the jury could conclude that Mr. Wayne was in the drug dealing business and therefore more likely to possess substantial quantities of cocaine and cash. Detective Sgt. Nolan testified based on his training and experience, as to the following:

> 1. The quantity of crack cocaine recovered from the bedroom was consistent with someone who was preparing or holding the drug for purposes of sale or distribution.
>
> 2. The absence of drug paraphernalia consistent with smoking crack cocaine found on the defendant indicated that Mr. Wayne was a drug dealer, and not a user, of crack cocaine.
>
> 3. The razor blades found on the dresser are commonly used by drug dealers to make accurate cuts in larger amounts of crack cocaine, in order to divide the larger quantity into saleable portions.
>
> 4. Razor blades are more commonly used by drug dealers than by ordinary users of crack cocaine.

(T.T., 1/14/03, pp. 20-26).

In addition, a woman identified as Ellen Corder also testified that she had purchased cocaine from Mr. Wayne on two occasions, and that Mr.

Wayne obtained the cocaine for her purchase and use. Detective Sgt. Goodzich also testified concerning several statements that Mr. Wayne was heard to make. While Mr. Wayne was in a holding cell at the Erie Police Department, he was heard talking with two other inmates in his cell, stating "they got nothing on me, all they found is an 8-ball". At that time, Mr. Wayne had not yet been told that any drugs had even been found in the search of the Tacoma Road apartment. There was a sufficient basis for the jury to conclude that Mr. Wayne was involved in drug dealing activities, and that he would keep the crack cocaine he offered for sale in a safe place where he would have both control over it and access to it. Based on the totality of the circumstances, there was sufficient evidence to support the jury's verdict and the verdict was not against the weight of the evidence.

An appropriate order shall follow.

ORDER

AND NOW, to-wit, this 19 day of June, 2003, upon consideration of defendant Charles G. Wayne's Post Sentencing Motion, and argument thereon, it is hereby **ORDERED, ADJUDGED and DECREED** as follows:

1. the defendant's motion at docket number 2030 - 2001 is **GRANTED;**

2. the defendant's motion at docket number 2031 - 2001 is **DENIED**.

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

CHRISTOPHER RUST
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and TROY LILLEY, Administrator of the Estate of JOSEPH LILLEY

INSURANCE / INTERPRETATION OF POLICIES

When the language of an insurance policy provision is not unclear or ambiguous, the Court must give effect to the plain meaning of the language in the agreement. An exception to this long-established principle occurs in circumstances where giving effect to a provision in an insurance contract would be contrary to a clearly expressed public policy.

INSURANCE / PUBLIC POLICY

Finding a contract or a contract provision to be against public policy is not a conclusion to be based on the Court's subjective and intuitive impression of the existence of some important governmental objective, but rather the result of a careful and deliberate analysis of laws and legal precedents. It is only in the most limited of circumstances and where there is virtually unanimity of opinion that a given policy is against the public health, safety, morals, or welfare that the Court may declare a contract against public policy.

INSURANCE / PUBLIC POLICY

In determining the validity of insurance policy provisions in light of public policy concerns, the Court must consider the circumstances presented in each case. *Burstein v. Prudential Prop. & Cas. Ins. Co.,* 570 Pa. 177, 809 A.2d 204 (2002).

INSURANCE / AUTOMOBILE INSURANCE / FINANCIAL RESPONSIBILITY LAW

Pennsylvania appellate courts have now repeatedly found that the clear intent of the legislature in drafting the Motor Vehicle Financial Responsibility Law was to limit the accelerating costs of motor vehicle liability insurance.

INSURANCE / AUTOMOBILE INSURANCE / FINANCIAL RESPONSIBILITY LAW

Premiums for motor vehicle insurance depend at least in part on the type of vehicle being insured. As liability costs depend on the type of car, insurance companies are entitled to know what kind of cars their insureds drive. The Motor Vehicle Financial Responsibility Law does not require an insurer to provide unlimited coverage and to cover all risks.

INSURANCE / AUTOMOBILE INSURANCE

The legislature left to the Insurance Department the responsibility of making rules and regulations for the administration and enforcement of the Motor Vehicle Financial Responsibility Law. 75 Pa.C.S.A. § 1704(b).

INSURANCE / INTERPRETATION OF POLICIES

It is never the role of the court to rewrite the parties' policy. *Garber v. Travelers Ins. Co.,* 280 Pa. Super. 323, 421 A.2d 744 (1980).

INSURANCE / AUTOMOBILE INSURANCE / EXCLUSIONS

The "non-owned car" exclusion does not violate public policy, and there is nothing about the limitation *per se* from which it can be concluded

that the provision is contrary to the public health, safety, morals or welfare of the people. Also, the "non-owned car" provision of the policy is not inconsistent with the legislative intent underlying the Motor Vehicle Financial Responsibility Law.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 13835 - 2000

Appearances: Joanna K. Budde, Esquire, for defendant State Farm Mut. Auto. Ins. Co.
David L. Hunter, Esquire, for defendant, Troy Lilley, Administrator of Estate of Joseph Lilley
William F. Scarpitti, Esquire, for plaintiff

OPINION

Bozza, John A., J.

This matter is before the Court on Cross-Motions for Summary Judgment in a Declaratory Judgment Action concerning the validity of a portion of State Farm Mutual Automobile Insurance Company's (State Farm) policy. The facts are largely uncontested, and the Court finds that there are no material issues of fact in dispute. They may be briefly summarized as follows.

On April 8, 2000, Christopher Rust was operating a motor vehicle belonging to his girlfriend, Heidi Sargent, when he struck and killed a pedestrian, Joseph Lilley, on Route 5 in Erie County, Pennsylvania. At the time of the accident, Mr. Rust and Ms. Sargent were living together. An action for wrongful death was initiated against Mr. Rust. At the time of the accident, Mr. Rust owned two vehicles, one of which was insured by Allstate Insurance Company and the other by State Farm. Insurance coverage was also available through Progressive Insurance Company, who insured Ms. Sargent's vehicle. After the initiation of the lawsuit, both Allstate and Progressive tendered their policy limits to the Estate of Joseph Lilley. State Farm, on the other hand, denied coverage, maintaining that the car being driven by Mr. Rust belonged to Ms. Sargent, and therefore did not qualify for coverage under its policy. Specifically, State Farm noted that although coverage for Mr. Rust was provided while occupying a "non-owned car", a "non-owned car" did not include a car "owned by, registered to, or leased to: ...(a) a person residing in the same household" as Mr. Rust.[1] It is defendant Troy Lilley's

[1] State Farm's policy defines the term "non-owned car" as follows: **Non-owned car** - means a **car** not owned by, registered to, or leased to:

1. **You, your spouse**;
2. **Any relative or relatives** unless at the time of the accident or **loss**:

position that the definition of non-owned car as applied in this case is against public policy and should not be enforced. For the reasons set forth below, this Court rejects Lilley's argument.

Initially, it is noted that it is not suggested that the language of provision at issue is unclear or ambiguous. Therefore, the Court must give effect to the plain meaning of the language in the agreement. *Burstein v. Prudential Prop. & Cas. Ins. Co.*, 570 Pa. 177, 809 A.2d 204 (2002). An exception to this long-established principle occurs in circumstances where giving effect to a provision in an insurance contract would be contrary to a clearly expressed pubic policy. *Eichelman v. Nationwide Ins. Co.*, 551 Pa. 558, 563, 711 A.2d 1006, 1008 (1998). Finding a contract or a contract provision to be against public policy is not a conclusion to be based on the Court's subjective and intuitive impression of the existence of some important governmental objective, but rather the result of a careful and deliberate analysis of "laws and legal precedents". *Id.* It is only in the most limited of circumstances and where there is virtually unanimity of opinion that a given policy is against the public health, safety, morals, or welfare that the Court may declare a contract against public policy. *Mamlin v. Genoe,* 340 Pa. 320, 325, 17 A.2d 407, 409 (1941). "Only in the clearest of cases, therefore, may a court make an alleged public policy the basis of judicial decision." *Id.* In the circumstances of this case, it is obvious that there is no evidence of "unanimity" of opinion that the "non-owned car" provision of State Farm's motor vehicle insurance contract is against public policy. No Pennsylvania appellate court has addressed the issue. Therefore, the Court must independently determine whether the policy provision at issue is contrary to public health, safety, morals or welfare. *Eichelman,* 551 Pa. at 566,711 A.2d at 1009. More specifically, because the matter of motor vehicle insurance is the subject of legislative initiative, the Court must determine whether the "non-owned car" provision is inconsistent with the legislative intent underlying the Motor Vehicle Financial Responsibility Law (MVFRL). *Id.* In determining the validity of insurance policy provisions in light of public policy concerns, the Court must consider the circumstances presented in each case. *Burstein v. Prudential Prop. & Cas. Ins. Co.,* 570 Pa. 177, 809 A.2d 204 (2002).

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[1] continued

(a) The car currently is or has within the last thirty (30) days been insured for liability coverage; and
(b) The driver is an **insured** who does not own or lease the car or cars involved;

3. Any other person residing in the same household as **you, your spouse**, or any other **relative**, or
4. Any **employer of you, your spouse**, or any other **relative**.

In supporting their respective positions, the parties have primarily relied on cases that have dealt with the "household exclusion" or the "family car exclusion" to under-insured or uninsured motorist coverage. While there are distinct factual differences in the circumstances giving rise to concerns about the validity of these provisions, this line of cases demonstrates the evolving reluctance of the courts to find such policy limitations or exclusions to be violative of public policy. In *Paylor v. Hartford Ins. Co.,* 536 Pa. 583, 640 A.2d 1234 (1994), the Court found that the "family car exclusion", as applied, was not violative of public policy, distinguishing the prior decision of the Superior Court in *Marroquin v. Mutual Benefit Insurance Company,* 404 Pa. Super. 444, 591 A.2d 290 (1991). The Court stated that "(t)he litany of cases demonstrates that the 'family car exclusion' is not necessarily violative of public policy or the legislative intent underlying the MVFRL." *Paylor,* 536 Pa. at 595, 640 A.2d at 1240. The Court's analysis centered on its conclusion that the insured was attempting to convert inexpensively obtained underinsured motorist coverage into liability coverage on the motor home, and noted that the plaintiff had made a conscious decision to insure a motor home with a different company with less coverage than had been obtained in other automobiles that were insured by Hartford. In such circumstances, the "family car exclusion" did not violate public policy.

In *Eichelman v. Nationwide Ins. Co.,* 551 Pa. 558, 711 A.2d 1006 (1998), the Supreme Court explicitly concluded that giving effect to the "household exclusion" provision actually furthered the legislative policy with regard to under-insured motorist coverage found in the MVFRL. *Eichelman,* 551 Pa. at 566-567, 711 A.2d at 1010. In that case, the insured had made a claim for underinsurance coverage under two insurance policies his mother and her husband had purchased from Nationwide Insurance. His own insurance policy on his motorcycle did not include underinsured motorist coverage because he had rejected such coverage at the time he purchased it. Nationwide refused coverage on the basis of a policy provision that excluded underinsured motorist coverage for "bodily injury suffered by operating a motor vehicle owned by you or a relative not insured for underinsured motorist coverage under this policy." *Eichelman,* 551 Pa. at 562, 711 A.2d at 1007. The Court observed that it would only be in the "clearest of cases that a court may make an alleged public policy the basis of judicial decision". The Court went on to conclude that the insured had voluntarily chosen to forego the purchase of underinsurance on the motorcycle, and found that the "household exclusion" provision was consistent with the legislative intention of the MVFRL to curtail the escalating costs of motor vehicle insurance in the Commonwealth. *Eichelman,* 551 Pa. at 567, 711 A.2d at 1010.

In similar decisions concerning the "household exclusion", such as *Windrim v. Nationwide Ins. Co.,* 537 Pa. 129, 641 A.2d 1154 (1994) and

Hart v. Nationwide Ins. Co., 541 Pa. 419, 663 A.2d 682 (1995), *(per curiam* order reversing the Superior Court), the Supreme Court upheld such provisions. In *Windrim,* the Court found that the "household exclusion provision" was valid, because relatives who were living with a named insured had decided not to purchase insurance for their own vehicles and then attempted to rely on uninsured motorist coverage under the named insured's policy. *Windrim,* 537 Pa. at 136, 641 A.2d at 1158; *See also: Eichelman v. Nationwide Ins. Co.,* 551 Pa. 558, 711 A.2d 1006 (1998).

Most recently, in *Burstein* v. *Prudential Prop. & Cas. Ins.* Co., 570 Pa. 77, 809 A.2d 204 (2002), the Supreme Court upheld the validity of an exclusion from underinsured motorists coverage for bodily injury caused "while using a non-owned car not insured under this part, regularly used by you...". Ms. Burstein, the insured was injured while driving a car provided by her employer for her regular use. In reversing the Superior Court's determination, the Court emphasized that, in light of the public policy concern for the increasing insurance costs as expressed in the MVFRL, it is an "arduous" task to invalidate otherwise clear policy exclusions on public policy grounds. *Burstein,* 570 Pa. at 185,809 A.2d at 208.

It is apparent that even in circumstances where a policy provision has been found to be violative of public policy. Such a conclusion does not preclude a different result in subsequent cases dealing with the same or a similar provision. The enforcement of a policy exclusion is dependant on the circumstances of each case. *Burstein v. Prudential Prop. & Cas. Ins. Co.,* 570 Pa. 177, 809 A.2d 204 (2002) (A public policy analysis of the validity of insurance contract provision is dependent on the circumstances of the case); *Paylor v. Hartford Ins. Co.*, 536 Pa. at 587, 595, 640 A.2d at 1235-1236, 1239-1240; *See also: Royal Ins. Co. of Am. v. Beauchamp,* 2002 U.S. Dist. LEXIS 7239 (E. D. Pa. 2002) (Insured voluntarily purchased inadequate underinsurance coverage; "household exclusion" enforceable); *Shelby Cas. Ins. Co. Statham,* 158 F. Supp.2d 610 (E. D. Pa., 2001) (Insured voluntarily chose not to purchase more underinsurance coverage on his own vehicle; "household exclusion" enforceable). In particular, where a legislative enactment has been modified or supplanted, as occurred with the repeal of the No-Fault Act and the adoption of the MVFRL, public policy considerations will need to be refocused. *Burstein v. Prudential Prop. & Cas. Ins. Co.,* 570 Pa. 177, 809 A.2d 204 (2002).

While there is no case in Pennsylvania analyzing the validity of the precise exclusion to the "non-owned car" coverage at issue in this case, the Superior Court has addressed an analogous provision. In *State Farm Mut. Auto. Ins. Co. v. Brnardic,* 441 Pa. Super. 566, 657 A.2d 1311 (1995), the Court was asked to determine whether a policy provision which excluded from "non-owned car' coverage a non-owned car that was used

for more than forty-five (45) days in a one year period. In that case, the insured, Joseph Brnardic, was operating a pickup truck owned by his employer. Mr. Brnardic's State Farm policy had expressly excluded a non-owned car that he operated "during any part of more than forty-five days in the three hundred sixty-five days preceding the date of the accident." *Brnardic,* 441 Pa. Super. at 567, 657 A.2d at 1312. Mr. Brnardic then argued that the exclusion violated public policy and was contrary to the MVFRL. He maintained that the law required that an insurance company provide the "greatest possible coverage to injured claimants." *Id.* In rejecting Brnardic's claim. The Court concluded that "the policy exclusion before us fully comports with Pennsylvania law, and makes good sense as well." *Brnardic,* 441 Pa. Super. at 568, 657 A.2d at 1313. The Court went on to explain that for sound practical reasons, insurance companies would not be expected to write coverage for unknown vehicles as the type of vehicle driven by an insured was a consideration in assessing liability costs. *Brnardic,* 441 Pa. Super. at 569, 657 A.2d at 1313. The Court commented:

> This exclusion makes sense: it is one thing to cover an insured while driving a borrowed car, but an insurer needs to know what cars its insured regularly drives in order to charge a proper rate, or even decide whether to take the risk of insuring the driver.

Brnardic, 441 Pa. Super. at 570, 657 A.2d at 1313 .

The Court found no public policy violation.

Turning then to the circumstances of this case, it is apparent that State Farm's policy clearly and unambiguously excludes from "non-owned car" coverage the vehicle Mr. Rust was operating at the time of the accident. *See: Gartner v. State Farm Mut. Auto. Ins. Co.,* 2000 R.I. Super. LEXIS 105 (2000) (finding State Farm's "non-owned car" exclusion for cars owned by a "person residing in the same household" as an insured to be unambiguous). Moreover, application of the public policy analysis summarized by the Court in *Eichelman v. Nationwide Ins. Co.*. 551 Pa. 558,711 A.2d 1006 (1998), leads to the conclusion that State Farm's "non-owned car" provision does not violate Pennsylvania's public policy as embodied in the MVFRL. There is no clear indication, let alone unanimity of opinion, that the exclusion violates public policy and there is nothing about the limitation *per se* from which it can be concluded that the provision is contrary to the "public health, safety, morals or welfare of the people". Turning then to an assessment of whether the "non-owned car" provision of the policy is inconsistent with the legislative intent underlying the MVFRL, it must be concluded that it is not. Pennsylvania appellate courts have now repeatedly found that the clear intent of the legislature in drafting the MVFRL was to limit the accelerating costs of motor vehicle liability insurance. *See: Burstein v. Prudential Prop. & Cas.*

Ins. Co., 570 Pa. 177, 809 A.2d 204 (2002); *Eichelman v. Nationwide Ins. Co.,* 551 Pa. 558, 563, 711 A.2d 1006, 1008 (1998); *Paylor v. Hartford Ins. Co:,* 536 Pa 583, 640 A.2d 1234 (1994); *Windrim v. Nationwide Ins. Co.* , 537 Pa. 129, 641 A.2d 1154 (1994); *Hart v. Nationwide Ins. Co.,* 541 Pa. 419, 663 A.2d 682 (1995); *State Farm Mut. Auto. Ins. Co. v. Coviello,* 2002 U.S. Dist. LEXIS 17318 (2002). To require an insurer to provide the coverage suggested by this case would most certainly not advance this objective.

In this case, although State Farm provides the coverage in circumstances where its insured is operating a non-owned vehicle, it limits such coverage by excluding the operation of vehicles owned by, registered to or leased by residents of the insured's household. It is obvious that the intent of this provision is to protect against those circumstances where an insured would have available unknown and unlimited vehicles to drive, thus making it significantly more difficult to assess risk. Premiums for motor vehicle insurance depend at least in part on the type of vehicle being insured. *Burstein v. Prudential Prop. & Cas. Ins. Co.,* 570 Pa. 177, 809 A.2d 204 (2002); *State Farm Mut. Auto. Ins. Co. v. Brnardic,* 441 Pa. Super. 566, 569, 657 A.2d 1311, 1313 (1995). As the Court noted in *Brnardic,* "(b)ecause liability costs depend on the type of car, insurance companies are entitled to know what kind of cars their insureds drive," *Id.* The MVFRL does not require an insurer to provide unlimited coverage and to cover all risks.[2] Moreover, the legislature left to the Insurance Department the responsibility of making rules and regulations for the administration and enforcement of the Act. 75 Pa.C.S.A. § 1704(b). Not only has the Insurance Department not addressed the issue in this case, but it has not adopted any rules or regulations concerning the substance of liability coverage to be provided by insurance companies. *See generally:* 31 Pa. Code §§ 61.1 - 64.14. A Court's determination that an insurance company must provide coverage for non-owned vehicles, including cars that belong to a household resident, would mean that an insurer would have to write policies without knowing the type of vehicle or the number of vehicles that are more likely to be available to an insured. This would most likely lead to an increase in the risk of loss and require a concomitant increase in premiums, a result the legislature intended to avoid.

Mr. Lilley has argued that the "non-owned car" provision in the policy is contrary to public policy because it is not limited to circumstances where the excluded vehicle is "regularly used" by the insured. For the

[2] Indeed, there are no express constraints on the type of coverage limitations a carrier my impose and the minimum coverage requirements are quite low. Further, the MVFRL leaves it to the Department of Transportation to determine the acceptable form of the financial responsibility that an insurer must offer. 75 Pa.C.S.A. § 1702.

Court to accept this position, it would have to make some sort of determination with regard to the underwriting significance of the "regular use" concept and adopt a standard policy provision that would meet public policy requirements, thereby substituting its judgment for that of the legislature and the Insurance Department. Mr. Lilley has not pointed to any authority that would require such an exercise. Moreover, it is never the role of the court to rewrite the parties' policy. *Garber v. Travelers Ins. Co.,* 280 Pa. Super. 323, 421 A.2d 744 (1980).

Accordingly, this Court cannot conclude that the public policy of the Commonwealth requires an insurance company to provide liability coverage for injuries resulting from the operation of a car owned by, registered to, or leased to a household resident. As a result, the Motion for Summary Judgment of Lilley will be denied and the Motion for Summary Judgment of State Farm will be granted.

An appropriate Order shall follow.

ORDER

AND NOW, to-wit, this 1 day of August, 2003, upon consideration of the Motion for Summary Judgment filed by the defendant State Farm Mutual Automobile Insurance Company and the Motion for Summary Judgment filed by Troy Lilley, Administrator of the Estate of Joseph Lilley, and argument thereon, and the Court finding that there are no material issues of fact in dispute, it is hereby **ORDERED, ADJUDGED and DECREED** as follows:

1. The Motion filed on behalf of State Farm is GRANTED;
2. the Motion filed on behalf of Troy Lilley is DENIED.

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

COMMONWEALTH OF PENNSYLVANIA
v.
CORY R. BROWN

CRIMINAL PROCEDURE / SUFFICIENCY OF EVIDENCE

Evidence is sufficient to sustain a conviction when, if viewed in the light most favorable to the Commonwealth as the verdict winner, and drawing all inferences favorable to the Commonwealth, the finder of fact could reasonably determine all elements of the crime have been established beyond a reasonable doubt.

In this case, where the minor victims testified and their evidence was collaborated by the testimony of a case worker for the Erie County Office of Children and Youth, a pediatric urologist, the victims' mother and the investigating police officer, there was sufficient evidence to sustain the defendant's conviction. The evidence presented in support of the defense does not require a contrary conclusion as it was within the province of the jury to determine the credibility of the witnesses and the ultimate facts. The evidence supported the verdicts and the conviction was not so contrary to the entire body of evidence as to shock the conscience of the court.

CRIMINAL PROCEDURE / SENTENCING

The court considered all relevant factors. The court did not consider the finding of the Sexual Offenders Assessment Board except for purposes of registration requirements. The court's decision to impose sentences consecutively was within the discretion of the court.

Appearances: Damon C. Hopkins, Esquire for the Commonwealth
W. Charles Sacco, Esquire for the Defendant

MEMORANDUM OPINION & ORDER

March 19, 2003: This matter is before the Court pursuant to Defendant's Motion for Judgment of Acquittal and/or Arrest of Judgment and Motion for Sentence Modification, which were received by this Court on March 6, 2003. For the reasons set forth below, the Defendant's Motions are hereby **DENIED**.

I. Factual & Procedural History

On December 14, 2001, Cory R. Brown, a/k/a "Reb," was charged with a multitude of sexual crimes as it pertained to his involvement and sexual contact with two minor children, K.A.E. and P.N.E. At the time the Information was drafted, K.A.E. was referred to as "K.A.E." and was age 8, and P.N.E. was referred in the Information as "P.N.E." and was age 6. The Information charged generally that, from December 25, 2000 to May 8, 2001, the Defendant engaged in a course of sexual conduct with these two minor victims. The matter proceeded to a jury trial which commenced on November 11, 2002 and ended on November 15, 2002, when the jury

unanimously rendered guilty verdicts for the following crimes: one (1) count of Rape (as it applied to K.A.E.), two (2) counts of Involuntary Deviate Sexual Intercourse (K.A.E.), one (1) count of Aggravated Indecent Assault (K.A.E.), two (2) counts of Endangering Welfare of Children (as it applied to K.A.E. and P.N.E.), two counts of Indecent Assault (K.A.E. and P.N.E.), and two (2) counts of Corruption of Minors (K.A.E. and P.N.E.). The Defendant was sentenced on February 24, 2003 and received an aggregate sentence of 15 1/2 years to 33 years of incarceration. Specifically, on Count 1, 4 and 7, Defendant was sentenced to mandatory minimum terms of incarceration pursuant to 42 Pa. C.S.A. §9718(a). The Defendant was sentenced on the remaining counts within the standard range of the guidelines. (*See* attached sentencing sheets).

Defendant now contends that the jury's unanimous verdict was against the sufficiency and weight of the evidence. Defendant also alleges the sentence given was improper and should therefore be modified. As demonstrated below, Defendant's contentions are rendered factually and legally meritless.

II. <u>Legal Discussion</u>

A. Defendant's Motion for Judgment of Acquittal and/or Arrest of Judgment

In Defendant's first allegation, he contends that both the sufficiency and weight of the evidence presented at trial were "inadequate to sustain a conviction in that both victims failed to offer specific details as to the time and circumstances when the alleged crimes were committed." (*See*, Defendant's Post Sentencing Motion at p. 2). Defendant continued and proffered the medical testimony could only offer "suspicious" conclusions not "tied directly to criminal activity." *Id.* The Defendant argues that the evidence presented by the Commonwealth fell "far short," as a matter of law, in satisfying the necessary burden of proof beyond a reasonable doubt. *Id.* Finally, the Defendant alleges the jury was "unduly influenced by the ages of the victims and failed to follow the instructions of the Court with regard to the burden of proof required to sustain a conviction." *Id.*

It is axiomatic, practically requiring no citation, that "the test for determining the sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the Commonwealth as verdict winner and drawing all proper inferences favorable to the Commonwealth, the fact-finder could reasonably have determined that all elements of the crime to have been established beyond a reasonable doubt." *Commonwealth v. Bishop*, 742 A.2d 178, 188 (Pa. Super. 1999); *Commonwealth v. Widmer*, 560 Pa. 308, 319, 744 A.2d 745, 751 (2000). A verdict is against the weight of the evidence only when it is "so contrary to the evidence as to shock one's sense of justice." *Commonwealth v. Mason*, 559 Pa. 500, 513 , 741 A.2d 708, 715 (1999); *Commonwealth v.*

Brown, 538 Pa. 410, 435, 648 A.2d 1177, 1189 (1994); *Commonwealth v. Zugay*, 745 A.2d 639, 645 (Pa. Super. 2000). "Moreover, it is within the province of the fact-finder to resolve all issues of credibility, resolve conflicts in evidence, make reasonable inferences from the evidence, and believe all, none, or some of the evidence presented." *Bishop, supra* at 189; *Zugay, supra* at 645.

The record of testimony in this case clearly demonstrates that the Commonwealth proved each element of the crimes charged beyond a reasonable doubt as confirmed by the jury's unanimous verdict. The Commonwealth elicited testimony from K.A.E., one of the victims, who testified at trial. K.A.E. testified she knew the Defendant as "Reb" and, during the time period in question, Reb lived in her house. "Reb" was K. B.'s, the mother of K.A.E. and P.N.E., boyfriend. In fact, K.A.E. testified she called Reb, "Daddy." She stated she knew the difference between good touches and bad touches and the bad touches did not make her feel good. She further continued and testified Reb had touched her in a bad way and he touched her with his hand in her front private part. Specifically, she testified he put his hand where she goes "pee pee." She also testified Reb made her touch his "weenie" and made her move it up and down. She demonstrated this motion to the jury, which simulated an act of masturbation. She continued and stated Reb put his "weenie" in the back of her "butt" and it hurt her. She also stated Reb put his hand in her "butt."

Her testimony also included a reference to Reb playing videotapes, and that the videotapes had "bad stuff" in them with both boys and girls with their clothes off, and she could see their private parts. K.A.E. was subjected to cross-examination and essentially reiterated the testimony she had provided in her direct testimony.

Following her testimony, the Commonwealth called P.N.E., K.A.E.'s younger sister, and also a named victim in the Information. Although not as specific as K.A.E. and at times not being able to remember facts clearly, she did testify she knew the difference between good touches and bad touches and that the bad touches by Reb made her feel "uncomfortable." She said Reb had a bad touch with her and touched her "front butt -- where she goes "pee." She also testified she was touched with Reb's "private part," however, could not remember what it looked like. She did testify she never had to touch him. Again, she was not as thorough in detail as K.A.E. and also stated that she never watched bad videos with Reb.

Corroborating the testimony of K.A.E. and P.N.E. was Erie County Office of Children and Youth caseworker, Tabbatha Battaglia. Ms. Battaglia testified that, during the course of her investigation, she had the opportunity to speak to K.A.E. and K.A.E. had told her she had a "secret." Ms. Battaglia stated K.A.E. called Reb her dad and that K.A.E. needed to

talk to her about this secret. Ms. Battaglia testified K.A.E. told her that her and Reb would lay down and Reb would "lick her butt" and then "Reb would stick his cock in back of her butt." She also testified K.A.E. told her that Reb put one finger inside of her butt and Reb made her move her hand up and down until white stuff would come out of his "weenie."

The Commonwealth called Dr. Justine Schober, who testified as an expert in pediatric urology. Dr. Schober testified that, in 16 years of practice, she has examined more the 3,000 children for signs or evidence of sexual abuse. She has been qualified as an expert and has testified in court as an expert on numerous occasions. Her testimony corroborated the testimony of K.A.E. Dr. Schober noticed K.A.E.'s anus had a loss of anal tone. She explained this finding to the jury. She further testified regarding the presence of fissures or small tears in the anus, which she observed during her medical examination, and rendered an opinion that this trauma was the result of sexual abuse. She was subjected to aggressive cross-examination and again rendered her opinion that K.A.E.'s examination revealed signs of sexual abuse.

The Defendant was permitted to call a witness out of order and called Dr. Susan Kaufman, D.O. Dr. Kaufman testified that she was Board certified in family practice; however, was not qualified as an expert in pediatric urology. Dr. Kaufman stated she had limited experience in sexual abuse cases and indicated on cross-examination that she has referred cases of abuse to Dr. Schober, who she recognized as an expert in this field. However, the defense did elicit from Dr. Kaufman that Dr. Kaufman's exam of K.A.E. and P.N.E. looked normal, and this included both an examination of the vaginal and rectal area. Again, however, Dr. Kaufman was subjected to cross-examination where her opinion was challenged with respect to the nature of the examinations she had performed on these children and her expertise, or lack thereof, in this area.

The Commonwealth had also called the mother of the daughters, K. B., and she testified regarding her observations of Reb's conduct with the children. Her testimony focused on Reb's odd desire to always want to stay at home and babysit the two girls alone while K.B. would go out.

Also, the Commonwealth called Corry Police Department Lieutenant Richard Shopene, who was the lead investigator in this case. Lieutenant Shopene testified that K.A.E. would often tell him about the bad touches that Reb would do to her and also those that Reb made her do to him. These statements also corroborated K.A.E.'s in-court testimony.

The defense then, after calling Dr. Kaufman out of order, began its case-in-chief and called witness Holly Trauner, who is an elementary school counselor. The Defendant elicited testimony from Ms. Trauner that she had a May 2001 meeting with K.A.E. and K.A.E. talked to her about "bad touches." However, during this meeting, she never mentioned the Defendant's name.

The defense called Amelia Nichols who had babysat for K.A.E. and P.N.E. on one occasion. She testified that during the time she babysat the children turned on the TV and watched adult programming, which included sexually explicit material.

The defense also intended to call Andrea Pigley, who was also a babysitter with Amelia Nichols. However, the parties stipulated she would testify consistently with Amelia Nichols that both K.A.E. and P.N.E. played sexual explicit adult programming on the television.

K.B. was recalled by the defense and subjected again to questioning regarding her motive or willingness to get Cory Brown in trouble if he ever left her. She denied ever making that statement. Apparently this was in an attempt to provide the jury with background information regarding the motive of K.B., as the mother of these two children, to somehow persuade them to fabricate allegations of sexual abuse by Cory Brown.

The defense then called Carl Bailey, who testified K. B. told him that if anybody ever made her mad she would get them in trouble. He also testified Ms. K.B. said she would get the kids to go along with her. To further support the Defendant's theory that the girls had fabricated this story at the bequest of their mother, Mico Jewell was called to testify. Mr. Jewell testified K.B. told him several years ago that if Cory Brown ever left her, she would "get him in trouble."

The defense also called Garnett E. Houser, who is the mother of the Defendant, to testify regarding her son's treatment of K.A.E. and P.N.E. and how the children interacted positively with him. She testified that her son loved both K.A.E. and P.N.E.

Finally, the Defendant himself testified and was subjected to the assessment of credibility by the jury. Of course, the defendant proclaimed his innocence and categorically denied any wrongdoing.

The jury had the benefit of this abundant amount of testimony. It is clear, there was an overwhelming amount of evidence for this jury to find the Defendant guilty beyond a reasonable doubt of the crimes charged. The jury deliberated conscientiously and fairly and did not rush to judgment. The jury was instructed by this Court in the preliminary instructions and in final instructions that they were the sole judges of the facts and credibility of the witnesses who testified. There was nothing to suggest that this jury did anything improper or utilized any improper information to reach its unanimous verdict.

Viewing the above evidence in the light most favorable to the Commonwealth, and all the reasonable inferences to be drawn from that evidence, the jury properly determined that all the elements of these crimes were established beyond a reasonable doubt. See, *Commonwealth v. Bishop, supra.* Continuing, the verdicts were not against the weight of the evidence and were not "so contrary to the evidence as to shock one's sense of justice," and certainly not this Court's. *See, Commonwealth v.*

Mason, supra.

The Defendant's claim that the medical testimony only presented "suspicious conclusions" is clearly erroneous. Dr. Schober delivered clear, concise, and convincing testimony, demonstrating her expertise in the area of pediatric urology. The evidence presented by the Commonwealth did not "fall far short" as a matter of law. Again, the jury in no way indicated that they were unduly influenced by the ages of the victims, and the suggestion by the Defendant that they were is merely a boilerplate and desperate attempt to somehow persuade this Court to grant a motion for judgment of acquittal, which this Court will not do.

For these reasons the Defendant's Motion for Judgment of Acquittal based on his challenge to the weight and sufficiency of evidence is **DENIED**.

B. Defendant's Motion for Sentence Modification

The Defendant contends the sentence imposed only focused on the seriousness of the offenses and failed to adequately consider the character and circumstances of the Defendant, including his lack of prior criminal record and the finding of the Sexual Offenders Assessment Board. (*See*, Defendant's Post-Sentencing Motion at p. 3). Once again, this Court finds these contentions are erroneous and do not persuade this Court to modify, in any way, the sentence that was imposed.

At the time of the sentencing, the Court considered a wide variety of factors. The Court considered the thoroughly prepared Pre-Sentence Investigative Report which was provided to both the Defendant, his attorney, and the attorney for the Commonwealth. There were no objections made to the conclusions set forth in that Pre-Sentence Investigative Report.

Also, the Court considered the application of Pennsylvania Sentencing Guidelines and, again, there were no issues raised by the Defendant regarding application of those guidelines. Defense counsel, Attorney Charles Sacco, did contend that some of the charges should merge for purposes of sentencing. The Court considered these arguments and the response by the Commonwealth. At sentencing, this Court set forth, on the record, the appropriate status of the law in Pennsylvania and denied the Defendant's request. (*See*, Transcript of the sentencing proceeding dated February 24, 2003, citing *inter alia, Commonwealth v. Gatling,* 807 A.2d 890, 2002 Pa. Lexus 2051 (Pa. Supreme Court, October 1, 2002.)).

This Court also considered the statements of defense counsel, the statements of the Defendant's friends and relatives, and the letters received by this Court which were written on behalf of the Defendant.

The Court also considered the statements of the Commowealth and the traumatic impact that these offenses had on the two young victims, K.A.E. and P.N.E. (the Court had available a Victim Impact Statement), and my observations of the girls at time of trial.

Of course, the Court also considered the nature and seriousness of these offenses, and the violation of the Defendant's position of trust he had established with the girls as a father figure. The Defendant clearly abused his position of trust for his own sexual gratification and selfish desires and pleasures.

The finding of the Sexual Offenders Assessment Board was considered by the Court but only for purposes of the registration requirements pursuant to Title 42 Pa. C.S.A §9795.1 *et seq*. The Court noted the Defendant did not qualify as a sexually violent predator, but was convicted of crimes that required him to undergo lifetime registration as set forth in §9795.1.

As a consequence of his convictions for the enumerated crimes, the Court imposed the mandatory minimum sentences that were applicable pursuant to the laws and statutes in Pennsylvania. *See*, 42 Pa. C.S.A §9718(a). The sentences for the other crimes were fashioned in the standard range and the Court ran many of these sentences consecutive to one another. The Court also did merge Count Three, Involuntary Deviate Sexual Intercourse, with Count One, Rape. Again, the Court refers to its reasons set forth on the record at the time of the sentencing wherein it explored the applicability of *Commonwealth v. Gatling*, *infra,* to these facts. (*See*, Transcript of Sentencing Proceedings, 2-24-03). The Court also ran Counts Thirteen and Fourteen concurrent to Counts Nine and Ten. Pursuant to 42 Pa. C.S.A. §9721 (a), the Court has discretion to make a sentence concurrent or consecutive with respect to the crimes facing a defendant for sentencing. *See also*, *Commonwealth v. Graham,* 541 Pa. 173, 661 A.2d 1367 (1995).

Consequently, for the reasons set forth above, the sentences were not illegal; they were set forth pursuant to consideration of numerous factors available to the Court and were, therefore, fair and appropriate under the circumstances.

The Defendant's request to modify the sentence is **DENIED**.

BY THE COURT:
/s/ **John J. Trucilla, Judge**

COMMONWEALTH OF PENNSYLVANIA
v.
CORY R. BROWN

CRIMINAL PROCEDURE / DIRECT APPEAL / INEFFECTIVENESS OF COUNSEL

As a general rule, claims of ineffective assistance of counsel should await collateral review. Ineffectiveness claims may be reviewed on direct appeal where there is an evidentiary record developing the claims and the trial court addresses the ineffectiveness claims in an opinion.

Where the defendant's claims of ineffectiveness of counsel have been raised on direct appeal and the ineffectiveness claims were not developed at trial, the court need not address those claims. The court will nonetheless address those issues as the defendant will probably be able to raise those same claims in a petition filed pursuant to the Post-Conviction Relief Act.

CRIMINAL PROCEDURE / POST CONVICTION / INEFFECTIVENESS STANDARD

A defendant raising a claim of ineffectiveness of counsel must overcome the presumption of counsel's competence by establishing (1) arguable merit of the underlying claim; (2) a lack of reasonable basis for the conduct of counsel; and (3) a reasonable probability of a different outcome.

Defendant's claim that trial counsel was ineffective for failing to challenge the competency of the two children who testified against him is rejected for failure to establish a reasonable probability of a different outcome where the two children were alert, answered the questions clearly and articulately, and showed no signs of confusion regarding the charges or the acts performed upon them.

There is no arguable merit to defendant's assertion of ineffectiveness in failing to object to the child witnesses being permitted to hold a stuffed animal while testifying nor is there any demonstration of a reasonable probability of a different outcome.

A general assertion of ineffectiveness due to the waiver of a preliminary hearing unsupported by any specific allegation of prejudice suffered as a result of the waiver is an insufficient basis upon which to find that trial counsel was ineffective.

CRIMINAL PROCEDURE / COMPETENCY HEARING / CHILDREN

In making a determination as to the competency of a child under the age of 14 to testify, the court in the exercise of its discretion must inquire as to whether the child possesses (1) capacity to communicate; (2) mental capacity to observe and remember; and (3) consciousness of the duty to speak the truth. The defendant's claim of error in failing to conduct a competency hearing is denied where the court conducted a colloquy at trial wherein each witness demonstrated the ability to understand questions and express intelligent answers, the ability to observe and remember, and a consciousness of the duty to speak the truth.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION NO. 2292 of 2002

Appearances: Damon C. Hopkins, Esq., for the Commonwealth
W. Charles Sacco, Esq., for the Defendant

MEMORANDUM OPINION & ORDER

I. PROCEDURAL HISTORY

August 4, 2003: On December 14, 2001, Cory R. Brown was charged with two (2) counts of Rape, four (4) counts of Involuntary Deviate Sexual Intercourse, two (2) counts of Aggravated Indecent Assault, two (2) counts of Endangering Welfare of Children, two (2) Counts of Indecent Assault and two (2) counts of Corruption of Minors. The Defendant's trial commenced on November 11, 2002. On November 15, 2002, a jury convicted Defendant of one (1) count of Rape, two (2) counts of Involuntary Deviate Sexual Intercourse, one (1) count of Aggravated Indecent Assault, two (2) counts of Endangering Welfare of Children, two (2) counts of Indecent Assault, and two (2) counts of Corruption of Minors. On February 24, 2003, Defendant received an aggregate sentence of sixteen and one-half to thirty-three years of incarceration. Post trial motions were then filed and this Court denied the Defendant's request for relief and set forth the findings in a Memorandum Opinion and Order dated March 19, 2003.[1]

Defendant filed his Notice of Appeal on April 4, 2003. On April 7, 2003, this Court ordered Defendant to file a Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. 1925(b). Defendant filed a motion on April 11, 2003 to extend time to file said motion until after all transcripts were filed. This Court granted that motion on April 11, 2003. All transcripts were filed on June 2, 2003. Defendant filed his 1925(b) response on June 30, 2003.[2] This Opinion follows.

II. FACTS[3]

On November 13, 2002, both K.A.E. and P.N.E. testified before this Court regarding their encounters with the Defendant when he was living with them as a paramour of their mother. K.A.E. and P.N.E. were the

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[1] See Memorandum Opinion and Order dated March 19, 2003 and attached hereto. *[Editor's note - 3/19/03 Opinion was published in ECLJ Vol. 86, No. 40 - Oct. 3, 2003]*

[2] The Honorable Judge Bozza is addressing Appellant's claims regarding the child witnesses' competency to testify, and the admission of testimony pursuant to 42 Pa.C.S.A. §5985. *See also*, transcript of hearing conducted on July 8, 2002 by Judge Bozza.

[3] The facts set forth herein are oriented only to the current 1925(b) Statement and a more extensive discourse of fact was presented in this Court's Opinion dated March 13, 2003.

victims of the sexual assault perpetrated by Cory Brown (hereinafter "Defendant"). At the time of their testimony, K.A.E. was ten (10) years old and P.N.E. was seven (7) years old. At the time of the assault, K.A.E. was eight (8) years old and P.N.E. was six (6) years old. At trial, K.A.E. testified first and brought a stuffed animal named "Ashley" to the stand. (Ct. Tr. of 11/13/2002 at 34.) This Court questioned K.A.E. about the difference between the truth and a lie and the inherent quality of badness associated with telling a lie. (Ct. Tr. of 11/13/2002 at 32-33.) K.A.E. satisfied this Court's inquiry and showed she knew the difference between telling the truth and telling a lie. Furthermore, K.A.E. made it clear she appreciated the oath that she took before this Court. (Ct. Tr. of 11/13/2002 at 34.)

After this Court's colloquy with K.A.E., the Commonwealth then asked K.A.E. if she understood why she was being called to testify, and whether she told the Judge she would tell the truth. (Ct. Tr. of 11/13/2002 at 36-37.) She answered in the affirmative to both of these inquiries. *Id*. On cross-examination, counsel for the Defendant asked K.A.E. if she had ever lied about the instant case, to which she testified "No." (Ct. Tr. of 11/13/2002 at 51.) In addition, K.A.E. clearly and accurately identified the Defendant. (Ct. Tr. of 11/13/2002 at 37.) K.A.E. was also able to provide lucid and articulate answers to questions posed by both attorneys and this Court. She showed no appearance of incompetence. Because of the sum of its inquiries and K.A.E.'s answers to them, this Court was satisfied that K.A.E. was able to competently testify. At no time during her testimony did K.A.E. ever give any indication that she was not competent to testify. She appropriately responded to each question she was asked.

P.N.E. testified after K.A.E. P.N.E., like K.A.E., had in her possession a stuffed animal when she testified. As with K.A.E., this Court conducted a colloquy with the young child in order to assess her ability to understand the difference between telling the truth and telling a lie. (Ct. Tr. of 11/13/2002 at 56-58.) P.N.E., like K.A.E., showed a knowledge and understanding of the difference between telling the truth and telling a lie. *Id.* P.N.E. was also able to accurately identify both the age of her older sister, K.A.E., as well as the Defendant, at trial. (Ct. Tr. of 11/13/2002 at 60-62.) Because of the sum of its inquiries and P.N.E.'s answers to them, this Court was satisfied that P.N.E. was able to competently testify.

III. LAW AND LEGAL ANALYSIS

Defendant prepared a 1925(b) response, with regard to trial court error, believing case law did not permit raising an ineffective assistance of counsel claim unless it was "apparent from the record." Defendant based his interpretation on the holding in *Commonwealth v. Grant,* 813 A.2d 726 (Pa. 2002). In *Grant*, the court held "...as a general rule, a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review." *Id*. at 738. Defendant claims there has been a series of cases questioning that panel decision. However, to answer the claims of

Defendant, there has been recent case law addressing when a reviewing court can consider a claim of ineffective assistance of counsel on direct appeal.

In *Commonwealth v. Bomar,* 2003 Pa. LEXIS 920, at pp. *43-48 (Pa. 2003) decided on May 30, 2003, the Pennsylvania Supreme Court held, notwithstanding *Grant* it would review ineffectiveness claims on direct appeal when there is an evidentiary record developing those claims and a trial court opinion addressing those claims. Clearly those circumstances do not exist in this case. In the instant matter there was no evidentiary hearing or trial court opinion addressing these ineffectiveness claims. *Bomar* appears to be limited to its very narrow facts.

In spite of the fact that *Bomar* was following *Grant's* holding, the court in *Bomar* held that it would review the ineffectiveness claim before it because:

> in contrast to the more common situation where ineffectiveness allegations are raised for the first time on appeal and the trial court is excluded from the review process, here, this Court has the benefit of the trial judge's evaluation of trial counsel's conduct in reviewing the claims, rendered close in time to the trial.

Bomar, 2003 Pa. LEXIS at *46.

More specifically, the facts show in *Bomar* that following sentencing, trial counsel withdrew from the case and proceeding counsel entered the matter and filed post-sentence motions on appellant's behalf, raising, *inter alia,* the same claims of trial counsel ineffectiveness that were raised before the court in *Bomar*. *See Bomar,* 2003 Pa. LEXIS at *44. In addition, the trial court conducted hearings on the post-sentence motions, at which appellant's trial counsel testified. *Id.* Moreover, the trial court addressed the ineffectiveness claims in its opinion. *Id.*

Contrary to *Bomar*, the Defendant in *Commonwealth v. Belak*, 825 A.2d 1252 (Pa. 2003), decided June 17, 2003, failed to raise any claims of trial counsel's ineffectiveness until he filed his statement of matters complained of on appeal pursuant to Rule 1925(b). *See Belak*, 825 A.2d at 1255. Consequently, in its Rule 1925(a) opinion, the trial court refused to consider Belak's ineffectiveness claims because no evidentiary record existed to address those claims. *Id.* Since there was no evidentiary record developing Belak's ineffectiveness claims, and given that the trial court opinion does not address those claims, *Bomar* was not applicable in *Belak*. *Id.* at 1254.

A similarly patterned situation is presented before this Court. Defendant did not develop an ineffectiveness claim at trial. Instead, he filed a direct appeal and in that appeal raised an ineffectiveness of counsel claim, *inter alia*. Because of this failure to develop such claims at trial, this Court would not need to address them. *See Belak*, 825 A.2d at 1255. The

facts before us are not analogous to *Bomar* and, therefore, we find *Belak* and *Grant* to be applicable.

However, as the Appellate Court will most likely dismiss Defendant's claims of trial counsel's ineffectiveness without prejudice to him to raise those claims in a petition filed pursuant to the Post-Conviction Relief Act, 42 Pa. C.S.A. §§9541-9546, this Court will address all claims, including the claim of ineffective assistance of counsel.

A. ISSUES COMPLAINED OF ON APPEAL

Assuming *arguendo* that a claim of ineffective assistance of counsel is properly before this Court for consideration, the claim will now be addressed. It is axiomatic that to prevail on a claim that counsel was constitutionally ineffective, the defendant must overcome the presumption of competence by showing: (1) his underlying claim is of , arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the challenged proceeding would have been different. See, *Commonwealth v. Bomar,* 2003 Pa. LEXIS 920, at p. *49 (decided May 30, 2003); *Commonwealth v. Pierce,* 786 A.2d 203, 213 (Pa. 2001); *See also*, *Commonwealth v. Kimball,* 724 A.2d 326, 333 (Pa. 1999). *See*, *Strickland v. Washington,* 466 U.S. 668 (1984).

A failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim. See, *Pierce,* 786 A.2d at 221-22; *See also*, *Commonwealth v. Albrecht,* 720 A.2d 693,701 (Pa. 1998). ("If it is clear that Appellant has not demonstrated that counsel's act or omission adversely affected the outcome of the proceedings, the claim may be dismissed on that basis alone and the court need not first determine whether the first and second prongs have been met.") Taking both what is necessary to prevail on a claim that counsel was ineffective, as well as the law that determines what will render a claim to be rejected, this Court will now address the Defendant's charges.

First, the Defendant alleges that trial counsel was ineffective in failing to challenge the competency of the two children witnesses when the case was rescheduled before this Court. This Court never saw reason to believe, and Defendant never asserted, that the two children were incompetent to testify in any way. At trial, they were alert and answered all questions in a reasonably clear and articulate manner, especially given the circumstances before them. They showed no signs of confusion regarding the charges (Ct. Tr. of K.A.E. on 11/13/2002 at 36.); (Ct. Tr. of P.N.E. on 11/13/2002 at 63.), or what acts had been performed on them by the Defendant. (Ct. Tr. of K.A.E. on 11/13/2002 at 38-47.); (Ct. Tr. of P.N.E. on 11/13/2002 at 63-66.) In addition, the Defendant does not show how, but for this asserted ineffectiveness, there is a reasonable probability that the outcome would have been different. *See, Pierce*. As this claim fails to

satisfy the third criteria that the Defendant must meet in showing that his counsel was constitutionally ineffective, it is therefore rejected without a decision on the first two prongs of the test. *See, Pierce*, 786 A.2d at 221-22; *See also*, *Albrecht,* 720 A.2d at 701.

The Defendant's second charge that trial counsel was ineffective in failing to object to child witnesses being able to testify with the aid or assistance of a stuffed animal is a meritless claim. No additional sympathy would be engendered by this stuffed animal above and beyond that already present in a trial involving children who had been sexually assaulted. The sympathy that might already exist in the jury's minds for these two young girls would not be enhanced because of the existence of what essentially would be the equivalent of a security blanket for a child who could be quite easily overwhelmed by the trial process. Again, the Defendant does not show how, but for this asserted ineffectiveness, there is a reasonable probability that the outcome would have been different. *See*, *Pierce*. There is no asserted measure of prejudice alleged by Defendant other than a mere conclusory claim. As this claim fails to satisfy either the first or third standard that the Defendant must reach in order to show his counsel was constitutionally ineffective, this claim is therefore rejected. *See*, *Pierce,* 786 A.2d at 221-22; *See also, Albrecht,* 720 A.2d at 701.

Third, the Defendant alleges that trial counsel was ineffective in failing to have a preliminary hearing. Defendant's contention that trial counsel was ineffective because he waived the preliminary hearing is unsupported by an averment of specific prejudice. He contends only that his defense was hampered because failing to secure testimony in a case where credibility is involved makes it impossible to challenge inconsistent testimony at trial. This is too general to entitle Appellant to relief. *Commonwealth v. McBride,* 570 A.2d 539, 541. Also, Mr. Brown was never denied his right of confrontation because he did get the opportunity to cross-examine these girls and the other Commonwealth witnesses. The credibility of the Commonwealth's case was vigorously attacked and exposed to the jury. It was the sole duty of this jury to find the facts and assess credibility. Defendant cannot articulate any prejudice from not pursuing a preliminary hearing because none was suffered by Defendant.

"We cannot consider ineffectiveness claims in a vacuum; rather, appellant must set forth an offer to prove at an appropriate hearing sufficient facts to allow the reviewing court to conclude that counsel was ineffective." *Commonwealth v. Ray,* 751 A.2d 233, 236 (Pa. Super. 2000). Defendant avers nothing other than the possibility of challenging inconsistent testimony at trial. There is no offer by the Defendant to dispute any of the testimony presented at trial. Defendant instead only offers a general claim that he suffered because he was deprived the

opportunity of perhaps being able to challenge the victims' inconsistent testimony. This is not a legal claim but a mere statement of wishful thinking. With no specificity in his own claims, Defendant wishes instead for issues to be conjured for him. This Court will not do so.

"In the absence of a more specific allegation regarding the prejudice suffered by appellant due to the waiver of a preliminary hearing, we find no basis upon which to find trial counsel ineffective with respect thereto." *McBride,* 570 A.2d at 541. The Defendant here had the benefit of counsel and chose to waive his preliminary hearing. "Counsel is presumed to be effective and [Defendant] has the burden of proving otherwise." *Ray*, 751 A.2d at 236. Defendant has not done so in the instant case. Accordingly, this Court will not consider this charge.

Finally, the Defendant contends this Court was in error ghen it failed to conduct a competency hearing regarding the witnesses. Both witnesses in question are under the age of fourteen. When the witness is under fourteen years of age, there must be a searching judicial inquiry as to mental capacity, but discretion nonetheless resides in the trial judge to make the ultimate decision as to competency. *See*, *Commonwealth v. McMaster*, 666 A.2d 724 (Pa. Super. 1995). In making its determination as to the extent of the child's competency, the court must inquire whether the child possesses:

> (1) such capacity to communicate, including as it does both an ability to understand questions and to frame and express intelligent answers, (2) mental capacity to observe the occurrence itself and the capacity of remembering what it is that she is called to testify about and (3) a consciousness of the duty to speak the truth.

Commonwealth v. D.J.A., 800 A.2d 965 (Pa. Super. 2002)

This Court conducted a colloquy at trial of both witnesses to ascertain their level of competence, which included their ability to understand questions and express intelligent answers (Ct. Tr. of K.A.E. 11/13/2002); (Ct. Tr. of P.N.E. of 11/13/2002); their capacity to observe the occurrence and remember what they are called to testify about (Ct. Tr. of K.A.E. of 11/13/2002 at 37-39, *inter alia);* (Ct. Tr. of P.N.E. of 11/13/2002 at 63-66, *inter alia.);* and their consciousness of the duty to speak the truth. (Ct. Tr. of K.A.E. of 11/13/2002 at 32-34); (Ct. Tr. of P.N.E. of 11/13/2002 at 56-58). In its colloquy and the responses given to the examination which followed, this Court was able to adequately satisfy each element necessary in making its determination as to the competency of the child witnesses. Therefore, accordingly, this Court found the witnesses competent to testify.

III. CONCLUSION

In light of the above, this Court concludes that Defendant has no basis to support his claim of ineffective assistance of counsel. In addition, this

Court did not err in allowing the child witnesses to testify while having a stuffed animal in their possession. Furthermore, this Court did not err in its ruling that the children were competent to testify before the jury. Consequently, the Defendant's request for a new trial is **DENIED**.

IV. ORDER

AND NOW, to-wit, this 4th day of August 2003, for the reasons set forth in the accompanying Opinion, it is hereby **ORDERED, ADJUDGED** and **DECREED** that Defendant's request for a new trial is **DENIED**

BY THE COURT:
/s/ **John J. Trucilla, Judge**

COMMONWEALTH OF PENNSYLVANIA
v.
CORY R. BROWN

EVIDENCE / HEARSAY / EXCEPTIONS / TENDER YEARS

Hearsay is generally inadmissible at trial unless it falls into one of the exceptions to the hearsay rule. The tender years exception to the hearsay rule mandates that an out-of-court statement made by a child victim or witness, describing physical abuse, indecent contact or other sexual offense performed with or on the child by another, not otherwise admissible by statute or rule of evidence, is admissible in evidence in any criminal or civil proceeding if: (1) the court finds, in an in camera hearing, that the evidence is relevant and that the time, content and circumstances of the statement provide sufficient indicia of reliability, and (2) the child either: (i) testifies at the proceeding; or (ii) is unavailable as a witness. 42 P.S. §5985.1.

EVIDENCE / HEARSAY / EXCEPTIONS / TENDER YEARS

The proponent of the statement must notify the adverse party of the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceeding at which the proponent intends to offer the statement, in order to provide the adverse party a fair opportunity to meet the statement. 42 P.S. §5985.1(b).

EVIDENCE / HEARSAY / EXCEPTIONS / TENDER YEARS

The tender years exception allows for the admission of a child's out-of-court statement due to the fragile nature of young victims of sexual abuse. However, any statement admitted under §5985.1 must possess sufficient indicia of reliability, as determined from the time, content, and circumstances of its making.

EVIDENCE / HEARSAY / EXCEPTIONS / TENDER YEARS

Once a witness is shown to be unavailable, his statement is admissible only if it bears adequate indicia of reliability.

EVIDENCE / COMPETENCY

Competency of a witness is presumed and the burden falls upon the objecting party to demonstrate incompetency. When the witness is under fourteen years of age, there must be a searching judicial inquiry as to mental capacity, but discretion rests in the trial judge to make the ultimate decision as to competency.

EVIDENCE / COMPETENCY

A child witness is competent to testify if he possesses: (1) such capacity to communicate, including as it does both an ability to understand questions and to frame and express intelligent answers; (2) mental capacity to observe the occurrence itself and the capacity of remembering what it is that she is called to testify about; and (3) a consciousness of the duty to speak the truth.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 2992 - 2001

Appearances: Damon C. Hopkins, Esquire, for the Commonwealth
Timothy J. Lucas, Esquire, for the defendant

OPINION

Bozza, John A., J.

Defendant Cory R. Brown was called to trial before the Honorable John A. Bozza on July 8, 2002, accused of engaging in sexual conduct with two minor children, K.A.E., age 8, and P.N.E., age 6. On July 9, 2002, a mistrial was declared. On November 12, 2002, Mr. Brown was again called to trial, this time before the Honorable John J. Trucilla. On November 15, 2002, Mr. Brown was found guilty by a jury of the following crimes: one count of rape of a person less than 13 years of age[1] (K.A.E.); two counts of involuntary deviate sexual intercourse ("IDSI") with a person less than 13 years of age[2] (both victims); one count of aggravated indecent assault of a person less than 13 years of age[3] (K.A.E.); two counts of endangering the welfare of children[4] (both victims); two counts of indecent assault of a person less than 13 years of age[5] (both victims); and two counts of corruption of minors[6] (both victims).

On February 24, 2003, Mr. Brown was sentenced by the Honorable John J. Trucilla as follows:

Count 1 - Rape of Person Less than 13 Years of Age - costs; five (5) years to ten (10) years incarceration;

Count 3 - IDSI of Person Less than 13 Years of Age - merges with sentence imposed at Count 1;

Count 4 - IDSI of Person Less than 13 Years of Age - costs; five (5) years to ten (10) years incarceration, consecutive to sentence imposed at Count 1;

Count 7 - Aggravated Indecent Assault of Person Less than 13 Years of Age - costs; two and one half (2 1/2) years to five (5) years incarceration, consecutive to sentence imposed at Counts 1 and 4;

Count 9 - Endangering Welfare of Children - costs; nine (9) months to twenty-four (24) months incarceration, consecutive to sentence imposed at Counts 1, 4 and 7;

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[1] 18 P.S. § 3121(a)(6).
[2] 18 P.S. § 3123(a)(6).
[3] 18 P.S. § 3125(7).
[4] 18 P.S. § 4304(a).
[5] 18 P.S. § 3126(a)(7).
[6] 18 P.S. § 6301(a).

Count 10 - Endangering Welfare of Children - costs; nine (9) months to twenty-four (24) months incarceration, consecutive to sentence imposed at Counts 1, 4, 7 and 9;

Count 11 - Indecent Assault of Person Less than 13 Years of Age - costs; nine (9) months to twenty-four (24) months incarceration, consecutive to sentence imposed at Counts 1, 4, 7, 9 and 10;

Count 12 - Indecent Assault of Person Less than 13 Years of Age - costs; nine (9) months to twenty-four (24) months incarceration, consecutive to sentence imposed at Counts 1, 4, 7, 9, 10, and 11;

Count 13 - Corruption of Minors - costs; nine (9) months to twenty-four (24) months incarceration, concurrent to sentence imposed at Count 9;

Count 14 - Corruption of Minors - costs; nine (9) months to twenty-four (24) months incarceration, concurrent to sentence imposed at Count 10.

Mr. Brown received an aggregate sentence of fifteen and one half (15 1/2) years to thirty-three (33) years incarceration. A Post-Sentence Motion was filed on March 5, 2003, which was denied in a Memorandum Opinion and Order filed by the Honorable John J. Trucilla on March 19, 2003. Mr. Brown filed a Notice of Appeal on April 4, 2003. On April 11, 2003, Mr. Brown was granted an extension of time in which to file a 1925(b) Statement of Matters Complained of on Appeal so that transcripts could be prepared. Mr. Brown then filed his 1925(b) Statement on June 30, 2003.

Mr. Brown has raised two issues with respect to rulings made by the Honorable John A. Bozza, namely that the Court erred

1. in finding that the proffered Commonwealth testimony qualified as admissible hearsay pursuant to 42 P.S. § 5985.1; and

2. in concluding that the two victims, each under the age of 13, were competent to testify.

These assertions of error focus on the Commonwealth's filing of a Notice of Intention to Offer Tender Years Testimony Pursuant to 42 P.S. § 5985.1 on February 27, 2002. Hearsay is generally inadmissible at trial unless it falls into one of the exceptions to the hearsay rule. *Commonwealth v. Bean,* 450 Pa. Super. 574, 677 A.2d 842 (1996). The tender years exception to the hearsay rule, section 5985.1 of the Judicial Code, mandates that

> an out-of-court statement made by a child victim or witness, who at the time the statement was made was 12 years of age or younger, describing physical abuse, indecent contact or any of the offenses enumerated in 18 Pa. C.S. Ch. 31 (relating to sexual offenses) performed with or on the child by another, not otherwise admissible by statute or rule of evidence, is admissible in evidence in any criminal or civil proceeding if:

1. the court finds, in an in camera hearing, that the evidence is relevant and that the time, content and circumstances of the statement provide sufficient indicia of reliability; and

2. the child either:
   i. testifies at the proceeding; or
   ii. is unavailable as a witness.

42 P.S. § 5985.1(a).
The proponent of the statement must notify the adverse party of the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceeding at which the proponent intends to offer the statement, in order to provide the adverse party a fair opportunity to meet the statement. 42 P.S. § 5985.1(b). The Pennsylvania Superior Court has noted that the tender years exception "allows for the admission of a child's out-of-court statement due to the fragile nature of young victims of sexual abuse." *Commonwealth v. O'Drain,* 2003 Pa. Super. LEXIS 2064, **8 (2003)(*citing Commonwealth v. Fink,* 791 A.2d 1235, 1248 (Pa. Super. 2002)). Further, "any statement admitted under § 5985.1 must possess sufficient indicia of reliability, as determined from the time, content, and circumstances of its making." *Id.*

Mr. Brown does not challenge the fact that proper notice was given, but instead appears to challenge the Court's determination that the statements of the victims provided sufficient indicia of reliability. The Court conducted an in camera hearing on July 8, 2002, prior to the start of Mr. Brown's first trial. At the time of the hearing, the Commonwealth offered the testimony of Lieutenant Richard C. Shopene, City of Corry Police Department; Tabatha Battaglia, former Erie County Office of Children and Youth intake specialist; K.B., mother of the victims; Detective Joseph J. Spusta, a county detective with the Erie County District Attorney's Office who is assigned to the Crimes Against Children unit; and the two victims, K.A.E. and P.N.E.

The Commonwealth indicated in the notice that (1) Lt. Shopene will testify to all the statements made to him by the victims that are recorded in his police reports; (2) Detective Spusta will testify to the statements made by the victims which he witnessed during interviews conducted by Lt. Shopene and which are recorded in Lt. Shopene's police reports; (3) K.B. will testify to the statements made to her by the victims regarding abuse committed by the defendant which are recorded in Lt. Shopene's police reports; and (4) Ms. Battaglia will testify to the statements the victims made to her in her capacity as an intake counselor for the Office of Children and Youth, and which are recorded in Lt. Shopene's police reports and in the CY -104 forms Ms. Battaglia filed with the Corry Police Department.

I. Statements by K.A.E.

The testimony concerning the statements made by K.A.E. focused on several interviews with the child that occurred several weeks apart. The first interview of K.A.E. was by Ms. Battaglia, and took place at the child's school, Wright Elementary in Corry, on May 8, 2001. At that time, Ms. Battaglia, using open-ended questions, asked K.A.E. if she knew what a secret was. (Tender Years Hearing Transcript, 7/8/02, p. 53). In response, K.A.E. informed her that she had a "bad secret" and that "Reb" told her not to tell anyone. (H. T., 7/8/02, p. 54). K.A.E. told her that Reb was her dad and that he lived with her, her mother, and her sister. (H. T., 7/8/02, p. 55). K.A.E. also told Ms. Battaglia that Reb would "lick her butt", and "stick his cock in the back of her butt". (H.T., 7/8/02, p. 51). K.A.E. also stated that the defendant would have "white stuff come out of his cock". (H.T., 7/8/02, p. 51). These were the terms that K.A.E. used to describe the activity, and K.A.E. was able to point to the areas of her body in reference to these actions. (H.T., 7/8/02, p. 51).

Ms. Battaglia then proceeded to the child's residence at [address], and was accompanied by Lt. Shopene. The person identified by K.A.E. as "Reb" was determined to be the defendant, Cory Brown, and Mr. Brown was asked to leave the residence at that time. (H. T., 7/8/02, p. 56). At that time, K.A.E. was interviewed by Lt. Shopene. Lt. Shopene testified that he spoke privately with K.A.E., and basically listened as she spoke to him. (H.T., 7/8/02, p. 20). K.A.E. told him that Mr. Brown had put his "cock in her butt", and demonstrated how she had masturbated the defendant. (H. T., 7/8/02. p. 21). K.A.E. explained that these events took place while her mother was in the bathroom, on the computer, or out for the evening. (H.T., 7/8/02, p. 21). K.A.E. also stated that, a few days earlier, her mother had walked in on K.A.E. and the defendant while K.A.E. had been touching the defendant's genitals, and that the defendant made her hug him to cover up their actions. (H. T., 7/8/02, p. 22).

The next interview of K.A.E. occurred on May 7, 2001, and took place at the Children's Advocacy Center. Ms. Battaglia and Lt. Shopene again interviewed K.A.E., and K.A.E. was described by Ms. Battaglia as very talkative. (H. T., 7/8/02, p. 64). At that time, K.A.E. drew a picture and told Ms. Battaglia that it was "Reb's cock". (H. T., 7/8/02, p. 64). K.A.E. also told Ms. Battaglia that she had to "lick Reb's butt", "suck Reb's cock" and "suck his two things by his cock". (H. T., 7/8/02, pp. 64-65). K.A.E. also reiterated her statement that the defendant had put his "cock in her butt", and said that this hurt her, and was "bad stuff". K.A.E. also described masturbating Mr. Brown, and told Ms. Battaglia that she had to do it "hard and fast". (H. T., 7/8/02, p. 65). K.A.E. said these events occurred in her mother's bedroom. (H. T., 7/8/02, p. 64). These statements were reiterated by Lt. Shopene in his testimony. (H. T., 7/8/02, pp. 23-25). Ms. Battaglia testified that she was aware that K.A.E. was borderline

mentally retarded, and that her concern was for such a young child to be asking sexually explicit questions, particularly to a stranger. (H.T., 7/8/02, pp. 62, 77).

Lt. Shopene testified that he saw K.A.E. again two times in June, 2001. On the first occasion, Lt. Shopene had stopped at the child's home, and testified that K.A.E. came up to him and asked him if he believed her. (H. T., 7/8/02, p. 28). Lt. Shopene stopped again at the child's home on June 23, 2001, and K.A.E. again told him that the defendant would put his "cock in her butt", demonstrated masturbating the defendant, and asked him if he believed her. (H.T., 7/8/02, p. 28). Lt. Shopene interviewed K.A.E. again on July 25, 2001, at the Children's Advocacy Center, and this interview was witnessed by Detective Spusta and ADA Damon Hopkins, Esquire. K.A.E. again told Lt. Shopene that the defendant put his "cock in her butt", and that it "hurt really bad". (H. T., 7/8/02, p. 30). K.A.E. also demonstrated masturbating the defendant, performing oral sex on the defendant, and stated that the defendant would "lick her front and butt". (H.T., 7/8/02, p. 30). K.A.E. also stated that the defendant made her "eat the white stuff that came out of the top of his "cock", but that she would spit it out. (H. T., 7/8/02, p. 31). Lt. Shopene testified that this interview was more like a conversation, with K.A.E. coming forward with the information without a lot of questioning. (H.T., 7/8/02, pp. 31-32).

Detective Spusta's testimony echoed that of Lt. Shopene, as his testimony is based on the interviews conducted by Lt. Shopene that Detective Spusta witnessed. Detective Spusta testified that on K.A.E.'s second time at the Children's Advocacy Center, he heard K.A.E. say that she was forced to lick Reb's "cock", "butt" and "the things that were near Reb's cock", and "eat the white stuff that same out of the top of Reb's cock". (H. T., 7/8/02, p. 113). Detective Spusta also testified that he saw K.A.E. demonstrate masturbating the defendant, and heard her say that the defendant had "would take his cock and put it up her butt and that this hurt". (H. T., 7/8/02, p. 113). K.A.E. also stated that the defendant licked her "privates", and pointed to her front area. (H. T., 7/8/02, p. 113). K.A.E. also pointed to her buttocks when she referred to that area. (H. T., 7/8/02, p. 114). Detective Spusta recalled that K.A.E. explained that the term "cock" was what the defendant told her to use. (H. T., 7/8/02, p. 114). Detective Spusta described K.A.E. as "an easy interview. You could ask her a basic open-ended question and she would talk for a great deal of time, telling you pretty much what she had to say". (H. T., 7/8/02, p. 114).

K.A.E.'s mother, K.B., testified that the children had not told her anything about the abuse before the police came to the house to interview the children on May 8, 2001. (H.T., 7/8/02, p. 91). K.B. stated that K.A.E. then told her about her contact with the defendant, stating that she would "play with his cock", and that she would put his "cock" in her mouth, and that "white stuff" would come out. (H. T., 7/8/02, p. 92). K.A.E. explained

that Reb had used the term "cock", and said that she would spit out the white stuff from her mouth. (H. T., 7/8/02, p. 92). K.B. stated that K.A.E. told her this information without any questioning by K.B., and that this occurred after Lt. Shopene had left. (H. T., 7/8/02, pp. 93, 103- 104). K.B. did state that she asked K.A.E. if she was assaulted by any of her other babysitters, and that K.A.E. had told her no. (H.T., 7/8/02, pp. 95-96).

K.B. testified that K.A.E. had begged her repeatedly to believe her, and told her that she was not lying. (H. T., 7/8/02, pp. 96-97). K.B. explained that the defendant would often tell her that "my girls...were lying all the time to me, and I think that they always heard his [sic] say that they ain't nothing but liars, and she wanted to make sure that I believed her, because he would always say they're lying." (H.T., 7/8/02, p. 97). On cross-examination, K.B. admitted that she told the representative of the Office of Children and Youth that "sometimes [K.A.E.'s] stories don't add up right because of her slowness", and that K.A.E. lied a lot. (H.T., 7/8/02. p. 106). K.B. qualified this statement, however, saying that the defendant had "always convinced me that [K.A.E.] did lie". (H.T., 7/8/02, p. 106).

K.B. also recalled Lt. Shopene asked her about the "hugging" incident a few days before, and whether K.B. recalled seeing the defendant with K.A.E. in the bedroom a few days earlier. (H. T., 7/8/02, p. 102). K.B. testified that her bedroom door was open, and she entered the room and saw K.A.E. sitting on the bed with the defendant apparently on his knees next to the bed, hugging K.A.E. (H. T., 7/8/02, p. 103). K.B. testified that she asked what they were doing, and the defendant told her that he was giving her a hug. (H.T., 7/8/02, p. 102). K.B. testified that she felt something was not right, but that she "didn't think nothing of it" at the time. (H.T., 7/8/02, pp. 102-104). K.B. said she asked K.A.E. about the "hugging" incident several days after Lt. Shopene first interviewed K.A.E. (H. T., 7/8/02, p. 104). K.B. testified that K.A.E. told her that the defendant said "I think your mom's coming, so slowly touch it, and don't let her know what we're doing" (H.T., 7/8/02, p. 105).

When determining whether the Commonwealth has met its burden pursuant to 42 Pa. C.S.A. § 5985.1, the Court must assess whether the "time, content and circumstances" of the proffered statements provide sufficient indications of reliability to justify their admission at the time of trial. *Commonwealth v. Delbridge,* 771 A.2d 1, 6 (Pa. Super. 2001), *petition for allowance of appeal granted,* 566 Pa. 618, 783 A.2d 764 (2001) (citations omitted). A searching inquiry is contemplated. Here, following the hearing, this Court concluded that the statements made by K.A.E. were sufficiently reliable for a jury to hear them. Specifically, the Court stated that

> With regard to (K.A.E.], the indicia [of reliability] are many and varied, but they would include, among other things, the manner in

> which she spoke on virtually all those occasions, the absence of any sort of prodding or leading questions on the part of the interviewers, the unusual explicitness of her—of her comments, her familiarity with various terms, as well as her candor. Those things all indicate the reliability of her statements.
> In addition to that, it's noteworthy that the statements were quite consistent over a considerable period of time, and there's at least some independent corroboration for their reliability with regard to the matter of the mother coming into the room and observing what was described as hugging. The statement that the child made to the mother in response to the question about that incident is also admissible, because the manifestations of its reliability are obvious from the record here this morning and this afternoon.

(H. T., 7/8/02, pp. 125-126).

The testimony of the four witnesses called by the prosecution at the time of the hearing revealed that the time, content and circumstances of the statements made by the child to Lt. Shopene, the caseworker, Ms. Battaglia and her mother contained multiple indicia of reliability.[7] It was apparent that the child was able to speak to investigators spontaneously and without prompting or the necessity of leading questions. See: *Commonwealth v. Bean,* 450 Pa. Super. 574, 677 A.2d 842 (1996) (child victim had tendency to tell adults what he believed they wanted to hear; Court should have more scrupulously inquired as to whether child was subjected to any suggestive interrogation). The child provided extraordinary detail, including vivid descriptions of the alleged sexual acts. On one occasion, she provided a drawing of the defendant's anatomy. (H.T., 7/8/02, p. 64; Com. Exh. 1). On another occasion, she described how she had to go to the bathroom and vomit following an incident of oral sex[8]. (H. T., 7/8/02, p. 92).

The statements made to Lt. Shopene and to Ms. Battaglia were remarkably consistent over a three-month period (i.e. May 8 to July 25, 2001). The statements made to her mother were consistent with those made to the police officer and the OCY caseworker. The child's description of the painful nature of the experience was a telling indication of the likely reality of what had occurred rather than some fantasized or

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[7] It is noted that the caseworker and Lt. Shopene were present together for at least two of the interviews. The caseworker and the mother were also present together for at least one of the interviews.

[8] Although not directed to the "time, content and circumstances" of the statement, the child's mother provided testimony that corroborated the manner in which the child testified one of the encounters occurred, namely the one in the bedroom where the mother arrived unexpectedly.

fabricated portrayal. (H. T., 7/8/02, p. 25). The fact that K.A.E. was able to vividly demonstrate what had occurred, including such detail as her position on the bed and the anatomical parts involved, in an age-appropriate manner was of significance in assessing whether her cognitive impression was consistent with the actual nature of the acts performed. (H.T., 7/8/02, pp. 21-23, 30, 65). At eight years old, K.A.E.'s familiarity with the acts she described and the terms she used would have been unexpected, absent significant personal experience. Although K.A.E. was characterized as being "borderline" mentally retarded, the nature, content and circumstances of her statements indicated that her cognitive skills were more than sufficient to allow her to recall events, describe conduct, and communicate with adults. Finally, there was absolutely nothing in the record to suggest neither any motive for lying, nor a proclivity for such elaborate fabrication.

This case does not present a circumstance like that found in *Commonwealth v. Bean,* 450 Pa. Super. 574, 677 A.2d 842 (1996), where the Court determined that the child was unavailable because he was found not competent to testify on the basis of his tendency to lie to adults. Here, the child was found to be competent, and in fact testified at the time of trial in November, 2002, and was subject to cross-examination. Where the child is available to testify, the concerns manifested by the United States Supreme Court in *Idaho v. Wright,* 497 U.S. 805, 110 S. Ct. 3139,111 L.Ed.2d 638 (1990) and *Ohio v. Roberts,* 448 U.S. 56, 100 S. Ct. 2531, 65 L.Ed.2d 597 (1980), as well as by the Superior Court in *Commonwealth v. Hanawalt,* 419 Pa. Super. 411, 615 A.2d 432 (1992) (child was incompetent to testify and therefore "unavailable"), need to be viewed in a somewhat different context.[9] K.A.E. was available for cross-examination, and at the time of trial in November, 2002, was asked about her statements to others about the defendant's actions. The jury had the opportunity to observe her confrontation on this matter of substantial significance and assess her truthfulness. This is to be compared to the situation where the alleged victim does not testify at trial and the prior out of court statements are introduced without the benefit of the defendant's opportunity to cross-examine the child to test the truthfulness and accuracy of what she said in the past. The testimony provided to the Court provided sufficient indicia of the reliability of K.A.E.'s statements and their admission in the circumstances of this case was proper.

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[9] In *Ohio v. Roberts,* the Court noted that ". . . once a witness is shown to be unavailable, 'his statement is admissible only if it bears adequate 'indicia of reliability''...". *Commonwealth v. Bean,* 450 Pa. Super. at 579, 677 A.2d at 844, fn 4 *(quoting Ohio v. Roberts,* 448 U.S. 56, 100 S. Ct. 2531, 65 L.Ed.2d 597 (1980)).

II. Competency Issue

Mr. Brown also challenges the Court's determination that the two victims, each under the age of 13, were competent to testify at trial. The Pennsylvania Superior Court has stated that

> [c]ompetency of a witness is presumed and the burden falls upon the objecting party to demonstrate incompetency. When the witness is under fourteen years of age, there must be a searching judicial inquiry as to mental capacity, but discretion nonetheless rests in the trial judge to make the ultimate decision as to competency. . . A child witness is competent to testify if he possesses:
>
> 1. such capacity to communicate, including as it does both an ability to understand questions and to frame and express intelligent answers,
>
> 2. mental capacity to observe the occurrence itself and the capacity of remembering what it is that she is called to testify about and
>
> 3. a consciousness of the duty to speak the truth.

Commonwealth v. Delbridge, 771 A.2d 1, 6 (Pa. Super. 2001), *petition for allowance of appeal granted,* 566 Pa. 618,783 A.2d 764 (2001) (citations omitted).

The Court conducted a thorough inquiry of both K.A.E. and P.N.E. at the time of the competency hearing, which took place immediately following the tender years hearing on July 8, 2002. Each child was able to answer the Court's questions intelligently, and each child stated that she was aware of her duty to speak the truth. *See:* Hearing Transcript, 7/8/02, pp. 127-143. Each child was able to answer questions concerning how old they were, where they went to school, the names of their teachers, and with whom they were living at the time. (H. T., 7/8/02, pp. 127, 129- 132, 135-137). Each child testified that telling the truth was the right thing to do, and that they each intended to tell the truth when asked a question by anyone. (H.T., 7/8/02, pp. 132-133, 137-141). Also, each child was able to identify the defendant. (H. T., 7/8/02, pp. 134, 141-142). The answers provided by each child showed that both children had (1) a capacity to communicate, including an ability to understand questions and to frame and express intelligent answers, (2) mental capacity to observe the occurrence itself and the capacity of remembering what it is that they were each called to testify about, and (3) a consciousness of the duty to speak the truth.

In addition, with regard to K.A.E., the Court had the benefit of substantial testimony with regard to the statements she had previously made concerning the allegations in the case. As noted above, that testimony indicated that she had the mental capacity to recall events and to recount prior occurrences in substantial detail. Moreover, K.A.E.'s statements demonstrated a sufficient ability to respond to questions in an

intelligent manner. Based on the record before the Court, the objecting party did not meet its burden, and the Court properly concluded, that each child was competent to testify at trial.

As to the remaining assertions of error set forth in the defendant's 1925(b) Statement, the Court hereby adopts and incorporates by reference herein for all purposes the Memorandum Opinion issued in this matter and filed August 4, 2003 by the Honorable John J. Trucilla, for the purposes of Rule 1925(a) of the Pennsylvania Rules of Appellate Procedure.

Signed this 7 day of August, 2003.

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

COMMONWEALTH OF PENNSYLVANIA
v.
CORRINE D. WILCOTT

CRIMINAL LAW / SUFFICIENCY OF EVIDENCE

The test for determining the sufficiency of evidence is whether viewing the evidence presented in a light most favorable to the verdict winner, together with all reasonable inferences drawn therefrom, the evidence is sufficient to prove each material element of a crime beyond reasonable doubt.

CRIMINAL LAW / AGGRAVATED ASSAULT

When the defendant knew that the victim was pregnant and defendant attempted to cause the victim serious bodily harm by grabbing her by the hair from behind, knocking her down, dragging her and, repeatedly kicking her in the abdomen, the jury's verdict of aggravated assault was supported by sufficient evidence.

CRIMINAL PROCEDURE / MERGER

The preliminary consideration in determining whether there is a merger of criminal offenses is whether the facts on which both defenses are charged constitute one solitary criminal act. If the offenses stem from two different criminal acts, merger analysis is not required. If, however, the event constitutes a single criminal act, a court must then determine whether or not the two convictions should merge.

CRIMINAL PROCEDURE / MERGER

In order for two convictions to merge from one solitary criminal act, (1) the crimes must be greater and lesser-included offenses and (2) the crimes charged must be based on the same facts. If either prong is not met, merger is inappropriate.

CRIMINAL PROCEDURE / MERGER

One crime is a lesser-included offense of a crime for purposes of merger if, while considering the underlying factual circumstances, the elements constituting the lesser crime as charged are all included within the elements of the greater crime and the greater offense includes at least one additional element that is not a requisite for committing the lesser crime.

CRIMINAL PROCEDURE / MERGER

For purposes of merger, "the same facts" means any act or acts which the accused has performed and any intent which the accused has manifested regardless of whether these acts and intents are part of one criminal plan, scheme, transaction, or encounter, or multiple criminal plans, schemes, transactions, or encounters.

CRIMINAL PROCEDURE / MERGER

For purposes of merger, all the elements of aggravated assault (the lesser crime) are not included in the criminal homicide/third degree murder of an unborn child (the greater crime) because the former applies to an entity outside the womb while the latter is specifically directed to an entity

within a mother's womb.

CRIMINAL PROCEDURE / MERGER

For purposes of merger of criminal offenses, in attacking the victim the defendant's intent was two-fold: (1) revenge on the victim for sleeping with the defendant's husband and (2) the death of the victim's unborn child. These differing intents are manifested by the defendant's statements made during the unprovoked attack. This aggravated assault of the victim does not merge with the third degree murder of the victim's unborn child.

EVIDENCE / RELEVANCE

The basic requisite of admission of any evidence is that it be both competent and relevant. Evidence is both "competent" if it is material to the issues to be determined at trial and "relevant" if it tends to prove or disprove a material fact in issue.

EVIDENCE / RELEVANCE

It is the trial court's function to exclude any evidence which would divert attention from the primary issues in the case; thus the trial judge has broad discretion regarding the admissibility of potentially misleading or confusing evidence.

EVIDENCE / RELEVANCE

A trial court may properly exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading of the jury. However, "prejudice" for the purposes of this rule does not mean detrimental to a party's case but rather an undue tenancy to suggest a decision on an improper basis.

EVIDENCE / RELEVANCE

Where a physician's testimony regarding the victim's sexually transmitted diseases would be more unfairly prejudicial than probative, where neither the victim's previous infection nor her past sexual history were relevant, and the defendant's expert was allowed to give his opinion that the fetus died of an infection, exclusion of the victim's sexually transmitted diseases was proper.

EVIDENCE / RELEVANCE

An expert's report was not required of the Commonwealth's medical expert witness where the physician testified about her own actions and observations regarding the delivery of the fetus and where the defendant did not file a motion requesting the preparation of a expert report. Pa. R. Crim. P. 573(B)(2)(b).

CRIMINAL LAW / AGGRAVATED ASSAULT

The intent to commit aggravated assault is established when the accused intentionally acts in a manner which constitutes a substantial or significant step toward perpetrating serious bodily injury upon another.

CRIMINAL LAW / AGGRAVATED ASSAULT

Where the defendant knew the defendant was pregnant and the defendant's intent can be inferred from her conduct and statements, there was sufficient proof of intent to commit aggravated assault.

CRIMINAL LAW / AGGRAVATED ASSAULT

The victim's statement that she "was as much at fault" as the defendant does negate the defendant's intent or justify an arrest of judgment or judgment of acquittal, as an admission of moral responsibility of having an affair is not an admission of factual liability.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION NO. 2426 A & B OF 2002

Appearances: John H. Daneri, Esquire, for the Commonwealth
Timothy J. Lucas, Esquire, for the Defendant

MEMORANDUM OPINION

PROCEDURAL HISTORY/FACTS

August 14, 2003: On July 2, 2002, the Erie Police Department filed a Criminal Complaint against Corrine D. Wilcott (hereinafter the "Defendant") charging her with Criminal Homicide of an Unborn Child[1], Aggravated Assault of an Unborn Child[2], Aggravated Assault[3], Simple Assault[4], and making Terroristic Threats[5]. These charges stem from the following conduct: The victim/mother, Sheena Carson, began having an intimate relationship with the Defendant's husband, Kareem Wilcott, who eventually impregnated Ms. Carson. The Defendant was informed that Ms. Carson's pregnancy was caused by her husband.

At approximately 1:30 A.M. on June 8, 2002, at a graduation party located at 2046 Downing Avenue in Erie, Pennsylvania, the Defendant grabbed Ms. Carson from behind by the hair, pulled her to the ground, and dragged her approximately six to ten feet along the sidewalk. During the assault, the Defendant kicked the right side of Ms. Carson's abdomen at least two times with the side of her right foot. At the time of this incident the victim was approximately 15.2 weeks pregnant with Mr. Wilcott's unborn child. Ms. Carson indicated that while kicking her, the Defendant stated, "I told you I was going to get you for sleeping with my husband." and, "I hope this bastard dies." Someone eventually pulled the Defendant off Ms. Carson.

[1] 18 Pa. C. S. A. §§2603, 2604 & 2605.
[2] 18 Pa. C. S. A. §2606.
[3] 18 Pa. C. S. A. §2702(a)(1).
[4] 18 Pa. C. S. A. §2701(a)(1).
[5] 18 Pa. C. S. A. §2706.

Approximately forty-five minutes to an hour later, Ms. Carson went to Saint Vincent's Hospital because she felt a cramping pain in her stomach area. Members of the hospital staff could not hear the baby's heartbeat. A few days later, Ms. Carson saw her OB/GYN physician, Dr. Bu, who also could not detect a fetal heartbeat. Dr. Andrea Jeffress subsequently removed the fetus stillborn. Prior to this incident, Ms. Carson had seen Dr. Bu on two occasions and he indicated the baby had no health problems.

A Preliminary Hearing was held on August 30, 2002, and after testimony was presented, the case was bound over for trial. Subsequently, on October 2, 2002, the Erie County District Attorney's Office filed a Criminal Information charging Ms. Wilcott with the above-referenced crimes.

The Defendant filed an Omnibus Pre-Trial Motion on November 27, 2002 and a Supplemental Omnibus Pre-Trial Motion on December 18, 2002, that included challenges to the constitutionality of the Pennsylvania Crimes Against Unborn Children Act (hereinafter "PACAUCA"). The Court denied each of the issues raised in the Defendant's Omnibus Pre-Trial Motions at the conclusion of the Suppression Hearing held on December 13, 2002 and upheld the constitutionality of the PACAUCA in its Opinion & Order dated January 24, 2003. On February 5, 2003, the Defendant filed a Motion for Change of Venue or Venire that was denied by Memorandum Opinion & Order dated February 7, 2003.

After a five-day trial ending on March 26, 2003, a jury found the Defendant guilty of Third Degree Murder of an Unborn Child, Aggravated Assault of an Unborn Child, Aggravated Assault (Sheena Carson), Simple Assault (Sheena Carson) and making Terroristic Threats. The Defendant was sentenced on June 26, 2003, as follows: at Docket #2426A of 2002, Count #1A -- eighty-four (84) months to one hundred sixty-eight (168) months incarceration in a State Bureau of Corrections facility; at Docket #2426B of 2002, Count #1B merges with Count #lA at Docket #2426A of 2002, and costs; Count #2B -- five (5) years probation, consecutive to Count #lA at Docket #2426A of 2002, $250 restitution, and costs; Count #3B -- one (1) year probation, consecutive to Count #2B, and costs; and Count #4B -- two (2) years probation, consecutive to Count #3B, restitution, and costs. The Defendant filed a timely Post-Trial Motion Pursuant to Pennsylvania Rule of Criminal Procedure 720 on July 7, 2003. This Memorandum Opinion is in response to the issues raised therein.

DISCUSSION

The Defendant's Motion to Modify or Reconsider Sentence is directed solely to the sentence imposed at Count #2B of Docket #2426B of 2002, the aggravated assault on Ms. Carson. The Defendant asserts her kicking Ms. Carson in the stomach was minimal conduct but resulting in significant injury and, therefore, an aggravated assault verdict is unwarranted and legally unjustified. The Defendant is challenging the

sufficiency of the evidence regarding the aggravated assault of Ms. Carson.

The test for determining the sufficiency of the evidence is whether viewing the evidence presented in a light most favorable to the verdict winner, together with all reasonable inferences drawn therefrom, the evidence is sufficient to prove each material element of a crime beyond a reasonable doubt. *See, Commonwealth v. Widmer,* 560 Pa. 308, 744 A.2d 745 (2000); *Commonwealth v. Bishop,* 742 A.2d 178 (Pa. Super. 1999). Aggravated assault of another is defined as follows:

> A person is guilty of aggravated assault if he: **attempts to cause serious bodily injury to another**, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life. 18 Pa. C.S.A. §2702(a)(1). (Emphasis added).

In the present case, the Defendant knew Sheena Carson was pregnant and she attempt to cause Ms. Carson serious bodily injury by grabbing her by the hair from behind, knocking her down, dragging her, and repeatedly kicking her in the abdomen. *See,* Jury Trial Transcript (Day 3), March 21, 2003, pp. 54-57 & 76-78. Therefore, the aggravated assault verdict is supported by sufficient evidence.

The Defendant also asserts that based upon the facts pled in the Criminal Information, the aggravated assault of Ms. Carson should merge with the third degree murder of the fetus at Docket #2426A of 2002. The facts pled in Criminal Information are as follows:

> [DOCKET #2426B of 2002] COUNT TWO: AND THE DISTRICT ATTORNEY FURTHER CHARGES that on the day and year aforesaid in the said County of Erie and State of Pennsylvania, the said CORRINE D. WILCOTT did attempt to cause serious bodily injury to another, or caused such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life, to-wit: SHEENA CARSON, in that the said CORRINE D. WILCOTT did KICK THE VICTIM IN THE ABDOMEN SEVERAL TIMES, CAUSING AN ABRUPTION OF THE PLACENTA FROM THE UTERINE WALL, WHICH CAUSED THE DEATH OF THE FETUS, occurring at 2046 DOWNING AVENUE; thereby the said CORRINE D. WILCOTT did commit the crime of AGGRAVATED ASSAULT, a felony of the first degree.
>
> [DOCKET #2426A of 2002] COUNT ONE: The District Attorney of Erie County by this Information charges that on (or about) JUNE 8, 2002, in the said County of Erie and State of Pennsylvania, the said CORRINE D. WILCOTT did intentionally, knowingly, recklessly or

> negligently cause the death of an unborn child, to-wit: BOY FETUS CARSON, IN THAT THE DEFENDANT DID KICK SHEENA CARSON, MOTHER OF THE FETUS, IN THE ABDOMEN SEVERAL TIMES, CAUSING AN ABRUPTION OF THE PLACENTA FROM THE UTERINE WALL, WHICH CAUSED THE DEATH OF THE FETUS, occurring at 2046 DOWNING AVENUE; therefore, the said CORRINE D. WILCOTT did commit the crime of CRIMINAL HOMICIDE/MURDER OF AN UNBORN CHILD.

In *Commonwealth v. Gatling,* 807 A.2d 890 (2002), the Pennsylvania Supreme Court set forth the following standard regarding merger of criminal offenses:

> The preliminary consideration is whether the facts on which both offenses are charged constitute one solitary criminal act. If the offenses stem from two different criminal acts, merger analysis is not required. If, however, the event constitutes a single criminal act, a court must then determine whether or not the two convictions should merge. In order for two convictions to merge: (1) the crimes must be greater and lesser-included offenses; and (2) the crimes charged must be based on the same facts. If the crimes are greater and lesser-included offenses and are based upon the same facts, the court should merge the convictions for sentencing; if either prong is not met, however, merger is inappropriate. One crime is a lesser-included offense of another crime if, while considering the underlying factual circumstances, the elements constituting the lesser crime as charged are all included within the elements of the greater crime, and the greater offense includes at least one additional element that is not a requisite for committing the lesser crime. Thus, in a situation where the crimes, as statutorily defined, each have an element not included in the other but the same narrow fact satisfies both of the different elements, the lesser crime merges into the greater-inclusive offense for sentencing.... 'The same facts' means any act or acts which the accused has performed and any intent which the accused has manifested, regardless of whether these acts and intents are part of one criminal plan, scheme, transaction or encounter, or multiple criminal plans, schemes, transactions or encounters.

Id. at 899.

In the instant case, the charges of Aggravated Assault of Ms. Carson and Criminal Homicide/Murder of the fetus stem from the same criminal act *(i.e.* the Defendant kicking Ms. Carson in the abdomen). Therefore, the Court must determine whether the two convictions merge.

Criminal Homicide of an Unborn Child and Murder of an Unborn Child are defined as follows:

> an individual commits criminal homicide of an unborn child if the individual intentionally, knowingly, recklessly or negligently causes the death of an unborn child in violation of section 2604 (relating to murder of unborn child) or 2605 (relating to voluntary manslaughter of unborn child). 18 Pa. C.S.A. §2603.
>
> A criminal homicide of an unborn child constitutes first degree murder of an unborn child when it is committed by an intentional killing....
>
> A criminal homicide of an unborn child constitutes second degree murder of an unborn child when it is committed while the defendant was engaged as the principal or an accomplice in the perpetration of a felony. . .
>
> All other kinds of murder of an unborn child shall be third degree murder of an unborn child. 18 Pa. C.S.A. §2604.

18 Pa. C.S.A. §3203 defines an "unborn child" as "an individual organism of the species *homo sapiens* from fertilization until live birth." Aggravated assault of a person is defined above.

Applying the standard set forth in *Gatling,* all the elements of aggravated assault of another (the lesser crime) are not included in the criminal homicide/third degree murder of an unborn child (the greater crime) because the former applies to an entity outside of the womb, while the latter is specifically directed to an entity within a mother's womb. Moreover, the crimes in the present case are not based on "the same facts." In attacking Sheena Carson, the Defendant's intent was two-fold: 1) revenge on Ms. Carson for sleeping with her husband, Kareem Wilcott; and 2) the death of Ms. Carson's unborn child. The Defendant's differing intents are manifested by her statements made during the unprovoked attack (*i.e.* "I told you I was going to get you for sleeping with my husband" and "I hope the bastard dies"). *See,* Jury Trial Transcript (Day 3), March 21, 2003, pp. 55 & 57. Therefore, the aggravated assault of Ms. Carson does not merge with the third degree murder of her unborn child.

The Defendant also requests an Arrest of Judgment or Judgment of Acquittal due to several alleged errors in her trial. The Defendant asserts the Court erred in determining that the Pennsylvania Crimes Against Unborn Children Act (18 Pa. C.S.A. §2601 *et seq.*) is constitutional. The Court incorporates herein by reference its Opinion & Order dated January 24, 2003, which specifically addressed this issue at length.

The Defendant asserts the Court erred by not allowing her to enter Sheena Carson's medical history that included evidence of prior vaginal infection and of sexually transmitted diseases. The Defendant claims this evidence was essential and necessary to buttress her medical expert, Dr.

Miles J. Jones, who opined that the fetus died of an infection. Pa. R.E. 403 provides that, "Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." In *Hutchison v. Luddy,* 763 A.2d 826 (Pa. Super. 2000), the Pennsylvania Superior Court stated:

> The basic requisite for the admission of any evidence is that it be both competent and relevant. Evidence is 'competent' if it is material to the issues to be determined at trial, and 'relevant' if it tends to prove or disprove a material fact in issue. The question of whether the evidence is relevant and, therefore, admissible rests within the sound discretion of the trial court and will not be reversed on appeal absent a showing that the court clearly abused its discretion. **It is the court's function to exclude any evidence which would divert attention from the primary issues in the case, thus the trial judge has broad discretion regarding the admissibility of potentially misleading or confusing evidence**. A trial court may properly exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues or misleading of the jury. However, 'prejudice' for the purposes of this rule, does not mean detrimental to a party's case, but rather, an undue tendency to suggest a decision on an improper basis. In Pennsylvania, the trial judge has broad discretion regarding the admission of potentially misleading and confusing evidence.

Id. at 838. (Emphasis added).

In the instant case, Dr. Jones' testimony regarding Ms. Carson's sexually transmitted diseases would be more unfairly prejudicial than probative and was therefore excluded, pursuant to Pa. R.E. 403. Neither Sheena Carson's previous infection, nor her past sexual history, were relevant. Also, the Defendant was not prejudiced by the exclusion of these facts because, at trial, Dr. Jones was allowed to give his opinion that the fetus died of an infection.

The Defendant asserts that the Court erred in allowing the Commonwealth to present the opinion testimony of Dr. Andrea T. Jeffress as a medical expert witness, not a fact witness as indicated by the Commonwealth prior to trial, without providing the Defendant with an expert report. In the instant case, Dr. Jeffress did not prepare an expert report. As the Commonwealth's witness, Dr. Jeffress testified about her actions and observations regarding the delivery of the fetus and, therefore, no expert report was required. Dr. Jeffress provided opinions at trial based upon her own observations and the tests results she ordered.

Moreover, the Defendant did not object to Dr. Jeffress as being qualified as an expert witness at trial and did not object to her opinions on

the record. The Defendant was aware the Commonwealth intended to call Dr. Jeffress as a witness and did not file a motion requesting the preparation of an expert report by her. *See,* Pa. R. Crim. P. 573 (B)(2)(b) **Pretrial Discovery and Inspection: Disclosure by the Commonwealth: Discretionary With the Court** (Upon a defendant's motion, the Court may order the Commonwealth's expert to prepare a report and the Commonwealth to disclose the report to the defendant).

Pa. R. Crim. P. 573 is designed to prevent prejudice to a defendant in the form of surprise. In the present case, the Defendant was aware Dr. Jeffress was testifying as a witness for the Commonwealth and therefore, was not surprised. Although Dr. Jeffress' opinion was that the fetus died of an abruption, she did not offer any opinion regarding the cause of the abruption. The Commonwealth's medical expert, Dr. Eric Vey, testified that the fetus died from "traumatic placental abruption" as a result of "blunt force trauma" that came from outside of Ms. Carson's abdomen. *See,* Jury Trial Transcript (Day 4), March 24, 2003, pp. 124 & 140. Furthermore, Defendant's counsel was provided with, and asked questions from, Dr. Jeffress' medical reports. Dr. Jeffress did not opine to any issues that were not included in her reports during her testimony. Therefore, the admission of Dr. Jeffress' testimony was not in error.

The Defendant asserts aggravated assault verdict is insufficient as a matter of law since there was insufficient proof of the Defendant's intent from kicking the victim in the abdomen. This claim is without merit. The Pennsylvania Superior Court stated in *Commonwealth v. Rosado,* 454 Pa. Super. 7, 684 A.2d 605 (1996) that aggravated assault does not require proof that serious bodily injury was inflicted, but only that an attempt was made to cause such injury. The "intent to commit aggravated assault is established when the accused intentionally acts in a manner which constitutes a substantial or significant step toward perpetrating serious bodily injury upon another." *Id.* at 25-26, 684 A.2d at 609. As noted above, the Defendant knew Ms. Carson was pregnant, and the Defendant's intent can be inferred from her conduct *(i.e.* knocking down, dragging, and kicking a pregnant woman in the abdomen). Moreover, the Defendant's statement, "I told you I was going to get you for sleeping with my husband." is evidence of her intent to inflict serious bodily injury upon Ms. Carson.

The Defendant asserts that Sheena Carson's letter dated June 26, 2003, which states that she "was as much at fault as Corrine" (the Defendant), is a sufficient and significant admission negating the Defendant's intent and justifying an arrest of judgment or judgment of acquittal on all of the charges. At the sentencing hearing on June 26, 2003, the Court determined Ms. Carson's admission was of moral responsibility for having an affair with a married man, not an admission of factual liability. Moreover, Ms. Carson's admission does not eviscerate or exonerate the facts of the

Defendant's unprovoked attack upon her, or the Defendant's intent as manifested by her statements, "I told you I was going to get you for sleeping with my husband." and "I hope this bastard dies." *See*, Jury Trial Transcript (Day 3), March 21, 2003, pp. 55 & 57. Consequently, the Defendant's assertion lacks merit.

The Defendant asserts the verdict of third degree murder of the unborn child is against the weight of the evidence because the placental bruise was on the fetal side, not the abdominal side of the placenta as would be the case if kicking cause the fetus' death. The Defendant's claim is simply mistaken. According to the Commonwealth's medical expert, Dr. Eric Vey, the bruise went through the placenta and was evident on both the abdominal (maternal) side and the fetal side. Dr. Vey further stated that the placental bruise was larger on the maternal side than on the fetal side, indicating a blunt force trauma from outside of Ms. Carson's body. *See*, Jury Trial Transcript (Day 4), March 24, 2003, pp. 199-120, 122-124. Based upon the evidence presented at trial, the verdict of third degree murder of the unborn child is not so contrary to the evidence as to "shock one's sense of justice." *Commonwealth v. Mason*, 559 Pa. 500, 513, 741 A.2d 708, 715 (1999); *Commonwealth v. Brown*, 538 Pa. 410, 435, 648 A.2d 1177, 1189 (1994); *Commonwealth v. Zugay*, 745 A.2d 639, 645 (Pa. Super. 2000).

CONCLUSION

For the foregoing reasons, the Defendant's Motion to Modify or Reconsider Sentence and Motions for Arrest of Judgment or Judgment of Acquittal are denied. An Order will follow.

ORDER

AND NOW, to-wit, this 14th day of August 2003, it is hereby **ORDERED, ADJUDGED** and **DECREED** that the Defendant's Post-Trial Motions, specifically her Motion to Modify or Reconsider Sentence, and Motions for Arrest of Judgment or Judgment Acquittal, are hereby **DENIED**.

BY THE COURT:
/s/ **John J. Trucilla, Judge**

THOMAS A. FEDORKO and KELLY A. FEDORKO
v.
ERIE INSURANCE EXCHANGE

INSURANCE / RESIDENT OF THE HOUSEHOLD

The law in Pennsylvania provides that a child of divorced or separated parents may be a resident of the households of both parents. *Erie Ins. Company/Erie Ins. Exch. v. Flood,* 168 Pa. Commw. 258, 649 A.2d 736 (1994). Residence is not to be determined on the basis of one's intentions, and it is not automatic that a child of divorced parents resides in both households. *Amica Mut. Ins. Co. v. Donegal Mut. Ins. Co.,* 376 Pa. Super. 109, 545 A.2d 343 (1988).

INSURANCE / RESIDENT OF THE HOUSEHOLD

The term "resident" used in the Erie Insurance policy has previously been found to be ambiguous. *Erie Ins. Company/Erie Ins. Exch. v. Flood,* 168 Pa. Commw. 258, 649 A.2d 736 (1994). Other definitions of resident have also been found to be ambiguous in Pennsylvania. *See: Nationwide Mut. Ins. Co. v. Ortiz,* 2001 U.S. Dist. LEXIS 13801 (M. D. Pa., 2001).

INSURANCE / RESIDENT OF THE HOUSEHOLD

Household has been defined "as those who dwell under the same roof and compose a family" *Boswell v. South Carolina Ins. Co.,* 353 Pa. Super 108,115, 509 A.2d 358, 362 (1986).

INSURANCE / RESIDENT OF THE HOUSEHOLD

Sporadic visits to relative's households are insufficient to establish residency. *See: Norman v. Pennsylvania Nat'l Ins. Co.,* 453 Pa. Super. 569, 684 A.2d 189 (1996).

INSURANCE / AMBIGUITY

A contract will be found to be ambiguous if, and only if, it is reasonably or fairly susceptible to different constructions, is capable of being understood in more senses than one, is obscure in meaning through indefiniteness of expression, or has a double meaning. *Erie Ins. Company/Erie Ins. Exch. v. Flood,* 168 Pa. Commw. at __,649 A.2d at 738. Any ambiguity of the insurance policy must be construed in favor of the insured. *Id.*

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 14243 OF 2001

Appearances: Charles D. Agresti, Esq., for the plaintiffs
Catherine Moodey Doyle, Esq., for the defendant

OPINION

Bozza, John A., J.

This matter came before the Court on Thomas and Kelly Fedorko's action for declaratory judgment. At issue is Kelly Fedorko's eligibility to

receive under-insured motorist coverage pursuant to a policy issued by the defendant, Erie Insurance Exchange, to Thomas A. Fedorko. This matter was called to trial on July 22, 2003, and at that time no testimony was provided, as the parties had agreed on a set of stipulated facts, as well as the submission of additional evidence in the form of pre-trial depositions and affidavits. (Oral Argument Transcript, 7/22/03, pp. 2-5.) Most, but not all, of the relevant facts are undisputed. They may be briefly summarized as follows.

Kelly A. Fedorko was involved in a motor vehicle accident on September 8, 2000. At the time of the accident, she was operating her mother's 1988 Chevy Berretta. As a result of the accident, she suffered serious injuries, and she was provided with compensation from the responsible party's insurance carrier in the sum of $100,000.00, the limits of the policy. Ms. Fedorko also settled a claim for first policy benefits under a policy issued to her mother in the amount of $75,000.00. She then proceeded to make a claim for under-insured motorist benefits (UIM), pursuant to her father's policy issued by the defendant. Erie Insurance Exchange denied coverage on the basis that Ms. Fedorko was not a "resident" of her father's household.

Thomas A. Fedorko and Kelly's mother, Robin Tidd, had been divorced since 1985, and Kelly enjoyed a continuing relationship with both parents. There was no formal custody agreement, however, the parties agreed that the children would reside primarily with Robin. Kelly's mother resided in the City of Erie, and her father resided in Millcreek Township. Kelly graduated from Central High School in Erie.

The law in Pennsylvania provides that, in the circumstances of this case, a child of divorced or separated parents may be a resident of the households of both parents. *See: Erie Ins. Company/Erie Ins. Exch. v. Flood,* 168 Pa. Commw. 258, 649 A.2d 736 (1994); *Amica Mut. Ins. Co. v. Donegal Mut. Ins. Co.,* 376 Pa. Super. 109, 545 A.2d 343 (1988). It is apparent, on the basis of the facts to which the parties have stipulated, that Kelly Fedorko was a resident of her mother's home.[1] The question remains as to whether she was also a resident of her father's home.

Initially, the plaintiffs argue that the term "resident" as used in the defendant's policy is ambiguous. The applicable policy provision states as follows:

> **"relative"** means a **resident** of **your** household who is:
> 1. a person related to **you** by blood, marriage or adoption, or
> 2. a ward or any other person under 21 years old in **your** care.

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[1] In one of the stipulated facts, No. 20, Kelly Fedorko resided primarily with her mother during the 1999-2000 school year at 3922 Stanton Road. *See also*: Stipulated Facts, Paragraphs 22, 23, 24, 25 and 26.

> "**resident**" means a person who physically lives with you in your household. **Your** unmarried, unemancipated children under age 24 attending school fulltime, living away from home will be considered **residents** of **your** household.

(Family Auto Insurance Policy, 1997 ed., p. 4, Exhibit A to Answer and New Matter.)

Plaintiffs have accurately noted that the term "resident" used in the Erie Insurance policy has previously been found to be ambiguous. *Erie Ins. Company/Erie Ins. Exch. v. Flood,* 168 Pa. Commw. 258, 649 A.2d 736 (1994). Since the *Flood* decision, Erie Insurance Exchange has modified its policy position to include a definition of the term "resident", which describes a resident as "a person who physically lives with **you** in **your** household." (Family Auto Insurance Policy, 1997 ed., p. 4, Exhibit A to Answer and New Matter.) Unfortunately, this definition does little to resolve the ambiguity inherent in the term "resident."[2] While this definition eliminates living arrangements that are not "physical" or where living is not in a "household", it does not provide any other guidelines to distinguish among the considerable variety of common living arrangements in contemporary society. Therefore the term "relative" remains ambiguous because as defined in the defendant's policy, it "is capable of being understood in more senses than one." As the Commonwealth Court noted in *Erie Ins. Company/Erie Ins. Exch. v. Flood,*

> a contract will be found to be ambiguous if, and only if, it is reasonably or fairly susceptible to different constructions, is capable of being understood in more senses than one, is obscure in meaning through indefiniteness of expression, or has a double meaning.

Flood, 168 Pa. Commw. at ___,649 A.2d at 738 *(citing Young by Young v. Equitable Life Assurance Society of the United States,* 350 Pa. Super. 247, 504 A.2d 339 (1986)). Any ambiguity of the insurance policy must be construed in favor of the insured. *Id.* Therefore, it cannot be concluded that the addition of the definition has limited residency to a single place, and the conclusion reached in the *Flood* case remains applicable in these circumstances. Hence, dual residency is certainly possible and it is conceivable that Ms. Fedorko could be a resident of both her mother's and her father's household.

Residence is not to be determined on the basis of one's intentions, and it is not automatic that a child of divorced parents resides in both

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[2] Other definitions of resident have also been found to be ambiguous in Pennsylvania. *See: Nationwide Mut. Ins. Co. v. Ortiz,* 2001 U.S. Dist LEXIS 13801 (M. D. Pa., 2001) (Term "resident", defined as "one who regularly lives in your household", found to be ambiguous).

households. *Amica Mut. Ins. Co. v. Donegal Mut. Ins. Co.,* 376 Pa. Super. 109, 545 A.2d 343 (1988). The facts in this case are most similar to those found in *Amica,* where the Superior Court determined that a daughter who had been injured in an automobile accident was not entitled to coverage pursuant to a policy issued by Donegal Mutual Insurance Company to her father. The daughter had stayed with her father three to five times per month during the school year.[3] *Amica,* 376 Pa. Super. at 113, 545 A.2d at 345. She did, however, keep a large quantity of clothes and numerous pairs of shoes, plus cosmetics and a pet rabbit, at her father's house. *Amica,* 376 Pa. Super. at 114, 545 A.2d at 345. She also received mail there. *Id.* The trial court concluded that she was a resident of her mother's house where she had spent the overwhelming majority of her time. The Superior Court affirmed the trial court's conclusion, noting that during the relevant school year, she did not spend a "significant and scheduled amount of time in her father's home." *Amica,* 376 Pa. Super. at 120, 545 A.2d at 349. The factual setting in the *Flood* decision was significantly different.

In *Flood,* the circumstances indicated that the sixteen year-old son had divided his time between his parents' homes, never staying with either one for more than six months. *Flood,* 168 Pa. Commw. at ___,649 A.2d at 739. The controversy centered on the impact of the mother's decision three to four weeks before the car accident to ask her son to leave her residence. It was suggested that in such circumstances, the son could no longer be considered to be a resident of the mother's household. The trial court found otherwise and the appellate court affirmed on the basis that there had been a history of the son moving from house-to-house because of disagreements with his parents, and because immediately after the accident, the mother took the son back to live with her indefinitely. *Id.* In these circumstances, the appellate court concluded that there was substantial evidence to support a finding that the child was a resident of the mother's household and, therefore, entitled to liability coverage.[4]

Unfortunately, there is no entirely objective means of determining residency as that term is defined in Erie Insurance Exchange's policy. The notion that, in order to be a resident, one has to physically live in a household is limiting but still encompasses a broad range of

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[3] There was some disagreement with this contention by the father, who testified his daughter stayed overnight only twice during the whole 1983-1984 school year. *Amica,* 376 Pa. Super. at 113, 545 A.2d at 345.

[4] It is noteworthy that the New Jersey appellate courts have taken the position that a minor child of divorced parents is the resident of both parent's households for purposes of determining coverage questions in motor vehicle insurance policies, without the need for significant factual analysis with regard to the question of residence. *See: Roman v. Correa,* 352 N.J. Super. 124, 799 A.2d 676 (N.J. Super. 2002).

circumstances. For example, there is no requirement placed on the frequency with which one must physically be present in the household to qualify, nor is there an indication as to how long the living period must have existed. Nor is the character of residency suggested. For example, does residency require overnight stays, meal preparation or consumption, and other activities associated with normal domestic life? There is no distinction between a temporary arrangement and a more permanent one. Also, unlike some insurance companies, the defendant did not choose to limit its definition by using "words of refinement" such as "regularly lives". *See: Nationwide Mut. Ins. Co. v. Budd-Baldwin,* 947 F.2d 1098 (3rd Cir. 1991); *Nationwide Mut. Ins. Co. v. Ortiz,* 2001 U.S. Dist. LEXIS 13801 (M. D. Pa. 2001). On the other hand, the requirement of "physically" living in a "household" does somewhat narrow the scope of possibilities.

At the time of the accident, it is apparent that Ms. Fedorko maintained a positive relationship with her father. She had a key to her father's home and could come and go as she pleased, and received some mail at her father's address. However, she at most visited him for three to four times per week for varying periods of time. She did not take meals at his house, certainly not on any regular basis, and the estimates of the number of times that she stayed overnight during the summer prior to the accident ranged from her father's estimate of one to two times to her own estimate of ten to twenty. Her mother does not recall if she stayed overnight at her father's house during that summer. *See:* Kelly Fedorko Deposition Transcript, 8/22/01, p. 9; Thomas Fedorko Deposition Transcript, 8/22/01, p. 28; Robin E. Tidd Deposition Transcript, 8/22/01, p. 11. Because this matter was submitted to the Court on the basis of depositions, there is virtually no basis on which the Court can assess the credibility of these various estimates. The Court can only conclude that over the three-month period, Ms. Fedorko occasionally spent the night at her father's house. There is nothing in the record that indicates the frequency of her overnight visits in the recent past. Following the accident she stayed exclusively at her mother's house. When at her father's house for an overnight, she stayed in her stepsister's room. She kept some clothing, personal items, a lamp and roller blades at his house. When she did spend the night, she brought certain personal items with her. She also apparently had a long-standing arrangement where she spent part of each holiday with both parents, and her father would welcome her friends to his house without prior permission. On occasion, she borrowed her father's car, and her father and stepmother were actively involved in school matters.

The question then is whether Ms. Fedorko physically lived in her father's household at the time of the accident. Without question Ms. Fedorko was welcome in her father's household and she spent varying amounts of time there. However, there was neither a commitment nor an

obligation for her to be there at any particular time or for any length of time. Nor was there an expectation of her presence at any particular time by any member of her father's household. While she slept there on occasion, the record does not reveal the circumstances of those occasions. While the concept of physically living in a household as expressed in the policy does not require staying in a place for a particular period of time, it does suggest an arrangement where a person's presence in the household is such that a reasonable person would conclude that she was more than just a visitor.[5] To conclude otherwise would mean that a person who spends time at a relative's household for a few weeks or perhaps days, and who just happened to be involved in a motor vehicle accident during that time, could claim coverage in a way that would undermine the underwriting capability of an insurer. Sporadic visits to relative's households are insufficient to establish residency. *See: Norman v. Pennsylvania Nat'l Ins. Co.,* 453 Pa. Super. 569, 684 A.2d 189 (1996)

Here, the definition of "relative" is one who "physically lives with you in your household".[6] (Family Auto Insurance Policy, 1997 ed., p. 4, Exhibit A to Answer and New Matter.) Life in a "household", as opposed to simply residing in a certain place, provides a practical and emotional foundation for carrying out daily activity. It implies a reciprocal arrangement, whereby one not only intends to stay or return but is free to do so without the need for obtaining the consent of other household members. Moreover, one's household residence is a place where certain personal prerogatives or liberties exist and where one has a concomitant duty, although perhaps benign, to contribute to the household's well being. For example, the accumulation of a substantial quantity of personal belongings of one kind or another, or the right to come and go without permission, (or, if a child, the right to care and supervision) and the practice of engaging in personal activities such as eating, grooming, hygiene, or recreation all are indicative of one's residence in a household. Similarly, a resident of a household may have or assume the responsibility to maintain its physical integrity and may contribute to its day to day functioning and its social equilibrium through rule compliance or in some other age-appropriate manner. While the existence of any one of these

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[5] *See: Toplin v. Pennland Ins. Co.* 34 Phila. 374 (1997). The Court of Common Pleas concluded that the plaintiff was a resident of her daughter's household where she spent 64 percent of her time there and stayed there every weekend.

[6] Household has been defined "as those who dwell under the same roof and compose a family". *Boswell v. South Carolina Ins. Co.,* 353 Pa. Super 108, 115, 509 A.2d 358, 362 (1986) (*quoting Drake v. Donegal Mutual Insurance Co.,* 422 F.Supp. 272 (W.D. Pa. 1976)).

characteristics is not, per se, determinative of the issue, each is an important consideration in identifying one's place of residence.

Here, Ms. Fedorko's visits to her father, while frequent, had a transitory character. One can only conclude from the record that during the period in question, she spent virtually all of her "home" time in the household of her mother and was dependent on her mother and her household to provide her with her everyday needs. Her foundation for carrying on her life's activities was the home of her mother. While she certainly was entitled to visit her father, with the exception of sleeping there occasionally, she did not carry on any of life's basic activities in his household on any regular basis nor in any predictable manner. Moreover, there was no indication that she accepted, nor for that matter that she was expected to play, any role in contributing to the well being of her father's household. When weighing all the circumstances of this case as the limited record allows, this Court can only conclude that while she was a welcome visitor, Ms. Fedorko was not a resident of her father's household. Therefore, a verdict will be entered finding in favor of the defendant.

ORDER

AND NOW, to-wit, this 30 day of September, 2003, upon the conclusion of a Non-Jury Trial in the above-captioned matter, it is hereby **ORDERED**, **ADJUDGED and DECREED** that a verdict is entered in favor of the defendant, Erie Insurance Exchange.

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

COMMONWEALTH OF PENNSYLVANIA
v.
DANIEL DAVID BOLDORFF

CRIMINAL PROCEDURE / APPEALS / WEIGHT OF EVIDENCE ISSUES

When considering whether a conviction was against the weight of the evidence, a new trial will only be awarded where it appears that the verdict was so contrary to evidence as to shock one's sense of justice. The Court must assess the credibility of the testimony offered by the Commonwealth, but the weight of the 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 the witnesses.

CRIMINAL PROCEDURE / APPEALS / SUFFICIENCY OF EVIDENCE ISSUES

When considering a challenge to the sufficiency of the evidence, the Court must view the evidence and all reasonable inferences to be drawn from the evidence in the light most favorable to the Commonwealth as verdict winner and determine if the evidence was sufficient to enable the fact-finder to establish all the elements of the offense.

CRIMINAL PROCEDURE / JURY SELECTION

The proper way for the defendant to raise the issue of a juror's impartiality would have been through a challenge for cause. The Pennsylvania Supreme Court has stated that a challenge for cause should be granted when the prospective juror has such a close relationship, familial, financial, or situational, with the parties, counsel, victims, or witnesses that the court will presume a likelihood of prejudice or demonstrates a likelihood of prejudice by his or her conduct or answers to questions.

CRIMINAL PROCEDURE / SENTENCING / MERGER

The doctrine of merger is designed to determine whether the legislature intended for the punishment of one offense to encompass that for another offense arising from the same criminal act or transaction. In order for two convictions involving a single criminal act to merge, (1) the crimes must be greater and lesser-included offenses; and (2) the crimes charged must be based on the same facts. Also, the Court must consider the specific facts underlying each conviction.

CRIMINAL PROCEDURE / SENTENCING

A sentencing court is required to state on the record its reasons for the sentence imposed. In addition, the Court enjoys broad discretion in choosing a penalty from sentencing alternatives and the range of permissible confinements, provided the choices are consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 114 - 2002

Appearances: Damon C. Hopkins, Esquire for the Commonwealth
Kevin M. Kallenbach, Esquire for the Defendant

OPINION

Bozza, John A., J.

On November 19, 2002, defendant Daniel David Boldorff was found guilty by a jury of the following crimes: one count each of statutory sexual assault[1]; aggravated indecent assault of person less than 16 years of age[2]; involuntary deviate sexual assault (IDSI) of person less than 16 years of age[3]; indecent assault of person less than 13 years of age[4]; and corruption of minors[5]. On January 13, 2003, the defendant was sentenced as follows:

Count I - Statutory Sexual Assault - merges with sentence imposed at Count III; costs;

Count II - Aggravated Indecent Assault of Person Less Than 16 Years of Age - twenty-four (24) months to forty-eight (48) months incarceration, consecutive to sentence imposed at Count III; costs;

Count III - IDSI of person Less than 16 Years of Age - sixty (60) months to one-hundred-twenty (120) months incarceration; costs;

Count IV - Indecent Assault of Person Less than 13 Years of Age - twelve (12) months to forty-eight (48) months incarceration, consecutive to sentence imposed at Count II; costs;

Count V - Corruption of Minors - twelve (12) months to forty-eight (48) months incarceration, consecutive to sentence imposed at Count IV; costs.

On December 2, 2002, Mr. Boldorff filed a Motion for New Trial, arguing that a jury member failed to disclose personal knowledge of a witness at trial, namely the defendant's wife. Following a hearing on the matter and an examination of the juror in question, the Court denied Mr. Boldorff's motion for a new trial in an Order entered January 10, 2003. On January 23, 2003, Mr. Boldorff filed a Motion to Reconsider Sentence, which the Court

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[1] 18 P.S. § 3122.1.
[2] 18 P.S. § 3125(a)(8).
[3] 18 P.S. § 3123(a)(2)(7).
[4] 18 P.S. § 3126(a)(2)(7).
[5] 18 P.S. § 6301(a).

denied in an Order entered March 10, 2003.

Mr. Boldorff filed a Notice of Appeal to the Superior Court of Pennsylvania on April 8, 2003, but did not notify the Office of Court Reporters that transcripts needed to be prepared. On April 30, 2003, the Office of Court Reporters was notified by the Court of Mr. Boldorff's appeal. An extension of sixty days was requested for the forwarding of the record to the Superior Court of Pennsylvania in order to accommodate the preparation of these transcripts. Hence, the record was required to be forwarded to the Superior Court by July 19, 2003.

In his 1925(b) Statement of Matters Complained of on Appeal, Mr. Boldorff raises the following allegations of error:

1. the verdict was against the weight and sufficiency of the evidence, as the victim's testimony was the only evidence against the defendant and was insufficient;

2. the Court erred in failing to grant the defendant's motion for new trial, as the jury was not impartial; and

3. the sentence was excessive and unreasonable, and the Court failed to merge the counts of indecent assault and corruption of minors.

I. Weight and Sufficiency of the Evidence

When considering whether a conviction was against the weight of the evidence, a new trial will only be awarded where it appears that the verdict was "so contrary to evidence as to shock one's sense of justice." *Commonwealth v. Simmons,* 541 Pa. 211, 229, 662 A.2d 621, 630 (1995). The Court must assess the credibility of the testimony offered by the Commonwealth, but "the weight of the 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 the witnesses." *Id.* When considering a challenge to the sufficiency of the evidence, the Court must

> view the evidence and all reasonable inferences to be drawn from the evidence in the light most favorable to the Commonwealth as verdict winner and determine if the evidence was sufficient to enable the fact-finder to establish all the elements of the offense.

Commonwealth v. Rios, 546 Pa. 271, 279, 684 A.2d 1025, 1028 (1996).

Mr. Boldorff asserts that the testimony of the victim was not sufficient to support the verdict, due to the "circumstances surrounding disclosure of these charges, as well as inconsistency with respect to the documentation in the victim's diary and the admitted untruthfulness of the complaining victim." (1925(b) Statement). Mr. Boldorff also challenges the victim's inability to testify as to more specific dates and times concerning the alleged assaults by Mr. Boldorff, and the "improbable

nature of the contacts given brief opportunity when this type of conduct would occur." (1925(b) Statement).

The victim, J.P., testified that she first met the defendant and his family when she was approximately eleven years old, and that the defendant began to kiss her on the lips shortly thereafter. (Trial Transcript, 11/18/02, pp. 53, 56-61). J.P. testified that the defendant continued to kiss her and hug her when the two were alone, and that the defendant continually told her not to tell anyone else about their conduct. (T.T., 11/18/02, pp. 63-66). J.P. testified that she became "used to" the defendant's conduct after a period of time, and even began "going along with it". (T.T., 11/18/02, pp. 64-65). J.P. also recalled that the defendant and his family moved to a different lot in the same trailer park, and that this move occurred when she was approximately thirteen or fourteen years old. (T.T., 11/18/02, p. 63). J.P. also testified that her own family moved to a different lot in the same trailer park when she was about fourteen or fifteen years old. (T.T., 11/18/02, p. 66). J.P. further testified that additional sexual conduct occurred between herself and the defendant after both families had moved to new homes. (T.T., 11/18/02, pp. 67-68).

Specifically, J.P. testified that she had been sent to the Boldorff home to borrow a torx wrench, and that the defendant had taken her into the shed behind his home, where he touched her breasts and her vaginal area under her clothing. (T.T., 11/18/02, pp. 68-72). J.P. testified that her brother and his friend were in the yard near the shed, and that when J.P. emerged, the two asked her "What are you doing, having sex with him?". (T.T., 11/18/02, p. 72). J.P.'s brother, E.P., testified concerning this incident, and supported J.P.'s testimony. (T.T., 11/18/02, pp. 141-149). J.P. also testified concerning an incident in which the defendant had her perform oral sex on him in the bathroom of his home, when the victim was approximately fifteen years old. (T.T., 11/18/02, pp. 75-80). J.P. again testified, as she did with each incident, that she did not tell anyone what had happened because she feared she would get in trouble with her parents, as the defendant warned her she would. (T.T., 11/18/02, p. 81).

The last specific incident J.P. testified to occurred after the incident in the bathroom, and occurred when she was approximately fifteen. (T.T., 11/18/02, p. 81-82). On this occasion, J.P. had gone to the Boldorff home to borrow a cookie recipe, and the defendant brought J.P. into the bedroom of his home. (T.T., 11/18/02, pp. 81-82). There, the defendant removed her shorts and undergarments, unzipped his own pants, and J.P. testified that she could feel the defendant's penis on her leg. (T.T., 11/18/02, p. 84). J.P. testified that the defendant was interrupted by a phone call, and that she dressed and returned home. (T.T., 11/18/02, pp. 84-86). J.P. testified that, following this incident, she began to stay away from the defendant, because she did not want others to discover what had happened. (T.T., 11/18/02, p. 86).

J.P. further testified that she informed her parents about her contact with the defendant in December, 2000, explaining to them that the defendant's conduct was the reason she no longer wanted to go to the defendant's home. (T.T., 11/18/02, pp. 96-98). J.P. further testified that she was "trying to keep it as minimal as possible" due to the fact that her parents became very upset at the news. (T.T., 11/18/02, p. 98). J.P. further testified that she gradually told the police that she was a willing participant in some of the incidents with the defendant, stating that she limited her disclosure because she was afraid the police would say that "you asked for it...you got what you got because of your actions." (T.T., 11/18/02, p. 99).

J.P. did admit that she would be reprimanded by her parents for lying on occasion, but that it was "just normal things that normal kids get in trouble for." (T.T., 11/18/02, p. 61). Specifically, J.P. testified that she would take items from her mother, and then tell her mother that she did not have the items. (T.T., 11/18/02, p. 103). J.P. also testified that the first time she was asked if she had had sexual contact with the defendant, she lied because she did not want to get into trouble. (T.T., 11/18/02, pp. 89-91, 124). The victim's mother, L.P., also testified concerning her daughter's truthfulness, and indicated that her daughter had lied only about minor issues, such as borrowing her mother's things without permission. (T.T., 11/19/02, pp. 13-14).

J.P. was able to recall the time of year that each incident occurred, and was able to recount each incident in detail. Her testimony was corroborated by the testimony of her brothers E.P. and D.P., as well as her parents, D.P. and L.P. It was exclusively for the jury to weight the evidence and to determine the credibility of the witnesses. The jury accepted the testimony of the victim and her family, and did not credit the testimony offered by the defendant's wife and twin sons. The jury had information concerning the victim's prior untruthfulness concerning unrelated issues, and had the ability to weigh that information along with the rest of the testimony offered at trial. These credibility decisions were solely for the jury to make, and the Court can find no error in their determination.

Also, there was sufficient evidence presented at trial for the jury to establish all the elements of the charged offenses. The offense of statutory sexual assault is committed when a person engages in sexual intercourse with a complainant under the age of 16 years and that person is four or more years older than the complainant, and the two are not married to each other. 18 P.S. § 3122.1. The definition of sexual intercourse in the Pennsylvania Crimes Code does include oral intercourse. 18 P.S. § 1301. Involuntary deviate sexual intercourse is committed when a person, *inter alia,* engages in deviate sexual intercourse with a complainant by threat of forcible compulsion that

would prevent a person of reasonable resolution who is less that 16 years of age, and the person is four or more years older than the complainant, and the two are not married to each other. 18 P.S. § 3123(a)(2)(7). The definition of deviate sexual intercourse in the Pennsylvania Crimes Code includes oral sex. 18 P.S. § 1301. The offense of aggravated indecent assault is committed, *inter alia,* when a person engages in penetration of the genitals of a complainant with a part of the person's body for any purpose other than good faith medical, hygienic or law enforcement procedures, and the complainant is less than 16 years of age and the person is four or more years older than the complainant, and the two are not married to each other. 18 P.S. § 3125(8). An individual is guilty of indecent assault if the individual, *inter alia,* has indecent contact with the complainant or causes the complainant to have indecent contact with that individual and the complainant is less than 13 years of age and the individual is four or more years older than the complainant, and the complainant and the individual are not married to each other. 18 P.S. 3126(a)(7). Indecent contact is defined as "any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in either person." 18 P.S. § 3101. An individual is guilty of corruption of minors if the individual, *inter alia,* performs any act that corrupts or tends to corrupt the morals of any child under the age of eighteen. 18 P.S. 6301(a)(1).

Based on the testimony of the victim at trial, there was more than sufficient evidence for the jury to find the defendant guilty of each of these offenses. The defendant was clearly more than four years older than the victim, and the two were not married to one another, and the victim was under the age of 16 at the time the crimes were committed. The victim was also under the age of 13 when the earliest crimes were committed in this case. The victim was able to testify concerning oral sex that she performed on the defendant, as well as the defendant's touching her genital areas underneath her clothing with his fingers. The jury found the victim to be credible, and her testimony was more than sufficient for the jury to find each element of the charged offenses had been met.

II. Impartiality of Jury

Mr. Boldorff's next assertion of error concerns the Court's denial of his motion for a new trial, and the issue of whether there was a lack of impartiality by the jury's foreman.[6] Following the conclusion of the trial, Mr. Boldorff's attorney requested that the Court conduct an inquiry to

[6] Defense counsel has framed this issue in his 1925(b) Statement as an issue concerning the "appearance that the jury was not impartial." The Court has addressed whether the jury was *actually* impartial, which may have been the issue that defense counsel intended to raise on appeal. The allegations raised by the defendant concern whether the jury foreman had prior knowledge of the case, allegations which far exceed any *appearance* of impropriety.

ascertain whether a juror had failed to disclose that he knew a defense witness in the trial, Kathy Boldorff, the defendant's wife. After preliminary testimony by Mrs. Boldorff and considerable discussion, the Court agreed to have the juror, Mr. Lance Lehr, testify. In her testimony, Mrs. Boldorff had stated that she knew Mr. Lehr from work where she had had direct personal contact with him on one occasion and had seen him at two work-related social functions. (Motion for New Trial Transcript, 12/23/02, pp. 6-7). She also testified that she spoke with him on the phone. (M.T., 12/23/02, p. 7) She noted that they worked in different divisions of the company. (M.T., 12/23/02, p. 12). Although she was in the courtroom during a considerable portion of the trial and testified herself. Mrs. Boldorff did not recognize him until the verdict was delivered. (M.T., 12/23/02. p. 13). She also noted that she thought he was aware of the case because she had told others who work in the restaurant division that special arrangements had to be made to avoid contact between the victim and her husband during a field trip to her workplace. (M.T ., 12/23/02, p. 8).

At a second hearing which will be discussed more fully below, Mr. Lehr essentially testified that after the trial commenced and Mrs. Boldorff testified concerning her place of employment, he became aware that he worked for the same employer. He advised the tipstaff of this fact but told her that he didn't know her. Mr. Lehr also testified that he had never heard anything about the case and had never discussed it with anyone at work until after the trial was over.

During *voir dire,* the Court asked the members of the jury pool whether anyone knew a prospective witness for the defendant, Kathy Boldorff. (T.T., 11/18/02, p. 9). No one responded affirmatively. *Id.* The jurors were also asked if they had heard anything about the case. (T.T., 11/18/02, p. 5-7). Some acknowledged that they did, but Mr. Lehr did not. *Id.* The question of the potential witnesses place of employment was not presented to the jury pool, nor was it requested. It is the defendant's contention that the juror lied when he failed to disclose that he knew a potential witness and that he had heard about the case. (T.T., 11/18/02, p. 5-7). Some acknowledged that they did, but Mr. Lehr did not. *Id.* The question of the potential witnesses place of employment was not presented to the jury pool, nor was it requested. It is the defendant's contention that the juror lied when he failed to disclose that he knew a potential witness and that he had heard about the case. The record does not support this serious allegation.

After observing and considering the testimony of Mr. Lehr and Mrs. Boldorff, the Court concluded that Mr. Lehr had been truthful in his responses to the questions on *voir dire* and that there had been no basis for dismissing Mr. Lehr for cause. Mr. Lehr testified that he candidly responded to the Court's questions during *voir dire* as to whether he had any knowledge of the case and whether he knew any of the witnesses,

including Mrs. Boldorff. (E.H., 1/8/03, p. 3). He noted that it was only after Mrs. Boldorff was asked by the prosecutor where she worked, and she replied "Comfort Inn." (T.T., 11/19/02, p. 65) that he realized that he was employed at the same company. (E.H., 1/8/03, p. 4). However, Mr. Lehr further testified that there were 500 employees in his division alone, and that he did not know Mrs. Boldorff personally and didn't recognize her even after she took the stand. (E.H., 1/8/03, p. 4, 7). Mr. Lehr acknowledged that a co-worker, an individual named Jeff Mona, had mentioned that he was aware Mr. Lehr had served as a juror in the Boldorff case, and that he had learned this information from someone else. (E.H., 1/8/03, p. 5). However, this occurred a week after the trial had been completed, and Mr. Lehr was not certain how Mr. Mona obtained that information. (E.H., 1/8/03, pp. 5, 7-8). Mr. Lehr acknowledged that in the ten years that he has worked for the company, he has had conversations with thousands of employees, and that Mrs. Boldorff may have been one of those employees. (E.H., 1/8/03, p. 7). However, Mr. Lehr repeatedly testified that he did not know Mrs. Boldorff by sight, and that he had no knowledge of the Boldorff's legal problems until the time of trial. (E.H., 1/8/03, pp. 7-10).

Had Mr. Lehr been in a position to know of Mrs. Boldorff's employment at the time of the *voir dire* and indicated that to the Court, the proper way for the defendant to raise the issue of his impartiality would have been through a challenge for cause. The Pennsylvania Supreme Court has stated that a challenge for cause

> should be granted when the prospective juror has such a close relationship, familial, financial, or situational, with the parties, counsel, victims, or witnesses that the court will presume a likelihood of prejudice or demonstrates a likelihood of prejudice by his or her conduct or answers to questions...

Commonwealth v. Weiss, 565 Pa. 504, 518, 776 A.2d 958, 966 (2001)(citations omitted). Even assuming that Mrs. Boldorff correctly indicated that she had met Mr. Lehr during their employment, there is nothing in the record to indicate that the juror had anything approaching a "close relationship" with her or the kind of relationship from which one would presume or anticipate prejudice. Moreover, the defendant's main concern seems to be that this juror had acquired information about the case from his work that he failed to share with the Court during *voir dire.* (Motion for New Trial Transcript, 12/23/02, pp. 19-20). This conclusion is supported by nothing other than speculation. Even if the Court were to accept Mrs. Boldorff's testimony on this issue, there is absolutely no indication that Mr. Lehr knew anything of substance about the case. Mr. Lehr's testimony at the evidentiary hearing was sufficient for the Court to conclude that there was no basis for a challenge for cause, and that the

defendant suffered no prejudice as a result of his service as a juror. The Court's refusal to grant a new trial on this basis was proper.

III. Sentencing

Mr. Boldorff's last assertions of error concern the sentence imposed by the Court. Mr. Boldorff argues that the Court should have merged the sentences imposed for the counts of indecent assault and corruption of minors into the "major felony counts". The Pennsylvania Supreme Court has stated that "the doctrine of merger is designed to determine whether the legislature intended for the punishment of one offense to encompass that for another offense arising from the same criminal act or transaction." *Commonwealth v. Fisher,* 787 A.2d 992, 994 (2001)(*quoting Commonwealth v. Anderson,* 538 Pa. 574, 577, 650 A.2d 20, 21 (1994)). In order for two convictions involving a single criminal act to merge, (1) the crimes must be greater and lesser-included offenses; and (2) the crimes charged must be based on the same facts. *Commonwealth v. Gatling,* 807 A.2d 890, 899 (Pa. 2002). Also, the Court must consider the "specific facts underlying each conviction." *Fisher,* 787 A.2d at 994.

Statutory sexual assault, IDSI, aggravated indecent assault, corruption of minors and indecent assault are not greater and lesser-included offenses of one another. As set forth above, statutory sexual assault is committed when a person engages in sexual intercourse with a complainant under the age of 16 years and that person is four or more years older than the complainant, and the two are not married to each other. 18 P.S. § 3122.1. The definition of sexual intercourse in the Pennsylvania Crimes Code does include oral intercourse. 18 P.S. § 1301. Involuntary deviate sexual intercourse is committed when a person, *inter alia,* engages in deviate sexual intercourse with a complainant by threat of forcible compulsion that would prevent a person of reasonable resolution who is less than 16 years of age, and the person is four or more years older than the complainant, and the two are not married to each other. 18 P.S. § 3123(a)(2)(7). The definition of deviate sexual intercourse in the Pennsylvania Crimes Code includes oral sex. 18 P.S. § 1301. The offense of aggravated indecent assault is committed, *inter alia,* when a person engages in penetration of the genitals of a complainant with a part of the person's body for any purpose other than good faith medical, hygienic or law enforcement procedures, and the complainant is less than 16 years of age and the person is four or more years older than the complainant, and the two are not married to each other. 18 P.S. § 3125(8). An individual is guilty of indecent assault if the individual, *inter alia,* has indecent contact with the complainant or causes the complainant to have indecent contact with that individual and the complainant is less than 16 years of age and the individual is four or more years older than the complainant, and the complainant and the individual are not married to each other. 18 P.S 3126(a)(8). Indecent contact is defined as "any touching of the sexual or

other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in either person." 18 P.S. § 3101. An individual is guilty of corruption of minors if the individual, *inter alia,* performs any act that corrupts or tends to corrupt the morals of any child under the age of eighteen. 18 P.S. 6301(a)(1). As the Pennsylvania Superior Court noted, "a corruption of minors charge, therefore, encompasses any such act, 'the consequence of which transcends any specific sex act and is separately punishable'...." *Commonwealth v. Fisher,* 787 A.2d 992, 995 (2001)(*quoting Commonwealth v. Hitchcock,* 523 Pa. 248, 253, 656 A.2d 1159, 1162 (1989)).

Here, the facts underlying the conviction for each offense show that merger of these offenses was not proper. It should first be noted that the Court already merged the counts of statutory sexual assault and IDSI, since these offenses were based upon the same conduct. Hence, the issue becomes whether the counts of indecent assault and corruption of minors should have merged with the counts of IDSI and aggravated indecent assault. Count 2 of the Criminal Information, outlining the aggravated indecent assault charge, refers to Mr. Boldorff's inserting his fingers into the vagina of the victim when she was between the ages of fourteen and fifteen. Count 3 of the Criminal Information, outlining the IDSI charge, refers to Mr. Boldorff's engaging in oral sex with the victim while she was between the ages of fourteen and fifteen. Count 4 of the Criminal Information, outlining the indecent assault charge, refers to Mr. Boldorff's touching of the victim's breasts and/or vaginal area on several occasions when the victim was between the ages of eleven and fifteen. Count 5 of the Criminal Information, outlining the corruption of minors charge, refers to Mr. Boldorff's engaging in oral sex with the victim and/or inserting his fingers into the victim's vagina and/or touching the victim's breasts and/or vaginal area. These actions were alleged to have occurred while the victim was between the ages of eleven and fifteen.

Each of these charges are based on distinct and separate conduct. The conduct alleged in the indecent assault count is clearly separate from the conduct alleged in the IDSI and aggravated assault counts, just as the conduct alleged in the corruption of minors count is clearly separate from the conduct alleged in the IDSI and aggravated assault counts: Further, in regard to the corruption of minors count, this charge focuses on the continuing course of conduct between the defendant and the victim over a period of four years, and it is the effect of this course of conduct which is alleged to have corrupted the minor victim. None of the "major felony counts" refer to a course of conduct, and it is for that reason that the corruption of minors charge should not have merged with any of the other offenses. Also, these offenses were not greater and lesser-included offenses of each other. For example, corruption of minors transcends any specific sex act, and cannot be considered a lesser-included offense of

IDSI or aggravated indecent assault. The offenses of IDSI and aggravated indecent assault do not have the same elements as the crimes of indecent assault and corruption of minors, and these offenses could not merge because they are lesser-included offenses. Based on the standard set forth in *Gatling.* Mr. Boldorff would have to show that the offenses were greater and lesser-included offenses and that the offenses were based on the same facts. Mr. Boldorff cannot meet this standard, and there was no error in not merging these charges for sentencing purposes.

Mr. Boldorff also challenges the length of his sentence, arguing that the sentence is excessive and unreasonable, does not account for his lack of a prior criminal record, and amounts to "needless cumulation." According to the Pennsylvania Guidelines for Sentencing, Mr. Boldorff faced a standard range sentence of twenty-two (22) months to thirty-six (36) months incarceration, and an aggravated sentence of forty-eight (48) months incarceration for the aggravated indecent assault count. Mr. Boldorff faced a standard range sentence of forty-eight (48) months to sixty-six (66) months incarceration, with an aggravated range of seventy-eight (78) months for the IDSI count. Mr. Boldorff also faced a standard range sentence of restorative sanctions to nine (9) months incarceration and an aggravated sentence of twelve (12) months incarceration, for each of the indecent assault count and corruption of minors count. 204 Pa. Code § 303.16. Hence, Mr. Boldorff faced a total standard range sentence of seventy (70) months to one-hundred-twenty (120) months incarceration for these offenses. Mr. Boldorff, as noted above, received an aggregate sentence of one-hundred-eight (108) months to two-hundred-sixteen (216) months incarceration for these offenses.

A sentencing court is required to state on the record its reasons for the sentence imposed. *Commonwealth v. Brown,* 741 A.2d 726 (Pa. Super. 1999). In addition, the Court enjoys broad discretion in choosing a penalty from sentencing alternatives and the range of permissible confinements, provided the choices are consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant. *Commonwealth v. Devers,* 519 Pa. 86, 546 A.2d 12 (1988). Further, it is presumed that where a pre-sentence report exists, the sentencing court is aware of relevant information concerning the defendant's character, and considered the information along with mitigating statutory factors when imposing sentence. *Id.* While Section 9721(b) of the Sentencing Code does mandate that the Court provide a "contemporaneous written statement" in every case where the Court imposes a sentence outside the sentencing guidelines, case law indicates that this requirement is satisfied when the judge states his reasons for the sentence on the record and in the defendant's presence. *See* 42 P.S §9721(b); *Commonwealth v. Widmer,* 446 Pa. Super. 408, 667 A.2d 215 (1995), *reversed on other grounds,* 547 Pa. 137, 689 A.2d 211 (1997).

It should first be noted that the defendant's lack of a prior criminal record was already accounted for in the guideline sentence recommendations, which are based on the Offense Gravity Score and the Prior Record Score. *Commonwealth v. Celestin,* 2003 Pa. Super. LEXIS 926, **24 (2003). Here, while Mr. Boldorff's Prior Record Score was zero, his Offense Gravity Score ranged from five to twelve, depending on the charged offense. Further, the Court did consider his background and his rehabilitative potential when fashioning its sentence. At the time of sentencing, the Court heard the testimony of Mr. Boldorff's wife, Kathy, and was well acquainted with the facts of the case, having presided over the trial.

The Court also specifically stated, in the presence of the defendant and on the record, the reasons for the Court's departure from the sentencing guideline ranges, as well as an explanation of the guideline ranges for each offense. The Court noted

> The Court: Mr. Boldorff, I have considered all the circumstances of your case. I have considered the information that's been provided to me in the Presentence Report. I've presided over the trial so I'm well acquainted with the activity that was involved in this particular case. I am aware of your background, the fact that you don't have a prior criminal history, that you've otherwise been law-abiding. I have read the Victim Impact Statements from the victim and her family and so I think I have sufficient information to make the decision that we're addressing here today concerning your sentence...

> ...For those sentences for which tier is an aggravated range or departure, I think they're all aggravated range sentences, or that's a concern, I do so for the following reasons:
>
> One, because this represented a course of conduct that occurred over a substantial period of time. It was not one isolated incident by any means. It began when this child was roughly 11 years old, continued to when she was approximately 14 or 15 or 16 years old, and that is a very bad thing.
>
> Secondly, this is a case which had a tremendous impact on the victim and her family. And I think it's important to understand in this regard that when you first start to engage in sexual or sexual-related conduct with a child who is 11, you are essentially teaching that child that this kind of activity is acceptable and okay. And in this particular case I believe that happened here, at least to some degree, and that's of a serious concern as well. For all those reasons I believe the sentences I have imposed are appropriate, and that's it.

(S.T., 1/33/03, [sic] pp. 15, 17-18).

The sentence imposed was appropriate considering the impact on the victim and the severity of the offenses, and does not amount to "needless cumulation".

For the reasons set forth above, the Court's judgment of sentence should be affirmed.

Signed this 23 day of July, 2003.

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

COMMONWEALTH OF PENNSYLVANIA
v.
EMIL DIAZ, Defendant

CRIMINAL LAW / REVOCATION OF PROBATION

The judge who took the defendant's original plea need not be the only judge who can preside over the hearing on revocation of probation because of other criminal charges. The statutes regarding imposition of sentence by the judge who presided at the trial or received the plea does not apply to revocation of probation. 42 Pa. C.S. § 9751. See also 42 Pa. C.S. § 9771

CRIMINAL LAW / REVOCATION OF PROBATION

Even if the statute, 42 Pa. C.S. § 9751, regarding sentencing after trial or plea, would be applicable to revocation of probation, there would be "compelling reasons" for allowing the revocation hearing to be conducted by another judge. The sentencing for the new conviction revoking revocation of probation could better fashion a sentencing scheme which is both fair to the defendant and addresses his need for rehabilitation and this policy also promotes judicial economy.

CRIMINAL PROCEDURE / REVOCATION OF PROBATION

Rule 708(B), Pa. R. Crim. P., does not require the original sentencing judge to preside over the revocation of probation on those original charges.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION CASE NO. 1172 OF 2002

ORDER

AND NOW, to-wit, this 8th day of September, 2003, it is hereby ORDERED and DECREED that Defendant's Motion to Recuse as Revocation Judge is DENIED.

Defendant originally entered a guilty plea on the charges filed at the above-captioned docket number before the Honorable Ernest J. DiSantis. Judge DiSantis also imposed the sentence for charges at this docket number. New charges were later filed against Defendant at docket number 1254 of 2003. Defendant pleaded guilty to those charges before the undersigned. Sentencing was scheduled for September 3, 2003. Defendant was informed that the undersigned would conduct his probation revocation hearing and impose sentence for the revocation at the same time.

Defendant filed the instant motion arguing that the probation revocation must be performed by Judge DiSantis because it was he who took Defendant's original plea. In support of his position, Defendant directs the Court's attention to 42 Pa.C.S.A. § 9751 which provides:

> The judge who presided at the trial or who received the plea of the defendant shall impose the sentence unless there are compelling reasons that preclude his presence.

However, the Court notes that section 9751 is found in the subchapter dealing with sentencing following a trial or a plea, not a revocation. The subchapter relating to revocation does not indicate one way or the other whether the judge who accepted the guilty plea must also impose the revocation sentence. *See* 42 Pa.C.S. § 9771.

Moreover, even if the judge who accepted the guilty plea must also impose the revocation sentence absent compelling circumstances, the Court finds that there are compelling reasons for having Defendant's probation revocation sentence imposed by a different judge. As Defendant correctly points out, the Erie County Court of Common Pleas has instituted a policy whereby a person who is subject to a probation revocation because of a new conviction will be sentenced on the new charges and the probation revocation at the same time by the judge assigned to the new charges. It is the opinion of the Court that one judge could better fashion a sentencing scheme which is both fair to the defendant and addresses his need for rehabilitation. The policy also promotes judicial economy since to accept Defendant's argument could mean that one defendant would have to appear before three or four judges where the defendant was under supervision at several docket numbers. Finally, the Court notes that there have been problems in the past when different judges handled the sentencings on the new charges and the probation revocation. Specifically, the state prison system has often had trouble with discrepancies between the different sentencings which are often not brought to the Court's attention before the Court loses jurisdiction to address the problem.

Defendant also argues that Pa.R.Crim.P. 708(B) stands for the proposition that the original sentencing judge is required to determine whether a violation of that sentence has occurred. The Rule simply does not set forth such a requirement. Rule 708(B) provides:

> Whenever a defendant has been sentenced to probation or intermediate punishment, or placed on parole, the judge shall not revoke such probation, intermediate punishment, or parole as allowed by law unless there has been:
>
> > (1) a hearing held as speedily as possible at which the defendant is present and represented by counsel; and
> >
> > (2) a finding of record that the defendant violated a condition of probation, intermediate punishment, or parole.

The Rule makes no mention of a requirement that the original sentencing judge hear the revocation.

For all the foregoing reasons, the Court finds that there is nothing which precludes it from sentencing Defendant on his revocation and Defendant's Motion to Recuse as Revocation Judge is denied.

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

NORMAN DeFRANCO and ANTHONY DeFRANCO, Plaintiffs
v.
SAINT VINCENT HOSPITAL and JEFFREY BEDNARSKI, M.D. and JOHN DOES, Defendants

CIVIL PROCEDURE / CAPACITY TO SUE / WRONGFUL DEATH

Neither the brother nor the nephew of the decedent have capacity to bring a wrongful death action where neither has been appointed as trustee *ad litem* and another individual, the decedent's daughter, has been appointed as administrator.

CIVIL PROCEDURE / CAPACITY TO SUE / LOSS OF CONSORTIUM

The Plaintiffs, the brother and the nephew of the decedent, do not have capacity to sue for loss of consortium as Pennsylvania law does not recognize a claim in the brother or the nephew for loss of consortium.

CIVIL PROCEDURE / LATE JOINDER OF PLAINTIFF

A motion to strike the joinder of a plaintiff after the statute of limitations has expired will be granted as an amendment may not be allowed after the expiration of the statute of limitations to bring in a new party.

JUDGES / RECUSAL

Recusal is unwarranted where the proponent of disqualification does not allege facts tending to show bias, interest or other disqualifying events. The plaintiff, the brother of the decedent, may not claim that the judge should recuse himself because his son was prosecuted by the district attorney's office at a time when this judge was the district attorney. Further, the motion is untimely where it is not filed until after the court has entered an order of dismissal.

CIVIL PROCEDURE / PRELIMINARY OBJECTIONS / TIMELY FILING

Where the plaintiff files a complaint which was never served and subsequently files an amended complaint which is served, the time for filing of preliminary objections runs from the service of the amended complaint. Preliminary objections filed within 11 days of the filing of the amended complaint are timely.

CIVIL PROCEDURE / PARTIES / WRONGFUL DEATH

The filing of an affidavit of the decedent's mother arguing her position as a party with an interest in the estate and a party with capacity to sue does not constitute the joinder of the mother as a plaintiff. Further, even if this document is construed to accomplish a joinder of the decedent's mother as a plaintiff, the statute of limitations bars the joinder.

CIVIL PROCEDURE / APPOINTMENT OF PERSONAL REPRESENTATIVE

The issue of the appointment of the proper party to be personal representative is not properly raised in this wrongful death action but must be raised in proceedings before the Orphans' Court.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 14199-2002

Appearances: John Quinn, Jr., Esq. for St. Vincent & Dr. Bednarski
Norman DeFranco, pro se

OPINION

At issue is whether Plaintiffs' Amended Complaint should be dismissed because Plaintiffs lack the capacity to sue for either wrongful death or loss of consortium. Additionally, it is averred Plaintiff, Anthony DeFranco, should be dismissed because he was added as a party after the statute of limitations expired. Upon consideration of the parties' briefs, oral arguments and the record, Defendants' Preliminary Objections must be granted and the case dismissed.

PROCEDURAL HISTORY / FACTS

Mario DeFranco, the decedent, accidentally fell at his family's home and hit his head rendering him unconscious. He was admitted to St. Vincent's Hospital in Erie, Pennsylvania, where he underwent surgery for a hemorrhage after which he was placed upon a life support system. Mario DeFranco died on December 12, 2000. Decedent's daughter, Destiny M. Henderson, was granted Letters of Administration *Pendente Lite* on November 15, 2001.

On December 2, 2002 the decedent's brother, Norman DeFranco, filed a Praecipe for Writ of Summons and a Complaint. The caption of the Complaint lists Norman DeFranco as Plaintiff and states as follows "AND NOW comes the Plaintiff's, [sic] the DeFranco Family, Norman DeFranco, the DeFranco Family, by and through Norman DeFranco, acting on behalf of the plaintiffs." Complaint filed 12/2/02 p. l. Paragraph 6 of the Complaint alleges the Defendants were negligent and unprofessional in removing Mario DeFranco from life support after having been notified by the Plaintiffs not to do so.

On December 3, 2002 a Writ of Summons was issued and the Sheriff served it upon the Defendants on January 2, 2003. However, a copy of the Complaint filed on December 2, 2002 was never served upon the Defendants. Defendants filed a Praecipe for Rule to File Complaint on January 23, 2003, which was served upon Norman DeFranco on January 31, 2003.

An Amended Complaint was filed on February 13, 2003 with the caption listing Norman DeFranco and Anthony DeFranco as Plaintiffs. Paragraph 2 of the Amended Complaint incorporates by reference the Complaint filed on December 2, 2002. The Amended Complaint repeatedly asserts that "The Plaintiff's [sic] in this matter are Norman and Anthony DeFranco, father and son, and bring forth this wrongful death Action [sic] as the victim's trustee ad litem (and representative)" and "Plaintiff's [sic] are

duly qualified and acting trustee ad litem's [sic] (representative) of the estate of the deceased, who died in the manner alleged below on December 12, 2000, leaving surviving him his mother, brother and nephew, for whose benefit Plaintiff's [sic] are bring this Action [sic]." Amended Complaint filed 2/13/03 pp. 1-2. The Amended Complaint also asserts the proximate cause of the decedent's death was the unlawful and unauthorized removal of the life support system by the Defendants. The Amended Complaint further alleges "[b]y reason of the death of decedent, decedent's surviving mother, brother and nephew has [sic] been deprived of decedent's comfort, society, counsel and services;...". Amended Complaint filed 2/13/03 p. 3.

Defendants filed Preliminary Objections and a Brief in Support on February 24, 2003. Plaintiffs filed a Response to Defendant's Preliminary Objections on March 6, 2003 and oral arguments were heard on March 31, 2003.

Defendants' Preliminary Objections are three-fold. First, the Plaintiffs lack the capacity to sue for the death of Mario DeFranco under the Wrongful Death Statute [42 Pa. C.S.A. §8301(b)] because they are not the personal representatives of the decedent's estate and they are not persons entitled by law to recover damages under the Act. Second, Plaintiffs also lack the capacity to sue for loss of consortium because neither of them is the decedent's spouse. Third, Anthony DeFranco should be dismissed as a Plaintiff because he was added to the lawsuit after the statute of limitations expired. *See* 42 Pa. C.S.A. § 5524(2). Each of these objections will be discussed *seriatim.*

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 material allegations in the petition for review, as well as all inferences reasonably adduced therefrom. *Allentown School District v. Commonwealth of Pennsylvania*, 782 A.2d 635, 638 (Pa. Commw. 2001). Preliminary objections are only to be sustained in cases where the law under consideration is clear and free from doubt. *Pennsylvania AFL-CIO v. Commonwealth* 563 Pa. 108, 757 A.2d 917 (2000). 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 criteria to the instant case, Defendants' Preliminary Objections that the Plaintiffs lack the capacity to bring a cause of action under the Wrongful Death Statute must be sustained. Pennsylvania Rule of Civil Procedure 2202(b) provides as follows:

> "If no action for wrongful death has been brought within six months after the death of the decedent, the action may be brought by the personal representative or by any person entitled by law to recover damages in such action as trustee ad litem on behalf of all persons entitled to share in the damages." Pa. R.C.P. Rule 2202(b).

Pennsylvania's Wrongful Death Statute provides, in part, as follows:

> "Except as provided in subsection (d) [Action by personal representative], the right of action created by this section shall exist only for the benefit of the spouse, children or parents of the deceased, whether or not citizens or residents of this Commonwealth or elsewhere...". 42 Pa. C.S.A. §8301(b).

Despite the fact that Plaintiffs' Amended Complaint asserts they are duly qualified and acting as trustee ad litem in bringing this cause of action on behalf of the decedent's mother, brother and nephew, the Court has never appointed either Norman DeFranco or Anthony DeFranco as trustee ad litem in this case. In fact, decedent's daughter, Destiny M. Henderson, was granted Letters of Administration *Pendente Lite* and therefore represents decedent's estate. The Plaintiffs are not the spouse, children or parents of the decedent. Furthermore, the decedent's mother's name and/or signature does not appear on either the Complaint filed on December 2, 2002, or the Amended Complaint filed on February 13, 2003. Consequently, Defendants' Preliminary Objection asserting that the Plaintiffs have no capacity in this case to sue under the Wrongful Death Statute is sustained.

Defendants' Preliminary Objections also assert the Plaintiffs lack the capacity to sue for loss of consortium. Paragraph 14 of the Amended Complaint states "[b]y reason of the death of decedent, decedent's surviving mother, brother and nephew has [sic] been deprived of decedent's comfort, society, counsel and services;...". Amended Complaint filed 2/13/03 p. 3. This allegation constitutes a claim for loss of consortium. However, a claim for loss of consortium is derived from the injured spouse's claim *Linebaugh v. Lehr*, 351 Pa. Super 135, 505 A.2d 303 (1986); *Scattaregia v. Wu*, 343 Pa. Super. 452, 495 A.2d 552 (1985) and as noted above, neither of the Plaintiffs were the decedent's spouse. Moreover, a claim for loss of filial consortium has not been recognized by our appellate courts. *Jackson v. Tastykake, Inc.*, 437 Pa. Super. 34, 648 A.2d 1214 (1994); *Brower v. City of Philadelphia*, 124 Pa. Commw. 586, 557 A.2d 48 (1989). Therefore, Defendants' Preliminary Objection that Plaintiffs lack capacity to sue for loss of consortium in this case must also be sustained.

Defendants' Preliminary Objection in the form of a Motion to Strike

Anthony DeFranco as a Plaintiff because he was added to the lawsuit after the statute of limitations expired is sustained. The decedent died on December 12, 2000 and as a result, the statute of limitations ran on December 12, 2002 pursuant to 42 Pa. C.S.A. § 5524(2). Anthony DeFranco filed an Appearance to be entered as an additional plaintiff on January 29, 2003; forty-eight (48) days after the statute of limitations had expired.

> "Where the statute of limitations has run, amendments will not be allowed to introduce a new cause of action or bring in a new party or change the capacity in which he is sued. If the effect of the amendment is to correct the name under which the right party is sued, it will be allowed; if it is to bring in a new party, it will be refused." *Thomas v. Duquesne Light Company*, 376 Pa. Super. 1, 6, 545 A.2d 289 (1988) *quoting Girardi v. Laquin Lumber Company*, 232 Pa. 1, 81 A.63 (1911).

Consequently Anthony DeFranco should be dismissed as a Plaintiff in this lawsuit since he was added as a new party after the statute of limitations had expired.

CONCLUSION

For the foregoing reasons, the Defendants' Preliminary Objections to the Plaintiffs' Amended Complaint are hereby **SUSTAINED** by the Court.

ORDER

AND NOW to-wit this 11 day of April 2003, 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

NORMAN DeFRANCO and ANTHONY DeFRANCO, Plaintiffs
v.
SAINT VINCENT HOSPITAL and JEFFREY BEDNARSKI, M.D. and JOHN DOE(s), Defendants

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 14199-2002

OPINION

Before the Court is an appeal from the April 11, 2003 Opinion/Order of this Court denying Appellant's Motion to Reconsider Order Dismissing Complaint and Motion for Trial Judge to Recuse Himself. As this Appeal is without merit, it must be dismissed

PROCEDURAL / FACTUAL HISTORY

The Procedural Factual History contained in the Opinion of April 11, 2003, is incorporated herein by reference. The most current procedural history is as follows:

On May 5, 2003, Appellant filed a Motion to Reconsider Order Dismissing Complaint and Motion of Trial Judge to Recuse Himself. On the same day, both of Appellant's Motions were denied.

On May 9, 2003, Appellant filed a Notice of Appeal and a Concise Statement of Matters Complained of on Appeal on May 21, 2003. This Opinion is in response thereto.

DISCUSSION

On appeal, Appellant asserts error in dismissing the lawsuit for the reasons set forth in this Court's Opinion/Order of April 11, 2003. The analysis as set forth in the April 11th Opinion remains the position of this Court and is incorporated herein by reference. However, each claim on appeal will be addressed *seriatim.*

Appellant asserts his state and federal constitutional rights were violated by the undersigned not recusing himself from the proceedings. The Supreme Court has established "[r]ecusal is unwarranted where there is no allegation or showing of any specific prejudgment or bias against an appellant. It is incumbent upon the proponent of a disqualification motion to allege facts tending to show bias, interest or other disqualifying events, and it is the duty of a judge to decide whether he feels he can hear and dispose of the case fairly and without prejudice because it is recognized that judges are honorable, fair and competent." *Commonwealth v. Abu-Jamal*, 720 A.2d 121 (Pa. 1998); *Reilly v. Southeastern Pennsylvania Transp. Authority*, 489 A.2d 1291, 1300 (Pa. 1985).

In the case *sub judice,* Appellant has failed to allege facts that would demonstrate bias, interest or other disqualifying events. Appellant contends recusal is warranted because the undersigned was the District Attorney who prosecuted Appellant's son, Anthony DeFranco, in a

criminal trial in May of 1989. There is no authority for the proposition that recusal is required for any case involving any family member of a person prosecuted criminally. Notably, Appellant was not prosecuted. While the undersigned was the District Attorney at the time of Anthony DeFranco's case, another attorney was the prosecutor at DeFranco's trial.

Importantly, Appellant never raised the issue of recusal until *after* there was a ruling against him in this case. This Court dismissed Anthony DeFranco as a Plaintiff in this lawsuit by Order date April 11, 2003. It was not until May 5, 2003 that Appellant filed a Motion to Recuse. Anthony DeFranco was dismissed because he was added as a new party after the statute of limitations expired and not for any other reason which might suggest prejudice or bias on behalf of the undersigned.

Moreover, the prior criminal case is in no way connected to the current civil action. The Supreme Court has established, "We have never held and are unwilling to adopt a *per se* rule that a judge who had participated in the prosecution of a defendant may never preside as judge in future unrelated cases involving that defendant. Absent some showing of prejudgment or bias we will not assume a trial court would not be able to provide a defendant a fair trial based solely on prior prosecutorial participation." *See Abu-Jamal supra; Commowealth v. Darush*, 459 A.2d 727, 731(Pa. 1983). Hence, Appellant's argument fails to compel the recusal of the undersigned and his claim must be dismissed.

Appellant also asserts error in striking Anthony DeFranco as a Plaintiff in the lawsuit. Although a Writ of Summons was properly filed to toll the statute of limitations in this action as to Appellant, Norman DeFranco, the Writ did not toll the statute of limitations as to Anthony DeFranco. Appellant filed the Writ on behalf of himself indicating no other parties participating in the action against Defendants. The statute of limitations began to run when the decedent died on December 12, 2000 and expired on December 12, 2002 pursuant to 42 Pa. C.S.A. §5524(2). Anthony DeFranco did not file an Appearance to be entered as an additional plaintiff until January 29, 2003, well after the statute of limitations had expired. Appellant and Anthony DeFranco subsequently filed an Amended Complaint as Plaintiffs. By law, however, amendments are not allowed to bring in a new party after the statute of limitations has run. *See Montanya v. McGongegal*, 757 A.2d 947, 950 (Pa. Super. 2000); *Thomas v. Duquesne Light Company*, 545 A.2d 289, 291 (Pa. Super. 1988).[1] Thus, Anthony DeFranco was properly stricken as a Plaintiff in this lawsuit and his claim must be dismissed.

[1] The Court held in both cases, "If the effect of the amendment is to correct the name under which the right is sued, it will be allowed; if it is to bring in a new party, it will be refused." *Id.*

Appellant next asserts error in accepting Defendants' Preliminary Objections where Appellant alleges they were untimely filed. The record reflects Appellant filed a Writ of Summons on December 3, 2002 and the Sheriff served the Writ upon Defendants on December 27, 2002. However, the record does not indicate Appellant's Complaint was properly served upon Defendants in accordance with Rule 400 (a) of the Pennsylvania Rules of Civil Procedure.[2] Although Appellant filed the Complaint on December 2, 2002, there is no evidence Appellant accomplished proper service of process nor that the Defendants ever *received* the Complaint. Consequently, on January 23, 2003, Defendants entered an appearance and filed a Praecipe for Rule to File Complaint within 20 Days or Suffer a Judgment of Non Pros. In response, Appellant filed an Amended Complaint on February 13, 2003. Defendants then filed timely Preliminary Objections on February 24, 2003, within twenty (20) days of the Amended Complaint in accordance with Rule 1026 of the Rules of Civil Procedure which provides, "every pleading subsequent to the complaint shall be filed within twenty days after service of the preceding pleading." Pa. C.R.P. Rule 1026(a). Therefore, Appellant's claim of error in accepting Defendant's Preliminary Objections due to untimeliness is without merit.

Appellant asserts the lack of his mother's name and/or signature being present on documents throughout the proceedings is a correctable error. However, not only was the name and/or signature of Appellant's mother, Alvira DeFranco English, omitted from documentation, but Appellant failed to properly include his mother as a party to the action from the time the lawsuit was commenced. In this case, it cannot be inferred that Ms. English was a party where her name never appeared on either Complaint nor any subsequent pleadings filed by Appellant.

As established in the Opinion of April 11th, neither Appellant nor his son, Anthony DeFranco, has capacity to sue under the Wrongful Death Statute where neither has been appointed as a personal representative or trustee ad litem in this case. Appellant's attempt to provide an affidavit signed by Ms. English in response to Defendant's Preliminary Objection as to Appellant's lack of capacity to sue, was not sufficient to include her as an additional party. The affidavit did not contain any language Ms. English was joining Appellant as a Plaintiff in the action; it merely provided argument as to her position as a rightful estate holder or party to sue and was not a part of the Complaint. Even if the affidavit included language that Ms. English was attempting to join as a Plaintiff in the lawsuit, the Statute of Limitations would have prevented her joinder. *See*

[2] The rule provides original process shall be served within the Commonwealth only by the sheriff with exceptions not applicable to this case.

e.g., Thomas v. Duquesne Light Company supra. The affidavit was signed on February 5, 2003 and Ms. English's right to bring a cause of action expired on December 12, 2002.

Additionally, Appellant claims decedent's daughter, Destiny Henderson, was improperly granted Letters of Administration *Pendente Lite* "in secrecy." This claim is one involving who should be the rightful Administrator of decedent's estate and thus, should be resolved in Orphan's Court. Since decedent's daughter was granted the Letters of Administration, she properly represents the interests of the estate in question. Should Appellant wish to challenge Destiny Henderson's representation, he must do so in the proper forum. As such, this claim on appeal must be dismissed.

CONCLUSION

For the reasons set forth in this Court's Opinion/Order of April 11, 2003 and for the foregoing reasons, this Appeal must be denied.

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

COMMONWEALTH OF PENNSYLVANIA
v.
RANDY DONNELL PETTY

CONFLICT

Where an actual conflict of interest exists, the defendant is entitled to have the conflict removed without any further showing of prejudice.

A mere allegation or appearance of impropriety is insufficient to establish an actual conflict of interest.

A defendant cannot prevail on a conflict of interest claim absent a showing of actual prejudice.

CRIMINAL PROCEDURE / SUFFICIENCY OF EVIDENCE

The test for determining the sufficiency of the evidence is whether, in viewing the evidence in the light most favorable to the Commonwealth as verdict winner and drawing all proper inferences favorable to the Commonwealth, the fact finder could reasonably have determined that all elements of the crime to have been established beyond a reasonable doubt.

A verdict is against the weight of the evidence only when it is so contrary to the evidence as to shock one's sense of justice.

CRIMINAL PROCEDURE / JURY DELIBERATIONS

It is within the province of the fact finder to resolve all issues of credibility, resolve conflicts in evidence, make reasonable inferences from the evidence, and believe all, none or some of the evidence presented.

CRIMINAL LAW / SPECIFIC CRIMES

A person recklessly endangers another when he engages in conduct that places or may place another person in danger of death or serious bodily injury.

A person engages in criminal mischief when he damages the tangible property of another intentionally, recklessly or by negligence in the employment of fire, explosives, or other dangerous means.

A person engages in the possession of an instrument of crime when he possesses a firearm or other weapon concealed upon his person with the intent to employ it criminally.

A person is guilty of carrying a firearm without a license when he carries a firearm in any vehicle or carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license.

CRIMINAL PROCEDURE / POST-TRIAL MOTIONS

After-discovered evidence can be the basis for a new trial if it: (1) has been discovered after the trial and could not have been obtained at or prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach the credibility of witnesses; and (4) is of such nature and character that a different verdict will likely result if a new trial is granted.

Defendant's knowledge of content of witness's testimony nine months prior to defendant's trial was not "newly discovered" evidence.

CRIMINAL PROCEDURE / PRE-TRIAL PROCEDURE

Court will treat motion for judgment notwithstanding the verdict, which is not available in criminal prosecutions, as a motion for acquittal.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION NO. 2270 of 2002

Appearances: Robert A. Sambroak, Esquire, for the Commonwealth
Gustee Brown, Esquire, for the Defendant

OPINION

August 27, 2003: Before the Court is Defendant's appeal from his conviction and sentence as set forth below. As this appeal is without merit, it should be dismissed.

PROCEDURAL / FACTUAL HISTORY

On November 20, 2002, after a two-day trial, a jury convicted Defendant, Randy Donnell Petty, of the following crimes: five (5) counts of Aggravated Assault[1] (Counts 6-10), felonies of the second degree; five (5) counts of Aggravated Assault[2] (Counts 20-24), felonies of the first degree; five (5) counts of Recklessly Endangering Another Person[3] (Counts 11-15); two (2) counts of Criminal Mischief[4] (Counts 16 & 17); one (1) count of Possessing Instruments of a Crime[5] (Count 18); and one (1) count of violating Firearms Not to be Carried Without a License[6] (Count 19). The Defendant was acquitted of one (1) count of Attempted Criminal Homicide/Murder[7] (Count 5) and four (4) additional counts of Attempted Criminal Homicide/Murder were withdrawn by the Commonwealth (Counts 1-4).

These charges stem from a shooting that occurred on or about December 28, 2001, in the parking lot of the Last Stop Tavern, located at 1063 West 18th Street, in Erie, Pennsylvania. Defendant and his two companions (Ricky Van Gibbs and Jason Paul Evans) entered the Last Stop Tavern. During the course of the evening, Mr. Evans exchanged angry words with Maulano Logan, who was accompanied by four friends (Anthony Shields, Germaine Spain, Eric Spain and Dion Bishop).

[1] 18 Pa. C.S.A. §2702 (a)(4).
[2] 18 Pa. C.S.A. §2702 (a)(1).
[3] 18 Pa. C.S.A. §2705.
[4] 18 Pa. C.S.A. §3304 (a).
[5] 18 Pa. C.S.A. §907 (b).
[6] 18 Pa. C.S.A. §6106 (a).
[7] 18 Pa. C.S.A. §2501 (a).

Mr. Evans challenged Mr. Logan to a fight outside the tavern. All of the persons involved exited the tavern, and Eric Spain and Mr. Bishop went to retrieve Mr. Shields' vehicle. Mr. Evans brandished a handgun at Mr. Logan, Mr. Shields and Germaine Spain, who retreated to Mr. Shields' automobile. While Mr. Shields was backing his vehicle out of the parking lot, a handgun was given to Defendant who stood in front of the car and fired several shots into it.

On December 2, 2002, Defendant's counsel filed the following motions: a Motion for New Trial (Conflict of Interest); a Motion for New Trial (Lack of Weight and/or Sufficiency of the Evidence); a Motion for New Trial (New Evidence); and a Motion for Judgment of Acquittal Notwithstanding the Verdict (Possession of an Instrument of a Crime). In its Memorandum Opinion and Order dated January 7, 2003, the Court considered these motions prior to sentencing, concluded they were premature and decided to treat them as post-sentencing motions. *See*, Pa. R. Crim. P. 720; *Commonwealth v. Fisher*, 764 A.2d 82 (Pa. Super. 2000).

On January 10, 2003, Defendant was sentenced as follows: at Count 20 (Aggravated Assault-first degree felony) five (5) years to ten (10) years incarceration in a State Bureau of Corrections facility and costs; at Count 21 (Aggravated Assault-first degree felony) five (5) years to ten (10) years incarceration in a State Bureau of Corrections facility, consecutive to Count 20 and costs; at Count 22 (Aggravated Assault-first degree felony) five (5) years to ten (10) years incarceration in a State Bureau of Corrections facility, consecutive to Count 21 and costs; at Count 23 (Aggravated Assault-first degree felony) five (5) years to ten (10) years incarceration in a State Bureau of Corrections facility, consecutive to Count 22 and costs; at Count 24 (Aggravated Assault-first degree felony) five (5) years to ten (10) years incarceration in a State Bureau of Corrections facility, consecutive to Count 23 and costs [five (5) year mandatory minimum sentences at Counts 20-24]; at Count 19 (Firearms Not to be Carried Without a License) six (6) months to two (2) years incarceration, consecutive to Counts 20, 21, 22, 23 & 24 and costs; at Count 18 (Possessing Instruments of a Crime) three (3) months to six (6) months incarceration, concurrent to Count 19; at Counts 6-10 (Aggravated Assault-felonies of the second degree) costs and they merge with Counts 20-24; at Counts 11-15 (Recklessly Endangering Another Person) costs and they merge with Counts 6-10 & 20-24; at Count 16 (Criminal Mischief) $300.00 fine and costs; and at Count 17 (Criminal Mischief) $300.00 fine and costs. Defendant received an aggregate sentence of twenty-five and one-half (25 1/2) years to fifty-two (52) years incarceration, $600.00 fine and costs.

Defendant's *pro se* Motion for New Trial and *pro se* Motion to Modify Sentence were received by this Court on January 22, 2003, and were filed

on February 3, 2003.[8] Arguments from both counsel regarding all of Defendant's pending motions were heard on February 6, 2003 and were denied by Memorandum Opinion and Order dated February 18, 2003.[9]

On May 15, 2003, Defendant filed an Application to File Appeal *Nunc Pro Tunc* that was treated by this Court as Defendant's first petition for Post-Conviction Collateral Relief (hereinafter "PCRA") and PCRA counsel was appointed to represent Defendant. On June 5, 2003, PCRA counsel filed a Supplement to Motion for Post-Conviction Collateral Relief, which was granted to the extent that Defendant's direct appeal rights were re-instated by order dated June 24, 2003, Defendant filed a timely Notice of Appeal *Nunc Pro Tunc* on July 9, 2003, and a Concise Statement of Matters Complained of on Appeal on July 21, 2003. This Opinion is in response to the issues raised therein.

DISCUSSION

Defendant asserts that the was denied a fair trial because the prosecutor had previously represented him in a prior criminal case, thereby creating a conflict of interest. "Where an actual conflict of interest exists, the defendant is entitled to have the conflict removed without any further showing of prejudice. On the other hand, a mere allegation or appearance of impropriety is insufficient to establish an actual conflict of interest." *Commonwealth v. Sims*, 799 A.2d 853, 856-857 (Pa. Super. 2002). "A defendant cannot prevail on a conflict of interest claim absent a showing of actual prejudice." *Commonwealth v. Karenbauer*, 552 Pa. 420, 437, 715 A.2d 1086, 1094 (1998).

In this case, Defendant has not shown that he was actually prejudiced by First Assistant District Attorney Robert Sambroak's prosecution of the case against him. Defense counsel failed to articulate any specific facts demonstrating prejudice and merely asserted the "appearance of impropriety," which is insufficient. *See*, Hearing Transcript, February 6, 2003, pp. 3-4. Furthermore, Attorney Sambroak had no recollection of his prior representation of the Defendant. It was merely an afterthought and he did not gain a strategic advantage in his prosecution of Defendant's case. *Id.* at pp. 10-11. Moreover, the jury was not aware of Attorney Sambroak's prior representation of the Defendant and could not draw any inferences therefrom. *Id.* at p. 5. Consequently, Defendant cannot offer

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[8] The Court notes that Defendant's post-sentence motions were mailed on January 17, 2003 and therefore, they were timely filed within ten (10) days of his sentence pursuant to the prisoner "mail-box" rule. *See, Commonwealth v. Castro*, 766 A.2d 1283 (Pa. Super. 2001).

[9] The Memorandum Opinion & Order dated February 18, 2003 is attached hereto. In fact, several of the issues raised by counsel and addressed by the Court are duplicated in the current appeal. No new facts or circumstances have been set forth by the Defendant. *[Editor's note: February 18th Opinion & Order was published in the Erie County Legal Journal on Aug. 8, 2003, Vol. 86, No. 32.]*

any specific allegations to support his assertion of "conflict of interest" and thus, this baseless claim must fail.

Defendant asserts that the verdicts were not supported by sufficient evidence as matter of law and they were against the weight of the evidence. "The test for determining the sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the Commonwealth as verdict winner and drawing all proper inferences favorable to the Commonwealth, the fact-finder could reasonably have determined that all elements of the crime to have been established beyond a reasonable doubt." *Commonwealth v. Bishop*, 742 A.2d 178, 188 (Pa.Super. 1999); *Commonwealth v. Widmer*, 560 Pa. 308, 319, 744 A.2d 745, 751 (2000). A verdict is against the weight of the evidence only when it is "so contrary to the evidence as to shock one's sense of justice." *Commonwealth v. Mason*, 559 Pa. 500, 513, 741 A.2d 708, 715 (1999); *Commonwealth v. Brown*, 538 Pa. 410, 435, 648 A.2d 1177, 1189 (1994); *Commonwealth v. Zugay*, 745 A.2d 639, 645 (Pa. Super. 2000). "Moreover, it is within the province of the fact-finder to resolve all issues of credibility, resolve conflicts in evidence, make reasonable inferences from the evidence, and believe all, none, or some of the evidence presented." *Bishop*, *supra* at 189; *Zugay*, *supra* at 645.

Applying these standards to this case, the record demonstrates that all the elements of the various crimes Defendant was convicted of were established. Defendant was convicted of Aggravated Assault which is defined, in part, as follows:

> A person is guilty of aggravated assault if he: attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life;...[or] attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon. 18 Pa. C.S.A. §2702(a)(1) & (4).

Defendant was also convicted of Recklessly Endangering Another Person. This occurs when someone "engages in conduct which places or may place another person in danger of death or serious bodily injury." 18 Pa. C.S.A. §2705. Defendant was convicted of Criminal Mischief, which occurs when someone: "(1) damages tangible property of another intentionally, recklessly, or by negligence in the employment of fire, explosives, or other dangerous means listed in section 3302(a) of this title (relating to causing or risking a catastrophe)";[10].... 18 Pa. C.S.A. §3304(a).

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[10] The Court notes that 18 Pa. C.S.A. §3304 (a)(5) was added to the statute on October 2, 2002 and therefore, does not apply to Defendant's case because these events took place on December 28, 2001 before the effective date of the amendment.

Also, Defendant was convicted of Possessing Instruments of a Crime. This occurs when someone "possesses a firearm or other weapon concealed upon his person with the intent to employ it criminally." 18 Pa. C.S.A. §907(b). Lastly, Defendant was convicted of violating Firearms Not to be Carried Without a License. This occurs when someone "carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license".... 18 Pa. C.S.A. §6106(a).

The jury, as fact-finder, considered all of the evidence, including the Commonwealth's three eyewitnesses, Dion Bishop, Eric Spain, and Germaine Spain, who testified that Defendant fired the weapon into the vehicle while it was occupied by all five victims. See, Jury Trial Transcript - Day One, November 18, 2002, pp. 54-55, 114-115, 119 & 139-140. Furthermore, the Commonwealth presented motive evidence that Germaine Spain had been tried and acquitted of killing Defendant's brother five years earlier. *See*, *Id*. at pp. 137-138; Jury Trial Transcript - Day Two, November 19, 2002, pp. 52-54. Although Jason Evans testified at trial that he did not know who fired the weapon, his videotaped statement taken by officers Frank Kwitowski and Ed Yeaney indicated Defendant fired the shots. On the videotape, Mr. Evans stated Defendant admitted that he shot the car up, the .45 shots were loud, and he wanted them to "pay for it" (*i.e.* revenge). *See*, Commonwealth Exhibit #9 (video of Mr. Evans' statement). Firing several shots from a handgun into a vehicle with five occupants is clearly an attempt to cause serious bodily injury to another, and Defendant's conduct certainly placed all five victims in danger of death or serious bodily injury. Therefore, the convictions of Aggravated Assault and Recklessly Endangering Another Person are supported by sufficient evidence.

At trial, evidence was presented demonstrating Defendant's gunfire damaged two motor vehicles, a 1989 Toyota Camry driven by the victims, and a 1992 Oldsmobile parked nearby. See, Jury Trial Transcript - Day One, November 18, 2002, pp. 91-108, 127 & 142; Jury Trial Transcript - Day Two, November 19, 2002, p. 9. Therefore, the convictions for two counts of Criminal Mischief are sufficiently supported by the record.

During the trial, several witnesses testified that a handgun was given to Defendant on the night these events took place, and Defendant did not possess a license to carry a firearm. *See,* Jury Trial Transcript - Day One, November 18, 2002, pp. 53, 113, 139 & 147-149; Jury Trial Transcript - Day Two, November 19, 2002, p. 29. Therefore, Defendant's convictions for Possessing Instruments of a Crime and Carrying a Firearm Without a License are supported by sufficient evidence.

Following the Court's limiting instruction, the jury was directed to consider, if they chose to do so, the inconsistent statements as substantive evidence and not merely for impeachment purposes. Of

course, the jurors were again reminded that they were the sole judges of credibility. *See,* Jury Trial Transcript - Day Two, November 19, 2002, pp. 35-37. Therefore, based upon the evidence set forth above the verdicts are not "so contrary to the evidence as to shock one's sense of justice," and certainly not this Court's. *See, Commonwealth v. Mason*, *supra.*

Defendant asserts the Court erred by not considering Dion Bishop's testimony, identifying Jason Evans as the shooter, as newly-discovered evidence. "After-discovered evidence can be the basis for a new trial if it: (1) has been discovered after the trial and could not have been obtained at or prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach the credibility of a witness; and (4) is of such nature and character that a different verdict will likely result if a new trial is granted." *Commonwealth v. Detman*, 2001 Pa. Super. 76, 770 A.2d 359, 360 (2001). *See also, Commonwealth v. McCracken*, 540 Pa. 531, 549, 659 A.2d 541, 545 (1995).

In the case *sub judice,* Defendant claims that Mr. Bishop (an eyewitness who testified at trial that Defendant fired the weapon on the night in question) had told others that it was, in fact, Mr. Evans who was the shooter, and not the Defendant. Defendant claims further that Mr. Bishop obtained a sawed-off shotgun shortly after the incident in question, because he wanted to shoot Mr. Evans who Mr. Bishop had claimed did the shooting.

To support his claim, at the February 6, 2003 hearing, Defendant called Yaphet Ettison to testify. Mr. Ettison was an inmate at the time that Mr. Bishop was incarcerated and was also present in the same cellblock as Mr. Evans. Mr. Ettison testified that he took it upon himself to approach Mr. Bishop in the cellblock to question him regarding the events surrounding Defendant. At this time, which was testified to as some time in February of 2002, Mr. Ettison stated that Mr. Bishop told him that Defendant did not do anything on the night of the shooting. *See* Hearing Transcript, February 6, 2003, pp. 13-14 & 21-22. Mr. Ettison also claimed that Mr. Bishop only told authorities that Defendant was the shooter because he was going along with his cousin, Germaine Spain, who had told the police that Defendant was the shooter. *Id.* at pp. 21-26.

As noted by Mr. Ettison's testimony, the information that was obtained from Mr. Bishop occurred sometime in February of 2002, nine months prior to Defendant's trial. Further, Mr. Ettison testified that he had shared this information with Defendant when he and they were incarcerated together sometime in October of 2002. *Id.* at pp. 17-19. The Court notes that Defendant's trial commenced with jury selection on November 18, 2002. Consequently, based on the testimony of Mr. Ettison, this Court does not believe this information qualifies as "newly discovered" evidence because Defendant was informed of it prior to trial. Furthermore, based on

Mr. Ettison's account, it is also apparent to this Court that any exercise of due diligence should have and would have uncovered this information, if it truly did exist.

Moreover, this alleged new evidence is merely corroborative and cumulative of Defendant's witness, Terry Porter. At trial, Mr. Porter testified that Jason Evans was the one who had the weapon and fired it on the date in question. Mr. Porter was an inmate with Mr. Evans at the Erie County Prison and testified regarding his relationship with Mr. Evans during his prison stay, and particularly the statements that Mr. Evans had made to him about this shooting. Consequently, Defendant did present evidence on his behalf that Jason Evans was the shooter and Mr. Porter's credibility was assessed by a jury. Therefore, the testimony of Mr. Ettison, if believed, is not only cumulative of the testimony given by both Mr. Porter and Defendant, who testified at trial that he had no involvement in the shooting, but it also is being used simply to impeach the credibility of Mr. Bishop. *See, Commonwealth v. Detman, supra*.

This testimony and the evidence proffered by Defendant are not of the nature and character that would result in a different verdict if Defendant had been granted a new trial. The jury had the opportunity to assess the credibility of all of the witnesses. They observed Jason Evans during his testimony, as well as the videotaped statement given by Mr. Evans which was used by the Commonwealth to contradict his in-court testimony. Further, the jury also had the opportunity to assess the testimony of Terry Porter and the credibility and testimony of Defendant. The Commonwealth's witnesses were subjected to thorough challenges on cross-examination, and any inconsistencies were certainly illuminated and presented to them. The jury rendered a unanimous verdict and this Court has previously stated that this verdict was supported by sufficient evidence to prove the crimes beyond a reasonable doubt. Consequently, for the reasons set forth above, the newly-discovered evidence proffered by Defendant was not sufficient to support a motion for a new trial.

CONCLUSION

For the reasons set forth above, Defendant's appeal should be dismissed.

BY THE COURT:
/s/ **John J. Trucilla, Judge**

DARLENE L. BERES a/k/a SALLY BERES, ANNA L. CARO a/k/a ANN CARO and HELEN M. RUSNAK, Plaintiffs
v.
ROMAN CATHOLIC DIOCESE OF ERIE, DONALD W. TRAUTMAN and MICHAEL J. MURPHY, Defendants

CIVIL PROCEDURE/PLEADINGS/PRELIMINARY OBJECTIONS

In reviewing a preliminary objection seeking to dismiss the case, the Court must accept as true plaintiff's averments of fact and any reasonable inferences therefrom.

TORTS/DEFAMATION

By statute the plaintiff in a defamation case must prove the following elements:

1. The defamatory character of the communication;
2. Its publication by the defendant;
3. Its application to the plaintiff;
4. The understanding by the recipient of its defamatory meaning;
5. The understanding by the recipient of it as intended to be applied to the plaintiff;
6. Special harm resulting to the plaintiff from its publication; and
7. Abuse of a conditionally privileged occasion.

See 42 Pa.C.S.A. §8343(a).

TORTS/DEFAMATION

A communication is considered defamatory if it tends to harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. *Goralski v. Pizzimenti,* 540 A.2d 595 (Pa. Commw. 1988).

The words in an allegedly defamatory statement must be given by judges and juries the same significance that other people are likely to attribute to them. It is not defamatory if the communication is only embarrassing or annoying to the subject. *Beckman v. Dunn*, 419 A.2d 583 (Pa. Super. 1980).

TORTS/DEFAMATION

A statement that an individual does not recall meeting with someone twenty years prior is not a statement capable of defamatory meaning. Likewise, a statement that an individual had not received complaints during another's tenure as Bishop is incapable of defamatory meaning. To have a different recollection of historical events is not defamatory and not capable of defamatory meaning under Pennsylvania law.

TORTS/DEFAMATION

A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the existence of undisclosed defamatory facts as the basis for the opinion. *Braig v. Field Communications,* 456 A.2d 1366 (Pa. Super. 1983). A simple expression of opinion based on disclosed…facts is not itself sufficient for an action of defamation. (*Id.*)

TORTS/LIBEL

Opinion, without more, is not actionable as libel. The allegedly libeled party must demonstrate that the communicated opinion may reasonably be understood to imply the existence of undisclosed defamatory facts justifying the opinion. *Beckman*.

TORTS/DEFAMATION

To say someone was denied unemployment benefits because he/she was "ineligible" is not a defamatory fact, particularly when the subject first states she did not receive unemployment "on technical grounds".

An individual who is not identified by name, and whose identity is not ascertainable from any of the defendant's statements does not have a cause of action under defamation. The fact that only two people would be able to identify an otherwise unidentified third person from a newspaper article is not sufficient to lower the plaintiff's reputation in the community as a whole. *Beckman*.

TORTS/DEFAMATION

One of the elements of defamation is that the plaintiffs must allege an abuse of a conditionally privileged occasion. 42 Pa.C.S.A. §8343(a)(7). The Appellate Courts have recognized three scenarios wherein a conditional privilege exists:

1. Some interest of the person who publishes defamatory matter is involved;
2. Some interest of the person to whom the matter is published or some other third person is involved; or
3. A recognized interest of the public is involved. *Beckman.*

TORTS/DEFAMATION

The defendant's response in this case was conditionally privileged under the First Amendment. Additionally, there is a recognized interest of the public involved in this matter given the national attention paid to the revelations of sexual abuse by priests. The plaintiffs failed to plead facts demonstrating an abuse of the conditional privilege. Actual malice or a reckless disregard for the truth must be established. Since the plaintiff's complaint does not allege or establish these elements the compliant is dismissed.

TORTS/VICARIOUS LIABILITY

Since the plaintiffs failed to establish liability on the part of the principles, there is no liability on the part of the Roman Catholic Diocese of Erie under vicarious liability.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 11421-2003

Appearances: Richard Peterson, Esq.
Kenneth Wargo, Esq.

(Editor's Note: This decision has been appealed to the Superior Court)

OPINION

Before the Court are the Preliminary Objections of the Defendants seeking to dismiss Plaintiffs' Complaint in its entirety as a matter of law. Given the undisputed facts as plead, and the benefit of all inferences therefrom to the Plaintiffs, the Defendants' Preliminary Objections must be granted. Hence this case is dismissed.

FACTUAL AND PROCEDURAL HISTORY

This case began when the Plaintiffs contacted the Erie Times News to have published their story about the response from the Diocese of Erie to the concerns Plaintiffs had about pornography possessed by an Erie Diocesan priest, Rev. Robert Bower. The result was a lengthy story published by the Erie Times News on April 17, 2002 in which certain statements are attributed to Bishop Murphy and Bishop Trautman.

By a letter to the editor of the Erie Times News dated April 19, 2002, Bishop Trautman challenged the April 17, 2002 news story. By Memo also dated April 19, 2002, Bishop Trautman transmitted a copy of his April 19, 2002 letter to all priests in the Diocese of Erie. The Erie Times News published Bishop Trautman's letter on April 21, 2002 in the Letters to the Editor section.

On May 20, 2003, Plaintiffs filed a nine-count Complaint against the Defendants asserting defamation based on statements attributed to Bishop Murphy in the April 17, 2002 article and in the case of Bishop Trautman, his letter to the editor of April 19, 2002. Plaintiffs also contend Bishop Trautman's April 19, 2002 Memo to the Diocesan priests was defamatory. The Defendants have filed a series of Preliminary Objections to the Complaint. The parties have had an opportunity to brief and orally argue this matter, which is now ripe for resolution.

STANDARD OF REVIEW

It is well settled that in reviewing a Preliminary Objection seeking to dismiss the case, accepted as true are Plaintiffs' averments of fact and any reasonable inferences therefrom. Further, relief is not available to the Defendants if there is any material issue of fact.

In the case *sub judice,* the salient facts are not in dispute. It is a matter of public record what was published on two occasions by the Erie Times News. Also, Bishop Trautman's April 19, 2002 Memo to the Diocesan priests speaks for itself. The issue to be decided is whether the Defendants are liable for defamation for statements made within these publications.

By statute, the plaintiff in a defamation case must prove all of the following elements:

1. The defamatory character of the communication;
2. Its publication by the defendant;

3. Its application to the plaintiff;
4. The understanding by the recipient of its defamatory meaning;
5. The understanding by the recipient of it as intended to be applied to the plaintiff;
6. Special harm resulting to the plaintiff from its publication; and
7. Abuse of a conditionally privileged occasion.

See 42 Pa. C.S.A §8343(a).

In this case, Plaintiffs have not established the first and seventh elements of a defamation claim. In addition, Plaintiff Helen Rusnak has not met the third element of defamation. Each of these three elements will be discussed seriatim.

WHETHER THE DEFENDANTS STATEMENTS
ARE CAPABLE OF A DEFAMATORY MEANING

It is initially the function of the Court to determine whether the communication in question is capable of a defamatory meaning. *Vitteck v. Washington Broadcasting Company*, 389 A.2d 1197 (Pa. Super. 1978). The Appellate Courts have adopted the view that "a communication is considered defamatory if it tends to harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Goralski v. Pizzimenti*, 540 A.2d 595, 598 (Pa. Com. 1988). Consideration must be given to the context in which the statement is made and the nature of the audience receiving the communication. "The words must be given by judges and juries the same significance that other people are likely to attribute to them" *Goralski*, *supra*. 540 A.2d at 598. Importantly, it is not defamatory if the communication is only embarrassing or annoying to the subject. *Beckman v. Dunn*, 419 A.2d 583, 587 (Pa. Super. 1980).

This Court has reviewed a number of published cases in which statements were found incapable of a defamatory meaning. For example, characterizing someone as "anti-semitic" was not defamatory, *see Rypbes v. Wapner*, 457 A.2d 108 (Pa. Super. 1983); stating that someone would act "by hook or by crook" is not defamatory as a matter of law, *see Beckman v. Dunn*, supra.; a statement that someone was terminated from employment due to misconduct was not defamatory as a matter of law, *see Goralski v. Pizzimenti,* supra.; alleging someone is crude, vulgar and obscene is not capable of a defamatory meaning, *see Maier v. Maretti*, 671 A.2d 701 (Pa. Super. 1985); a cartoon portraying a person as vile, obscene, abusive, insensitive and paranoid is not capable of defamatory meaning, *see Wecht v. PG Publishing Company*, 510 A.2d 769 (Pa. Super. 1986).

In addition, a co-worker describing another's work as incompetent and lacking trust in that person is not defamation as a matter of law, *see Gordon v. Lancaster Osteopathic Hospital*, 489 A.2d 1364 (Pa. Super. 1985); statements that someone is not helpful, is uncooperative and takes an adversarial position is not capable of a defamatory meaning, see *Prano*

v. O'Connor, 641 A.2d 607 (Pa. Super. 1994).

Against this backdrop, the statements of both Bishops will be considered for defamatory content.

STATEMENTS OF BISHOP MURPHY

The context of Bishop Murphy's statements begins with the April 17, 2002 newspaper article. The Plaintiffs publicly allege in the newspaper article that Sally Beres, in her capacity as secretary to Rev. Robert Bower, a priest assigned to the Newman Center on the campus of Edinboro College (now Edinboro University), discovered homosexual pornography in the mail of Rev. Bower in 1982. The three Plaintiffs claim to have met with Bishop Murphy in July, 1982 at the Bishop's office. According to the Plaintiffs, they presented to Bishop Murphy the pornographic materials and expressed their concerns about Rev. Bower. Bishop Murphy purportedly refused to look at the materials and said "we cannot let this get out". Bishop Murphy then went on to lecture the Plaintiffs "on love and what it meant to love". Two days after the meeting with Bishop Murphy, Sally Beres was fired from her job by Monsignor Sullivan.

According to Sally Beres, the Diocese contested her unemployment claim. Ms. Beres recalled Rev. Bower testifying against her at the hearing. Ms. Beres claimed in the April 17, 2002 article that she was denied unemployment by a labor referee "on technical grounds".

Sally Beres says she kept the pornographic materials that Bishop Murphy would not accept in her attic until 1999 when Rev. Bower was arrested by Pennsylvania State Trooper Lee Formichella. According to the April 17, 2002 article, after Rev. Bower was arrested, the three Plaintiffs went to Trooper Formichella and stated their concerns about Rev. Bower, with Ms. Beres providing the pornographic materials from her attic to Trooper Formichella.

In the April 17, 2002 article, Bishop Murphy's response in its entirety is as follows:

> "Murphy says he does not remember the meeting which would have happened shortly after he became Bishop of Erie on July 16, 1982. Murphy, 86, retired at age 75 and lives at the rectory next to St. Patrick Catholic Church on East Fourth Street.
>
> Murphy said he received no complaints about Bower during his tenure, which ended when Trautman was named Bishop of Erie in June 1990. Told of what the women said about the meeting with him, Murphy said he could remember nothing of the sort.
>
> 'I'm sure I would recall something', he said."

It must be noted that Bishop Murphy has not legally adopted the statements attributed to him in the April 17, 2002 article. Unlike Bishop Trautman's Letter to the Editor, which is clearly Bishop Trautman's

communication, Bishop Murphy's statements are attributed to him by a third party. Nonetheless, given the procedural posture of this case, this Court will accept as true that Plaintiff would present the testimony of the news reporter that Bishop Murphy in fact made the oral statements as reported in the April 17, 2002 article.

In examining Bishop Murphy's statement, it must be considered that in April, 2002, at age 86 and having been retired since 1990, Bishop Murphy was asked about a meeting which allegedly occurred in July, 1982. Bishop Murphy reportedly stated that he did not remember such a meeting and "I am sure I would recall something." There is an important distinction that Plaintiffs fail to draw. By stating he did not remember such a meeting, Bishop Murphy did not say the meeting did not occur. Bishop Murphy qualified his memory by the observation that he should remember such a meeting; however, in his published comments Bishop Murphy never concluded, opined or factually stated that any of the Plaintiffs were lying in claiming they met with him in July, 1982.

The recipient of the statements attributed to Bishop Murphy would infer that at his age and stage of retirement, he had no specific recollection of a meeting some twenty years prior. Notably, shortly after Bishop Murphy's statements, the April 17, 2002 article contains statements attributed to Attorney Dennis Kuftic, a man roughly half the age of Bishop Murphy, that he only "vaguely" remembers talking to Sally Beres about filing a wrongful dismissal lawsuit against the Catholic Church. In the reported words of Attorney Kuftic, "I vaguely remember talking to somebody like that" he said, "but it has been too long." If Attorney Kuftic has a vague recollection of meeting with Ms. Beres, the reader is left to conclude that it is understandable why Bishop Murphy, at age 86, may not recall a meeting which occurred even longer ago than Attorney Kuftic's meeting.

Recognizing the Plaintiffs are entitled to all fair inferences from their facts as plead, the most damaging inference that can be attributed to Bishop Murphy's comment is that he does not remember meeting with the Plaintiffs. Obviously Bishop Murphy's recollection differs from that of the Plaintiffs. However, these circumstances do not mean that Bishop Murphy is calling the Plaintiffs liars and/or criminals as Plaintiffs allege.

Whether the 1982 meeting occurred is of no moment. Plaintiffs claim it did, Bishop Murphy responded that he does not remember. To state that you do not recall meeting with someone twenty years ago is not a statement capable of a defamatory meaning. To hold otherwise puts at risk every person whose memory may be different from that of another.[1]

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[1] For example, to follow Plaintiffs' logic, Attorney Kuftic may have the same liability exposure as Bishop Murphy.

A similar analysis is applicable to the purported statement of Bishop Murphy that "he received no complaints about Bower during his tenure (as Bishop). . ." . This statement standing alone is not defamatory as to anyone. Further, it is unclear what question was posed to Bishop Murphy and to what type of complaint Bishop Murphy was referring. It is also unknown what information was provided by the reporter to Bishop Murphy before the Bishop was asked the question. Hence there are a number of possible interpretations of Bishop Murphy's statement. However, for purposes of this case, Bishop Murphy's statement will be considered in the light proffered by the Plaintiffs.

According to the Plaintiffs, Bishop Murphy's statement is directly implying the Plaintiffs are lying when they say they met with him in July, 1982 and presented him the pornographic materials in the possession of Rev. Bower. Accepting as true Plaintiffs interpretation, given the law in Pennsylvania, Bishop Murphy's comment is not capable of a defamatory meaning.

This Court is required to give the words of Bishop Murphy "the same significance that other people are likely to attribute to them." *Goralski*, supra. 540 A.2d at 598. In his statement, Bishop Murphy is manifesting a different recollection of history than the Plaintiffs. As a result, his memory of the facts is opposite from that of the Plaintiffs. To have a different recollection of history is not defamatory. On a daily basis in every newspaper in this country, there are stories in which parties are quoted with different recollections of the facts. If every person who has a different recollection of the facts as quoted in the newspaper is liable for defamation, then our court system would be inundated with defamation cases.

There is nothing in Bishop Murphy's statement which would lower the Plaintiffs in the estimation of the community or deter third persons from associating with the Plaintiffs. Notably, in his statement Bishop Murphy does not identify or name any of the Plaintiffs. Also, Bishop Murphy does not affirmatively state the Plaintiffs are wrong or are lying.

If stating that someone would "act by hook or by crook"[2] or is "anti-semitic"[3] or is "vile, obscene, abusive, insensitive and paranoid"[4] are statements not capable of a defamatory meaning, then Bishop Murphy stating he received "no complaints about Bower" is incapable of a defamatory meaning under Pennsylvania law. Understandably, the Plaintiffs could be embarrassed or annoyed by the fact Bishop Murphy does not recall meeting with them in 1982 or receiving any complaints

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[2] *Beckman v. Dunn*, 419 A.2d 587.

[3] *Rypbes v. Wapner*, 457 A.2d 108.

[4] *Wecht v. PG Publishing Company*, 510 A.2d 769

about Rev. Bower. However, such embarrassment or annoyance does not give rise to a cause of action for defamation. See *Beckman v. Dunn*, supra.

THE STATEMENTS OF BISHOP TRAUTMAN

The consideration of Bishop Trautman's statements include facts separate from Bishop Murphy. It is uncontroverted that Bishop Trautman was not present for any alleged meeting between the Plaintiffs and Bishop Murphy in July, 1982. Also, according to the Complaint as well as the published statements of Sally Beres, the Plaintiffs never communicated directly to Bishop Trautman their concerns, information or evidence about Rev. Bower. Unlike Bishop Murphy, it is undisputed that Bishop Trautman made the statements as set forth in his Letter to the Editor published April 21, 2002.

It is Bishop Trautman's Letter to the Editor which Plaintiffs claim is defamatory. This Court has analyzed the letter in terms of its overall defamatory meaning as well as engaged in a line-by-line analysis thereof. Whether reading the letter as a whole or treating each sentence as a separate statement, Bishop Trautman's letter is incapable of a defamatory meaning under present law.

In reviewing Bishop Trautman's letter, it must be determined which are statements of fact and which are expressions of opinion. The Appellate Courts have adopted the Restatement of Torts, Second, stating "a defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the existence of undisclosed defamatory facts as the basis for the opinion." See *Braig v. Field Communications*, 456 A.2d 1366 (Pa. Super. 1983), as quoted in *Goralski*, supra., 540 A.2d at 598. "A simple expression of opinion based on disclosed...facts is not itself sufficient for an action of defamation..." *Braig*, 456 A.2d at 1373.

As the Superior Court has stated:

> "Opinion, without more, is not actionable as libel. The allegedly libeled party must demonstrate that the communicated opinion may reasonably be understood to imply the existence of undisclosed defamatory facts justifying the opinion." *Beckman v. Dunn*, supra. 419 A.2d at 587.

The Defendants correctly assert that a reader of Bishop Trautman's letter is immediately put on notice that it is likely to contain the author's opinion because it is published in the Letters to the Editor section of the newspaper. However, the mere publishing of a letter to the editor does not create immunity for Bishop Trautman as it still needs to be reviewed for defamatory content. Indeed, Bishop Trautman's letter is interspersed with both factual averments and expressions of his opinion.

As with Bishop Murphy, the analysis of Bishop Trautman's letter must begin with the context in which the statements were made. The Plaintiffs

went to the Erie Times News with the intent of informing the public of the failure of the Diocese of Erie to respond in 1982 to evidence presented to Bishop Murphy about Rev. Bower and the failure to act at any time thereafter. When Bishop Trautman answered the news reporter's questions regarding this matter, he would have little way of knowing what was going to be published in the ensuing April, 17, 2002 article. Not satisfied that the news article was fair or balanced, Bishop Trautman chose to try to "set the record straight" in his letter to the editor.

Plaintiffs contend Bishop Trautman's letter is defamatory because it accuses them of being liars and engaging in criminal activity. Specifically, Plaintiffs argue the Bishop's letter infers Sally Beres committed perjury before the labor referee and that all three Plaintiffs gave false reports to Trooper Formichella in 1999. The Plaintiffs are wrong as a matter of fact and law.

The opinions expressed in Bishop Trautman's letter are based on disclosed facts and do not imply the existence of any undisclosed defamatory fact(s). Bishop Trautman's letter discusses facts as averred by Sally Beres in the April 17th article or as stated in the Bishop's letter to the editor. A line by line analysis of Bishop Trautman's letter is in order. Bishop Trautman's sentences are hereinafter emboldened and then analyzed.

> **"In the interest of fairness, objectivity, and setting the record straight, I would like to respond to the Erie Times-News story of April 17th on Rev. Robert Bower."**

This first sentence of Bishop Trautman's letter clearly puts the reader on notice that Bishop Trautman is giving his version of the circumstances surrounding Rev. Robert Bower. Obviously, Bishop Trautman is implying the news article of April 17th was not fair, objective or accurate. There is nothing defamatory in this sentence.

> **"The Erie Times-News featured on its front page the accusation that Sally Beres reported 20 years ago to Bishop Michael J. Murphy that Rev. Bower possessed pornographic literature. Subsequently, she was fired and the direct inference is made that her reporting of Bower was the cause and effect of her dismissal."**

These two sentences simply frame the issue being addressed by Bishop Trautman, to-wit, the direct inference that Sally Beres was fired by the Diocese because she reported to Bishop Murphy that Rev. Bower possessed pornographic literature. There is nothing in these two sentences which is defamatory or anything other than the expression of the author's opinion.

> **"Bishop Murphy at age 86 has stated he has no recollection of such a meeting 20 years ago. I have been the Bishop of Erie for 12 years. Beres has never written or called me regarding her accusation or**

> **the fact that she possessed for 17 years pornographic literature in her attic belonging to Bower."**

This paragraph addresses the 1982 meeting. These three sentences are undisputed facts in that Bishop Murphy stated he does not recall the 1982 meeting, Bishop Trautman had been Bishop for twelve years and Sally Beres never brought any of the information or pornographic literature to Bishop Trautman. Clearly these sentences are not defamatory.

> **"Beres never mentioned to Msgr. Richard Sullivan, when he came to her 20 years ago and fired her, anything about an accusation against Rev. Bower, pornographic literature, or a meeting with Bishop Murphy. It would seem only logical that she would have exposed this information to Msgr. Sullivan at the time he met with her, which was just two days after she had supposedly met with Bishop Murphy. Yet nothing was said to Msgr. Sullivan about Rev. Bower, Bishop Murphy, or pornographic literature."**

In these sentences Bishop Trautman is questioning why Sally Beres would not have disclosed the information about Rev. Bower to Monsignor Sullivan when Sullivan fired her two days after she met with Bishop Murphy. In the April 17, 2002 article, Monsignor Sullivan stated that Sally Beres did not mention the pornographic materials to him when he dismissed her in 1982. Bishop Trautman's assertion that Sally Beres never mentioned anything to Monsignor Sullivan is a statement of a disclosed fact. Bishop Trautman then offers his opinion that this is the type of information which logically Sally Beres would have provided to Monsignor Sullivan. This opinion by Bishop Trautman does not constitute actionable defamation.

> **"It seems only logical she would have mentioned all of this to the labor referee of the unemployment compensation board which heard her complaint. The judgment made at that time by the referee went against her. I would conclude, therefore, there was no merit found in her accusation."**

These first three sentences of the fourth paragraph of the letter discuss the disposition of the unemployment claim by Sally Beres. This subject was first aired by Sally Beres in the April 17, 2002 article in which she stated her unemployment claim was dismissed "on technical grounds". Bishop Trautman is simply offering a different opinion and/or explanation than Sally Beres. In these three sentences, Bishop Trautman is opining, as evidenced by his words "it seems only logical" that Ms. Beres would have mentioned to the labor referee that her dismissal was in retaliation for her disclosure regarding Rev. Bower. Bishop Trautman provides his opinion, as reflected in the language "I would conclude," that the labor referee found no merit in her testimony. In other words, Bishop Trautman is

opining that Sally Beres had an opportunity to disclose this information to the labor referee and either failed to do so or that her allegation did not merit receiving unemployment benefits.

Importantly, Bishop Trautman is not accusing Sally Beres of perjury. It is clear Bishop Trautman did not participate in the unemployment proceeding. Instead, he is offering his opinion as to why Sally Beres may not have received unemployment benefits. Bishop Trautman is also engaging in the process for which he later criticizes the Erie Times News, that of seeking corroboration for Sally Beres' allegations.

The Plaintiffs contend in their Brief that Bishop Trautman knew or was negligent in not knowing that Beres' unemployment claim was dismissed based on ineligibility. See Plaintiffs' Reply Brief at page six. However, as the April 17, 2002 article points out, the record of the unemployment proceeding was destroyed (probably in 1985) and thus not available to Bishop Trautman.

Further, Plaintiffs' contention is directly contradicted by the published statements of Sally Beres in which she described an evidentiary hearing at which Rev. Bower testified in opposition to her unemployment claim. In fairness to Bishop Trautman, he, as well as any other reader of the statements of Sally Beres in the April 17, 2002 article, would conclude that Ms. Beres had an opportunity to tell her story to the labor referee. Hence, Bishop Trautman's opinion is based on disclosed facts. He is responding to the facts as alleged by Sally Beres in the April 17th article. Bishop Trautman is also responding to the direct inference Sally Beres leaves with the reader of the April 17, 2002 article that her unemployment claim was meritorious but for a technicality.

If in fact Sally Beres was denied unemployment due to ineligibility, such is not an "undisclosed defamatory fact" withheld by Bishop Trautman. To say someone was denied unemployment because he/she was "ineligible" is not a defamatory fact, particularly when the subject first states she did not receive unemployment "on technical grounds". *See Goralski* supra. (a statement that someone was terminated from employment due to misconduct is not defamatory). Accordingly, Bishop Trautman's response on this issue does not contain or rely on an undisclosed defamatory fact and is therefore not defamation.

"When Bower was arrested in 1999, why did she not come forth to the Diocese with her secret information?"

Bishop Trautman's sentence is obviously questioning why Sally Beres never provided her information to the Diocese after Bower was arrested in 1999. This is clearly a rhetorical factual question expressing a non-actionable opinion.

The remainder of the fourth paragraph consists of Bishop Trautman discussing what he perceives as unbalanced news coverage by the Erie

Times News. There is nothing in the remainder of this paragraph, nor anything in the remainder of the letter, which is defamatory as to Plaintiffs.

It is also important to note what Bishop Trautman's letter does not say. There is no statement by Bishop Trautman in his letter claiming the Plaintiffs gave false information to the police in 1999. Instead, Bishop Trautman questions why Sally Beres did not provide the Diocese with the same information that she provided to Trooper Formichella. Nothing in this observation by Bishop Trautman consists of an inference that the Plaintiffs committed the crime of false reports to the police. There is no inference that can be drawn from it that Bishop Trautman is accusing any of the Plaintiffs of lying to the police in 1999. Plaintiffs attempt to construe the letter in this fashion is unsupportable.

Whether Bishop Trautman's letter is analyzed line by line or for its overall meaning, it is incapable of a defamatory meaning given prior precedents. The tenor of Bishop Trautman's letter is unneccessarily harsh. While it is understandable why the Plaintiffs would be annoyed or embarrassed by the Bishop's dispute with their factual allegations, such a factual dispute does not give rise to a claim for defamation under Pennsylvania law.

WHETHER THE MEMORANDUM OF BISHOP TRAUTMAN DATED APRIL 19, 2002 IS DEFAMATORY AS A MATTER OF LAW

In Paragraph 27 of their Complaint, Plaintiffs allege that Bishop Trautman circulated to all parishes within the Diocese of Erie "a defamatory letter directing priests to include in their weekend sermons a response to the April 17, 2002 Erie Times News newspaper story, including an attack on the credibility and integrity of Plaintiffs". Plaintiffs did not attach the alleged defamatory letter.

Instead, the Defendants produced a Memorandum from Bishop Trautman dated April 19, 2002. The Bishop's Memorandum to the Diocesan priests reads in its entirety:

> "Attached is a copy of a letter which I have forwarded to the Erie Times News. I would ask, if you so would wish, to share this information with your parishioners."

There is absolutely nothing in Bishop Trautman's communication to the priests which is defamatory. Hence, the allegations of paragraphs 27 through 40 of Plaintiffs' Complaint fail to establish a defamatory communication.

WHETHER THE DEFENDANTS STATEMENTS COULD BE UNDERSTOOD AS APPLICABLE TO THE PLAINTIFF HELEN M. RUSNAK

The defamation statute requires proof that the statements are applicable to the Plaintiffs. See 42 Pa. C.S.A. §8343(a)(3). Plaintiffs are

correct that the communications do not have to specifically name each Plaintiff. *Cosgrove Studio & Camera Shop Inc. v. Pane*, 182 A.2d 751 (Pa. 1962). Nonetheless, Helen Rusnak's identity is not ascertainable from any of the Defendant's statements or the surrounding circumstances.

In the April 17, 2002 newspaper article, Plaintiffs Anna Caro and Sally Beres are clearly identified by name. However, Helen Rusnak intentionally chose to conceal her identity. To the newspaper's credit, Ms. Rusnak's identity was not disclosed. Therefore the reader of the April 17, 2002 article would have no way of knowing the identity of the third woman who purportedly met with Bishop Murphy in 1982.

Rusnak's contention that at least two people would know of the connection between her identity and the Defendants comments as reported in the April 17th newspaper article, namely the news reporter and Trooper Lee Formichella, is unpersuasive. In determining whether the comments are defamatory, the "nature of the audience hearing the remarks is a critical factor in determining whether the communication is defamatory." *Maier v. Moretti*, supra., 671 A.2d at 705. There is no evidence of record that Trooper Formichella read the article of April 17, 2002. Giving Plaintiffs the benefit of assuming Trooper Formichella read the article, the fact that he and the news reporter are the only two who would know the unidentified third person in the article is Helen Rusnak is not sufficient to lower Ms. Rusnak's reputation in the community as a whole. *See Beckman v. Dunn*, supra. Any member of the public who read the April 17, 2002 article could not connect the dots between Bishop Murphy's comments and Helen Rusnak.

Likewise, none of Bishop Trautman's statements can be perceived as applying to Helen Rusnak. It is undisputed that Bishop Trautman was not at the purported 1982 meeting, therefore he would have no personal knowledge of the identity of the third woman. When Bishop Trautman read the April 17, 2002 article, he would be unable to ascertain the identity of Helen Rusnak since it was not revealed in the article. Moreover, not once in his letter of April 19, 2002 did Bishop Trautman mention Helen Rusnak. To the extent Bishop Trautman's letter questions whether the 1982 meeting occurred, a person reading the letter and going back and reviewing the April 17, 2002 newspaper article would still not know of any connection to Helen Rusnak. Accordingly, Helen Rusnak has failed to establish any factual basis that the communications by Bishop Trautman would be understood as applicable to her.

WHETHER THE PLAINTIFFS HAVE ALLEGED SUFFICIENT EVIDENCE OF AN ABUSE OF A CONDITIONAL PRIVILEGE

One of the elements of defamation is that the Plaintiffs must allege an "abuse of a conditionally privileged occasion". *See* 42 Pa. C.S.A. §8343(a)(7). Thus, even if the Defendants statements are deemed to be capable of a defamatory meaning, Plaintiffs still have the burden of

averring facts establishing an abuse of a conditional privilege. In this case, the Plaintiffs have failed to allege sufficient facts.

The Appellate Courts have recognized three scenarios wherein a conditional privilege exists:

"1. Some interest of the person who publishes defamatory matter is involved;
2. Some interest of the person to whom the matter is published or some other third person is involved; or
3. A recognized interest of the public is involved."

Beckman v. Dunn, supra. 419 A.d at 588. *See* also *Miketic v. Baron*, 675 A.2d 324, 329 (Pa. Super. 1996).

In the case *sub judice* the first and third scenarios exist. Clearly, Bishop Trautman and Bishop Murphy have an interest in the matter. The Plaintiffs chose to go public with their story attacking the integrity of the two Bishops. Each of the Bishops has an interest in responding to the allegations. Their response is conditionally privileged under the First Amendment.

In addition, there is a recognized interest of the public involved in this matter. Obviously, the Erie Times News felt it newsworthy to provide "a look at how the Catholic Diocese of Erie in two separate incidents nearly two decades apart handled concerns about the sexual leanings of one of its priests." See the April 17, 2002 article. Given the national attention paid to the revelations of sexual abuse by priests, there is a recognized interest of the public involved in this subject matter, if for no other reason than the protection of children. Thus, there are conditional privileges attaching to the statements of the two Bishops in the April 17, 2002 article, the Letter to the Editor by Bishop Trautman published April 21, 2002 and Bishop Trautman's Memo to all priests dated April 19, 2002.

By statute then, it is incumbent upon the Plaintiffs to plead facts demonstrating an abuse of the conditional privilege. Further, Sally Beres and Anna Caro each concede she is a "limited public figure" requiring the existence of actual malice as an abuse of the conditional privilege. Plaintiffs' Complaint does not establish actual malice.

Viewed in a light most favorable to the Plaintiffs, the following picture emerges. It was the Plaintiffs who chose to go public with their story. It was the Plaintiffs who made factual allegations challenging the integrity of Bishop Murphy and Bishop Trautman. The response of Bishop Murphy is limited in that he is quoted as saying that he does not recall meeting with the Plaintiffs, which meeting he should remember. Assuming arguendo Plaintiffs can prove, as they claim, that such a meeting occurred, Murphy's lack of a recollection of the meeting does not constitute actual malice towards the Plaintiffs.

This is not a situation where Bishop Murphy fired the first salvo attempting to besmirch the reputations of the Plaintiffs. Instead, he was

simply responding to the public accusations made by the Plaintiffs and did so in a very limited way. As noted, he was 86 years old at the time and had been retired since 1990. He was called upon to publicly respond to a question about a meeting which allegedly occurred twenty years prior. His failure to recall it, even if confronted with his appointment book and other witnesses, does not amount to actual malice or a reckless disregard for the truth. Therefore Plaintiffs have failed to aver sufficient facts amounting to actual malice or a reckless disregard of the truth by Bishop Murphy.

The same context applies to Bishop Trautman. The Plaintiffs launched the first public broadside impugning Bishop Trautman's integrity. He responded in part by alleging different facts and expressing different opinions. This was not a situation where Bishop Trautman initiated the public debate and attempted to lower the reputations of the Plaintiffs. Bishop Trautman's letter to the editor was limited only to Sally Beres with no mention or discussion of Helen Rusnak or Anna Caro. It cannot be inferred from his letter that Bishop Trautman is accusing any of the Plaintiffs of committing any crime(s). It is also undisputed that he was not present when the alleged 1982 meeting occurred nor do Plaintiffs contend that they ever went to see Bishop Trautman with their evidence and concerns. On this record, the Plaintiffs have failed to allege sufficient facts amounting to an abuse of a conditional privilege by Bishop Trautman.

WHETHER PUNITIVE DAMAGES ARE APPROPRIATE

Because the Plaintiffs have failed to establish a case for defamation, *a fortiori* the claim for punitive damages must fall. Even assuming arguendo the facts as alleged by the Plaintiffs constitute defamation, the Defendants' conduct is not so outrageous as to warrant punitive damages.

LIABILITY OF THE ROMAN CATHOLIC DIOCESE

Plaintiffs allege vicarious liability on the part of the Roman Catholic Diocese of Erie. Since the Plaintiffs have failed to establish liability on the part of the principals, Bishops Murphy and Trautman, there is no vicarious liability on the part of the Diocese of Erie.

CONCLUSIONS OF LAW

I. The statements attributed to Bishop Murphy in the April 17, 2002 article are not capable of a defamatory meaning under Pennsylvania law.

II. The letter to the editor by Bishop Trautman dated April 19, 2002 and published in the Erie newspaper on April 21, 2002 is incapable of a defamatory meaning as a matter of law as to each Plaintiff.

III. Bishop Trautman's Memorandum of April 19, 2002 transmitting to all Diocesan priests a copy of his April 19, 2002 letter to the editor is not capable of a defamatory meaning.

IV. Plaintiffs' Complaint fails to establish that any of the communications of any of the Defendants can identify Helen M. Rusnak

as one of the subjects or lower her standing in the community as a whole.

V. Plaintiffs have failed to allege sufficient facts demonstrating an abuse of a conditional privilege attached to the statements of Bishop Murphy and Bishop Trautman.

VI. Plaintiffs have failed to allege a sufficient basis for a punitive damages claim.

VII. Based on the foregoing, there can be no vicarious liability on the part of the Roman Catholic Diocese of Erie.

CONCLUSION

We have survived as a democracy in no small part because our citizens are able to freely express opinions and assertions of fact. Other citizens are free to agree or disagree with the asserted opinions or stated facts. The First Amendment allows for, indeed encourages, a certain level of contentious discourse among our citizens.

In this case, the Plaintiffs have asserted certain facts. Bishop Murphy has responded with a different recollection of the facts than claimed by the Plaintiffs. Bishop Trautman has questioned the lack of corroboration for the facts asserted by the Plaintiffs. For the First Amendment to have any meaning, the Defendants herein are entitled to assert the same free speech rights the Plaintiffs exercised.

To hold otherwise tilts the level playing field of the First Amendment, for it gives an unfair advantage to a party who goes first with serious allegations of misconduct. If the subject of the allegations cannot respond by having a different memory or by disputing the allegations, then the First Amendment is eviscerated. The First Amendment is not limited to one-sided discussions.

This is not to say the Defendants in this case had free rein in their response to the Plaintiffs allegations. However, given the facts alleged, the Defendants communications were not capable of a defamatory meaning under Pennsylvania law nor outside the bounds of a conditional privilege under the First Amendment. The Defendants statements have not gone so far as to give rise to a claim of defamation for the Plaintiffs.

In this case, it is not the role of the Court to determine whether the Diocese of Erie appropriately handled any alleged improprieties with any priest; or to hold the Bishops accountable for any alleged failure to act. In addition, it is not for this Court to determine whether a meeting occurred in 1982 between the Plaintiffs and Bishop Murphy or whether Sally Beres was properly terminated from employment. Instead, the present inquiry is limited to a determination of whether the Plaintiffs have legally established a defamation case against the Defendants. For the reasons stated, Plaintiffs have not done so. Therefore, the law requires the case be dismissed.

ORDER

Based on the foregoing Opinion, the Preliminary Objections of the Defendants are hereby **GRANTED** and Plaintiffs' Complaint is **DISMISSED** in its entirety as a matter of law.

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

COMMONWEALTH OF PENNSYLVANIA
v.
VANESSA GALE ODELL

CONSTITUTIONAL LAW / DUE PROCESS
CRIMINAL PROCEDURE / TECHNICAL DEFENSES / DUE PROCESS DEFENSE

18 Pa. C.S. § 2506, relating to drug delivery resulting in death, violates the due process clauses of the Fourteenth Amendment of the United States Constitution and Article 1, Section 9 of the Pennsylvania Constitution inasmuch as the statute is void for vagueness.

The void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness so that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

A criminal statute must provide notice of its reach in order to be constitutional.

The plain language of 18 Pa. C.S. § 2506, relating to drug delivery resulting in death, defines the offense as third-degree murder, which requires proof of malice, and therefore, cannot be a strict liability statute.

18 Pa. C.S. § 2506, relating to drug delivery resulting in death, is silent as to *mens rea*, and consequently, a citizen is not put on notice of the criminal mindset necessary to commit a violation of that statute.

Failure to charge each individual in the chain of custody in the distribution of a Fentanyl patch does not lessen the culpability of the defendant.

CONSTITUTIONAL LAW

Legislative acts of the General Assembly enjoy a strong presumption of constitutionality and the party challenging the legislation bears a heavy burden of persuasion.

A statute will be found unconstitutional only if it clearly, palpably and plainly violates constitutional rights.

All presumptions are in favor of the constitutionality of acts and courts are not to be astute in finding or sustaining objections to them.

If a law is susceptible to a reasonable interpretation that supports its constitutionality, the court must accord the law that meaning.

The touchstone of due process is protection of the individual against arbitrary government action.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION NO. 984 OF 2003

Appearances: Chad Vilushis, Esq. for the Commonwealth
James A. Pitonyak, for the Defendant

OPINION

The present matter is the Defendant's request to dismiss a criminal charge based on the statute's unconstitutionality. Upon review, Section 2506 of the Pennsylvania Crimes Code does violate the due process clauses of the Fourteenth Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution. Specifically, the statute is void for vagueness as to the required mens rea for the offense and encourages arbitrary and discriminatory enforcement. Thus, this charge must be dismissed.

FACTUAL BACKGROUND

The Commonwealth alleges that on November 28, 2002, Petitioner sold a Fentanyl pain-killing patch, a Schedule I Substance, to Darren Bowman. On December 1, 2002, Mr. Bowman died. An autopsy report concluded Bowman's death was the result of combined alcohol and Fentanyl toxicity.

Subsequently, Petitioner was charged by Sergeant Charles Rosequist of the North East Police Department with one count of Drug Delivery Resulting in Death[1] and one count of Recklessly Endangering Another Person[2]. A preliminary hearing was held before District Justice Frank J. Abate, Jr. on April 7, 2003.

At the preliminary hearing, Mr. Bowman's widow, Patricia Bowman, testified she had not seen him put on a Fentanyl patch. Nor had Mrs. Bowman observed any unusual behavior from Mr. Bowman in the days leading to his death. Notes of Testimony (hereinafter "N. T."), Odell Preliminary Hearing, 4/07/03, pp. 4-12. Mrs. Bowman did state the night before Mr. Bowman's death they attended a Christmas party. *Id.* at 11. She witnessed Mr. Bowman, who arrived at the party one to two hours before she did, drinking alcohol from the time she arrived until the time she left. Mrs. Bowman was unsure of the number of drinks her husband ingested. *Id.* at 11.

Mr. Bowman arrived home from the party shortly after his wife. He then proceeded to smoke about "half a joint" of marijuana before Mrs. Bowman left the house to get something to eat. *Id.* at 17. Upon her return she found Mr. Bowman asleep sitting up on the couch. Mrs. Bowman ate her food and went to sleep in the same room. Later she awoke to find Mr. Bowman face down on the floor, so she called 9-1-1. According to Mrs. Bowman, she did not hear anything during the night. Mrs. Bowman also revealed that Mr. Bowman had back problems and had a prescription for Hydrocodone but did not have a prescription for Fentanyl.

Soon after her husband's death, Mrs. Bowman received a call from

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[1] 18Pa.C.S.§2506

[2] 18Pa.C.S §2705

Petitioner, who is a relative of hers, in which Petitioner informed her that she delivered the Fentanyl patch to Mr. Bowman. *Id.* at 27. The investigating officer, Sergeant Charles Rosequist of the North East Borough Police Department, confirmed this information through a call he received from Angie Rose, Mrs. Bowman's sister, who stated Petitioner had also phoned her and told her she delivered the patch to Mr. Bowman. *Id.* at 27.

Petitioner voluntarily set up a time to meet with the police and came to the station on her own. During her meeting with Sergeant Rosequist, Petitioner signed a written statement admitting her actions. In her statement to the police, Petitioner declared she was unaware that the Fentanyl patch was for Mr. Bowman. *Id.* at 30. She stated that Mr. Bowman told her it was for someone else and she went on to inform him to "tell whoever he was getting it [the patch] for not to drink while taking ther *(sic.)* patch because it could kill him." Sergeant Rosequist also indicated there were several other drugs found in Mr. Bowman's body. The substances, GHB ("Ecstasy") and marijuana, were discovered along with Fentanyl and alcohol according to the toxicology report. *Id.* at 33.

After hearing the testimony of Mrs. Bowman and Sgt. Rosequist, District Justice Abate bound both charges over to Court. Attorney James Pitonyak filed an Omnibus Pre-Trial Motion for Relief on July 2, 2003, which included a challenge to the constitutionality of the statute. On August 25, 2003, the Court heard oral arguments from both counsel. The parties have now filed briefs and the matter is ripe for resolution.

APPLICABLE STATUTE

Section 2506 (a) of the Pennsylvania Crimes Code states the following:

> A person commits murder of the third degree who administers, dispenses, delivers, gives, prescribes, sells or distributes any controlled substance or counterfeit controlled substance in violation of section 13(a) (14) or (30) of the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, and another person dies as a result of using the substance. 18 Pa. C. S. 2506(a).

STANDARD OF REVIEW

The Pennsylvania Supreme Court has held "legislative acts of the General Assembly enjoy a strong presumption of constitutionality, and the party challenging the legislation bears a heavy burden of persuasion." *Defazio v. Civil Service Comm'n of Allegheny Count*y, 756 A.2d 1103, 1105 (Pa. 2000) *citing Consumer Party of Pennsylvania v. Commonwealth*, 507 A.2d 323 (Pa. 1986). Moreover, "[a] statute will be found unconstitutional only if it clearly, palpably and plainly violates constitutional rights." *Commonwealth v. MacPherson*, 752 A.2d 384, 388

(Pa. 2000); *Commonwealth v. McMullen*, 756 A.2d 58, 61 (Pa. Super. 2000). The Supreme Court has also stated: "[It]" is axiomatic that he who asks to have a law declared unconstitutional takes upon himself the burden of proving beyond all doubt that it is so. All presumptions are in favor of the constitutionality of acts and courts are not to be astute in finding or sustaining objections to them." *Sablosky v. Messner*, 92 A.2d 411, 416 (Pa. 1952) *quoting* Hadley's Case, 6 A.2d 874, 877 (Pa. 1939).

Similarly, the United States Supreme Court has held "a facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *U.S. v. Salerno*, 481 U.S. 739, 745 (1987). If a law is susceptible to a reasonable interpretation which supports its constitutionality, the Court must accord the law that meaning. *U.S. v. National Dairy Products Corp.*, 372 U.S. 29, 32 (1963).

PETITIONER'S CHALLENGES

Petitioner asserts §2506 of the Pennsylvania Crimes Code violates the due process mandates found in both the Pennsylvania and the United States Constitutions. Specifically, Petitioner avers the statute is void for vagueness in that it creates the subject offense as Third-Degree Murder which requires proof of malice. However, the statute is silent as to the mens rea of the offense. Thus, it is impossible to discern from the language what mental state is required for criminal liability. (Petitioner's Omnibus Pre-Trial Motion, 7/02/03, ¶¶8-10).

Petitioner further claims §2506 is void for vagueness on its face because the absence of a mens rea requirement creates a "risk of arbitrary governmental action throughout all aspects of the criminal justice system" in which those involved in the enforcement of §2506 would have to "extrapolate from the language found [...], whether this is merely a strict liability statute, requiring only proof of the act of drug delivery and a death resulting therefrom for criminal liability, or if there must additionally be proof of mens rea, criminal intent or malice." *Id. ¶9*. Petitioner's claims will be addressed seriatim.

CONSTITUTIONALITY OF §2506

The constitutionality of 18 Pa. C.S.A.§2506 has been previously addressed by the Superior Court. In *Commonwealth v. Highhawk*, 687 A.2d 1123 (Pa. Super. 1996), the Superior Court was asked to interpret the language of §2506 to determine whether the statute was a sentencing provision or whether it created a substantive crime. The Superior Court invalidated §2506 because subsection (c) included language which stated: "Provisions of this section shall not be an element of the crime." The Superior Court concluded the inconsistencies resulting from subsection (c) nullified the attempt in subsection (a) to define the elements of a new crime and thus caused §2506 to be relevant only upon

conviction. Accordingly, the Superior Court declared the statute void for vagueness because it failed to give fair notice of the crime charged.

The Superior Court did not address the issue of the mens rea element in *Highhawk.* However, in a footnote the Superior Court made this observation:

> "The Commonwealth contends that Section 2506 eliminates the mens rea requirement in that a defendant can be found guilty of violating such regardless of his intent as it relates to the death of the victim. In light of our ultimate disposition of this case, we decline to address the issue of the degree of culpability required to support a conviction under Section 2506...We do note, however, that certain other states such as New Jersey have adopted strict liability statutes to protect society from death caused by the distribution of illegal drugs. See, e.g. N.J.S.A. 2C:35-9." *Commonwealth v. Highhawk* at p. 1130, fn. 8.

Following the *Highhawk* decision, the Pennsylvania legislature re-enacted §2506 in 1998 by simply eliminating subsection (c). In so doing, the legislature clarified its intent to create a new substantive crime of Third Degree Murder rather than enact a sentencing enhancement. However, the legislature did not define the mens rea element required for the subject offense, which is why the constitutionality issue has resurfaced.

a. The Due Process Challenge: Void For Vagueness

Our Supreme Court has outlined the requirements for a due process challenge where a statute is alleged to be void for vagueness:

> As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. The principle aspect of the doctrine is the requirement that legislation establish minimal guidelines to govern law enforcement for, without such minimal guidelines, a criminal statute might permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilictions *(sic.).*

See McMullen supra. at 61 *citing Commonwealth v. Mikulan*, 470 A.2d 1339, 1342-43 (Pa. 1983)(citations omitted).

A criminal statute must provide notice of its reach in order to pass constitutional muster. Included within this notice is the necessary mens rea to commit the crime. In this case, at issue is whether §2506 is a strict liability statute or whether it requires proof of all the elements of Third Degree Murder, including malice.

The Commonwealth contends §2506 requires no intent for criminal liability, which would in application create a strict liability statute. Petitioner counters that the plain language of §2506 makes the offense a Third Degree Murder requiring proof of malice as an element. Because the

statute is inartfully drafted, it is unclear whether the legislature intended to create strict liability or whether proof of malice is required. We are then left with a situation in which a lay person would not understand what conduct is prohibited. Thus, the statute is void for vagueness.

The Superior Court directed our legislature to the New Jersey statute which was enacted to accomplish the same goal as §2506, to-wit the "attempt to control the number of deaths related to controlled substances." *Commonwealth v. Highhawk, supra.* at page 1127. Our legislature presumably was aware that it could have created §2506 to invoke strict liability consistent with the language of the New Jersey statute. Unlike the statute in New Jersey, which provides explicit guidelines regarding causation and an express mental element for culpability, §2506 is silent as to mens rea. Accordingly, a citizen is not put on notice of the criminal mindset necessary to commit a violation of §2506. Therefore this Court is constrained to find the statute is void for vagueness in violation of the due process clauses of the Pennsylvania and United States Constitutions.

b. Arbitrary Enforcement

Neither the statute nor the legislative history reveals whether the legislature intended to create a strict liability offense. As a result, it is impossible to enforce the statute without some degree of arbitrariness and/or discrimination. The "touchstone of due process is protection of the individual against arbitrary government action." *Commonwealth v. Heck*, 491 A.2d 212, 219 (Pa. Super 1985). In upholding this standard of due process, our appellate courts have relied on the language of the United States Supreme Court in *Grayned v. City of Rockford,* which states:

> If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford ,408 U.S. 104, 108-109 (1972); *Commonwealth v. Hughes*, 364 A.2d 306, 310 (Pa. 1976) (footnotes omitted).

Petitioner alleges that §2506 leaves it to law enforcement to arbitrarily charge a citizen for a violation thereof. For example, Petitioner argues there are numerous people in the chain of custody of the same Fentanyl patch with which she is charged, all of whom would be equally culpable under a strict liability interpretation of §2506. Petitioner avers the failure of law enforcement to charge each of these individuals in the chain of custody is an arbitrary enforcement of the statute prohibited by the due process clause.

Petitioner's argument is unpersuasive since law enforcement has the discretion but not the obligation to file any criminal charges. Further, the failure to file charges against others who may have moved the substance in the same chain of custody does not lessen the culpability of Petitioner.

What is of greater concern is the inconsistent application of the statute. It is entirely plausible that §2506 could be interpreted to be a strict liability statute in one case with another case requiring proof of malice. Hence the citizen prosecuted in the case in which §2506 is treated as a strict liability statute is in a more difficult position than the citizen in the case in which malice is required to be proven. The failure to have an explicit standard within §2506 allows for such arbitrary and discriminatory enforcement, or leaves the possibility of inconsistent results to police, prosecutors, judges and juries. Given the distinct possibility of arbitrary enforcement, the statute as presently drafted is unconstitutional.

CONCLUSION

Section 2506 is void for vagueness in violation of the due process clauses of the Fourteenth Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution. As such, Petitioner's Omnibus Pre-Trial Motion for Relief is granted as it relates to the charge of violating Section 2506.

The ruling in this case is compelled by the constitutional analysis required. In reaching this result, this Court is mindful of the legitimate purpose for which §2506 was enacted. If properly redrafted, §2506 could be an effective tool to lessen the number of drug-related deaths in this community.

ORDER

For the reasons set forth in the accompanying Opinion, 18 Pa. C.S.A. §2506 is unconstitutional and the charge is DISMISSED.

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

KATHERINE J. KNOBLOCH-FEDORKO, Plaintiff

v.

PAUL J. FEDORKO, Defendant

CHILD SUPPORT / NURTURING PARENT

A court may decline to attribute any earning capacity to a parent with no previous work history where it is in the best interest of a child of tender years that the parent stay at home. The court has discretion to determine the earning capacity to be attributed to a parent staying at home and may reduce the calculated earning capacity to account for day-care costs or consider day-care costs as an expense in determining support.

The court determines that a mother with a college degree is to be deemed to have some wage earning capacity despite the absence of a previous work history in her selected field. As the mother is the primary caretaker of a two-year old child and it is in the child's best interest that the mother not be employed full-time, the court will attribute an earning capacity based on part-time employment.

CHILD SUPPORT / STUDENT OBLIGOR

Where the defendant has a bachelor's degree and a part-time work history as well as assets and income, the court will not reduce his support obligation either because he is a full-time student or because he receives financial support from his parents.

CHILD SUPPORT / CORPORATIONS AND TRUSTS

In determining a party's support obligation, all assets must be examined regardless of the source and regardless of whether they are actually available for support purposes. Efforts to shield business profits and transfers of ownership are impermissible when done to avoid support obligations. Trust funds may not be used as a shelter from support obligations and trust income may be included in support calculations. The court will not permit the defendant to reduce his support obligation by allowing a family business and/or trust to serve as a shelter for income.

SPOUSAL SUPPORT / APL / DURATION

The court may terminate spousal support when the period for which support has been paid becomes disproportionate to the length of the marriage. Where the parties were married for a little over three months and the defendant has since paid spousal support for a period of approximately 2-1/2 years, the court will exercise its discretion to terminate spousal support.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA DOMESTIC RELATIONS SECTION
PACSES Case No. 953104483 Docket No. NS200200957

Appearances: John Rogala Evanoff, Esq., Attorney for Plaintiff
Brian M. DiMasi, Esq., Attorney for Defendant

OPINION

Connelly, J., November 25, 2003

Procedural History

This matter comes before the Court subsequent to three separate support petitions filed by the parties. Katherine J. Knobloch-Fedorko (hereinafter Plaintiff) filed a Complaint for Modification of Support seeking an increase in child and spousal support. Paul J. Fedorko (hereinafter Defendant) filed his own Complaint for Modification of Support, seeking a decrease in child support. Defendant also filed a Petition to Terminate Spousal Support. All three petitions were consolidated and *support de novo* hearings were held before this Court on June 7 and August 5, 2003.

Findings of Fact

Given the numerous filings in this case, an outline of the facts is necessary for purposes of clarity.

Plaintiff Katherine J. Knobloch-Fedorko has primary physical custody of the parties' two-year old son. She holds a Bachelor's Degree in Exercise Physiology, received in 1997, and a Master's Degree in Sports Psychology, received in 2000. (Defendant's brief p. 4). To date, she has not completed any Ph.D. program, nor has she been employed in her fields of study. (Plaintiff's brief p. 9). Over the past few years, Plaintiff worked for free or for minimal benefits at different family-run businesses, including an automobile dealership and the Big-T Driving Range, both owned by her parents, and Power Personal Training, owned by her brother. (Plaintiff's brief p. 11). She is currently not employed outside the home. Plaintiff also resides in a four-bedroom home owned by her parents, to whom she pays reduced rent and utilities. (Defendant's brief pp. 14-15, Plaintiff's brief p. 12). Plaintiff's parents have also provided other financial assistance to her such as legal fees and loans for her expenses. (Plaintiff's brief p. 12, Defendant's brief pp. 13-14).

Defendant Paul J. Fedorko is currently enrolled as a full-time graduate student at Mercyhurst College, working on a Master's Degree in Hotel and Restaurant Management. (Defendant's brief p. 12). He holds a Bachelor's Degree from Syracuse University. (Plaintiffs Exhibit 30). Until August 2002, he was employed at Olive Garden to "get some experience in the restaurant business" but left to devote time to his studies. (Defendant's brief p. 12). Like the Plaintiff, Defendant is also currently unemployed. His parents have also loaned and/or given money to cover many of his living expenses. (Defendant's brief pp. 13-14).

Defendant's parents created identical trust funds for him and his sister Melissa, of $750,000.00 each, on January 5, 1999. (Defendant's brief p. 9, Plaintiffs brief p. 2, Plaintiffs Exhibits 4 and 5). Both siblings are also 20% shareholders in a family business, Fedorko Properties, Inc. (hereinafter FPI), which owns and operates Peninsula Plaza, located at 1111 Peninsula

Drive, Erie. (Defendant's brief pp. 8-9)

On June 14, 2001, both trust funds were loaned in full to a newly established, family business, the Fedorko Family Limited Partnership (hereinafter FFLP), to help purchase the former Tracy School property, located at 12th Street and Peninsula Drive, Erie. Defendant and his sister each hold 49% shares in FFLP and their trust funds contain 20-year promissory notes with an adjusted interest rate of LIBOR plus 125 basis points. (Plaintiff's brief p. 2, Defendant's brief pp. 8-11). The annual interest income generated by each trust fund is $22,575.02 per year and is paid to the beneficiaries on a quarterly basis. (Defendant's brief p. 11).

Plaintiff and Defendant were married on December 21, 2000. (Plaintiff's brief p. 1, Defendant's brief p. 2). Just prior to the marriage, the *Erie Times-News* published a wedding announcement, written by the Defendant, on December 17, 2001. [sic] (Plaintiff's Exhibit 30). In that article, the Defendant was listed as "vice president in charge of operations and the leasing division" of FPI. (Plaintiff's brief pp. 2, 5, Exhibit 30). Plaintiff was listed as a graduate of West Virginia University.

The parties separated in April 2001, but the exact date is disputed. Defendant contends it is April 2, 2001, a total of 103 days of marriage. (Defendant's brief p. 2). Plaintiff contends that it is April 13, 2002, a total of 478 days of marriage. Plaintiff remembers that date in particular because it is Defendant's birthday. (Plaintiff's brief p. 7). Plaintiff also asserts that the later date is more accurate because she and the Defendant attempted to reconcile several times during 2001. However, Plaintiff's support filings say otherwise, listing April 2, 2001 as the date of separation on several documents. (Defendant's brief p. 17). Based on those filings, the Court finds that April 2, 2001 is the final date of separation.[1]

Plaintiff first filed for spousal support on April 30, 2001 (Plaintiff's and Defendant's briefs p. 2). In a July 25, 2001 support order, she received $500.00 per month in spousal support in addition to the Defendant paying her almost $2,000 credit card bill and $1,000 toward arrearages. Defendant also agreed to pay the full costs of Plaintiff's medical insurance and pre-natal care for their unborn child.

The parties' son, Hunter Knobloch (hereinafter Hunter), was born on November 2, 2001. (Plaintiff's and Defendant's briefs pp. 1, 2). In April 2002, the parties agreed that Defendant would pay $835.00 in spousal support and $1,665.00 in child support, a total of $2,500.00 per month. (Defendant's brief p. 2). The agreement was backdated to January 22, 2002.

Throughout 2001 and 2002, the parties unsuccessfully attempted to

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[1] See *Frey v. Frey,* 2003 Pa. Super. 135, 821 A.2d 623 where in dispute over date of separation, the Superior Court accepted the husband's proffered date and facts presented appeared more credible.

reconcile their marriage several times, Defendant filed for divorce for the first time during 2001 but withdrew on January 8, 2002, for purposes of reconciliation. (Defendant's brief p.18). He continued to receive mail at Plaintiff's address from February 2002 to April 2002 and agreed to support Plaintiff and Hunter per Court Order. (Plaintiff's brief p. 6. Plaintiff's Exhibit 19). Another support conference between the parties was held on May 30, 2002, in which Defendant claimed no ownership interest in FFLP. FFLP's 2001 federal tax return and his testimony at the hearing later showed this to be untrue. (Plaintiff's Exhibit 8).

On June 13, 2002, Judge Kelly granted the Plaintiff's request for a Protection From Abuse Order against the Defendant for six months. Defendant again filed for divorce on June 19, 2002, which was later withdrawn on July 16, 2002. A July 22, 2002 letter from Defendant's attorney, Brian M. DiMasi, to opposing counsel, John Rogala Evanoff, listed the reason as another attempt to reconcile. (Plaintiff's brief p. 6, Exhibits 23, 24, and 25). Defendant filed for divorce for the third time on December 23, 2002. (Plaintiff's brief p. 7, Exhibit 26). Presently, a master's hearing has been scheduled for the parties.

A new Support Order was issued on April 23, 2003 then adjusted on June 1, 2003, ordering Defendant to pay Plaintiff $1,500 per month- $725.24 spousal support and $701.35 in child support, plus $73.41 in arrears. The Order was effective back to May 2, 2003. (Plaintiff's brief p. 11). Both parties have appealed that Order to this Court.

Plaintiff seeks an increase in support based upon her belief that the Defendant was employed by his family's corporations, FPI and FFLP, and should be assessed an earning capacity based on this income. She also maintains that the Defendant and his family are shielding income available for support by lending Defendant's entire trust fund to FFLP to purchase the Tracy School property.

Defendant seeks to decrease or terminate spousal support because Plaintiff is not working to her full earning capacity based on her education. He maintains that he is unable to afford the current amount of support due because he attends school full-time and his full trust fund income is unavailable due to the loan to FFLP. Defendant also contends that he was never employed by FPI or FFLP and has never received any benefits, wages, salaries, or commissions from either corporation.

The Court addresses these issues now.

Conclusions of Law

Both parties essentially argue that neither is being properly assessed at their full earning capacity. Each party further argues that they cannot work a regular 40 hours per week due to other obligations.

Plaintiff's Earning Capacity and Employment Potential

In particular, Plaintiff argues that no earning capacity should be assessed for her because the "nurturing parent" doctrine applies. Plaintiff

has primary physical custody of two-year old Hunter and has not worked regularly outside the home since the parties were first married. Plaintiff testified that she and the Defendant agreed that she would remain home during the marriage to be a wife and mother, and as a result of this decision, she did not seek employment or continue her education. (Plaintiff's brief p. 9).

A court may consider a wife or mother's earning capacity as "a material factor in arriving at a reasonable support order." *Com. ex rel. Simpson v. Simpson,* 430 A.2d 323 (Pa. Super. 1981). Additionally, a court "should take her employability into consideration when fixing the order of support." At 324. If the parent staying at home is shown to be in the best interests of the child, a court may also decline to consider any earning capacity at all. *Griffin v. Griffin,* 558 A.2d 75 1989). *See also Stredny v. Gray,* 510 A.2d 359 (Pa. Super. 1986) ("Nurturing parent" doctrine applies if it is in the best interests of the child). However, if the parent has a previous work history, "nurturing parent" doctrine does not apply. *Depp v. Holland,* 431 Pa. Super. 209, 636 A.2d 204 (1994)

A stay at home mother is not automatically exempt from earning capacity calculations, especially if she is able to work but chooses not to. *Munger v. Yauger,* 42 Pa. D. & C. 3d 108 (Common Pleas Court of Erie County, 1986). "The Superior Court clearly stated that they did not establish an absolute rule that an earning capacity cannot be imputed to a parent who chooses to stay at home with a young child." *Supra* at 112, *citing Wasiolek v. Wasiolek,* 25 Pa. Super. 108, 380 A.2d 400 (1977). But, "some earning capacity" may be considered, even minimally, and the parent may receive a reduction for day care costs or have them included as part of the minor child's expenses for support. *Fichthorn v. Fichthorn,* 533 A.2d 1388 (Pa. Super. 1987), *Rock v. Rock,* 385 Pa. Super.126, 560 A.2d 199 (1989). The *Rock* Court further held that a party should not be forced to incur additional day care expenses other than those that are absolutely necessary. *See also Iralsky v. Iralsky,* 2003 Pa. Super. 162, 824 A.2d 1178 (2003) (Court rejected testimony of husband's expert regarding wife's earning capacity, finding that assigning more work hours to her would only increase his child support obligation, i.e. day care costs).

". . .[A] court is not strictly bound by the nurturing parent's assertion that the best interest of the child is served by the parent's presence in the home." *Funk v. Funk,* 376 Pa. Super. 76, 545 A.2d 326, 331 (1988). A party may be assessed a greater than minimum wage earning capacity, particularly if the party has obtained a higher level of education. In *Funk,* the Court found that the wife's earning capacity was worth more than minimum wage because she held a Psychology Degree from Duke University.

In the case at bar, Plaintiff is at home full-time with Hunter and does not have previous work history in her field of knowledge. However, the Court

does not see how Plaintiff is unable to work, even part-time. Presumably, her educational background accords her a higher than minimum wage earning capacity. Hence, the Court finds the testimony of the Defendant's expert witness, Lisa Hammers, from GenEx Incorporated, to be of particular assistance. Her report revealed several places around the Erie area where a person with Plaintiff's background could be gainfully employed. Based on Ms. Hammer's testimony, her "employability" potential appears to be promising. Instead of reiterating the entire report, the Court accepts defense counsel's summary on page 7 as follows:

1) There are fourteen (14) different, available positions within the Erie metropolitan area at which Plaintiff could be employed.

2) Those positions are located at Hamot Medical and Wellness Centers, St. Vincent's Medical Center, Family First Center, Stairways, Nautilus Fitness Center, Erie County Department of Public Works, and GECAC.

3) The possible wages Plaintiff could earn range from $8.59 to $22.50 per hour, an average wage of $15.54 per hour.

4) If Plaintiff worked full-time (40 hours) at the average hourly wage ($15.54), she would earn $621.00 per week.

Since Plaintiff is physically and mentally able to work and has two college degrees, she should be able to obtain, at minimum, entry-level employment in her field or a related field. Based in part on the Defendant's expert's testimony, the Court finds that the Plaintiff should be assessed a part-time earning capacity of 25 hours per week at the average wage of $15.54 per hour calculated by Ms. Hammers. This amounts to a total of $388.50 per week gross pay. The Court also bears in mind that Plaintiff is the primary caretaker of Hunter, the parties' minor child. Given his tender age of two years, Hunter's best interests would most likely be better served if Plaintiff is home at least part-time to care for him, rather than placing him in full-time daycare as Defendant seems to suggest in order for Plaintiff to work to her full earning capacity. The parties can reduce their potential day care costs by sharing them, so that one party is not more burdened than the other in providing Hunter with day care.

Defendant's Earning Capacity and Employment Potential

With regards to the Defendant, he argues that he should not be assessed a full-time earning capacity because he is attending school full-time rather than working, and his trust fund income is unavailable for purposes of support. He testified that his parents cover most of his everyday expenses, which he intends to pay back someday. He also maintains that he receives nothing from FPI or FFLP. (Defendant's brief p. 12).

According to *Mellott v. Sheffield,* 22 Pa. D. & C. 4th 224 (Court of Common Pleas, Fulton County, 1994), attending school full-time does not allow for a reduction in support. The Court in *Mellott* refused to excuse a father newly enrolled in law school from his support obligation. Rather, the Court temporarily reduced the support by one third for the duration of law school. The father could not also claim that the "nurturing parent" doctrine applied to him simply because he was home between classes more often than when he was previously employed. In the issue case, the Court dismisses Defendant's argument that full-time school attendance should lessen his support obligation.

Further, the fact that the Defendant's parents are helping with his expenses does not preclude him from his full support obligation either. A father can still be required to pay support based on his earning potential, even if he is receiving substantial financial assistance from someone else. *Mooney v. Doutt,* 2001 PA Super 12, 766 A.2d 1271 (2001). In *Mooney,* a father living with his parents while seeking employment was still required to pay support, in light of the fact that he could find work at any future time. *Mooney* also found that the focus of support is on a party's earning capacity, what one could theoretically earn, not the actual earnings.

The Court acknowledges that Defendant has a Bachelor's Degree and is working toward his Master's, but his educational pursuit does not release him from his support obligation, even temporarily. Even in his own brief, Defendant asserts that he "is taking every reasonable step to improve his future, and consequently, his earning capability." (Defendant's brief p. 13). Moreover, his earning potential is very likely to be greater than the mere minimum wage capability presented to the Court. *See Funk, supra.*

But, at this time, Court cannot fully determine what Defendant's earning capacity could be without more evidence. Arguably, Defendant could be assessed by another expert, like Ms. Hammers, taking into account what field Defendant holds his Bachelor's Degree in, whether he has had an opportunity to work within that area, and what positions may be available to him in the Erie area. But, such an expert was not offered by the Plaintiff. Therefore, the Court finds that Defendant's earning capacity should be assessed based on his part-time wages earned as a waiter at Olive Garden, $8.28 per hour, 25 hours per week, a total of $207.00 a week. This amount does not include his trust fund income, which the Court shall address presently.

As to Defendant's claim that he does not receive any benefits, wages, salaries or commissions from FPI or FFLP, the Court is inclined to disagree. Defendant is included on the family business's health insurance for which he pays nothing. He also holds significant shares in the businesses, 20% in FPI and 49% in FFLP. FPI's 2002 and 2001 tax returns show no discernable net income for any member of the Fedorko family.

But, the FFLP 2001 tax return showed an income of $48,508.00, 49% of which was attributable to the Defendant. His net income from FFLP alone in 2001 was $23,769.00, or $1980.75 a month. Tax returns for 2002 were not presented to the Court for review, so the Court must rely on the 2001 figures. Therefore, the Court finds that Defendant did receive income from FFLP that may be included in calculating his earning capacity for support purposes.

Defendant's Trust Fund and Interest Income

As stated before, Defendant's parents created identical trust funds for him and his sister Melissa, of $750,000.00 each in 1999. On June 14, 2001, both trust funds were loaned in full to a new family business entity, FFLP. The entire corpus of the Defendant's trust fund is now a 20-year promissory note with an adjusted interest rate of LIBOR plus 125 basis points. (Defendant's brief pp. 10-11) The annual interest income generated by Defendant's trust fund is estimated at $22,575.02 per year and is paid on a quarterly basis.

A party's lifestyle and cash flow, including trust funds and inheritances, may be considered for purposes of support income.[2] *Com. ex rel. Hauptfuhrer v. Hauptfuhrer,* 226 Pa. Super. 301, 310 A.2d 672 (1973). A court may base its support award upon calculation of a party's earning capacity as well as their available financial sources. *Butler v. Butler,* 339 Pa. Super. 312, 488 A.2d 1141 (1985). In *Butler,* the court included the husband's tort award from a personal injury lawsuit as income available for support purposes. It held:

> "In assessing the full measure of a parent's financial resources, a court must evaluate, *inter alia,* a parent's earning capacity, property interests, stock holdings, real estate rents, alimony *pendente lite* award, and investments. In short, all the parent's assets must be examined regardless of the source. . ."

At 1142-3, 316-7, citations omitted.

Therefore, it is within this Court's authority to look into all of the Defendant's sources of income, including his trust fund and Fedorko family business dealings, whether or not they are available for support purposes.

Shielding business profits from support without a legitimate reason (i.e. tax breaks) is impermissible. *King v. King,* 390 Pa. Super. 226, 568 A.2d 627 (1989) *citing Com. ex rel. Loring v. Loring,* 399 Pa. Super. 92, 488 A.2d 326 (1985). While deductions and depreciations may allow a corporation to

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[2] See *Humphreys v. DeRoss.* 567 Pa. 614, 790 A.2d 281 (2002) where the Pennsylvania Supreme Court recently held that a party's inheritance received during the marriage could no longer be considered as income available for support.

reduce its tax burden, not all corporate monies are exempt from support obligations. *See Fennell v. Fennell,* 753 A.2d 866 (Pa.Super. 2000) (Superior Court found no deliberate shielding of husband's corporate income, but did find that tax breaks to reduce the amount of taxable income was standard company practice).

Transfers of company ownership, sales of stock shares, etc. are also impermissible when done to avoid support obligations, including equitable distribution in divorce proceedings. *Nagle v. Nagle, et al.,* 799 A.2d 812 (Pa.Super. 2002). In *Nagle,* the court ruled against a husband who transferred all of his company stock to his son because the transfer suspiciously coincided with the time his wife filed for divorce. The court concluded that the transfer was done to reduce the amount of husband's property available for equitable distribution.

Transfers of corporate ownership done in name are not allowed to avoid support either. *Pacella v. Pacella,* 492 A.2d 707, 342 Pa.Super. 178 (1985) (Husband who continued to receive income and loans from corporation he transferred for free to family members was not entitled to lower support because he was supposedly no longer part of the corporation). The *Pacella* court also held, "[w]here we have found, in support cases, that actual earnings did not reflect earning capacity, we have approved the use by trial courts of a variety of means to arrive at earnings figures that accurately reflect a party's real wealth." At 712.

Trust funds may also not be used to shelter income from support, as the Court held in *Fitzgerald v. Kempf,* 805 A.2d 529 (Pa.Super 2002). There, the court found that the husband was not deliberately shielding his income from support because he disclosed all information about the trust, including that it was going to terminate shortly and no longer be available for support.

Trust income received from a family business may be used in support calculations. *Hoag v. Hoag,* 646 A.2d 578, 435 Pa.Super. 428 (1994). In *Hoag,* a husband, employed by his parents' business, claimed that he made no money from four separate irrevocable trusts. He contended that he never received actual income, only tax breaks from the trusts. The court decided to "pierce the corporate veil" to determine what income was truly available for support purposes. *See also Commonwealth ex rel. Maier v. Maier,* 418 A.2d 558, 274 Pa.Super. 580 (1980) (Where husband was sole stockholder of corporation and determined his own salary, the court pierced the corporate veil to use corporate income as basis for determining earning capacity).

A court can even look at "deferred income" such as unexercised stock options to make proper support calculations. *MacKinley v. Messerschimdt,* 814 A.2d 680 (Pa.Super. 2002). The court allowed a mother's stock options to be included in her support calculations, because she could at any time exercise the options and cash them out for extra income.

The Court finds *King, Hoag, Nagle,* and *Pacella* to be particularly relevant to the case at bar, and especially regarding the Defendant and his family's business activities.

In *King,* the husband shielded substantial income from support consideration by using his business partnership to retain portions of the income. This Court notes that FFLP now retains the full amount of Defendant's $750,000.00 trust fund in the form of a loan already used to help purchase the Tracy School property.

In *Hoag,* the husband made the disingenuous claim that he received no income whatsoever from four different trusts, only tax breaks. The Court similarly notes that the Defendant's trust fund is neatly (and legally) tied up in a 20-year promissory note, generating only interest income. As Plaintiff's counsel points out, the principal of that note will not be available during the years that Hunter is a minor child and is entitled to child support. (Plaintiffs brief p. 19).

In *Nagle,* the husband's own son assisted him in sheltering company stock income subject to equitable distribution from his soon-to-be-ex-wife. The Court also observes that Defendant's trust fund was loaned with the assistance of Defendant's father, Peter Fedorko, to the newly established FFLP during ongoing support conferences and pending divorce proceedings. Defendant's own witness, Ken Slaney, the Fedorko family CPA, even testified that Peter Fedorko paid $18,500.00 in legal fees with a check issued from Defendant's trust fund on January 11, 2002, authorized by the father's Power of Attorney over his son's trust fund. (Plaintiff's brief pp. 5, 8, Exhibit 6).

In *Pacella,* the husband, despite claiming not to be employed by his former corporation, continued to receive income, loans, and more after he transferred ownership to two nephews for nothing but "corporate good will." The Court finds that the Defendant has received health insurance, business and financial experience, and employment from FPI and FFLP. Plaintiff testified that Defendant traveled to work every day to the Peninsula Plaza job site and occasionally she accompanied him and assisted him with work. The Court finds it hard to believe that Defendant went to the site merely out of curiosity or to visit his family every single day. Nor can the Court ignore the parties' wedding announcement, written by the Defendant himself, that lists him as employed by FPI, something that Defendant denied at support conferences, the support *de novo* hearing, and in legal memorandum presented to this Court.

Clearly, this Court finds the Defendant's testimony regarding his activities involving his trust fund, FPI, and FFLP to be less than credible. See *Neil v. Neil,* 731 A.2d 156 (Pa.Super. 1999) where the support hearing officer, the trial court, and the Superior Court each found husband's credibility to be lacking due to actions taken by his family's business around the time of a support conference. The court upheld the trial court's

finding that the husband voluntarily reduced his support income by allowing the business to help shelter his income from support. This Court, as the one in *Neil,* holds the same to be true to the Defendant.

Other Support Issues

Under newly promulgated Pa. R.C.P. 1910.16-5 (c)[3], the trier of fact can consider the duration of the parties' marriage when determining the amount of spousal support or APL to award. Defendant argues that this rule was passed in response to parties unjustly receiving significant amounts of support for relatively short-term marriages such as the one in the case at bar. (Defendant's brief pp. 21-22)[4]. Plaintiff has received approximately 2-1/2 years of spousal support for a marriage that lasted a little over three months. (Defendant's brief pp. 1-2). The Court, upon review of the new section (c), concludes that it is within its discretion to terminate Plaintiff's spousal support. This is because Plaintiff has received an amount of support for a time period equal to ten times the entire span of her marriage. (Thirty (30) months of support divided by three (3) months of marriage equals 10 times). Further, as stated previously, Plaintiff is more than capable of working and earning an income to support herself.

Regarding Defendant's concern about the replevin hearing with parties and their parents before Judge Cunningham, the Court sees no need to address it because it is ordering spousal support to be terminated effective the date of this Order, not the as yet undetermined date of divorce.[5]

Conclusion

This Court finds itself in full agreement with Judge Kelly's assessment at the PFA hearing that both parties have credibility issues *(Protection From Abuse Hearing 6/13/02,* Day Two, p. 53, lines 3-7). The testimony and evidence presented clearly show that both parties are privileged adults who are fortunate enough to each have parents willing to help with the majority of their living expenses, including housing, legal fees, vehicles, loans, and employment. However, having such generous

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[3] Supreme Court of Pennsylvania Domestic Relations Procedural Rules Committee Recommendation 61, September 24, 2003.

[4] Defendant's reliance on this Court's decision in *Potter v. Wall,* PACSES No. 51804072, Civil Action-Law 14120-2001, is misplaced. At issue was a petition to compel paternity testing after a complaint for child support was filed, not a complaint for spousal support.

[5] See *VanBuskirk v. VanBuskirk,* 527 Pa. 218, 590 A.2d 4 (1991) where son's parents were joined in equitable distribution action as third parties because they gifted property to son and his wife during marriage.

families does not excuse either party from the important duties of supporting themselves and their child. Neither party has been shown to be incapable of working, they just lack experience in their respective fields. This should not prevent them from trying to obtain employment and raise their child in the same lifestyle they themselves are accustomed to. Nor should they attempt to shield themselves from their support obligations by hiding behind their parents' financial support and their minimal work experience.

ORDER

AND NOW, TO-WIT, this 25th day of November 2003, after review of the evidence, testimony, and briefs presented, the aforementioned case law, and consulting with the Support Office, the Court hereby orders the following:

1) Plaintiff is assessed a gross earning capacity of $1683.50 a month, based on the testimony of expert witness, Lisa Hammers of GenEx Incorporated. Her monthly net income is $1431.55. Keeping in mind that Plaintiff is a full-time parent of a 2-year-old, of whom she has primary custody, Plaintiff's earning capacity will only be calculated on a part-time basis of 25 hours per week under the "nurturing parent" doctrine.

2) Defendant must pay Plaintiff one-half (50%) of any daycare costs she incurs while working. This half will be credited toward the monthly amount of child support paid by the Defendant. Plaintiff will provide receipts of her day care costs to Defendant for reimbursement within 14 days of costs incurred or forfeit any reimbursement.

3) Defendant's gross earning capacity is assessed at $4690.00 a month, based on his Olive Garden monthly wage of $828.00, his trust fund interest income of $1881.25 per month, and his 2001 net income share from FFLP of $1980.75 per month.

4) The Defendant's total monthly net income for support purposes is $3408.82 per month. The support grid shows that Defendant is responsible for $638.01 per month in child support.

5) Defendant will cover health insurance for the Plaintiff and Hunter by including them on his family's company policy (which previously provided for all three of them). Defendant is also 100% responsible for unreimbursed medical expenses incurred over the sum of $250.00

per year. Plaintiff must also submit receipts and invoices to Defendant for reimbursement within 30 days of costs incurred. If Plaintiff fails to do so, she will forfeit reimbursement.

6) Plaintiff's spousal support is hereby terminated, according to Pa. R.C.P 1910.16-5 (c), effective the date of this Order.

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